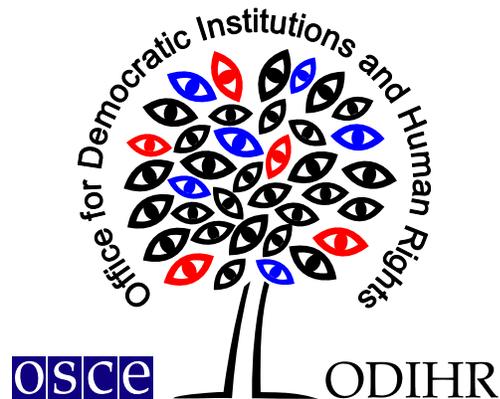


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FoRB)

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**Comments on the  
Law on Amendments and Additions to some  
Legislative Acts of the Republic of Kazakhstan  
on Issues of Religious Freedom and Religious  
Organizations**

Prepared by the OSCE/ODIHR Advisory Council  
on Freedom of Religion or Belief

## **I. Introductory Remarks**

1. At the request of the Government of Kazakhstan, the current Comments are intended to provide an analysis of the Law of the Republic of Kazakhstan “On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Issues of Religious Freedom and Religious Organizations” (the “Proposed Religion Law”) at the time of its passage by Kazakhstan’s Parliament on 26 November 2008. These Comments are based on a copy of the Proposed Religion Law in the Russian language as transmitted to the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) by Kazakhstan’s State Committee on Religious Affairs (“Committee on Religious Affairs”) on 25 November 2008. This document is attached as Exhibit A. The unofficial English translation done by the ODIHR and relied upon in preparing these Comments is attached as Exhibit B.

2. The background of the current Comments is as follows. On 16 May 2008, the Permanent Delegation of the Republic of Kazakhstan to the OSCE submitted a request for comments on an earlier draft of the Proposed Religion Law submitted to the ODIHR (the “Original Draft Law”).

3. The task of preparing comments was delegated to the OSCE/ODIHR Advisory Council on Freedom of Religion or Belief (the “Advisory Council”), a body with representation from a large number of OSCE participating States, and with extensive experience in advising the ODIHR and participating States with regard to law reform initiatives such as that contemplated by the Proposed Religion Law (and the Original Draft Law).

4. Three weeks after receiving the request for assistance on 16 May 2008, Comments on the Original Draft Law were finalized by the Advisory Council (OSCE/ODIHR Opinion Nr. REL-KAZ/110/2008 of 10 June 2008) (the “June Advisory Council Comments” or “ACC”). These comments noted numerous ways in which the legislation did not comply with Kazakhstan’s international human rights commitments.

5. After the June Comments were submitted, a meeting was held on 26 June 2008 in Astana) (the “June Meeting”) with Mr. Ardak Doszhan, Chairman of the Religious Affairs Committee of the Ministry of Justice of the Republic of Kazakhstan. At this meeting, Kazakh officials requested that time be allowed to provide additional

information regarding the June Advisory Council Comments and that the comments not be released in the interim.

6. ODIHR, received a communication dated 5 August 2008 from the Embassy of the Republic of Kazakhstan in Warsaw transmitting a letter from Mr. Ardak Doszhan and a compilation of comments and questions of Kazakh authorities (referred to collectively as the “August Letter”). The August Letter was translated into English by the ODIHR and then referred to the Advisory Council for preparation of a response.

7. The August Letter provided paragraph-by-paragraph responses to the June Advisory Council Comments. Among other things, the August Letter provided some information about how the provisions of the Original Draft Law dovetailed into Kazakhstan’s legal system as a whole, and how certain procedural issues (such as prosecution of cases and appeals) could be expected to function in practice. Since religious association laws themselves often do not contain these provisions themselves, it is routine for the Advisory Council to seek such information in the process of preparing its Comments. The August Letter also referred in summary form to improvements in the law that had been made by the “working group.” The Advisory Council has been pleased to receive this information, and to the extent possible, has sought to take such changes into account.

8. Among other things, the August Letter asked for extensive information about how various issues were handled in various European countries. It took some time for the Advisory Council to gather this information directly from experts in various European countries. The response (OSCE/ODIHR Opinion-Nr. REL-KAZ/119/2008 (Adv. Council on FoRB), the “September Response”), was translated and transmitted to the appropriate Kazakh officials on 30 September 2008.

9. The Advisory Council’s September Response welcomed various changes in the legislation that were identified in the August Letter. Among other things, the August Letter noted various changes that had been made in the Original Draft Law as indicated in the August Letter. These included the following: (1) the broadening of the conception of “religious buildings” to include “reconditioned” buildings, as well as new constructions; (2) the substitution of “within one hundred meters” for the vague “nearby” in specifying an area that should be protected from offensive conduct around religious buildings; (3) deletion of a vague clause indicating that religion-state relations would be regulated taking into account “their influence on development of

spiritual and cultural traditions of the people of Kazakhstan,” with uncertain practical implications for religious communities; (4) elimination of administrative liability for religious activities engaged in by unregistered groups (but not criminal liability); (5) elimination of theological expert review of literature published within Kazakhstan; (6) elimination of a requirement that religious books and materials be disseminated “in coordination with the authorized agency”; (7) dropping of a series of excessively cumbersome and intrusive provisions related to monitoring of financial operations of religious organizations; (8) deletion of the requirement that parents provide consent in written form to religious activities of their children; (9) deletion of provision on missionary quotas; and (10) elimination of the “ten year” requirement for acquiring centralized entity status.

10. The Advisory Council’s September Response also noted that in light of the explanations provided in the August Letter, some of the issues noted in the June Advisory Council Comments were not as significant as they initially appeared to be, or turned out not to be problems at all. For example, the explanations given regarding “theological examination” suggested that this process should not extend to evaluating the substantive religious beliefs of particular religious communities. Some of the worries about excessive government discretion appeared to be addressed by independent provisions of the Law on the Procuracy and the requirement that no final actions could be taken without judicial decision and a right of appeal. A provision aimed at barring use of charitable activities to influence religious convictions had been narrowed. Indications that administrative liability has been eliminated for creation of entities that carry out religious activity other than religious organizations appeared to be encouraging if they mean that religious groups can use other forms of entities to carry out religious activities.

11. Despite the fact that many and significant improvements had been made, and many issues were less problematic than first appeared, significant problems remained.

12. While the September Response was being prepared, the Advisory Council learned that the Majilis (lower house) of the Parliament of Kazakhstan passed a version of the Draft Law on second reading on 24 September 2008. The Advisory Council appreciated being informed during subsequent meetings that many of the points made in its June Comments were taken into account in the version of the Law adopted on 24 September.

13. As a follow-up meeting had been planned in June, the Advisory Council and the Committee for Religious Affairs met in October 2008, in the margins of the OSCE Human Dimension Implementation Meeting (HDIM) in Warsaw, and on 25 November 2008 in Astana. For that occasion, four members of the Advisory Council: Prof. Roman Podoprighora (Kazakhstan), Father Vsevelod Chaplin (Russia), Professor Rafael Palomino (Spain), and Professor Cole Durham (USA) travelled to Astana to meet with the authorities of the Government of Kazakhstan.

14. During the meeting on 25 November, Mr. Doszhan provided extensive information about the state of the legislation at the time of the meeting. Among the improvements introduced taking into consideration the comments of the Advisory Council, he noted were the following: (1) the separation of religion and state has been specified in greater detail, particularly in the distinction between secular and religious systems of education; (2) the inclusion of specific provisions for deferring military obligations of students of religious universities; (3) provisions addressing religious insults had been clarified by limiting their application to incidents occurring within 100 meters of religious building; (4) prohibitions on selling alcoholic beverages near mosques were dropped; (5) provisions imposing quotas on foreign missionaries were dropped; (6) the 10 year minimum time period for registration of religious organizations was eliminated; (7) provisions that would have required submission of religious literature published in Kazakhstan for state approval were dropped; (8) a variety of intrusive financial reporting recommendations were deleted; and (9) provisions requiring that parental consent for participation of children in religious activities be in writing were eliminated, though parental consent was still required. Many of these changes had already been noted and acknowledged in the Advisory Council's September Response, but it was helpful to be assured that many of these positive changes were actually being included in the legislation.

15. Significant changes were introduced between the time of the Original Draft Law in May 2008 and the passage of the Proposed Religion Law on 26 November 2008. Since the official request of Kazakhstan on 16 May 2008, the Advisory Council has prepared successive sets of comments based on the evolving legislation as transmitted by the Committee on Religious Affairs, and on additional information provided during meetings of the Advisory Council with the Committee on Religious Affairs and through correspondence.

16. The current Comments draw on comments that were prepared at earlier stages in the evolution of the legislation, and have been revised to take into account information provided by the Religious Affairs Committee of the Ministry of Justice of the Republic of Kazakhstan and various changes and improvements that have been made in the legislation.

17. Many of the points made in earlier comments have been incorporated in the legislation, which has been significantly improved as a result of amendments made to prior versions of the legislation. The information received from the Committee on Religious Affairs has been helpful in many ways in identifying refinements, noting issues that have been solved, and recognizing that some of these issues may be less severe or may arise in a narrower band of cases than originally thought.

18. The Advisory Council welcomes the progress that has been made in improving the legislation incorporating some of its comments. However, a number of issues identified by the Advisory Council at earlier stages with respect to the Proposed Religion Law's compliance with international human rights standards, including OSCE commitments, remain outstanding.

19. Kazakhstan and its people have a reputation for cultivating tolerance and preventing ethnic and religious strife. This has been emphasized and recognized in all meetings and exchanges between officials of the Republic of Kazakhstan and the Advisory Council. The Advisory Council welcomes the improvements that have been made in the Proposed Religion Law thus far, and hopes that these Comments will be helpful in addressing the outstanding issues.

20. In response to questions posed by the Committee on Religious Affairs, Section IV of these Comments also addresses comparative approaches to handling relationships between religion and the state in various European countries. In general, the notes provided in Section IV on country practices elsewhere explain that stricter types of regulation used in other countries to help manage religion-state cooperation in finance and other areas are not appropriate and in general are not used when it comes to establishing the requirements for "base level" legal entities—that is, the legal entities available to religious organizations for engaging in the full range of activities that they are entitled to carry out in light of their right and the rights of their members to freedom of religion or belief. International standards allow countries to impose stricter requirements on religious groups seeking to qualify for various types of financial and other benefits, so long as any differential treatment can be objectively

justified. However, the existence of stricter rules in this “upper-tier” context does not justify imposing similar barriers on access to base-level entities, because this would interfere with the fundamental right to freedom of religion or belief.

## II. Executive Summary

21. As noted above, many improvements have been made in the legislation between the time it was submitted to the Advisory Council for comment in May and the time it was passed in November. However, there are a number of residual problematic issues in the Proposed Religion Law include the following: (1) a general pattern of structuring provisions in ways that impose impermissible limitations on manifestations of religion, in violation of applicable limitation clauses of international instruments;<sup>1</sup> (2) failure to fully respect the right of religious communities to acquire legal entity status;<sup>2</sup> (3) lack of clear standards for ascribing liability for wrongdoing of particular individuals to religious organizations;<sup>3</sup> (4) vague provisions which fail to comply with fundamental rule of law constraints because they are insufficiently precise and fail to give fair notice of what the law requires;<sup>4</sup> (5) inappropriate constraints on rights to express and disseminate religious beliefs;<sup>5</sup> (6) risks of non-neutral evaluation of the substantive content of religious beliefs;<sup>6</sup> (7) proscription of religious activities carried out by unregistered groups and on some of the religious activities of groups that have only “record registration;”<sup>7</sup> (8) the requirement of an excessive number of members in order to obtain legal entity status (50 for each local religious organization);<sup>8</sup> (9) inadequate protection of the right of religious communities to autonomy in structuring their own affairs;<sup>9</sup> (10) parental consent provisions that are overly rigid and could deprive mature minors of religious freedom rights and could impose liability on religious groups for unpredictable teenage behavior despite good faith efforts to respect parental wishes regarding involvement of their children in religious activities;<sup>10</sup> (11) excessive penalties for non-compliance

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<sup>1</sup> See paragraphs 28-35 *infra*, as well as discussion of particular limitations throughout these Comments.

<sup>2</sup> See paragraphs 36-39 and 73 *infra*.

<sup>3</sup> See paragraphs 42-43 *infra*.

<sup>4</sup> See paragraphs 44-46 *infra*.

<sup>5</sup> See paragraphs 47-59 *infra*.

<sup>6</sup> See paragraphs 60-63 *infra*.

<sup>7</sup> See paragraphs 64-72 *infra*.

<sup>8</sup> See paragraph 73 *infra*.

<sup>9</sup> See paragraphs 74-77 *infra*.

<sup>10</sup> See paragraphs 78-84 *infra*.

with registration rules;<sup>11</sup> transition provisions that fail to adequately protect vested rights of existing religious organizations.<sup>12</sup> Some provision is made for smaller religious groups, but in many key respects, their rights to engage in the full range of religious activities are subjected to inappropriate limitations or restrictions.

22. In general, it appears that the needs of larger and predominant religious communities are being adequately addressed, but in the field of freedom of religion or belief, protecting the rights of larger and dominant groups is seldom the problem. The real test is whether the rights of smaller religious groups are being fully protected. It is primarily in this area that the Proposed Religion Law falls short. Rather than facilitating religious freedom, the Proposed Religion Law's registration provisions create potential obstacles to the rights of many groups to acquire legal entity status.<sup>13</sup> The Proposed Religion Law is structured to make it difficult for smaller groups to carry out the full range of religious activities in which such groups would reasonably be expected to engage. Religious groups and local religious organizations and groups are not authorized to establish religious educational organizations.<sup>14</sup> Rights to engage in missionary work, while less restricted than in an earlier draft of the legislation, are still constrained.<sup>15</sup> Re-registration of all religious groups is required, putting at risk existing organizations and vested property rights in the event re-registration is denied.<sup>16</sup>

### **III. General Comments**

#### **A. Applicable Standards**

23. These Comments have been prepared taking into account Kazakhstan's international commitments, and in particular its commitments as a participating State in the OSCE, relevant international standards with respect to religious association laws<sup>17</sup>, relevant provisions of Kazakhstan's Constitution, and general experience with

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<sup>11</sup> See paragraph 85 *infra*.

<sup>12</sup> See paragraph 87 *infra*.

<sup>13</sup> See, e.g., paragraphs 64-73, 75-77, and 87 *infra*.

<sup>14</sup> See paragraph 77 *infra*.

<sup>15</sup> See paragraphs 55-59 *infra*.

<sup>16</sup> See paragraph 86 *infra*.

<sup>17</sup> The term "religious association law" is used in these comments to cover the body of law dealing with registration, recognition, establishment, creation, operation and dissolution of legal entities for religious organizations. Sometimes the phrase "registration law" is used as a convenient shorthand for this field. Different systems use different techniques to create legal entities or to mark their coming into existence. Some systems allow establishment of legal entities without any state approval or involvement, as with the creation of trusts in the common law world and certain South African corporations. See Johan van

religious association laws in other countries. In order to keep the body of the Comments as short as possible, general background information about the applicable international standards is described in a summary fashion in the course of discussing particular provisions, relying on more extended treatment of the relevant norms and case law that is easily accessible elsewhere.

24. In particular, the Comments rely on the “OSCE Guidelines for Review of Legislation Pertaining to Religion or Belief” (the “OSCE Guidelines”)<sup>18</sup> that have been prepared by the Advisory Panel on Freedom of Religion or Belief of the ODIHR. The OSCE Guidelines are easily accessible online.<sup>19</sup> Because Appendix I of the OSCE Guidelines includes the relevant passages on freedom of religion or belief from all the major international instruments, it has not been necessary to quote them in the body of these Comments.

25. While the decisions of the European Court of Human Rights (“European Court” or “ECTHR”) are not technically binding on Kazakhstan, they represent the leading forum for interpretation of the relevant human rights instruments for most members of the OSCE, and thus constitute significant persuasive authority on the relevant issues.

#### **B. Legal Context.**

26. The Advisory Council wishes to express its appreciation for the opportunity it has had to receive information that has clarified how the Proposed Religion Law fits into the broader system of legislation and legal practice in Kazakhstan. This has helped to explain how some of the issues on the face of the legislation are addressed by other features of the legal system of the Republic of Kazakhstan. Thus, for example, it was helpful to be told of Articles 25 and 26 of the Republic of Kazakhstan’s Law on the Procuracy, and that these impose constraints on how violations of law are prosecuted. Similarly, explanation of trial and appellate court procedures was informative, since issues such as denial of registration can be

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der Vyver, “Religion,” in *The Law of South Africa* (LAWSA), ed. W. A. Joubert and J. A. Faris, 23 (Durban: Butterworths), para. 248 (Joan Church rev.). Some form of state registration or recognition is more typical as a precondition of acquisition of legal entity status in other legal systems.

<sup>18</sup> The OSCE Guidelines were adopted by the Venice Commission of the Council of Europe at its 59th Plenary Session (Venice, 18-19 June 2004), and were welcomed by the OSCE Parliamentary Assembly at its Annual Session (Edinburgh, 5-9 July 2004). The OSCE Guidelines have also been commended by the U.N. Special Rapporteur on Freedom of Religion or Belief. Report of the Special Rapporteur on the Freedom of Religion or Belief to the 61st Session of the Commission on Human Rights, E/CN.4/2005/61, par. 57.

<sup>19</sup> The Guidelines are available at [http://www.osce.org/publications/odihr/2004/09/12361\\_142\\_en.pdf](http://www.osce.org/publications/odihr/2004/09/12361_142_en.pdf) (English) and at [http://www.osce.org/publications/odihr/2004/09/13600\\_142\\_ru.pdf](http://www.osce.org/publications/odihr/2004/09/13600_142_ru.pdf) (Russian).

appealed to these bodies. Also, it has been helpful both through discussion and through the written comments to get a better sense of the problems that the legislation is trying to address. Further, there are inevitably difficulties of translation in working on this kind of project, many of which have been clarified through discussion.

### **C. Non-Compliance with International Standards**

27. The August Letter and various meetings with officials in Kazakhstan have been helpful in many ways in suggesting refinements, noting problems that have been solved, identifying problems that may be less severe or may arise in a narrower band of cases than originally thought, and so forth. However, many serious issues remain with respect to the Proposed Religion Law’s compliance with international human rights standards, including in particular OSCE commitments.

#### **1. Many Provisions Fail to Respect Requirements of International Limitation Clauses**

28. A major part of the problem appears to be that the full practical requirements of the right to freedom of religion or belief under international law have not been taken into sufficient account in drafting the Proposed Religion Law. In particular, the constraints the Proposed Religion Law imposes on religious activity and religious groups assume that it is easier to justify limitations on manifestations of religion than is in fact the case under international standards. With this in mind, it is worth commenting briefly on the general principles that govern what types of constraints are permissible in religious association laws and what are not. While these are well-settled as a matter of international law, they are often not sufficiently understood. It is helpful to summarize these points here in order to be able to refer back to them at various points in the comments that follow.

29. The fundamental guide for decision of whether a particular limitation on a manifestation of religion is permissible under international law is provided by the so-called “limitation clauses” of the pertinent international instruments—most notably Article 18(3) of the International Covenant for Civil and Political Rights (“ICCPR”),<sup>20</sup> which reads:

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are

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<sup>20</sup> Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is essentially parallel.

necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.<sup>21</sup>

To the extent that creating legal entities for religious communities can be regulated at all, it is only permissible as a regulation of “manifestations” of religion, since it is only “manifestations” that may be “subject to limitations.”<sup>22</sup> Where religious association laws facilitate religious practice, they do not constitute a limitation at all. When they are used as a control mechanism, in contrast, they often do impose limitations. Such restraints are permissible only if they fall within the permissible range of limitations set forth in the limitation clause. Specifically, limitations on manifestations of religion are permissible only if three rigorous criteria are met.

30. First, limitations can only be imposed by law, and in particular, by laws that comport with the rule of law ideal.<sup>23</sup> Many of the constraints on religious association laws flow from this requirement. Thus, limitations may not be retroactively or arbitrarily imposed on specific individuals or groups; neither may they be imposed by rules that purport to be laws, but are so vague that they do not give fair notice of what is required or they do not bar arbitrary enforcement.<sup>24</sup> Due process considerations, such as the rights to prompt decisions and to appeals, also reflect these basic rules of law requirements.

31. Second, limitations must further one of a narrowly circumscribed set of legitimating social interests. Recognizing that all too often majority rule can be insensitive to minority religious freedom rights, the limitations clause makes it clear that in addition to mustering sufficient political support to be “prescribed by law,” limitations are only permissible if they additionally further public safety, public order,

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<sup>21</sup> Article 18(3) ICCPR.

<sup>22</sup> Matters relating to the internal forum, such as the internal holding of beliefs, changing beliefs, and so forth lie for the most part beyond the regulatory reach of the state. For more detailed discussion of internal forum issues, see Manfred Nowak and Tanja Vospernik, *Permissible Restrictions on Freedom of Religion or Belief*, in Tore Lindholm, W. Cole Durham, Jr. and Bahia Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004) 148-52; Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), pp. 294-98.

<sup>23</sup> See, e.g., *Sunday Times v. the United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 30 (1979); *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) at 15 (1993); Carolyn Evans, *Freedom of Religion under the European Convention of Human Rights* (Oxford: Oxford University Press, 2001), pp. 138-142; Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), pp. 319-320.

<sup>24</sup> *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (ECtHR, App. No. 40825/98, 31 July 2008), § 71; *Hasan and Chaush v. Bulgaria*, Eur. Ct. H.R., App. No. 30985/96 (Oct. 26, 2000), paras. 84-87; Carolyn Evans, *supra* note 23, pp. 139-42

health or morals, or the rights and freedoms of others. Significantly, as the UN Human Rights Committee's official commentary on Article 18(3) of the ICCPR points out, the language of the limitations clause is to be strictly interpreted:

Restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>25</sup>

The reference to "public order" as a legitimating ground must be understood narrowly as referring to prevention of public disturbances as opposed to a more generalized sense of respecting general public policies. Significantly, the term for "public order" in the French version of the ICCPR is not "ordre public" in the sense often used in French public and administrative law to refer to the general policies of the community, but rather "*la protection de l'ordre*,"<sup>26</sup> terminology suggesting concrete public disturbance and disorder.

32. Third, even if a particular limitation on freedom of religion or belief passes all the foregoing tests, it is only permissible as a matter of international human rights law if it is genuinely necessary. The decisions of the European Court of Human Rights, which has had the most experience adjudicating the meaning of limitation clause language, have made it clear that in most cases, analysis turns ultimately on the necessity clause. In the European Court's decisions, public officials defending a certain limitation can often point to legislation supporting it, and the legitimating grounds are broad enough that they can be used to cover a broad range of potential limitations. Insistence that limitations be genuinely and strictly necessary puts crucial brakes on state action that would otherwise impose excessive limitations on manifestations of religion.

33. As the European Court has framed the issue, an interference with religion is necessary only when there is a "pressing social need" that is "proportionate to the

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<sup>25</sup> United Nations Human Rights Committee, General Comment No. 22 (48) on Article 18, adopted by the UN Human Rights Committee on 20 July 1993, UN Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in UN Doc. HRI/GEN/1/Rev.1 at 35 (1994), para. 8.

<sup>26</sup> Carolyn Evans, *supra* note 23, p. 150; Manfred Nowak & Tanja Vospernik, *Permissible Restrictions on Freedom of Religion or Belief*, in Lindholm, Durham and Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Leyden: Martinus Nijhoff Publishers, 2004) 152-53 & n. 23.

legitimate aim pursued.”<sup>27</sup> Clearly, when analyzed in these terms, the issue of necessity must be assessed on a case-by-case basis. However, certain general conclusions have emerged. First, in assessing which limitations are “proportionate,” it is vital to remember that “freedom of thought, conscience and religion is one of the foundations of a “democratic society.”<sup>28</sup> State interests must be weighty indeed to justify abrogating a right that is this significant. Second, limitations cannot pass the necessity test if they reflect state conduct that is not neutral and impartial,<sup>29</sup> or that imposes arbitrary constraints on the right to manifest religion.<sup>30</sup> Discriminatory and arbitrary conduct are obviously not “necessary” within the meaning of this standard. In particular, state regulations that impose excessive and arbitrary burdens on the right to associate and worship in community with others—such as burdensome registration requirements—are impermissible.<sup>31</sup> In general, where religious groups can point to alternative ways that a particular state objective can be achieved that would be less burdensome for the religious group and would substantially accomplish the state’s objective, it is difficult to claim that the more burdensome alternative is genuinely necessary.

34. The phrasing of the Proposed Religion Law’s “limitation clause” at the end of its Article 3 fails to include the “necessity” requirement, which is in fact the most critical protection of religious freedom. Article 3 provides that “Manifestation of freedom to worship a religion or disseminate beliefs can be limited by legislation of the Republic of Kazakhstan only for the purpose of protection of public order and safety, lives, health, morals, or rights and freedoms of other citizens.” The clause is not broad enough in its coverage, that is, it addresses freedom to worship and to disseminate, but possibly not the full range of “worship, teaching, practice and observance” that is the typical description of the right to manifest religion or belief in the international instruments. It captures part of the “prescribed by law” requirement

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<sup>27</sup> See, e.g., *Kokkinakis v. Greece*, 17 E.H.R.R. 397 (1994)(ECtHR, May 25, 1993), para. 49; *Wingrove v. United Kingdom*, 23 Eur. Ct. H.R. (ser.A) 1937 (1996), para. 53; *Manoussakis and Others v. Greece*, 23 E.H.R.R. 387 (1997)(ECtHR, Sept. 26, 1996), paras. 43-53; *Serif v. Greece* (ECtHR, Dec. 14, 1999, para. 49); *Metropolitan Church of Bessarabia v. Moldova* (ECtHR, Dec. 13, 2001, App. No. 45701/99), para. 119.

<sup>28</sup> *Metropolitan Church of Bessarabia v. Moldova* (ECtHR, Dec. 13, 2001, App. No. 45701/99), para. 114.

<sup>29</sup> *Id.*, para. 116.

<sup>30</sup> *Ibid.*, para. 118; *Manoussakis and Others v. Greece*, 23 E.H.R.R. 387 (1997)(ECtHR, Sept. 26, 1996), paras. 43-53.

<sup>31</sup> *Metropolitan Church of Bessarabia v. Moldova* (ECtHR, Dec. 13, 2001, App. No. 45701/99), para. 118.

of the international instruments by speaking of limitations imposed by legislation. But it arguably misses the qualitative “rule of law” component of the international standards—i.e., that limitations must be prescribed by laws that are clear, non-retroactive, give fair warning, and limit the exercise of arbitrary official discretion. It expands the legitimating grounds somewhat by adding protection of “lives,” but it fails to restrict the set of “rights and freedoms of other citizens” that can potentially overrule religious freedom to “fundamental rights”. Most significantly, however, the limitation clause of Article 3 doesn’t include the “necessity” requirement that is widely recognized as the critical feature of modern limitation clauses.

35. The foregoing summary of the requirements of the “limitations clause” that govern when limitations may be imposed on manifestations of religion under international law make it very clear that any limitations must be very carefully structured. They must be proportional to the objective pursued in the sense that the objective (protection of health, safety, order, health, or morals) cannot be achieved through less restrictive means or limitations. It is not enough to say that a particular limitation is justified by “health” or “safety,” etc. It is necessary to go further and show that they are not vague (a problem with many of the provisions). Even more importantly, it is necessary to show that there is a pressing social need for the limitation, and that the limitation is narrowly tailored to avoid undue burdens on religious freedom, and that it is non-discriminatory. Each individual limitation proposed by the Proposed Religion Law needs to be able to meet this test. The recurrent problem with many of the provisions is that they fail to do so. The result is that many of the provisions of the Proposed Religion Law are systematically over-restrictive. Thus, while many of the clarifications and explanations provided by the August Letter are helpful, suggesting important correctives that need to be taken into account and providing a better understanding of the Original Draft Law, in many contexts they do not solve the fundamental human rights problems pointed out by the Advisory Council Comments.

## **2. Registration Provisions Do Not Adequately Protect the Right to Acquire Legal Entity Status.**

36. Virtually all countries with modern legal systems have religious association laws that govern the creation, operation and dissolution of religious entities. As a formal matter, these laws have similar features: they spell out how a group of people can create an organization that will be recognized as an artificial legal

person for purposes of carrying out collective activities. The specific institutional structures that emerge inevitably reflect both the history of the country involved, the nature and degree of diversity of religious communities in the country, and typical patterns for dealing with other types of groups and organizations in the country. It is typical to recognize that religious groups are distinctive and exist independently of and prior to recognition by the state. They have their own legal vitality and personality, recognized in the relationships between the believers and the religious community. State recognition, in this sense, works as a tool to facilitate the normal development of religious entities in the law of a given country, in order to protect one of the means to religious freedom development. Religious freedom of both individuals and groups applies prior to and without the need of any legal recognition. What is most significant from a comparative perspective is not so much the formal elements of these structures, but how they are applied. Are they used primarily as a means to facilitate the activities of religious groups, or are they used primarily as a control mechanism? As noted above, when the latter is the case, rules governing acquisition of legal entity status can easily result in violations of religious freedom rights.

37. OSCE Commitments clearly contemplate that religious communities should be able to acquire legal entity status. Principle 16(c) of the Vienna Concluding Document (1989) provides that “participating States will . . . grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries.” The precise legal form used to grant juristic personality may vary from country to country, but the critical issue is that some form be available that will religious groups to acquire a form of entity status that will enable them to carry out the full range of their religious affairs.

38. Because of the importance of this issue, the OSCE Guidelines address the practical issues involved in great detail, as follows:<sup>32</sup>

- Registration of religious organizations should not be mandatory *per se*, although it is appropriate to require registration for the purposes of obtaining legal personality and similar benefits;
- Individuals and groups should be free to practise their religion without registration if they so desire;

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<sup>32</sup> OSCE Guidelines, *supra* note 18, Section II(F).

- High minimum membership requirements should not be allowed with respect to obtaining legal personality;
- It is not appropriate to require lengthy existence in the State before registration is permitted;
- Other excessively burdensome constraints or time delays prior to obtaining legal personality should be questioned;
- Provisions that grant excessive governmental discretion in giving approvals should not be allowed; official discretion in limiting religious freedom, whether as a result of vague provisions or otherwise, should be carefully limited;
- Intervention in internal religious affairs by engaging in substantive review of ecclesiastical structures, imposing bureaucratic review or restraints with respect to religious appointments, and the like, should not be allowed;
- Provisions that operate retroactively or that fail to protect vested interests (for example, by requiring re-registration of religious entities under new criteria) should be questioned.

39. A major line of decisions of the European Court over the past decade has held that freedom of association and freedom of religion entail a right to acquire legal entity status. As a result of these cases, the right to legal entity status is now firmly entrenched in international human rights law.<sup>33</sup> The registration process should not itself pose a major obstacle to acquiring entity status.<sup>34</sup>

40. The Proposed Religion Law continues to be problematic in that it fails to provide full protection to the right to acquire legal entity status as just described. In the first place, Article 7(4) increases the number of members needed to acquire full legal entity status to fifty. For smaller religious communities that as a matter of conscientious belief organize on a congregational basis, this number may be prohibitively high for many congregations, and will significantly limit access of many groups to full legal entity status. More generally, Article 4(1) provides that “Activities of religious organizations that are not registered in the order defined by the legislation

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<sup>33</sup> Canea Catholic Church v. Greece, 27 EHRR 521 (1999) (ECtHR, App. No. 25528/94, 16 December 1997) (legal personality of the Roman Catholic Church protected); United Communist Party of Turkey v. Turkey (ECtHR, App. No. 19392/92, 30 January 1998); Sidiropoulos & Others v. Greece (ECtHR, App. No. 26695/95, 10 July 1998); Freedom and Democracy Party (ÖZDEP) v. Turkey (ECtHR, App. No. 23885/94, 8 December 1999); Hasan and Chaush v. Bulgaria (ECtHR, App. No. 30985/96, 26 October 2000); Metropolitan Church of Bessarabia v. Moldova (ECtHR, App. No. 45701/99, 13 December 2001); Moscow Branch of the Salvation Army v. Russia, ECtHR, App. No. 72881/01, Oct. 5, 2006; Church of Scientology Moscow v. Russia (ECtHR, App. No. 18147/02, 5 April 2007); Svyato-Mykhaylivska Parafiya v. Ukraine (ECtHR, App. No. 77703/01, 14 September 2007).

<sup>34</sup> Church of Scientology Moscow v. Russia (ECtHR, App. No. 18147/02, 5 April 2007).

of the Republic of Kazakhstan are not allowed.” In a similar vein, Article 375(2) of the Code of Administrative Violations establishes a penalty of up to fifty monthly calculation indicies (up to one hundred for juridical persons) for “evasion by religious organization leaders of registering an organization.” The Proposed Religion Law makes no allowance for those who object to registration as a matter of conscience—a relatively rare but nonetheless well known religious position that should be respected. The Proposed Religion Law seeks to minimize the burden of mandatory registration by allowing religious groups to operate, but insists that such groups be “subjected to record registration in local executive agencies” and provides that they have no rights to “undertake missionary activities” or to “establish, rent and operate worship service or religious meeting locations open for public access.” Article 4-3. To further complicate this picture, vagueness in the provisions dealing with “notifying registration” leaves open possibilities that this might be used to obstruct the ability of groups to carry out their religious affairs. The review procedures for approval of registration also leave open possibilities of excessive governmental discretion in approving or denying registration applications. For these and more detailed reasons set forth in these Comments, the registration provisions fall short of meeting OSCE and other international standards.

#### **IV. Comments in Detail**

##### **A. Downplaying Protection of Religious Freedom**

41. Article 1 of the Original Draft Law was originally titled “Purpose of the Law,” and went on to provide, “This Law guarantees implementation of citizens’ rights to freedom of religion, preserved in the Constitution of the Republic of Kazakhstan, as well as in international human rights acts and agreements.” The new version drops the reference to implementing freedom of religion ideals, and instead indicates merely that the provisions of the law “refer to the social relationships established in connection with realization of the rights to freedom of religion by citizens, . . . foreign nationals, and stateless persons, and in connection with activities of religious organizations and religious groups.” Of course, the constitutional and international rights to freedom of religion still exist, despite the apparent downgrading of the purposes of the statute. But the shift could have negative effects long term in guiding those who interpret the legislation.

## **B. Lack of Clear Standards for Ascribing Liability to Religious Associations**

42. Both the Administrative Code as revised and the Proposed Religion Law contemplate organizational violations. Nowhere, however, is it spelled out precisely when liability attaches to an organization. Every organization has members that engage in some inappropriate conduct. But when is the conduct so grave and pervasive in an organization that the organization itself should suffer penalties or even be dissolved? Also, it should be noted that many religious organizations do not have “fixed” personal membership. That means that a person claiming to be a member of the organization is not always in reality associated with it, so that difficult factual issues can arise as to when individual conduct should be imputed to the organization. This results in further complications in assessing the liability for organizations. These types of considerations are not clearly defined in the Proposed Religion Law. The consequences for organizations are potentially quite harsh.

43. Discussion of these issues with officials suggested that the complex issues of ascription of liability are handled essentially as matters of fact on a case-by-case basis in courts in Kazakhstan. This runs the risk that there is little to stop biased ascriptions. That is, larger and familiar churches are less likely to have wrongful conduct of leaders or members ascribed to the religious organizations as a whole than are smaller and less popular groups. A better practice is to set a clear standard for organizational liability, and to give the organization a warning and a chance to cure before imposing liability. If the activity of the entire organization can be shut down without any provision for notice or judicial review because of the action of one member, these penalties are extremely harsh and disproportionate limitations on religious freedom.

## **C. Vague Provisions**

44. Many provisions of the Proposed Draft Law are vague, and fail to give clear notice to organizations and individuals and invite abuse of authority and discrimination by officials. This is a critical point, because unduly vague laws do not suffice to meet the “prescribed by law” test in international limitation clauses. (See Comments on International Standards, Paragraphs 27-35 above) Stated differently, the limitation clauses assume that limitations are permissible only if they are prescribed by a law that meets basic rule of law criteria in terms of being precise, giving fair warning of what will constitute liability, thereby avoiding risks of abuse of official discretion

and assuring that legislation will not unnecessarily interfere with expression and religious freedom rights.

45. A number of vague provisions have been eliminated from the final version of the Proposed Religion Law, but some remain. The most problematic of these is the reference in Article 3(3) to “insulting citizens’ feelings.” Is it enough to disagree on religious doctrine? If so, this would violate a core element of religious freedom and present an impermissible limitation on the manifestation of religious beliefs. Limitations can be made when necessary to “protect the fundamental rights and freedoms of others,”<sup>35</sup> but laws that are overprotective of religious sensitivities could have the effect of imposing undue constraints on fundamental rights to freedom of expression and to the expressive side of freedom of religion or belief.

46. One of the most problematic vague terms in the Proposed Draft Law is a “theological examination.” (The translation that was used as a basis for these Comments uses the term “theological examination, but Russian speakers on the Advisory Council have noted that a more accurate translation would have been “religious expertise” (*religiovedcheskaia ekspertisa*). This repeats a formulation drawn from Russian law on religious associations. Regardless which translation is used, the notion opens the possibility that state representatives will be empowered to engage in substantive assessment of a religious community’s beliefs. More details are given in Article 4-4 on how “religious studies expertise” is to be structured and carried out. But no objective for the theological examination is given, and no limits are placed on those conducting the examination. There is the risk that this vagueness could lead to abuse of discretion and unlawful discrimination on the part of government officials.

#### **D. Inappropriate Constraints on Rights to Express and Disseminate Religious Beliefs**

47. Numerous provisions of the Proposed Religion Law restrict freedom of expression and rights to disseminate religious and other materials through: censorship, restrictions on who can produce religious materials, restrictions on where religious materials may be distributed, restrictions on who may disseminate religious ideas and material, and compulsory use of the full name of the religion on all religious

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<sup>35</sup> ICCPR Art. 18.3.

materials.<sup>36</sup> All of these are significant violations not only of religious freedom, but of freedom of expression as well.

48. Article 13 of the Proposed Religion Law contains numerous provisions that impose excessive, disproportionate and unnecessary constraints on distributing religious literature and other communicative materials. Article 13(2) provides an exception for import of religious materials intended for private use, but otherwise it requires all importing of religious materials to be allowed “only upon conducting a religious expert examination.” Officials in Kazakhstan have noted that their constitution does not allow censorship, but it is difficult to see why the procedures outlined in Article 13 do not run afoul of this ban. The officials claim that those undertaking the review do not evaluate religious teachings, but only analyze whether the literature is inconsistent with law in Kazakhstan. The idea is to make sure that people are not engaging in advocacy seeking to overturn the constitution order, etc. But there is nothing in the law that imposes this constraint, and such a constraint would be difficult to enforce in any event.

49. Article 13(4) also restricts where religious materials can be distributed. It provides: “It is not allowed to disseminate religious literature, other informative materials of religious content, religious items, and other forms of religious propaganda in premises of state agencies and enterprises, education and health organizations, as well as in adjoining territories.” The aim is ostensibly to protect the secular character of the state, but the regulation provided seems excessively broad, with the result that it unduly narrows free expression rights. Stripping public settings of all signs of religious expression constitutes hostility rather than neutrality towards religion, and in that sense is an unsatisfactory notion of secularism. What is important is avoiding the sense of official endorsement of religious materials, particularly in key public buildings that house institutions of state power (e.g., parliament, government, courts, and local administration). It is important to make a distinction between what is allowed in public institutions as opposed to private institutions. Obviously, much greater latitude should be permitted in the dissemination of religious materials and other items in private, possibly religiously affiliated institutions, than would be permissible in public institutions. Even in public institutions, there is often

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<sup>36</sup> The state has a legitimate interest in assuring that a group should not be able to use another group’s name in ways that are fraudulent or otherwise misleading, and clarity of identification should be required. However, in some cases this can be achieved without placing the full formal name of the legal entity on every religious object or publication.

justification for dissemination of such materials. For example, excessive limits on the use of religious materials in hospitals or other health care facilities could be extremely problematic for legitimate pastoral care efforts within such facilities.

50. Article 13(5) provides, “Dissemination of religious literature, other informative materials of religious content and religious items to citizens in public places is allowed only in stationary facilities specifically constructed by local executive agencies.” Again, the constraints on where dissemination is allowed seem excessive, and go far beyond merely providing a reasonable order for distributing religious literature and other items.

51. An additional problem with Article 13 is that it seems to authorize discrimination against religious groups that have not acquired the status of organizations. Thus, Article 13(6) provides that “Religious organizations have the right to publish, manufacture, export, import, and disseminate religious items, service books, and other informative materials of religious content.” The implication seems to be that religious groups are not so authorized. Similarly, Article 13(7)-(8) provides that “Religious organizations have exclusive rights to establish enterprises publishing service literature and manufacturing religious items. Other institutions and organizations may perform these activities only upon approval of corresponding religious organizations, administrations, and centers.”

52. The August Letter suggests that the restrictions on importing and dissemination of religious materials established by the Proposed Religious Law can be justified on the grounds that the state can intervene in the flow of information to help make it “well organized,” and that the right to “publish, import and disseminate” does not rule out certain limits. Germany is referred to as an example of a country that establishes “an order of distribution” of religious liberty and other information materials. This appears to be a misunderstanding of German theory and practice. Professor Gerhard Robbers, a specialist on constitutional law at the University of Trier in Germany, has provided the following information: “In Germany, there is absolutely no “state interference to make the flow of religious literature ‘well organized.’” Anyone and any religious organization is free to publish, import, and disseminate literature, including religious literature. This also applies to public institutions such as hospitals, schools, universities, etc. Censorship is prohibited by the German constitution. In the case of literature that would constitute a criminal offence such as pornographic literature or hate speech literature, criminal law and criminal

investigation law applies. This, however, is only relevant for the individual case in which an individual, specific piece of literature has to be seized or banned. A general restriction or channelling of religious literature as such is impermissible under German law. More generally, while some limits may be permissible, they need to pass the strict tests posed by the limitation clauses that determine the narrow conditions under which expression and manifestations of religion can be limited. These clauses do not justify anything as intrusive as systematic expert theological evaluation of all imports.

53. Article 13's limitations on the distribution of religious materials are severe limitations on freedom of expression and religion and are unnecessary in a democratic society. They violate OSCE commitments to freedom of religion ("states will . . . . allow religious faiths, institutions and organizations to produce, import and disseminate religious publications and materials")<sup>37</sup> and speech,<sup>38</sup> Article 19 of the ICCPR ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"), as well as very likely Article 20.1 and 20.2 of the Constitution of the Republic of Kazakhstan, which ban censorship and provide for the right to freely disseminate information.<sup>39</sup>

54. These constraints on freedom of expression are defended by citing Principle 16(2) of the OSCE Vienna Concluding Document, which obligates all

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<sup>37</sup> Vienna Concluding Document, par. 16.10.

<sup>38</sup> Vienna Concluding Document, par. 34 ("[states] will ensure that individuals can freely choose their sources of information. In this context they will . . . allow individuals, institutions and organizations, while respecting intellectual property rights, including copyright, to obtain, possess, reproduce and distribute information material of all kinds. To these ends they will remove any restrictions inconsistent with the abovementioned obligations and commitments." ); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, par. 9.1 ([the states reaffirm that] "everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright."); Concluding Document of Budapest , 6 Dec. 1994 para. 36 ("The participating States reaffirm that freedom of expression is a fundamental human right and a basic component of a democratic society."); Istanbul Document, Istanbul, 19 November 1999, Charter for European Security: III Our Common Response, par. 26 ("We reaffirm the importance of . . . the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for . . . unimpeded transborder and intra-State flow of information . . .").

<sup>39</sup> Constitution of the Republic of Kazakhstan, Art. 20.1 ("The freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited.), 20.2 ("Everyone shall have the right to freely receive and disseminate information by any means not prohibited by law.")

participating States to “contribute to the climate of mutual tolerance and respect between believers and non-believers” is of course a laudable goal, but does not justify imposing the kind of limitations that this provision is invoked to support. The appropriate answer to this suggestion is an often-cited provision of the European Court of Human Rights’ decision in *Serif v. Greece*:

Although the Court recognizes that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other . . . .<sup>40</sup>

Restricting access to information is not the appropriate way to achieve social harmony.

55. The Proposed Religion Law also imposes unnecessary constraints on the right to freedom of expression of missionaries and on the rights of others to receive information. Peaceable sharing of one’s beliefs is a critical element of the right to “manifest” one’s religious beliefs.<sup>41</sup> Missionary work is also protected under freedom of speech and the right to disseminate information.<sup>42</sup> OSCE commitments include that states will “[m]ake it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries . . . .”<sup>43</sup> and “allow individuals, institutions and organizations, while respecting intellectual property rights, including copyright, to obtain, possess, reproduce and distribute information material of all kinds. To these ends they will remove any restrictions inconsistent with the abovementioned obligations and commitments.”<sup>44</sup> States also reaffirm that “everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The restrictions on this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.”

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<sup>40</sup> *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999), §53.

<sup>41</sup> ICCPR Art. 18, European Convention Art. 9.

<sup>42</sup> *Kokkinakis v. Greece*, 260-A ECtHR. (ser. A) (1993) (establishing that non-coercive bearing of religious witness is protected under freedom of religion); see also Const. Kazakh. Art. 20; European Convention Art. 10 (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”)

<sup>43</sup> Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975.

<sup>44</sup> Vienna Concluding Document, par. 34.

56. Earlier provisions which would have introduced a quota system for missionaries would clearly have violated these principles, as well as the right of religious groups to autonomy in their own affairs. Fortunately, the quota provision was withdrawn before passage of the Proposed Religion Law.

57. Provisions such as Article 4-3(3)(1), which provides that religious groups have “no rights to . . . perform missionary activities” and Article 4-2, which can be read to make it difficult for religious organizations to send missionaries to new areas impose unjustifiable burdens on both freedom of religion and freedom of expression rights.

58. Article 14(2) raises an important practical problem concerning the proper limits of missionary activity. It provides, “Charitable activities aimed at the dissemination of doctrinal statements taking advantage of material hardships of citizens are prohibited.” This is a significant improvement over an earlier formulation, and particularly if the term “taking advantage of” is narrowly interpreted to connote genuine abuse, the phrase is probably not overbroad. Nonetheless, it is important to bear in mind certain practical problems in construing this provision. Many religious traditions provide charity to the disadvantaged. It would be very difficult if not impossible to determine whether the charity was used to “encourage” people to have religious opinions. In any case, “encouraging” individuals to hold religious convictions does not violate the fundamental rights and freedoms of others. Determining whether charitable activity is secretly “aimed at” spreading doctrine by exploiting material needs is extremely subjective, and while this reflects a valid concern, it is important that this provision be more clearly tied to specific forms of abuse. It would be counterproductive if this type of provision were applied in ways that created disincentives for religious communities to engage actively in charitable programs. That is, a religious community may engage in good faith charitable work with no intention of exploiting this work to proselytize. People in the community, however, may try to curry favor with the religious group by joining the group. Others might convert in good faith without any concern for obtaining charitable aid, but at a subsequent time fall on hard times, and benefit from normal charitable programs of the religious community. There are many diverse possible situations. The point is that if any group that engages in charitable aid and also has converts is at risk of a violation of this vague section, the result may be both a violation of expression rights (the right to share beliefs) and the creation of a disincentive to engage in genuine charitable

work. In order to avoid conflict with international limitation clauses, it is important that the phrase “taking advantage of” be construed strictly.

59. A mere requirement that missionaries register in the sense of giving notice of where they live and where they will be working is probably permissible, so long as the requirement is not structured in a burdensome way and is not used to obstruct the missionary’s right to freedom of expression (and the related right to freedom of religion). It may be that this is all that the “record registration” established by Article 4-2 is intended to require, but if that is the case, the notice could be substantially less cumbersome. The fact that the provisions of Article 4-2 require submission of information on the “literature, audio and video materials and/or other religious items meant for missionary activities,” and that “[u]se of additional religious materials after record registration shall be approved by local executive agencies” suggests that more than non-discretionary recording of the fact that someone wishes to do missionary work is involved. To the extent that “record recording” conveys discretion to government officials to decide whether and how missionaries can carry out their expressive activities, it goes too far. The Proposed Religion Law in its current form fails to provide the appropriate guidance.

**E. Non-Neutral State Evaluation of the Substantive Content of Beliefs**

60. Article 4-4 and other provisions contemplating “religious expert examination” raise serious concerns of the possibility of the state being in the position to make judgments on the acceptability of religious doctrine. This “religious expert examination” is too open-ended and is rife with possibility for abuse and discrimination. The Proposed Draft Law does not state the purpose for such examinations, nor does it impose limitations on methods or objects of examination. Article 9(7), however, provides, “Expert statement based on religious expert examination results shall serve as the basis for making a decision regarding state registration or refusal of state registration of religious organization by the registration agency.” Thus, the assessment made by the “religious expert examination” plays a key role in securing registration. Nowhere, however, is it made clear that the state is barred from making theological judgments on the beliefs of a group. Indeed, the terms of Article 4-4 of the Religion Law (as amended) appear to suggest that the state body may examine the beliefs of a group and not just its actions, charter, or prior conduct elsewhere. Such review is inconsistent with protecting religious freedom. As the

European Court has emphasized, “The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”<sup>45</sup>

61. The State Committee on Religious Affairs has pointed to Article 9-1 and indicated that from its point of view, religious studies expertise “is conducted only in order to define the accordance of dogma and activity of religious organizations to the legislation of the Republic of Kazakhstan.” It is confirmed by Article 42 of the Civil Code of the Republic of Kazakhstan, wherein the general principle for registration of all types of legal entities is determined: “The refusal of registration due to the inexpediency of the formation of a legal entity is not permitted.” Further, the State Committee notes that “in case of refusal in the state registration of a religious organization, the registering authority is obliged to issue an explanation for the refusal in written form and in the order set in the legislative acts, containing reference to the violation of the specific law, and this refusal can be appealed juridically.” While these constraints limit the likelihood of evaluation of religious doctrines or beliefs, they do not explicitly rule it out.

62. The potential problem of non-neutral review is compounded by uncertainty as to exactly how those performing the review are selected. Originally, “representatives of religious organizations” were to be included. Article 4-4(4) of the Proposed Religion Law currently states that “Religious expert examinations shall be carried out with the participation of state agency representatives and religious experts. For the purposes of expert examination it is allowed to involve professionals having special knowledge.” This appears to move in the right direction, but significantly, the law does not say that *only* professional experts may be involved. Moreover, even professional experts are likely to have particular biases. What is important, if the review is to occur, is that it be as neutral as reasonably possible. In this respect, it may make sense to provide that any reviewing body should be balanced. Not allowing representatives of religious organizations to take part in the provision of relevant expertise would mean that they were being discriminated against by comparison to secular scholars, who tend to be assumed to be objective (although in fact this not necessarily the case). Religious organizations should have the same right to participate in any discussion and study (which is not the same as taking the decision

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<sup>45</sup> Manoussakis and Others v. Greece, 23 E.H.R.R. 387 (1997)(ECtHR, Sept. 26, 1996), para. 48.

itself) which might lead to decisions affecting their interests. Allowing open hearings on these issues may also provide valuable input and can enhance the fairness of proceedings.

63. The explanations provided by the Committee on Religious Affairs on the issue of how religious expert examinations will most likely proceed are reassuring. However, the problem remains that there is no real standard to govern “religious expert examinations,” whether conducted by scientists, politicians, theologians or an expert committee. The risk is that whoever undertakes “religious expert examination” under these conditions may tend to engage in inappropriate evaluation of religious beliefs, which is inconsistent with the core notion that religious freedom includes freedom to choose and live according to beliefs that others may find objectionable. The response of the August Letter that only the conditions set forth in Article 9-1 can serve as a basis for denial of legal entity status appears to affirm that the intent of the law in Kazakhstan is not allow inappropriate evaluation of the substance of religious beliefs. It would be helpful if this could be made more explicit in the Proposed Religion Law. One approach would be to make it clear that the *only* grounds for denial of registration would be the factors listed in Article 9-1, and that the religious expert evaluation may focus solely on those issues.

**F. Proscription of Religious Activities Carried Out By Unregistered Groups or Groups with “Record” Registration**

64. One of the primary issues in the Proposed Religion Law (and the associated administrative code provisions) is that registration is made mandatory. Article 4(1) of the Proposed Religion Law provides that “Activities of religious organizations that are not registered in the order defined by the legislation of the Republic of Kazakhstan are not allowed.” Article 1-1(7) defines “religious activities” broadly to mean “activities directed towards satisfaction of religious wants of followers.” In a similar vein, Article 375(2) of the Code of Administrative Violations of the Republic of Kazakhstan establishes a penalty of up to fifty monthly calculation indices (up to one hundred for juridical persons) for “evasion by religious organization leaders of registering an organization.” For religious believers who have conscientious objections to submitting to registration, or for whom undue obstacles are placed in the way of registration, these provisions constitute a direct violation of religious freedom rights.

65. That is, these provisions, as well as the provision of Article 4-3 (proscribing public religious activity of minimally registered small groups) violates ICCPR Article 18,<sup>46</sup> which establishes the right to manifest one's religion or belief "in worship, observance, practice and teaching" "either individually or *in community with others*" (emphasis added). They also violate OSCE commitments providing that participating States will "recognize, respect and furthermore agree to take the action necessary to ensure the freedom of the individual to profess and practice, alone or *in community with others*, religious or belief acting in accordance with the dictates of his own conscience"<sup>47</sup> (emphasis added). Further, OSCE commitments<sup>48</sup> and the European Convention<sup>49</sup> guarantee the right "to freedom of peaceful assembly and to freedom of association with others" and OSCE commitments require states to "respect the right of . . . religious communities to establish and maintain freely accessible places of worship or assembly."<sup>50</sup>

66. The decision whether or not to register with the state may itself be a religious one, and is well within the scope of core elements of religious freedom.<sup>51</sup> While some limitations on the activity of unregistered groups are legitimate and proportional (i.e., it is not unreasonable to deny the incidents of legal entity status to a group that has not sought to acquire the status), restrictions such as those in Article 4-3 which prevent unregistered groups from undertaking missionary activities; establishing, renting or operating service or meeting locations open to the public, and so forth, are disproportionate and "unnecessary" within the meaning of international limitation clauses. If it is thought that a legal entity is necessary to carry out such activities, then it is vital that the requirements for acquiring legal status must be low enough to allow even small groups to be able to carry out these normal religious

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<sup>46</sup> See also European Convention, Art. 9(1).

<sup>47</sup> Concluding Document of Madrid – The Second Follow-up Meeting, Madrid, 6 Sept. 1983, "Questions relating to Security in Europe," par. 12.

<sup>48</sup> Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, Paris, 21 Nov.1990 ("We affirm that, without discrimination, every individual has the right to . . . freedom of association and peaceful assembly."); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990 "[participating States reaffirm that] "(9.2) everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards; (9.3) the right of association will be guaranteed.")

<sup>49</sup> European Convention Art. 11.

<sup>50</sup> Vienna Concluding Document, par. 16.4.

<sup>51</sup> See Vienna Concluding Document, par. 16.4 (states "respect the right of . . . religious communities to . . . organize themselves according to their own hierarchical and institutional structure.").

activities. Article 4-3 appears to assume that registration can be made a pre-condition and prerequisite for enjoying religious freedom rights, which is clearly against international standards that recognize that these rights are not dependent on being created or recognized by the state.

67. The fact that there is a relatively easy method of registration does not cure the human rights violation inherent in a law that says “Operation of religious organizations not registered in the order set up in RK legislation is not allowed.” (Article 4(2)). There are some religious communities (not many) who object as a matter of conscience to registering. They have the right to continue to function. They may have to waive the right to acquire entity status, but there should be no criminal or administrative sanction (other than not obtaining entity status) that flows from non-registration.

68. A provision that required unregistered groups to give notice of their existence and of the address of a contact person so that the state could contact the group if necessary may be permissible, so long as this is not used as a ground for controlling or restricting the activities of the group and so long as officials do not have discretion to deny such registration, and provided that if there are particular groups that have a sincere conscientious objection to providing such notification, they may be exempted. Repeat registrations of the foregoing nature, to assure that a group is not defunct, may also be reasonable. This may be what is intended by the notion of “record registration” of religious groups in Article 4-3(2) and 4-3(4). But the risk is that record notification could be administered in a way that is substantially more restrictive. There is really very little indication of exactly how “record registration” is to function. Article 6-1 states that the “authorized agency shall . . . (2) carry out examination and analysis of activities of religious organizations,, missionaries, and religious groups created in the territory of the Republic of Kazakhstan.” No indication is given of what limits are to be placed on such examination, or what exactly the examination is supposed to look for. Article 6-1(7) indicates that the Authorized Agency is to “ensure execution of religious expert examinations,” which may be called for in connection of record registration of groups, although this is not clear. Article 6-1(10) indicates that the Authorized Agency can “introduce suggestions to law enforcement agencies regarding prohibition of activities of physical or juridical persons.” This could have significant ramifications for groups. Article 6-2 provides that local executive agencies are to “perform record registration and repeated

registration of missionaries and religious groups in accordance with Regulations approved by the authorized agency.” Exactly how this procedure is to be carried out and what standards should guide it remain vague and undefined. Moreover, no limits are imposed to assure that the registration procedure cannot be used to give registration officials excessive discretion. In fact, the number of such groups is likely to be small, and state concerns with such groups can be adequately addressed in other ways. One suggestion could be to provide greater clarity about how “record registration” is supposed to work, and by imposing sharp limits on the authority of public officials to use this procedure to limit the activities of religious groups. It needs to be made very clear in the legislation that “record registration” is designed solely to give officials information for purposes of being able to contact the group, and may not be used to obstruct religious activities.

69. European countries do have registration systems, but nowhere is registration *mandatory*. Groups that do not register do not get the benefits of legal entity status, but they are free to carry out the full range of religious activities called for by their beliefs, subject only to constraints that can be justified under international limitation clauses.

70. The reason that such mandatory registration requirements are impermissible goes straight to the core of freedom of religion or belief. According to ICCPR, an individual has a right, independent of state authorization, “either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” ICCPR, art. 18(1). As mentioned in Paragraphs 28-35 of this document, this right to manifest religion or belief may be limited only when it meets *all* of the following three conditions: (1) the limitation must be prescribed by law; (2) it must protect one of a small set of enumerated state interests—public safety, order, health, or morals or the fundamental rights and freedoms of others (limitations based on other grounds are not permitted); and (3) in *addition*, the particular means of providing the protection must be strictly *necessary*—*i.e.*, the state action must be proportionate in that it furthers a pressing social need; it must be narrowly tailored to avoid unnecessary intrusion on the right to freedom of religion or belief; and it must be non-discriminatory. Limitations that violate any of the foregoing conditions are not permissible under international

standards.<sup>52</sup> Requiring registration as a mandatory precondition of religious activity, even if set forth in a law and arguably protective of one of the enumerated grounds is not necessary, if for no other reason than it will always be possible to identify specific harms and to address them with more narrowly tailored criminal or administrative sanctions. That is, if the reason for insisting on registration is to protect public order and to protect citizens from harmful activity carried out by dangerous groups, the objectives can be carried out by passing legislation that imposes sanctions for the harmful activities in question, rather than making it impossible or extremely difficult for religious groups to carry out any activities, or a broad range of activities, by denying them the right to register. Using a registration law as the means to further the state's objective in this setting is not narrowly tailored enough, and is thus not "necessary" in the sense required by international limitation clauses. More generally, freedom of religion or belief is a *human* right that is not dependent on state registration or approval to come into existence.

71. The Advisory Council respectfully recommends that these provisions be dropped. The point is not that genuine problems resulting from the conduct of religious groups cannot be addressed by precisely drafted crimes or administrative regulations. In fact, general criminal law statutes typically provide adequate coverage, and where that is not the case, narrowly tailored criminal or administrative norms can be added. Dealing with these issues at the level of registration imposes limitations on manifestations of religion that are, in comparison, unnecessarily broad and restrictive. It is not necessary to impose a general constraint on the freedom of religious groups in order to address a much narrower set of genuine risks to public safety, health, order, morals, and the right of third parties.

72. A related issue is raised by Section 2 of Article 375 of the Code of Administrative Violations, which establishes an administrative offense of activity by religious organizations "inconsistent with its goals and objectives as defined in its statute." This may be legitimate at some level, provided that the state does not create pressures that force religious communities to unduly narrow the scope of their activities in ways that are inconsistent with freedom of religion or belief. In some cases, a religious community may by mistake have framed its purposes in a way that is narrower than necessary. In this situation, the state should be liberal in allowing

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<sup>52</sup> ICCPR, art. 18(3); UN Human Rights Committee, General Comment 22(48), paragraph 8 (providing the official interpretation of Article 18(3) of the ICCPR).

amendments. In many cases, the appropriate response to ultra vires activity of this kind is to hold that it is voidable if there is some party who objects or is injured, but otherwise to allow the relevant acts to stand. Administrative sanctions would seem to be appropriate only where the ultra vires conduct harms the interests of others. Establishing this as an administrative offense without possibility of first giving a warning opens the door for abuse of supervisory discretion. Religious organizations regularly engage in a variety of activities: educational, humanitarian, charitable, etc. and it would be easy to second-guess its statute and to try to find some activity which arguably violates its goals and objectives. Since the penalty for organizations is quite harsh -- 20 monthly calculation indices, and for legal entities 100 monthly calculation indices with suspension of activity for up to 6 months -- this provision should at the very least require a warning with opportunity to cure the problem and any harms that ensue.

#### **G. The Right to Legal Entity Status**

73. For religious groups who wish to organize not merely as groups, but as organizations, the Proposed Religion Law creates barriers that are likely to be problematic for some. Most notably, Article 7(4) increases the number of members required to 50, and it makes this number a prerequisite for the establishment of each local religious organization. While this number is not unreasonable for some religious communities, which generally have large local congregation, it can be very problematic for smaller groups that for theological reasons organize on a congregational basis. Many such local groups simply will not have fifty adult members, and they will thus be foreclosed from acquiring legal entity status. The threshold of 50 may even make it difficult for larger denominations such as the Russian Orthodox Church and Islam to create local religious organizations in small towns and villages. The requirement of fifty members, particularly as a requirement for every local religious organization, will significantly limit access of many groups to legal entity status. But as emphasized in paragraphs 36- 39, above, it is now well settled that religious communities willing to live within the constitutional order of the state should have the right to legal entity status.<sup>53</sup>

#### **H. The Right to Religious Autonomy**

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<sup>53</sup> See, e.g., Vienna Concluding Document, Principle 16(c).

74. The right for religious communities to autonomy in carrying out their own affairs is fundamental both to the rights of religious communities as such and to the rights of the individuals that compose and are served by the communities. This right is clearly recognized in Principle 16.4 of the Vienna Concluding Document, which recognizes the right of religious communities, inter alia, to:

- establish and maintain freely accessible places of worship or assembly,
- organize themselves according to their own hierarchical and institutional structure,
- select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State,
- solicit and receive voluntary financial and other contributions.

These rights are key features of the more general right to religious autonomy. This right is insufficiently protected by several provisions of the Proposed Religion Law.

75. For example, Article 7(3) subdivides religious organizations into “local” and “central” organizations. This distinction reflects practical realities that in many religious denominations, there are in fact central and local bodies that perform rather different functions. The reality is that different religious communities, often as a matter of doctrine, have different ecclesiastical structures. Some are hierarchical, some are congregational, some are representational, and some are connectional, and so on. A religious association law can facilitate the ability of a religious community to structure its own affairs by making legal structures available which can be used to set up legal structures that mirror the ecclesiastical organization of the religious community. Thus, it may be helpful for a religious organization to use a “central” organization for administrative purposes, and “local” organizations for its local congregations. Exactly how religious organizations choose to structure their affairs is not the business of the state, which should remain neutral as to these issues. A problem with the Proposed Religion Law is that it defines central structures as religious organizations “operating in the territories of at least five administrative states, cities of republican significance, or the capital.” Article 7(5). This definition ignores the autonomy of religious organizations in structuring their own affairs. Some religious groups may have multiple congregations, but perhaps only in one or two

administrative states, or only in Astana or Almaty. Such a religious community may wish to have a centralized organization, and perhaps one that consists only of local religious organizations (and not necessarily of natural persons). Article 7(5) also creates problems for religious traditions that create sub-entities such as dioceses in very different ways than those contemplated by this section. The law ought to be flexible and facilitate respect for and implementation of the internal norms of religious communities. The law ought to give religious communities the ability to structure their affairs as they prefer. Instead, the effect of Article 7 will be to give some larger religious communities the ability to have centralized organizations, but will deny others of this type of entity, and even for the larger communities, the law does not necessarily comport with their religiously based practices. Similar problems exist with Article 6-1(12), which empowers the Authorized Agency to “coordinate . . . appointment of religious organization leaders in the Republic of Kazakhstan by foreign religious centers.” This could lead to significant contradictions with the internal rules and practices of many religious traditions. There is no reason to make legal structures available on a basis that is really non-functional for religious groups or which may operate in a discriminatory way.

76. Allowing religious groups to choose their own structures is a core element of religious autonomy and religious freedom and is well protected under OSCE commitments: states will “respect the right of . . . religious communities to . . . organize themselves according to their own hierarchical and institutional structure.”<sup>54</sup> Convenience of conceptual organization of the legislation is not a sufficient justification to deny or impair the right to religious autonomy.

77. Since only central religious organizations are permitted to establish “religious education organizations, which implement professional education programs of training clergymen,” discrimination against minority or newer groups is particularly problematic. Education of one’s own clergy is a core right of all groups of believers, and should not be limited to groups that are widespread and have been in the country over ten years. Under OSCE commitments, states agree to “respect the right of *everyone* to give and receive religious education . . . whether individually or in association with others” (emphasis added)<sup>55</sup> and “allow the training of religious

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<sup>54</sup> Vienna Concluding Document, par. 16.4.

<sup>55</sup> Vienna Concluding Document, par. 16.6.

personnel in appropriate institutions.”<sup>56</sup> This should not be restricted to larger religious organizations that have sufficient geographical dispersion to be eligible to create central organizations.

### **I. Parental Consent Provisions**

78. In the Proposed Religion Law, the requirement that parental consent to the participation of children in religious activities be provided in writing has been eliminated. In general, international human rights provisions recognize the rights of parents to guide the upbringing of their children. The Proposed Religion Law’s call for parental consent appears to be aimed at implementing both Article 18(4) of the ICCPR and the Convention for the Rights of the Child<sup>57</sup> which provide in slightly different terms that parents have the liberty to ensure the religious and moral education of their children in conformity with their own convictions.<sup>58</sup>

79. However, as currently framed, the legislation is unduly restrictive. First, it fails to take into account the rights of mature minors. As provided by the Convention on the Rights of the Child, Art. 14.2, parental direction of the child’s right to freedom of religion must be exercised “in a manner consistent with the evolving capacities of the child.” Second, it may be unduly restrictive in several other ways. It fails to allow for practical realities that may arise when there are custody conflicts, or where the parents have disagreements with regard to questions of religious upbringing. It might also impose excessive sanctions in situations where teenagers attend meetings with friends or in situations where religious leaders may simply not be aware that a child is attending a service without parental consent. If a pastor or priest is giving a sermon and sees an unknown youth walk into the church, must he interrupt his sermon and expel the unknown youth before he can lawfully continue with his sermon? Failure to require a warning before imposing more serious sanctions is particularly problematic in such contexts. As initially drafted, the Original Draft Law could have undermined the intentions and rights of the parents by being overly formalistic in requiring written consent of both parents for any (and presumably every) religious activity. It makes much more sense as a practical matter to place the burden on

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<sup>56</sup> Vienna Concluding Document, par. 16.8.

<sup>57</sup> Convention on The Rights of The Child, Adopted and Opened for Signature by United Nations General Assembly Resolution 44/25 on 20 November 1989, Entered into Force 2 September 1990.

<sup>58</sup> See also OSCE Vienna Concluding Document, par. 16.7.

parents to object to involvement of their child with a particular religious community than to place the burden on the religious community.

80. A caveat in this regard is that the Proposed Religion Law fails to consider the child's right to freedom of thought, conscience and religion and the "evolving capacities of the child." (Convention on the Rights of the Child, Art. 14.1 and 14.2). These rights "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others" (Convention on the Rights of the Child, Article 14.3). Children also have the right "to freedom of association and to freedom of peaceful assembly," subject only to the same limitations as the children's religious freedom rights. The Proposed Religion Law addresses these concerns to a considerable extent by noting that the State shall "not intervene . . . into the education of children as done by their parents or other legal representatives in accordance with their beliefs *and taking into account the right of children to religious freedom.*" Article 4(2).

81. While it is legitimate and important to recognize the rights that parents have with respect to the upbringing of their children, it is important that rules in this area be sufficiently flexible that religious groups do not suffer because of the sometimes unpredictable actions and interests of teenagers. Removing the overly formalistic written consent requirements probably moves things in a more practical direction. But except where there is a demonstrated pattern or practice of ignoring parental wishes, a better approach would not presume that religious leaders lacked consent unless they continued to involve youth over the express objection of the parents (whether verbal or in writing).

82. A somewhat different side of the parental consent picture is implicit in Article 4(6), which states that "religious organizations are prohibited from carrying out activities persuading to and forcing family fragmentation, preventing receipt of obligatory secondary education, and performing civil duties to the state . . ." Again, states are permitted to limit religious freedom in order to protect the "public safety, order, health, or morals or the fundamental rights and freedoms of others,"<sup>59</sup> but best practice is to list specific harms to be prevented, thus avoiding excessive discretion by government officials and possibility of discrimination. In particular, banning

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<sup>59</sup> ICCPR Art. 18.3; see also European Convention, Art. 9.2; Vienna Concluding Document, par. 17.

“persuading or forcing split of families” is vague and open to abuse. Determining the causation of family break-ups is very difficult because of the subjective nature of the relationships. In fact, there are few religious groups that intentionally seek to coerce the splitting up of families. The reality is that different members of a family may be attracted by different religious teachings. When that is the case, the individual family members have the right to “have or adopt” a religion of their choice. ICCPR Art. 18(3). The fact that some tensions result is not grounds for banning particular religious organizations.

83. A provision of this nature carries the risk of being invoked in a discriminatory way. Imagine a situation in which there is a family that belongs to one of the prevailing religions of a country, and one of the members decides to join a smaller, less well-known religious community. It may well be that the smaller religious community encourages family unity, but that the members of the family belonging to the prevailing group oust the family member who has converted to the smaller group. It is extremely unlikely that a situation of this kind will be used as evidence for banning or dissolving the prevailing religion, even though the coercion for family break-up is emanating from its adherents. On the contrary, it is all too likely to be taken as an excuse for taking action against the smaller group. These situations are inevitably complex, but the provision in question is vague and highly likely to be administered in discriminatory ways.

84. There is some concern that wording changes made toward the end of the drafting process could be read to change a provision that originally imposed sanctions for organizing religious youth activities and then involving youth without parental consent, whereas now it imposes sanctions for any involvement of youth in religious activities without parental consent. See Article 375(3), Code of Administrative Violations of the Republic of Kazakhstan. This change exacerbates the problems noted above.

#### **J. Excessive Penalties for Minor Non-Compliance**

85. Without going into detail, the level of punishments for failure to register and for various other forms of non-compliance with the Proposed Religion Law seem excessive—particularly in light of the fact that in many cases, the conduct subject to sanctions is actually conduct deserving protection under international

religious freedom norms. This is true both with respect to fines and with respect to the grounds for dissolution of an existing religious organization.

**K. Insensitive Transition Provisions**

86. The transition provisions appear to require re-registration of all religious organizations under the newly enacted provisions. This is likely to burden officials with a high volume of unnecessary work. More significantly, to the extent that some groups that are currently registered and have vested property rights may not qualify to re-register (for example, if they do not have enough members), the transition rules could operate to deprive legitimate groups of their property rights. More sensitive provisions that avoid such problems should be drafted.

**L. Discriminatory Provisions**

87. A recurrent theme running through the Proposed Religion Law is a pattern of provisions that if not used properly could lead to discrimination against smaller and less popular religious groups. In a country with Kazakhstan's heritage of tolerance, giving in to pressures to discriminate against such groups seems particularly unfortunate and inappropriate. In the end, the real test of a country's commitment to the ideals of religious freedom is not how it treats the larger and traditional groups, but how it treats the smaller and less familiar groups. Kazakhstan's excellent work in organizing Congresses of the Leaders of World and Traditional Religions would have a greater impact if matched by showing similar respect to smaller and less powerful groups. The United Nations Human Rights Committee, in interpreting Article 18 of the ICCPR, has stated that

“Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.”<sup>60</sup>

By refining a number of the provisions in the Proposed Religion Law, Kazakhstan can make major strides both in promoting religious freedom for its inhabitants, and also in the broader global setting.

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<sup>60</sup> UN Human Rights Committee General Comment No. 22 (48), adopted by the U.N. Human Rights Committee on 20 July 1993, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), par. 2.

## V. Notes on Practices in Other Countries

88. The August Letter from the Committee on Religious Affairs included several pages of questions concerning how various issues being dealt with by the Original Draft Law (and other existing Kazakh legislation) are addressed in other countries. The questions are extensive and experts from a number of countries mentioned in the August Letter have been consulted on specific issues. In particular various members of the Advisory Council, including Prof. Gerhard Robbers, Prof. Rafael Palomino and Mr. Alain Garay contributed helpful comparative material mentioned below. Additional and more specific answers regarding law and practice in other countries were given in the context of a second meeting between the Committee for Religious Affairs and some representatives of the Advisory Council on 25 November 2008. Only the more significant points are noted here. In general, what these comparative law points show is that although many of the foreign practices referred to might appear to deviate from principles that form the basis of the Advisory Council Comments, in fact there is no conflict. Either the conflict disappears when the foreign practice is properly considered, or in fact, the other country's practices may violate international standards. Because the paragraphs that follow address specific questions, they do not provide a systematic comparative overview of the issues, but they do cast comparative light on a number of key issues addressed by the Original Draft Law and the Proposed Religion Law.

89. **Definitional Issues.** Many different definitional approaches are used. Increasingly, what authorities reviewing such definitional issues recognize is that broad definitions should be used to avoid discrimination. That is, if an unduly narrow definition is used, some religions or religious activities might be inappropriately excluded by definition. Since it is the state that is making the definition, the state will be guilty of discriminating in the process of making definitions. Thus, the basic approach of the UN Human Rights Committee is the appropriate one: "The terms belief and religion are to be broadly construed. Article 18 [on freedom of religion or belief] is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions."<sup>61</sup> Narrower definitions may in fact be found in land use or other specific

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<sup>61</sup> UN Human Rights Committee, General Comment No. 22 (48) (Article 18), adopted by the UN Human Rights Committee on 20 July 1993, UN Doc. CCPR/C/21?Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

codes, but if they were to result in discriminatory treatment of different communities, they would be problematic.

90. **Religious Examinations.** In Europe, substantive evaluation of religious beliefs is not to be performed by government officials. Review of applications for entity status tends to be largely formal, and does not require special religious experts to evaluate applications. In general, any such review is structured so as to be neutral among religions.

91. **European Registration Rules.** Virtually all of the countries listed in the August Letter's questions regarding European registration practices have legal structures that recognize two or more levels of religious organizations, the lowest level of which provides for a basic form of legal entity status that is easily accessible and through which a religious community can carry out the full range of its religious activities. The right to acquire legal entity status recognized in OSCE commitments and under international standards more generally relates to this basic type of legal entity, which could be an ordinary civil association or a form of religious entity that is easily accessible to all. Such "base-level" entity status is easily available in virtually all of the countries mentioned.

92. The concordat in Poland, agreements in Italy and Spain, recognized religions in Belgium (and Austria), corporations under public law in Germany, and in a different sense, in Greece, established churches in several countries, traditional religions in Lithuania, and so forth through many European systems, are all examples of "upper tier" structures. These are not totally without controversy, since there are arguments that discrimination against smaller groups sometimes occurs. But in general they have been accepted on the grounds that there are objective reasons for differentiating these larger religious groups and their distinctive social roles, and because smaller groups are still protected in the sense that they are free to practice their religion without acquiring legal entities, if they so choose, and in addition, if they seek juristic personality, they can easily acquire a form of entity status that does not set limits on the types of religious activities in which they can engage. European Court cases have made it clear that while these base level entities are not necessarily

eligible for all forms of state cooperation and financial assistance, they must have freedom to carry out the full range of their religious affairs.<sup>62</sup>

93. It is significant to note that in many countries, “upper tier” access is open to a large number of religious communities. Thus, in Germany, many smaller religious communities have been granted status as corporations of public law (this includes Jehovah’s Witnesses, Mormons, Adventists and numerous protestant groups). In Spain, the “upper tier” consists of the Roman Catholic Church and religious communities belonging to three federations (Protestant, Jewish, and Muslim) that have agreements with the state. The Protestant federation includes a wide range of Protestant groups. Interestingly, the Christian Orthodox tradition is granted a position under the Protestant umbrella.

94. International standards (as opposed to various national constitutions that provide for the secularity of the state) do not proscribe funding of religious education or other forms of religious activity, although this should be handled in ways that are non-discriminatory. The Constitution of Kazakhstan, like the constitutions of the Russian Federation and the United States, appears to bar funding of religious activities. Constitutional provisions of this type which limit direct funding of religious organizations are not required by OSCE or international human rights standards, but are obviously binding as a matter of national constitutional law where, as in Kazakhstan, such provisions are present in the national constitution.

95. **Experience of Other Countries with Children’s Rights.** The question of how children’s rights and the rights of parents are protected in other countries is a field of law in itself. Many of the key cases have involved Jehovah’s Witnesses, whose rights have generally been protected, subject to temporary emergency custody proceedings where the health of the child is involved. In general, these issues are resolved on a case-by-case basis, and often the boundaries of protection are defined by cases in which minority religions win the right to raise their children in accordance with their beliefs. The “best interests of the child” standard is widely respected, but it is construed in ways that take into account the importance of a family’s religious beliefs in determining these interests.

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<sup>62</sup> Svyato-Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01 (14 September 2007), § 123; Church of Scientology Moscow v. Russia, ECtHR App. No. 18147/02, 5 April 2007, §§ 74, 84; Kimlya, Sultanov and Church of Scientology of Nizhnekamsk v. Russia (ECtHR, App. Nos. 76836/01 and 32782/03, 9 June 2005).

96. **Minimum Member Requirements.** In general, where European countries impose minimum membership requirements of any magnitude, the requirements relate to upper tier entities, not to the base level entities required in each of the mentioned countries. Typically, the “upper tier” religious organizations are distinguished legally because they have the right to state “cooperation,” often taking the form of various kinds of state financial assistance. Since the provision of the Constitution of the Republic of Kazakhstan on the separation of church and state would appear to bar such subsidies, there is less of a need for “upper tier” structures. The important point for purposes of the present analysis is that in European countries, while substantial numbers may be needed for recognition as an “upper tier” religious organization, provision is made for other and smaller groups to easily acquire legal entity status which carries with it the right to carry out the full range of a religious community’s activities.

97. Thus, for example, Prof. Gerhard Robbers of the University of Trier in Germany indicates that “There is no requirement that a religious community follow traditional practices or understanding to qualify as a religion in Germany. Under the German Basic Law, religious organizations may acquire status as corporations under public law ‘if their constitution and the number of their members offer an assurance of their permanency.’” These constitutional standards have not been further specified by statute. Significantly, however, religious communities are free to organize as registered associations (*eingetragene Vereine*), and they can do so with as few as seven members.”

98. To the best of our knowledge, all laws creating base level legal entity status require that key leaders of the organization and/or an official contact person should be listed. Of course, as indicated above, most countries do not require that a religious community register at all, but if they wish to have the benefits of legal entity status, they must typically provide such basic information.

99. **Time, Place and Manner Restrictions.** It is widely understood that certain restrictions can be imposed on expression that relate not to the content of what is said, but to the time, place, or manner of the expression. That is, while general restraints on freedom of expression, including religious expression, are not permissible, some reasonable constraints on the time, place and manner of restriction may be imposed. Thus, religious speech through a blaring megaphone at 3:00 a.m. in a residential neighborhood may be restricted, so long as there are reasonable

opportunities to engage in the expression otherwise. Similarly, large public assemblies or processions may need to obtain special permission. Distribution of religious literature in airports, fairs, and the like, may be assigned to specific locations so as not to interfere with general flow of pedestrian traffic. The question of protecting the rights of neighbors against music and other loud noises is protected in various ways. There may be general decibel level regulations which set maximum noise levels for various times. There may also be general rules that allow legal actions to abate nuisances (i.e., unreasonable interference with normal use of property). The significant point here is that religious groups are not singled out. If local legislation allows people to play music in their homes, or to invite reasonable numbers of people to social gatherings, it would be discriminatory not to allow similar uses just because they are religious.

100. **Impounding of published or other media material.** During the November meeting of the Advisory Council with Mr. Doszhan of the State Committee on Religious Affairs, Professor Rafael Palomino discussed how Spain deals with risks of materials that may be linked to violent conduct. The information was of considerable interest since Spain's experience with its Basque terrorists was relevant to some of the concerns with terrorism in Kazakhstan. According to the Constitutional Court's rules, article 20 (5) of the Spanish Constitution implicitly forbids seizure of publications done directly by the executive power. Executive power only can request from the judiciary to start a process for seizing printed, recorded, etc. material. Paragraph (5) is a constitutional guarantee to avoid any kind of arbitrariness or bias on the part of the executive power, submitting either the process and the result of seizure to legal standards of impartiality, which basically are: (1) assessment of the material done by an autonomous body from the executive power (the judge) according to objective evidence; (2) explicit justification of the reasons for seizure reflected in the text of the judicial resolution. According to procedural law, judicial seizure of publications only could be done in those cases in which a crime is committed through the publication, the recordings or other means of information.

101. **Financial Reporting Requirements.** In general, the point of the Advisory Council is not that no reporting requirements may be imposed, but that at a minimum, they should not be heavier than what is imposed on other organizations, and if anything, out of respect for religious organizations, they should be lighter.

102. With respect to France, Mr. Garay notes that religious groups are responsible for annual tax filings, but that these are (and should be) no more burdensome than comparable filings for other commercial or non-profit legal entities. If anything, in his view, some thought should be given to being particularly sensitive to religious freedom in administering these tax reporting requirements.

103. Regarding the United States, Form 1023 is the basic form used to apply for tax exemption of non-profit organizations. Significantly, the relevant tax rules clearly specify that religious organizations are considered to be tax exempt without filing Form 1023. As summarized in the instructions to Form 1023, “The following types of organizations may be considered tax exempt under Section 501(c)(3) [the provision defining exempt status] even if they do not file Form 1023: Churches, including synagogues, temples, and mosques and integrated auxiliaries of churches and conventions or associations of churches.” Some religious groups fill out the form anyway, on a voluntary basis, but they are definitely not required to do so. Another indication of the deference accorded to religious organizations out of respect for freedom of religion is evident in the area of audits. Tax authorities in the United States are not free to conduct audits of churches unless a high-level Internal Revenue Service official has determined that there is likelihood of wrongdoing.<sup>63</sup> This assures that local officials cannot harass particular religious groups.

## **VI. Conclusion**

104. The Parliament of Kazakhstan has made substantial progress in refining the Proposed Religion Law and in bringing it into compliance with international standards. However, a sufficient number of significant outstanding issues remain if the law is to be brought into full compliance with Kazakhstan’s OSCE commitments and other international standards. In many areas, the problems with the legislation reflect legitimate concerns that appropriate legislation can address, but in a manner that addresses problems with more narrowly tailored and sensitive provisions that can solve actual problems without imposing excessive burdens on freedom of religion or belief.

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<sup>63</sup> Internal Revenue Code, § 7611 (the IRS may only initiate a church tax inquiry if the Director, Exempt Organizations Examinations, reasonably believes, based on a written statement of the facts and circumstances, that the organization: (a) may not qualify for the exemption; or (b) may not be paying tax on unrelated business or other taxable activity). See <http://www.irs.gov/charities/churches/article/0,,id=179674,00.html>.