

ARTICLE 19

# Kazakhstan: Draft Criminal Code

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Legal analysis

## Executive Summary

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In this brief, ARTICLE 19 analyses the provisions of the new draft Criminal Code of Kazakhstan (Draft Code) that engage the protection of the right to freedom of expression, namely the those on defamation and “incitement to social, national, tribal, racial, class and religious hatred.”

ARTICLE 19 identifies a number of problems with the Draft Code and argues that the provisions on defamation and incitement are not in compliance with international law. Referring to the applicable international standards and best practices of balancing between the right to freedom of expression and other interests the review makes recommendations for bringing the Draft Code in line with these standards.

### Recommendations

- All provisions on criminal defamation and insult should be removed from the Draft Criminal Code.
- Article 181 of the Draft Code should prohibit only “advocacy of hatred that constitutes incitement to discrimination, hostility or violence,” with non-exhaustive grounds, including grounds of nationality, religion, ethnicity, sexual orientation and gender identity and disability. The drafters should also recognize that the purpose of the provisions is implementation of Article 20 para 2 of the International Covenant on Civil and Political Rights.
- The Draft Code should specify that the offence under Article 181 of the Draft Code requires intent (intentional crime).
- “Incitement to social hatred” “incitement to class hatred”, “insulting national honour and dignity and religious feelings of citizens” and “classes”, “propagandizing social hatred” should be scrapped from the Draft Code.
- The sanctions should be significantly decreased.

Additionally, ARTICLE 19 recommends that the judiciary and law enforcement authorities are provided with comprehensive and regular trainings on incitement standards (under Article 181 of the Code), including the interpretation of incitement as per the recommendations of ARTICLE 19.

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## About ARTICLE 19 Law Programme

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year and comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal..>

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [legal@article19.org](mailto:legal@article19.org). For more information about this analysis, please contact Boyko Boev, Senior Legal Officer of ARTICLE 19 at [boyko@article19.org](mailto:boyko@article19.org) or +44 20 7324 2500.

# Introduction

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The Criminal Code of Kazakhstan is currently undergoing revision and a new draft Criminal Code (Draft Code) has been prepared. The proposed Draft Code includes provisions which incriminate different types of expression. The reform gives an opportunity to improve the current criminal law framework and impact on media freedom in the country; this is important since many journalists and media have complained of violations of their right to freedom of expression as a result of criminal provisions which are in conflict with international law.

Following the accession of Kazakhstan to the International Covenant on Civil and Political Rights (ICCPR) in 2005, the Kazakhstan authorities promised on numerous occasions to bring the provisions relating to freedom of expression in line with international standards. For example, before and during Kazakhstan's OSCE chairmanship, the Government pledged that defamation would be abolished from the Criminal Code. Importantly, in 2011, the President of Kazakhstan Nursultan Nazarbayev wrote in the Washington Post that the country would decriminalise defamation.<sup>1</sup>

ARTICLE 19 welcomes the opportunity to comment on the Draft Code. For the past 10 years, we have campaigned for this reform and for bringing the media legislation of Kazakhstan in line with international law. We have also reviewed different laws of Kazakhstan<sup>2</sup> and engaged with local stakeholders in discussion on reform as well as the state of freedom of expression in the country. Together with our partners and independently, we have also formulated a number of proposals for the Government on freedom of expression problems.

In this brief, we analyse those provisions of the Draft Code that are relevant for the protection of the right to freedom of expression.<sup>3</sup> We specifically look at the provisions on defamation and "incitement to social, national, tribal, racial, class and religious hatred." Our analysis draws upon the international standards and jurisprudence of international bodies, including the UN Human Rights Committee (HR Committee) and the European Court of Human Rights (European Court) in respective areas and comparative standards.

We also refer to standards developed by ARTICLE 19, namely *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (Defining Defamation),<sup>4</sup> and to the ARTICLE 19 policy document *Prohibiting incitement to discrimination, hostility or violence*.<sup>5</sup> These

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<sup>1</sup> Nursultan Nazarbayev, Kazakhstan's steady progress toward democracy, Washington Post, 1 April 2011; available at <http://wapo.st/ggb4ZX>,

<sup>2</sup> Memorandum on Kazakhstan's Laws Regulating Mass Media, 2002; available at <http://bit.ly/16xMJBt>; Summary of concerns with regard to proposed amendments to Kazakhstan's media laws, 2006; available at <http://bit.ly/ZNH0Yh>; or Memorandum on Civil Code restriction on freedom of expression, 2012; available at <http://bit.ly/XdnjT8>.

<sup>3</sup> The analysis is based on the Russian version of the Draft Code; the text is available upon request from ARTICLE 19.

<sup>4</sup> Defining Defamation, ARTICLE 19, London 2000; available at <http://bit.ly/140Z42h>.

<sup>5</sup> Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, 2012; available at <http://bit.ly/VUzEed>.

principles have attained significant international endorsement, including by the special mandates on freedom of expression<sup>6</sup> and in the Rabat Plan of Action.<sup>7</sup>

ARTICLE 19 stands ready to continue the discussion on the Criminal Code reform in Kazakhstan and to work with legal experts and the authorities on the harmonisation of the domestic laws with international law.

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<sup>6</sup> Joint Declaration of 30 November 2000; available at <http://bit.ly/140ZiGK>.

<sup>7</sup> The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 2012, available at <http://bit.ly/WljCyQ>.

## Provisions on defamation and insult in the Draft Code

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ARTICLE 19 regrets that the Draft Code does not envisage decriminalisation of defamation. This is in a direct conflict with the commitments made by the Kazakhstan Government at a number of occasions since 2010. On the contrary, all provisions on criminal responsibility for defamation and insult from the existing Criminal Code:

Under the existing Criminal Code, defamation is prohibited in Article 129 para 1 (“ordinary defamation”) and in Article 129 paras 2 and 3 (“aggravated defamation”). Qualifying offences of defamation, i.e. acts with a higher social danger, include defamation done in public or by means of mass media and accusations of corruption and serious crimes. Sanctions for defamation include fines, correctional labour<sup>8</sup>, restriction of freedom<sup>9</sup> and deprivation of liberty.

Like defamation, the crime of insult is defined as ordinary insult (Article 130 para 1) and aggravated insult (Article 130 (2) when it is conducted publicly or by means of mass media. The penalties for insult include fines, involvement in public works<sup>10</sup> and correctional labour.

The Criminal Code includes separate offences of insult of public officials (Article 320), affronts to the honour and dignity of members of parliament (Article 319), public insult of the First President – Nation Leader (Article 317-1), affronts to the honour and dignity of the president (Article 318), libel of a judge, prosecutor, investigator, interrogator, court marshal, court executioner (Article 343) and insult of participants of court proceedings (Article 342).

The Draft Code not only maintains these provisions, but also proposes an increase of penalties for them (with exception of the offence of public insult of the First President – Nation Leader<sup>11</sup>):

- the fines for defamation would be increased to the maximum of 3,000 monthly assessment indices (around USD 30,000). The maximum term of the penalties of restriction of freedom and of imprisonment for defamation is three years.

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<sup>8</sup> Under Article 43 of the Criminal Code, correctional labour is sentenced for a period from two months up to two years, and is served in the place of work of the convict. The court establishes the amount of withholdings to be made from the wages of the convict. The withholdings should be between five and twenty five percent of the convict’s wages and go to the revenues of the state.

<sup>9</sup> Under Article 45 of the Criminal Code, restriction of freedom consists in the imposition of certain duties which restrict the convict’s freedom. They can be endured in the place of his residence under the supervision of the specialised body. The court imposes the performance of the following duties: not to change permanent place of residence, work or training without giving notice to the specialised authorities, not to visit certain places during recreational time, not to leave the convict’s place of residence, and not to depart from other areas without a permit from the specialised authority.

<sup>10</sup> Under Article 42, public works consist of the performance by a convict without compensation, in the time free from his work or studies, of publicly useful works, the type of which shall be defined by local executive bodies or local self-government bodies. The sanction can last for a period between sixty and two hundred and forty hours, and can be performed for no longer than four hours per week.

<sup>11</sup> Article 317-1 (2) of the draft Criminal Code: the maximum penalties for insult through mass media are a fine of up to 1,000 monthly assessment indices (around USD 10,000), correctional labour for up to 2 years and restrictions of freedom or imprisonment for up to 3 years

- the maximum fine for insult becomes 200 monthly assessment indices (around USD 2,000) whereas the maximum penalty of involvement in public works is for a period of up to 180 hours.
- the maximum fine for affronts to the honour and dignity of the president becomes 3,000 monthly assessment indices (around USD 30,000).<sup>12</sup> Other envisioned penalties for the offence are correctional labour, restriction of freedom and imprisonment for up to 3 years;
- the maximum fine for affronts to the honour and dignity of members of parliament becomes 2,000 monthly assessment indices (around USD 20,000).<sup>13</sup> Other envisioned penalties for this offence are correctional labour, restriction of freedom and imprisonment for up to 2 years;
- the maximum fine for insult of public officials<sup>14</sup> becomes 240 monthly assessment indices (around USD 2,400). Other envisioned penalties for the offence are restriction of freedom and arrest, for a maximum term of 4 months;
- the maximum fines for libel of a judge, prosecutor, investigator, interrogator, court marshal, court executioner are 4,000 monthly assessment indices (around USD 40,000).<sup>15</sup> Other envisioned penalties for this offence are correctional labour, restriction of freedom and imprisonment for up to 4 years;
- the maximum fine for insult of participants in court proceedings is to become 500 monthly assessment indices (around USD 5,000).<sup>16</sup> For the same offence the Criminal Code prescribes also correctional labour, involvement in public work and arrest for up to 6 months.

### **Analysis of the defamation and insult provisions**

ARTICLE 19 opposes these provisions and calls on the drafters to repeal all provisions of defamation and insult in the Draft Code for being unnecessary restrictions on freedom of expression. In particular we highlight the following factors that must be considered by the drafters:

#### ***Criminal defamation and criminal insult provisions do not meet the requirement of necessity under international law***

Under Article 19 para 3 of the ICCPR, any interference with the right to freedom of expression must be “necessary”. The test of necessity includes, *inter alia*, an assessment of the “proportionality” of the restriction on freedom of expression. The assessment also concerns the harshness of criminal penalties. Criminal defamation laws fail this test for the following reasons:

- Criminal defamation and criminal insult have a chilling effect on the right to freedom of expression: the European Court has stressed that the mere fact that a sanction is of a criminal nature has in itself a disproportionate chilling effect.<sup>17</sup> Recognising the adverse effect of criminal sanctions themselves and particularly the potential impact of a criminal

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<sup>12</sup> Article 381 of the draft Criminal Code.

<sup>13</sup> Article 382 of the draft Criminal Code.

<sup>14</sup> Article 384 of the draft Criminal Code.

<sup>15</sup> Article 419 of the draft Criminal Code.

<sup>16</sup> Article 418 of the draft Criminal Code.

<sup>17</sup> See ECtHR, *Cumpănă and Mazăre vs. Romania*, [GC] No 33348/96, 17 December 2004; and *Azevedo v. Portugal*, no. 20620/04, 27 March 2008.



record on an individual, the European Court has held that restraint must be used in the imposition of criminal sanctions for defamation.<sup>18</sup> Even suspended criminal sentences are held to have a lasting impact on journalists' activities.<sup>19</sup> A similar position has been upheld by the UN Special Rapporteur on freedom of expression<sup>20</sup> who recommended that "criminal liability for defamation be abolished and replaced with civil one."<sup>21</sup> Moreover, in the context of political debate, the European Court said that criminal censure is likely to discourage the making of criticisms as well "hamper the press in performing its task as purveyor of information and public watchdog."<sup>22</sup>

- Criminal defamation and criminal insult are not means of last resort: harm caused by defamation can be adequately addressed by the civil laws that are less restrictive and better equipped to remedy the injury to the victim's reputation by compensation in terms of damages. By contrast, criminal sanctions do not for the most part aim to remedy the actual harm caused to the victim. This position has been upheld by the European Court which stressed that governments should "display restraint in resorting to criminal proceedings, *particularly where other means are available* for replying to the unjustified affronts and criticisms of its adversaries or the media".<sup>23</sup>
- Criminal sanctions (even a suspended sentence) impose a great and unnecessary burden on a potential speaker and are thus disproportionate to harm caused. This position has been held by international and regional human rights authorities, such as the UN Special Rapporteur on Freedom of Opinion and Expression<sup>24</sup> or the Inter-American Court of Human Rights.<sup>25</sup>

### ***Criminal defamation is outmoded***

ARTICLE 19 believes that in the 21<sup>st</sup> century, criminalization of defamation is a disproportionate means of addressing the problem of unwarranted affronts to reputation. Criminal defamation laws originated in the Middle Ages and were initially used for protection of the reputation of monarchs. Criminal reputation was later maintained by authoritarian rulers.

Today the rights in the Universal Declaration of Human Rights have become part of modern constitutions. The right to freedom of expression is invoked to empower people in the search of

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<sup>18</sup> For example, *Otegi Mondragon v. Spain*, no. 2034/07, 15 March 2011.

<sup>19</sup> *Şener v. Turkey*, No. 26680/95, 18 July 2000.

<sup>20</sup> Report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr Abid Hussain, submitted in accordance with Commission resolution 1999/36, E/CN.4/2000/63, 18 January 2000: "criminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction."

<sup>21</sup> *Ibid.*

<sup>22</sup> *Lingens v. Austria*, Judgment of 8 July 1986, Series A no 113, para 44.

<sup>23</sup> *Castells v. Spain*, Judgment of 23 April 1992, Series A no 236 at para 46 [emphasis added].

<sup>24</sup> Report of the Special Rapporteur on Freedom of Opinion and Expression, Ambeyi Ligabo, A/HRC/7/14, 28 February 2008, para 49: "the subjective character of many defamation laws, their overly broad scope and their application within criminal law have turned them into powerful mechanisms to stifle investigative journalism and silent criticism."

<sup>25</sup> *Ricardo Canese v Paraguay*, Merits, Reparations and Costs, Inter AmCtHR, 31 August 2004 para 104: "penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct."

truth.<sup>26</sup> It has been recognized as an integral aspect of each individual's right to self-development and fulfilment.<sup>27</sup> The right to freedom of expression enables all citizens to understand political issues and be able to participate in the working of democracy.<sup>28</sup> The democratic form of government predicates tolerance of expression, in particular on issues of public interest. In the words of the ECtHR freedom of expression and political debate "lie at the very core of the concept of a democratic society."<sup>29</sup> Hence the social harm of defamation has decreased and it is no longer necessary to keep the offence of libel and insult in criminal codes. In great majority of Council of Europe states criminal penalties are very rarely applied to defamation.<sup>30</sup>

### ***Decriminalisation of defamation is a global trend***

Criminal defamation laws have been abolished in Armenia, Argentina, Bermuda, Bosnia and Herzegovina, Romania, Cyprus, Estonia, Ghana, Georgia, Grenada, Ireland, Maldives, Moldova, Montenegro, New Zealand, Mexico, Sri Lanka, Togo, the UK, Ukraine, and USA. Recently Kazakhstan's neighbours Tajikistan and Kyrgyzstan decriminalised defamation.

At present about half of the Council of Europe member states have taken concrete action or are considering steps to either decriminalise defamation or alleviate the sanctions that can be imposed."<sup>31</sup>

### ***International recommendation for abolishment***

International bodies, such as the UN and the OSCE, have long recognized the threat posed by criminal defamation laws and have recommended that they should be abolished. The HR Committee has expressed its concern over the misuse of criminal defamation laws in its Concluding Observations in relation to States' periodic reports<sup>32</sup> and held that States should consider the decriminalization of defamation.<sup>33</sup> Similar are the positions of the UN Special

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<sup>26</sup> This argument is particularly associated with the political philosophers Milton and John Stuart Mill.

<sup>27</sup> T. Campbell, 'Rationales for Freedom of Communication', in T. Campbell and W. Sadurski (eds.), *Freedom of Communication* (Aldershot: Dartmouth, 1994) 33-4.

<sup>28</sup> Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper, 1948).

<sup>29</sup> *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103.

<sup>30</sup> See Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, the Media Division of Council of Europe, CDMSI(2012)Misc11, p. 7.

<sup>31</sup> Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, the Media Division of Council of Europe, CDMSI(2012)Misc11, p. 7.

<sup>32</sup> See for example, HR Committee, Concluding Observations on Uzbekistan, 24 March 2010, CCPR/C/ARG/CO/4, HR Committee, Concluding Observations on Cameroon, 28-29 August 2010, CCPR/C/CMR/CO/4, HR Committee, Concluding Observations on Mexico, 17 May 2010, CCPR/C/MEX/CO/5 at para 20, HR Committee, Concluding Observations on Tunisia, 28 March 2008, CCPR/C/TUN/CO/5 at para 18.

<sup>33</sup> HR Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011 para 47.

Rapporteur and the OSCE Representative on Freedom of the Media in 2002.<sup>34</sup> UNESCO has also adopted numerous declarations recommending the repeal of criminal defamation laws.<sup>35</sup>

### ***Kazakhstan should fulfil its commitments***

Since 2010, the Kazakhstan Government and President made several promises to decriminalise defamation. Before and during Kazakhstan's OSCE chairmanship the government pledged that defamation would be abolished from the criminal code. On 1 April 2011, the President wrote in Washington Post:

We are listening to our growing civil society about speeding up change in the culture on rights and freedom. We will, for example, make defamation a civil rather than a criminal offense to encourage free speech and bring us into line with international best practices.

<sup>36</sup>

### **Particular Problems with Criminal Defamation and Insult in Kazakhstan**

In addition to arguments above, ARTICLE 19 finds the current provisions on defamation and insult in the Draft Code problematic for the following reasons:

#### ***There should be no special protection of the reputation of public officials***

The Criminal Code includes separate offences of insult of public officials (Article 320), affronts on the honour and dignity of members of parliament (Article 319), public insult of the First President – Nation Leader (Article 317-1), affronts on the honour and dignity of the president (Article 318), libel of a judge, prosecutor, investigator, interrogator, court marshal, court executioner (Article 343) and insult of participants of court proceedings (Article 342).

ARTICLE 19 has long argued that under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status as it well established in international law that such officials should tolerate more, rather than less, criticism. Hence, the privileged protection of a head of State through special legislation on defamation cannot be considered “necessary” in a democratic society and is not compatible with the right to freedom of expression. This has been recognized by HR Committee,<sup>37</sup> special rapporteurs on freedom of expression,<sup>38</sup> the European Court<sup>39</sup> and the OSCE<sup>40</sup>. The special protection for public officials, the president and the members of parliament should therefore be removed from the Draft Code.

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<sup>34</sup> The 2002 Joint Declaration of special mandates, *op.cit.* states: “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”

<sup>35</sup> See for example, Washington Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2011 and Dakar Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2005. The Doha Declaration of May 2009 also calls on UNESCO member states “to remove statutes on defamation from penal codes.”

<sup>36</sup> Nursultan Nazarbayev, Washington Post, *op.cit.*

<sup>37</sup> See, for example General Comment No. 34, *op.cit.*; or Concluding observations on Serbia and Montenegro. 12/08/2004. CCPR/CO/81/SEM0.

<sup>38</sup> UN Special Rapporteur on Freedom of Opinion and Expression, Tenth Anniversary Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, 25 March 2010, A/HRC/14/23/Add.2.

<sup>39</sup> See, for example, *Lingens v. Austria*, *op.cit.*, para. 42 and *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, paras. 63-64.

***The draft Criminal Code does not provide protection for public interest***

“The public interest defence” sets out an appropriate balance between the right to freedom of information and reputation by protecting those who have acted reasonably to protect public interest and taken whatever steps were reasonably possible to check their facts. International law requires that states recognise the public interest defence in defamation cases.<sup>41</sup> Also, many European defamation laws explicitly provide for public interest defence or such a defence is recognized in the constitutional jurisprudence.<sup>42</sup>

**Recommendations**

- ARTICLE 19 recommends that all provisions on criminal defamation and insult are removed from the Draft Criminal Code and abolished in their entirety. They should be replaced with appropriate civil defamation laws that meet international freedom of expression standards and provide set of defences for defamation.

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<sup>40</sup> Warsaw Declaration, 1997; Bucharest Declaration, 2000; Paris Declaration, 2001

<sup>41</sup> See, General Comment No. 34, *op.cit.*, para. 47: “in any event, a public interest in the subject matter of the criticism should be recognized as a defense.” See also Council of Europe Resolution 1577 (2007), *op.cit.*, which also emphasises that statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence.

<sup>42</sup> See for example, Section 269 of the Danish Criminal Code: “An allegation shall not be punishable if its truth has been established or if the author of the allegation in good faith has been under an obligation to speak or has acted in lawful protection of *obvious public interest* or of the interest of himself or of others (emphasis added).

# Incitement to social, national, tribal, racial, class or religious hatred

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Article 181 of the Draft Code proposes a revision of the current Article 164 of the Criminal Code that prohibits “incitement to social, national, tribal, racial or religious hatred.” The provision incriminates different acts when conducted publicly:

- incitement to social, national, tribal or religious hatred,
- insulting the national honour and dignity, or religious feelings of citizens,
- propagandizing exclusiveness, superiority, or inferiority of citizens based on their attitude towards religion or their genetic or racial belonging,
- propagandizing social, national, racial, or religious hatred or discord

Aggravated offences are committed when the acts:

- are carried out by a group of persons or committed repeatedly, or combined with violence or a threat to apply it, as well as committed by a person with the use of his official position, or by the head of a public association or
- entailed serious consequences.

The Draft Code maintains these provisions, but adds a protection of “class” in Article 181 and increases the sanctions for the offence. The new penalties include imprisonment up to 20 years, deprivation of a right to hold certain positions or to engage in certain types of activity for a period up to 3 years or indefinitely.

## Incitement to hatred under international law

Article 20 para 2 of the ICCPR sets limitations on freedom of expression and requires States to “prohibit” certain forms of speech which are intended to sow hatred, namely

[A]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 20 para 2 of the ICCPR does not require States to prohibit all negative statements towards national groups, races and religions. However, States should be obliged to prohibit the advocacy of hatred that constitutes incitement to discrimination, hostility or violence.

“Prohibition” allows 3 types of sanction: civil, administrative or, as a last resort, criminal.

States are also obliged under the International Convention on the Elimination of Racial Discrimination (ICERD).<sup>43</sup> to “declare [as] an offence punishable by law” the following four types of conduct:

- All dissemination of ideas based on racial superiority or hatred;
- Incitement to racial discrimination;
- All acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin;

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<sup>43</sup> Article 4(a) of the ICERD of the International Convention on the Elimination of All Forms of Racial Discrimination New York, adopted on 7 March 1966, entered into force on 4 January 1969; available at <http://www2.ohchr.org/english/law/cerd.htm>. Kazakhstan has acceded to the treaty on 26 Aug 1998.

- Any assistance of racist activities, including the financing of them.<sup>44</sup>

### ***Assessing the restrictions of incitement to hatred***

The HR Committee re-affirmed that there is a strong coherence between Articles 19 and 20 of the ICCPR when it stated that:

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in Article 20 are all subject to restriction pursuant to Article 19, paragraph 3. As such, a limitation that is justified on the basis of Article 20 must also comply with Article 19, paragraph 3.<sup>45</sup>

51. What distinguishes the acts addressed in Article 20 from other acts that may be subject to restriction under Article 19, paragraph 3, is that for the acts addressed in Article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that Article 20 may be considered as *lex specialis* with regard to Article 19.

52. It is only with regard to the specific forms of expression indicated in Article 20 that States parties are obliged to have legal prohibitions. In every case in which the state restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with Article 19.<sup>46</sup>

ARTICLE 19 has developed a specific policy on prohibitions of incitement that elaborates on interpretation of Article 20(2) of the ICCPR in a greater detail;<sup>47</sup> in particular, we have recommended that:

- States should adopt uniform and clear definition of key terms of Article 20(2) of the ICCPR – “hatred,” “discrimination,” “violence,” and “hostility”<sup>48</sup> and make sure that the interpretation is also consistent in jurisprudence by domestic courts.

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<sup>45</sup> See communication No. 736/1997, *Ross v. Canada*, Views adopted on 18 October 2000.

<sup>46</sup> See, General Comment No. 34, *op.cit.*

<sup>47</sup> Prohibiting incitement to discrimination, hostility or violence, *op.cit.*

<sup>48</sup> ARTICLE 19 recommends that the definition of these terms should be as follows:

- Hatred is a state of mind characterised as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.” See, Camden Principles on Freedom of Expression and Equality, ARTICLE 19, 2009.
- Discrimination shall be understood as any distinction, exclusion, restriction or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status, colour which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. This definition is adapted from those advanced by the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination.
- Violence shall be understood as the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation. The definition of violence is adapted from the definition of violence by the World Health Organisation in the report World Report on Violence and Health, 2002.
- Hostility shall be understood as a manifested action of an extreme state of mind. Although the term implies a state of mind, an action is required. Hence, hostility can be defined as the manifestation of hatred – that is the

- Domestic legislation should include specific and clear reference to “incitement to discrimination, hostility or violence” with references to Article 20(2) of the ICCPR and avoid broader or less specific language.
- The prohibition of incitement should conform to the three-part test of legality, proportionality and necessity under Article 19(3). This means that any prohibitions are provided for by law; pursue a legitimate aim; and be necessary in a democratic society, i.e. it must meet a pressing social need and meet the requirement of proportionality.
- Although Article 20(2) of the ICCPR only lists three characteristics which states are required to protect from incitement – nationality, race, and religion, the list should be read in light of Article 2(1) and Article 26 of the ICCPR and requires States to prohibit incitement also on the basis of “sexual orientation” and “gender identity” and disability. This interpretation would comply with evolution of the developments in protection of human rights since the adoption of the ICCPR in 1977.<sup>49</sup>
- The intent of the speaker to incite to hatred (that is to incite others to commit acts of discrimination, hostility or violence) should be considered a crucial and distinguishing element of incitement as prohibited by Article 20(2) of the ICCPR. Importantly, the element of intent distinguishes incitement from other forms of expression that may offend, shock or disturb but are nevertheless protected under Article 19(2) of the ICCPR. Hence, ARTICLE 19 recommends that domestic legislation should always explicitly state that the crime of incitement to hatred is an intentional crime<sup>50</sup> and not a crime that can be committed through recklessness or negligence.<sup>51</sup> The elements of intent should include
  - Volition (purposely striving) to engage in advocacy to hatred;
  - Volition (purposely striving) to target a protected group on the basis of prohibitive grounds;
  - Having knowledge of the consequences of his/her action and knowing that the consequences will occur or might occur in the ordinary course of events.

Additionally, with a view to promoting a coherent international, regional, and national jurisprudence relating to the prohibition of incitement, ARTICLE 19 proposes that all incitement cases should be assessed under an uniform incitement test, consisting of a review of all the following elements:

- Context: of the expression in broader societal context of the speech.
- Intent: of the speaker to incite to discrimination, hostility or violence;
- Position and role of the speaker: in a position of authority and exercising that authority.
- Content: form and subject matter of expression, tone and style.

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manifestation of “intense and irrational emotions of opprobrium enmity and detestation towards the target group.” Camden Principles, *op. cit.*, Principle 12.1.

<sup>49</sup> The ICCPR was adopted before equality movements around the world made significant progress in promoting and securing human rights for all. However, it has since come to be interpreted and understood as supporting the principle of equality on a larger scale, applying to other grounds not expressly included in the treaty text, including sexual orientation, gender identity, and disability.

<sup>50</sup> In some jurisdictions, also acting “wilfully” or “purposefully.”

<sup>51</sup> ARTICLE 19 notes that the legislation of many States already recognises intent or intention as one of the defining elements of incitement, for example, the UK, Ireland, Canada, Cyprus, Ireland, Malta, and Portugal.

- Extent of the expression: public nature of the expression; the means of the dissemination; magnitude of the expression;
- Likelihood of imminent harm-: probability of discrimination, hostility or violence as a result of the expression.

### **Analysis of the Proposed Article 181**

The Article 181 of the Draft Code incriminates two groups of acts.

- all acts relating to incitement to hatred: incitement to social, national, tribal, religious and class hatred, propaganda to exclusiveness and propagandizing hatred.
- insulting the national honour and dignity or religious feelings of citizens.

ARTICLE 19 finds that defining the acts in both groups as elements of the same crime is incorrect, because the nature of the acts is different. We note that international law differentiates between incitement to hatred and other restrictions on freedom of expression and subjects them to different tests for legitimacy.

These provisions are analysed separately.

### **Provisions on incitement to hatred**

ARTICLE 19 finds the provisions on incitement to hatred problematic for the following reasons:

- **The protection against incitement to “social” and “class” hatred, and “propagandizing hatred” have no basis in international law**

The obligation under Article 20 para 2 of ICCPR to prohibit incitement does not recognise “social group” or “class” as characteristics requiring specific protection by States. The prohibition of incitement to social hatred implies protection of “social groups” and existences of “classes.” While the protected grounds of national, racial or religious hatred may not be exhaustive, as noted above, ARTICLE 19 argues that the list of protected characteristics should be considered in light of the right to non-discrimination as provided under Article 2(1)<sup>52</sup> and Article 26<sup>53</sup> of the ICCPR. Although both have been interpreted expansively to include characteristics such as sexual orientation and gender identity and disability, the criteria for differentiation should be objectively justified and reasonable.

ARTICLE 19 finds that the belonging to a social groups or class is not an objectively justifiable and reasonable criterion. Unlike nationality, disability or ethnic origin, for example, “social group” and “class” are very vague categories. ARTICLE 19 is concerned that the authorities can exploit them to classify the criticism of any group as “incitement”, for example, calling politicians a “social group” or oil company owners a “social group”. The

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<sup>52</sup> Article 2, para 1 of the ICCPR provides: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>53</sup> Article 26 of ICCPR provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”



risk of restrictions will prevent debate on issues on public interest such as social justice and fair distribution of public wealth.

- **There is no requirement of intent**  
Article 181 of the Draft Code does not make incitement and intentional crime. As noted above, ARTICLE 19 argues that incitement to hatred should always be an intentional crime to meet requirements of the ICCPR.
- **The prohibitions on social hatred and propagandizing hatred do not meet the three-part text under Article 19, para 3 of ICCPR**  
Furthermore “social hatred” and “class hatred” are too vague as concepts to have the qualities of precision and accessibility to be considered “provided by law”. These grounds may be interpreted subjectively. Furthermore, the provisions are drawn so widely that they may illegitimately restrict critical or offensive forms of expression, including political speech, even if there is no risk of violence or need to prevent public order.
- **The proposed sanctions for incitement to hatred and propagandizing hatred are harsh**  
The imprisonment and deprivation of right to hold a certain position or engage in certain types of activity are serious penalties. Moreover the maximum term of imprisonment is 20 years. If convicted politicians risk being forever banned from participating in politics. ARTICLE 19 thinks that the sanctions are very harsh and can be imposed without any consideration of the principle of proportionality. Without these safeguards the provision will stifle discussion on issues of public importance such as social justice and fair distribution of public wealth. If imposed the proposed sanctions are likely to breach the right to freedom of expression.

In addition, ARTICLE 19 notes that it is very important that the judiciary and law enforcement authorities are provided with comprehensive and regular trainings on incitement standards (under Article 181 of the Code), including the interpretation of incitement as per ARTICLE 19’s recommendations.<sup>54</sup>

### ***Provision on insulting the national honour and dignity and insulting of religious feelings of citizens***

ARTICLE 19 finds that the prohibitions of insulting national honour and dignity and of religious feelings of citizens do not meet international standards for the following reasons:

- **The prohibitions on insulting national honour and dignity and of religious feelings of citizens are unclear** and therefore do not meet the requirement of “prescribed by law.” It is unclear what is meant by “the national honour and dignity” and “religious feelings.” The draft Code does not contain definitions of these categories.
- **Protection of “national honour and dignity” and “religious feelings of citizens” are not legitimate aims** for restrictions on freedom of expression. As described above, it is well established that any interferences with the right to freedom of expression must pursue a legitimate protective aim, as exhaustively enumerated in Article 19 para 3 (a) and (b) of the ICCPR. Legitimate aims are those that protect the human rights of others, protect national

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<sup>54</sup> Cf. Prohibiting incitement to hatred; *op.cit.*

security or public order or protect public health and morals. Protection of “national honour and dignity” and “protection of religious feelings of citizens” are not among the legitimate aims under international law. Therefore they do not meet the second part of the test for legitimacy of restrictions on the right to freedom of expression.

- Finally, Article 181 of the Draft Code allows for **indiscriminate sanctioning of remarks relating to the nation or religion**. By contrast Article 19 para 3 of the ICCPR requires that all restrictions on the right to freedom of expression are necessary and proportionate. We are concerned that jokes or satirical works can lead to prosecution.

#### **Recommendations:**

- Article 181 of the Draft Code should prohibit only “advocacy of hatred that constitutes incitement to discrimination, hostility or violence,” with non-exhaustive grounds, including grounds of nationality, religion, ethnicity, sexual orientation and gender identity and disability. The drafters should also recognize that the purpose of the provisions is implementation of Article 20 para 2 of the International Covenant on Civil and Political Rights.
- “Incitement to social hatred” “incitement to class hatred”, “insulting national honour and dignity and religious feelings of citizens” and “classes”, “propagandizing social hatred” should be scrapped from the Draft Code.
- The sanctions for violations of Article 181 of the Code should be significantly decreased.