

ARTICLE 19

Kazakhstan: National Security Law

Legal analysis

Executive summary

In May 2012, ARTICLE 19 analysed the National Security Law (“the Law”) of Kazakhstan, adopted by the Kazakhstan Senate in December 2011 and signed by President Nazarbayev on 6 January 2012. ARTICLE 19 finds that the Law fails to comply with international standards on freedom of expression and information

The analysis makes clear from the outset that the protection of national security, while a duty on all states, must not be pursued at the expense of protections for fundamental human rights, including the right to freedom of expression. Experience tells us that some of the worst violations of human rights are justified by governments as necessary for protecting national security. As the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* emphasise, national security and freedom of expression should be considered as interlinked and mutually reinforcing concepts.

It is a positive feature of the Law that at various points the importance of protecting fundamental human rights is acknowledged as both an objective and a priority in ensuring national security – a national interest and a key to ensuring public safety. Despite these assurances, ARTICLE 19 finds that a great many provisions in the Law do not comply with international standards on freedom of expression and information.

The Law suffers from an incoherent structure, pursuing numerous disconnected and ill-defined objectives. The most fundamental flaw is the impermissibly broad conceptualisation of “national security” and its conflation with the expansive notion of “national interests”. Both are defined in such ambiguous terms that government entities are essentially granted unfettered discretion to control the free flow of information and suppress dissent.

It is of particular concern to ARTICLE 19 that the Law confers broad powers on all government authorities to protect “information security”. This expansively defined concept essentially allows government to control all information flows, including the power to prevent “information impact on social and individual consciousness, related to deliberate distortion and spreading of unreliable information in the prejudice of national security”. This same section also allows the government to suspend the provision of communications services to individuals.

A number of provisions are geared towards the promotion of a single Kazakh identity through the suppression of expression that is perceived as undermining unity. Examples include the powers granted to authorities to ensure “public safety” through “the formation of a national ideology, based on the Kazakhstan patriotism and ethnic harmony”, “strengthening the unity of the people of Kazakhstan and tolerance in society”, and “assuring preservation of the historic, traditional, intellectual and cultural values of the Kazakhstan society”. It is clearly established under international law that promoting a single culture or set of values is not a legitimate basis for suppressing the right to freedom of expression.

ARTICLE 19 urges the Government of Kazakhstan to urgently amend the Law based on the recommendations advanced in this analysis. It is of utmost importance to the safeguarding of democracy and peace in the country that respect for the right to freedom of expression and information is fully integrated to domestic law.

Summary of Recommendations

- The Law should begin with a clear overarching statement of purpose that makes its nature as a ‘framework’ for future legislation apparent.
- The preamble must emphasise that protecting national security and fundamental human rights are interconnected and mutually reinforcing concepts.
- A single chapter enumerating fundamental human rights that apply to the interpretation entire Law should be adopted to replace existing *ad hoc* references to these concepts. The incorporation of a legally enforceable human rights instrument, such as the International Covenant on Civil and Political Rights, would strengthen such a chapter further.
- National security must be redefined as “the protection of the state’s existence or its territorial integrity against the use or threat of force, or the state’s capacity to respond to the use or threat of force.” Provisions related to broader national interests that do not directly engage this purpose must be removed from the Law.
- The Law should stipulate explicitly that national security may only be used to justify restrictions on freedom of expression where (1) the expression is intended to incite imminent violence; (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.
- The concept of “political security” is open to abuse and may be used as a pretext for stifling robust debate on public interest matters and insulating the government from criticism. These provisions should therefore be removed from the Law.
- The concept of information security is impermissibly broad and should be removed from the Law entirely. In particular, blanket measures to compel communications service providers to disconnect individuals for violating the Law do not comply with freedom of expression standards and must be removed.
- The principle of maximum disclosure of information held by the government should be adopted. Information must be disclosed unless: the information concerns a legitimate, protected interest listed in the law; disclosure threatens substantial harm to that interest; and the harm to the protected interest is greater than the public’s interest in having the information.



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About the Article 19 Law Programme

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, 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 online 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. For more information about this analysis and about the work of ARTICLE 19 in Kazakhstan, please contact Nathalie Losekoot, Senior Programme Officer for Europe and Central Asia at Nathalie@article19.org.

Introduction

In this analysis ARTICLE 19 reviews the National Security Law (“the Law”)¹ of Kazakhstan for its compliance with international standards on freedom of expression and information. The Law was adopted by the Kazakhstan Senate in December 2011 and signed by President Nazarbayev on 6 January 2012. It provides a ‘framework’ that sets the parameters for future legislation in the field of national security.

ARTICLE 19 has been working on freedom of expression and access to information issues in Kazakhstan since 2001. In this time, the Law Programme has produced numerous analyses of draft and enacted legislation. Recently, ARTICLE 19 provided recommendations in relation to Kazakhstan’s Draft Law on Broadcasting,² and the Draft Law on Access to Public Information.³ ARTICLE 19 also continues to monitor the situation for freedom of expression and information on the ground in Kazakhstan. It is recalled that only months after President Nazarbayev enacted this Law, prominent journalist Lukpan Akhmedyarov was repeatedly stabbed and shot – allegedly in response to his public criticisms of the government. This is just one example of many, demonstrating the precariousness of the situation for journalists – and the need to both promote security and safeguard the right to freedom of expression.

This analysis makes clear from the outset that the protection of national security, while a duty on all states, must not be pursued at the expense of protections for fundamental human rights, including the right to freedom of expression. Experience tells us that some of the worst violations of human rights are justified by governments as necessary for protecting national security. As the Johannesburg Principles on National Security, Freedom of Expression and Access to Information emphasise, national security and freedom of expression should be considered as interlinked and mutually reinforcing concepts.

It is a positive feature of the Law that at various points the importance of protecting fundamental human rights is acknowledged. Importantly, Article 17(2) recognises the value of ensuring “guarantees of rights and freedoms of man and citizen, while ensuring national security.” Other provisions recognise the protection of human rights as both an objective and a priority in ensuring national security – a national interest and a key to ensuring public safety.

Despite these assurances, ARTICLE 19 finds that a great many provisions in the Law do not comply with international standards on freedom of expression and information. The Law suffers from an incoherent structure, pursuing numerous disconnected and ill-defined objectives. The most fundamental flaw is the impermissibly broad conceptualisation of “national security” and its conflation with the expansive notion of “national interests”. Both are defined in such ambiguous terms that government entities are essentially granted unfettered discretion to control the free flow of information and suppress dissent.

¹ The Law of the Republic of Kazakhstan of 6 January 2012, № 527-IV 3PK “On National Security of the Republic of Kazakhstan”; available at <http://online.zakon.kz>. This analysis is based on the unofficial translation of the Law from Russian to English. ARTICLE 19 takes no responsibility for the accuracy of these translations or for comments based on mistaken or misleading translation. The translation is available on request from ARTICLE 19.

² Kazakhstan: Draft Law on Broadcasting, 13 September 2011, available in English and Russian at: <http://www.article19.org/resources.php/resource/2733/en/kazakhstan:-draft-law-on-broadcasting>

³ Kazakhstan: Draft Law on Access to Public Information, 1 October 2010, available at: <http://www.article19.org/resources.php/resource/1635/en/memorandum-on-the-draft-law-of-the-republic-of-kazakhstan-on-access-to-public-information>

It is of particular concern to ARTICLE 19 that the Law confers broad powers on all government authorities to protect “information security”. This expansively defined concept essentially allows government to control all information flows, including the power to prevent “information impact on social and individual consciousness, related to deliberate distortion and spreading of unreliable information in the prejudice of national security”. This same section also allows the government to suspend the provision of communications services to individuals (Article 21(4)).

A number of provisions are geared towards the promotion of a single Kazakh identity through the suppression of expression that is perceived as undermining that unity. Examples include the powers granted to authorities to ensure “public safety” through “the formation of a national ideology, based on the Kazakhstan patriotism and ethnic harmony” (Article 19(2)), “strengthening the unity of the people of Kazakhstan and tolerance in society” (Article 19(3)), and “assuring preservation of the historic, traditional, intellectual and cultural values of the Kazakhstan society” (Article 19 (9)). It is clearly established under international law that promoting a single culture or set of values is not a legitimate basis for suppressing the right to freedom of expression.

ARTICLE 19 urges the Government of Kazakhstan to amend the Law, as a matter of priority, based on the recommendations advanced in this analysis. It is of utmost importance to the safeguarding of democracy and peace in the country that respect for the right to freedom of expression and information is fully integrated to domestic law.

International Freedom of Expression Standards

The rights to freedom of expression and information are fundamental and their full enjoyment is central to achieving individual freedoms and to developing democracy, particularly in countries transitioning from periods of conflict or totalitarianism. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all human rights.

This section identifies international standards on freedom of expression, emphasising those most relevant to the protection of national security. These standards form the basis of the legal analysis that follows.

Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights (UDHR)⁴ guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the UDHR. The ICCPR binds its 167 states party to respect its provisions and implement its framework at the national level.⁶ Kazakhstan signed the ICCPR on 2 December 2003 and ratified it on 24 January 2006⁷ and is therefore legally bound to respect and to ensure the right to freedom of expression as contained in Article 19 of the ICCPR:⁸

1. Everyone shall have the right to freedom of opinion
2. 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.

⁴ UN General Assembly Resolution 217A(III), adopted 10 December 1948

⁵ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit)

⁶ Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

⁷ See UN Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁸ Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.

On 21 June 2011, the HR Committee, as treaty monitoring body for the ICCPR, issued General Comment No.34 in relation to Article 19.⁹ General Comment No.34 constitutes an authoritative interpretation of the minimum standards guaranteed by Article 19 ICCPR¹⁰ and is therefore instructive on a number of freedom of expression concerns raised by the National Security Law.

Limitations on the Right to Freedom of Expression

While the right to freedom of expression is a fundamental right, it is not guaranteed in absolute terms. Article 19(3) permits the right to be restricted in the following respects:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are prescribed by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order, or of public health or morals.

Restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put in jeopardy the right itself. Determining whether a restriction is narrowly tailored is often articulated as a three-part test. It is required that restrictions are i) prescribed by law, ii) pursue a legitimate aim; and iii) that they conform to the strict tests of necessity and proportionality.¹¹

- **“Provided by law”**: Article 19(3) requires that restrictions on the right to freedom of expression must be provided by law. This requires a normative assessment; to be characterised as a law a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.¹²

General Comment No.34 further provides that for the purpose of Article 19(3) a law may not confer unfettered discretion for restricting freedom of expression on those charged with executing that law.¹³ Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. The requirement that the law be sufficiently precise for this purpose is closely related to the requirements of necessity and proportionality. It ensures that restrictions on freedom of expression are only employed for legitimate protective objectives and limits the opportunity to manipulate those restrictions for other purposes.

- **“Legitimate aim”**: Interferences with the right to freedom of expression must pursue a legitimate protective aim as exhaustively enumerated in Article 19(3)(a) and (b) ICCPR. Legitimate aims are those that protect the human rights of others, protect national security or public order, or protect public health and morals. As such, it would be impermissible to prohibit expression merely because it is critical of government or advocates for political change. Similarly, it is not permissible to pursue illegitimate

⁹ See, CCPR/C/GC/34

¹⁰ ARTICLE 19 statement on HR Committee Comment No.34 <http://www.article19.org/resources.php/resource/2631/en/un:-article-19-welcomes-general-comment-on-freedom-of-expression>

¹¹ Velichkin v. Belarus, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005).

¹² Leonardus J.M. de Groot v. The Netherlands, No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995).

¹³ *Ibid.*

objectives through a reliance on Article 19(3) that is merely pre-textual. Furthermore, restrictions on freedom of expression must be narrowly tailored to achieve their objective and must therefore be content-specific. Where a State does limit freedom of expression, the burden is on that state to show a direct or immediate connection between that expression and the legitimate ground for restriction.

General Comment No.34 notes that extreme care must be taken in crafting and applying laws that purport to restrict expression to protect national security. Whether characterised as treason laws, official secrets laws or sedition laws they must conform to the strict requirements of Article 19(3).¹⁴ The HR Committee have also held that “it is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”¹⁵

General Comment No.34 provides further guidance on laws that restrict expression with the purported purpose of protecting morals. Such purposes must be based on principles not deriving exclusively from a single tradition but must be understood in the light of the universality of human rights and the principle of non-discrimination.¹⁶ It would therefore be incompatible with the ICCPR, for example, to privilege one particular religious view or historical perspective.

- **“Necessity”**: States party to the ICCPR are obliged to ensure that legitimate restrictions on the right to freedom of expression are necessary and proportionate. Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result. General Comment No.34 states that generic bans on the operation of certain websites and systems are never proportionate and are therefore incompatible with Article 19(3).

The United Nations, Counter-Terrorism and Human Rights

The United Nations has played a key role in promoting the principle that while a State is under a duty to protect individuals from terrorist attacks that should not be exploited as a pretext for suppressing legitimate expression. In a speech to the UN Security Council on 20 January 2003, then UN Secretary General Kofi Annan noted that “we are seeing an increasing use of what I call the ‘T-word’ – terrorism – to demonize political opponents, to throttle freedom of speech and the press, and to delegitimize legitimate political grievances.”¹⁷

In particular, UN General Assembly Resolution 60/158 of 16 December 2005 on the “protection of human rights and fundamental freedoms while countering terrorism” reaffirmed the “fundamental importance, including in response to terrorism and the fear of terrorism, of

¹⁴ Paragraph 30 HR Committee General Comment 34.

¹⁵ Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

¹⁶ Paragraph 32 HR Committee General Comment 34.

¹⁷ Kofi Annan, Statement to the 20 January Security Council ministerial meeting on terrorism, 20 January 2003;

respecting all human rights and fundamental freedoms and the rule of law.”¹⁸ Similarly, the UN Counter-Terrorism Strategy of 2006 urges States to abide by Resolution 60/158, recognising in its preamble that “development, peace and security, and human rights are interlinked and mutually reinforcing”.¹⁹

More specifically, the UN Human Rights Commission has issued numerous resolutions reminding States to “refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression in ways which are contrary to their obligations under international law.”²⁰

Joint Declaration of the Special Mandates

In 2008, The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression and Access to Information, issued a joint declaration “on defamation of religions, and anti-terrorism and anti-extremism legislation” (the Joint Declaration).

The Joint Declaration advances four principles to guide the development of anti-terrorism legislation in compliance with international standards on freedom of expression and information:

- The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.
- The criminalisation of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism, understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts (for example by directing them). Vague notions such as providing communications support to terrorism or extremism, the ‘glorification’ or ‘promotion’ of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement, should not be criminalised.
- The role of the media as a key vehicle for realising freedom of expression and for informing the public should be respected in anti-terrorism and anti-extremism laws. The public has a right to know about the perpetration of acts of terrorism, or attempts thereat, and the media should not be penalised for providing such information.
- Normal rules on the protection of confidentiality of journalists’ sources of information – including that this should be overridden only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means – should apply in the context of anti-terrorist actions as at other times.

¹⁸ A/Res/60/158, available at: <http://www.undemocracy.com/A-RES-60-158.pdf>

¹⁹ Resolution 60/158: Protection of human rights and fundamental freedoms while countering terrorism, A/Res/60/288, adopted on 28 February 2006; available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/497/08/PDF/N0549708.pdf?OpenElement>.

²⁰ Commission on Human Rights resolution 2003/42; Commission on Human Rights Resolution: 2004/42; The right to freedom of opinion and expression, Human Rights Resolution 2005/38.

The Johannesburg Principles

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information²¹ (“Johannesburg Principles”), a set of international standards developed by ARTICLE 19 and international freedom of expression experts, are instructive on restrictions on freedom of expression that seek to protect national security.

Principle 2 of the Johannesburg Principles states that restrictions sought to be justified on the ground of protecting national security are illegitimate unless their genuine purpose and demonstrable effect is to protect the country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force.

The key test for assessing the legitimacy of restrictions on freedom of expression in the name of national security is set out in Principle 6, which subject to the other principles, prohibits restrictions on expression unless: the expression is intended to incite imminent violence; it is likely to incite such violence; and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. The restriction cannot be a pretext for protecting the government from embarrassment or exposure of wrongdoing, to conceal information about the functioning of its public institutions, or to entrench a particular ideology.

Principle 7 outlines forms of expression that are protected, and that cannot be legitimately suppressed in the pursuit of protecting national security, these include but are not limited to express that:

- advocates non-violent change of government policy or the government itself;
- constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;
- constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
- is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

Lastly, Principle 7 affirms that “[n]o one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.”

In relation to freedom of information, Principle 15 states that a person may not be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

²¹ Adopted on 1 October 1995. These Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and have been referred to by the United Nations Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996.

Analysis of the National Security Law

The National Security Law (the Law) entered into force on 6 January 2012. Structurally, the Law is made up of 30 articles divided into 5 chapters: “general provisions”; “the system of ensuring national security and its main functions”; “the authorities of the President, Security Council, Parliament, Government, Courts and State Bodies of the Republic of Kazakhstan”; “ensuring national security”; and finally, “concluding provisions”.

This section analyses the Law against international standards on the right to freedom of expression and information and makes recommendations to bring the Law into compliance with these standards.²²

Purposes of the Law

The Law is prefaced with the following summary of its function:

The present Law regulates the legal relations in the field of national security of the Republic of Kazakhstan and defines the content and principles of person and citizen, society and state, system, aims and directions of ensuring national security of the Republic of Kazakhstan.

ARTICLE 19 notes that this preamble fails to clarify the overarching purposes of the Law, requiring the reader to consult all 30 Articles before the intended functions are realised. As Article 29 indicates, this Law is in fact intended to “provide a framework of developing and adopting other regulations governing specific areas and means of ensuring national security.” The legislation is therefore not a comprehensive legal instrument for addressing Kazakhstan’s national security concerns but an initial measure designed to set the parameters for more specific legislation that will follow. It defines key terms, outlines key purposes, and indicates which bodies will have what responsibilities in the field of national security.

This lack of clarity in the preamble reflects a thematic problem in the Law that speaks to its incoherent structure, with numerous disconnected and contradictory objectives that are detached from “national security” as understood in international law. This incoherence poses significant problems for the right to freedom of expression, as “national security” may more easily be used as a pretext for stifling public debate and insulating the government from criticism. It is of utmost importance that legislation addressing national security concerns makes it clear that national security will not be pursued at the expense of protection for fundamental human rights, particularly the right to freedom of expression.

Recommendations:

- The Law should begin with a clear overarching statement of purpose that makes its nature as a ‘framework’ apparent.
- The preamble must emphasise that protecting national security and fundamental human rights are interconnected and mutually reinforcing concepts.

²² It is noted that this analysis is based on an unofficial translation of the National Security Law provided to ARTICLE 19. We take no responsibility for the accuracy of these translations or for comments based on inaccurate translations.

Protection of fundamental human rights

It is a positive feature of the Law that, at a number of points, references to the importance of protecting fundamental rights while safeguarding national security are made. Examples include Article 1(2), Article 3(2), Article 5(1), and Article 19(1)(1) which recognise human rights as an objective of national security, a priority in ensuring national security, a main national interest and as key to ensuring public safety. As already emphasised, the protection of fundamental human rights – including the right to freedom of expression – must be centre stage in advancing any national security policy.²³

It is also encouraging that Chapter IV on “ensuring national security” begins with a stand-alone provision for the protection of human rights. Article 17 of the Law is titled “guarantees of rights and freedoms of man and citizen, while ensuring national security.” In Article 17(1) the assurance is provided that ensuring the “safety of every person and citizen on its territory” will be done “in accordance with national legislation and international treaties.” This incorporates the human rights protections contained in the ICCPR, including the Article 19 protection of the right to freedom of expression.

While this is a positive measure, ARTICLE 19 notes that the Law does not clearly enumerate the protected rights nor cite a legally enforceable human rights instrument to aid interpretation of the Law. The provision would therefore be strengthened by a more explicit guarantee of fundamental human rights and citing a legally enforceable human rights instrument to that effect.

The commitment to human rights in Article 17(1) of the Law is qualified by subparagraph (2), which provides the assurance that “rights and freedoms” will only be restricted by law, and only “to the extent that is necessary to protect the constitutional order, protection of public order, human rights and freedoms, health and morals of the population.” The protection of the constitutional order is not a legitimate basis for restricting the right to freedom of expression. It is also noted that these grounds may not be used to restrict human rights that are non-derogable under international law – even for the protection of national security. These include the right to be free from discrimination (Article 2 of the ICCPR), the right to life (Article 6 of the ICCPR), and the right to be free from torture and cruel, inhuman and degrading treatment or punishment (Article 7 of the ICCPR). Article 17(2) must therefore distinguish between these different types of human rights.

Other provisions in the Law specifically limit the authority of public officials to act contrary to human rights guarantees. Article 19 of the Law, titled “ensuring public safety”, specifically prohibits taking actions that “unduly restrict the rights and freedoms of man and citizens”. Furthermore, Article 17(3) provides that any official who goes beyond their authority will be liable “as prescribed by law.” These are positive provisions, the spirit of which should be retained in any future revisions to the Law.

Article 2(2) of the Law clearly establishes that where a conflict between domestic law and international norms arises, it is the international norm that must be applied, thereby nullifying any contradictory provision in the Law. To the extent that any provision in the law is inconsistent with the protection for the right to freedom of expression in Article 19 of the ICCPR, Article 2 of the Law requires it to be disregarded. However, this is qualified by Article 2(3) that prohibits the conclusion of international agreements that are “capable to cause damage to national security or leading to loss of independence for the Republic of Kazakhstan; or narrowing the sphere of sovereign rights of the Republic of Kazakhstan.” This provision seemingly acts as an obstacle to

²³ See, for example, the UN Counter-Terrorism Strategy of 2006.

the ratification of future international human rights instruments, and may even encourage those interpreting the law to not pay due attention to fundamental human rights protections.

ARTICLE 19 is concerned that references to the protection of human rights are made on an ad hoc basis, scattered and unorganised throughout the Law, often alongside provisions that directly undermine the right to freedom of expression. A more coherent approach would be to devote a single chapter at the beginning of the Law to the protection of fundamental human rights – with its provisions taking precedence over all others in the Law. This chapter would ideally enumerate the fundamental human rights that are protected and clearly indicate the grounds on which they can be limited – perhaps by incorporating a legally enforceable human rights instrument by name.

Recommendations:

- A single chapter enumerating fundamental human rights that apply to the entire Law should be adopted to replace existing ad hoc references to these concepts.
- The Law should specifically incorporate a legally enforceable human rights instrument, such as the ICCPR.
- The protection of the constitutional order is not a legitimate basis for restricting human rights and must be removed.
- Any provision allowing restrictions on the protection of human rights must provide an explicit exception for non-derogable rights.

Conceptualising “national security”

From a freedom of expression perspective, the Law’s conceptualisation of “national security” is fundamentally flawed, undermining the Law as a whole. Two problems persist throughout the Law. Firstly, the definitions adopted for “national security” and related concepts are impermissibly broad in their scope and ambiguously framed. This lack of clarity makes it difficult to determine the parameters of the national security framework the Law seeks to establish, and what principles limit the conduct of the authorities.

Secondly, the term “national security” is conflated with the much more expansive notion of “national interests”. This leads to an understanding of “national security” that is much broader than that which may be used as a basis for restricting the right to freedom of expression under Article 19(3) of the ICCPR.

ARTICLE 19 recalls that the Johannesburg Principles understand the protection of “national security” as the protection of the state’s existence or its territorial integrity against the use or threat of force or the state’s capacity to respond to the use or threat of force.²⁴ Article 1(3) of the Law adopts this much broader definition:

[A] state of protection of *national interests* of the Republic of Kazakhstan from *real and potential threats*, providing dynamic development of person and citizen, society and state. [emphasis added]²⁵

²⁴ The Johannesburg Principles, Principle 2.

²⁵ This definition is supplemented by Article 1(4) “ensuring national security”, which refers to the power of any government authority or even citizen to promote national security as defined in Article 1(3). Article 1(5) provides a further definition for “systems of ensuring national security”, which is essentially all the mechanisms available to the State for exercising power.

The language of protecting the country's *existence* or *territorial integrity* from the *use or threat of force* is absent from this definition. Instead, the protection of national security is considered to be the protection of *anything* that falls within the Law's broad conception of the national interest, from any kind of real *or potential* threat.

A more comprehensive typology of "national security" is set out in Article 4 of the Law. Six "types of national security" are identified, namely: "public security"; "military security"; "political security"; "economic security"; "information security" and "ecological security". Each type of security is defined so ambiguously that any robust and critical discussion of public policy matters in any of these fields could be framed as a "threat" to that interest. Such ambiguous protections include those for "the spiritual-moral values of Kazakhstan society"; "favourable international situation of the state"; "the integrity of society and its stability", and "the information space". This is demonstrative of the Law's conflation of "national security" with other state interests that do not provide a legitimate basis for restricting the right to freedom of expression under Article 19 of the ICCPR.

This problem is not confined to Article 4 of the Law only. Article 1(6) defines "national interests" in such broad terms that "national security" can come to mean whatever the authorities want it to mean:

[A] set of legally recognised political, social and other demands of the Republic of Kazakhstan, implementation of which influences the ability of the state to ensure protection of human and citizen rights, values of the Kazakhstan society and basics of the constitution regime".

None of these subjective terms are defined, the meaning of "political, social and other demands"; "human and citizen rights"; "values of the Kazakhstan society", or "basics of the constitution regime" are so fluid that public authorities are essentially given discretion to consider whatever they like as falling within the national interest – and use this as a basis for restricting the right to freedom of expression. The HR Committee made it clear in General Comment No. 34 that laws must not confer unfettered discretion for restricting freedom of expression on those charged with executing that law.²⁶

A further layer of confusion is added by Article 5 of the Law, which advances a non-exhaustive 18-point list of items that are in the "national interest". Only 3 of these 18 points relate to national security as understood by the Johannesburg Principles. These provisions (points 12, 13 and 18) relate to combat readiness, weapons readiness and the protection of the territory of Kazakhstan from "threats, caused by emergency situations and military conflicts".

The majority of the remaining 15 "national interests" listed in Article 5 do not bear any relation to national security at all. ARTICLE 19 is particularly concerned that at least six of these apparent "national interests" relate to the creation or maintenance of an environment free from expression that is critical of the incumbent government. These interests are:

- 3) social harmony and political stability in the country;
- 4) Kazakhstani patriotism and unity of nations of Kazakhstan;
- 5) preservation and augmentation of material and spiritual-moral values of Kazakhstani society; ...

²⁶ *Ibid.*

- 8) inviolability of the constitutional regime of the Republic of Kazakhstan including the dependence, unitary structure and presidential form of governance, integrity, inviolability of the state borders and inalienability of the country's territory;...
- 14) maintaining the development of the competitive and protected national information space; ...
- 17) promotion of the political initiatives aimed at strengthening positive image and authority of the Republic of Kazakhstan at the international level.

ARTICLE 19 notes that none of these aims fall within the legitimate bases for restricting expression provided by Article 19 (3) of the ICCPR and therefore *any* attempt to control the free flow of information on these issues is a violation of Kazakhstan's obligations under international human rights law. Furthermore, Principle 7 of the Johannesburg Principles emphasizes the importance of protecting these forms of expression, warning against the tendency of governments to use national security legislation to target such expression – which in fact has a detrimental impact on national security.

The remaining “national interests” listed in Article 5 may be in the “public interest” to protect, but with the exception of “ensuring rights and freedoms of people and citizens” (point 1), they have nothing to do with the protection of national security. As such they do not provide legitimate grounds for restricting the right to freedom of expression. These protected interests include: healthcare (point 6); education (point 7); sustainable and efficient functioning of state institutions (point 9); economic development (point 10); economic security (point 11); the environment (point 15), and international cooperation (point 16).

Unfortunately there is more. A 19-point list of “main threats to national security” is provided in Article 6. Again, the majority of these “threats” bear little relation to national security as understood in the Johannesburg Principles. This again demonstrates the conflation of “national security” with interests that do not provide a legitimate basis for restricting the right to freedom of expression. We recall that expression may only be considered a threat to national security if it is intended to incite imminent violence; it is likely to incite such violence; and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.²⁷ None of the listed “threats” would meet this three-part test if they concerned expressive conduct. The most concerning are:

- 1) “reduction of the level of legality and law enforcement”;
- 5) “aggravation of the social and political situation, expressed in interethnic and religion conflicts, mass disturbances”;
- 7) “activity, directed to a forcible change of the constitutional regime including activities infringing on the unitary structure of the Republic of Kazakhstan, integrity, inviolability, inalienability of its territory, security of protected persons”;
- 8) “terrorism, extremism and separatism in any form and development”;
- 9) “intelligence subversive activity”;
- 10) “disruption of the activities of the public authorities, violation of their smooth operation, reduction of the level of governance in the country”,
- 18) “political image and the economic rating of Kazakhstan”
- 17) “information impact on the public and individual conscience related to deliberate wrench and dissemination of unreliable information to harm national security”;
- 16) “weakening of the level of protection of the information space of the country, as well as the national information resources from illegal accession”;

²⁷ See Johannesburg Principles, Principle 6.

Again, while these items may represent national interests that the Kazakh government can legitimately engage in the promotion of, they cannot be used as justifications for restricting the right to freedom of expression or other fundamental human rights.

Recommendations:

- Articles 1(3), (4) and (5) of the Law should be amended to define national security as “the protection of the state’s existence or its territorial integrity against the use or threat of force, or the state’s capacity to respond to the use or threat of force.” The listed “threats to national security” in Article 6 of the Law should also be amended to reflect only threats that meet this definition.
- The term “national interest” is not helpful in defining “national security”. All references to “national interest” must be removed from the Law. Article 1(6) and Article 5 should therefore be deleted in their entirety.
- The articulation of “national security” in the Law should reflect the understanding that freedom of expression may only be restricted in pursuit of this aim if the expression is intended to incite imminent violence; it is likely to incite such violence; and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Measures to protect national security and ensure public safety

The Law creates numerous powers for protecting national security and ensuring public safety. These provisions are very vague in their use of language and therefore of uncertain scope, and do not comply with international freedom of expression standards.

Article 18(3) of the Law vaguely mandates the implementation of “a set of operational and long-term measures to prevent and neutralize threats to national security, including those to remove the causes and conditions giving rise to these threats. The power to “neutralize threats to national security”, essentially grants public officials unfettered discretion to censor any expression deemed as “threatening” to “national security”. Similarly broad powers include Article 18(5) “making immediate decisions and actions to protect national interests, suppressing illegal activity which encroach on the national security, and taking other right-restriction measures” and Article 18(6) “localizing and eliminating the impacts of encroachment upon national interests and taking all necessary remedial measures.” None of these provisions are narrowly tailored to the protection of legitimate national security interests and require significant revision.

Measures for ensuring public safety are also broad and imply the use of government power to control freedom of expression. Article 19 of the Law provides that “public safety” will be ensured through “the formation of a national ideology, based on the Kazakhstan patriotism and ethnic harmony” (subparagraph 2), “strengthening the unity of the people of Kazakhstan and tolerance in society” (subparagraph 3), and “assuring preservation of the historic, traditional, intellectual and cultural values of the Kazakhstan society” (subparagraph 9).

ARTICLE 19 recalls that in Comment No. 34 the HR Committee stated that restrictions on the right to freedom of expression designed to protect “morals” must be based on principles not deriving exclusively from a single tradition but must be understood in the light of the universality of human rights and the principle of non-discrimination.²⁸ This rationale applies equally to Laws that attempt to cultivate patriotism and a single national identity. Article 19 of the Law implies that there is only one accepted narrative in Kazakhstan on issues of national identity and the

²⁸ Paragraph 32 HR Committee General Comment 34.

various elements of shared morality, history and tradition that may be thought to constitute such an identity. Privileging one set of ideas above others through legal prescription inevitably leads to the censoring of individuals who do not share those ideas. These provisions are therefore not compliant with international standards on freedom of expression.

Recommendations:

- Measures to protect national security (Article 18 of the Law) and to ensure public safety (Article 19) should be amended so that any restriction on freedom of expression is narrowly tailored towards the protection of national security as understood under international law, i.e. the protection of state's existence or its territorial integrity against the use or threat of force, or the state's capacity to respond to the use or threat of force.

“Information Security”

ARTICLE 19 is especially concerned about the concept of “information security” and the powers given to the authorised bodies to control the ambiguously termed “information space”. Article 1(2) defines the “information space” so broadly that it essentially includes any information that is capable of influencing the public.

The particulars of ensuring information security are provided in Article 23 of the Law. It includes numerous measures that are so ambiguous that they could easily be deployed to justify blanket censorship of the media and all other forms of communication, particularly from outside of Kazakhstan. Broad powers are conferred on all government agencies, organisations and officials to “take measures” aimed at preventing “information dependence” and the “expansion of information and the blockade from other states, organisations and individuals”. Measures may also be taken to detect, prevent or suppress leakages of State secrets, without protection provided for whistleblowers, and the even broader power to prevent “information impact on social and individual consciousness, related to deliberate distortion and spreading of unreliable information in the prejudice of national security”. None of these interests have a legitimate basis under Article 19 of the ICCPR.

Article 21(5) of the Law lists a number of prohibited acts. Among various provisions prohibiting ownership or control of the communications infrastructure by non-citizens, the provision also prohibits the disclosure of state secrets (subparagraph 2) and the distribution of printed products and products of foreign mass media the contents of which undermines national security (subparagraph 1). None of these provisions comply with international standards on freedom of expression.

Article 21(4) of the Law further provides that network owners and service providers may be given binding orders to suspend the provision of communications services to individuals and/or legal entities. The provision does not specify on what grounds individuals can have their communications services cut. Requiring communications providers to deny individuals access to information services is a violation of Article 19 of the ICCPR.

Furthermore, it is noted that all the government authorities listed (extensively) in Article 15(1) are given the power to “inform the population about the state of national security and undertaken measures to ensure, conduct propagandistic and counter-propagandistic activities.” Again, this seems to reserve powers to a broad range of bodies to exercise control of the free flow of information. Such a broad power violates both the right to freedom of expression and information. Information security, in the manner described in Article 1(2), Article 15, and Article 21, is far too vague a concept for such broad executive powers to be based upon. The concept must be entirely revisited and narrowed so that its purposes are clearer – or scrapped all together. In respect of

information held by the government, the principle of maximum disclosure must be adopted. A public body must disclose any information that it holds and is asked for, unless: the information concerns a legitimate, protected interest listed in the law; disclosure threatens substantial harm to that interest; and the harm to the protected interest is greater than the public's interest in having the information.²⁹

Recommendations:

- The concept of information security is impermissibly broad and should be removed from the Law entirely. Article 1(2), Article 15 and Article 21 of the Law in particular should be scrapped.
- Blanket measures taken to compel private communications intermediaries to disconnect individuals for violating the Law do not comply with freedom of expression standards and must be removed.
- The principle of maximum disclosure of information held by the government should be adopted. Information must be disclosed unless: the information concerns a legitimate, protected interest listed in the law; disclosure threatens substantial harm to that interest; and the harm to the protected interest is greater than the public's interest in having the information.

Political Security

To ensure the “political security” of Kazakhstan, the authorities are authorised by Article 21 to “make decisions” and “take measures” to, among other things, “improve the political culture of society”; punish anyone who forcibly terminates the power of the government or hinders the activities of government bodies or anyone who uses “denominational differences” for terrorist or extremist purposes. Again, these broad powers would enable government officials to censor any expression that they perceive as being critical of government policy and are therefore not compliant with Kazakhstan's obligations under international law.

Specifically, non-citizens (foreigners and stateless people) are not permitted to “publicly oppose” the sovereignty, territorial integrity, the unity of its people, social harmony, and political stability in Kazakhstan. Anyone breaching this rule will be ejected from the country or face other punishment. The right to freedom of expression is guaranteed to all people – it is therefore contrary to international standards to provide asymmetric protections on the basis of nationality.

Recommendations:

- The concept of political security is open to abuse and may be used as a pretext for stifling robust debate on public interest matters and insulating the government from criticism. Provisions on political security should therefore be removed from the Law.

²⁹ The Public's Right to Know: Principles on Freedom of Information Legislation, ARTICLE 19, London: 1999, Principle 4; available at <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>