

**ARTICLE 19**



# **Kazakhstan: Right to freedom of expression and 'extremism' restrictions**

November 2020

Report

---

## ARTICLE 19

Free Word Centre  
60 Farringdon Road  
London,  
EC1R 3GA  
United Kingdom  
T: +44 20 7324 2500  
F: +44 20 7490 0566  
E: [info@article19.org](mailto:info@article19.org)  
W: [www.article19.org](http://www.article19.org)  
Tw: [@article19org](https://twitter.com/article19org)  
Fb: [facebook.com/article19org](https://facebook.com/article19org)

A19/ECA/2021/002/

---

© ARTICLE 19, 2020

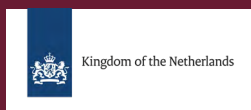
This work is provided under the Creative Commons Attribution-Non-Commercial-ShareAlike 2.5 licence. You are free to copy, distribute and display this work and to make derivative works, provided you:

- (1) give credit to ARTICLE 19;
- (2) do not use this work for commercial purposes;
- (3) distribute any works derived from this publication under a licence identical to this one.

To access the full legal text of this licence, please visit: <http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode>.

ARTICLE 19 would appreciate receiving a copy of any materials in which information from this report is used.

Made by support from the Dutch Ministry of Foreign Arrairs



---

# Executive summary

In this report, ARTICLE 19 and the Legal Media Center examine the most important elements of Kazakhstan's legislative restrictions on freedom of expression designed to address 'extremism' and their implementation in practice. Most of the 'extremism' provisions analysed in this report are 'hate speech' provisions, although Kazakhstani law does not use this term. This report finds that the relevant legislation is not compatible with the country's obligations under international human rights standards. ARTICLE 19 and the Legal Media Center note that not only does it fail to meet international freedom of expression standards, the domestic legislation is applied in a way that could quell any political dissent and activism, thus becoming an instrument of state control and censorship.

The report finds that the cited legislation employs a very vague and broad concept of 'extremism' which leads to overapplication and interpretation. The legislation also includes:

- Far-reaching negative consequences for individuals found guilty of committing 'hate speech' in addition to penalties imposed on them under the criminal law (by virtue of placing such individuals on the list of sponsors of terrorism and extremism);
- Prohibition/termination of organisations that have been found responsible for disseminating proscribed "extremist" content;
- Removal of proscribed content from circulation by virtue of listing it as "extremist material";
- Suspension of entire communication networks and websites to cut off access to "extremist" content (under the Law on Communications).

Without endorsing the misconstrued understanding of the concept of 'extremism' in Kazakhstan, the report analyses the relevant national legislation to assess whether it complies with international freedom of expression standards. Moreover, the report addresses the problematic jurisprudential practices through various case studies. This includes over-reliance on expert opinion in the form of linguistic expert assessments, not considering the potential conflict of interests of freedom of expression and, focusing only on the language of the statement not the intent of the speaker.

ARTICLE 19 and the Legal Media Center urge the Government to bring the relevant legislation and practices in compliance with the country's international human rights obligations. Compliance with international standards will still enable the legislation to achieve its purpose which is to reduce 'hate speech' and counter incitement to violence and hatred.

---

## Key recommendations

- All legal restrictions on freedom of expression should be compliant with the requirements of legality (i.e. they must be sufficiently clear and precise), necessity (i.e. they must be necessary to achieve one of the legitimate aims of limiting freedom of expression under international law, such as protecting the rights of others), and proportionality (i.e. a particular restriction can be imposed only if a less restrictive alternative is not sufficient). All legal restrictions on incitement should be formulated with reference to the six-factor test set out in the Rabat Plan of Action.
- All 'counter-extremist' laws in their current form should be repealed. At minimum, all forms of expression that do not constitute direct incitement to violence should be removed from the scope of the "counter-extremism" laws and, accordingly, from the application of "counter-extremist" measures such as lists of prohibited extremist materials and bans on "extremist" not-for-profit organisations and media outlets;
- Restrictions imposed on freedom of expression under Articles 5, 20 and 39 of the Constitution should be reviewed to ensure that they only allow limiting expression that amounts to incitement to discrimination, hostility or violence on the basis of internationally recognised protected characteristics. In particular, restriction of expression on the basis of inciting "social strife" (and the implied protected characteristic of belonging to a social group) should be completely removed due to its inherent lack of clearly defined boundaries;
- The definitions contained in Article 174 of the Criminal Code should be substantially revised to make it clear that this provision applies only to speech that amounts to incitement to discrimination, hostility or violence - which in turn requires the proof of intent to cause discrimination, hostility or violence. The category of expression "insulting the national honour and dignity or the religious feelings of individuals" should be removed altogether;
- Individuals convicted under Article 174 of the Criminal Code should be removed as a category of individuals automatically placed on the list of entities and individuals linked to financing terrorism and extremism under Article 12 of the Law on countering the legitimization of criminally-obtained profits (money-laundering) and financing of terrorism. All such individuals currently on the list should be removed from it;
- Article 453 of the Code of Administrative Offences should provide clear criteria to ensure that the law-enforcement authorities' decisions under which of the two provisions to prosecute are consistent and non-arbitrary and that only the most serious cases get prosecuted under Article 174. Article 453 of the Code

---

of Administrative Offences should be modified so that it is limited only to intentional acts, with intent required both for the act itself and for the harmful consequences;

- Closures of organisations and media outlets (including blocking entire websites) should be permitted only as a last resort in the most exceptional circumstances. Less restrictive alternatives should be envisaged for media, such as self-regulatory complaint mechanisms;
- The courts should interpret and apply all legal provisions restricting ‘extremism’ and ‘hate speech’ in a manner consistent with the requirements of international human rights law, in particular, Article 19 para 3 and Article 20 para 2 of the ICCPR (as interpreted in the Rabat Plan of Action). This involves interpreting the current definitions of prohibited ‘hate speech’ narrowly, so that, wherever possible, they are narrowed down to advocacy of hatred amounting to incitement (подстрекательство) to discrimination, hostility or violence;
- In determining if a particular statement falls under a prohibited category, analysis should never be limited to the language of that statement. The courts and law-enforcement authorities in charge of investigating ‘extremism’ and ‘hate speech’ cases should always establish the speaker’s intent to cause prohibited consequences. Furthermore, they should always consider the likelihood of harm to be caused by the statement - and, to that end, the context in which it was made, its extent and magnitude, and the speaker’s position and their authority or influence over their audience;
- The courts and law-enforcement authorities should minimise their reliance on expert assessments in ‘extremism’ and ‘hate speech’ cases. They should only seek expert opinion when specialist knowledge is truly needed to interpret or assess particular evidence. The courts should never substitute their own assessment for the analysis performed by experts;
- Blocking of websites should only be authorised by an independent and impartial court with related procedural safeguards under the rule of law. Any order to block access to content should be limited in scope and strictly proportionate to the legitimate aim pursued. In the interim, we also recommend that law enforcement authorities should not exercise their powers to suspend access to websites, communication services and networks and other measures granted to them under the Communications Law;
- Judges, law-enforcement officials and other relevant officials (e.g. those involved in media regulation) should be provided with comprehensive and regular training on international human rights standards and comparative good practices, in particular those relating to ‘hate speech’ and national security;

- 
- In collaboration with experts and civil society, law enforcement authorities should develop investigative guidelines on the prosecution of 'extremism' and 'hate speech' cases in line with international human rights standards;
  - The relevant executive authorities should exercise self-restraint in the use of restrictive measures at their disposal. In particular, they should seek the liquidation/banning of not-for-profit and media organisations only in the most serious cases of repeated violation of 'extremism' and 'hate speech' law restrictions and after all other less restrictive interventions at their disposal have proven to be insufficient.

---

# Table of Contents

<b>Introduction</b>	<b>6</b>
<b>Applicable international human rights standards</b>	<b>8</b>
The general scope of the right to freedom of expression	8
Limitations on freedom of expression on the basis of 'extremism'	9
Limitations on 'hate speech'	10
Obligation to prohibit	11
Permissible limitations	13
Lawful expression	13
<b>Kazakhstan's 'extremism' legislation and its enforcement</b>	<b>15</b>
Constitutional framework	15
Criminalisation of 'extremism' and 'hate speech'	16
Criminal Code	16
Measures against 'extremism' and 'hate speech' under other legislation	20
Code of Administrative Offences	20
Extremism Law	21
Suspension of media outlets under the Mass Media Law	24
Blocking websites and entire networks under Law on Communications	25
The enforcement of 'hate speech' restrictions	27
<b>Conclusion: key problems identified</b>	<b>31</b>
<b>Recommendations</b>	<b>34</b>
<b>About ARTICLE 19 and the Legal Media Center</b>	<b>38</b>

---

# Introduction

In this report, ARTICLE 19 and the Legal Media Center examine the most important elements of Kazakhstan's legislative restrictions on freedom of expression that are ostensibly designed to address 'extremism' and their implementation in practice.

The relevant legislation comprises of mishmash of prohibitions of various conduct (from terrorism to content that falls under some category of 'hate speech') and involves criminal penalties against individuals, quasi-criminal measures against non-governmental organisations and media outlets, measures aimed at restricting content directly, and measures allowing to suspend entire websites, networks and communication services.

A majority of the 'extremism' provisions analysed in this report are 'hate speech' provisions, although Kazakhstani law does not have this term.<sup>2</sup> However, 'hate speech' is a convenient shorthand to designate those diverse categories of prohibited expression. The report deliberately avoids referring to them as "incitement to hatred," even though it is often done by commentators who take their cue from the language of international human rights instruments. Such a label would be misleading, considering that the actual restrictions, as they are defined in the law and applied in practice, fall well short of the strict threshold implied in the notion of incitement as it is understood in those instruments.

Not all categories of speech prohibited under Kazakhstani counter-extremism legislation can be linked to 'hate speech.' ARTICLE 19 and the Legal Media Center have chosen to focus only on those that are for a number of reasons.

- First, disparate categories of speech prohibited under the rubric of 'extremism' do not have a discernible unifying characteristic other than being artificially united by the lawmakers under that label. ARTICLE 19 opposes the use of 'extremism' as a legal concept, especially as a basis for rights restriction. Hence, we are wary of reinforcing this fallacious concept by discussing all "counter-extremist" restrictions collectively.
- Second, experience shows that 'hate speech' related restrictions are frequently used to target legitimate speech, often for being critical of the authorities or not conforming to state-approved narratives. This bad practice is enabled by the vague language of the 'hate speech' laws that easily lends itself to overreach and abuse.

---

<sup>1</sup> The term 'hate speech' is not defined in international human rights law. As described below international standards require different response to different types of 'hate speech' based on the level of severity. For these reasons, ARTICLE 19 uses the term in inverted comas.

<sup>2</sup> The legislation instead uses terms such as "igniting strife" and "propaganda of exceptionalness, superiority or inferiority" (on the basis of different protected characteristics).



- 
- Third, restricting some instances of ‘hate speech’ is not only legitimate but may even be required. International law expressly obliges States to prohibit the most serious forms of ‘hate speech’ where they amount to incitement of discrimination, hostility or violence. This can be seen by national decision-makers as a strong justification - or an excuse - for sweeping restrictions. However, not all ‘hate speech’ can be legitimately restricted. Whereas appropriate (narrowly defined) restrictions serve the aim of advancing equality and non-discrimination, finding the right balance between this aim and the protection of freedom of expression is a challenging task.

ARTICLE 19 and the Legal Media Center wish to emphasise that the focus of this report on ‘hate speech’ does not imply our endorsement of the other restrictions imposed on freedom of expression under the ‘counter-extremism’ laws.

The structure of this report is as follows.

- First, it sets out applicable international human rights standards;
- Second, it offers an analysis of the key elements of the national legislation that serve as a basis for the restrictions. This starts with the broad framework established in the constitution and is followed by focus on to the criminal-law measures and measures envisaged in the so-called “counter-extremism” legislation. The report assesses the compatibility of all of those measures with international freedom of expression standards, highlighting the most problematic areas where violations of freedom of expression are most likely to occur.
- The report further includes a brief discussion of how these legal provisions are enforced in practice. Unfortunately, this area is marked by exceptionally low levels of transparency, with only very limited and incomplete data available for review. While a comprehensive analysis of the relevant practice would be impossible for this reason, the available data is sufficient to conclude that the serious deficiencies of the legislative framework are not only not mitigated in practice, but are (mis)used by the State to target legitimate expression.

Drawing on this analysis, the report makes recommendations to the national law/policy-makers and law-enforcement authorities in order to assist them in bringing the relevant legislation and the practice of its implementation fully in line with Kazakhstan’s international obligations in the field of freedom of expression.

---

# Applicable international human rights standards

## The general scope of the right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights<sup>3</sup> and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties.<sup>4</sup> As a State party to the ICCPR, Kazakhstan must ensure that its legislation pertaining to freedom of expression complies with Article 19 ICCPR as interpreted by the Human Rights Committee (HR Committee) and that they are in line with the special mandates' recommendations.

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice.

The right to freedom of expression, however, is not absolute. Under Article 19(3) of the ICCPR, expression may be restricted in limited exceptional circumstances as long as any restrictions are:

- **Provided by law:** all relevant legislation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim:** the list of which is exhaustive, and it includes respect of the rights or reputations of others, the protection of national security or of public order (*ordre public*), and the protection of public health or morals;
- **Necessary and proportionate in a democratic society:** if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.

---

<sup>3</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>4</sup> Article 10 of the European Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights; and Article 13 of the American Convention on Human Rights.

---

## Limitations on freedom of expression on the basis of 'extremism'

There is no agreed definition of 'extremism' under international law and the term is often used interchangeably with 'terrorism,' that, equally, is not defined.<sup>5</sup> Both terms refer to limitations on freedom of expression on national security grounds.

The protection of freedom of expression in the context of national security has been a matter of significant debate for a number of years, both internationally and at domestic levels. Specifically, under international law, it is well recognised that human rights, including free expression, must be respected in the fight against terrorism/extremism, and must not be arbitrarily limited. For example, the UN Security Council Resolution 1456 (2003) states that:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.<sup>6</sup>

The UN Human Rights Commission has also issued resolutions reminding nations 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."<sup>7</sup>

Furthermore, in the Johannesburg Principles on Freedom of Expression and National Security,<sup>8</sup> freedom of expression may be restricted on national security grounds only where it is intended to incite imminent violence, is likely to incite such violence, and there are a direct and immediate connection between the speech and the likelihood or occurrence of such violence.<sup>9</sup> The UN Secretary-General has supported this interpretation, stating that:

---

<sup>5</sup> See e.g. UNODC, [Frequently Asked Questions on International Law Aspects of Countering Terrorism](#), 2009, p. 4; or [The Use of the Internet for Terrorist Purposes](#), 2012, para 49.

<sup>6</sup> Resolution 1456 (2003), para 6. See also General Assembly resolution 60/288 of 20 September 2006 on Global Counter-Terrorism Strategy

<sup>7</sup> Commission on Human Rights resolution 2003/42; Commission on Human Rights Resolution, 2004/42; The right to freedom of opinion and expression; or Human Rights Resolution 2005/38.

<sup>8</sup> [Johannesburg Principles on National Security, Freedom of Expression and Access to Information](#), October 1995. The Principles, developed by a group of experts from around the world and endorsed by the UN Special Rapporteur on Freedom of Expression.

<sup>9</sup> *Ibid.*, Principle 6.

---

Laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action.<sup>10</sup>

In a similar vein, the Special Rapporteur on human rights and counter terrorism explained that for the criminalisation of incitement to terrorism to be compliant with international human rights law, it must, among other criteria, be limited to the incitement to conduct that is truly terrorist in nature, include an actual (objective) risk that the act incited will be committed, and expressly refer to intent to communicate a message and intent that this message incite the commission of a terrorist act.<sup>11</sup>

ARTICLE 19 and the Legal Media Center is aware that as in Kazakhstan, some States have also legislated against 'extremism' in addition to counter-terror laws. However, we note that speech restrictions aimed at countering 'extremism' are prima facie illegal under international law due to the internet vagueness and overreach of this concept. The HR Committee has criticised its use in national legislation to restrict expression because it is "too vague to protect individuals and associations against arbitrariness in its application."<sup>12</sup> The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has described it as "critical and prima facie non-human rights compliant practice" and expressed "serious concerns that the term lends itself to illegitimate judgments about what extremism is."<sup>13</sup> She further described the category of extremist crimes as "particularly vague and problematic," "broad and overly vague," capable of "encroach[ing] on human rights in profound and far-reaching ways" and, ultimately, "per se incompatible with the exercise of certain fundamental human rights."<sup>14</sup>

## Limitations on 'hate speech'

The term 'hate speech' has no definition under international human rights law, although various broad definitions of 'hate speech' have been advanced by the UN and regional

---

<sup>10</sup> Report of the Secretary-General, The protection of human rights and fundamental freedoms while countering terrorism, A/63/337, 28 August 2008, para 62.

<sup>11</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 22 December 2010, A/HRC/16/51, paras 29-32.

<sup>12</sup> Concluding observations on the Russian Federation (CCPR/CO/79/RUS), para 20.

<sup>13</sup> Human rights impact of policies and practices aimed at preventing and countering violent extremism, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 21 February 2020, A/HRC/43/46, para 13

<sup>14</sup> *Ibid*, para 14.

---

levels.<sup>15</sup> While there is no universally accepted definition, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States.<sup>16</sup>

- Severe forms of ‘hate speech’ that international law *requires States to prohibit*, including through criminal, civil, and administrative measures, under both international criminal law<sup>17</sup> and Article 20(2) of the ICCPR;
- Other forms of ‘hate speech’ that States *may prohibit* to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment;
- ‘Hate speech’ that *is lawful* but nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State but should be protected from restriction under Article 19(3) of the ICCPR.

### **Obligation to prohibit**

Article 20(2) of the ICCPR obliges the State to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” In this context, advocacy should be understood as an intention to promote hatred publicly towards the target group. Article 20(2) prohibits such advocacy only if it reaches the level of incitement, which in turn implies the speaker’s intent to incite others to commit acts of discrimination, hostility or violence. While the proscribed outcome need not in fact occur, the term “incitement” strongly implies the advocacy of hatred must create “an imminent risk of discrimination, hostility or violence against persons belonging to [the target group].”<sup>18</sup>

---

<sup>15</sup> For example, the Committee on Elimination of All Forms of Racial Discrimination (ICERD Committee) has defined ‘hate speech’ as “a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society; see General Recommendation No. 35, CERD/C/GC/35, para 7. For definitions adopted in the context of the Council of Europe, see Committee of Ministers Recommendation No. R(97)20 on Hate Speech and Committee of Ministers Recommendation No. Rec (2010)5 on measures to combat discrimination on the grounds of sexual orientation or gender identity.

<sup>16</sup> C.f. ‘Hate Speech’ Explained: A Toolkit, *op.cit.*

<sup>17</sup> UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, Article 3(c). It specifically requires States to prohibit the direct and public incitement to genocide through criminal law rather than other less severe forms of censure that might be offered by administrative or civil law.

<sup>18</sup> See, e.g. ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence, December 2012.

---

The **Rabat Plan of Action** provides additional authoritative guidance on the scope of restrictions required by Article 20(2).<sup>19</sup> This document set out six key criteria that should be taken into account:

- *The context of the expression*: the expression should be considered within the political, economic, and social context in which it was communicated;
- *The speaker*: in particular, the position of the speaker, and their authority or influence over their audience. The speaker must address a public audience and their expression include advocacy of hatred targeting a protected group based on protected characteristics and constituting incitement to, inter alia, violence;
- *The intent of the speaker*: the speaker must specifically intend to engage in advocacy of violence and intend for or have knowledge of the likelihood of the audience being incited to violence;
- *The content of the expression*: what was said, including the form and the style of the expression, whether the expression contained direct or indirect calls for discrimination, hostility or violence, and the nature of the arguments deployed and the balance struck between arguments;
- *The extent and magnitude of the expression*: the analysis should examine the public nature of the expression, the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume;
- *The likelihood of harm occurring*, including its imminence.

The Human Rights Committee has explained that restrictions imposed under Article 20 must be compliant with the three-part test set out in Article 19(3).<sup>20</sup>

---

<sup>19</sup> Office of the High Commissioner for Human Rights (OHCHR), [The Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, February 2013.

<sup>20</sup> General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para 50.

---

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the ICERD on this test.<sup>21</sup>

### **Permissible limitations**

There are forms of 'hate speech' that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR and the three-part test set out above.

### **Lawful expression**

Irrespective of how 'hate speech' is generally defined, it is necessary to keep in mind that not all 'hate speech' can be legitimately restricted. International freedom of expression standards protect expression that is offensive, disturbing or shocking.<sup>22</sup> Consequently, restricting expression solely on the basis of "offence" caused to an individual or group is not permitted. Although originally intended to assist in the application of Article 20(2) of the ICCPR only, the six factors set out in the Rabat Plan of Action, with necessary adjustments, provide useful guidance for determining if other forms of 'hate speech' reach the level of severity that justifies their restriction under Article 19(3).<sup>23</sup>

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of 'hate speech' is symptomatic, or from maximising opportunities for all people. Many of these positive measures are set out in the Rabat Plan of Action,<sup>24</sup> which draws extensively upon ARTICLE 19's Camden Principles on Freedom of Expression and Equality.<sup>25</sup>

---

<sup>21</sup> UN Committee on the Elimination of Racial Discrimination, General recommendation No. 35: Combating racist hate speech, 26 September 2013, paras. 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

<sup>22</sup> The Human Rights Committee describes the scope of the right to freedom of expression as including "deeply offensive" speech, General Comment No. 34, *op. cit.*, para 11. See also. e.g., European Court of Human Rights, *Handyside v. UK*, App. N. 5493/72, 7 December 1976.

<sup>23</sup> See 2019 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/47/486, para 24.

<sup>24</sup> *Op. cit.*

<sup>25</sup> ARTICLE 19, [The Camden Principles on Freedom of Expression and Equality](#), 2009.

---

Given the confusion surrounding the concept, it is beneficial to achieve clarity about categories of expression which should not automatically be considered 'hate speech.' This also includes expression related to denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive. This is, in particular, a problem of two areas of restrictions in Kazakhstan:

- **Defamation of religions/blasphemy:** The right to freedom of expression cannot be limited to protect religions or associated ideas or symbols from criticism, or to shield the feelings of believers from offence or criticism. Such illegitimate restrictions can take various forms in national laws, including direct blasphemy<sup>26</sup> and insult to religious feelings.<sup>27</sup> International human rights standards are clear that prohibitions of blasphemy without the added element of incitement to discrimination, hostility or violence are not legitimate.<sup>28</sup>
- **Protection of “the State” and public officials:** International standards do not permit restrictions on freedom of expression that are designed to protect “the State” or its symbols from insult or criticism.<sup>29</sup> These entities cannot be the target of 'hate speech,' because they are not people and are therefore not rights-holders.<sup>30</sup> For natural persons associated with the State, such as heads of state or other public officials, this status is not a “protected characteristic” on which discrimination claims, or the characterisation of 'hate speech,' can be based.

---

<sup>26</sup> Direct blasphemy seeks to protect a religion, its doctrines, symbols, or venerated personalities, from perceived criticism, contradiction, contempt, stigmatisation, stereotyping or 'defamation.'

<sup>27</sup> Insult to religious feelings seeks to protect the feelings or sensibilities of a group of persons 'insulted,' 'offended,' or 'outraged' by incidents of blasphemy against a religion they identify with.

<sup>28</sup> See Rabat Plan, *op.cit.*; and General Comment No. 34, *op.cit.*, para 48 (which states that “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged by article 20, paragraph 2, of the Covenant”). The Committee has also underlined that it would be “impermissible” to “prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”

<sup>29</sup> See, e.g. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, 20 April 2010; or Johannesburg Principles, *op.cit.*, para 38.

<sup>30</sup> *Ibid.*, Johannesburg Principles.



---

# Kazakhstan's 'extremism' legislation and its enforcement

## Constitutional framework

Freedom of expression is guaranteed in Article 20 of the Constitution of Kazakhstan. However, several constitutional provisions envisage restrictions on freedom of expression are not fully compatible with the limits set in Articles 19 and 20 of the ICCPR.

The general limitation clause for constitutional rights, including freedom of expression, is found in Article 39 para 1 of the Constitution. It is similar to the three-part test under Article 19(3) of the ICCPR insofar as it requires that restrictions be provided by law and be necessary to achieving certain aims. However, the grounds on which freedom of expression can be restricted differ somewhat from those listed (exhaustively) in Article 19 para 3 of the ICCPR. In addition to protecting "public order, the human rights of others, public health and public morals" (all of which are found in Article 19 of the ICCPR), Article 39 para 1 refers to "the protection of the constitutional system." In the absence of an established authoritative interpretation of the latter ground, it is a matter of concern that, if interpreted broadly, it may cover legitimate expression that is critical of the existing constitutional system and/or proposes (peaceful) changes to the Constitution.

Elsewhere, the Kazakhstan Constitution specifically prohibits several broadly defined categories of expression. Thus, as far as 'hate speech' is concerned, Article 20 para 3 includes *inter alia* the prohibition of "propaganda and advocacy" of "social, racial, national, religious, estate-related and clan-related superiority." This seemingly covers a much wider range of expression than what is required to be prohibited under Article 20 para 2 of the ICCPR for the following:

- "Superiority" is a broader and more pliable notion than that of "hatred" referred to in the ICCPR;
- "Social superiority" is an even broader and vaguer category which is incapable of clearly delineating groups or individuals that are meant to benefit from special protection. It is not synonymous with "social origin" (which is a protected characteristic recognised under international law), and it can potentially apply to any expression conveying superior attitudes on the basis of social status, occupation, social function or any number of other "social" aspects of a person's identity;

- 
- The element of “incitement to discrimination, hostility or violence” is not expressly required, and its absence it cannot be presumed that the speaker’s intent or the likelihood of harm resulting from the expression must be taken into account.

The reference to the archaic concept of “estate [of the realm]” is puzzling. It appears that this concept has no currency in Kazakhstan’s social, political or legal systems. In the absence of an authoritative legal definition/established judicial practice, its purpose or scope of potential application remain entirely unclear.

Furthermore, Article 5 para 3 of the Constitution prohibits non-governmental organisations (NGOs) whose aims, or actions are directed towards “igniting social, racial, national, religious, estate-related and clan-related discord.” Similar to Article 20 para 3 of the Constitution, this is an overly broad prohibition that, seemingly, is not confined to expression constituting incitement to discrimination, hostility or violence.

Further constitutional basis for limiting freedom of expression is found in Article 39 para 2 of the Constitution which pronounces as unconstitutional “any action” that is “capable of disrupting inter-ethnic or inter-denominational concordance.” This provision raises the same issues of being overly broad and vague. In particular, ARTICLE 19 and the Legal Media Center observe that:

- The term “capable of” does not necessarily require the existence of intent, nor does it indicate the required level of likelihood that specified harm (“disruption of concordance”) will occur;
- The term “disrupting of concordance [harmony]” is an equally broad concept which, in the absence of an established narrow authoritative interpretation, is not confined to causing “discrimination, hostility or violence” in the meaning of the ICCPR.

Finally, it cannot be assumed that restrictions on expression falling within this broadly defined category are required to comply with the proportionality test under Article 39 para 1 of the Constitution, since such expression is excluded from constitutional protection by virtue of being characterised as “unconstitutional.”

## **Criminalisation of ‘extremism’ and ‘hate speech’**

### **Criminal Code**

**Article 174** of the Criminal Code criminalises intentional public acts “aimed at igniting social, national, clan-related, racial, estate-related or religious strife, insulting the national honour and dignity of citizens or the religious feelings of individuals, as well as the propaganda of the exceptionalness, superiority or inferiority of individuals on the grounds of their attitudes

---

to religion [or] their nationality, race or clan affiliation.” In its second paragraph, a more severe punishment of up to 10 years in prison is imposed for the same acts if they are either (i) committed by a group of individuals, or (ii) committed repeatedly, or (iii) combined with violence or threats of violence, or (iv) committed by a person making use of their official position, or (v) committed by “a leader of a public association, including with the use of financial means received from foreign sources.” In the third paragraph, an even stricter punishment (up to 20 years in prison) is envisaged for the same acts if they are committed by a criminal entity or if they have entailed grave consequences.

While this provision allows the authorities to prosecute instances of ‘hate speech’ that must or may be prohibited under international law, the scope of expression it potentially covers is too broad to comply with the proportionality requirement under Articles 19 para 3 and 20 para 2 of the ICCPR. The proportionality requirement is further violated by the excessive severity of the envisaged punishment.

Article 174 relies on vague concepts that are not defined anywhere in the law but easily lend themselves to an overly broad interpretation, such as igniting strife, insulting national honour and dignity, and propaganda of exceptionalness, superiority or inferiority. The prohibition of expression “insulting religious feelings” is equally problematic on account of its vagueness. In addition, it effectively amounts to a prohibition of blasphemy, i.e. a category of speech restriction that has been specifically criticised in the Rabat Action Plan and by the Human Rights Committee,<sup>31</sup> along with the Human Rights Council<sup>32</sup> and UN special mandates<sup>33</sup> for being intrinsically in breach of freedom of expression.

Certain protected characteristics included in this provision extend its application even further beyond the limits permissible under the ICCPR. Whereas protecting individuals against ‘hate speech’ directed at them because of their race, nationality, religious beliefs or social origin is uncontroversial, the references to “social strife” (with the implied protected characteristic of belonging to a social group) and “estate of the realm” are deeply problematic.

---

<sup>31</sup> General Comment No. 34, op.cit., paras 48-49; Human Rights Committee, *Kim v the Republic of Korea*, Comm. No. 574/1994, 3 November 1998 and *Park v the Republic of Korea*, Comm. No 628/1995, 20 October 1998.

<sup>32</sup> See in particular the Resolution of the Human Rights Council (HRC) 16/18, and **Implementing HRC Resolution 16/18: a framework for inclusivity, pluralism, and diversity**, ARTICLE 19, February 2017.

<sup>33</sup> Report the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special rapporteur on FoE), to the Human Rights Council, 28 February 2008 A/HRC/7/14 paragraph 85; **Joint statement** from 10 December 2008; Report of the Special Rapporteur on freedom of religion or belief to the Second Session of the HRC, A/HRC/2/3, 20 September 2006, para 38; Report of the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/HRC/2/3 (September 20, 2006).

---

“Social strife” is a too vague and too pliable a notion to be meaningfully defined in a narrow and predictable manner. It effectively acts as a catch-all category that is potentially capable of accommodating any critical/hateful expression disfavoured by the authorities as long as it can be presented as being aimed at specific individuals or groups of individuals (this concern is borne out by the application of this provision in practice discussed below).

As for protection afforded on the basis of belonging to a particular “estate of the realm”, the absence of an established understanding of the meaning of this otherwise archaic concept within the realities of the present-day Kazakhstan makes its practical application impossible to foresee and thus in contradiction with the legality requirement under Article 19 para 3 of the ICCPR. Nor is it possible to justify such a restriction as being necessary, considering that the category was artificially introduced by the lawmakers and it does not reflect any pre-existing patterns of discrimination or hostility.

Article 174 expressly requires for proscribed acts/speech to be intentional. However, it is unclear if intent is only required for the act itself (e.g. intentionally making a statement public) or if it is also required with regard to causing any of the proscribed harmful consequences. While only the latter interpretation is compatible with the freedom of expression guarantees under the ICCPR, practice shows that the existing ambiguity is resolved in favour of the former interpretation, which is more punitive towards the defendant and more restrictive on freedom of expression.

The provision is silent as to whether some probability that the impugned expression will cause any of the proscribed consequences is required, let alone what level such probability must attain. The absence of this essential element means that, in practice, the focus is exclusively or primarily on the content of the speech, to the exclusion of other relevant factors reflected in the six-part test of the Rabat Action Plan.

Some of those factors do come into play in the guise of “aggravating circumstances” listed in paragraphs 2 and 3 of Article 174. However, this is done in a mechanistic way which cannot substitute for a comprehensive analysis of the specific circumstances of an individual case. With the exception of the clear-cut situation where the ‘hate speech’ results in “grave consequences” (provided that this was the speaker’s intention), the “aggravating circumstances” (such as repetitiveness or the status of the speaker as a leader of a civic organisation) do not automatically make a specific instance of ‘hate speech’ more serious compared to any other instance of ‘hate speech’ where those factors are absent, even though, depending on the specifics of the case, they may be indicative of higher negative impact of the impugned speech or higher likelihood of harm. The content of the statement, the political or social context in which it is made, the size and susceptibility of the audience, the platform/medium used by the speaker, and the speaker’s informal influence/stature are examples of

---

factors that may be equally or more relevant in assessing the seriousness of 'hate speech' in a specific case.

Since no automatic link exists between the aggravating circumstances listed in Article 174 and the gravity of a 'hate speech' incident (with the self-evident exception of the "grave circumstances" proviso), the automatically harsher sentences envisaged on the basis of those circumstances cannot be justified as "necessary" in the meaning of Article 19 para 3 of the ICCPR.

Two of those circumstances are additionally problematic because they allow the authorities to impose disproportionately higher penalties on civil society activists and media workers.

- The first such circumstance is committing a 'hate speech' offence with the aid of one's "official position." The Criminal Code does not define the meaning of "official position" for these purposes, so it is unclear if it is limited only to persons holding public office, extends to any position of authority (e.g. including in the private sector), or indeed covers any employment status. Since the law enforcement authorities tend to opt for the most expansive interpretation, it is deeply concerning that this clause may be used to impose a harsher punishment on editors or, possibly, even journalists because of their profession rather than the nature/impact of the 'hate speech' offence committed.
- The other aggravating circumstance in this group is committing 'hate speech' while being "a leader of a public association." Automatically imposing a harsher penalty solely because of the speaker's affiliation creates an added chilling effect on the freedom of expression of civil society organisations and activists. It is also an arbitrary/discriminatory interference with freedom of association. It is made even more arbitrary by the fact that it is apparently not required for such a person to commit 'hate speech' in the course of their official functions - it would seem to apply to them even if they spoke in their personal capacity.

Finally, it should be noted that Article 174 is included in the section of the Criminal Code that is dedicated to "crimes against peace and global security." The other crimes contained in that section are mostly acts recognised as crimes against humanity and war crimes under international law. This categorisation may explain the severity of penalties envisaged in Article 174, but it is by no means justified. Only the most severe form of 'hate speech' - incitement to genocide - amounts to an international crime. Article 174 covers, however, a much broader scope of expression (in fact, as was discussed above, it is so broad that it covers expression that may not be legitimately restricted under international law, let alone criminalised). It is even unclear if 'hate speech' amounting to incitement to genocide is covered by Article 174 at all, since it can and should be prosecuted under Article 168 of the Criminal Code which specifically criminalises genocide.

---

## Measures against 'extremism' and 'hate speech' under other legislation

### Code of Administrative Offences

Further prohibitions are contained in the Code of Administrative offences.

The production, storage, shipment and dissemination of content "aimed at igniting social, racial, national, religious, estate-related or clan-related strife" is also sanctioned under **Article 453** of the Code of Administrative Offences. Under this provision, it is not only individuals that can be held liable, but also commercial entities and media organisations. The fines envisaged for individuals are a distinctly milder penalty in comparison to the prison sentences and professional bans under Article 174 of the Criminal Code. However, in the case of media organisations, the automatic penalty for repeated 'hate speech' offences include the withdrawal of the offending organisation's licence and termination. Given that it is mandatory in all instances of repeated 'hate speech' offences regardless of the specifics of the 'hate speech' incidents involved, this penalty fails to comply with the proportionality requirement under Article 19 of the ICCPR.

The one important definitional difference between Article 174 of the Criminal Code and Article 453 of the Code of Administrative Offences is that the latter does not expressly require for proscribed acts to be intentional. This creates a significant additional potential for using Article 453 to curtail legitimate expression that does not constitute unlawful 'hate speech' under international law (or, indeed, even under domestic law):

- Article 453 of the Code of Administrative Offences penalises individuals and organisations that are not speakers themselves but provide services essential for the dissemination of speech authored by others, such as production, storage, transportation and distribution. By making them liable regardless of their intent (and, thus regardless of their actual knowledge of the unlawful nature of the impugned content), the law strongly incentivises such service-providers to exercise extreme caution and reject any potentially controversial or problematic material even if it is not illegal under domestic law.
- Article 453 also penalises individuals and organisations that are speakers - i.e. the authors of proscribed content - but who did not intend to cause any of the proscribed harmful consequences. As has already been explained above, intent to cause discrimination, hostility or violence is an essential element of 'hate speech' that can be legitimately restricted under international law. Consequently, insofar as the Code of Administrative Offences prohibits "negligent" 'hate speech' it is in breach of Articles 19(3) and 20(2) of the ICCPR for this reason alone.

---

Where the respective provisions of the Criminal Code and the Code of Administrative Offences overlap (i.e. with regard to intentional public statements aimed at causing certain types of “strife”), the law fails to provide criteria for determining which of the two should be the basis for prosecuting a specific case. This determination is seemingly left to the discretion of the law enforcement authorities, thus adding to the arbitrariness that already exists on account of those provisions’ overly vague and imprecise language.

### **Extremism Law**

Expression “igniting” the above-mentioned types of “strife” is considered as a form of “extremism” under the Law on Countering Extremism (Extremism Law), which, in consequence, brings into play a set of “counter-extremist” measures which can be used against individuals and organisations and directly against illegal content.

These additional restrictions on freedom of expression can be divided into the following categories:

- Additional far-reaching negative consequences for individuals found guilty of committing ‘hate speech’ offences that come on top of the penalties imposed on them under the criminal law (by virtue of placing such individuals on the list of sponsors of terrorism and extremism);
- Prohibition/termination of organisations that have been found responsible for disseminating proscribed “extremist” content;
- Removal of proscribed content from circulation by virtue of listing it as “extremist material” (which also in practice may take the form of blocking entire websites rather than targeting specific content only);
- Suspension of entire communication networks and websites to cut off access to “extremist” content (under the Law on Communications).

### **Additional sanctions against individuals**

According to Article 12 of the Law on countering the legitimization of criminally-obtained profits (money-laundering) and financing of terrorism, anybody convicted under Article 174 is automatically placed on a “list of entities and individuals linked to financing terrorism and extremism.” They are kept on the list until the expunction of their conviction, i.e. for 6 or 8 years after they have served their criminal sentence (the 8-year timeframe applies to convictions under Article 174 para 3).

In practical terms, a person’s inclusion in the list amounts to very serious restriction on their freedom and personal autonomy and has far-reaching and very significant negative consequences for their ability to carry on with their every-day life. These consequences include:

- 
- Depriving the person of the ability to access/independently dispose of their personal finances (blocking their banking accounts);
  - Taking away the person's right to found/participate in not-for-profit organisations;
  - Severely restricting the person's ability to engage in commercial activity, including by means of denying them the possibility to register as an individual entrepreneur;
  - Barring the person from registering or transferring a motor vehicle.

These restrictions are not set out in one legislative act but, instead, scattered across different laws unrelated to the issue "extremism." It is possible that other restrictions may already exist in the legislation or may be added in the future.

Regardless of the effectiveness or justifiability of these restrictions as a response against actual sponsors of terrorism or violent extremism, there is no plausible justification for imposing them on individuals who are guilty of criminal hate speech. Such justification is provided neither by the nature of these measures nor even by the formal logic of the relevant domestic legislation (for the list in question is expressly designated to sponsors of terrorism/extremism only). The only explanation for applying them to persons convicted for 'hate speech' acts would appear to be the formal characterisation of such acts as 'extremism.'

An additional problem with these restrictions is that they are imposed automatically and inflexibly, thereby clearly failing the proportionality requirement. They apply irrespectively of the sentencing received by the individual in the criminal trial, whether it be a suspended sentence or a fine. Consequently, in a given case these secondary extra-criminal sanctions may well be more disruptive and burdensome for the convicted individual than the criminal punishment per se.

In light of the above, the application of this measure to individuals convicted for 'hate speech' acts is flagrantly in breach of Article 19 para 3 of the ICCPR.

### **Sanctions against organisations**

The 'counter-extremism' legislation also enables the authorities to liquidate and ban organisations, such as not-for-profit organisations and media outlets, when they are found to be responsible for disseminating 'hate speech' as it has been defined in the domestic legislation. The legal basis for this measure is established in Articles 3 and 8 of the Extremism Law. According to these provisions, an organisation that "commits extremism" is declared by court to be an "extremist organisation" and banned from operation across the country.



---

“Committing extremism” is the only substantive criterion for imposing this measure. As has been pointed out above, “extremism” for these purposes includes expression that is considered to be “aimed at igniting social, racial, national, religious, estate-related or clan-related strife.” The imposition of what is self-evidently the most restrictive measure that can be applied to an entity (a permanent closure and ban) solely in response to statements falling into this broad category is flagrantly in breach of the proportionality requirement under Article 19(3) for the following two reasons:

- The same definitional reason that applies to all restrictions on ‘hate speech’ existing under Kazakhstani law: As has already been extensively discussed above, prosecuted speech is defined in a manner so broad and vague as to cover lawful ‘hate speech’ that cannot be legitimately restricted under international law and even legitimate expression that does not constitute any form of ‘hate speech’ at all (e.g. criticism of the authorities).
- The lack of less restrictive measures: The law does not allow for a nuanced approach designed to afford maximum protection to freedom of expression and freedom of association even when genuine instances of ‘hate speech’ have been detected. It goes for the nuclear option of termination and permanent banning regardless of the gravity of a ‘hate speech’ incident and its actual impact, of whether it is a one-off incident or a repeated pattern or whether other less restrictive solutions would be sufficient. Under international law, however, the termination of an organisation should be allowed only as a last resort in the most exceptional circumstances, such as where ‘hate speech’ is of a particularly grave character posing an exceptionally serious public threat or where serious patterns of ‘hate speech’ have been persistent and the previously applied less restrictive responses have proven insufficient. This requires that less restrictive measures are available in the first place, such as self-regulatory complaint mechanisms, the right of reply, financial penalties, official cautions, or temporary suspension.

According to the Extremism Law, an organisation can be terminated and banned only on the basis of a court decision declaring it to be an “extremist organisation.” However, this purported judicial safeguard is of little practical value, considering that the legal framework on the basis of which the courts are required to operate is inherently flawed.

### **Restricting “extremist” content**

Article 1 of the Extremism Law introduces the notion of “extremist materials.” Those include any media materials/publications/data storage devices containing the types of proscribed expression discussed in the present report. Whereas the other responses target authors of proscribed content or individuals and organisations acting as conduits for proscribed content, this measure targets proscribed content directly.

---

The Extremism Law does not expressly establish a procedure for officially determining if content is an “extremist material.” However, Article 9 of the Extremism Law implies that it requires a mandatory court decision, similarly to the procedure for “extremist organisation.” This interpretation is further supported by Chapter 47 of the Civil Procedure Code which establishes a single procedure for judicial determinations with regard to both “extremist organisations” and “extremist materials.”

As is the case with all restrictions addressed in this report, this measure is irretrievably tainted by the overly broad manner in which ‘hate speech’ is defined in the domestic legislation. For this reason alone, it cannot be said to be compatible with Articles 19 para 3 and 20 para 2 of the ICCPR. As was already pointed out, judicial involvement is not an adequate safeguard against the measure’s arbitrary or disproportionate application when the underlying legal basis is fundamentally flawed.

An additional problem with this measure is that it excises targeted content from the public sphere completely (the kind of response that should be reserved only for the most extreme forms of illegal content, such as child pornography or images of extreme graphic violence). This makes it impossible to conduct an independent analysis or monitor the actual practice of the use of this measure. In consequence, not only are the authorities enabled to target and remove content that is legitimate under international freedom of expression standards and to punish individuals and organisations for disseminating such content, but they are also able to shield any misuse of the hate speech/counter-extremist laws from public scrutiny.

## **Suspension of media outlets under the Mass Media Law**

The Law on Mass Media<sup>34</sup> poses a number of restrictions on the content of what may be published. Article 13 of the Law bans inter alia “advocating war, social, racial, national, religious, class and clan superiority;” disclosure of “technical principles and tactics of anti-terrorism operations during their conduct” or “propaganda for extremism or terrorism.” A violation of any of these prohibitions may lead to temporary suspension of registration of a media outlet; while a violation of the ban on extremism or terrorism and “publication of materials and distribution of information, oriented to incitement of cross-national and inter-confessional hatred” may lead to permanent loss of registration.

ARTICLE 19 has a number of concerns with regard to these provisions:

- Our first concern is that these restrictions repeat existing prohibitions under other legislations analysed above, or that they create subtle variations of existing prohibitions. From a purely legal point of view, repeating or varying these provisions in the Law on Mass

---

<sup>34</sup> The Law of the Republic of Kazakhstan dated 23 July 1999 No. 451-I, as subsequently amended.

---

Media creates a highly confusing situation. In addition, repeating the prohibitions sends a signal to the media that they are being singled out for special scrutiny, which is likely to have an illegitimate chilling effect on their right to freedom of expression. This concern is particularly valid given the broad and vague nature of these restrictions.

- Our second concern is that these restrictions are so broadly phrased that they are very easily abused for political purposes. As already reiterated above, all restrictions on freedom of expression must pass the requirements of the three part test. Vague and broadly worded restrictions constitute an illegitimate interference with the right to freedom of expression. It is also important that restrictions are not themselves stated in absolute terms and strike at the heart of the right to freedom of expression. The prohibitions on the publication of material that advocates social, racial, national, religious, class or clan superiority or “propaganda” for “terrorism” or “extremism” are very vague and easily abused for political purposes; and
- The prohibition on the disclosure of anti-terror tactics would make it impossible for the media to have any discussion over whether the army or police used the correct tactics in any given case, including, for example, when police “anti-terror” actions result in the deaths of civilians.

### **Blocking websites and entire networks under Law on Communications**

Article 41-1 of the Law on Communications grants the law enforcement and national security authorities and the Ministry of Information broad discretionary powers to temporarily suspend access to websites or even entire communication networks and service providers “or the circulation of information containing calls for extremist or terrorist activity.” In effect, the sole criterion for the application of this measure is that those websites, networks or providers are found to be carrying content that is deemed to be illegal (i.e. fall under a broad category of “extremist or terrorist activity”) by the authorities demanding the suspension. Like most of the other measures discussed above, this one is not specific to ‘hate speech’ but rather applies to a wide range of proscribed expression, of which ‘hate speech’ is a part due to the way it is characterised under domestic law (e.g. as a form of ‘extremism’).

ARTICLE 19 and the Legal Media Center note that website blocking is a disproportionate interference with the right to freedom of expression as it is ineffective to achieve its stated purpose. However, to the extent that governments seek to impose blocking measures, any such measure must be provided by law. Moreover, blocking should only be permitted in respect of content which is unlawful or can otherwise be legitimately restricted under international standards on freedom of expression. Accordingly, any law providing for blocking powers should do the following:<sup>35</sup>

---

<sup>35</sup> See, e.g. ARTICLE 19, [Freedom of Expression Unfiltered: How blocking and filtering affect free speech](#), December 2016.

- 
- Specify the categories of content that can be lawfully blocked, consistent with international standards on freedom of expression;
  - Specify the level or levels at which blocking may be applied and the kinds of technologies that may be used; in this regard, before using specific technologies, impact assessments should be carried out to determine whether the proposed technologies have a detrimental impact on freedom of expression and the right to privacy and whether alternative, less intrusive, methods could be used to achieve the same purpose;
  - Specify that blocking should only be authorised by an independent and impartial court with related procedural safeguards under the rule of law.
  - Any order to block access to content should be limited in scope and strictly proportionate to the legitimate aim pursued. In determining the scope of any blocking order, the courts should refer themselves to the following:
    - Any blocking order should be as narrowly targeted as possible;
    - Whether the blocking order is the least restrictive means available to deal with the alleged unlawful activity, including an assessment of any adverse impact on the right to freedom of expression;
    - Whether access to other lawful material will be impeded and if so to what extent, bearing in mind that in principle, lawful content should never be blocked;
    - The overall effectiveness of the measure and the risks of over-blocking.

However, the Kazakhstani law does not provide any additional criteria for implementing such a disruptive measure other than the supposed presence of illegal content. In particular:

- It does not narrow down the broad spectrum of expression constituting illegal content under domestic law to particularly egregious instances that may genuinely justify an urgent interference on this scale;
- It does not require the authorities to use the least restrictive approach or consider the negative impact of the suspension on freedom of expression and other rights and legitimate interests;
- It does not specify for how long such a suspension can be imposed, or

- 
- It does not provide for any procedural safeguards against unjustified/unlawful use of this measure.

The absence of such additional criteria is compounded by the underlining problems with the domestic definitions of illegal content (and, specifically, 'hate speech'). In consequence, this measure is clearly incompatible with Articles 19 para 3 and 20 para 2 of the ICCPR. It is worth reminding that the Human Rights Committee has signed out this type of practice for specific criticism:

Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3.<sup>36</sup>

## The enforcement of 'hate speech' restrictions

The enforcement of the existing restrictions on 'extremism' and 'hate speech'-like expression is marked by exceptionally low levels of transparency on the part of the authorities, partly due to the fact that 'hate speech' acts are categorised as 'extremism' and so are automatically treated as a grave national security risk necessitating secrecy. In particular, any 'hate speech' content labelled as 'extremist material' is completely excised from the public arena, preventing the possibility of its analysis by a third party. Even decisions in criminal trials under Article 174 of the Criminal Code are not made systematically available to the public.

While a comprehensive assessment of the current practices is not feasible for these reasons, the present section offers a brief overview of the limited available information, which, however, is sufficient to demonstrate how some of the major flaws of the existing legislation are misused in practice to penalise legitimate expression protected under Article 19 of the ICCPR.

The available evidence shows that the Kazakhstani courts adopt a **formalistic approach** to determining if a specific statement is 'extremist' (i.e. if it falls into any of the prohibited categories of 'hate speech'). The courts focus on the language of the statement, while making no meaningful attempt to establish and assess other crucial factors, such as (1) the speaker's intent to cause proscribed harmful consequences (e.g. a certain kind of

---

<sup>36</sup> General Comment No. 34, *op.cit.*, para 43.

---

“strife”), (2) the context in which the statement was made, both in the narrow sense of the expressive act of which the statement formed a part and in the broad sense of the social, political and economic context, or (3) the likelihood of any specific harm to be caused by the statement.

Neither the speaker’s actual ability to influence their audience, nor the audience’s likely perception of the statement are regarded as relevant. Instead, the courts and the prosecutors adopt what can be described as a ‘magic thinking’ approach: only the language itself matters, and once the language is found to be transgressive, the harm is automatically implied, irrespective of any external factors. The courts and the law enforcement authorities do not consider that the speech’s audience has its own agency which will determine how the audience will interpret, be influenced by, and react to the speech, including the audience’s capacity to respond with counter-speech.

As an offshoot of the strictly textual approach, the courts are **excessively reliant on expert opinion in the form of linguistic expert assessments**. This is done at the expense of the court’s independent analysis of all relevant circumstances, including the language used. Whether it is a criminal trial or a civil-law hearing on restricting “extremist material,” a ‘hate speech’ case stands or falls by the conclusions of the expert report.

The courts **do not consider the conflicting interests** of freedom of expression and so make no attempt to balance the need for restricting ‘hate speech’ against the need to protect freedom of expression in individual cases. In fact, the defendant’s right to freedom of expression is not discussed even in the most superficial manner. The lack of a rights balancing effort is also reflected in the special procedure under which the cases on recognition of certain information materials or organisations as “extremist” are normally considered by the court. This simplified court procedure does not require presence of a defendant and is inherently designed to protect the rights and interests of an applicant (who is normally a representative of state authorities – a prosecutor). The respective court decisions on recognition of organizations as “extremist” are rarely accessible for public scrutiny.

Without careful consideration of the above factors, it is impossible to determine whether a specific act of ‘hate speech’ attains the level of severity that justifies its restriction in any form under international law. However, the problem with the enforcement practice and the underlying legislation in Kazakhstan does not stop there. It is not only that the ‘hate speech’ legislation is used to restrict forms of ‘hate speech’ that are protected by freedom of expression - this legislation has also been used to prosecute political and civil society activists and members of religious minorities for statements that are clearly not ‘hate speech’ of any kind.

---

Thus, for instance, **civil society campaigner Saken Baykenov** was sentenced to 2 years in prison for criticising the policy of leasing the Baikonur spaceport to Russia because of the environmental concerns about the type of fuel used for Russian space rockets. The Court held that his statements had “signs of igniting social [and] national hostility or strife, insulting national honour and dignity, and expression of the exceptionalness and superiority of one nation and religion vis-a-vis the other.”<sup>37</sup> No further explanation/analysis is provided in the judgment - the court just mechanically relates the phrases from the law.

The notion of “igniting social strife” has been specifically exploited to target legitimate political expression, including by virtue of characterising public officials as a protected “social group.” For instance, in the case against **political movement ‘The Democratic Choice of Kazakhstan’** the court interpreted the criticism of the government contained in its political programme as an attempt to “create a negative perception of the authorities” with the aim of “triggering social strife.” The elements of the programme that directly appealed to the interests of coalminers, oil industry workers and other groups were viewed as further “evidence” of the movement’s aim to cause “social strife.”<sup>38</sup>

The conviction of activists **Maks Bokaev and Talgat Ayan** is another example of the misuse of the concept of “social strife” in order to punish political activism. Bokaev and Ayan were sentenced to 5 years in prison for organising a rally against the rumoured decision of the government to lease a significant amount of land to China. Their conviction was partly based on Article 174 of the Criminal Code, in respect of which the court found that their statements were designed to create negative attitudes towards “social groups” such as members of parliament and “professional groups” such as law enforcement personnel and, consequently, pursued the aim of “igniting social strife.”<sup>39</sup>

The excessively vague concepts of “igniting national strife, insulting honour and dignity of Kazakh nation” were also applied to suppress public discussion of the creative literary works. Activists and bloggers **Serikjan Mambetalin and Yermek Narymbayev** received criminal convictions for discussing on Facebook an alleged ‘extract’ from the book of Murat Telibekov “Wind from the street” (the book’s author had been also a target of criminal persecution which was then suspended). Ironically, the discussed ‘extract’, as claimed by the author, had never been a part of his book but nevertheless, led to the

---

<sup>37</sup> The judgment is on file with ARTICLE 19. Some media reporting on the case can be found (in Russian) [here](#).

<sup>38</sup> The judgment (in Russian) can be found [here](#).

<sup>39</sup> The judgment is on file with ARTICLE 19. The case was criticised by the Special Rapporteur on counterterrorism and human rights, following her visit to Kazakhstan in 2019, see A/HRC/43/46/Add.1, para. 22. See also her statements on this case [reported in the media](#) (in Russian).

---

criminal conviction of Mambetalin and Narymbayev. The impugned text is removed from public circulation and thus, there is no possibility of the public scrutiny of the respective court judgments (in this case the original decision of the court of the first instance was later slightly alleviated by the court of appeals).

Another specific concern is the use of the notion of “insulting religious feelings” included in Article 174 of the Criminal Code to prosecute members of religious minorities, ostensibly for statements that may be regarded by some as “blasphemous.” For instance, **Jehovah’s Witness Teymur Akhmedov** was convicted to a 5-year prison sentence for mildly negative comments about certain religious practices in Islam that he had made at a meeting of a Jehovah’s Witnesses’ group.<sup>40</sup>

---

<sup>40</sup> The judgment is on file with ARTICLE 19. Some media reporting on the case can be found [here](#) (in Russian).



---

# Conclusion: key problems identified

The analysis of the Kazakhstani 'extremism' and 'hate speech' legislation included in this report reveals a number of serious flaws that make this legislation incompatible with international standards on freedom of expression. In particular:

- The legislation relies on excessively vague and undefined terminology to determine forms of prohibited expression. This opens it to overbroad interpretation and misuse, allowing the authorities to restrict legitimate expression simply because it is critical or offensive or because it does not conform to a narrative favoured by the State;
- The legislation does not expressly require the speaker's intent to cause certain harm (discrimination, hostility or violence) as an essential element of prohibited forms of hate speech;
- The legislation does not require that prohibited 'expression must be likely to cause certain harmful consequences (discrimination, hostility or violence). This opens it to excessively broad and formalistic application which focuses merely on the content of the contested expression but does not take account of the context or the likely perception by the audience;
- Sanctions against individuals for the violation of the law are limited to particularly severe criminal penalties. Those penalties can only be justified in the most exceptional narrowly defined cases which involve incitement to violent acts, but they are disproportionate for most instances of criminal 'hate speech' as it is defined in the Criminal Code;
- The already excessively harsh criminal penalties are compounded by highly disruptive extra-criminal sanctions under the counter-extremism law that are automatically imposed on all individuals convicted for 'hate speech' offences. These secondary sanctions are rooted in the formal categorisation of 'hate speech' acts as 'extremism', but they otherwise lack any plausible justification and, in many cases, they can be more onerous than the actual criminal sentencing;
- Sanctions against legal entities (e.g. media outlets and not-for-profit organisations) are limited to liquidation and permanent banning which can be imposed under the counter-extremism legislation. The authorities are granted the discretion to impose these extreme measures regardless of the seriousness of a 'hate speech' incident (defined as 'extremism'), its scale or frequency. However, under international law, such

---

measures can only be justified in the most exceptional circumstances where less restrictive measures are not sufficient;

- This and other measures, including the removal of content labelled as “extremist material”, are fatally tainted by the excessively broad underlying legal definitions of “hate speech”-like expression. In consequence, they all can be employed in an arbitrary and/or disproportionate manner and misused to penalise legitimate expression such criticism of public officials or governmental policies;
- The mandatory judicial involvement in the implementation of some of these measures (the liquidation of “extremist organisations” or removal of “extremist” content) cannot provide an adequate safeguard against their arbitrary or disproportionate application, because the underlying legislation is too vague and ambiguous to provide sufficient guidance to the judiciary and it fails to ensure that decisions are balanced against the need to protect freedom of expression;
- The executive authorities are also granted a very wide discretion to suspend websites and even entire networks and communication services when they believe that those carry illegal content, including ‘hate speech’. So disruptive a measure is generally disfavoured under international law, and it requires a particularly strong justification. However, the law fails to ensure that it is limited only to the most exceptional circumstances and applied only for the shortest period of time and only when no other less restrictive response is sufficient.

Although some of the above flaws in the legislative framework could be partially rectified through a restrained and human rights compliant interpretation of the law in practice, this has not occurred in Kazakhstan. Conversely, the available evidence shows that the flaws are amplified and even deliberately exploited to target legitimate expression. Specifically:

- The legislative definitions of proscribed speech are interpreted expansively rather than narrowly. For instance, terms such as “social strife” are stretched to cover statements critical of governmental policies and decisions;
- In determining if a given statement is a proscribed form of “extremist” expression/hate speech, no consideration is given to the speaker’s intent, the expression’s context, its audience, or the likelihood of harm to occur. A supposedly transgressive statement is automatically assumed by authorities to produce harmful consequences in the real world such as some form of “strife”;
- The law enforcement authorities and courts are fully reliant on linguistic expert reports in their assessments of proscribed speech, at the expense of their own independent analysis of the content of the expression and other relevant circumstances. Such total

---

and totally misplaced reliance on linguistic expertise shifts de facto responsibility from the courts and law enforcement authorities to forensic experts who by definition are unqualified and unauthorised to make determinations on points of law;

- Considerations related to protection of freedom of expression do not enter judicial analysis in 'hate speech' cases. The impact that criminal sanctions or other restrictions may have on freedom of expression is not viewed by courts as a relevant factor. In consequence, courts make no attempt to assess whether the restriction is strictly necessary and proportionate as per the requirements of international human rights law.

---

# Recommendations

ARTICLE 19 and the Legal Media Center believe that a serious overhaul of the ‘extremism’ and ‘hate speech’ laws is required to bring them in line with Kazakhstan’s international obligations and achieve the right balance between protecting individuals against discrimination and hate-motivated violence on the one hand and protecting the right to freedom of expression on the other. As a starting point, these two objectives should not be viewed by policymakers, courts and other stakeholders as mutually exclusive. When freedom of expression is excessively restricted, it stifles public debate on the issues of discrimination, prejudice and hate, their underlying causes and possible solutions; it also silences the voices of minorities and the marginalised. So, in the end, the restrictions become counterproductive to the very purpose they are supposed to serve.

Reforming the legislation, however, is only part of the answer. It is equally important that the law is interpreted and applied in a manner consistent with human rights standards and, specifically, with the guarantees of the right to freedom of expression. In fact, considerable positive change can be achieved even before the much needed reform is completed, providing that the courts and law-enforcement authorities implement the relevant legislation with reference to Kazakhstan’s international human rights obligations - for instance, by carefully assessing the necessity and proportionality of restrictive measures in every individual case.

ARTICLE 19 and the Legal Media Center make the following recommendations to the Kazakhstani government:

- As a general point, all legal restrictions on freedom of expression should be compliant with the requirements of legality (i.e. they must be sufficiently clear and precise), necessity (i.e. they must be necessary to achieve one of the legitimate aims of limiting freedom of expression under international law, such as protecting the rights of others), and proportionality (i.e. a particular restriction can be imposed only if a less restrictive alternative is not sufficient). All legal restrictions on incitement should be formulated with reference to the six-factor test set out in the Rabat Plan of Action.
- We oppose the use of the inherently vague notion of ‘extremism’ as a basis for rights restrictions, and we strongly recommend the repeal of the ‘counter-extremist’ laws in their current form. At the very least, however, all forms of expression that do not constitute direct incitement to violence should be removed from the scope of the “counter-extremism” laws and, accordingly, from the application of “counter-extremist” measures such as lists of prohibited extremist materials and bans on “extremist” not-for-profit organisations and media outlets.

- 
- Restrictions imposed on freedom of expression under Articles 5, 20 and 39 of the Constitution should be reviewed to ensure that they only allow limiting expression that amounts to incitement to discrimination, hostility or violence on the basis of internationally recognised protected characteristics. In particular, restriction of expression on the basis of inciting “social strife” (and the implied protected characteristic of belonging to a social group) should be completely removed due to its inherent lack of clearly defined boundaries;
  - The definitions contained in Article 174 of the Criminal Code should be substantially revised to make it clear that this provision applies only to speech that amounts to incitement to discrimination, hostility or violence - which in turn requires the proof of intent to cause discrimination, hostility or violence. The category of expression “insulting the national honour and dignity of citizens or the religious feelings of individuals” should be removed altogether;
  - Criminal forms of ‘hate speech’ should be removed from the category of crimes against humanity and war crimes and instead included among crimes against the individual. Irrespective of the formal categorisation, prison sentences should be envisaged only for the most serious forms of incitement to violent action;
  - Individuals convicted under Article 174 of the Criminal Code should be removed as a category of individuals automatically placed on the list of entities and individuals linked to financing terrorism and extremism under Article 12 of the Law on countering the legitimisation of criminally-obtained profits (money-laundering) and financing of terrorism. All such individuals currently on the list should be removed from it;
  - While the penalisation of ‘hate speech’ under Article 453 of the Code of Administrative Offences is a significantly milder alternative to Article 174 of the Criminal Code (and, therefore, it is welcome as such), the law should provide clear criteria to ensure that the law-enforcement authorities’ decisions under which of the two provisions to prosecute are consistent and non-arbitrary and that only the most serious cases get prosecuted under Article 174. Article 453 of the Code of Administrative Offences should be modified so that it is limited only to intentional acts, with intent required both for the act itself and for the harmful consequences;
  - The definitions of prohibited ‘hate speech’-like expression that are contained in other legislation should be also revised to ensure that they are limited to expression amounting to incitement of discrimination, hostility or violence (e.g. in the context of banning so-called “extremist materials);
  - Closures of organisations and media outlets (including blocking entire websites) should be permitted only as a last resort in the most exceptional circumstances.

---

Less restrictive alternatives should be envisaged for media, such as self-regulatory complaint mechanisms and financial penalties;

- Restrictions on ‘extremism’ and ‘hate speech’ in the Law on Mass Media should be reviewed for compliance with international law standards on freedom of expression. To the extent that they are legitimate and necessary, they should be moved to legislation of general application;
- Redress under civil law should be made available as a less restrictive alternative, involving the possibility for victims of ‘hate speech’ and for NGOs to seek redress in the form of pecuniary and non-pecuniary damages, the right of correction and reply (for incidents of ‘hate speech’ in the media) and/or a public apology.

ARTICLE 19 and the Legal Media Center further recommend the following steps to improve the implementation of the existing legislation as well as ensure that any future legislation will be enforced in a human rights compliant manner:

- The courts should interpret and apply all legal provisions restricting ‘extremism’ and ‘hate speech’ in a manner consistent with the requirements of international human rights law, in particular, Article 19 para 3 and Article 20 para 2 of the ICCPR (as interpreted in the Rabat Plan of Action). This involves interpreting the current definitions of prohibited ‘hate speech’ narrowly so that, wherever possible, they are narrowed down to advocacy of hatred amounting to incitement (подстрекательство) to discrimination, hostility or violence;
- In determining if a particular statement falls under a prohibited category, analysis should never be limited to the language of that statement. The courts and law-enforcement authorities in charge of investigating ‘extremism’ and ‘hate speech’ cases should always establish the speaker’s intent to cause prohibited consequences. Furthermore, they should always consider the likelihood of harm to be caused by the statement - and, to that end, the context in which it was made, its extent and magnitude, and the speaker’s position and their authority or influence over their audience;
- The courts and law-enforcement authorities should minimise their reliance on expert assessments in ‘extremism’ and ‘hate speech’ cases. They should only seek expert opinion when specialist knowledge is truly needed to interpret or assess particular evidence. The courts should never substitute their own assessment for the analysis performed by experts;
- Blocking of website should only be authorised by an independent and impartial court with related procedural safeguards under the rule of law. Any order to block access to content should be limited in scope and strictly proportionate to the legitimate aim

---

pursued. In the interim, we also recommend that law enforcement authorities should not exercise their powers to suspend access to websites, communication services and networks and other measures granted to them under the Communications Law;

- Restrictions on 'extremism' and 'hate speech' in the Law on Mass Media should be reviewed for compliance with international law standards on freedom of expression. To the extent that they are legitimate and necessary, they should be moved to legislation of general application;
- Judges, law-enforcement officials and other relevant officials (e.g. those involved in media regulation) should be provided with comprehensive and regular training on international human rights standards and comparative good practices relating to hate speech;
- In collaboration with experts and civil society, law enforcement authorities should develop investigative guidelines on the prosecution of 'extremism' and 'hate speech' cases in line with international human rights standards;
- The relevant executive authorities should exercise self-restraint in the use of restrictive measures at their disposal. In particular, they should seek the liquidation/banning of not-for-profit and media organisations only in the most serious cases of repeated violation of 'extremism' and 'hate speech' law restrictions and after all other less restrictive interventions at their disposal have proven to be insufficient;

---

# About ARTICLE 19 and the Legal Media Center

**ARTICLE 19** advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, 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, freedom of expression and equality, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation 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 at <https://www.article19.org/resources.php/legal>.

For more information about the ARTICLE 19's work in Kazakhstan and in Europe and Central Asia, you can contact us by e-mail at [eca@article19.org](mailto:eca@article19.org)

**The Legal Media Center** is a Kazakhstani non-governmental organisation that has been working in the field of mass media, legal defence, and journalism training since 2003. The Legal Media Center works to develop high-quality and professional media in Kazakhstan through providing comprehensive training to journalists and promoting the interests of the media community. In addition, the Legal Media Center promotes international human rights and freedom of expression standards through its participation in the development of new legislation and conducts regular monitoring and research.





## **DEFENDING FREEDOM OF EXPRESSION AND INFORMATION**

---

ARTICLE 19 Free Word Centre 60 Farringdon Road London EC1R 3GA

T +44 20 7324 2500 F +44 20 7490 0566

E [info@article19.org](mailto:info@article19.org) W [www.article19.org](http://www.article19.org) Tw [@article19org](https://twitter.com/article19org) [facebook.com/article19org](https://facebook.com/article19org)