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*Analysis of
the Draft Law “On Introduction of Amendments and Additions into Certain
Legislative Acts of the Republic of Kazakhstan on Matters Related to
Noncommercial Organizations
and
the Draft Law “ On the Activities of Branches and Representative Offices
(Separate Subdivisions) of International or Foreign Non-commercial
organizations in the Republic of Kazakhstan”*

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This analysis was prepared by the International Center for Not-for-Profit Law (ICNL) within the framework of the Civil Society Support Initiative, under the leadership of Counterpart International with financial support from USAID.

This analysis¹ was prepared upon request by the USAID Mission in Kazakhstan. This Analysis focuses on the RK Draft Laws “On the Activities of Affiliates (Separate Subdivisions) of International or Foreign Non-commercial organizations in the Republic of Kazakhstan”, as well as “On Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan on Matters Related to Noncommercial Organizations”, which were presented to the Majilis of the Parliament of the Republic of Kazakhstan by a group of deputies on the 20th of April, 2005 (“The Draft Laws”).

The Draft Laws contradict international laws and international best practices. If enacted, these laws will result in the termination of the invaluable assistance to Kazakhstan provided by many foreign and international organizations and undermine the development of civil society. The Draft Laws would damage the international reputation of the Republic of Kazakhstan, placing it in line with countries such as Turkmenistan and Belarus with respect to NGO legislation.

Unfortunately, we do not see an opportunity to modify the Draft Laws so that they would implement beneficial goals for the state and be in line with international norms. The only task of the Draft Laws, on admission by the drafters themselves, is deemed to be the strengthening of control over non-commercial organizations’ activities. Presently, several Kazak laws, including the Law “On Non-commercial Organizations”, the Law “On State Registration of Legal Persons and Record Registration of Branches and Representative Offices”, the provisions of the Criminal Code and the Code on Administrative Offence contain enough provisions allowing for supervision and control over non-commercial organizations’ activities. The introduction of additional control mechanisms, in the absence of any argument concerning their necessity, is an unjustified waste of state resources.

¹ Draft under revision.

This Analysis consists of two sections. The First section addresses the Draft Law “On the Activities of Branches and Representative Offices (Separate Subdivisions) of International or Foreign Non-commercial organizations in the Republic of Kazakhstan” and the second on the Draft Law “ On Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan on Matters Related to Non-commercial Organizations”. The Analysis evaluates the proposed Draft Laws on their compliance with the norms of international law and generally accepted international best practice. The Analysis also considers the consequences which would occur in the event of the adoption of the Draft Laws.

In addition, the Analysis considers the drafter’s arguments in support of the Draft Laws proposed in the Explanatory Note to the Draft Laws. The authors of this Analysis have chosen not to be restricted by the interpretation of the relevant provisions of international documents and laws of other countries to which the drafters themselves refer, but to provide the individuals concerned about the Draft Laws with the opportunity to familiarize themselves with these documents and to become aware of the inaccurate interpretation of these documents by the drafters.

We hope that this Analysis will help prevent the numerous problems which will arise in connection with the adoption of the Draft Laws and to preserve the image of Kazakhstan as one of the most democratic states in Central Asia.

<p>Analysis of the Draft Law “On the Activities of Branches and Representative Offices (Separate Subdivisions) of International or Foreign Non-commercial organizations in the Republic of Kazakhstan”</p>

The main problems of the Draft Law “On the Activities of Branches and Representative Offices (Separated Subdivisions) of International or Foreign Non-commercial Organizations in the Republic of Kazakhstan” (Draft Law) are:

- 1. The two-level accreditation and record registration system for branches and representative offices of international and foreign organizations.**
- 2. The requirement related to re-registration of all international and foreign organizations currently operating in Kazakhstan.**
- 3. The prohibition of the expression of opinion, the obtaining and distribution of information for foreign and international organizations.**
- 4. Termination of the invaluable assistance to Kazakhstan provided by many foreign and international organizations.**
- 5. Ungrounded requirements for branches and representative offices (separate subdivisions) of international or foreign noncommercial organizations in the Republic of Kazakhstan and unreasonable obligations for local executive bodies.**
- 6. Deficiencies in the accreditation procedure outlined for foreign and international organizations.**
- 7. Discrimination with respect to foreign citizens and stateless persons.**

Below follows a more in-depth, detailed analysis of each of the listed problems:

- 1. Two-level accreditation and record registration system for branches and representative offices of international and foreign organizations.**

Article 6: The branches and representative offices (separate subdivisions) of international or foreign non-commercial organizations in the Republic of Kazakhstan shall be subject to accreditation and record registration.

Analysis:

Foreign and international organizations are required to go through a more complicated registration procedure consisting of two stages (accreditation and record registration) in comparison with the single stage registration process for Kazakhstan non-commercial organizations and foreign commercial organizations. In attempting to justify such discriminatory provisions, the drafters refer to international practice, particularly to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations. The drafters state that the Convention allows for special restrictions with respect to an international nongovernmental organization in the country in which it is created. Such an interpretation is not correct and is taken out of context. The above Convention allows organizations registered in the territory of one of the states-participants of the Convention, to carry out the activities in the territory of any state-participant of the Convention without any registration. These organizations enjoy the same rights and have the same obligations as the local organizations in the respective country. The Convention makes allowance that with respect to such organizations there may be additional certain requirements that are not applicable to local organizations (The text of the Convention is attached). The drafters interpreted the provisions too broadly when they interpreted a “no-registration required” provision of the Convention to justify an extremely complicated two-stage registration procedure for foreign and international organizations in Kazakhstan.

The drafters also refer to “Fundamental Principles on the Status of Non-governmental Organizations in Europe”, which was approved by the Resolution of the Committee of Ministers of the European Council at the 87th session on April 16, 2003. This document envisions that permission may be required before foreign nongovernmental organizations can undertake activities in one or another country (The text of the this document is also attached to the Analysis for further review). This principle, that the possibility of obtaining permission for the activities for a foreign organization provided for in the Fundamental principles, does not, in any way, justify the proposed double procedure for accreditation and record registration in Kazakhstan. The proposed procedure is in conflict with the provisions and the spirit not only of the given documents, but also of other international documents, establishing the guarantees of the freedom of expression and the freedom of association. (See also Analysis to Problem #2).

2. Requirement related to re-registration of all foreign and international organizations currently operating in the Republic of Kazakhstan.

Article 11, Point 2 and 3. The branches and representative offices [separate subdivisions] of international or foreign noncommercial organizations, created prior to the enactment of the present Law, must undergo accreditation with the Ministry of Justice in the procedure established by the legislation and re-registration within three months from the day of the entering of the present Law into force.

Branches and representative offices (separate subdivisions) of international or foreign noncommercial organizations, not having fulfilled the requirements of Point 2 hereof, shall be subject to liquidation in the judicial procedure on application of the procurators office with advice from the bodies of justice.

Analysis:

Any re-registration is a costly and labor-consuming process which requires substantial resources both from organizations subject to re-registration and from state agencies conducting re-registration. In the absence of serious grounds which would require such an action, re-registration is a serious waste of state resources. At present, international and foreign organizations are registered and operate in the Republic of Kazakhstan on the basis of the RK Law #2198 “On State Registration of Legal Entities and Record Registration of Branches and Representative Offices” dated April 17, 1995 (with subsequent amendments). These organizations operate within the framework of the law, participate in socially beneficial activities and finance important social programs. There is no base to require re-registration. Re-registration would also create numerous new problems with the accreditation procedure proposed in the Draft Laws. (See Analysis regarding Problems 1 and 6 in the present Analysis.)

3. Prohibition of the freedom for expression of opinion, the obtaining and distribution of information for foreign and international organizations.

The Draft Law, as a whole, Art. 4, Points 2, 3 (3-5): Branches and representative offices (separate subdivisions) of international and foreign non-commercial organizations in the Republic of Kazakhstan may not be created for expressing the political will of citizens, various social groups, as well as for the purposes of representation of their interests in the representative and executive state agencies, bodies of self-government, and participation in their formation. Also, (Art. 4, Section 3, Points 3-5) they may not carry out activities directed at the disorganization of state agencies’ activities, the violation of their uninterrupted functioning, the decrease in the level of manageability of the country, and other consequences undesirable for Kazakhstan.

Analysis:

The Draft Law as a whole, and Point 4 in particular, violate the right for the freedom of expression for foreign and international organizations and are in conflict with the norms and the principles of international law, guaranteeing the right of expression. Although the Republic of Kazakhstan is not a member of the European Convention for the Protection of Human Rights and Basic Freedoms, this Convention is generally recognized as the standard of democracy for any state. Therefore, it is important to note that the Draft Law is directly in conflict with the European Convention for the Protection of Human Rights and Basic Freedoms, in which Article 10, Section 1 it is clearly stated that “Every individual has the right to express his opinion freely. This right includes the freedom to stand by one’s own opinion and the freedom to obtain and disseminate information and ideas without any interference on the part of public authorities and regardless of the state borders”. The reference to “independence from state borders” in Article 10 clearly indicates that not only local, but also foreign and international organizations, fall under the protection of Article 10.

When prohibiting the creation of branches and representative offices of international and foreign organizations for the expression of the political will of citizens and various social groups, the drafters refer to the example of Spain, where the law prohibits nongovernmental organizations to engage in intelligence related activities or organization of paramilitary formations to pursue unlawful goals and co-operate with terrorism. The reference to Spain is absolutely correct. In Spain the law prohibits not only non-governmental organizations, but also any individuals and legal entities to engage in terrorism, intelligence or other illegal activities.

However, it seems, that there is a difference between the prohibition of terrorism and the representation of the interests of the unemployed, single mothers, and other deprived groups.

4. Termination of the invaluable assistance to Kazakhstan provided by many foreign and international organizations.

The Draft Law as a whole, Article 2, Point 1 (the carrying out of activities only through branches or representative offices)

Article 4 Point 2 (the prohibition of the establishment of branches for the purposes of expressing the political will of citizens, various social groups, as well as the prohibition for carrying out of activities)

Analysis:

The Draft Law will affect not only traditional advocacy and human rights groups but also all NGOs including social services providers, humanitarian, and relief organizations. Article 2 Point 1 effectively prohibits any humanitarian and technical aid to the Republic of Kazakhstan when an organization providing it does not have a branch or representative office in the Republic of Kazakhstan. Considering the complicated registration procedure for the branches and representative offices of foreign and international organizations, as well as the unbearable reporting requirements (See analysis for Problems 1, 5, and 6 in the present Analysis), Kazakhstan will incur severe negative consequences if this provision is adopted.

Since in Article 4, Point 2, it is not clear what the meaning of “expression of will”, the Article prohibits foreign organizations to provide assistance to large families, the unemployed, refugees, and other social groups, since a piece of bread given to a refugee may lead to an increase in their social and political activities. In addition, Kazakhstan will be deprived of important social aid and many international organizations may decide to provide such assistance to other countries in the region instead of trying to interpret and object to this provision.

Article 4 also provides an unjustifiably wide range of potential reasons for the prohibition of the activities of branches and representative offices (separate subdivisions) of international and foreign noncommercial organizations. There is no definition provided of “consequences, undesirable for Kazakhstan” and “the decrease in the level of manageability in the country”. The interpretation of these and other grounds remains at the discretion of officials. Based on these provisions, an official may forbid the activities of any foreign or international organization. This will also lead to a rise in corruption and the termination of activities of many international and foreign organizations in Kazakhstan who will not wish to operate under the constant threat of liquidation for the reasons stated in the provision.

5. Unjustified requirements for branches and representative offices (separate subdivisions) of international and foreign noncommercial organizations in the Republic of Kazakhstan and unreasonable obligations for local executive bodies.

Article 5. Point 2: Branches and representative offices (separate subdivisions) of international or foreign noncommercial organizations in the Republic of Kazakhstan shall be obliged:

- 1) To notify the local executive bodies of the oblast, the city of republican significance, or the capital not later than 10 days concerning the holding of activities (conferences, presentations, training, exhibitions, seminars etc.) at the

- expense of the organization, or with funds provided by international and foreign organizations, foreigners, stateless persons, or legal entities;
- 2) To provide the local executive agencies with access to the activities held, indicated in Sub point 2) of this Point, as well as to the information on the number and the composition of participating individuals;
 - 3) On request of local executive bodies to provide materials on the activities held.

Analysis:

The request for foreign international and foreign organizations to provide information on conducting any events currently exists only in a few countries, including Uzbekistan, Turkmenistan and Belarus.

Any assembly of “more than two persons” may be recognized as an activity and may serve as the grounds for liquidation of any organization. Thus, any organization, no matter how much it has tried to implement the law, may be liquidated on the basis of the proposed provisions, since the failure to notify a local authority poses a threat of suspension and liquidation of the activities of the branch or representative office (Article 7(1)(1) of the Draft Law).

In addition, the provisions of Articles 5 and 8 are impracticable for local state agencies on whom additional obligations are imposed. No funds have been allocated to help fulfill these obligations. Local state authorities will require additional resources for the creation of staff who would be responsible for approving the funds and visiting the events. Also, any allocation of such funds would be an irresponsible waste of state resources since it is not clear why the local agencies need this information and what purpose it would serve.

6. Deficiencies in the accreditation procedure outlined for foreign and international organizations.

Article 6, point 2 paragraphs 4 and 5: The Ministry of Justice has the right to request additional materials necessary for consideration of the application related to the accreditation of the branch and the representative office (separate subdivision) of an international or foreign non-commercial organization. The deadline for consideration of an application for accreditation of the branch and representative office (separate subdivision) of an international or foreign non-commercial organization shall not exceed thirty calendar days and shall be calculated from the day the full set of documents was submitted.

Analysis:

Requirements for the accreditation of branches and representative offices (separate subdivisions) are not well thought-out and may cause problems both for foreign and international organizations and for the registering agencies. For example, article 6 point 2(5) provides that the counting down of the term of documents’ examination starts from the day of submission of the full set of documents for accreditation. This provision creates concern since in the same sub-point the Ministry of justice, the body conducting the accreditation, is given the right “to request additional materials, necessary for consideration of an application for accreditation of the branch and representative office (separate subdivision) of international or foreign noncommercial organization”. Thus, the Draft law may create the possibility of a “legal eternity” for an incomplete set of documents for accreditation. Should the Ministry of justice request one more document, this new set of documents submitted for accreditation would start the process again from the beginning since it means the original set of documents was

not complete. At the same time, the foreign organization is deprived of the opportunity to appeal any decision related to the submission of documents.

7. Discrimination with respect to foreign citizens and stateless persons.

Article 6 Point 1. Only a citizen of the Republic of Kazakhstan may be deemed to be the Head of the branch and representative office (separate subdivision) of an international or foreign noncommercial organization in the Republic of Kazakhstan.

Analysis:

The Requirement concerning the appointment of only a citizen of Kazakhstan to the position of the Head of branch or representative office of a foreign or international organization is in conflict with international best practice. Most European countries do not have a nationality related requirement for members or top managers. Some countries, for example Luxemburg and Belgium, were forced to amend their legislation, where it was provided that 3/5 of the members must be citizens of the corresponding states, as a result of the decision of the European court of justice dated 1999, which established that the respective corresponding provision of the Belgian law violated Article 12 of the agreement of the European Council on prohibition of discrimination against citizens of the members of the European Council on the basis of their citizenship/nationality.²

In its “Resolution on nonprofit associations in European Community”³ the European Parliament resolved a problem concerning the inadmissibility of any discriminating measures on the basis of citizenship/nationality, affecting the right to participate, create or manage a association, with respect to citizens of the participating states of the European Community.

In its commentary to the International Pact on Civil and Political rights, UN Committee on Human Rights⁴ determined that “Thus, common rule should be such that each of the rights guaranteed shall be guaranteed without discrimination between citizens and non-citizens. Non-citizens shall enjoy the same benefits by the general rule of non-discrimination in respect to the rights, guaranteed in the Pact... As an exception, some rights shall be recognized as being only for citizens (article 25 of the Pact). Such exceptions may include the participation in state affairs, direct and free election of representatives, and access to the services, financed by the state.”

In an attempt to justify the discrimination with respect to stateless persons and foreign citizens, drafters, in the explanatory note, refer to the Law “On associations” of the Polish Republic, where it is supposedly determined that only citizens of Poland shall be deemed to be top managers of noncommercial organizations, including international and foreign. In doing so, their number must be no less than 15 persons. In fact, the Polish Law on associations does not provide any restrictions for individuals who can become top managers of an association. The Law establishes that only citizens of Poland can become founders of an association (article 3 part 1). The Law (article 4) also establishes that foreign citizens can be

² Commission of the European Communities v the Kingdom of Belgium, 1999.

³ Resolution on non-profit-making associations in the European Communities, by European Parliament, was submitted by the Committee on Legal Affairs and Citizens' Rights to the European Parliament (1). This was accompanied by an explanatory statement (see *Appendix 3.6*). The report was tabled on 17 December 1986. The resolution was debated in the European Parliament on 12 March 1987 and the following amended resolution was adopted on 13 March 1987 <http://www.uia.org/legal/app412.php>

⁴ General Comment No. 15: The position of aliens under the Covenant: 11/04/86. CCPR General Comment No. 15. (General Comments) <http://www.unhcr.ch/tbs/doc.nsf>

members of association. Further, the Law allows foreigners to be managers of associations. The requirement for the presence of 15 people, set by the drafters of the draft law, also has nothing to do with governing bodies. Article 9 of the Polish law requires a minimal number of 15 people to establish the association⁵.

Analysis of the Draft Law “On the Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan On Matters Related to Non-commercial Organizations”

The main problems in the Draft Law “On Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan on Matters Related to Non-commercial Organizations” include the following:

- 8. Establishment of disproportionate repressive sanctions for the untimely notification by a NCO to the local executive agencies on the holding of events.**
- 9. Discrimination against foreign citizens and stateless persons.**
- 10. Barriers for the noncommercial sector of RK to receive financing.**

Below follows a more in-depth, detailed analysis of each of the listed problems:

8. Establishment of disproportionate repressive sanctions for the untimely notification by a NCO to the local executive agencies on the holding of events.

Article 374-2 Point 2 of the Code of RK of Administrative Offence: “Failure to inform, untimely notification by noncommercial organizations of the local executive agencies of the oblast, city of republican significance or capital, on holding of the events at the expense of funds, provided by international and foreign organizations, foreigners, stateless persons, foreign legal entities, - Shall entail a fine for noncommercial organization at the rate of two hundred MIF with prohibition of operation of noncommercial organization or without such”.

Analysis:

A fine in an amount of 1,500 USD with the subsequent liquidation of the non-commercial organization for the untimely notification on holding any event under foreign financing is deemed to be a punishment not proportionate to the violation. The sanction can be applied even if an NCO notifies the state authority within 9 days prior to the date of holding the activity, instead of 10 days, required by the law. The sanction is especially frightful since the Kazakhstan legislation does not provide a definition of what constitutes an “event” of which one should be notified. Any assembly of “more than 2 individuals” can be recognized as an event and may serve as a grounds for liquidation of any organization. Thus, any organization, no matter how hard it has tried to obey the law, can be liquidated on the basis of the proposed

⁵ It should also be noted that citizens in Poland have an alternative between the creation of an association (legal entity) and a simple association, which does not have the status of a legal entity and requires only 3 people to create.

sanctions. These repressive sanctions could lead to the complete destruction of the entire noncommercial sector of RK.

9. Discrimination against foreign citizens and stateless persons.

Article 12 point 2 part 3 Law of the RK “On non-commercial organizations”: “Foreigners and stateless persons do not have the right to be managers, members of the executive governing body of the foundations and its board of trustees”.

Analysis:

The Article is in conflict with Article 12 (4) of the Constitution of RK where it is clearly stated that foreigners and stateless persons in the Republic of Kazakhstan shall enjoy the same rights and fulfill the same obligations as the citizens of RK, unless otherwise provided for by the Constitution, laws and international agreements. The restriction of the rights of foreign citizens and stateless persons to participate in, and manage, the activity of an association has been repeatedly recognized by international institutions as a violation of human rights guaranteed by international legal acts, such as, for example, the International Pact on civil and political rights. (See also Analysis in the problem 7 of the present Analysis.)

10. Barriers for the non-commercial sector of RK to receive financing.

Article 35 point 2-1 of the Law of RK “On non-commercial organizations”:
“2-1. Financing of non-commercial organizations, including voluntary property contributions, donations and any other types of material assistance, from foreign countries, foreign legal entities, international organizations, foreigners, stateless persons and legal entities with foreign participation shall be conducted by consent of local executive agencies (city of oblast significance). Such consent is not required if the branch or representative office of international and foreign organizations received the consent of local executive authority of the region (city of the oblast significance) on the financing of the noncommercial organization.
In order to receive the consent, non-commercial organization shall submit an application to the local executive authority by the place of its location. Application should contain the information on the volume, composition of the financing and its destination”.

Analysis:

This requirement in the Draft Law is unjustified both with respect to non-commercial organizations and their donors and the local executive agencies, placing a huge burden on all parties with a complete lack of justification. It should also be noted that the RK already has effective tax, currency and customs legislation that regulates all financing from foreign sources. In addition, there are sanctions for violating these provisions that already exist in the Civil code and in the Code of administrative offence.

Drafters of the Law justify the need for the consent of local authorities for the financing by the branch office of local non-commercial organizations under the French experience, where, supposedly, in accordance with the Law on the Contracts concerning the formation of associations, any financial aid, donations and gifts in large amounts requires the obtaining of the prefecture’s permission or the State Council of France, and minor amounts

shall be subject to declaration. Actually, only special kinds of donations require state authorities permission. These are donations for inheritance, land, real estate and other donations, which require a formal contract between a donor and the recipient. Thus, the French legislation does not provide any arguments in support of the proposed control over any donations on the part of government agencies.

International best practice allows non-commercial organizations to obtain funding both from foreign and local sources. The opportunity to find, receive, and use the funds, including contributions from foreign sources, is a key factor in supporting the viability of non-commercial organizations, which has been recognized by international standards, such as those reported within the framework of the OSCE.⁶ At the same time, international best practice recognizes the need for the establishment of some legislative provisions to regulate financing from foreign and local sources.

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The International Center for Not-for-Profit Law is an international expert organization engaged in research, education activity and provides technical assistance to support the development of noncommercial legislation on a global basis. At present, ICNL provides assistance to the representatives of public and parliamentary bodies and nonprofit organizations in the development of legislation related to the matters of state financing of nonprofit organizations in more than 40 countries, including all countries of Central and Eastern Europe and the CIS.

ICNL has been operating in Kazakhstan since 1997 and during this time has actively cooperated with representatives of state authorities and noncommercial organizations and has assisted in the elaboration of tax legislation and other legislative acts concerning nonprofit organizations.

⁶ See the document of Copenhagen Conference on humane measurement SCEC from June 29, 1990, paragraph 10.4 ([Participating states declare on their **liability**]...to allow members of such groups and organizations ...to request, receive and use voluntary financial contributions from national and international sources, as it is provided by the law, with the purpose of encouraging and protection of human rights and main freedoms.”)