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The reform of the criminal law grossly violates the international obligations of Kazakhstan in the field of human rights. The authorities have ignored the recommendations of the EU and human rights organisations

The reformed Kazakh criminal law contains politicised and vague criminal charges, which can be widely and subjectively interpreted by the state in order to oppress opposition activists, journalists and politicians. The adoption of repressive laws can be regarded as the successful completion of the struggle against political pluralism and dissent, which was launched by the Kazakh authorities after the Zhanaozen tragedy. Given the lack of access to a fair trial, the new criminal law may serve as the final blow to civil society and destroy the remnants of freedom of speech and freedom of assembly in Kazakhstan. Now, it will be more difficult for the victims of political oppression to seek protection under the law, as the law itself supports political persecution.

In early July 2014, President Nazarbayev signed the new Criminal Code (CC), the Code of Criminal Procedure Code (CCP) and the Criminal Executive Code (CEC), as well as the Code of Administrative Offences (CAO).¹ From **1 January, 2015**, Kazakh citizens will live under the new criminal legislation. The code reform process was initiated by Kazakhstan's General Prosecutor's Office on the instruction issued by Nursultan Nazarbayev on 6 January, 2012.

Some changes in the criminal law can be regarded as positive, in particular: the exclusion of an additional penalty of confiscation of property from the sanctions provided in 45 articles; increased penalties for torture; criminalisation of sanctions for impeding the lawful professional activities of journalists. In addition, the Kazakh authorities refused to introduce in the Criminal Code, violations of the law on religious activity and rescinded the ban on possession of religious literature by inmates in prisons.

However, in most cases, legislative changes are contrary to the Constitution and the international obligations of Kazakhstan. Unfortunately, **numerous appeals** addressed by the European Parliament, the OSCE, Human Rights Watch, Amnesty International, Reporters Without Borders and the International Centre for Not-for-Profit Law to the Kazakh authorities urging them to revise the reformation of the criminal law in accordance with the requirements of human rights, **were unheeded**². Most of the fundamental recommendations, presented by Kazakh NGOs were also ignored.³ Draft codes weren't referred for examination to the Venice Commission and the OSCE.⁴ Kazakh NGOs requested that the president impose a veto over the adopted draft codes, but once again, the representatives of civil society were not heeded.

Contrary to the demands of the international community, the Kazakh authorities have maintained numerous conflicting articles, restricting human rights, and in some cases even increased the penalties for criminal offences punishable under these articles.

¹ The codes were signed between the period of 3 July, 2014 and 5 July, 2014 - <http://www.zakon.kz/4636626-prezident-podpisal-obnovlennyj.html> ; <http://news.nur.kz/320550.html> ; <http://www.kazpravda.kz/news/view/21732> ; <http://www.adilet.gov.kz/ru/node/60603>

² <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2013-0167&language=EN> ; <http://www.osce.org/ru/fom/104489?download=true> ; <http://www.hrw.org/news/2013/09/16/kazakhstan-letter-prosecutor-general-regarding-proposed-amendments-criminal-code> ; <http://www.hrw.org/news/2014/04/30/dispatches-kazakhstan-tightens-noose-around-rights/> ; <http://en.rsf.org/kazakhstan-increasingly-suffocating-climate-03-04-2014,46085.html>

³ <http://www.adilsoz.kz/news/show/id/1616> ; http://www.upr-info.org/sites/default/files/document/kazakhstan/session_20_-_october_2014/ai_upr20_kaz_e_main.pdf ; <http://www.icnl.org/research/monitor/kazakhstan.html> ; <http://radiotochka.kz/2071-.html>

⁴ <http://www.zakon.kz/4523686-uchastniki-seminara-vystupili-s.html>

1. THE FREEDOM OF ASSEMBLY

- **Article 3 of the CC – the introduction of the ‘leader of the civil association’ concept**

A leader can not only be the ‘head’, but also *‘other participant of the civil association, capable through his influence and authority to carry out actions in order to control the activities of the civil association’*. This concept is used in several articles and greatly aggravates the criminal offence. The current wording allows for consideration of any member of the association to be the ‘leader’.

- **Article 400 of the Criminal Code ‘Violation of the order of organising and holding meetings, rallies, pickets, marches and demonstrations’**

The new code considers organising and participating in an illegal gathering *‘or other illegal public event’* to be a criminal offence. Penalties for these actions have been reduced, but remain disproportionately severe: up to 75 days of incarceration and a fine of up to 300 monthly calculation indices⁵ (approx. 2,580 euros). Currently, the Criminal Code also provides for liability for *‘assisting in the organisation or holding of such activities’*.

Human rights activists point out that the term *‘assistance’* allows for the arrest of journalists and users of social networks who share information and prepare for a rally, which does not subsequently receive approval from the authorities.⁶ This fact suggests that the representative of the General Prosecutor’s Office, Kanat Seytgaparov, misinformed representatives of the UN, when on 30 October, 2014, during the UPR review, he stated that Article 400 *“narrows the scope for criminal liability compared with the previous criminal code.”*

- **Article 402 of the CC ‘Actions which encourage the continuation of participation in a strike, deemed by a court to be unlawful’**

For such actions activists, journalists and users of social networks could face fines of up to 25,810 euros or up to 3 years’ imprisonment. Kazakh human rights activists point out that in the absence of an independent judiciary, any strike can be declared illegal.⁷

- **Article 403 of the CC ‘Illegal interference by members of public associations in the activities of public bodies’**

This provision, having been transferred from the existing criminal code, is now more permissive. Authorities may interpret it arbitrarily, as it is unclear what is meant by *‘interference in the activities of state bodies’*, and why it is so that the responsibility extends to members of public associations.

- **Article 404 of the CC ‘Creation, management and participation in the activities of illegal civil and other associations’**

The new Criminal Code significantly increases maximum sentences under this article. For ‘active participation’ in illegal civil or religious associations, one may face a fine of up to 51,620 euros, or imprisonment for up to 6 years. At the same time, an association is ‘illegal’ if it *‘encourages citizens to refuse to fulfill their civic duties’*, ‘undermines the security of the state or proclaims ‘intolerance’ including social intolerance.

- **Article 489 of the CAO ‘Violation of the legislation of the Republic of Kazakhstan on public associations...’**

The article was transferred from the current version of the Code of Administrative Offences, but with tougher sanctions. Additionally, criminal liability for participating in unregistered civil and religious

⁵ From 1 January, 2015, 1 monthly calculation index = 1 982 tenge

⁶ http://www.bureau.kz/data.php?n_id=6214&l=ru

⁷ <http://www.kspk.org/index.php/tribune/statements/item/41-20th-session-of-the-upr-working-group>

associations is introduced, which contradicts the internationally enshrined right of citizens to be members of informal associations. At the same time, Kazakhstan's Deputy Minister of Justice, Elvira Asimova stated that *'registration of religious associations is not perceived by us as a restriction on the right to freedom of religion'*.

- **Article 490 of the CAO 'Violation of the legislation of the Republic of Kazakhstan on religious activities and religious associations'**

The article was transferred from the current version of the CAO and it maintains quite strict limitations on the freedom of religion which were introduced after the adoption of the 2011 Law 'On Religious Activity and Religious Associations' and they include: censorship of religious literature; restriction of the activities of missionaries and non-traditional, informal religious groups; a ban on the activities of unregistered religious groups.

2. THE FREEDOM OF SPEECH

- **Article 130 of the CC 'Libel'**

The article was transferred from the current version of the code, albeit with a significant tightening of sanctions: fines increased 6-fold (up to 25,810 euros), at the same time, in each case, a punishment of imprisonment can be imposed. Exorbitant fines are too high for the media outlets to pay, and failure to pay results in their closure. Activists state that in Kazakhstan, 20-30 lawsuits are opened annually on charges of libel. It was due to the charges of libel that journalists Natalia and Aidos Sadykov were forced to flee Kazakhstan in search of refuge.

On 30 October, 2014, during the UPR review, representatives of Kazakhstan stated they did not consider the criminalisation of libel to be a violation of international obligations, as charges of libel are based on statements of individual citizens and are not linked to any professional activity.

- **Article 174 of the CC 'Inciting social, national, ethnic, racial, class or religious hatred'**

The authorities have not only established a new type of 'hatred' – 'class hatred', but also increased the maximum sentence under this article from 12 to 20 years' imprisonment. At the same time, the terms used in the article are not defined and the criteria for consideration of an act as 'criminal' are not explained. It is on these charges that in 2012, a sentence of 7.5 years in prison was handed down to politician Vladimir Kozlov, whom the international community subsequently recognised as a political prisoner.

- **Article 274 of the CC 'Spreading false information'**

While in the current version of the code, this charge is present as a sub point of the article on terrorism, in the new edition it appears as an independent article, which extends its applicability. The maximum penalty for spreading false information which could *'disturb public order'* or *'harm the rights and legitimate interests of citizens'* is 10 years' imprisonment. This provision endangers all journalists who write about the problems of corruption or internal conflicts between the elites in Kazakhstan.

- **Article 456 of the CAO 'Violation of the procedure for publishing the output information'**

The article was transferred from the current version of the CAO and maintains an excessive punishment for violation of the output information: a fine of up to 430 euros, or suspension of the release of the media outlet. The suspension of the release of independent media outlets for minor technical violations has become a new method of oppression over the past two years. In violation of the principle of commensuration and proportionality of sentences, in the years 2013-2014, the release of 'Pravdivaya

Gazeta' ['The truthful Newspaper'] was banned, while the releases of the newspapers 'Pravda Kazakhstan' ['The Truth of Kazakhstan'] and 'Tribuna' ['The Tribune'] were suspended.

3. THE RIGHT TO LIFE AND PROTECTION FROM VIOLENCE

- **Article 146 of the CC 'Torture'**

The new edition of the Criminal Code has increased the maximum penalty for the exertion of torture from 4300 euros to 43,000 euros and the maximum term of imprisonment from 10 to 12 years. In Kazakhstan, the number of allegations of torture has significantly increased. However, the number of instituted criminal cases on charges of torture is ten times smaller than that of the number of allegations of torture; at the same time, policemen are frequently tried for 'abuse of power and official authority', rather than 'torture'.

- **Article 47 of the CC 'Death Penalty'**

Despite the fact that since 2003, Kazakhstan has a moratorium on the death penalty in place, this kind of punishment is maintained in the new Criminal Code as capital punishment. Moreover, the number of offences for which the death penalty can be imposed has been increased (in particular, Article 164 'Violation of the laws and customs of war' was introduced in the new Criminal Code).

4. THE RIGHT TO A FAIR TRIAL

- **Article 53 of the CCP 'Powers of the court'**

Unlike the previous version, the new article prohibits the court from issuing interlocutory judgements against the lower court (or judge). Thus, according to lawyer Serik Sarsenov, the new Code of Criminal Procedure does not provide for judicial responsibility for irregularities in the administration of justice.⁸

- **Chapter 30 of the CCP 'Undercover investigations'**

This is a new article in the Code of Criminal Procedure, which provides for covert (secret) surveillance of a person, eavesdropping, video recording, intrusion into a dwelling and the removal of information from computers. Still, the article does not clearly state in which cases such covert actions can be undertaken, which can result in the arbitrariness of law enforcement agencies and the illegal obtainment of evidence. Lawyer Alexander Ginzburg noted that in this case, it is the merging of the criminal process and the operational and investigative activities, which contravenes the Constitution and laws of the Republic of Kazakhstan.⁹

- **Article 87 of the CCP 'Recusation of a judge'**

As in the current Code of Criminal Procedure, the new version does not detail the circumstances which may give reason to believe that the judge personally, directly or indirectly bears a conflicting interest in a given case. Therefore, even when there are signs of a judge's bias, any motion for his recusation will be dismissed.

5. THE RIGHT TO A LEGAL DEFENDER

- **Elimination of the pre-investigation check (the stage of criminal proceedings).** Alexander Banchuk, a spokesman for the Centre for Political and Legal Reforms (Ukraine), assessed these

⁸ <http://pravo.zakon.kz/4587861-zamechanija-na-proekt-ugolovno.html>

⁹ <http://www.zakon.kz/4568011-o-tak-nazyvaemykh-neglasnykh.html>

amendments in the Code of Criminal Procedure as positive: it becomes impossible to unjustifiably refuse an aggravated person the initiation of criminal proceedings, and the work of the pre-trial investigation bodies is simplified.¹⁰ On the other hand, the removal of the pre-investigation check means that immediately after the registration of the application, a criminal case will be instituted, and investigators will be able to conduct searches, freeze bank accounts, monitor correspondence and telephone calls, etc. Lawyer of the editorial office of the 'Central Asia Monitor' newspaper, Tamara Simakhina, believes that now, people will be able to 'settle scores' with each other through the initiation of criminal cases, and this mechanism can also be applied to politically inconvenient persons. Lawyer Tair Nazkhanov noted that such powers of investigators can be used to cause damage to businesses.¹¹

- **The role of lawyer**

According to member of the Bar of Almaty, Daniyar Kanafin, despite the extension of powers of defenders, in the new Code of Criminal Procedure *"proceedings in criminal cases, in fact, continue to maintain a classic inquisitorial character, where all power is concentrated in the hands of the prosecution bodies, while a counsel may act only as a complainant and petitioner, counting on the mercy of the aforementioned bodies"*. In particular, it is demonstrated in the procedure for access to state secrets, when many 'inconvenient' lawyers are unjustifiably denied access to the necessary files, which results in their inability to effectively protect the interests of their clients.¹²

6. THE RIGHTS OF PRISONERS

- As in the current CEC, the new code maintains **formal performance evaluation of the behaviour of prisoners** (number of penalties and commendations). However, this system leaves room for subjective, selective or corrupt approaches by prison administrations. For example, the abuse of penalties by administrations has taken place in the cases of political prisoners Vladimir Kozlov, Vadim Kuramshin and Aron Atabek.¹³

- **Article 104 of the CEC 'The rights and obligations of convicts'**

According to the article which was transferred from the current version of the Code, all convicts are obliged to work in jobs assigned by the administration of the correctional institution. This equates to forced labour in prisons, as convicts are not allowed to refuse to work under unfavourable conditions. The provision contravenes the Constitution and the Labour Code of Kazakhstan, under which forced labour is prohibited.

- **Article 106 of the CEC 'Visiting prisoners'**

Although the new code provides for the right of a prisoner to be visited by his or her common law spouse, the duration of the visits of prisoner's relatives has been shortened: short visits from 4 to 2 hours; longer-term visits - from 3 to 2 days.

Responding to questions from delegates of the United Nations Member States regarding the oppression of journalists and human rights activists, representatives of Kazakhstan have repeatedly stressed that they base their laws on the 'equality before the law' principle, regardless of occupation or profession. However, in practice, the new criminal law separately defines the criminal liability of

¹⁰ <http://prc.kz/files/library/219/rus/Сборник%20по%20УПК.pdf>

¹¹ http://forbes.kz/process/expertise/biznes_-_pod_pritselom_upk

¹² <http://prc.kz/files/library/219/rus/Сборник%20по%20УПК.pdf>

¹³ <http://en.odfoundation.eu/a/4748,dissident-aron-atabek-is-being-subjected-to-cruel-treatment-in-a-kazakh-prison> ; <http://en.odfoundation.eu/a/4759,a-step-back-in-the-field-of-human-rights-kazakhstan-refused-to-alleviate-the-plight-of-political-prisoners-vladimir-kozlov-and-roza-tuletayeva> ; <http://en.odfoundation.eu/a/3879,political-prisoner-vadim-kuramshin-reports-systematic-pressure-from-the-colony-administration>

certain groups: members of *'social and religious associations'*. If the criminal law applies equally to all individuals and organisations, it remains unclear why the authorities differentiate, in a discriminatory manner, when it comes to the liability of civil activists.

"Kazakhstan has always been, and remains to be, committed to the principles of openness, fairness and impartiality in the promotion and protection of human rights," – the UN Deputy Minister of Justice of Kazakhstan, Elvira Asimova, enunciated at the meeting. Unfortunately, such statements are only declarative in nature. Introducing reform of the criminal law, the Kazakh authorities had an opportunity to prove that they fulfill their international obligations with respect to human rights, at least at the legislative level, but failed to take advantage of this opportunity.

In fact, the preservation of an authoritarian regime was enshrined in law. This can be explained, in particular, by the reaction of the Kazakh authorities to Ukraine's Euromaidan events and the collapse of the authoritarian regime of Yanukovich. With the new legislation, the authorities made it clear that they will firmly quash any incidents of social unrest during the expected change of elites in Kazakhstan.

In July 2013, Nursultan Nazarbayev told British reporters: *"We are grateful for the advice and remarks, but no one has the right to tell us how to live and build our country"*.¹⁴ Kazakhstan continues to openly defy the international obligations in the field of human rights and, at the same time, allows itself to openly and publicly misinform UN agencies, the European Parliament, the OSCE and international human rights organisations. Increasing the pressure on human rights in the new criminal law has not become a barrier to the signing an extended agreements on cooperation between the EU and Kazakhstan.

Democratic society must not, once again, turn a blind eye to the defiance of human rights principles and actions which leave the Kazakh authorities without having to face any legal or political consequences. We call on the international community to exert pressure on the Kazakh authorities, demanding that they review the reform of criminal law in accordance with the recommendations of Kazakh and international NGOs, the European Parliament, the OSCE, and that they refer the new codes for examination to the Venice Commission and engage foreign and independent experts in the field of criminal law and protection of human rights in the works aimed at improvement of the codes.

For more detailed information, please address:

Katerina Savchenko - katerina.savchenko@odfoundation.eu

Igor Savchenko - igor.savchenko@odfoundation.eu

¹⁴ <http://www.uralskweek.kz/2013/07/01/nazarbaev-otvetil-britanskomu-zhurnalistu-na-vopros-o-soblyudenii-prav-cheloveka-v-rk/>