INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, LLC (ICNL, LLC) KYRGYZ REPUBLIC
1126 16th Street, NW, Suite 400 Washington, DC 20036 USA
Tel: (202) 452-8600 Fax: (202) 452-8555, www.icnl.org

Kyrgyzstan, 720040, Bishkek, 204 Abdrakhmanov St., 4th Fl.
Tel: (312) 664-636 Fax: (312) 620-830 E-mail: NIdrisov@icnlalliance.kg

Analysis
of the draft law of the Kyrgyz Republic On Making Additions and Amendments to Certain Legislative Acts of the Kyrgyz Republic
(the draft law on "foreign agents")

30 May 2014

On 26 May 2014, the Parliament members Bakir uulu Tursunbay, Nurkamil Madaliyev and Nadira Narmatova introduced in Zhogorku Kenesh the draft law of the Kyrgyz Republic **On Making Additions and Amendments to Certain Legislative Acts of the Kyrgyz Republic** (hereinafter referred to as the draft law). Principally, the draft law proposes changes to the Law of the Kyrgyz Republic On Noncommercial Organizations (hereinafter, the NGO law), as well as the Law of the Kyrgyz Republic On the State Registration of Legal Entities and Branches (Representative Offices) and the Criminal Code of the Kyrgyz Republic.

Prepared at the request of Kyrgyz NGOs concerned over the content of the draft law, this study examines its main provisions, which may significantly limit the activities of Kyrgyz and foreign non-commercial organizations (hereinafter, NGOs and INGOs, respectively) in Kyrgyzstan.

Many provisions of the draft law conflict with the fundamental democratic principles that enshrine human rights. A number of provisions contradict the provisions of the International Covenant on Civil and Political Rights (ICCPR), to which Kyrgyzstan has been a party since 1994. Other provisions are not clear and/or contradict the current legislation of the Kyrgyz Republic.

If passed, the draft law will impact negatively not only on NGOs defending the interests of their members or certain groups of the population, but also on all NGOs, including charitable and humanitarian organizations providing social services. The draft law proposes to grant broad powers to the state authorities: to interfere in the internal affairs of NGOs and INGOs and suspend their activities or liquidate them at its discretion, virtually without any administrative rules that would limit the arbitrariness. The draft law also creates barriers and restrictions for NGOs activity that have no parallel application to the activities of commercial organizations.[1]

[1] In international practice, legal regulation of the activity of ordinary NGOs (that have no status of a charitable or social benefit organization) in democratic countries is supposed to be analogous to that of commercial organizations as far as the registration procedure, reporting, audit by state bodies, liquidation, etc. are concerned.

There is no doubt that Kyrgyzstan, like any other state, should take measures against threats to its national security and sovereignty. However, it would be a mistake to view NGOs as a special source of such threats.

The discriminatory provisions of the draft law can be combined into four groups: (1) provisions against all NGOs, including those that receive no foreign funding, (2) regulations against NGOs that will be recognized as "foreign agents," (3) provisions against INGO branches and representative offices and (4) provisions on criminal liability of NGO and INGO representatives.

Below we consider the provisions that cause the greatest concern:

1. The establishment of new burdensome requirements for all NGOs and the right of state authorities to interfere in their internal affairs:

- NGOs are required to submit another report to the authorized state agency;
- the Ministry of Justice of the Kyrgyz Republic (hereinafter, the Ministry of Justice) is granted the right to request and check internal documents of NGOs, send its representatives to participate in any internal activities of NGOs, and determine at its discretion whether an NGO complies with the goals of its creation or not.

2. Forcing NGOs that receive funding from foreign sources through a humiliating special registration as "foreign agents," restriction of their activities, and establishing burdensome requirements for them:

- the requirement to pass an annual financial audit;
- the requirement that they submit another report to the authorized state body and publish it in the media or on their website;
- the Ministry of Justice is granted the right to conduct scheduled and unscheduled inspections of the activities of these NGOs, and the discretion to suspend their activity for up to 6 months.

3. The establishment of new burdensome requirements for branches and representative offices of INGOs, restriction of their activities, and the provision of the Ministry of Justice with the right to interfere in their internal affairs:

- the requirement to pass an annual financial audit;
- the requirement that they submit another report to the authorized state body and publish it in the media or on their website;
- the Ministry of Justice is granted the right to instruct branches and representative offices of INGOs to stop financing those or other local NGOs and take the decision, at its sole discretion, to exclude organizations from the register of branches and representative offices.

4. The inclusion in the Criminal Code of the Kyrgyz Republic of new rules on criminal liability of NGO and INGO representatives, which have no parallel application to representatives of commercial organizations and state bodies.

Here are some of the reasons why the above provisions of the draft law are problematic.

1. New Burdensome Requirements for All NGOs and the Right of the Ministry of Justice to Interfere in Their Internal Affairs

1.1. New Report to Authorized Agency

The draft law proposes to include in the NGO law the following norm: *"NGOs are required to submit documents to the authorized body that contain a report on their activities, the composition of the governing bodies, purposes of expenditure of funds and use of other property, including that received from foreign sources … ."*

Thus, if the draft law is passed, the NGOs will be required to submit to the authorized state body another report in addition to the existing three. At present in Kyrgyzstan, all legal entities (including NGOs) monthly report to (1) the tax authorities and (2) the Social Fund, as well as (3) bodies of statistics on a quarterly basis. A new report to another state body is unnecessary and creates an additional unreasonable burden on NGOs. NGOs will be forced to draw up the new report and submit it to the relevant state body instead of spending that time and effort on their statutory public benefit activities. Moreover, the draft law does not establish new reporting forms or specify what additional information should be submitted, which means that these relations are likely to be regulated by legislative acts. In turn, those regulations can create additional threats for NGOs, making new reporting particularly complex and burdensome.

The requirement to provide new reporting may create problems not only for NGOs, but also for governmental agencies. If the draft law is adopted, thousands of NGOs will begin handing in their reports, for example, to the Ministry of Justice. Its staff will have to be expanded significantly if only just to read them all. How much budget money will be wasted? In all the years of its independence, there has not been a single case of NGOs being used for the benefit of a foreign donor and to the detriment of Kyrgyzstan.

1.2. The Right of the Ministry of Justice to Interfere in the Internal Affairs of NGOs

The draft law provides the Ministry of Justice with significant new powers, almost unrestricted by administrative means. The Ministry of Justice and its departments will be able to request and check internal documents of NGOs, send their representatives to participate in any internal activities of NGOs, and determine at their discretion whether an NGO complies with the goals of its creation or not – all that in absence of any procedures that could restrict the Ministry's actions and protect the rights of the NGOs.

- ***Authority to request and check all internal documents of NGOs.*** The draft law provides the Ministry of Justice with the authority to request and check any internal documents of NGOs, including internal control documents, internal rules, and internal supervision of the organization's management and finance. The proposed provision of the draft law conflicts with:
  1) Article 5 of the NGO Law, which states that *"interference of state bodies or officials in the activity of non-profit organizations ... is not allowed,*" as well as
  2) international practice and the international obligations of the Kyrgyz Republic, in particular, Article 17 of the ICCPR, according to which *"1. No one shall be subjected to arbitrary or*

unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." The guarantees of basic human rights apply to NGOs, as has been repeatedly confirmed by the decisions of the International Court on Human Rights, because NGOs are organizations of citizens.

- ***Authority to send representatives to participate in the internal activities of NGOs.*** The draft law allows the Ministry of Justice to send their representatives to participate in the internal activities of NGOs, without any restrictions. A government employee may participate in an internal meeting of members of the organization, for example, even if that meeting has to determine how to influence the decisions of a state body that may conflict with the interests of the citizens. There is no doubt that such participation of the civil servant would undermine the effectiveness of the organization's efforts to protect the rights and interests of citizens. These powers are also contrary to Article 17 of the ICCPR.

- ***Authority in its discretion to determine whether the activities of an NGO are legal***. The draft law may give the Ministry of Justice the right at its discretion to assess whether the activity or expenses comply with the NGO's statutory goals. For example, an NGO has determined in its charter to engage in educational activities, but at some point, its members or supervisory body have decided that the organization will rather help an orphanage. This is not an educational activity and it is not written in the charter, so despite its public benefit character, it may be regarded as contrary to the charter and therefore can serve as a basis for holding the NGO accountable. In accordance with customary international practice, NGOs, just as commercial companies, shall have ample capacity to engage in any legal activity. The only reasonable restriction may be the requirement that the NGO's main objective is not profit. Additional restrictions may apply to certain groups of NGOs (e.g. charities) that enjoy significant tax and other privileges, but not all NGOs. As long as an NGO conducts its activity within the law, how exactly to comply or not to comply with the requirements of the charter in its activities is an internal matter of the NGO and its higher governing body. The changes proposed by the draft law also contradict the international obligations of Kyrgyzstan, in particular, Article 17 of the ICCPR.

2. Forcing NGOs that Receive Foreign Funding to Register as "Foreign Agents," Restriction of Their Activities, and Burdensome Requirements for Them

2.1 Forcing NGOs that Receive Foreign Funding to Register as "Foreign Agents"

The draft law contains norms which force NGOs receiving funding from foreign sources through a humiliating special registration as "foreign agents," restrict their activities, and establish a number of burdensome requirements for them.

In Kyrgyz and Russian, the phrase "foreign agent" has a negative connotation and is normally regarded as synonymous with "foreign spy." In view of the broad definition of "political activity" proposed in the draft law and the large number of NGOs receiving foreign funding, most of them will have either to register as "foreign agents" or relinquish the only source of funding they have to engage in their lawful activity if the draft law is adopted.

Currently, almost all NGOs in the country receive funding from foreign sources, because the conditions for financing NGOs from local sources are not yet in place. They have no incentive to engage in business activity. The current measures to encourage natural and legal persons willing to provide material support to NGOs are not sufficient. Nor does the state allocate sufficient funds for mutually beneficial public contracts with NGOs.

The draft law defines "political activity" very broadly:

"Political activity is participation (including by funding) in the organization and carrying out of political actions in order to influence government decisions aimed at changing state policies conducted by them, as well as in the formation of public opinion for above purposes."

As a result, hundreds of NGOs defending the rights of their members and/or public interests (for example, in the sphere of human rights protection or environmental protection) may be regarded as taking part in "political activities" and, when they receive foreign funding, be compelled to register as "foreign agents." Given this requirement, many NGOs will simply cease to exist because no one wants to recognize themselves as a "foreign agent (spy)." The requirement to register as one can be viewed as direct interference in the issues of financing and activities of NGOs, which is inadmissible.

In all countries with established democratic traditions, organizations (including NGOs) can receive foreign funding and use it to promote legislative reforms, oppose state policy on different issues, participate as observers in elections, help develop state policy in this or that sphere, and engage in many other activities. Individual restrictions on foreign funding are imposed on small groups of organizations (for example, political parties) regarding some clearly defined types of activity (for example, financing of election campaigns in support of candidates members of state bodies). These individual restrictions are already part of the legislation, including the Kyrgyzstan Constitution.

As in all democratic countries, Kyrgyzstan citizens and organizations currently enjoy the principle: *"Everything is allowed that is not prohibited by law."* The same is true regarding NGO funding, which is quite consistent with the principles of democracy. Hundreds and thousands of Kyrgyzstan NGOs that receive funding from various sources, including from abroad, carry out public benefit activities in various spheres such as:

- Local community development,
- Raising the transparency of election campaigns,
- Assistance to the elderly, persons with limited capabilities, delinquent children and other vulnerable categories of citizens,
- Poverty reduction,
- Environmental protection,
- Health care,
- Improvement of prison conditions,
- Advocacy support,
- Support of the freedom of speech and the mass media,
- Strengthening of democracy
- and scores of other public benefit programs being funded from international and foreign grants.

It should be remembered that the Criminal Code and the Administrative Liability Code of the Kyrgyz Republic already provide for liability for all socially dangerous acts such as crimes and

offenses. Regardless of whether it was committed with money from an internal or external funding source, any such act must be punished accordingly.

2.2 Restriction of the Activity of "Foreign Agent" NGOs and Burdensome Requirements for Them

The draft law provides for new requirements for NGOs that will be recognized as "foreign agents" regarding:

- Their annual financial audit;
- Their new reporting to the authorized state body; and
- Their publication of the audit report and conclusions in the media or at their website.

In order to pass the annual financial audit, these NGOs will have to hire an independent audit company. In Kyrgyzstan, these are private organizations certified by the state. As a rule, the cost of audit is high. Publication of the audit report and conclusions in the media is also too expensive. NGOs with limited financial resources will not be able to pay for that. In international practice, the requirements regarding the financial audit and the publication of the audit report and conclusions in the media are only imposed on a number of categories of NGOs, for example, those which acquire the status of a charity (or public benefit) organization and obtain substantial tax benefits from the state, or those receiving state funding to provide social services to the population or implement various social projects. In Kyrgyzstan, a newly drafted law on charitable organizations also requires charities to take an annual financial audit and publish its report and conclusions on the website of the State Tax Service.

Arguments against requiring these NGOs to submit new reporting (provided for by the draft law) are similar to those set forth in Section 1.1 above.

The above requirements are unduly burdensome for NGOs and do not comply with international practice and the international obligations of Kyrgyzstan.

2.3 The Right of the Ministry of Justice to Inspect "Foreign Agent" NGOs and Suspend Their Activity

The draft law provides the Ministry of Justice with the right to conduct planned and unplanned inspections of NGOs that will be recognized as "foreign agents" and interfere in their internal affairs. Arguments against those norms of the draft law are similar to those set forth in Section 1.2 above.

The draft law also gives the Ministry of Justice the right at its discretion to suspend the activity of an NGO "performing the functions of a foreign agent and which has not applied to be included on the register of non-profit organizations performing functions of a foreign agent, in accordance with the Law of the Kyrgyz Republic On the State Registration of Legal entities, Branches (Representative Offices)" for up to six months.

The draft law thereby authorizes the Ministry of Justice to suspend the activity of an NGO without a court decision – in fact, to terminate it. The application of this provision in practice would be a direct violation of human rights and the international obligations of the Kyrgyz Republic under the ICCPR.

3. New Burdensome Requirements for INGO Branches and Representative Offices, Restriction of Their Activity, the Right of the Ministry to Interfere in Their Internal Affairs

3.1 Restriction of the Activity of INGO Branches and Representative Offices and New Burdensome Requirements for Them

The draft law provides for new requirements for branches and representative offices of INGO in the Kyrgyz Republic regarding:

- Their annual financial audit;
- Their new reporting to the authorized state body; and
- Their publication of the audit report and conclusions in the media or at their website.

These requirements will significantly complicate the activity of INGOs in the Kyrgyz Republic and do not comply with good international practice.

The draft law provides the Ministry of Justice with the right to prohibit a branch or representative office of an INGO from financing individuals or organizations *"in order to protect the fundamentals of the constitutional system and ensure the defense capability and security of the state, the morality, health, and the rights and freedoms of others."* As with other new powers considered in this Analysis, the draft law provides MoJ with effectively unlimited authority to make, at its discretion, the decision on the termination of financing of NGOs, as the draft law contains no criteria for assessing their activities. Without a doubt, application of this provision in practice will be recognized as interference in the internal affairs of INGOs, which is a direct violation of human rights and the international obligations of the Kyrgyz Republic.

3.2 The Right of the Ministry of Justice to Exclude Branches and Representative Offices of International Organizations and INGOs from the Respective Register

If a structural division of an INGO fails to submit its report within the prescribed period or its activity is not consistent with the stated goals and the information provided in its report, the draft law provides that such structural division of an INGO may be excluded from the register of branches and representative offices of international organizations and INGOs by decision of the Ministry of Justice. The provision of such broad powers to the Ministry of Justice – to take a decision on exclusion from the register without a court order – is not consistent with positive international practice and will seriously aggravate the legal status of INGOs in the Kyrgyz Republic. The adoption of this provision may lead to a decrease in programs for the financing of socially useful projects from foreign sources and a drop in the activity of international and foreign organizations that provide substantial assistance to Kyrgyzstan in its resolution of social, economic and other problems.

4. Criminal Liability of NGO Representatives

The draft law provides for the introduction of criminal liability for NGO representatives:

1) in the form of a fine in the amount of 20 to 50 thousand KG Soms or deprivation of liberty for up to three years for *"the establishment of a religious association or any other non-profit organization or structural unit of a foreign non-profit organization or a non-profit*

organization that performs the functions of a foreign agent, the activity of which involves violence against citizens, or other harm to their health or to induce citizens to refuse from the fulfillment of their civic responsibilities or to commit other illegal acts, as well as the leadership of such association, organization or a structural unit."

2) in the form of a fine in the amount of 10 to 40 thousand KG Soms or deprivation of liberty for up to two years for *"participation in the activities of these non-profit organizations or structural subdivisions, as well as propaganda of acts..."* stipulated in the previous norm.

The question arises: "Is it possible to establish a commercial organization and commit any of the above-mentioned acts in the framework of its activity? Or, can such acts be committed by individuals working in state bodies?" Of course not! These acts are dangerous to society regardless of who committed them. The Criminal Code and the Code on Administrative Liability of the Kyrgyz Republic already include responsibility for these offenses and crimes, so whoever commits them shall be liable regardless of where they work, be it a NGO, a state agency or the business sector, or if they are unemployed. There is no reason whatsoever to introduce a special category of "NGO representatives" where responsibility for the commitment of such acts applies to everyone.

Conclusion

Kyrgyzstan has a well-deserved reputation as one of the more progressive countries in Central Asia and the CIS as regards the ensuring and protection of fundamental rights and freedoms, the creation of a legal environment in which civil society assists the Parliament, President, and Government in the implementation of their primary mission – the improvement of the citizens' living standards. Regrettably, the provisions of the draft law undermine and reverse the efforts of Kyrgyzstan in this area, weakening its ability to develop human resources, attract foreign investments, and enjoy the support of its citizens and the international community for sustaining Kyrgyzstan as a democratic state.

The analysis shows that the draft law, if adopted, will significantly worsen the legal status of both local and foreign NGOs. A number of its norms contradict the ICCPR and other major sources[2] of international law on human rights. Although its drafters say that it is proposed "*in the interests of national security or public safety, public order, health and morality of the population or protection of rights and freedoms of others,"* our analysis shows, however, that the draft law does not meet the interests of the state if they really consist in building a genuine democracy in this country. Moreover, the draft law and application of its norms can lead to appeals to the UN Committee on Human Rights about violations of the rights of citizens and NGOs in the Kyrgyz Republic. The Kyrgyz Republic is likely to lose all legal arguments regarding these appeals – and earn the image of an undemocratic country.

On several occasions, President Almazbek Atambayev has publicly expressed his opinion about the draft law. On September 19, 2013, while on a visit to Belgium, he said that "*Kyrgyzstan does not need a law like that*." Two months later, however, he said during an interview with the BBC on November 19, 2013: *"This terminology [foreign agent] was first introduced in America. If the organization is financed from abroad, it is viewed as a 'foreign agent' in America.' Russia has only*

[2] The Universal Declaration of Human Rights (Article 20) (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11) (1950), and the International Covenant on Civil and Political Rights (Article 22) (1966) contain very similar provisions to that effect.

copied this experience, so it is not a Russian but an American idea which came from the West. But I would not like to talk in this case about where it is being copied from – America or Russia. Let the Parliament will consider the draft law first, and then we'll see what happens. But I want to emphasize that the first such law was adopted in the cradle of democracy – the USA."[3] What made the President change his opinion? Perhaps, he was misled to think that *"Russia has only copied American experience*." Apart from a few similar words in its title, the American FARA (Foreign Agents Registration Act) has nothing in common with Federal Law #121-FZ of the Russian Federation On Making Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Noncommercial Organizations Performing the Functions of Foreign Agents of 20 July 2012.[4] The FARA was adopted on the eve of World War Two in 1938 to check the spread of Nazi propaganda in the United States. After the war it was changed many times, and the most substantive amendments were made in 1966 and 1995 to shift the focus from Nazi propaganda to political lobbying. FARA is not aimed at regulating NGOs (there is not a single word about them in the law), it does not restrict their activity and is not directed against them. Under FARA, any individual or entity may be an agent of a foreign "principal" (customer) if they act "at the order, request, or under the direction or control, of a foreign principal" and "engage in political activity in the interest of a foreign principal", including by representing "the interests of such foreign principal before any agency or official of the Government of the United States." (FARA 611 (c) (1)). FARA was adopted to identify the persons (commercial companies, NGOs or private individuals) who act in behalf and in the interest of foreign governments, organizations, or private individuals, lobbying their interests in government bodies and through public officials of the US Government.[5] The Russian law is aimed exclusively against NGOs, it does not provide for such a condition as engaging in political activity in the interest of a foreign principal, and, furthermore, it defines political activity so broadly that any active NGO with foreign funding can be referred to the category of "foreign agents." For example, the procurator's office sent a warning to the NGO Help Mucoviscidosis[6] Patients, which refused to register as a foreign agent. Another "foreign agent" was the Far East Reserve for the Protection of Cranes, an organization that conducted a number of joint projects with foreigners and received grants from abroad[7], which is absurd and would be absolutely impossible under FARA. Even Vladimir Putin, who is not known for his liberal attitude toward NGOs, had to admit at the 4 September 2013 meeting of the Council for Human Rights under the President of the Russian Federation that "everything is not all right" with the law about the registration of NGOs as foreign agents and expressed his readiness to hear proposals of rights advocates about its improvement.[8]

Based on the above, the conclusion can be made that it is not judicious to adopt the draft law.

The International Center for Not-for-Profit Law (ICNL) thanks all concerned parties for the possibility to present its comments regarding the draft law and hopes to continue this cooperative work.

---

[3] Available at *http://www.bbc.co.uk/russian/international/2013/11/131118_kyrgyz_president_interview.shtml*

[4] Available at *http://graph.document.kremlin.ru/page.aspx?1620877*

[5] Notably, it would do Kyrgyzstan good to have a similar law, as society is increasingly aware of some politicians pushing political decisions, including draft laws, through the parliament in the interest of individual countries or international corporations.

[6] *Mucoviscidosis* – a hereditary disease of exocrine glands that affects most critically the lungs, the pancreas and a number of other vital organs and systems.

[7] Available at *http://lenta.ru/news/2013/05/17/political*

[8] Available at *http://lenta.ru/news/2013/09/04/foreignagents/*