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**Analysis of Article 395-2
proposed for inclusion into the Code of Kyrgyz Republic
on Administrative Liability**

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In July 2013, the draft Law of Kyrgyz Republic on Introducing Changes and Amendments into some Legislative Acts of the Kyrgyz Republic ¹ (hereinafter – draft law), developed by the State Committee of National Security of the Kyrgyz Republic (SCNS), was posted on the website of the Government of the Kyrgyz Republic for public discussion. The draft law is aimed against religious extremism and contains provisions to prevent this danger to society. The public, including noncommercial organizations (NCOs) of Kyrgyzstan, support this initiative, since civil society of Kyrgyzstan is alarmed by the threat posed by the rise of religious extremism in Central Asia.

However, the draft law also contains provisions against unregistered public organizations, which are not directly related to the problem of religious extremism, contradict international law and the Constitution and laws of the Kyrgyz Republic, and threaten to weaken civil society in Kyrgyzstan. These provisions cause concern of public of the Kyrgyz Republic and the international community, and raise a question: is the Government of the Kyrgyz Republic truly committed to building democracy in the country?

This Analysis was prepared by the International Center for Not-for-Profit Law (ICNL) at the request of number of NCOs of the Kyrgyz Republic concerned about the content of the draft law. ICNL's Analysis covers only certain provisions of the draft law that are related to Article 395-2, proposed for inclusion into the Code of Kyrgyz Republic on Administrative Liability, on imposing administrative responsibility on citizens for leading and participating in the activities and funding of unregistered public organizations (hereinafter - Article 395-2).

Below in the Analysis we explain why the abovementioned provisions of Article 395-2 are problematic.

¹ http://www.gov.kg/?attachment_id=23475

Analysis

Contradiction to the Constitution and the Laws of the Kyrgyz Republic

In Part 2 of Article 3 of the draft law it is proposed to amend the Code of Kyrgyz Republic on Administrative Liability by a new Article 395-2, which imposes administrative responsibility on citizens for leading, participating in the activities of, as well as funding of unregistered public organizations. The establishment of this administrative responsibility in fact would prohibit the exercise of “freedom of association” by citizens who participate in the activities of unregistered public organizations. This contradicts the Constitution of the Kyrgyz Republic and the Law on Noncommercial Organizations, as well as international treaties and conventions on human rights to which the Kyrgyz Republic is a party.

According to the Constitution of the Kyrgyz Republic as of June 27, 2010 (hereinafter – Constitution), the right of association is referred to as one of the fundamental human rights and freedoms. Article 35 of the Constitution prescribes that: “*Everyone has the right to freedom of association*”. In accordance with Article 16 of the Constitution:

“1. Human rights and freedoms are inalienable and belong to everyone by nature.

Human rights and freedoms are highest values. They act directly; determine the meaning and content of activities of the legislative, executive authorities and local self-governmental bodies.

2. The Kyrgyz Republic respects and ensures human rights and freedoms to all individuals within its territory and under its jurisdiction”.

The Law of the Kyrgyz Republic on Noncommercial Organizations as of October 15, 1999, # 111, provides citizens the right to establish unregistered public organizations. In accordance with Part 2 of Article 6 of this Law: “*Noncommercial organizations can be created with or without formation of a legal entity in the form of public associations, foundations and institutions.*” This provision is in full compliance with democratic standards. Therefore, Article 395-2 directly contradicts existing Kyrgyz law.

Contradiction to international law

Article 395-2 contradicts international treaties and conventions to which the Kyrgyz Republic is a party. The ban on unregistered public organizations directly violates provisions of the Universal Declaration of Human Rights (Article 20)², the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 8)³, and the International Covenant on Civil and Political Rights (ICCPR) (Article 22)⁴.

² The Universal Declaration of Human Rights adopted by the resolution 217 A (III) of the UN General Assembly as of December 10, 1948, ratified by the Kyrgyz Republic in October 1994.

³ The International Covenant on Economic, Social and Cultural Rights, adopted by the resolution 2200A (XXI) of the UN General Assembly resolution as of December 16, 1966, ratified by the Kyrgyz Republic in 1994.

⁴ The International Covenant on Civil and Political Rights, adopted by the resolution 2200A (XXI) of the UN General Assembly as of December 16, 1966 and ratified by the Kyrgyz Republic in October 1994.

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Article 22 of the ICCPR states:

“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”.

It is an accepted fact that “freedom of association” includes the right to informal associations, i.e., groups without legal personality. Many other sources of international law confirm that the exercise of the right to freedom of association, does not require a person to register a public organization, or even to notify the government about its creation. “Registration should not be an obligatory requirement. Civil society organizations should have the right to exist and to work without registration, if they do not want to register”.⁵ “The legislation of particular countries should in no way prohibit informal associations only because of absence of their legal personality.”⁶

At present, the laws of the Kyrgyz Republic comply with international law. However, the introduction of restrictions on the establishment of unregistered NCOs in the Kyrgyz Republic will be regarded as a violation of the ICCPR and a failure of the Kyrgyz Republic to fulfill its obligations.

The absence of a direct relation with the fight against the threat of extremism

Developers of the draft law wrongly believe that a ban on unregistered public organizations will help them fight against extremism. Extremists may be individuals and various organizations, including commercial organizations. Extremist activities of any entities, registered or unregistered, must be prohibited and punished. There are no reasons for singling out unregistered public organizations in Kyrgyzstan as highly dangerous or suspicious subjects of extremist activity.

⁵ A report submitted by the Special Representative of the UN Secretary General on human rights defenders, Hina Jilani, in accordance with UN General Assembly Resolution № 58.178 (October 1, 2004.), P. 21 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/533/18/PDF/N0453318.pdf?OpenElement>)

⁶ The OSCE/ODIHR document, Key guiding principles of freedom of association, with an emphasis on non-governmental organizations, page 67.

Conclusion

The Analysis of the draft law shows that the proposed Article 395-2 is discriminatory and restricts the rights and freedoms of citizens.

Although the authors of the draft law refer to the fact that the draft law is proposed *in the interests of national security or public safety*, the proposed Article 395-2 does not correspond to international practice and principles of international law.

Kyrgyzstan has established a reputation for being one of the more progressive countries in Central Asia, and indeed the Newly Independent States (NIS), in terms of protecting fundamental human rights and freedoms and creating a legal framework where civil society can work together with the government towards its basic mission to improve living conditions for the citizens. Unfortunately, provisions of Article 395-2 would undermine and reverse the effort of Kyrgyzstan in this sphere, and would impair Kyrgyzstan's ability to develop human resources, attract foreign investment, receive humanitarian aid and profit from the wisdom of its people that are essential to maintaining Kyrgyzstan's good standing in the world as a democratic country.

The adoption of Article 395-2 will lead citizens to appeal to the UN Committee on Human Rights. Most likely, the Kyrgyz Republic will lose these cases. The country will form the image of a non-democratic country. The Kyrgyz Republic may be denied foreign economic assistance that is available only to countries with democratic regimes.

Based on the aforementioned, we recommend excluding from the draft law the provisions of Article 395-2 imposing administrative responsibility on citizens for leading and participating in the activities and funding of unregistered public organizations.

ICNL is grateful for the opportunity to state its comments and looks forward to continued collaboration in future.