



**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 E-mail: [icnl@icnl.org](mailto:icnl@icnl.org)

Кыргызстан, 720040, Бишкек ул. Абдрахманова 204, 4-й этаж

Тел: (312) 664-636 Факс: (312) 620-830 E-mail: [NIldrisov@icnlalliance.kg](mailto:NIldrisov@icnlalliance.kg)

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**Analysis of Article 12 of the draft Law of Kyrgyz Republic  
on Fighting against Legalization (Laundering) of Criminal Proceeds and  
Financing Terrorist or Extremist Activity**

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On January 28, 2013 the Prime-Minister's office of the Kyrgyz Republic introduced to Parliament the draft law of the Kyrgyz Republic on Fighting against Legalization (Laundering) of Criminal Proceeds and Financing Terrorist or Extremist Activity (hereinafter – the draft law), developed by the State Financial Intelligence Service under the Prime-Minister's office of the Kyrgyz Republic. Civil society organizations (CSOs) at first supported this initiative due to concerns over increasing terrorism and extremism in the Central Asian region.

However, in April 2013, the draft law suddenly had a new Article 12, which poses a threat and could jeopardize the development of civil society in the Kyrgyz Republic. This article, and (after its inclusion in the draft law) the draft law as a whole raises grave concerns amongst the citizens of the Kyrgyz Republic and the international community, and calls into question whether the Government of the Kyrgyz Republic is aimed at building democracy in the country.

The present Analysis is developed at the request of noncommercial organizations (NCOs) of the Kyrgyz Republic, who are troubled by the content of Article 12 of the draft law, titled “preventive measures for NCOs”.

The present Analysis highlighted provisions of Article 12 of the draft law that are troubling for a number of reasons:

1. NCOs without any proper justifications are automatically segregated into a special category suspected of engaging in terrorism and extremism. For instance, according to part 3 of Article 12 of the draft law citizens must inform authorities of any suspicions relating specifically to NCOs' activities, even though citizens might also have such suspicions about activities of commercial organizations and individuals.
2. It is proposed to require additional reporting from NGOs that receive funding from any foreign sources, including pursuant to intergovernmental agreements (part 2 of article 12 of the draft). Thus, almost all NGOs will be considered as potential suspects of terrorism and extremism, considering the fact that more than 65%<sup>1</sup> of NGOs receive foreign funding as the main source. Funding from international organizations (such as the Red Cross, UNDP, OSCE, USAID, and other

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<sup>1</sup> This figure is taken from the study of the nonprofit sector, conducted in 2005 by the Association of Civil Society Support Centers (ACSSC)

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organizations that provide social services to the population under bilateral agreements on cooperation with Kyrgyzstan) will also be considered to be potential funding of extremism and terrorism.

Of course, the true measure of the damage the draft law will bring to civil society and democracy in the Kyrgyz Republic will only be revealed upon its implementation. Today we can only note that the proposed provisions of the draft law are not in line with international practice, including the FATF Recommendations that are referenced by the authors of the draft. The proposed provisions of the draft law will certainly have a negative effect on civil society in Kyrgyzstan (both local and foreign NGOs working in Kyrgyzstan). It remains unclear how, even potentially, these rules will help the Kyrgyz Republic to fight extremism and terrorism, given that the known cases of extremism and terrorism in Kyrgyzstan have nothing to do with the activities of NGOs.

Below we will consider provisions of Article 12 of the draft law that cause the greatest concerns.

The main problems that will appear in case the existing version of the draft law is adopted are following:

1. Empowerment of state bodies to control NCOs that will include:
  - 1.1. New burdensome reporting requirements for NCOs;
  - 1.2. Giving authority to state bodies to verify income and revenue of NCOs with respect to their proper use.
2. Establishment of new measures relating to activities of NCOs that are not concurrently applied to commercial organizations:
  - 2.1. Imposing on citizens and legal entities the obligation to communicate their suspicions of any activities of NCOs to the financial intelligence body, law enforcement bodies and the state security body;
  - 2.2. Designation of an authorized state body for “monitoring and control” of activities of NCOs.

Below this Analysis demonstrated why the abovementioned provisions of Article 12 of the draft law are problematical.

## **1. Empowerment of State Bodies to Control NCOs**

### **1.1. New burdensome reporting requirements for NCOs.**

In Part 2 of Article 12 of the draft law stipulates that “NCOs that “receive financial resources a high percentage of which consist of international assets, shall:

...

2) publish annual financial reports with detailed description of income and revenues that are verified properly with respect to expenditure of all funds according to the stated purposes and objectives of the NCO;

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3) take measures to identify and document the identification data of its donors, as well as confirm the powers and positive reputation of its recipients and partner NCOs (as well as internationals);

4) maintain for 5 years detailed reports on internal and international operations (transactions);

5) provide the financial intelligence body, national security body and law enforcement body with the information listed in items 1-4 of Part 2 of Article 12».

Hence, if the draft law is adopted in existing version, then NCOs will be obliged to submit at least three more reports to state bodies (in addition to the three currently-existing types of reports): (1) to financial intelligence body, (2) to national security body and (3) law enforcement bodies.

At present all organizations in Kyrgyzstan (including NCOs) submit monthly reports on all types of incomes, as well as received from foreign sources, to taxation bodies and the Social Fund, and quarterly reports to the Statistics body. Taxation bodies and the Social Fund also have the right to conduct annual verification of all financial documents of NCOs. NCOs are gravely concerned that the new requirements to report to three more state bodies can become too burdensome for NCOs receiving funds from foreign sources, which are almost all NCOs in the country.

It is clear that any additional kinds of control, including new reporting requirements, will increase the scope of work for NCOs that will have to fulfill these requirements, since they will have to expend time and energy to prepare these reports and submit them to corresponding state bodies.

The justification letter for the draft law states that the draft law was developed pursuant to FATF Recommendations<sup>2</sup> as of February 15, 2012 (hereinafter – FATF Recommendations) for the purpose of bringing legislation of the Kyrgyz Republic into compliance with international standards for fighting against the laundering of criminal proceeds, financing terrorism and spreading weapons of mass destruction.

But FATF Recommendations do not suggest imposing any additional reporting requirements on NCOs.. FATF Recommendations related to NCOs could be met without establishing additional reports for NCOs by using the existing monthly reports that NCOs are required to submit to the tax service and financial intelligence, national security and law enforcement bodies, all of whom could examine such reports.

As for the requirement of the draft law that annual financial reports be published, it should be noted that there is a mistake in translation of FATF Recommendations into Russian. In the original text in English it is said as follows: “NCOs should issue annual financial statements ...”, that in proper translation means that “NCOs shall issue (produce, make public) financial reports ...”. This does not mean that NCOs shall necessarily publish their reports in mass

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<sup>2</sup> FATF - The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction, as well as conducts assessment of compliance of national systems of states with these standards.

FATF was established in 1989 by the decision of G7 and is the main international institution developing and implementing international standards in the sphere of combating money laundering and the financing of terrorism. 35 countries and 2 organizations are members of FATF, 20 organizations and 1 country are observers.

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media. E.g., an NCO may develop its written financial report and make it available to all interested parties, as well as mass media, at their request.

**1.1. Giving authority to state bodies to verify income and revenue of NCOs with respect to their proper use**

In Part 2 of Article 12 of the draft law it is said that “NCOs that receive financial resources a high percentages of which consists of international assets, shall:

...

2) publish annual financial reports *with detailed description of income and revenues, that are verified properly with respect to expenditure of all funds according to the stated purposes and objectives of NCO*” (Emphasis added.)

...

Hence, if the draft law is adopted in current version, it will give state bodies authority to verify incomes and revenues of NCOs with respect to their proper use. These new powers will authorize state bodies to evaluate at their own discretion if the activities of an NCO or its revenues comply with its chartered aims and objectives. For example, if an NCO specifies in its charter that it will engage in educational activities, but at some time the members and supervisory body of organization decide that organization shall render assistance to a pre-school. Such activity is not stated in the charter, so it may for the basis for an allegation that the NCO is engaged in unauthorized use of funds.

In accordance with common international practice, NCOs along with commercial organizations shall have broad legal capacity to engage in any legal activity. The only reasonable limitation can be a requirement that the main objective of the activity cannot be profit-seeking. Additional limitations can be applied to particular groups of NCOs that enjoy significant tax and other state-sponsored benefits, but not to all NCOs. So long as NCOs operate within the law, then it is the internal affair of the NCO itself and its superior managing body to what extent it adheres or does not adhere to the requirements of its charter in its activities. The given provision of the draft law is also in contradiction with:

1) Article 5 of the Law of Kyrgyz Republic on Noncommercial Organizations, which says that “intervention of state bodies or their officials into activities of NCOs ...is not allowed”, and

2) international obligations of Kyrgyz Republic or Article 17 of International Covenant on Civil and Political Rights (ICCPR) in which Kyrgyz Republic is a Party since 1994.

**2. Establishment of new measures relating to activities of NCOs that are not along applied to commercial organizations:**

**2.1. Imposing on citizen and legal entities the obligation to communicate their suspicions of any activities of NCOs to the financial intelligence and other state bodies**

Part 3 of Article 12 of the draft law contains the following provision:

*“In case suspicion on the part of any legal entity or individual, that a specific NCO is engaged in laundering of criminal proceeds or financing terroristic or extremist activity or by*

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*terrorists or extremists, then such persons or entities shall immediately (within several hours) send a relevant message to the financial intelligence body or national security body and law enforcement body to enable them to take necessary measures according to the legislation of Kyrgyz Republic”.*

The legislation of Kyrgyz Republic does not provide for any such measures with regard to activities of commercial organizations. This brings up the question: “if there is suspicion with regard to commercial organization, then shall it be reported to law enforcement bodies?” This approach explicitly discriminates against NCOs in comparison with commercial organizations and contradicts to provisions of international law<sup>3</sup>, as well as positive international practice.

**2.2 Designation of an authorized state body for “monitoring and control” of activities of NCOs**

Part 5 of Article 12 contains the following provision:

*“5. Effective monitoring or performance monitoring of activities of NCOs are conducted by authorized state body determined by the Prime-Minister’s office of Kyrgyz Republic”.*

Hence, if the draft law is adopted in current version, then it will authorize the designation of an authorized state body for “monitoring and control” over activities of NCOs in the Kyrgyz Republic. Currently, the legislation of Kyrgyz Republic does not provide for determination of an authorized state body for “monitoring and control” over activities of NCOs. This approach also explicitly discriminates against NCOs in comparison with commercial organizations and contradicts provisions of international law, as well as positive international practice.

**Conclusion**

Analysis of Article 12 of the draft Law shows that if the draft law is adopted then it may become a basis to limit the rights of NCOs.

In the 2013 annual report of Mr. Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, states that analysis of various forms of criminalization of NCO funding shows that at the moment some countries are using measures aimed at fighting against terrorism and money laundering as instruments to constrain NCOs and suppress criticism from these organizations. Mainly local NCOs involved in stimulation and protection of civic and political rights are subject to funding constraints, but in some cases these can be national branches of international NCOs.

The text of proposed Article 12 of the draft law appears to have been copied from the law or draft law of some totalitarian country, in which authorities are afraid of a so-called “color revolution” and in order to prevent it want foreign funding of NCOs to be under tight control. These concerns are not justified in Kyrgyzstan. Kyrgyzstan went through two revolutions in 2005 and 2010

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<sup>3</sup> "NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and should be subject to the administrative, civil and criminal law obligations and sanctions generally applicable to those legal persons" (Section 7 of the CoE Recommendations).

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and is not now facing “color revolutions”, because Kyrgyzstan is moving towards establishment of genuine democracy.

As for the need to establish mechanisms for transparency of NCO operations, at the moment there is a draft Law on Charitable Organizations and Charitable Activity (hereinafter – draft Law on Charitable Organizations) developed in the Kyrgyz Republic, that provides mechanisms for ensuring maximum transparency in the activities of charitable organizations. The draft Law on Charitable Organizations is published on the web-site of Jogorku Kenesh of Kyrgyz Republic for public discussions and in the near future will be initiated by group of parliamentarians, including two vice-speakers. It is expected that after adoption of the draft Law majority of approximately 1500 working NCOs will obtain charitable status and will operate in compliance with the new law.

The letter of justification for the draft law says that the draft law is developed in order to implement FATF Recommendations, but, it is necessary to remember that FATF Recommendations are not propositions of international law<sup>4</sup>.

Based on abovementioned, it is possible to conclude that adoption of the draft law in current version of Article 12 is inadvisable.

ICNL is pleased to have the opportunity to provide this Analysis to the draft law and hopes for continuation of partnership in future.

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<sup>4</sup> Counter-Terrorism, "Policy Laundering," and the FATF: Legalizing Surveillance, Regulating Civil Society published here: <http://www.icnl.org/research/library/files/United%20States%20of%20America/Ben%20Hayes.pdf>