

ANALYSIS

Law of the Kyrgyz Republic on Amendments to the Law of the Kyrgyz Republic on Noncommercial Organizations (also known as the Law on Foreign Representatives)

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Introduction

On April 2, 2024, the President signed the Law of the Kyrgyz Republic (KR) on Amendments to the Law on Noncommercial Organizations (hereinafter, the law).¹

This Analysis was prepared by the International Center for Not-for-Profit Law (ICNL) at the request of a number of noncommercial organizations (NCOs) concerned about the content of the law.² The law may have a negative impact on all NCOs, including charitable and humanitarian organizations and providers of social services to the population.

The following provisions of the law are of greatest concern:

- I. Forcing NCOs in receipt of funds from foreign sources to register as “*foreign representatives*” and establishing additional burdensome requirements for them, including:
 - o the obligation to apply for inclusion in the Register of NCOs performing the functions of a foreign representative;

¹ The justification letter and all versions of the draft law in the process of consideration by the Jogorku Kenesh can be found here: <https://kenesh.kg/bills/634426>.

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- the requirement to mark all their materials as “*produced, distributed and (or) sent by a noncommercial organization performing the functions of a foreign representative*”;
 - annual submission of an independent audit report to an authorized government body; among others.
2. Granting the Ministry of Justice (MoJ) the right to conduct inspections of NCOs performing the functions of a foreign representative, to interfere in their internal affairs, as well as to suspend their operations at its own discretion for up to six months, with subsequent liquidation in court.
 3. Possible ban on the activities of foreign (international) NCOs (INCOs) operating without registration.

The reasons why the provisions of the law are problematic are presented below.

Analysis

1. **FORCING NCOS THAT RECEIVE FUNDING FROM FOREIGN SOURCES TO REGISTER AS "FOREIGN REPRESENTATIVES" AND ESTABLISHING ADDITIONAL BURDENSOME REQUIREMENTS FOR THEM**

1.1. RESTRICTING NCOS' ACCESS TO FUNDING

Some provisions of the law force NCOs receiving funds from foreign sources and taking part in “*political activity*” in the KR to discriminatory special registration as “*foreign representatives*” and establish additional burdensome requirements for them. With the adoption of the law, in order to avoid the label of “*foreign representative*,” some NCOs will be forced to abstain from receipt and use of foreign funding. At the same time, some NCOs may not have sufficient funds to comply with the burdensome requirements of the law, such as the mandatory independent annual audit, thereby forcing them to terminate their operations. In this way, the law significantly restricts the access of Kyrgyz NCOs to legitimate sources of funding, which is a violation of Article 22 of the International Covenant on Civil and Political Rights (ICCPR).

The ability of NCOs to diversify their funding sources reliably ensures their independence. This is why the right of NCOs to access funding from any legitimate source, including foreign and international sources, is protected under Article 22 of the ICCPR. According to the Organization for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR) Guidelines on Freedom of Association (para. 218), NCOs should have access to funding from any legitimate source. Any control imposed by the state on an association receiving foreign

resources should not be unreasonable, overly intrusive, or disruptive of lawful activities.³

1.2. RESTRICTIONS ON THE RIGHT OF NCOS TO FREEDOM OF EXPRESSION AND PARTICIPATION IN THE MANAGEMENT OF PUBLIC AND STATE AFFAIRS

The law contains the following provisions and definitions regarding the concept of “political activity”:

“A noncommercial organization shall be recognized as participating in political activities carried out in the territory of the [KR] if, regardless of the goals and objectives specified in its constituent documents, it participates (including through funding) in the organization and conduct of political actions in order to induce the adoption by government bodies of decisions aimed at changing the state policy they are pursuing, as well as in the shaping of public opinion for said purposes.

Political activity is activity in the sphere of state structure, protection of the foundations of the constitutional order of the [KR], protection of the country’s sovereignty and ensuring its territorial integrity, ensuring legality, law and order, state and public security, defense, foreign policy, as well as socio-economic and national development.

Forms of political activity include:

- participation in the organization and conduct of public events in the form of mass meetings, rallies, demonstrations, marches or pickets or in various combinations of those forms, and the organization and conduct of public debates, discussions and addresses;

- participation in activities aimed at obtaining a certain result in an election or referendum, in the monitoring of an election or referendum, the formation of election or referendum commissions, and the activities of political parties;

- public appeals to state and local government bodies and their officials, as well as other actions that influence the activities of these bodies, including the adoption, amendment or repeal of laws or other normative legal acts;

- dissemination, including through the use of modern information technologies, of opinions on decisions and policies of state bodies;

³ OSCE/ODIHR and Venice Commission, Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organizations and other Legislative Acts of the Kyrgyz Republic, CDL-AD (2013)030, October 16, 2013, para. 66, http://www.legislationline.org/download/action/download/id/4857/file/239_FOASS_KYR_16%20Octt%202013_en.pdf.

- the shaping of socio-political views and beliefs, including by conducting public opinion polls or other sociological research and publishing their results; and

- the involvement of citizens, including minors, in the said activities.”

Since the law gives a broad definition of “*political activity*,” some NCOs that protect the rights of their members and (or) public interests (for example, in the spheres of copyright and intellectual property protection, human rights, freedom of speech, observation of elections, economic development, protection of business community interests, and many others) may be recognized as taking part in “*political activity*” and, if they receive foreign funding, be forced to register as “*foreign representatives*,” thereby incurring all negative consequences.

The right of NCOs to freedom of opinion and expression through their objectives and activities is a fundamental principle of freedom of association.⁴ This right is an addition to the individual right of the members of NCOs to freedom of expression and opinion. NCOs have the right to participate in public and political debate, regardless of whether their position is in accord with government policy.⁵ Moreover, they are entitled to participate “*in the government of [their] country and in the conduct of public affairs*,” including the development of laws and policies at all levels.⁶ These rights are enshrined in Articles 32 and 37 of the Kyrgyz Constitution, as well as Articles 19 and 25 of the ICCPR.

Therefore, the provisions of the law on NCOs’ “*political activities*” restrict their rights to freedom of expression and participation in the management of public and state affairs, violating the obligations of the KR under the ICCPR and its Constitution.

1.3. STIGMATIZATION OF NCOS AS “FOREIGN REPRESENTATIVES”

According to the law,

“materials produced and (or) distributed by noncommercial organizations included in the Register as performing the functions of a foreign representative, including through the mass media and (or) using the Internet, must be accompanied by an indication that these materials

⁴ ECHR, *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], applications ## 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of February 13, 2003, para. 88, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936>; ECHR, *Gorzelik and others v. Poland* [GC], Application #44158/98, Judgment of February 17, 2004, para. 91.

⁵ OSCE-ODIHR Guidelines on Freedom of Association (para. 31).

⁶ See UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Article 8, https://www.un.org/ru/documents/decl_conv/declarations/defender.shtml; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in the appropriate language (the Aarhus Convention), June 25, 1998, articles 6 and 8, http://www.un.org/ru/documents/decl_conv/conventions/orhus.shtml.

(information) were produced, distributed and (or) sent by a noncommercial organization performing the functions of a foreign representative.”

The phrase “*foreign representative*” has a negative connotation. It suggests that NCOs with this status serve the interests of a foreign state or organization rather than the interests of Kyrgyzstan and its people, which is not true. Due to the broad definition of “*political activity*” in the law and the large number of NCOs receiving foreign funding, some of them will have to register as “*foreign representatives*” or give up their only source of funds and cease their statutory activities.

As noted by United Nations’ (UN) Special Rapporteurs, “*such labeling with the additional reporting obligations [...] could present an interference with the exercise of the right to freedom of association and of freedom of expression without discrimination, as the amendments proposed in the draft law clearly disadvantage NCOs receiving foreign funding.*”⁷ Therefore, the stigmatization of NCOs as “*foreign representatives*” violates Article 22 of the ICCPR.

It should be remembered that the recipients of foreign funding and aid in the KR include not only NCOs but also government bodies, among them members of the Jogorku Kenesh. They are directly engaged in political activities without having to register as, or refer to themselves as, “*foreign representatives*” in every public communication. Although they receive foreign investment, Kyrgyz commercial organizations are actively involved in public life and engage in what could fall under the definition of “*political activity*” as that term is defined by the law. For example, many telecommunication operators (commercial organizations) have published appeals to the Ministry of Digital Development and the Cabinet of Ministers of the KR regarding the draft Digital Code of the KR as part of a public discussion.⁸ Based on the list of forms of “*political activity*” in the law, such actions by telecommunication operators would definitely be characterized as political.⁹ Although there is no need to impose any restrictions on business activities or investments, the very fact of targeted stigmatization of NCOs indicates an intention to undermine their reputation with the public rather than ensure transparency of sources of foreign influence.

1.4. POSSIBLE DISCLOSURE OF PERSONAL DATA OF FOUNDERS AND DIRECTORS OF “FOREIGN REPRESENTATIVE” NCOs

The law provides that an authorized body (in all likelihood, the MoJ) shall maintain a public register of “foreign representative” NCOs. The register is to include the name of an NCO and its founders and director’s data. At the same time, the law requires the

⁷ UN Special Rapporteurs regarding the draft law on “foreign representatives,” October 2, 2023, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28447>.

⁸ See: <http://koomtalkuu.gov.kg/ru/view-npa/2927>.

⁹ “Forms of political activity: [...] public appeals to state bodies, local self-government bodies and their officials, as well as other actions that influence the activities of those bodies, including the adoption, amendment, and repeal of laws or other legislation.”

director of a “foreign representative” NCO to apply for inclusion in the register to the authorized body. The procedure for maintaining the register, including the mandatory information it should contain, shall be established by an internal document of the authorized body. As a result, the authorized body will specify, by its order, what information a “foreign representative” must submit on its founders and director for inclusion in the register.

Article 17 of the ICCPR and Article 63 of the Constitution of the KR guarantee the right to the protection of personal data. According to the UN Human Rights Committee, this right is required to be guaranteed against all interferences and attacks from state authorities.¹⁰ Since it is not a normative legal act, an order of the authorized body is issued under a simplified procedure without a public discussion. Therefore, such delegation of rule-making powers increases the risk that the authorized body will require the provision of redundant personal data of the NCO’s founders and director. Such implementation of the law will violate the principle of legality and legitimacy of restrictions, which says that a law should be clear, especially in those provisions which determine the discretionary powers of state bodies.¹¹

1.5. INDEPENDENT ANNUAL AUDIT OF “FOREIGN REPRESENTATIVE” NCOS AND SUBMISSION OF THE AUDIT REPORT TO THE AUTHORIZED BODY

Under the law, a “foreign representative” NCO must undergo an annual audit by an independent auditor and submit its report to the authorized body. For that purpose, NCOs will have to hire independent auditing companies, the cost of whose audit services are usually high. NCOs with limited resources will not be able to afford these audits. As a consequence of this financially burdensome requirement, some NCOs will be forced to cease operations owing to a lack of funds to pay for independent audits. Others will have to redirect funds that could have been used to support individuals in need of assistance.

International good practice does not require a financial audit for all NCOs, but rather some special categories of NCOs, such as those that acquire the status of a charitable or (public benefit) organization to which the state grants significant tax benefits.

2. GRANTING THE MOJ NEW POWERS TO INTERVENE IN THE INTERNAL AFFAIRS OF “FOREIGN REPRESENTATIVE” NCOS

2.1. AUTHORITY TO INSPECT THE ACTIVITIES OF “FOREIGN REPRESENTATIVE” NCOS

The law grants the MoJ significant new powers that will restrict the activities of “foreign representative” NCOs. The MoJ and its subdivisions will be able to request and inspect

¹⁰ General Comment #16 – Article 17 (Right to Privacy), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FGECC%2F6624&Lang=ru.

¹¹ ECHR, *Hasan and Chaush v. Bulgaria* [GC], Application #30985/96, Judgment of October 26, 2000, para. 84; ECHR, *Aliyev and Others v. Azerbaijan*, Application #28736/05, Judgment of December 18, 2008, para. 35.

internal documents of such NCOs and determine, at their own discretion, if an NCO's activities and expenditures are in line with its statutory purposes.

The procedure for such inspections will be determined by an MoJ internal regulation, which is not a normative legal act. Since the process of developing internal regulations by government bodies does not provide for stakeholder engagement or public discussion, the procedure may grant broad powers to the MoJ and insufficiently protect NCOs' rights. This would violate the principle of good governance in law, policy, and practice enshrined in the Guidelines on Freedom of Association (paras. 32, 106), which state that *"associations and their members should be consulted in the process of introducing and implementing any regulations or practices that concern their operations."*

2.2. AUTHORITY TO REQUEST AND INSPECT NCO INTERNAL DOCUMENTS

The law authorizes the MoJ to request and inspect any internal documents of "foreign representative" NCOs, including those on internal governance, internal rules, and finance. The outlined provision of the law is in conflict with:

1. Article 5 of the Law of the KR on Noncommercial Organizations, which states that *"interference of government bodies or officials in the activities of noncommercial organizations [...] shall not be allowed"*; as well as
2. international practice and international obligations of the KR, including 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, or to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."* As has been repeatedly confirmed by decisions of the UN Human Rights Committee, the guarantees of fundamental human rights extend to NCOs, since they are associations of citizens.

2.3. AUTHORITY TO OBTAIN INFORMATION ON THE FINANCIAL AND BUSINESS ACTIVITIES OF FOREIGN REPRESENTATIVE NCOS FROM CREDIT AND OTHER FINANCIAL ORGANIZATIONS

The law authorizes the MoJ to request and obtain information on the financial and economic activities of "foreign representative" NCOs from credit and other financial institutions. This provision contradicts the Law of the KR on Banks and Banking Activity, specifically, part 4 of Article 67 of the Law of the KR on Banks and Banking Activity, which states that *"no information constituting a banking secret shall be provided to any other persons [except for financial intelligence agencies and the authorized tax body] other than on the basis of a judicial act."* Under part 3 of Article 2 of the same law, *"where the norms [of the Law of the KR on Banks and Banking] conflict with those of other laws of the [KR], the norms [of the Law of the KR on Banks and Banking] shall apply to regulate banking legal relations."*

2.4. AUTHORITY TO DETERMINE AT ITS DISCRETION WHETHER AN NCO'S ACTIVITIES ARE LEGITIMATE

The law gives the MoJ the right to assess, at its discretion, whether the activities or expenditures of a “foreign representative” NCO are consistent with its statutory purposes.

For example, an NCO has declared in its charter that it will be engaged in the development of education, but during parliamentary elections, its members or its supervisory body decide to send its observers on the election day. Since these activities are not written in the NCO’s charter, they may be considered noncompliant with the charter and serve as grounds for holding the NCO accountable.

In accordance with part 2 of Article 53 of the Constitution of the KR, “*Everyone has the right to carry out any actions and activities, except for those prohibited by the Constitution and laws*”. Therefore, NCOs should have the broad legal capacity of commercial organizations to engage in any activity not prohibited by law. The only reasonable restriction may be the requirement that making profit is not the main purpose of the NCO’s activities. Additional restrictions may apply to certain categories of NCOs (for example, charity organizations) that enjoy significant tax and other benefits, but not to all NCOs. As long as an NCO conducts its activity within the limits of the law, it is an internal matter for the NCO itself and its governing body to decide how closely it sticks to its statutory purposes in its activities. The changes adopted in this part of the law also contradict Kyrgyzstan’s international obligations, in particular Article 17 of the ICCPR.

2.5. AUTHORITY TO SUSPEND ACTIVITIES AND INITIATE THE LIQUIDATION OF AN NCO

If an NCO evades registration as a “foreign representative,” fails to mark its materials as produced/distributed by a “foreign representative,” or fails to submit an audit report to the authorized body, the latter shall send it a notice requiring the NCO to eliminate the violation within no more than a month. For example, the law provides for a ten-day period to eliminate a violation, such as failure to provide an audit report. However, it is impossible to rectify such a violation in ten days. The Guidelines on Freedom of Association (para. 234) state that “*the legislation, policy and practice of the state should provide associations with a reasonable amount of time to rectify any oversight or error.*”

If an NCO fails to eliminate violations within the specified period, the MoJ may suspend the NCO’s activities at its own discretion (without a court order) for a period of no more than six months. This provision of the law is a violation of the right to association, since according to the Guidelines on Freedom of Association (para. 255), any suspension of the activities of an NCO “*should... only be based on a court order.*” In addition, a lengthy suspension of activities could lead to a de facto freezing of the operations of the NCO, resulting in a sanction tantamount to dissolution.

The law provides that if it is suspended, the NCO shall be prohibited from using its bank accounts, except for settlements on its business activities and work contracts, compensation of losses caused by its actions, and payment of taxes, fees, and fines. Granting such authority to MoJ would be considered a violation of NCOs' right to use their property, *since any seizure of property or loss of control over it could prevent the association from achieving its goals.*¹²

At the same time, the law provides that a decision to suspend an NCO may be appealed in the manner provided for by the Law of the KR on the Basics of Administrative Activities and Administrative Procedures with the clarification that filing an appeal shall not suspend the execution of the appealed decision. However, according to the Guidelines on Freedom of Association (para. 240), *"appeals against sanctions imposed should have the effect of suspending the enforcement of sanctions until the appeals are completed."* This makes it possible to avoid situations where the lengthy appeal procedure, during which its accounts are frozen or it must pay high fines, brings an NCO to the brink of collapse even if the appeal is ultimately upheld.

If the NCO fails to eliminate the violations indicated in the notice within the six-month suspension period, the MoJ may petition a court to liquidate it. According to the Guidelines on Freedom of Association (paras. 234, 237, 239, 252), the prohibition and dissolution of NCOs should always be used as a measure of last resort when an NCO has committed serious violations entailing a serious threat to the security of the state or certain groups, and should always be proportionate to those violations. That said, the burden of proof for violations leading to sanctions should always be on the authorities (para. 241).

Therefore, the practical application of the above provisions of the law would be a direct violation of human rights and international obligations of the KR established under the ICCPR and other international instruments in the field of human rights and freedoms.

3. POSSIBILITY OF PROHIBITING AN INCO TO CARRY OUT ACTIVITIES WITHOUT REGISTRATION

The law contains the following provision: *"A foreign noncommercial organization shall carry out its activities in the territory of the [KR] through its structural subdivisions – branches and representative offices."* The law does not provide for the possibility for an INCO to carry out its activities in the KR without registering a branch or representative office. Although the law does not directly prohibit INCO activities without registering a branch or representative office, this conclusion can be made based on the above-quoted provision.

¹² See *The Holy Monasteries v. Greece*, applications ##13092/87 and 13984/88, Judgment of December 9, 1994.

The norms of international law guaranteeing the right to freedom of association, including the right to freedom of establishing and operating NCOs, extend to INCOs as well. *“The foregoing standards should equally be observed with respect to the formation of branches of associations, foreign associations or unions and network of associations, including those operating at the international level.”*¹³

Conclusion

Kyrgyzstan enjoys a well-deserved reputation as one of the more progressive countries of Central Asia and Eurasia as far as ensuring and protecting fundamental human rights and freedoms is concerned. It is known for creating a legal environment where civil society assists the Jogorku Kenesh, the President, and the Cabinet of Ministers in carrying out their main mission of improving the living conditions of the people. Regrettably, some provisions of the law undermine and reverse Kyrgyzstan’s efforts in this field and weaken its ability to develop human resources, attract foreign investment, and enjoy the support of its citizens and the international community for maintaining its sustainable position as a democratic state.

The adopted law will likely lead to a downgrade of Kyrgyzstan’s international political and economic rating (index), which foreign businesses rely on to assess their risks of investing in a particular country. Political and economic indices are closely linked. For example, political risks are key for three out of five criteria for assessing the sovereign credit rating by S&P.¹⁴ The World Bank uses the Investment Competitiveness Diagnostics,¹⁵ as well as Worldwide Governance Indicators,¹⁶ in which political risks play a significant role. A recent World Bank study showed that investors consider “political risk” as the second major factor in deciding whether to invest in developing and “transition” economies. Furthermore, there are purely political indices that all major companies look at before investing in a country. The main political indices include The World Justice Rule of Law Index,¹⁷ Freedom Ratings,¹⁸ the Corruption Perception Index¹⁹ and the TRACE Bribery Risk Matrix.²⁰ It is very likely that with the

¹³ Para. 166 of the Guidelines, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report to the Human Rights Council (Best practices that promote and protect the rights to freedom of peaceful assembly and of association), UN Doc. A/HRC/20/27, May 21, 2012, para. 59.

¹⁴ Sovereign Risk Indicators 2022 Estimates: <https://disclosure.spglobal.com/sri/>.

¹⁵ Investment Competitiveness Diagnostics: <https://www.worldbank.org/en/topic/investment-climate/brief/investment-competitiveness-diagnostics-and-research>.

¹⁶ Worldwide Governance Indicators: [https://info.worldbank.org/governance/wgi/#:~:text=The%20Worldwide%20Governance%20Indicators%20\(WGI.Government%20Effectiveness](https://info.worldbank.org/governance/wgi/#:~:text=The%20Worldwide%20Governance%20Indicators%20(WGI.Government%20Effectiveness).

¹⁷ The World Justice Rule of Law Index by World Justice Project: <https://worldjusticeproject.org/rule-of-law-index/>.

¹⁸ Freedom Ratings by Freedom House: <https://freedomhouse.org/countries/freedom-world/scores>.

¹⁹ Corruption Perception Index by Transparency International: <https://www.transparency.org/en/cpi/2021>.

²⁰ The TRACE Bribery Risk Matrix: <https://www.traceinternational.org/trace-matrix>.

introduction of restrictions for NCOs and INCOs, the ratings of the Kyrgyz Republic will deteriorate, which may lead to a decrease in investment in the country's economy.

ICNL's analysis shows that the law will significantly worsen the legal situation for a considerable part of NCOs in the KR. A number of provisions of the law contradict the ICCPR and other main sources of international human rights law.²¹ The law is not in the public interest – if indeed it consists of building a genuine democracy in the country, as written in the Constitution of the KR.

ICNL appreciates this opportunity to present its comments on the law and looks forward to continued cooperation in the future.

²¹ Universal Declaration of Human Rights (Article 20) (1948), 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.