

## ANALYSIS OF THE DRAFT LAW OF THE KYRGYZ REPUBLIC ON MAKING ADDITIONS AND AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF THE KYRGYZ REPUBLIC (DRAFT LAW OF THE KYRGYZ REPUBLIC ON “FOREIGN REPRESENTATIVES”)

DECEMBER 15, 2022

On May 26, 2014, Members of Parliament (MPs) Bakir uulu Tursunbay, Nurkamil Madaliyev, and Nadira Narmatova introduced the Draft Law of the Kyrgyz Republic on Making Additions and Amendments to Certain Legislative Acts of the Kyrgyz Republic, which was referred to as the Draft Law on “Foreign Agents.” After extended and intense public discussion of the initiative from 2014-2016, the parliament rejected the draft law on May 12, 2016, after its consideration in the third reading.

On November 21, 2022, MP Narmatova initiated the Draft Law of the Kyrgyz Republic on Making Amendments to Certain Legislative Acts of the Kyrgyz Republic (the Law on Non-Commercial Organizations, the Law on State Registration of Legal Entities, Branches (Representative Offices), and the Criminal Code of the Kyrgyz Republic) (hereinafter referred to as the Draft Law), which contains nearly the same provisions as the 2014 Draft Law on “Foreign Agents.” The most important difference between this new Draft Law and the Draft Law on “Foreign Agents” is use of the word “representative” instead of “agent.”

This Analysis was prepared by the International Center for Not-for-Profit Law (ICNL)<sup>1</sup> at the request of NCOs concerned about the content of the Draft Law. It examines its main provisions, which may significantly limit the activities of Kyrgyzstani 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 Kyrgyzstan.

If passed, the Draft Law will negatively impact not only NGOs defending the interests of their members or certain groups of the population but also 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 their 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.<sup>2</sup>

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

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 representatives," (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 most significant concern:

- I. Establishing new burdensome requirements for all NGOs and the right of state authorities to interfere in their internal affairs, including:
  - the requirement for NGOs to submit a new report to the authorized state agency;
  - the Ministry of Justice may request and check the internal documents of NGOs, send its representatives to participate in any internal activities of

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<sup>2</sup> In international practice, the 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, audits by state bodies, liquidation, etc. are concerned.

- NGOs, and determine at its discretion if an NGO complies with the goals of its creation.
2. Forcing NGOs that receive funding from foreign sources through a humiliating special “foreign representative” registration, restriction of their activities, and establishing burdensome requirements for them, including:
    - 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; and
    - the Ministry of Justice may conduct scheduled and unscheduled inspections of the activities of these NGOs, with the discretion to suspend their activity for up to six months.
  3. Establishing new burdensome requirements for branches and representative offices of INGOs, restriction of their activities, and providing the Ministry of Justice with the right to interfere in their internal affairs:
    - the requirement to pass an annual financial audit;
    - the requirement to submit a new report to the authorized state body and publish it in the media or on their website;
    - the Ministry of Justice may instruct branches and representative offices of INGOs to stop financing local NGOs and take the decision, at its discretion, to exclude organizations from the register of branches and representative offices.
  4. Establishing new rules on criminal liability of NGO and INGO representatives in the Criminal Code of the Kyrgyz Republic, which has no parallel application to representatives of commercial organizations and state bodies.

Below 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 the following norm in the NGO law: *“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 those received from foreign sources ...”*.

Thus, if the Draft Law is passed, the NGOs will be required to submit another report to the authorized state body in addition to the existing four reports. At present, in Kyrgyzstan, all legal entities (including NGOs) submit the following:

- two monthly reports to the tax authorities - on tax and insurance contributions to the Social Fund;

- a report to the statistical authorities every six months; and
- according to the current NCO Law (Article 17), NCOs shall annually, before April 1, post on the website of the State Tax Service (STS) information about the sources and use of their income and expenditures, as well as information about the acquired, used, and alienated property.<sup>3</sup>

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 submitting their reports, for example, to the Ministry of Justice. In order to read and process all the reports, it will be necessary to expand the Ministry's staff and with significant implications for the state budget. 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 if an NGO complies with the goals of its creation— all while lacking 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 the following:
  - 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 Kyrgyzstan, 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 fundamental human rights apply to NGOs, as has been repeatedly confirmed by the International Court on Human Rights' decisions since NGOs are citizen associations.

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<sup>3</sup> With the stated goal of ensuring the transparency of NGOs, these requirements entered into force on June 29, 2021.

- ***Authority to send representatives to participate in the internal activities of NGOs.*** The Draft Law allows the Ministry of Justice, without any restrictions, to send its representatives to participate in the internal activities of NGOs. A government employee may participate in an internal meeting of members of the organization, for example, even if that meeting relates to 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 to engage in educational activities in its charter, but at some point, its members or supervisory body have decided that the organization would rather help an orphanage. This is not an educational activity, and this activity is not indicated 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 Article 53 (2) of the Constitution of the Kyrgyz Republic and with customary international practice, NGOs, just as commercial companies, shall have ample capacity to engage in any legal activity that is not prohibited by law. 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 Representatives,” Restriction of Their Activities, and Burdensome Requirements for Them**

### **2.1 Forcing NGOs that Receive Foreign Funding to Register as “Foreign Representatives”**

The Draft Law contains norms that force NGOs to receive funding from foreign sources through a humiliating special registration as “foreign representatives,” restrict their activities, and establish a number of burdensome requirements for them.

In Kyrgyz and Russian, the phrase “foreign representative” has a negative connotation. This notion suggests that NGOs with such status serve the interests of a foreign state or a foreign organization rather than the interests of Kyrgyzstan and its people, which does not correspond to reality. In view of the broad definition of “political activity” proposed in the Draft Law and a large number of NGOs receiving foreign funding, most of them will have to either register as “foreign representatives” or relinquish the only source of funding they have to engage in their lawful activity if the Draft law is adopted.

Currently, most 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 representatives.” Given this requirement, many NGOs will simply cease to exist because no one wants to recognize themselves as a “foreign representative.” 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 various spheres, 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 to state bodies). These individual restrictions are already part of the legislation, including the Constitution of the Kyrgyz Republic.

As in all democratic countries, Kyrgyzstan’s citizens and organizations currently enjoy the principle: *“Everything is allowed that is not prohibited by law.”*<sup>4</sup> 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:

- supporting local community development;
- improving the transparency of election campaigns;
- assisting the elderly, persons with limited capabilities, delinquent children, and other vulnerable categories of citizens;
- promoting poverty reduction;
- protecting the environment;
- supporting health care;
- improving prison conditions;
- supporting advocacy;
- supporting freedom of speech and the mass media;
- strengthening democracy; and
- implementing many other public benefit programs being funded by international and foreign grants.

Notably, the Criminal Code and Code on Violations 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 source, any such act must be punished accordingly.

## 2.2 Restriction of the Activity of “Foreign Representatives” NGOs and Burdensome Requirements for Them

The Draft Law establishes new requirements for NGOs that are recognized as “foreign representatives,” including:

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

In order to pass the annual financial audit, NGOs recognized as “foreign representatives” will have to hire an independent audit company. In Kyrgyzstan, these are private organizations certified by the state. In general, the cost of an independent audit is high. Publication of the audit report and conclusions in the media is also expensive. NGOs with limited financial resources will not be able to cover the costs. In international practice, the requirements regarding the financial audit and the

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<sup>4</sup> Article 53 (2) of the Constitution of the Kyrgyz Republic

publication of the audit report and conclusions in the media are only imposed on select 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. For example, in recent years, Kyrgyzstani NGOs developed a draft law on charitable organizations that would require charities, which would receive various tax and other preferences, to complete an annual financial audit and publish their report and conclusions on the STS website.

Arguments against requiring NGOs recognized as “foreign representatives” 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 Representative” 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 are recognized as “foreign representatives” and interfere in their internal affairs. Arguments against these norms in 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 representative” if it has not applied to be included in the register of non-profit organizations performing functions of a “foreign representative,” 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 Kyrgyzstan 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 establishes new requirements for branches and representative offices of INGOs in Kyrgyzstan, including:

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

These requirements will significantly complicate the activity of INGOs in Kyrgyzstan 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 the Ministry of Justice with effectively unlimited authority to make a decision to terminate, at its discretion, the financing of NGOs, as the draft law contains no criteria for assessing their activities. Without a doubt, applying 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 Kyrgyzstan.

### 3.2 The Right of the Ministry of Justice to Exclude Branches and Representative Offices of International Organizations and INGOs from the 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 Kyrgyzstan. 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 50 to 100 thousand Kyrgyzstani soms or imprisonment for up to five years for “*establishing an association or other non-profit organization or a structural unit of a foreign non-profit organization, or a non-profit organization the activities of which involve violence against citizens or other harm to their health or inducing citizens to refuse to perform civil duties or to commit other illegal acts, as well as leadership of such an association, organization or structural unit.*”
- 2) in the form of a fine in the amount of 100 to 200 thousand Kyrgyzstani soms or imprisonment for up to ten years for “*active participation in the activities of associations*” provided for in the previous norm, “*as well as propaganda of deeds of such organizations.*”

The question arises on why NGOs are singled out, as it is clearly not possible to establish a commercial organization and commit any of the above-mentioned acts in the framework of its activity, nor can such acts be committed by individuals working for state bodies. These acts are dangerous to society regardless of who committed them. The Criminal Code and the Code on Violations already include responsibility for these offenses and crimes, so whoever commits them shall be liable regardless of where they work, be it an NGO, a state agency, or the business sector, or if they are unemployed. There is no reason whatsoever to introduce a particular category of “NGO representatives” when 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 Eurasia towards ensuring the protection of fundamental rights and freedoms, the creation of a legal environment in which civil society assists the parliament, the Government of the Kyrgyz Republic, Presidential Administration, and other state bodies in improving citizens’ living standards. Regrettably, the Draft Law provisions undermine and reverse Kyrgyzstan’s efforts 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.

More than 90% of the Draft Law is copied from Russian “foreign agents” legislation. In 2014-2016, supporters of the Draft Law on “Foreign Agents” in Kyrgyzstan claimed that the United States was the first country to adopt this kind of law, and that Russia only followed their example. This does not correspond to reality. 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 July 20, 2012.<sup>5</sup> FARA was adopted on the eve of World War II 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 no mention of them in the law), as it does not restrict their activity, nor is it 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 on 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.<sup>6</sup> The 2012 Russian law was aimed exclusively against NGOs, 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, in Russia, the Far East Reserve for the Protection of Cranes was recognized as a “foreign agent,” which conducted a number of joint projects with foreigners and received grants from abroad,<sup>7</sup> which would be absolutely impossible under FARA.

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<sup>8</sup> of international law on human rights. The Draft Law does not correspond to the state interests if they really seek to build a true democracy in the country, which is written in the Constitution of the Kyrgyz Republic. 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 Kyrgyzstan. Kyrgyzstan is likely to lose all legal arguments regarding these appeals – and earn the image of an undemocratic country.

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<sup>5</sup> Available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_132900/](http://www.consultant.ru/document/cons_doc_LAW_132900/)

<sup>6</sup> Notably, it would be beneficial for Kyrgyzstan 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.

<sup>7</sup> Available at <http://lenta.ru/news/2013/05/17/political>

<sup>8</sup> 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.

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

ICNL thanks all concerned parties for the possibility of presenting its comments regarding the Draft Law and hopes to continue this cooperative work.