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Analysis of the Draft Law of the Kyrgyz Republic on Foreign Gratuitous Aid (Assistance) to the Kyrgyz Republic March 23, 2012

On November 29, 2011, the Speaker of Parliament of the Kyrgyz Republic, Mr. Akmatbek Keldibekov, and the Deputy of the Parliament, Mrs. Elmira Dzhumaliev, introduced into Parliament the draft law “On International Gratuitous Assistance to Kyrgyz Republic and Introducing Changes and Amendments to Some Legislative Acts of Kyrgyz Republic”.

On January 26, 2012 this draft law was separated into two draft laws and introduced again with a number of technical changes relating mostly to the quality and delivery of medical supplies and other goods: (1) the draft law on Foreign Gratuitous Aid (Assistance) to Kyrgyz Republic, and (2) the draft law on Introducing Changes and Amendments into Some legislative Acts of Kyrgyz Republic (into the Tax Code, the Customs Code, the Law of Kyrgyz Republic on Road Fund). These two draft laws were initiated into the Parliament by Deputies Mr. Akmatbek Keldibekov, Mrs. Elmira Dzhumaliev, Ms. Urmat Amanbaeva, Mr. Abdulatip Rejevaliev and Mr. Dastan Bekeshev.

This Analysis is prepared at the request of non-commercial organizations (NCOs) of the Kyrgyz Republic which expressed their concern about the content of the draft law on Foreign Gratuitous Aid (Assistance) to Kyrgyz Republic (hereinafter referred to as “draft law”).

This Analysis evaluates key provisions of the draft law which (in opposition to international common practice) will make foreign financing of NCOs more difficult and may lead to restriction of activities of NCOs in Kyrgyzstan. The draft law, if adopted, may have a negative impact on all NCOs, including charitable and humanitarian organizations specializing in provision of social services to the population, taking into consideration that the majority of NCOs currently receive the major part of their funding (over 65%)¹ from foreign source.

The draft law, if adopted, will affect not only local NCOs, but also will have a negative impact on the ability of international and foreign organizations to render technical, humanitarian, educational, medical, social and other assistance directly to individual citizens and organizations in Kyrgyzstan.

Excessive regulation of foreign assistance may lead to reduction of foreign funding of NCOs in Kyrgyzstan. Any reduction in foreign funding will, in turn, result in reduction of provision of social services to the population at a time when such services are urgently needed by the population.

Below are presented the arguments as to why certain provisions of the draft law are a potential source of restriction of activities of NCOs.

¹ This figure is taken from research of noncommercial sector of Kyrgyzstan conducted by Association of Civil Society Centers (ACSSC) in 2005

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1. Narrowing of definition of term “grant“.

Article 1 of the draft law on Foreign Aid contains definition of term as “foreign grant” which are narrower than existing definition “grant” stipulated in the Tax Code.

According to the Tax Code “grant” – assets gratuitously provided by states, international, foreign and domestic organizations to the Government, local bodies and noncommercial organizations not involved in the activity of supporting of political parties and election campaigns. Here is only one restriction “not to use grant in supporting of political parties and election campaigns”, others are allowed.

According to the draft law on Foreign Aid “foreign grant” - foreign gratuitous aid provided for implementation of specific programs in education, health, art, culture and environment protection spheres.

Therefore the definition of term “foreign grant” has exhaustive list of program objectives. This list of programs doesn’t include such programs like: (1) development of local communities; (2) support for transparency of election campaigns; (3) support of elderly, disability, street children and other needed categories of citizens; (4) improvement of conditions for prisoners; (5) support of human rights defender’s activity; (6) support of freedom of speech and media; (7) democracy development programs and other public benefit programs which are basically now funded by the foreign and international grants.

2. Provision of broad authority to the executive body of the government to establish new procedures necessary to receive foreign assistance.

Paragraph 2(1) of Article 6 of the draft law provides that within one month from the date the law enters into force, the Government will “take necessary measures” to “establish the procedure for rendering foreign gratuitous aid.” This provision gives the executive body of the government broad discretionary authority, without appropriate guidelines or limits, to establish unspecified new procedures that must be complied with by organizations to receive foreign assistance. For example, according to this authority, the executive body of the state could impose (1) a requirement to obtain permission from the government before receiving foreign assistance (in the same manner as is required in many totalitarian countries), and also (2) to introduce at its own discretion new procedures to control the activities of citizens and organizations (including NCOs) receiving foreign assistance. New procedures, for example, could establish mandatory audits or impose requirements to file additional reports with regard to income generated from foreign sources.

Currently all Kyrgyz organizations (including NCOs) are required to file tax reports on a monthly basis to disclose income generated from all sources, including of foreign origin. In addition, all organizations are currently required to file quarterly statistical reports. It is not clear why any additional reports would be needed, when existing reports already require disclosure of foreign-sourced income.

Such new measures would be unnecessary and overly burdensome for recipients of foreign assistance. It is well known that imposing additional measures of control, including reporting requirements, increase the time and resources an organization must spend on compliance instead of using the same resources to

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implement their statutory activities. This will result in a corresponding decrease in provision of services to the population by NCOs.

Analysis

Analysis of the draft law demonstrates that if it is adopted it will lead to unwarranted and unnecessary restrictions of the rights of citizens and organizations. If the draft law will be adopted, executive bodies of the state will be granted enormous discretion to restrict the rights of citizens and organizations (including NCOs) without any appropriate checks or safeguards.

It is possible to agree with authors of the draft law that there have been certain problems with misappropriation of humanitarian aid imported into Kyrgyzstan under the current system that exempts such aid from VAT and customs duties. The cause of these problems is the lack of appropriate control over the distribution of goods imported into Kyrgyzstan under the auspices of humanitarian assistance. However, these problems can be resolved through introducing amendments into legislation specifically regulating the use and distribution of such humanitarian assistance. The regulation proposed in the draft law is designed not only to solve the problems related to humanitarian assistance, but also allows limitations on any kind of foreign assistance, whether in the form of goods, services or money, being provided Kyrgyzstan citizens, NCOs and other organizations, including branch and representative offices.

The draft law promotes the idea that “foreign assistance” is a potential threat to the state of Kyrgyzstan. In order to prevent this potential threat, the drafters propose to create a new system of unfettered control, potentially including burdensome audits and reporting requirements, over all organizations that receive foreign funding of any kind and for whatever purpose. But there is no justification for this perceived threat. In 2009, during the tenure of President Bakiev, other attempts to restrict foreign assistance were made. At that time, the initiators of the restrictions were not able to present even a single example of an NCO which operated for the benefit of a foreign donor and threatened the state of Kyrgyzstan. It should be also remembered that pursuant to the Criminal Code and the Code of Administrative Liabilities, the Kyrgyz Republic already imposes punishments for all crimes and misdeeds against the public interest. Persons who commit such crimes and violations already carry liability in accordance with these laws.

Kyrgyzstan NCOs are also concerned that the process of drafting and adoption of secondary legal acts of executive bodies of the government is not as transparent and participatory as the process of drafting and adopting laws. This creates an additional threat that the draft law, by granting such broad authority to executive bodies of the government to establish secondary legal acts, would unnecessarily restrict rights of citizen and organizations.

In countries around the world that have established democratic traditions, organizations (including NCOs) may receive foreign funding and use it to support various types of activities, including advocacy for law reforms, to support or criticize legislation, to monitor elections, or to assist the government with drafting policies in various spheres. It is appropriate to apply some limitations, either in case of specific groups or organizations (e.g. political parties), or in regard to certain types of activities (for example, financing of election campaigns). Restrictions of this type already exist in Kyrgyz legislation, including in the State Constitution.

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Conclusions

In Kyrgyzstan, citizens and organizations benefit from a fundamental legal and democratic principle: “everything that is not prohibited is permitted”. The same democratic principle should apply to all organizations (including NCOs) in regards to financing. Granting too much authority to the executive body of the government could violate this principle, particularly if the authority is exercised arbitrarily without first being set forth in a legal act that provides advance opportunity for public hearing and debate.

Based on the arguments presented above, it is apparent that adoption of the draft law is overbroad and unnecessary. The problems caused by misappropriated humanitarian aid would be better solved by introducing legislation aimed at preventing and prosecuting those specific activities.

ICNL is thankful for the opportunity to provide this Analysis, and we hope that we will have the opportunity to provide further assistance with improving Kyrgyz legislation.