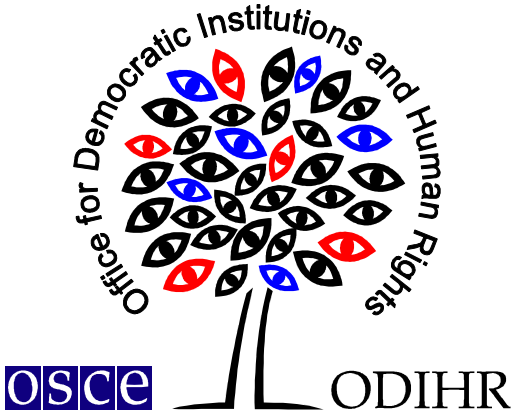
Warsaw, 1 March 2007 Opinion-Nr.: NGO– TAJ/082/2007 rev (IU)[1] www.legislationline.org	

COMMENTS
ON THE REVISED DRAFT LAW
OF THE REPUBLIC OF TAJIKISTAN
ON CIVIL SOCIETY ORGANIZATIONS (ASSOCIATIONS)

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[1] These Comments are a revised version of the Comments No NGO– TAJ/057/2006 (IU), whereby the OSCE/ODIHR commented on the previous version of the Draft Law.

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1. INTRODUCTION

1. *On February 23, 2007 the OSCE/ODIHR was requested by the OSCE Centre in Dushanbe to provide an update on the earlier OSCE/ODIHR Comments on the draft Law of the Republic of Tajikistan on Civil Society Organizations (Associations) considering the revisions made to the draft Law in the meantime. At this point, the draft Law has been passed by the Lower Chamber of the Parliament and is pending approval by the Upper Chamber.*
2. *These Comments have been prepared on the basis of the Russian and unofficial English translations of the revised draft Law.*
3. *The earlier Comments were prepared upon the request of April 4, 2006 by the OSCE Center in Dushanbe to review the draft Law of the Republic of Tajikistan on Civil Society Organizations (Associations). The Comments were subsequently shared with the State authorities of the Republic of Tajikistan and discussed at a roundtable in Dushanbe.*

2. SCOPE OF REVIEW

4. These Comments analyze the draft Law of the Republic of Tajikistan on Civil Society Organizations (Associations) (hereinafter referred to as the "revised draft Law" or "draft") from the viewpoint of its compatibility with the relevant international human rights standards and the OSCE commitments. The Comments also examine the revised draft Law in light of international best practices with regard to regulation of non-profit organizations. The international standards referred to by the Comments may not only be those legally binding for the Republic of Tajikistan, but may include international instruments not binding upon Tajikistan as well as documents of declarative or recommendatory nature which have been developed for the purpose of interpretation of relevant provisions of international treaties.
5. These Comments do not purport to provide a comprehensive review.
6. The OSCE/ODIHR would like to mention that the opinion provided herein is without prejudice to any further opinions or recommendations that the ODIHR may wish to make on the issue under consideration.
7. Note that in several instances the citations to the English translation have been modified to better reflect the concepts of the Law and to avoid terminological incongruency. In particular, the Comments refer throughout to "*civil society organizations*" rather than to "*public organizations*" as the functional equivalent of the Russian term "*общественные организации*" in order to prevent ambiguities and miscomprehension likely to arise in non-Russian speaking readers.

3. EXECUTIVE SUMMARY

8. The revised draft Law continues to suffer from vagueness and inconsistency. A particular example that needs to be addressed is lack of clarity with regard to whether or not the right to informal association is protected. The revised draft would also benefit from a clearer and more purpose-oriented typology of non-profit organizations. As far as the permissible restrictions are concerned, it is recommended that a court decision be required as a basis for the prohibition for a certain individual from founding or joining an NGO on the ground of his/her association with a terrorist group.

9. On the other hand, it is welcome that the drafter has taken on board the previously made OSCE/ODIHR recommendation to delete the provisions concerning liability for organized crime where a non-profit organization management officer is found personally responsible for a criminal act by the organization.

10. A full list of recommendations follows below.

    1) It is recommended that the provisions of Article 4(2) be revised to set forth the right of everyone to found NGOs while expressly and unequivocally providing that the choice of whether or not to proceed with formal registration shall be left to the discretion of the founders themselves. It is also recommended that the wording of Article 16(2) be changed to provide for the possibility – where the group wishes to acquire legal entity status -- rather than for a direct obligation of filing the constituent documents with the registration authority. It is recommended that the Article 10(3) requirement for certain types of NGOs to file a notice of constitution with the local executive body be deleted. [see para 15]

    2) It is recommended that the draft be revised to abolish the category of NGO "participants." The drafters may, however, wish to provide for a definition of "volunteer" as an individual with full legal capacity who by his/her free choice benefits the community or a particular group through providing unpaid services to a non-profit organization. [see paras 20-21]

    3) It is recommended that the proposed typology of NGOs be revised to distinguish between membership-based and non-membership NGOs. It is recommended that foundations make a separate category of non-membership NGOs. [see para 29]

    4) It is welcome that Article 7(2) of the draft expressly provides for the right of aliens to found and join NGOs. Consideration may be given to removing the residency requirement for aliens wishing to join NGOs. [see para 30]

    5) It is recommended that a court decision be required as a basis for the prohibition for a certain individual from founding or joining an NGO on the ground of his/her association with a terrorist group. [see para 32]

6) It is recommended that provisions of Article 34(2) stipulating the unconditional right of the registration authority representatives to attend NGO events be removed from the draft NGO Law or replaced with a provision which would exhaustively enumerate and clearly define the specific types of meetings to which registration body representatives may have unimpeded access. [see para 39]

7) It is welcome that the revised draft Law no longer includes the provision that where a non-profit organization management officer is found personally responsible for a criminal act by the organization, the management officer shall be held liable for directing a criminal organization. [see para 40]

4. ANALYSIS AND RECOMMENDATIONS

4.1 Freedom of informal association.

11. Article 4(2)[2] of the revised draft Law provides for the right to found and join NGOs without a "prior authorization" by the authorities.

12. It is not exactly clear if "prior authorization" in this context is intended to mean the state registration or some additional clearance before state registration can be proceeded with. If "prior authorization" is congruent with the state registration, then the provision could be interpreted as expressly providing for freedom to associate informally, which would be very welcome. Even if this is the case, however, Article 16(2) which provides that "*founders of a civil society organization shall be required to file the constituent documents of the organization with the registration authority*"[3] would effectively nullify the positive effect of Article 4(2).

13. It has to be noted that the international standards concerning freedom of association specifically provide for the right to associate informally. The Fundamental Principles on the Status of Non-Governmental Organizations in Europe[4] (hereinafter referred to as "Fundamental Principles") expressly provide that "*NGOs can be either informal bodies, or organizations which have legal personality*."[5]

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[2] Draft Law on Civil Society Organizations (Associations), Article 4(2) ("*Citizens shall have the right to found according to their own choice civil society organizations (associations) without a prior authorization by the State or regulatory authorities, as well as to join such civil society organizations (associations) in accordance with the charters of the latters.*")
[3] Emphasis added.
[4] Although not legally binding in general and on Tajikistan as a non-member State of the Council of Europe in particular, the Fundamental Principles nevertheless are internationally recognized as an authoritative body of standards widely used for the interpretation of international treaty norms concerning freedom of association. The Fundamental Principles in English or Russian are available at http://www.coe.int/T/E/NGO/public/Fundamental_Principles/Fundamental_principles_intro.asp (last visited on 11 April 2006).
[5] Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 5.

14. Moreover, the draft provides for an additional registration procedure[6] with the local executive bodies for the groups that do not acquire legal entity status. This is the case with the so-called "social initiative groups" which are discussed below in more detail. This registration takes the form of a notice of constitution rather than an approval of constitution, but still substantially restricts freedom of informal association.

15. It is therefore recommended that the provisions of Article 4(2) be revised to set forth the right of everyone to found NGOs while expressly and unequivocally providing that the choice of whether or not to proceed with formal registration shall be left to the discretion of the founders themselves. It is also recommended that the wording of Article 16(2) be changed to provide for the possibility – where the group wishes to acquire legal entity status – rather than for a direct obligation of filing the constituent documents with the registration authority. Finally, it is recommended that the Article 10(3) requirement for certain types of NGOs to file a notice of constitution with the local executive body be deleted.

4.2 Number of founders.

16. Article 16(1)[7] requires a minimum of three founders to establish an NGO. This provision is in compliance with the Fundamental Principles[8] and in fact lower than in a significant number of the OSCE participating States,[9] and as such is welcome.

4.3 Membership.

17. The revised draft Law retains the provisions introducing a new category of NGO "participants" in addition to NGO members. Article 6(3) of the draft defines "participants" as "*natural persons who share the goals of the organization and/or its activities, take part in its activity without any compulsory formalization of conditions for such participation, unless otherwise provided for by the charter.*"[10]

18. The introduction of this new category seems rather artificial and does not serve any particular purpose. While it is clear that where there exist membership-based NGOs it is helpful to define who qualifies as a member, there is no added value derived from separately defining those who may have no meaningful contact with the non-profit beyond participating in a one-off event.

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[6] Draft Law on Civil Society Organizations (Associations), Article 10(3) ("*A social initiative group is an informal civil society organization which is not subject to state registration; upon being established, it shall submit a written notification to the local body of state executive power.*")
[7] *Id.,* Article 16(1) ("*Civil society organizations shall be established at the initiative of a minimum of three natural persons as founders.*")
[8] Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 16 ("*Two or more persons should be able to establish a membership based NGO. A higher number may be required where legal personality is to be acquired, but this number should not be set at a level that discourages the establishment of an NGO.*")
[9] *Cp.* requirements regarding the minimum number of founders in other OSCE participating States. Thus, a number of participating States (including Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Lithuania, Poland, Romania, and Slovenia) require the same number as provided for by the draft Law, while in other countries this figure rises to 10 (Hungary, Slovenia, Latvia) or even higher (Cyprus, Greece). At the same time, some States either have no minimum requirement (Norway, Sweden) or require as few as two founders (Armenia, France), which can be viewed as a best practice.
[10] Draft Law on Civil Society Organizations (Associations), Article 6(3).

19. Moreover, the definition as it stands now is rather vague and can be easily misinterpreted. It is not exactly clear what "*sharing … goals and/or …activities*" may mean in the context of the draft. In particular, if an individual shares the vision and priorities of an NGO without necessarily directly cooperating or even coming into contact with the group, would this be considered as an instance of "sharing goals"? This would be an impermissibly wide interpretation of "participation" – making, for example, a member of PETA (a U.S.-based animal protection-oriented non-profit organization) automatically a "participant" of an animal protection group in Tajikistan without even his/her knowledge that this group exists – yet this is not entirely impossible under the current definition. Similarly, would someone become a "participant" simply by buying a ticket to a performance raising funds for a particular cause (which may be easily interpreted as "participating" in a event)?

20. In the light of the above consideration, it is recommended that the draft be revised to abolish the category of NGO "participants."

21. At the same time, some people may choose to extend support to a non-profit and benefit a wider community by volunteering their labor. It is the growing international tendency to recognize the legal status of volunteers and to extend to them legal protections and guarantees in a similar fashion as to paid employees. The drafters may therefore wish to provide a definition of volunteer as an individual with full legal capacity who by his/her free choice benefits the community or a particular group through providing unpaid services to a non-profit organization.

4.4 NGO typology.

22. Article 7[11] of the draft classifies all "civil society organizations" into three main groups: (a) "civil society associations," (b) "mass movements," and (c) "social initiative groups" (this latter group essentially includes groups that would be customarily called grassroots or community-based organizations). The subsequent provisions[12] define each organizational type.

23. The line between "civil society associations" and "social initiative groups" is especially blurred and to a certain extent arbitrary. The main distinctions between these two types of NGO are (a) limitation on the thematic and geographic scope of activity of "social initiative groups" (according to the draft, these can only operate on the community level and engage in basic social service delivery and community development projects); (b) "civil society associations" are membership-based NGOs, while "social initiative groups" are not; and (c) no provision for the formal incorporation of "social initiative groups," making them informal groups by default.

24. As far as the limitation of the thematic and geographic scope of "social initiative groups" is concerned, legislation does not appear to be a suitable instrument for regulating this issue. It would be more justified to leave the decision of the thematic and geographic scope to the non-profit itself, which would accordingly reflect it in its charter.

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[11] *Id.,* Article 7 ("*Civil society organizations may be established in the following forms: civil society associations; mass movements; social initiative groups*.")
[12] *Id.,* Articles 8, 9, 10.

25. It also remains unclear why "civil society associations" should be membership-based while "social initiative groups" should not. First of all, assigning non-membership status to "social initiative" (i.e. grassroots) groups is self-contradictory, since grassroots activity is ultimately activity by a group of individuals who have joined to further their own interests, and "membership" is therefore its essential characteristic and a cornerstone.

26. If the drafters intend to introduce the typology of non-profit organizations, a better option would be to simply draw a distinction between membership-based and other NGOs.

27. On the other hand, the proposed typology leaves out an essential category of non-membership NGOs such as foundations which does not fit under any of the categories in the draft. It is recommended that foundations be singled out into a separate category of non-profit organizations, since due to their very specific role and character of activities they may legitimately require a separate regulatory regime. In particular, it is entirely legitimate to require that foundations may only be established as legal entities. In addition, where the group seeks establishment in the form of a foundation, additional documents proving the availability of sufficient financial means may be required.

28. Finally, as regards the status of "civil society associations" as legal entities and of "social initiative groups" as informal groups, a better solution would be to leave it to the discretion of the group itself to choose whether it would rather seek incorporation as a "civil society association" or choose to operate with an informal status, in which case no separate category needs to be created at all.

29. Making a separate category of "social initiative groups" seems thus rather artificial. It is recommended that the proposed typology of NGOs be revised to distinguish between membership-based and non-membership NGOs. It is recommended that foundations make a separate category of non-membership NGOs.

4.5 Aliens as founders and/or members.

30. It is welcome that the draft[13] expressly provides for the right of aliens to found and join NGOs. Consideration may be given to removing the residency requirement for aliens wishing to join NGOs.

4.6 Restrictions on founding and joining NGOs.

31. The draft[14] prohibits "*persons associated with terrorist, extremist or separatist organizations*" from founding and joining NGOs. While this prohibition is not *per se*

[13] *Id.,* Article 17(2) ("*Foreign citizens and stateless persons on a par with the citizens of the Republic of Tajikistan shall have the right to found, join or participate in civil society organization, provided that they have a permanent residence in the Republic of Tajikistan or an appropriate residence permit. Any restrictions on the right of foreign citizens and/or stateless persons shall be stipulated by the laws of the Republic Tajikistan or the international treaties ratified by the Republic of Tajikistan.*")
[14] *Id.,* Article 17(8) ("*The following may not be founders or members of or participants in civil society organizations: government agencies (except for the cases stipulated in Article 11 of this Law); legal entities (except for cases stipulated in Articles 6, 11 and 16 of this Law); persons associated with terrorist, extremist or separatist organizations.")*

problematic, the provision is still open to arbitrary application and abuse since the draft does not provide for a specific procedure to determine association with a terrorist group.

32. It would therefore be recommended that a court decision be required as a basis for the prohibition for a certain individual from founding or joining an NGO on the ground of his/her association with a terrorist group.

4.7 Government monitoring.

33. Article 34(2)[15] of the draft Law provides for the unconditional right of the registration authority to delegate its representatives for attending any NGO events.

34. On the one hand, the right of unconditional access by the registration authority representatives would in a vast majority of cases prove redundant in the cases where the event is of public nature, meaning that everyone, including State officials such as the registration authority representatives, are free to attend – in fact, it may be assumed that most NGOs would usually be interested to invite state officials if the issues on the event agenda affect public interest.

35. On the other hand, with particular respect to events which are not public, the proposed requirement may potentially impede legitimate NGO activities which – for lawful reasons – require restricted access or should even be conducted in a confidential manner. This is, for instance, the case for NGOs working with crime victims, such as organizations operating shelters or counseling centers for domestic violence, child abuse or human trafficking victims. It is entirely legitimate and in fact necessary for normal operation of a victim assistance NGO that some of its activities and meetings (e.g. counseling sessions) be restricted to access by the victim and the professional worker to prevent further trauma to the victim, while others (e.g. shelter operations) be conducted in complete secrecy, for instance to prevent perpetrators from knowing the location of the shelter and thus enabling potential retaliation against the victim. Another case may be various peer support groups, where the participants gather to share very personal experiences and to help themselves overcome their common problems. For instance, a group of parents of children with attention deficit hyperactivity disorder (ADHD) may find strangers' presence at their meetings intimidating and inhibiting, since children with ADHD tend to be inattentive, score low at school and are often unpopular with their peers, and parents may view it as a "shame" to talk about their children's problems in the presence of someone who they do not know well.

36. In this connection, it is essential to bear in mind that in many cases the issue of access to certain type of meetings (e.g. meetings on private property) may have direct

[15] *Id.,* Article 34(2) ("*The registration body shall exercise control over the compliance of the activities of civil society organizations to their charter goals. The registration body shall have the right: to demand that the management of the civil society organization provide access to administrative records of the organizations; to delegate its representatives for attendance at the events organization by the civil society organization; where the there is evidence of a violation by the civil society organization of the law of the Republic of Tajikistan or of its own charter, to issue a letter of caution to the management of the organization indicating the specific grounds for caution.* ")

implications for the right to privacy, and the organizing party should retain the right to deny access. This should not, of course, be interpreted as to preclude duly authorized access by law enforcement officials where there is evidence of illegal activity; however, this issue does not concern non-profit organizations only and is presumably already addressed by the Code of Criminal Procedure of the Republic of Tajikistan.

37. In addition, the requirements of regular reporting and unimpeded access to administrative records provide a sufficient guarantee of visibility for non-profit organizations, and heightened scrutiny in the absence of evidence of any illegal activity may well constitute an interference with the presumption of the lawfulness of the activity conducted (as a particular case of the presumption of innocence).

38. At the same time, the draft Law may include a provision which would exhaustively enumerate and clearly define the specific types of meetings to which registration authority representatives may have unimpeded access, e.g. to general or board meetings of the NGO.[16]

39. In view of the above considerations, it is recommended that provisions of Article 34(2) stipulating the unconditional right of the registration authority representatives to attend NGO events be removed from the draft NGO Law or replaced with a provision which would exhaustively enumerate and clearly define the specific types of meetings to which registration body representatives may have unimpeded access.

4.8 Liability of the management of the non-profit organization.

40. It is welcome that the revised draft Law no longer includes the provision that where a non-profit organization management officer is found personally responsible for a criminal act by the organization, the management officer shall be held liable for directing a criminal organization.

[16] For instance, Article 16 of the Armenian Law on Public Organizations makes it obligatory for NGOs *"[u]pon well-grounded demand of the state authorized body in the field of justice of the Republic of Armenia (hereafter referred to as state authorized body) within reasonable time frames to provide the latter with other documents concerning the activities of the organization, and to allow the representatives of that body to be present at the general meeting of the organization.)"* (Emphasis added.)