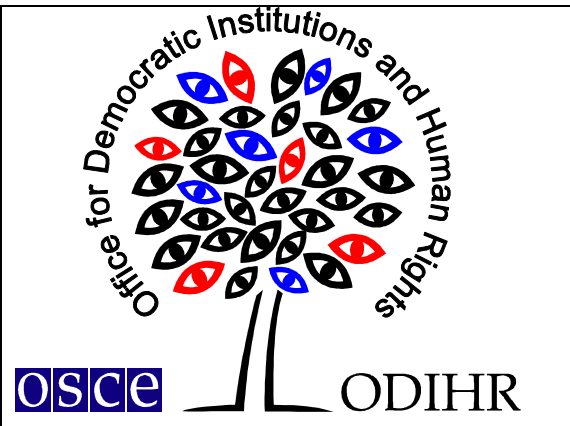


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COMMENTS
ON THE DRAFT LAW
OF THE REPUBLIC OF TAJIKISTAN
ON CIVIL SOCIETY ORGANIZATIONS (ASSOCIATIONS)

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1. INTRODUCTION

1. *On April 4, 2006, the OSCE/ODIHR was requested by the OSCE Center in Dushanbe to review the draft Law of the Republic of Tajikistan on Civil Society Organizations (Associations).*
2. *These Comments have been prepared on the basis of the Russian translation of the draft Law.*

2. SCOPE OF REVIEW

3. These Comments analyze the draft Law of the Republic of Tajikistan on Civil Society Organizations (Associations) (hereinafter referred to as the “draft Law”) from the viewpoint of its compatibility with the relevant international human rights standards and the OSCE commitments. The Comments also examine the draft Law in light of the international best practices with regard to non-profit regulation. The international standards referred to by the Comments may not be only 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.
4. These Comments do not purport to provide a comprehensive review.
5. 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.

3. EXECUTIVE SUMMARY

6. The draft Law suffers from certain vagueness and inconsistency. A particular example that would need to be addressed is lack of clarity with regard to whether or not the right to informal association is protected. The 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. Finally,

the conflation of illicit activity by an organization, on the one hand, with organized criminal activity, on the other, should be eliminated by deleting 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.

7. A full list of recommendations follows below.

- 1) It is recommended that the provisions of Article 3(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 12]
- 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 17-18]
- 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 26]
- 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 27]
- 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 29]

- 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 36]
- 7) It is recommended that the draft be revised to delete the provisions of Article 26(3) concerning liability for organized crime where a non-profit organization management officer is found personally responsible for a criminal act by the organization. [see para 45]

4. ANALYSIS AND RECOMMENDATIONS

4.1 Freedom of informal association.

8. Article 3(2)¹ of the draft provides for the right to found and join NGOs without a “prior authorization” by the authorities.
9. 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*”² would effectively nullify the positive effect of Article 3(2).
10. It has to be noted that the international standards concerning freedom of association specifically provide for the right to associate informally. The Fundamental Principles

¹ Draft Law on Civil Society Organizations (Associations), Article 3(2) (“*Citizens shall have the right to found according to their own choice civil society organizations (associations) without a prior authorization by the state authorities, as well as to join such civil society organizations (associations) in accordance with the charters of the latter.*”)

² Emphasis added.

on the Status of Non-Governmental Organizations in Europe³ (hereinafter referred to as “Fundamental Principles”) expressly provide that “*NGOs can be either informal bodies, or organizations which have legal personality.*”⁴

11. Moreover, the draft provides for an additional registration procedure⁵ 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.
12. It is therefore recommended that the provisions of Article 3(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.

13. Article 16(1)⁶ requires a minimum of three founders to establish an NGO. This provision is in compliance with the Fundamental Principles⁷ and in fact lower than in a significant number of the OSCE participating States.⁸

³ 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).

⁴ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 5.

⁵ Draft Law on Civil Society Organizations (Associations), Article 10(3) (“*A social initiative group is an informal civil society organizations which is not subject to state registration and shall be entered in the registry at the local executive body.*”)

⁶ *Id.*, Article 16(1) (“*Civil society organizations shall be established at the initiative of a minimum of three natural persons as founders.*”)

⁷ 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.*”)

4.3 Membership.

14. The draft introduces a new category of NGO “participants” in addition to NGO members. Article 6(3) of the draft defines “participants” as “*natural persons who have expressed their support to the goals and/or individual activities of the organization without acquiring a formal membership status, unless the organizational charter provides otherwise.*”⁹
15. 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.
16. Moreover, the definition as it stands now is rather vague and can be easily misinterpreted. It is not exactly clear what “*support to ... 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 “expressing support to 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) 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?
17. It is therefore recommended that the draft be revised to abolish the category of NGO “participants.”

⁸ *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.

⁹ Draft Law on Civil Society Organizations (Associations), Article 6(3).

18. 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.

19. Article 7¹⁰ 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 provisions¹¹ define each organizational type.

20. 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.

21. 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.

22. It also remains unclear why “civil society associations” should be membership-based while “social initiative groups” should not. First of all, assigning non-membership

¹⁰ *Id.*, Article 7 (“Civil society organizations may be established in the following forms: civil society associations; mass movements; social initiative groups.”)

¹¹ *Id.*, Articles 8, 9, 10.

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.

23. 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.
24. 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.
25. 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.
26. 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.

27. It is welcome that the draft¹² 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.

28. The draft¹³ prohibits “*persons associated with terrorist, extremist or separatist organizations*” from founding and joining NGOs. While this prohibition is not *per se* 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.

29. 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.

30. Article 34(2)¹⁴ of the draft Law provides for the unconditional right of the registration authority to delegate its representatives for attending any NGO events.

31. 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

¹² *Id.*, Article 7(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 organizations on the condition that they are permanent or temporary legal residents in the Republic of Tajikistan. Any restrictions on the right of foreign citizens and/or stateless persons shall be stipulated by the laws of the Republic of Tajikistan or the international treaties ratified by the Republic of Tajikistan.*”)

¹³ *Id.*, Article 17(8) (“*Civil society organizations cannot be founded or joined by or involve as participants the following: state bodies; legal entities; persons associated with terrorist, extremist and/or separatist organizations.*”)

¹⁴ *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 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.*”)

assumed that most NGOs would usually be interested to invite state officials if the issues on the event agenda affect public interest.

32. 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.
33. 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 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.

34. 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).
35. 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.¹⁵
36. 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.

37. Article 36(3)¹⁶ of the draft Law provides 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.
38. The proposed provision proceeds from a dangerous conflation between criminal activities by an organization/corporation and activities by a criminal organization while these are two different and clearly distinguishable types of activity.

¹⁵ 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.)

¹⁶ Draft Law on Civil Society Organizations (Associations), Article 36(3) (“Where the civil society organization, with or without legal entity status, commits a criminal act, the management officers of the organization may be held liable by a court decision for directing a criminal organization, provided they are found personally responsible for the commission of the criminal act in question.”)

39. Criminal activities by a corporation may, depending on the country's legal context, be prosecutable either as a crime committed by the organization or by a specific individual or by both. In countries where the domestic legislation provides for corporate criminal liability¹⁷ the organization would be held liable for the offense where the offense was committed by an officer (or officers) authorized to act on behalf of the corporation and acting in the scope of employment. In addition to the corporate liability, the organization's officer may be found personally liable for his/her criminal conduct where the officer in question consciously promoted or at least knew about and did not take reasonable steps to prevent the illicit act. However, the criminal legislation of the Republic of Tajikistan does not recognize corporate liability.¹⁸ Therefore, it is only possible to impose criminal liability on individual officers where these are personally responsible for the act and have the requisite state of mind.
40. Activities by a criminal organization are clearly distinguishable from corporate criminal acts in the sense that a criminal organization is a group created specifically for the purpose of commission of an illicit act.
41. The United Nations Convention Against Transnational Organized Crime defines an "organized criminal group" as a "*structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit*"¹⁹ (Emphasis added.)
42. In a similar fashion, the Criminal Code of the Republic of Tajikistan defines an "organized group" as a "*structured group of two or more persons who have joined in*

¹⁷ Among the OSCE participating States, it is mostly the countries using the Anglo-American law, including Canada, the United Kingdom, and the United States. However, an increasing number of continental legal systems (examples include France and Germany) have started incorporating elements of corporate criminal liability in their domestic legal frameworks.

¹⁸ This and the subsequent paragraphs should **not** be interpreted as a recommendation to consider introducing corporate criminal liability in Tajikistan.

¹⁹ United Nations Convention Against Transnational Organized Crime, Article 2. Full text of the Convention is available in English and Russian at http://www.unodc.org/unodc/en/crime_cicp_resolutions.html (last visit on 12 April 2006).

advance with the aim of committing one or more crimes.”²⁰ A “criminal network” is defined as a “structured association of two or more criminal groups with the aim of continued commission of grave and/or especially grave crimes, and which has formally defined roles for its members and internal governance structures.”²¹

43. It is certainly not entirely impossible that an individual illicit act committed by an organization through its senior officials may at the same time qualify as an act by an organized criminal group. A hypothetical case may be that of a director and two board members of a non-profit dealing with child welfare conspiring to facilitate illegal adoptions for financial benefit and through the use of their position with the organization. The act could qualify as an offense committed by an organized criminal group (since it was committed by a group of three persons who have joined to commit a series of offenses) as well as an offense committed by an organization (since committed by officers authorized to act on behalf of the organization and acting in the scope of their employment). However, as illustrated by the previous sentence, liability for an act committed by an organized criminal group would be based on a totally different set of evidence than corporate criminal liability (if it existed in Tajikistan, which is not the case).
44. Moreover, as it has already been mentioned, Tajikistan’s Criminal Code already addresses the issue of organized crime by defining “organized groups” and “criminal networks.” The Special Part of the Criminal Code provides for a significant number of predicate offenses prosecutable as aggravated crimes when committed by an organized criminal group or a criminal network. Overall, Tajikistan’s criminal legislation provides sufficient basis and tools to adequately prosecute organized criminal activities, and any gaps or deficiencies are better addressed by amendments to the general criminal law framework rather than by specialized legislation such as the draft Law in question.
45. It is therefore recommended that the draft be revised to delete the provisions of Article 26(3) concerning liability for organized crime where a non-profit organization

²⁰ Criminal Code, Article 39(3).

²¹ *Id.*, Article 39(4).

*OSCE/ODIHR Comments on the Draft Law of the Republic of Tajikistan
on Civil Society Organizations (Associations)*

management officer is found personally responsible for a criminal act by the organization.