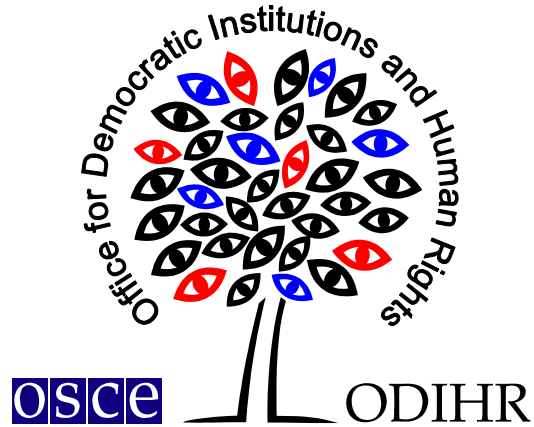


Warsaw, 22 June 2007

Opinion-Nr.: NGO– UKR/089/2007 (IU)

[www.legislationline.org](http://www.legislationline.org)



**OPINION**  
**ON THE DRAFT LAW OF UKRAINE**  
**ON CIVIL SOCIETY ORGANIZATIONS**

**TABLE OF CONTENTS:**

1. INTRODUCTION
2. SCOPE OF REVIEW
3. EXECUTIVE SUMMARY
4. ANALYSIS AND RECOMMENDATIONS

## **1. INTRODUCTION**

1. *On June 5, 2007 the OSCE/ODIHR was requested by the Minister of Justice of Ukraine through the OSCE Project Coordinator's Office in Ukraine to review the draft Law of Ukraine on Civil Society Organizations.*
2. *This Opinion has been prepared on the basis of the unofficial English translation as well as the Ukrainian original of the draft Law.*

## **2. SCOPE OF REVIEW**

3. This Opinion analyzes the draft Law of Ukraine on Civil Society Organizations (hereinafter referred to as the "Draft") from the viewpoint of its compatibility with the relevant international human rights standards and the OSCE commitments. The Opinion also examines 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 Opinion may not only be those legally binding for Ukraine, but may include international instruments not binding upon Ukraine 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. This Opinion does 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.
6. 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 Opinion refers throughout to "*civil society organizations*" rather than to "*public organizations*" as the functional equivalent of the Ukrainian term "*громадські організації*" in order to prevent ambiguities and miscomprehension likely to arise in non-Ukrainian speaking readers.

## **3. EXECUTIVE SUMMARY**

7. The Draft can overall be characterized as a sound and non-restrictive piece of legislation. It would, however, benefit from improved clarity and internal consistency, in particular as far as the definitions and the catalog of CSO rights are concerned.
8. There are also a few specific concerns to be noted against the backdrop of overall positive change. In particular, it is strongly recommended that the provisions concerning CSO prohibition incorporate the test of proportionality and necessity. It is essential that the Draft clarify the legal consequences of the failure or refusal to "legalize" a CSO, as well as expressly provide for the freedom to associate informally.

9. With regard to the anticipated impact of the Draft on the development of civil society in Ukraine, the drafters should consider the possibility for CSOs to engage in for-profit activities as long as the profits are retained within the organization and ultimately used for the furtherance of its statutory objectives, which is all the more vital as the tradition of philanthropic giving in Ukraine is still in the making.
10. A full list of recommendations follows below.
  - 1) It is recommended that the words “*on the basis of individual membership*” be removed from the text so that the Draft cover both associations of individuals and associations of assets (i.e. foundations). Since foundations may in many instances be legitimately covered by a different regulatory regime than membership NGOs, it is also recommended that the Draft introduce separate categories of membership and non-membership NGOs. *[Article 1(1)]*
  - 2) It is recommended that “self-governing” be added to the definition of CSOs. *[Article 1(1)]*
  - 3) It is strongly recommended that the test of proportionality and necessity be introduced in provisions concerning the prohibition of CSOs. In addition, the drafters may consider further detailing and clarifying para 7 of the provisions (“*violation of human rights and freedoms and public health*”) in order to minimize the risk of its arbitrary or abusive interpretation. *[Article 2(1)]*
  - 4) It is welcome that the Draft expressly affords the right to found CSOs to both Ukrainian nationals and aliens (including foreign nationals and stateless persons) and to both domestic and foreign legal persons. It is also welcome that individuals without full legal capacity, albeit with certain entirely legitimate limitations on the exercise of their right to found, can found CSOs as well. The possibility for children to join CSOs is welcome. *[Article 6(1)]*
  - 5) It is recommended that the provisions concerning CSO “legalization” be revised to make “legalization” mandatory only for groups seeking legal entity status. The law may, however, legitimately require certain institutional forms if particular benefits are to be enjoyed or where the activities to be pursued by the organization legitimately require higher financial scrutiny. *[Article 10(1)]*
  - 6) It is proposed that relevant provisions be revised to provide for a non-exhaustive catalog of rights accorded to both incorporated and non-incorporated CSOs, and to ensure internal consistency of the Draft. Certain rights (such as the right to engage in for-profit activity) may be reserved for incorporated NGOs only. *[Article 20]*
  - 7) It is recommended that the provisions of the Draft concerning “economic” activities be revised so that to permit for-profit activities by CSOs as long as the profits are retained within the organization and ultimately used for

the furtherance of its statutory objectives. An express prohibition on the distribution of profits should be included. [Article 22]

- 8) It is recommended that the provisions concerning CSO dissolution be revised so that to introduce a range of graduated sanctions and to make dissolution a measure of last resort. The requirement of a court decision in order to dissolve a CSO is welcome. [Article 26]

## **4. ANALYSIS AND RECOMMENDATIONS**

### ***4.1 Definitions***

11. The Draft defines a “civil society organization” (hereinafter referred to as “CSO”) as “*a non-profit association created on voluntary basis and on the basis of individual membership for the purposes of realization and protection of rights and freedoms, and for satisfaction of political, economic, social, cultural and common interests of individuals.*”<sup>1</sup> The Draft expressly excludes from the scope of its operation “*political parties, artistic unions, trade unions and their divisions, organizations of employers and their divisions, religious and cooperative organizations, as well as [...] other non-profit associations, the establishment and activity of which is provided [for] by other laws.*”<sup>2</sup>
12. By making “individual membership” a key definitional element of a “civil society organization,” the Draft leaves non-profit foundations outside its remit. It is noteworthy that to date Ukraine has no framework act on foundations, therefore foundations can hardly be considered as excluded from the scope of the operation of the Draft under the umbrella category of “*other non-profit associations, the establishment and activity of which is provided [for] by other laws.*” Foundations, notwithstanding their existence and indeed key role in Ukraine’s civil society, are thus left in a legal limbo. It is therefore recommended that the words “*on the basis of individual membership*” be removed from the text so that the Draft cover both associations of individuals and associations of assets (i.e. foundations). Since foundations may in many instances be legitimately covered by a different regulatory regime than membership CSOs (in particular as far as their founding and reporting requirements are concerned), it is also recommended that the Draft introduce separate categories of membership and non-membership CSOs.
13. Furthermore, the proposed definition does not mention the key characteristic of NGOs such as self-governance. Fundamental Principles on the Status of Non-Governmental Organizations in Europe (hereinafter referred to as the Fundamental Principles) define NGOs as “*voluntary self-governing bodies*” which are “*not*

---

<sup>1</sup> Draft Law on Civil Society Organizations, Article 1(1).

<sup>2</sup> *Id.*, Article 1(3).

therefore subject to direction by public authorities.”<sup>3</sup> It is recommended that “self-governing” be added to the definition of CSOs.

#### 4.2 Restrictions on CSO founding and operation

14. The Draft prohibits the founding and operation of CSOs “if their purposes or actions are aimed at: 1) liquidation of Ukraine’s independence; 2) change of constitutional order through violent acts; 3) violation of sovereignty and territorial integrity of state, detriment to its security; 4) unlawful usurpation of state power; 5) popularization of war and violence; 6) kindling of ethnical, race and religious animosity; 7) violation of human rights and freedoms and public health, and 8) creation of militarized formations.”<sup>4</sup> A court decision is required as a basis for a CSO prohibition.<sup>5</sup>
15. While the stated prohibited aims fall within the scope of permissible grounds for restrictions under international law, i.e. national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others,<sup>6</sup> it is strongly recommended that the corresponding test of proportionality and necessity be introduced in accordance with the relevant requirements of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “ECHR”).<sup>7</sup>
16. The test of proportionality and necessity implies that any measures must be proportionate to the legitimate aim pursued, and only imposed to the extent which is no more than absolutely necessary. It is all the more essential given that the application of the provisions in question may be triggered not only by CSOs that choose to include the listed prohibited aims as their statutory objectives, but also by various individual “actions” by CSOs, which may or may not be grave enough so that

---

<sup>3</sup> Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Council of Europe, Principle 1 [full text available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/civil\\_society/Basic\\_texts/1\\_Basic\\_texts.asp#TopOfPage](http://www.coe.int/t/e/legal_affairs/legal_co-operation/civil_society/Basic_texts/1_Basic_texts.asp#TopOfPage), last visited on 8 June 2007].

<sup>4</sup> Draft Law on Civil Society Organizations, Article 2(1) (“*Legalization is prohibited for public organizations, and activity of already existing legalized public organizations shall be prohibited by the court decision, if their purposes or actions are aimed at: 1) liquidation of Ukraine’s independence; 2) change of constitutional order through violent acts; 3) violation of sovereignty and territorial integrity of state, detriment to its security; 4) unlawful usurpation of state power; 5) popularization of war and violence; 6) kindling of ethnical, race and religious animosity; 7) violation of human rights and freedoms and public health, and 8) creation of militarized formations.*”)

<sup>5</sup> *Id.*

<sup>6</sup> See International Covenant on Civil and Political Rights, Article 22(2) (“*No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*”); also the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11(2) (“*No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*”)

<sup>7</sup> See above.

to justify banning the organization. Would, for instance, a one-off statement made by a CSO member calling for violent change of constitutional order pass the required threshold to ban the CSO if the individual making the statement does not have the standing within the organization to speak on its behalf, nor do his/her words pose a threat of imminent violence?

17. Likewise, the drafters may consider further detailing and clarifying para 7 of the provisions (“*violation of human rights and freedoms and public health*”) in order to minimize the risk of its arbitrary or abusive interpretation. The para as it stands now is overbroad and may in principle be used as a basis for a ban on a CSO where it commits, for instance, an “act” of encroaching upon others’ human rights and freedoms by way of holding a massive assembly resulting in traffic restrictions.

#### **4.3 CSO founders and members**

18. It is welcome that the Draft expressly affords the right to found CSOs to both Ukrainian nationals and aliens (including foreign nationals and stateless persons) and to both domestic and foreign legal persons.<sup>8</sup> It is also welcome that individuals without full legal capacity, albeit with certain entirely legitimate limitations on the exercise of their right to found, can found CSOs as well.<sup>9</sup> Finally, the possibility for children to join CSOs is welcome.

#### **4.4 CSO founding and freedom of informal association. The acquisition of legal entity status**

19. The Draft provides for CSO founding through the so-called “legalization” (alternatively termed “official recognition”) procedure,<sup>10</sup> whereby the group seeking establishment is required to file a registration application (full procedure) or a notice of establishment (simplified procedure).<sup>11</sup>
20. The Draft is silent on what the consequences of operation for “non-legalized” groups would be. The provision that CSO “*shall be considered established after their legalization*” raises the concern that may be used to restrict freedom of informal association.

---

<sup>8</sup> See Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Council of Europe, Principle 15 (“*Any person, be it legal or natural, national or foreign national, or group of such persons, should be free to establish an NGO.*”) See also the European Court of Justice case C-172/98, *Kingdom of Belgium v. Commission* (June 29, 1999) whereby the Court ruled against Belgium’s nationality restrictions for participation in civic organizations.

<sup>9</sup> Draft Law on Civil Society Organizations, Article 6(1) (“*Public organizations can be established by: 1) citizens of Ukraine, foreigners or stateless persons with full civil capacity; 2) citizens of Ukraine, foreigners or stateless persons with partial civil capacity in cases established by law; and 3) legal persons of Ukraine or other countries.*”)

<sup>10</sup> *Id.*, Article 10(1) (“*Public organizations shall be considered established after their legalization.*”)

<sup>11</sup> *Id.*, Article 10(2) (“*Legalization of public organizations shall be made by means of state registration or notice on establishment.*”)

21. The Fundamental Principles provide that “NGOs can be either informal bodies, or organizations which have legal personality.”<sup>12</sup> The fact that non-governmental organizations may be formed as legal entities does not mean that individuals are required to form legal entities in order to exercise their freedom of association. The classifications operated in national law can only be a starting point, but in no way may result in banning informal associations on the sole ground of their not having legal personality.<sup>13</sup>
22. The freedom to informal association does not, however, preclude the possibility that certain institutional forms may be required if particular benefits are to be enjoyed or where the activities to be pursued by the organization legitimately require higher financial scrutiny. Foundations may be one such “formal NGO only” organizational category. For instance, the British Charities Act makes it mandatory for a charity to register if it has a permanent endowment, permanently uses or occupies land, or its aggregate annual income is equal to or exceeds £1,000.<sup>14</sup> Also, the law may require that only formal NGOs be permitted to engage in fundraising activity.
23. It is therefore recommended that the provisions concerning CSO “legalization” be revised to make “legalization” mandatory only for groups seeking legal entity status. The law may, however, legitimately require certain institutional forms if particular benefits are to be enjoyed or where the activities to be pursued by the organization legitimately require higher financial scrutiny. At the same time, it is welcome that a simplified procedure of “legalization” (through filing a notice of establishment) is available.

---

<sup>12</sup> Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Council of Europe, Principle 5.

<sup>13</sup> See *Chassagnou and Others v. France*, judgment of the European Court of Human Rights (ECHR), 29 April 1999; *The United Communist Party of Turkey and Others v. Turkey*, judgment of the ECHR, 30 January 1998; *Artico v. Italy*, judgment of ECHR, 13 May 1980.

<sup>14</sup> For a specific example, see United Kingdom, Charities Act 1993 (“*The following charities are not required to be registered—*

(a) any charity comprised in Schedule 2 to this Act (in this Act referred to as an “exempt charity”);

(b) any charity which is excepted by order or regulations;

(c) any charity which has neither—

(i) any permanent endowment, nor

(ii) the use or occupation of any land,

and whose income from all sources does not in aggregate amount to more than £1,000 a year;

and no charity is required to be registered in respect of any registered place of worship.”)

#### 4.5 CSO rights

24. Article 20 of the Draft provides for an extensive catalog of rights accorded to CSOs.<sup>15</sup> While no reference to “legalization” is made in para 1 of the article listing the rights, para 2 provides that “*legalized public organizations enjoy other rights established by Ukrainian legislation*” (emphasis added). This generates the understanding that para 1 provides for an exhaustive list of rights that all CSOs, regarding of their legal status, shall enjoy, while para 2 accords additional, non-enumerated rights to “legalized” CSOs. This reading, however, is problematic (and may indeed be unintended by the drafters) for at least two reasons. First, although para 1 lists the right to engage in “economic” activities as available to all CSOs, Article 22 expressly reserves this right to “legalized” CSOs only – moreover, to CSOs “legalized by means of state registration.”<sup>16</sup> Second, if legal entity status is acquired through “legalization,” it is not clear how a non-legalized – therefore a non-incorporated – CSO can be a “civil law party” under the Ukrainian law.
25. It is proposed that Article 20 be revised to provide for a non-exhaustive catalog of rights accorded to both incorporated and non-incorporated CSOs, and to ensure internal consistency of the Draft. Certain rights (such as the right to engage in “economic” activities) may be reserved for incorporated NGOs only.

#### 4.6 For-profit activities by CSOs

26. Article 22 of the Draft permits registered CSOs to engage in “non-profit economic activity.” No provision is made for for-profit activities by CSOs.<sup>17</sup>
27. While CSOs are by definition non-profit organizations, it is acceptable for them to pursue for-profit activities as long as the profits are not distributed among the organization’s members for gain, and as long as they are ultimately used for the furtherance of the organization’s statutory objectives. The Fundamental Principles specifically provide that “*NGOs do not have the primary aim of making a profit. They*

---

<sup>15</sup> Draft Law on Civil Society Organizations, Article 20 (“1. For realization of the purposes and tasks provided for in statutory documents public organizations have right to: 1) represent and protect rights and lawful interests of its members as well as other persons in state bodies; 2) act as civil law party; 3) organize mass public gatherings (meetings, mass-meetings and demonstrations, etc.); 4) give spiritual, organizational and material support of pother public organizations, help to create them; 5) create establishments and organizations, realize economic activity for the purposes and tasks of public organizations; 6) establish mass media; 7) get information necessary for realization of its tasks and purposes from state bodies and bodies of local power, and introduce proposals to bodies of state power; 8) spread information and popularize the ideas and purposes the organizations seeks to achieve; and 9) participate in charitable activity. 2. Legalized public organizations enjoy other rights established by Ukrainian legislation.”)

<sup>16</sup> *Id.*, Article 22(1) (“For the purpose of fulfilment of tasks public organizations legalized by means of state registration shall perform necessary non-profit economic activity.”)

<sup>17</sup> It should be noted that the term of “non-profit economic activity” on its own is rather vague, however, since the term is present in Ukraine’s Economic Code, this Opinion leaves it outside the scope of discussion.

*do not distribute profits arising from their activities to their members or founders, but use them for the pursuit of their objectives.”*<sup>18</sup>

28. In fact, properly regulated for-profit activities can prove a valuable source of CSO funds and an additional contribution to civil society development, especially where the tradition of philanthropic giving is still in the making.
29. It is recommended that the provisions of the Draft concerning “economic” activities be revised so that to permit for-profit activities by CSOs as long as the profits are retained within the organization and ultimately used for the furtherance of its statutory objectives. An express prohibition on the distribution of profits should be included.

#### **4.7 Involuntary termination/ dissolution**

30. The Draft would allow to dissolve a CSO in case it continues “*illegal activity after being fined.*”<sup>19</sup>
31. While it is welcome that the Draft unequivocally requires a court decision in order to terminate the legal existence of a CSO, the provision in question is nevertheless likely to result in the abuse of the dissolution measure, since it is applicable by default to all CSOs which once fail to rectify the breach or omission, however minor that may be.
32. It is essential that the law make available a range of graduated sanctions imposable on organizations in compliance with the principle of proportionality, and a sanction that is being imposed is no more than absolutely necessary. Termination or dissolution should only be used as a measure of last resort.
33. It is recommended that the provisions concerning CSO dissolution be revised so that to introduce a range of graduated sanctions and to make involuntary dissolution a measure of last resort. The requirement of a court decision in order to dissolve a CSO is welcome.

---

<sup>18</sup> Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Council of Europe, Principle 4.

<sup>19</sup> Draft Law on Civil Society Organizations, Article 26 (“1. Court shall take a decision on compulsory dissolving (liquidation) of public organization on the territory of Ukraine at the proposal of legalization body. 2. Legalization body can make such proposal in case of: 1) activity provided for in article 2 of this Law; 2) continuing of illegal activity after being fined according to this Law. 3. Court at the same time shall decide on cessation of public organization’s branches and printed media liquidated through compulsory dissolving. 4. Legalization body within fifteen days from the day when judicial decision on compulsory dissolving (liquidation) came into power shall enter necessary changes into the Official Register and General State Register of Legal Persons and Natural Persons-Entrepreneurs.”)