
The analysis of the draft Law of the KR “On introduction of the amendments to the Civil procedure code of the Kyrgyz Republic”

On March 31, 2020, the State Committee for National Security of the KR submitted a **single package** of the bills for the public discussion, **the draft Law of the KR “On introduction of the amendments to the Civil procedure code of the Kyrgyz Republic” and the draft Law of the KR “On countering the terrorism”** (<https://www.gov.kg/ru/npa/s/2363>).

Pursuant to the background statement, the aim of the proposed amendments to the bill “On introduction of the amendments to the Civil procedure code of the Kyrgyz Republic” (the CPC of the KR) “is to ensure harmonization of the regulatory legal acts of the Kyrgyz Republic (the KR) in the area of countering the terrorism”.

The draft law proposes to amend article 261-1 of the CPC of the KR setting it forth in the following version:

“1. A prosecutor within the scope of his competence **upon recommendation of the government authorities involved into countering the terrorism and the extremism** is entitled to apply to a court with a statement to recognize **organizations as well as** information materials that call to carry out such an activity or explain and justify the necessity to carry out it as extremist or terrorist complying with the regulations on judicial jurisdiction established by chapter 4 of this Code”.

The background statement notes that the proposed draft does not contradict the norms of the current legislation. However, proposing the bill in the area of countering the terrorism, an initiator simultaneously encroaches on the area of countering the extremism. The norm regarding the procedure for recognizing the materials as extremist additionally includes the organizations, including **the mass media, the rights and the lawful interests of which, will be directly affected.**

According to the requirements of article 20 of the Kyrgyz Law “On regulatory legal acts of the Kyrgyz Republic”, the draft regulatory legal acts affecting constitutional rights and freedoms of the citizens as well as the activity of the mass media shall be subject to legal, human rights, gender, environmental, anti-corruption and other scientific examinations. Respectively, the civil society has the right to familiarize itself with the outcomes of the scientific examinations and the examinations carried out by the Ministry of Justice of the KR.

Conduct of the parliamentary hearings on the draft laws regarding enforcement of constitutional rights, freedoms and obligations of the citizens, the legal status of non-profit organizations and mass media, and the combat against offences **is obligatory** in article 115, part 3 of the Law of the KR “On the Regulations of the Jogorku Kenesh of the Kyrgyz Republic”.

However, at present due to the corona virus pandemic, **conduct of the parliamentary hearings** and, consequently, **organization of the proper public discussions** according to article 22 of the Law of the KR “On regulatory legal acts of the Kyrgyz Republic” for the proposed amendments to recognize an organization (including the mass media) as terrorist or extremist **don’t seem to be implemented activities.**

Taking into account the fact that the current law on countering the extremist activities uses heterogeneous, broad lists of the offences united in general as extremist; this, in conjunction with the proposed bill carries a real threat to develop from an enforcement action aimed to prevent the offences into the instrument for suppression of human rights and freedoms. In general, this bill entails the **risks for the activity of the free mass media, and due to the reasons stated below, its adoption seems to be inadmissible:**

1. The proposed bill contradicts the stated concept of the draft

The proposed amendments as to recognizing the organizations as extremist do not comply with the stated concept of the draft, where the aim of the bill has been specified by the initiators as filling the gap “in the procedure for recognizing the organizations as terrorist”.

The misconception of the norms in the substantive law (the legal nature of the notions “extremism” and “terrorism”) generates the errors in the law enforcement and judicial practice. Such crimes as **terrorism** and **extremism** are often used in the speeches of not only everymen, but also politicians as interchangeable and substitutable; however, it shall be evident for the theoreticians in the jurisprudence that in fact they **are not the same**.

For this very reason the crimes in the extremist trend are included **into the section “the crimes against the public authority”, in the chapter “the crimes against the foundations of the constitutional system and the state security”** in our Criminal code; here the object of the crime is human and citizen rights and freedoms, the constitutional system and the political system of the Kyrgyz Republic. And the terroristic crimes are specified in **the section “the crimes against the public security and the public order”, in the chapter “the crimes against the public security”** and expected to have a special aim to threaten the population and to force the government authorities through the use of the extreme violence measures or the threat to use such measures to achieve the results required to the criminals.

2. The bill assigns the functions to the mass media that are unusual to it and contradicts the norms of the Constitution of the KR

In general, **the proposed bill again raises the problems of imperfection in the specific Law of the KR “On countering the extremist activities”** that in its content does not contain a conceptual definition of the extremism. The notion of the extremism in the law is disclosed through the list of various actions, including the activity aimed at:

- changing violently the foundations of the constitutional system and violating the integrity in the Kyrgyz Republic;
- undermining the security of the Kyrgyz Republic;
- initiating racial, national (interethnic) or religious hatred as well as social hatred related to violence or the calls for violence;
- violating the national dignity;
- advocating exclusiveness, superiority or inferiority of the citizens according to their relation to the religion, social, racial, national (ethnic), religious or language affiliation;
- advocating emblems or symbols of the extremist organization;
- public calls to carry out the specified activity or to commit the specified actions (article 1).

The most types of the extremist activities presented in the list are connected with restriction of the rights to the freedom of speech and the freedom of expression. Moreover, the above

mentioned actions are formulated so that they suggest rather wide interpretations and if there are formal signs, they allow to attribute many statements and materials to the extremist ones.

When studying the bills in the state and official languages, it is clear that **the organizations as well as the information materials will be recognized as extremist and terrorist simultaneously**. Recognizing the organization as extremist or terrorist entails **the liquidation of a legal entity** according to the requirements of part 2, article 96 of the Civil code of the KR¹.

It follows that **this law allows closing the mass media that has disseminated the information without knowing that it is extremist**. This norm evidently provides an opportunity to the law enforcement authorities to abuse their powers creating a flow of ungrounded criminal prosecutions on such categories of the cases.

The mass media in its daily activity cover different events making and disseminating interviews, news items, analytical materials, etc. The activities recognized as extremist or terrorist cover a wide range and require in some events special knowledge in the area of philology, linguistics and law. But, **the editorial staff of the mass media** is not a law enforcement or a judicial authority, consequently, it **shall not be assigned with the functions of the law enforcement and judicial authorities unusual to it**. Implementing its mission, the mass media, first of all, seeks to report on the socially significant information about the situation in the country, the taken decisions of the authorities that can directly affect the rights and the lawful interests of the population.

These amendments contradict the established procedure for restricting the rights and the freedoms according to clause 2, article 20 of the Constitution of the KR – any restriction shall be established by the law, and that the introduced “restrictions shall be commensurable with the set aims”. Establishment of the restricting measures that are not extreme and allow, on the other hand, protecting the rights and the freedoms of other persons, at the same time, achieving the constitutionally significant aims can be considered commensurable in this event.

This was the case with the channel September. We remind that the television channel September showed the interview in a live television broadcast on September 29, 2016 with a former high-ranking official from the agencies of the internal affairs A. Kaparov, who expressed his viewpoint on the situation in the country. This material in 2017 was recognized as extremist, which supposedly was confirmed by the linguistic examinations. In addition, the court did not study the evidence, since there was no record with the interview of A. Kaparov in the case files and the provided linguistic examination was prepared for the comments to completely different video material. As a result, the state violating and using chapter 25-1 of the CPC of the KR prohibited the broadcasting of the whole television channel, though according to the law, only a specific material should be proved and recognized as extremist. **If the bill in the proposed wording is adopted by the parliament, such illegal actions with regard to the mass media according to the intention of the authorities will be legalized.**

3. The bill permits the forced closing of the organization, including the mass media, on a fast-track basis

The amendments propose to apply the mechanism for taking a decision **on recognizing the organization (including the mass media) as terrorist or extremist within 3-5 days**. The existing mechanism according to chapter 25-1 envisages to consider within a three-day period the issue, if any material is subject to recognizing as extremist or terrorist.

¹ The Civil code of the KR, part 2, article 96. Available on the web-site of the Ministry of Justice of the KR <http://cbd.minjust.gov.kg/act/view/ru-ru/4?cl=ru-ru>

It is inadmissible and illegal to apply this simplified mechanism with regard to the organization, since it **does not provide an opportunity to study comprehensively and completely** the activity of the organization, including the mass media, **in such a short period.**

It is impossible to consider within 3-5 days the issue that the organization represented by the mass media is terroristic or extremist. Since in accordance with the requirements of article 11 of the Law of the KR “On countering the extremist activities” in order to consider the issue on termination of the activity it is necessary to establish:

- violation of human rights and freedoms,
- infliction of the personal injury, the injury to the health of the citizens, the environment, the public order, the public security, the property, the lawful economic interests of individuals and (or) legal entities, the society and the state,
- presence of the real threat to infliction of such injury.

These circumstances in all events shall be established by the court through **conduct of relevant examinations** (philological, linguistic, political) including single-discipline reviews, multi-discipline reviews and re-examinations, **which cannot be prepared and studied within three days.**

The impossibility to establish these circumstances for a short period, undoubtedly, leads to the abused discretion, since the organizations will be recognized as prohibited without any analysis and a substantial court proceeding. **Thus, the absence of all procedural rights of the mass media and the short periods for consideration of the statement represent the significant risks for the independent mass media.**

In accordance with article 8 of the above law, the activity of the mass media can be terminated legally only if the employees regularly violate the legislation using the mass media to publish the extremist materials listed in the Ministry of Justice of the KR. By the way, the background statement to the bill should contain a special need justifying regulation of these or those relations by the proposed legislative solution. However, **the initiator** of the draft except for expression of the general concerns **has not provided the evidence on the regular violation** of the norms in the legislation on countering the extremism and the terrorism **by the mass media, has not published the statistical data on the mass scale of such violations exactly by the mass media** and has not provided any example of the violating mass media **to ground the necessity of this very regulation for the activity of the organizations.**

In addition, the specific procedure according to chapter 25-1 of the CPC of the KR supposes to consider the statement without compulsory participation of a concerned party and within a period (3-5 days) shortened by the law. So, if the case is considered without participation of the second party, **neither the author of the material nor the editorial staff, the material of which is a subject of the court consideration have the opportunity to participate completely in the court proceeding.** Thus, the party can be deprived of the opportunity to use all procedural rights as it has been envisaged in the action proceeding (complying with the principles of versatility for consideration of the case, the adversary nature of the parties and the publicity of the taken decisions).

In the event with the television channel September, the editorial staff was informed only two hours prior to the court hearing. Due to such circumstances, the editorial staff was deprived of the opportunity to attract quickly a qualified legal assistance. In its turn, the Supreme court

when considering the cassation appeal just terminated the proceeding in case² without providing the assessment to the willful violations of the first instance court.

If the bill in the proposed wording is adopted by the parliament, such illegal actions can happen to any mass media at any moment.

4. The bill deprives the mass media’s founders of the ownership

The issue for recognizing the organization as extremist or terrorist shall be considered only in the manner of the action proceeding, where it shall be studied, if continuous publication or dissemination of the prohibited materials from the list of the extremist materials of the Ministry of Justice of the KR has taken place.

This norm violates the constitutional right of a defendant to a judicial defense³, since in this situation the defendant within three days for consideration of the case does not have time to receive a court notice on appointment of the hearing or it is not notified at all, since the prosecutor’s office has not make any effort to find a defendant.

The court shall take place on an adversary basis providing an opportunity to each of the parties to present its evidence of expediency and in expediency to recognize the organization as extremist or terrorist. In addition, all legal instruments shall be provided to appeal the decision of the first instance court in the second instance court on appeal and then under the cassational procedure in the Supreme court of the KR.

However, in the proposed regulation the case on closing the mass media can be considered without participation of the defendant; as a result, when the organization finds out that it has been recognized as extremist or terrorist, only the supervisory instance – the Supreme court of the KR is left. But new evidence already cannot be provided and new witnesses cannot be invited in this instance. The Supreme court of the KR can consider only those materials that have been studied by the first instance court. **In other words, the organization is deprived of the procedural rights to protect its violated interests.**

The case to recognize the organization as extremist can’t be considered in a simplified manner also based on the fact that **under such circumstances the rights of the founders-the owners of the organization are violated.** In the event of the draft law implementation, they are deprived of their property. Therefore, the case shall be also considered with their participation in the action proceeding.

5. The bill contradicts the provisions of the law of the KR “On countering the extremist activities”

One more evidence that this initiative is not studied profoundly by the initiator is that this part of the bill **contradicts the norms of the substantive law, exactly article 11 of the Law of the KR “On countering the extremist activities”.** According to this norm, the activity of the relevant mass media can be terminated by the court decision based on the statement of an authorized government authority involved into the registration of the mass media or the authority in the area of printing, television and radio broadcasting and mass media, or the General Prosecutor’s Office of the KR or a prosecutor reporting to it.

² <http://media.kg/news/verxovnyj-sud-otkazal-telekanalu-sentyabr-v-vosstanovlenii-propushhennogo-sroka-podachi-kassacii>

³ The Constitution of the KR, article 20, clause 4

In addition, in the event of the bill adoption, according to the CPC only the prosecutor can apply with a statement to recognize an organization as extremist upon recommendation of the government authorities involved into countering the terrorism and the extremism. **In this regard, the adoption of the draft regulatory legal acts that contradict the current legislation is also deemed inadmissible.**

In addition, **there is no a justification in the bill for what reason it is necessary to send the court decision**, which has become effective to three instances at once for publishing: the General Prosecutor's Office, the agencies of the national security and the internal affairs. All above mentioned authorities are supposed to keep their own registers.

The existing practice to send the court decision to one authority – the Ministry of Justice of the KR is more clear – if necessary any concerned person can specify in one authority, i.e. in one list, if the organization is extremist or terroristic. If the right to publish is provided to three law enforcement authorities, then in the required events, the citizens and the government authorities will have to receive certificates and to specify the published information from three lists. The scheme proposed by the initiators of the bill will bring the bureaucratic red tape into this process.

Summarizing the foregoing, it shall be noted that this bill violates human rights and freedoms established by the Constitution, since it:

- contradicts the stated concept of the draft;
- assigns the functions to the mass media that are unusual to it and contradicts the norms of the Constitution of the KR;
- allows the forced closing of the organization, including the mass media, on a fast-track basis;
- deprives the mass media's founders of their ownership;
- contradicts the provisions of the Law of the KR "On countering the extremist activities".

This bill is submitted by the Government of the KR to the Jogorku Kenesh of the KR under the regime of the emergency situation and the state of emergency with a request to consider it with the priority over other matters as the urgent one. **In addition, the background statement does not contain the explanation, for what reason this bill shall be considered and adopted with such priority over other matters, when the main and real threat to the security of the population and the country now is the corona virus pandemic, to which this bill has no relation.**

The following fact arises concern that under the emergency situation due to the announced pandemic, proper organization of the public discussion and the parliamentary hearings compulsory for this category of the bills are out of the question.

It is evident that **this initiative does not meet the daily and real needs of the population** such as ensuring continuous payment of the pensions, the salary to the public sector employees, setting the compensation to the persons involved into the combat against the epidemic, providing the social support to the low-income families, legal regulation of the issues to support the small and medium business, etc.

Based on the foregoing, the initiative proposed by the SCNS "On introduction of the amendments to the Civil procedure code of the Kyrgyz Republic" shall be retracted.