

**Mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association**

REFERENCE:  
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17 July 2020

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolution 41/12.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the draft law No. 2681, which includes several provisions that, if approved, might be incompatible with Ukraine's obligations under international human rights law and standards. In particular, they could jeopardize the legitimate exercise of the right to freedom of association in the workplace.

According to the information received:

On 27 December 2019, the Cabinet of Ministers of your Excellency's Government submitted the draft law "On Labor" Reg. No. 2708 to the Parliament of Ukraine. This draft law was submitted without consultations, such as tripartite social dialogue, between representatives of employees, employers and the government. The draft law No. 2708 raised significant objections from diverse sections of civil society, national and international trade unions, and other advocacy groups.

On the same day, a group of Ukrainian parliamentarians submitted to the Parliament of Ukraine the draft law "On Amendments to Certain Legislative Acts of Ukraine (Concerning Some Issues of Trade Union Activity" Reg. No. 2681).

Among the reforms is an individualization of employment relations, placing workers on precarious contracts or labor reserve schemes and facilitating dismissals and, extending working hours. The draft law No. 2681 also targets trade unions, their activities and their property.

In April 2020, the Committee on Economic, Social and Cultural Rights as part of the review of the seventh report of Ukraine expressed its concerns regarding the amendments proposed by the draft laws. It stated that they would weaken the powers of trade unions, including the right to strike. It also urged the State to review the draft law on strikes and lockouts (No. 2682), with a view to ensuring the effectiveness of collective bargaining and of the right of union representation (E/C.12/UKR/CO/7, 2 April 2020, paras 27).

According to information received a new version of the draft law No. 2681 will be considered at the next plenary session of the parliament with amendments that seem identical to those introduced in December 2019.

The draft laws would establish several direct and indirect restrictions on the rights of trade unions and their members to exercise their right to association, freedom of peaceful assembly and expression through the exercise of their trade union freedoms.

In this connection, I would like to transmit my concerns in relation to the compatibility of these draft laws with the International Covenant on Civil and Political Rights (ICCPR), which Ukraine ratified on 12 November 1973, as well as with other established international instruments and human rights principles. I will not detail their compatibility with the standards set by the International Labor Organization, such as the Freedom of Association and Protection of the Right to Organize Convention (No. 87) ratified by Ukraine on 14 September 1956 and which calls on States to avoid discrimination against trade unions, to protect employers' and workers' organizations against mutual interference and to promote collective bargaining; and the Right to Organize and Collective Bargaining Convention (No. 98) to which Ukraine acceded on the same day, which protects workers who are exercising their right to organize.

At the outset, I would like to express my concern about the information received regarding the lack of meaningful consultations so far with civil society, and mainly with the trade union organizations that may be directly affected in the exercise of their rights, and limited in the mechanisms they have to enforce them. The inclusion of civil society, national experts and the public on complex issues that impact the exercise of human rights is essential. The seriousness of the consequences of a restriction on the freedom of association and peaceful assembly requires a thorough and comprehensive review. Consultations with civil society and in this case with trade unions provide an important source of information that allows the authorities to consider the effects that legislation might have on the enjoyment of human rights.

I wish to remind your Excellency's Government that Article 19 of the ICCPR protects the right to freedom of opinion and expression. All forms of expression are protected, as are all methods of dissemination (CCPR/C/34, para. 12). Article 21 of the same Covenant recognizes the right of peaceful assembly and article 22 refers to the right of everyone to associate with others. The right to peaceful assembly is an individual right that is exercised collectively, and is therefore inherently associative (CCPR/C/31, para. 9). The relationship between articles 19, 21 and 22 is clear since the protection of those who participate in peaceful gatherings, is only possible when their rights relating to political freedoms are protected, in particular the freedom of expression. In this sense, a strike is a form of peaceful assembly (A/HRC/20/27 para. 24) and without due protection of their rights of assembly and association, the workers have little power to change the conditions that shield poverty, feed inequality and limit democracy (A/71/385, para. 11).

I believe that, trade union rights are essential means available to workers and their organizations to promote their economic interests and that one of the clearest ways to

manifest these rights is through the creation of associations and peaceful demonstrations. I would like to add that strikes, in particular, are a mechanism for interaction and influence by the labor sector on decisions that are not limited to conditions of employment and, in this regard, trade unions and unionized workers can be considered human rights defenders (A/HRC/4/37, para. 17). Both trade unions and the right to strike are fundamental tools for the realization of workers' rights, as they provide mechanisms through which workers can defend their interests (A/71/385 para. 54).

In exceptional circumstances the rights to freedom of expression and freedom of peaceful assembly and association may be restricted. However, the restrictions, being the exception, cannot be so extensive as to jeopardize the right itself, (CCPR/C/GC/34 para. 21). According to the Human Rights Committee:

*“Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”* (CCPR/C21/Rev.Add.13 párr. 6).

For a restriction to be permissible, it must be provided for by law; it can only be imposed for a legitimate purpose and must meet strict tests of necessity and proportionality (CCPR/C/GC/34, para. 22). The requirement of proportionality requires the State to choose the least intrusive instrument to achieve the desired result (ibid., para. 34). A State would be in violation of article 21 if it did not comply with its obligation to facilitate peaceful assembly and if it did not justify the legitimacy of the restriction (Chebotareva v. Russian Federation (CCPR/C/104/D/1866/2009), para. 9.3).

There are several amendments in the mentioned reforms that raise concerns, which have already been transmitted to your Excellency's Government by different actors, such as a diverse section of civil society, national and international trade unions, and the Committee on Economic, Social and Cultural Rights. Therefore, I would like to focus on the possible incompatibility of certain provisions with the full enjoyment of the right to freedom of association.

*On the restriction to trade union pluralism:*

The number of trade unions in an enterprise could be limited to no more than two (Article 1 to the draft law No. 2681). The choice of workers to establish and join organizations is the exercise of their fundamental to freedom of association as a whole and therefore its restriction is limited to the conditions mentioned above. While I understand the desire of any Government to promote trade union unity and avoid the multiplicity of small competing trade unions, a blanket restriction on the number of unions allowed in an enterprise would be a disproportionate measure. The State has less severe measures and more desirable means to encourage trade unions to join together voluntarily to form strong and united organizations instead of imposing a restriction which would de facto deprive the workers of the free exercise of their right of

association. I strongly encourage your Excellency's Government to explore other mechanisms to balance the interference with the right and the legitimate goal, so that the right to freedom of association is not devoid of its essence. Furthermore, I am concerned about what would happen to those enterprises that have more than two trade unions as the draft law is unclear about this. I wish to remind your Excellency's Government that any restriction must be formulated with sufficient precision to enable individuals to regulate their behaviour in accordance with it" (CCPR/C/GC/34, para. 25) and that "in no case may restrictions be applied or invoked in such a way as to impair the essential element of a right recognized in the Covenant". (CCPR/C/31, para. 6).

*On the establishment of control commissions, the limitation of collective bargaining and the minimum membership of a trade union:*

The amendments request the establishment of "control commissions" in all trade unions (Article 36 of the draft law No. 2681). The motivation for this proposal is unclear, and it imposes greater internal checks on trade unions than what they already have established in their own statutes. In my view, the requirement to establish a control commission would violate the right of trade unions to organize their activities freely, to adopt their own statutes, and to establish their own structures.

Article 20 of the draft law No. 2681 prohibits management personnel of a trade union to act as representative of employees in collective bargaining. However, the amendment includes no definition of the term "management" which could be interpreted broadly to refuse to bargain with unions whose members include, for example, employees performing occasional supervisory work but are not responsible for the management decisions of the enterprise. As mentioned below, any restriction on the right to freedom of association should be made with enough clarity as to allow any person to regulate their behavior appropriately. While I acknowledge, that it is not necessarily incompatible with the full exercise of freedom of association to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, it would be disproportionate to define the categories of such staff so broadly as to weaken the association of other workers in the enterprise by depriving them of a substantial proportion of their present or potential membership. I recall that absolute or blanket restrictions are inherently disproportionate, whether on the exercise of the right in general or on the exercise of the right in certain places and at certain times, since they exclude consideration of special circumstances. (A/HRC/23/39, para. 63). I would encourage your Excellency's Government to consider the expression "management" or "supervisors" as to be limited to cover only those persons who genuinely represent the interest of the employers, for example those who have the authority to appoint or dismiss.

The proposed article 1 of the law of Ukraine on trade unions, their rights and guarantees of their activity intends to limit the membership of primary trade unions to at least 10 persons, up from 3 currently without an apparent reasoned basis. While I acknowledge that legislation may require an appropriate minimum membership, according to the information received, in the case of Ukraine this could exclude many workers from the ability to form or join a union, namely those who are employed in

micro and small enterprises. As I mentioned below special circumstances specific to each situation need to be taken into consideration when restricting the right to freedom of association. What constitutes a reasonable number may vary according to particular conditions in which a restriction is imposed. I would advise your Excellency's Government to consider that the legally required minimum number of members to form a union must not be so high as to hinder in practice the establishment of trade union organizations and that any modification of the existing minimum requirement should be done in consultation with the workers' and employers' organizations.

*On the forced transfer to the state of all trade union property:*

The final provisions of the draft law No. 2681 would require trade unions to transfer the property that was in their possession as of 24 August 1991 (when Ukraine declared its independence) to your Excellency's Government. The motivation behind this provision would be that all such property belonged to the USSR, and as such, is state property which belongs to the successor entity. According to the information received, much trade union property has been acquired by member dues and was not state property at the time of the independence of Ukraine. Further, the property has been in constant possession of trade unions for the nearly 30 years since independence. I would like to emphasize that the protection of trade union property and more generally to resources of associations is one of the elements that are essential for the normal exercise of trade union rights and its confiscation could be considered a significant violation of the right to freedom of association. Access to resources is important, not only to the existence of associations, but also to the enjoyment of other human rights by those benefitting from the work of an association (A/HRC/23/39 para. 9).

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to our attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information;
2. Please provide information on measures taken to ensure the compliance of the amendments mentioned in this letter with Ukraine's relevant obligations under international human rights law and standards;
3. Please provide information on the reasons behind the absence of consultations during the drafting process of the amendments, such as the tripartite social dialogue, between representatives of employees, employers and the government, and if your Excellency's Government is planning on carrying out consultations before further considering the amendments.

I reiterate my willingness to assist the State of Ukraine in its efforts to strengthen the country's legislative and institutional framework, and thus to guarantee the realization of human rights for all persons in Ukraine.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Clement Nyaletsossi Voule  
Special Rapporteur on the rights to freedom of peaceful assembly and of association