

Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 41/12, 43/4 and 43/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning two Draft Laws aimed at providing oversight of not-for-profit organisations in Thailand. These are:

1. The Draft Act on the Promotion and Development of Civil Society Organization B.E..., proposed by the Ministry of Social Development and Human Security
2. The Draft Act on the Operations of NGOs B.E....., proposed by the Office of Council of State

On 23 February 2021, the cabinet, in principle, approved the OCS Draft Act, making it as the main draft to be used for further legislation. The Office of Council of State, as required by the Constitution, has arranged for public consultation on all drafts of the law via an online platform. The consultation period has been opened from 12 – 31 March 2021.

In this regard, we wish to submit the following comments on the OCS Draft Act (hereinafter the 'Draft Act'), which does not appear to conform to international human rights law and standards. To the contrary, if no further changes are made, the Draft Act may impinge on the exercise of the rights to freedom of expression and freedom of association which are guaranteed under international human rights law, in particular under articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand acceded on 29 October 1996. We hope these comments and analysis of the provisions will serve as a basis for further discussions, and we stand ready to provide any technical assistance to the authorities upon request.

1. Purpose of the Acts

Section 1 of the Draft Act provides that the purpose of the laws is:

“to regulate the operation of not-for-profit organizations in the Kingdom to ensure propriety, morality, openness, transparency, and the genuine serving of public and national interest without any hidden and fraudulent agenda in order to uphold public interest, and the peaceful public order, and good morals of the people.”

We recognize the important role of civil society in promoting civil, cultural, economic, political and social rights, responding to public health crises, realizing the right to development, empowering persons belonging to minorities and marginalised groups, supporting crime prevention, promoting corporate social responsibility and accountability, combating human trafficking, empowering women and youth, advancing the realization of all human rights and the implementation of the 2030 Agenda for Sustainable Development, among many others. As such, we believe Section 1 of the Draft Act does not sufficiently emphasise the positive role played by non-for-profit organizations in contributing to addressing and resolving challenges and issues that are important to society.

In particular, we worry that the emphasis on the need for non-for-profit organizations to serve the “public and national interest without any hidden and fraudulent agenda” may suggest that the authorities insufficiently acknowledge the expertise and support provided by these organisations, and even consider them as a potential threat to the society. We believe such a provision stigmatises civil society and does not comply with States’ obligation to “create and maintain a safe and enabling environment in which civil society and human rights defenders can operate free from hindrance and insecurity” (Human Rights Council’s resolution 27/31). We are particularly concerned that the language to “*uphold public interest, and the peaceful public order, and good morals of the people*” may also be used arbitrarily to restrict the activities of non-for-profit organisations and human rights defenders that promote the rule of law and accountability for human rights violations, call for civil disobedience, combat discrimination and violence against women and LGBTIs persons, among many others. If these concerns were to be corroborated, we seriously worry that the overall potential impact of the Draft Act would in fact be in direct contradiction to its stated goal of genuinely serving the public interest and would rather likely be detrimental to civic space in Thailand.

2. Scope of the law and broad ministerial oversight

Section 4 of the Draft Act defines “Not-for-profit organisation” as:

“includ(ing) a group of individuals which are not established by any specific law, but implement activities that do not have the purpose of seeking income or profits to be shared.”

Section 5 paragraph 1 of the Draft Act provide:

In order to organize activities in the Kingdom, a not-for-profit organization must register itself under the criteria, methods and conditions prescribed by the Minister (of the Interior).¹

Section 5 paragraph 2 further provides:

Apart from ensuring compliance with laws concerning the establishment and operation of each of not-for-profit organization and as specifically required by this Act, organizations must act in compliance with the criteria, methods and conditions prescribed by the Minister of this Act as well.

¹ The Minister is specified in the law to be the Minister of the Interior.

The definition of non-for-profit organization in the Draft Act is broad, and will encompass a wide range of civil society organizations, community groups, people's committees, sport clubs, cultural gatherings, religious organisations, political parties, trade unions, cooperatives and even online informal groups. As a result, the restrictive measures to be introduced by this Draft Act would impinge on the rights to freedom of expression and association of millions of individuals. We would like to recall that according to international human rights standards, "the right to freedom of association equally protects associations that are not registered. Individuals involved in unregistered associations should indeed be free to carry out any activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions." (A/HRC/20/27 para. 56).

Section 5 paragraph 1 authorises the Minister to "*prescribe the criteria methods and conditions for registration.*" There is a lack of clarity and clear understanding of what the criteria, methods and conditions for registration are, leaving them at the absolute discretion of the Minister. We would like to recall that Human Rights Council Resolution 22/6 calls upon States to ensure that procedures governing the registration of civil society organizations are transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal and avoid requiring re-registration and are in conformity with international human rights law.

Furthermore, we are concerned by section 5 paragraph 2 of the Draft Act, insofar as it states the "*organizations must act in compliance with the criteria, methods and conditions prescribed by the Minister of this Act.*" In the absence of a rigorous definition of "criteria, methods and conditions", we are seriously concerned that this provision may be used arbitrarily to allow the Ministry of Interior to restrict the scope of permissible activities of all organisations, which could place their independence and their ability to conduct activities freely in jeopardy. In particular, it would become extremely difficult for organisations to be critical of the government, or work on political topics.

3. Burdensome financial and reporting obligations

Disclosure of income, reporting and taxation

Section 6 paragraph 1 of the Draft Act law provides:

Not-for-profit organizations must disclose sources and amounts of funds or materials used in their implementation each year. The information shall be submitted to the registrar according to the criteria or method prescribed by the Minister. They are also required to submit tax return to the Revenue Department every year according to the criteria or method prescribed by the Director General of the Revenue Department.

Section 8 of the Draft Act Provides:

A not-for-profit organization is required to submit a financial report audited by a certified public accountant to the registrar within sixty days after the last day of fiscal year. The registrar shall then make available the audited report in the Department of Provincial Administration's database.

We are concerned that these requirements may be overly onerous, in particular for smaller community based organisations that may not have the established financial or administrative capacities and resources for reporting, exposing them in the case of non-compliance to extremely severe repercussions, including closing down of organisations, large fines and even the possibility of imprisonment.

While States may have a legitimate interest in establishing reporting requirements to registered associations to ensure their compliance with the law, these requirements “should not inhibit associations’ functional autonomy and operation” (Human Rights Council Resolution 22/6) by adding costly and protracted burdens. The need to dedicate more time and resources to administrative requirements could be highly detrimental to the activities of many organizations, as they are particularly time-consuming, and may have a negative impact on their budgets and ability to carry out their mandates and activities, including humanitarian activities. The mandate of the Special Rapporteur on the rights to freedom of association and of peaceful assembly further noted that the use of “onerous and bureaucratic reporting requirements” can eventually “obstruct the legitimate work carried out by association” (A/HRC/23/39, para 38). We would particularly cautious about the inclusion of reporting requirements, based on ambiguous terms such as “according to criteria or methods prescribed by the Minister”, which may be used against groups critical of government’s views and actions.

4. Restrictions on foreign funding:

Section 6 Paragraph 2 of the Draft Act provides:

“Not-for-profit organizations can accept money or materials from natural persons, legal entities or groups of individuals who are non-Thai, or which have not been registered in the Thai Kingdom, as the case may be, to fund only activities in the Kingdom as permitted by the Minister. They are also required to report on the acquisition and the disbursement of such money or materials, and the implementation of the activities every year to the registrar based on the criteria, methods and duration determined by the registrar.” (Emphasis added)

We are seriously concerned that these provisions may restrict the ability for non-for-profit organizations “to seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without prior authorization or other undue impediments” (A/HRC/23/39). By giving absolute discretion to the Minister of the Interior to authorise or block any activities funded by non-Thai donors, these provisions violate Article 22 of the ICCPR, which clearly states that “no restrictions may be placed on the exercise of [the right to freedom of association] 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”. We underscore that non-governmental organisations pursuing objectives and employing means in accordance with international human rights law benefit from international legal protection. As a result, we recall “members of associations should be free to determine their statutes, structure and activities and make decisions without State interference” (A/HRC/20/27 para. 64) so that they can effectively exercise their rights to freedom of association and of expression. In this context, we also underscore that the protection afforded by article 22 extends to all

activities of an association. Accordingly, fundraising activities are protected under article 22 of the ICCPR, and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with article 22.

Furthermore, Section 6 paragraph 3 of the Draft Act authorises the registrar, in the context of organisations funded by foreign donors:

“to enter the office of a not-for-profit organization to inspect the use of money or materials, or the implementation of activities, and to have the power to investigate and obtain and make a copy of electronic communications traffic made by the not-for-profit organization for further investigation.”

While the goal to combat corruption is a legitimate one, this provision will allow the Government, and not a competent independent and impartial judicial court, to access all emails of NGOs operating in country funded by non-Thai donors, thus allowing it to monitor and surveil any exchange of associations’ staff, in violation of their right to privacy, protected by Article 17 of the ICCPR. This may also lead to breaking the confidentiality of communications between the associations and the victims and beneficiaries they serve which in turn may expose victims and beneficiaries to risk of reprisals. We recall that Article 17 permits interference with the right to privacy only where it is “authorized by domestic law that is accessible and precise and that conforms to the requirements of the Covenant”, is in pursuit of “a legitimate aim” and “meet[s] the tests of necessity and proportionality” (A/69/397, para. 30). The Human Rights Committee put these principles into practice in its 2017 concluding observations on the sixth periodic report of Italy under the International Covenant on Civil and Political Rights (CCPR/C/ITA/CO/6, para. 36). It determined that the right to privacy required that robust, independent oversight systems were in place regarding surveillance, interception and hacking, including by ensuring that the judiciary was involved in the authorization of such measures, in all cases, and by affording persons affected with effective remedies in cases of abuse, including, where possible, an ex post notification that they had been placed under surveillance or that their data had been hacked (See report of the Special Rapporteur on freedom of opinion and expression on surveillance and human rights, A/HRC/41/35 para. 25)).

Section 7 further states:

In order to establish a chapter, a not-for-profit organization which accepts money or materials from natural persons, legal entities or groups of individuals who are non-Thai, or which have not been registered in the Thai Kingdom, are required to notify the registrar beforehand according to the criteria and conditions prescribed by the Minister.

We are further concerned that section 7 requires not-for-profit organisations receiving foreign funding, and which wish to set up chapters, to notify the registrar based on similarly undefined and discretionary “criteria and conditions”. In the absence of a rigorous definition of “criteria and condition”, we are seriously concerned that this provision may be used arbitrarily to deny the registration of chapters, in contradiction with international standards related to freedom of association which favours a notification procedure for the creation of associations and branches (A/HRC/20/27 para. 59).

Non-compliance and punishment

Pursuant to Section 11 of the Draft Act:

Any not-for-profit organization which has been operating in the Kingdom before the date this Act comes into force and does not have the characteristics prescribed in Section 5 (sub article 2) must register within thirty days after this Act has come into force.

We note with concern the very short time frame of thirty days after the law comes into force for all organisations to register. This is a highly burdensome registration process. It appears unreasonable and unfeasible for many of the groups that would fall within the purview of the new law, if adopted un-amended, to be able to carry out the necessary administrative steps to be able to register within thirty days. Moreover, we are mindful that many Thai laws provide a far longer time frame from the promulgation of the law in the government gazette to the start of implementation.

Section 9 further provides that:

A not-for-profit organizations which violates or fails to act in compliance with Section 5 (sub-article 3), 6, 7 or 8 shall have its registration revoked by the registrar.

As noted above, we are concerned that numerous provisions of the Draft Act are overly broad and grant excessive discretion to the Ministry of Interior to determine what activities are in compliance with the Draft Act. As such, we are also seriously concerned that Section 9 allows the Ministry to revoke registration based on undefined and subjective criteria, in violation of international norms related to freedom of association. We are further concerned that there does not appear to be any right to appeal this decision provided for within the Draft Act.

We would like to underscore that any restriction to the right to freedom of association should be provided by law so that members of organizations can understand what behaviour is permissible. Moreover, we recall that the suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient. Moreover, such measures should only be taken by independent courts (A/HRC/20/27, para 75) and appeal recourses against decisions of such courts should be available.

Finally, Section 10 provides that:

any person who operates a not-for-profit organization in the Kingdom without becoming registered per Section) shall be punished with imprisonment not exceeding five years or fined not exceeding one hundred thousand baht, or both.

We wish to point out that that prison sentences and high fines as punishment are not necessary, nor proportionate to the violation of non-registration. Failure to register should not automatically result in the dissolution of the organization, nor should it result into the criminalisation of its members. We underscore that individuals

involved in unregistered associations should never be subject to criminal sanctions for failure to register their groups (A/HRC/20/27, para 56).

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we 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 analysis;
2. Kindly provide information on the remaining stages of the legislative process with regard to the Draft Act;
3. Please provide information on the steps that your Government intend to take to amend the Draft Act in line with the above mentioned analysis and international human rights law and standards

In conclusion, we call on your Excellency's Government to reconsider its approach to non-for-profit organizations and revise the Draft Act thoroughly with a view to addressing the aforementioned concerns. We would further urge that any revised drafts be made public well prior to the consultation period which would allow for more meaningful public inputs and discussion. We stand ready to provide support and advice to your Excellency's Government on legislative reform in this field.

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](#) after 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 our highest consideration.

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