

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

Ref.: OL KGZ 4/2023
(Please use this reference in your reply)

2 October 2023

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 50/17, 52/9 and 52/4.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received regarding the proposed Draft Law "**On Amendments to Certain Legislative Acts of the Kyrgyz Republic**" (**Law of the Kyrgyz Republic "On Non-Commercial Organizations" and the Criminal Code of the Kyrgyz Republic**), and hereinafter referred to as the draft law.

We note that many provisions in the proposed law would be contrary to the international human rights obligations of the Kyrgyz Republic, including the right to the freedom of association, the right to freedom of opinion and expression, the right to non-discrimination and the right to privacy. If passed, this draft law could have a chilling effect on the operation of all associations in the Kyrgyz Republic, limiting their ability to advocate for human rights, provide social services, and contribute to the development of a robust and inclusive society.

We have made similar observations in previous communications sent to Your Excellency's Government in September 2013 (KGZ 2/2013), September 2014 (KGZ 5/2014), March 2020 (KGZ 1/2020) and January 2022 (KGZ 1/2020), when we urged the Kyrgyz Government not to adopt legislation which would unduly restrict the right to freedom of association.

We strongly advise your Excellency's Government to refrain from approving the draft law in its current form, and we respectfully encourage your Excellency's Government to consult broadly with all sectors of civil society to develop a new comprehensive law, which ensures an enabling environment for civil society, and which complies with the international human rights obligations and best practices.

Background

In September 2013, two members of the Jogorku Kenesh (the Parliament of the Kyrgyz Republic), submitted to the Parliament a draft Law “On Introducing Amendments and Changes into some Legislative Acts of the Kyrgyz Republic” (Law “On Non-Commercial Organizations”, Law “On State Registration of Legal Entities, Branches (Representative Offices)” and the Criminal Code of the Kyrgyz Republic), which was referred to in public as the Draft Law on “Foreign Agents.” In 2016, following public discussions and advocacy campaigns of civil society, the Parliament rejected the draft law in its third reading.

On 21 November 2022, a member of the Parliament introduced for public discussion the draft law “On Amendments to Certain Legislative Acts of the Kyrgyz Republic,” the text of which was similar to the text of the previous draft law introduced in 2013, apart from the concept of “foreign agent,” which was replaced by a “foreign representative.” This draft law was then withdrawn, as the Law of the Kyrgyz Republic “On State Registration of Legal Entities, Branches (Representative Offices)” lost its legal force and, therefore, the amendments related to this law were not technically possible.

On 19 May 2023, 33 members of the Parliament submitted for public discussion the draft law “On Amendments to Certain Legislative Acts of the Kyrgyz Republic” (Law of the Kyrgyz Republic “On Non-Commercial Organizations” and the Criminal Code of the Kyrgyz Republic). The provisions of this draft law are identical to the draft law introduced in November 2022, except for the norms proposed to amend the Law of the Kyrgyz Republic “On State Registration of Legal Entities, Branches (Representative Offices),” which was no longer in force. The draft law has passed public discussions and is soon to be considered at the meeting of the profile committee of the Housing and Communal Committee of the Kyrgyz Republic.

In addition to the above-mentioned draft law, which is analyzed below, on 2 November 2022, the Presidential Administration submitted for public discussion the draft Law “On Non-Profit, Non-Governmental Organizations.” Following numerous appeals to the President of the Kyrgyz Republic from civil society and international actors, it has been postponed indefinitely, while the working group was established to finalize this draft law.

Relevant international human rights standards

We respectfully draw your Excellency's Government's attention to the relevant international human rights law provisions enshrined in the International Covenant on Civil and Political Rights (ICCPR), which Kyrgyzstan acceded to on 7 October 1994. In particular, we would like to highlight article 19, which guarantees the right of everyone to freedom of opinion and expression, the enjoyment of which is fundamental to the enjoyment of a number of other rights, articles 21 and 22, which guarantee the rights of everyone to peaceful assembly and freedom of association, article 25, which promotes the right of every citizen to take part in the conduct of public affairs, and article 17, which protects against arbitrary or unlawful interference with a person's privacy, reputation and home.

Under Article 2 of the ICCPR, states have a responsibility to take deliberate, concrete, and targeted steps towards meeting the obligations recognised in the Covenant, including by adopting laws or other measures as necessary to give domestic effect to the rights stipulated in the Covenant. States are obliged to ensure that the

domestic legal system is compatible with the State's treaty obligations and duties.

We also recall the Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the Declaration on Human Rights Defenders, which stresses, in article 5, the right of everyone to form, join, participate, and communicate with non-governmental organizations (NGOs) for the purpose of promoting and protecting human rights and fundamental freedoms. Articles 16 and 18 of the Declaration further note the important role that such NGOs play in safeguarding democracy and delivering on these fundamental freedoms.

Comparison of the draft law to international human rights standards

The label of a "foreign representative"

Article 1 of the draft law (paras. 7-9) states that a non-commercial organization (NCO) is considered to be performing the functions of a "foreign representative" if it is:

- *"established in the Kyrgyz Republic";*
- *"receives funds and other property from foreign states, their state bodies, international and foreign organizations, foreign citizens, stateless persons or persons authorized by them who receive funds and other property from these sources (with the exception of open joint-stock companies with state participation and their subsidiaries) (hereinafter - foreign sources)";*
- *"participates, including in the interests of foreign sources, in political activities carried out on the territory of the Kyrgyz Republic." (Art. 1, paras. 7-9)*

An NCO is recognized as the one participating in political activities if *"...regardless of the goals and objectives specified in its constituent documents it participates (including through financing) in organizing and conducting political actions in order to influence the adoption of decisions by state bodies aimed at changing their state policy, and also in the formation of public opinion for these purposes." (Art. 1, paras. 7-9)* The draft law further specifies that the political activity does not, however, include *"activities in the fields of science, culture, art, healthcare, public health, social support and protection of citizens, social support for disabled people, protection of motherhood and childhood, promotion of a healthy lifestyle, physical culture and sports, protection of flora and fauna, as well as charitable activities." (Art. 1, paras. 7-9)*

As we were informed that the term "foreign representative" carries certain negative connotations in the Kyrgyz Republic, we consider that an NCO labelled as a "foreign representative" could encounter an atmosphere of fear and hostility, in addition to the reluctance of partners, including representatives of the State authorities, to cooperate with such NCO, which would pose difficulties for its operation. Such labelling with the additional reporting obligations, which are discussed below, could represent an interference with the exercise of the right to freedom of association and of freedom of expression without discrimination, as the amendments proposed in the draft law clearly disadvantage NCOs receiving foreign funding. In order to be compatible with international human rights standards, such

interference must be provided by law, must pursue a legitimate aim and must be “necessary in a democratic society”.

We also observe the overly vague definition of “political activities” in the draft law, which could make it difficult for an NCO to anticipate such activities in its work while giving the authorities broad discretion as to naming an activity “political.” We would like to remind that under international human rights standards, associations should be allowed to participate in public affairs and criticism of governmental actions, promote human rights ideas, provide information to international organisations, and take part in other similar activities.¹ Although an NCO performing the functions of a “foreign representative” is not directly prohibited from participating in political activities, the fundamental political right of any citizen to attempt to influence politics could end up being adversely affected under this draft law. For instance, citizens could feel reluctant to engage in the activities of such an association performing the functions of a “foreign representative” and participating in political activities or could fear advocating and promoting the activities of such an organization due to the imposed new criminal liability under this draft law, which would result in the fine or imprisonment for up to ten years. (Article 2)

In the same manner, the draft law does not distinguish between various forms of “funding and other property,” under which different activities could fall, including, for instance, a purchase of a computer by an NCO from an international company. In this regard, we would like to remind of the “principle of legal certainty,” which recognizes that ill-defined and/or overly broad laws are open to arbitrary application and abuse.² The vagueness of these offences increases the risk that they may be applied in a manner that is contrary to the principle of international law, *nullum crimen sine lege* (no crime without law).

We would also like to draw your Excellency’s Government’s attention to the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on “Access to Resources,” which clarifies that the associations have the right to freely access human, material and financial resources from domestic, foreign, and international sources, which is inherent in the right to freedom of association and essential to the existence and effective operations of any association.³ Thus, measures which compel recipients of foreign funding to adopt negative labels such as “foreign representatives” constitute undue impediments to the right to seek, receive and use such funding.⁴ In addition, the Human Rights Committee has affirmed that “*the right to freedom of association relates not only to the right to form an association but also guarantees the right of such an association to freely carry out its statutory activities*”,⁵ including using equipment received as foreign aid.⁶

Burdensome reporting obligations

We note that the draft law introduces a wide range of new reporting obligations for NCOs. Under the new provisions, the structural units of foreign non-commercial organizations and NCOs acting as “foreign representatives” would be

¹ A/RES/53/144, Art. 7, 9

² A/73/361, para. 34

³ A/HRC/50/23, para. 9

⁴ A/HRC/23/39, paras. 20, 82

⁵ Belyatsky et al. v. Belarus (CCPR/C/90/D/1296/2004)

⁶ Korneenko v. Belarus (CCPR/C/105/D/1226/2003) and Korneenko et al. v. Belarus (CCPR/C/88/D/1274/2004)

subject to mandatory audit and would need to submit the auditor's report to the competent authorities on an annual basis, in addition to the usual requirements foreseen for NCOs. (Art.1(2) In addition, NCOs acting as "foreign representatives" would be required to submit to the authorized body every six months a document containing an activity report and information on the personal composition of their governing bodies, along with the documents related to the expenditure of funds and the use of property, which would need to be sent on a quarterly basis. NCOs acting as "foreign representatives" would also be required to disclose every six months in the media or on the Internet "*reports on their activities, including their founders, composition of their property, sources of funds and other areas of expenditure.*" (Art. 1(2)

We would like to highlight that while states may have a legitimate interest in establishing reporting requirements for NCOs to ensure compliance with the law, these requirements "*should not inhibit associations functional autonomy and operation,*"⁷ by adding costly and protracted burdens. Our predecessor has noted that the use of "onerous and bureaucratic reporting requirements can eventually obstruct the legitimate work carried out by associations."⁸ In addition, our predecessor stated that "associations should be accountable to their donors, and at most, subject by the authorities to a mere notification procedure of the reception of funds and the submission of reports on their accounts and activities," while also calling on states to adopt measures to protect individuals and associations against "*undue audits and other attacks in relation to the funding they allegedly received*".⁹ Thus, such new obligations appear to exceed what can be considered "necessary in a democratic society", and would not be in line with international standards such as those laid out in the ICCPR.

Extensive oversight

We note that the draft law grants the authorities extensive oversight powers over NCOs, which may amount to almost unrestricted administrative control over these associations. According to the new Article 17 proposed by the draft law, the authorities may request documents related to the operation of NCOs and review the compliance of their activities with their statutes, including with respect to the use of funds. The authorities are also allowed "*to conduct unscheduled inspections of non-commercial organizations performing the functions of a foreign representative,*" relying on a number of grounds, such as, among others, "*receipt of information from government agencies, local authorities about the non-commercial organization performing the functions of a foreign representative violating the legislation of the Kyrgyz Republic in the sphere of its activities.*" (Article 1(2))

The draft law also gives the registration authorities the rights to:

- request official documents from the NCOs;
- request information from different state departments about the financial activities of the NCOs;
- send representatives to attend events held by NCOs. (Article 1(2))

We would like to underline that such wide powers granted to public authorities to control, monitor and interfere with the activities of NCOs would not be justified

⁷ A/HRC/RES/22/6

⁸ A/HRC/23/39, para. 38

⁹ Ibid. paras. 37, 82

under international human rights standards. The unscheduled inspections could constitute a tool of potential intimidation, surveillance and harassment by authorities, which could be used against organizations that voice criticism or dissent against the Government. We would like to remind that any means of control over associations need to be fair, objective and non-discriminatory, and should not be used as a pretext to silence critics.¹⁰ In addition, attendance of the associations' meetings on private property may have direct implications for the right to privacy, as enshrined in Article 17 of the ICCPR.

As outlined by the former Special Rapporteur on freedom of peaceful assembly and of association, authorities should not be entitled to condition any decisions and activities of the association, request associations to submit annual reports in advance or enter an association's premises without advance notice.¹¹ Independent bodies may have a legitimate interest in examining an association's records, but such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk.¹²

Sanctions

The draft law grants the state authorities in its Article 17, namely, the Ministry of Justice, with the wide powers to suspend the operation of NCOs under the following conditions:

- The authorities can issue written notices to NCOs and structural subdivisions of the foreign NCOs, which "*were found to have violated the laws of the Kyrgyz Republic or to have committed acts contrary to the purposes provided for in its constituent documents*" indicating the period for its removal for not less than one month;
- The authorities may suspend the activities of NCOs that have failed to register as "foreign representatives" for up to six months without a court decision. In the case of such suspension, the NCOs are prohibited from using bank deposits "*with the exception of settlements on economic activity and employment contracts, compensation for losses caused by its actions, payment of taxes, fees and fines.*" (Article 1(2)7-9)

The draft law further states that the structural units of foreign NCOs may be de-registered, if they do not provide the required information within the set deadline or do not act in line with their set objectives. (Article 1(2)7-9)

We note that the draft law stipulates that the suspension of the activities and de-registration of NCOs are not taken by judicial authorities but are left to the discretion of executive authorities. In addition, while the suspension of these activities may be appealed in court, the draft law does not allow for an appeal in case of de-registration of the structural units, which contradicts the right to an effective remedy under Article 2 of the ICCPR.

The suspension or involuntary de-registration of an NCO poses severe restrictions on the freedom of association and should only be possible when there is a

¹⁰ Ibid. para. 38

¹¹ A/HRC/20/27, para. 65

¹² Ibid. para. 64

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 lesser measures would be insufficient. Moreover, such drastic measures should only be taken by independent and impartial courts, and appeal recourses against decisions of such courts should be available.¹³

We also note that the draft law could seriously interfere with the financial transactions of a foreign non-commercial organisation and, thus, with its internal work and activities, due to the following provision:

“For the purpose of protecting the foundations of the constitutional system, defence and security of the state, morality, health, rights and freedoms of other persons, the authorized body has the right to issue to the structural subdivision of the foreign non-commercial organization a reasoned decision to ban the transfer of funds and other assets to specific recipients of these funds and other assets.” (Article 1(2)7-9)

As stated by the former Special Rapporteur on the rights to freedom of peaceful assembly and of association, states cannot loosely interpret international obligations to restrict the right to freedom of association by including such justification as “the interests of national security or public safety” or “public order.”¹⁴ We would, thus, like to reiterate that the claim that “national security is threatened when an association receives funding from a foreign source” is spurious and is in contradiction with international human rights law.¹⁵

Criminal liability

We would like to note the amendments to Article 259 of the Criminal Code foreseen by the draft law, which envisages criminal liability and imprisonment for the NCO representatives as follows:

- 1) In the form of a fine in the amount of 50,000 to 100,000 KGS (equivalent of 563 to 1,127 USD) or imprisonment for up to five years for the establishment of an association or other NCO or a structural unit of a foreign NCO, which activities “*involve violence against citizens or other harm to their health or inciting citizens to refuse to perform civic duties or to commit other unlawful acts, as well as leadership of such an association, organization or structural unit.*”
- 2) In the form of a fine in the amount of 100,000 to 200,000 KGS (equivalent of 1,127 to 2,254 USD) or imprisonment for up to ten years for “*active participation in the activities of associations*” described in the previous point, as well as “*for propaganda of acts of such organizations.*” (Article 2)

We would like to remind Your Excellency’s Government of the principle of “legal certainty” under international law. In this broad and vague formulation, it is unclear when an NCO would “incite” citizens and what is meant by “propaganda of acts,” “other unlawful acts,” and the scope of “civic duties.” We note that this revised

¹³ A/HRC/20/27, paras. 75, 76

¹⁴ Ibid. para. 30

¹⁵ Ibid.

Article would not meet the “prescribed by law” test, as envisaged by international human rights law.

Concluding observations

Enabling and protecting the right to freedom of association is key to providing an effective response to the challenges facing the Kyrgyz Republic. This right is vital for the realisation of a wide range of other rights, including civil, political, economic, social, and cultural rights. These rights are essential components of democratic societies, enabling them to respond to the needs, grievances, rights, and desires of their populations.¹⁶ Thus, the undue and excessive limitations on the associations’ access to resources, not only affect their operational capacity but have a detrimental impact on the communities they serve.¹⁷

We would like to remind Your Excellency’s Government that states have the primary responsibility and duty to protect, promote, and realise all human rights and fundamental freedoms by taking necessary measures to create the social, economic, political and other conditions and legal guarantees required to ensure that all persons under their jurisdiction, individually or collectively, can enjoy these rights and freedoms in practice.

For these reasons, we encourage Your Excellency’s Government to reconsider and withdraw the draft law in its current form. We further encourage the Parliament to initiate broad and inclusive processes of dialogue and meaningful consultation with civil society and other interested parties, to better understand NGOs’ role, the nature of their work, the diversity of the sector, and their needs and concerns. This will allow for the drafting of new, less restrictive, more inclusive, and enabling, legislation that promotes the critical work of NGOs and other associations, and ensures citizens’ and beneficiaries’ rights are protected, in accordance with constitutional and international human rights law obligations of the Kyrgyz Republic.

We remain at your disposal to provide further technical assistance on the issues addressed in this communication, should Your Excellency’s Government deem it necessary and request it.

As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify matters 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. Please indicate what measures will be taken to ensure that the legal framework applying to local and international NGOs in Kyrgyzstan complies with Your Excellency’s Government’s obligations under international human rights law, in particular, Article 22 of the ICCPR.
3. Please indicate what measures Your Excellency’s Government have taken or will take to ensure broad consultation with civil society, including minority associations and women’s groups, in developing the

¹⁶ A/77/171, para. 1

¹⁷ A/HRC/23/39, para. 23

regulatory framework for NGOs in Kyrgyzstan.

4. Please provide more detailed information on the measures Your Excellency's Government plans to take to ensure the oversight body for NGOs is independent and does not have unrestricted powers. Please also advise what safeguards will be put in place to ensure that the measures adopted by this body are necessary and proportionate in a democratic society, and whether these include appeal mechanisms to a competent, independent, and impartial judicial authority.
5. Please explain what measures have been taken to ensure that all human rights defenders in the Kyrgyz Republic can carry out their peaceful and legitimate activities without fear of judicial harassment or other restrictions.

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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