

Lawyers' Rights Watch Canada urges Thailand to withdraw draft NGO law

Repressive draft law is a threat to civil society and violates international human rights law

Statement

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Lawyers' Rights Watch Canada (LRWC) joins the growing international expressions of concern about Thailand's proposed *Act on the Operations of Not-for-Profit Organizations* ("Draft Act").¹ The Draft Act poses threats to internationally guaranteed rights of civil society in Thailand, including human rights defenders. LRWC recommends that the Royal Thai Government withdraw the Draft Act and conduct full and meaningful consultations with civil society to ensure that all NGO laws comply with international human rights law and standards.

Introduction: NGO laws must comply with international human rights law and standards

LRWC supports laws regulating non-governmental organizations (NGOs) provided that the laws genuinely serve to protect the public interest and comply with international human rights law and standards. There may be legitimate reasons to regulate certain NGOs, for example, those seeking to take advantage of special tax benefits. All limitations imposed on civil society must, however, be clear, prescribed by law, and strictly "necessary in a democratic society" as required by Article 21 and 22(2) of the *International Covenant on Civil and Political Rights* (ICCPR)² to which Thailand acceded on 29 October 1996.

LRWC has reviewed the Draft Act and finds that it does not comply with international human rights law binding on Thailand. Its vague and overbroad provisions fail to ensure the protection of civil society from arbitrary interference by authorities. The Draft Act threatens to prohibit, constrain, or criminalize the lawful activities of many civil society groups. It violates rights guaranteed by the *Universal Declaration of Human Rights* (UDHR)³ and the ICCPR, including the rights to freedom of association, privacy, and assembly; the right to effective remedies; and the right to participate in public affairs. The Draft Act has the potential to detract from Thailand's fulfilment of its obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁴ and the UN Sustainable Development Goals.⁵

¹ Draft Act on the Operations of Not-for-Profit Organizations, BE...., 23 February 2021, OCS English translation on file with LRWC.

² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

This statement summarizes LRWC's concerns, many of which are shared by UN experts⁶ and other organizations.⁷

Vague, overbroad Draft Act violates the international law principle of legality

The Draft Act contains several vague and overbroad provisions that could be used arbitrarily to interfere with or criminalize lawful activities of civil society. The Draft Act violates the customary international law principle of legality which requires that any restriction on fundamental rights and freedoms must be prescribed in clear and precise terms so that everyone can understand and foresee the legality of their acts or omissions.⁸

The UN Human Rights Committee, in its General Comment No. 34, explains the principle of legality as follows:

... a norm, to be characterized as a “law,” must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.⁹

According to the 2012 report of the Special Rapporteur on the situation of human rights defenders, the principle of legality also requires that “before a piece of legislation is adopted, it must be promulgated democratically, meaning that it should be subject to broad consultations with individuals and associations concerned, including civil society.”¹⁰ It is fundamental to the

⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at: <https://www.refworld.org/docid/57b6e3e44.html>.

⁶ UN Human Rights Council, 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, 26 March 2021, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26320>.

⁷ International Centre for Non-Profit Law, *Law on the Operation of Not-for-Profit Organizations*, 13 May 2021, available at: <https://www.icnl.org/resources/civic-freedom-monitor/thailand> (click on “legal snapshot” and scroll down); International Commission of Jurists, *Re: Recommendations concerning the Draft Act on the Operation of Not-for-Profit Organizations B.E....*, 31 March 2021, available at: <https://www.icj.org/wp-content/uploads/2021/03/Thailand-NPO-Submission-2021-ENG.pdf>; CIVICUS, *Re: Submission on the draft law on Operations of Not-for-Profit Organizations*, 2 April 2021, available at: <https://www.civicus.org/index.php/media-resources/news/5022-thailand-ngo-law-would-strike-severe-blow-to-human-rights>; Amnesty International, *Submission to the Office of the Council of State on the Draft Act of Not-for-Profit Organizations*, 31 March 2021, available at <https://www.amnesty.org/download/Documents/ASA3939282021ENGLISH.pdf>; Human Rights Watch, *Re: Proposed Law on Not-for-Profit Organizations*, 30 March 2021, available at: <https://www.hrw.org/news/2021/03/30/letter-thailand-office-council-state-re-proposed-law-not-profit-organizations>.

⁸ See a brief explanation of the principle of legality UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders*, A/67/292, 10 August 2012, paras 65-67, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=a/67/292.

⁹ UN Human Rights Committee (HRC), *CCPR General Comment No. 34: Freedom of Opinion and Expression*, 12 September 2011, CCPR/C/GC/34, available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹⁰ *Ibid.*, para 67.

principle of legality that laws be drafted and promulgated in ways that ensure that the public can be “aware of what constitutes punishable behaviour.”¹¹

The principle of legality protects society from the arbitrary abuse of power by the State. The imprecise language of the Draft Act allows unfettered discretion by authorities to determine who falls within the legislation. The definition of a “not-for-profit organization” under Section 4 of the Draft Act is almost limitless in scope. Section 4 states:

“Not-for-profit organisation” shall include a group of individuals that are not established by any specific law but implement activities that do not have the purpose of seeking income or profits to be shared.

This definition is so vague and overbroad that it potentially captures any informal group or club that operates without income or profit. The Draft Act appears to prohibit any unregistered groups from conducting any non-profit activity, no matter what the groups’ size or purpose, including ad hoc groups temporarily set up or coming together for particular purposes, events, or gatherings.

The uncertainty as to which groups may be captured by the definition is a serious concern, especially regarding those who may hold or express views that differ from those of State authorities. The undefined scope of the Draft Act, in conjunction with the risk of severe punishment for violations of its unclear provisions, creates considerable risk of illegitimate criminal charges and arbitrary detention and causes uncertainty and fear among a range of legitimate not-for-profit groups, including those engaging in humanitarian and development work, human rights, environmental protection, education, or social activities. Under the Draft Act, many organizations that are already registered under different legislation, such as foundations set up under the *Civil and Commercial Code*, will not be required to re-register under the Draft Act, but they will be subject to its more stringent requirements or require further permission to operate “in compliance with the criteria, methods and conditions prescribed by the Minister of this Act as well.”¹²

The UN Human Rights Committee explains, in its General Comment No. 16, that:

... the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims, and objectives of the Covenant [ICCPR] and should be, in any event, reasonable in the particular circumstances.¹³

The Draft Act creates opportunities for sweeping, unfettered, and arbitrary constraints on the rights to freedom of thought, opinion, expression, privacy, association, or assembly guaranteed

¹¹ Ibid., para 67.

¹² Draft Act Section 5.

¹³ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <https://www.refworld.org/docid/453883f922.html>.

by the ICCPR, Articles 17-22. The Draft Act also has the potential to be used to violate the right of people to participate in public affairs guaranteed by ICCPR Article 25, including the right to participate freely in public dialogue and debate about public policy issues.¹⁴

Criminalization of lawful civil society activities violates the right to freedom of association

The Draft Act seriously violates the right to freedom of association protected by Article 22 of the ICCPR. Section 5 of the Draft Act requires non-profit organizations to register in order to operate. Section 10 imposes criminal punishment for anyone operating an unregistered organization. The punishment is up to five years imprisonment and/or fines of 100,000 baht (approximately USD \$3,250). Organizations are required to register within 30 days of the Draft Act coming into force.

The mandatory registration criteria are vague and open to arbitrary application. This means that registration could be arbitrarily denied. The short registration period, compounded by the vague criteria as to who needs to register, exposes members of civil society groups to the risk of severe criminal punishment for engaging in lawful group activities.

Section 6 of the Draft Act permits the Minister of Interior to authorize or block activities funded by non-Thai donors. The Draft Act does not define what activities are allowed to be supported with foreign funds. This potential for arbitrary decision-making infringes on the freedom of association and impacts the legitimate pursuits of various kinds of international non-profit organizations, including humanitarian and human rights organizations lawfully present in Thailand.

The right to freedom of association is essential for the fulfilment of other rights protected by the ICCPR, including the right to freedom of thought, conscience and religion (Article 18); freedom of opinion, expression and information (Article 19); and freedom of peaceful assembly (Article 21). All these rights are interrelated, interdependent, and indivisible. The right to freedom of association is also indivisible from the rights set forth in the ICESCR, and the fulfilment of the Sustainable Development Goals requires effective cooperation with civil society groups concerned with development and humanitarian endeavours, as well as human rights defenders promoting rights-based approaches to sustainable development including labour, environmental and climate issues.

In his 2019 report to the UN General Assembly, the Special Rapporteur on the rights to freedom of peaceful assembly and of association wrote that it is “widely recognized that an active and unfettered civil society is essential to development and poverty eradication efforts.”¹⁵ He stated that “[l]aws that require mandatory registration for all associations seeking to form and operate freely in a country can effectively impede the enjoyment of the right to freedom of

¹⁴ UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 8, 25, 26, available at: <https://www.refworld.org/docid/453883fc22.html>.

¹⁵ UN General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/74/349, 11 September 2019, Summary, available at: <https://undocs.org/A/74/349>.

association...”¹⁶ The Special Rapporteur noted that laws providing for heavy fines or criminal prosecution for failure to register causes exclusion of marginalized groups including those living in poverty, contrary to the Sustainable Development Goals.¹⁷ In 2015, the Special Rapporteur’s report emphasized that,

the right to freedom of association applies to informal associations and does not require that a group be registered. Individuals involved in unregistered associations should be free to carry out any activity and should not be subject to criminal sanctions. Allowing unregistered associations is not only fundamental to a good enabling environment for civil society but essential to support civic participation for those living in poverty and most marginalized.¹⁸

Violation of the right to privacy

Section 6 of the Draft Act requires non-profit organizations to report the sources and amounts of their funding. This invasive reporting requirement applies to all groups, regardless of size, income level, or purpose. The Draft Act also permits the registrar to enter the offices of organizations without a warrant or prior notice and acquire copies of correspondence from its members. These broad surveillance powers would permit arbitrary search and seizure and would compel organizations to disclose confidential information in violation of privacy rights protected by Article 17 of the ICCPR.

Violation of the right to freedom of peaceful assembly

The Draft Act could be used to unlawfully restrict the right of peaceful assembly guaranteed by Article 21 of the ICCPR. The vague and overbroad terms of the Draft Act provide the potential for arbitrary interference of the right of peaceful assembly of persons engaged in any non-commercial meeting, including educational events or spontaneous peaceful gatherings for any purpose.

The Special Rapporteur on the rights to freedom of peaceful assembly and of association stated in 2015 that the rights to freedom of peaceful assembly and of association should be viewed as the rule and limitations as the exception.¹⁹ The UN Human Rights Committee, in its 2020 General Comment No. 37, confirms that Article 21 “requires States to allow such assemblies to take place without unwarranted interference and to facilitate the exercise of the right and to protect the participants” and “any such restrictions must be narrowly drawn.”²⁰ The General Comment also states that:

¹⁶ *Ibid*, para. 49.

¹⁷ *Ibid.*, Summary.

¹⁸ *Ibid*, para 49.

¹⁹ UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kia, A/HRC/29/25, 28 April 2015, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A%2FHRC%2F29%2F25

²⁰ UN Human Rights Committee, CCPR General Comment No. 37 (2020) on the right of peaceful assembly (article 21), 17 September 2020, CCPR/C/GC/37, available at:

States must ensure that laws and their interpretation and application do not result in discrimination in the enjoyment of the right of peaceful assembly, for example on the basis of race, colour, ethnicity, age, sex, language, property, religion or belief, political or other opinion, national or social origin, birth, minority, indigenous or other status, disability, sexual orientation or gender identity, or other status.

Violation of the right to an effective remedy: Lack of procedural safeguards

The Draft Act provides for regulatory oversight by the Ministry of the Interior and Department of Provincial Administration rather than an oversight body independent of the executive. The Draft Act also lacks procedural safeguards against the abuse of executive power. It provides no information as to any mechanism or grounds for appeal.²¹

The lack of procedural safeguards and an appeal to an effective, impartial appeal mechanism violates ICCPR in Article 2.3, which states that,

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

Violation of the right to take part in public affairs

Article 25 of ICCPR provides for the right to take part in the conduct of public affairs, which entails “exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This right, together with the rights to freedom of association and freedom of peaceful assembly, requires that individuals have an effective means to collectively voice their views, including views that dissent from those of State authorities. The vagueness and overreach of the Draft Act threatens to constrain these rights and silence public debate and dialogue.

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f37&Lang=en.

²¹ Draft Act Section 9 states that: “Any pending appeal to the revocation of registration shall have no mitigation on the revocation,” but the Draft Act does not describe any appeal process.

The Draft Act threatens human rights defenders

Persons advocating human rights (human rights defenders) are particularly vulnerable under the Draft Act, as their opinions frequently involve calling attention to gaps in human rights protection or violations committed or allowed by State authorities. The UN Declaration on Human Rights Defenders,²² adopted by consensus of the UN General Assembly in 1999, recognizes the legitimacy and importance of the activities of human rights defenders, including their right to participate in peaceful activities for promotion of human rights and against human rights violations. The Declaration calls on States to ensure that defenders can carry out their activities without fear of reprisals. In particular, Article 12 of the Declaration on Human Rights Defenders states:

- (1) Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.
- (2) The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

Recommendations: Withdraw the Draft Act and consult with civil society

The Draft Act was approved in principle by the cabinet on 23 February 2021. This approval was followed by a very brief and inadequately-publicized period of public consultation from 12-31 March 2021. A longer period of meaningful public consultation would ensure that the Draft Act complies with Thailand's human rights obligations.

Thailand's government has not articulated a clear rationale as to why the numerous restrictions of rights under the Draft Act are necessary or proportional to any legitimate purpose. It has not demonstrated how the limitations of the Draft Act are necessary for the protection of public security, public order, public health or morals, or the protection of the rights and freedoms of others as required by Article 21 and 22(2) of the ICCPR.

LRWC urges the immediate withdrawal of the Draft Act and meaningful consultation with civil society to ensure that all laws governing civil society organizations are in compliance with international human rights law and standards, including the principle of legality and the rights to freedom of thought, opinion, expression, privacy, association, and assembly; the right to remedies; and the right to participate in public affairs. The protection of these civil and political

²² UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*: resolution / adopted by the General Assembly, 8 March 1999, A/RES/53/144, available at: <http://www.refworld.org/docid/3b00f54c14.html>. The Declaration, while not in itself a binding instrument, is based on human rights standards enshrined in instruments that are legally binding at international law, including the ICCPR. The Declaration, adopted by consensus of the General Assembly, represents a unanimous commitment by States to its implementation.

rights is essential for the advancement and fulfilment of economic, social and cultural rights and the Sustainable Development Goals

Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers and human rights defenders who promote international human rights, the independence and security of human rights defenders, the integrity of legal systems, and the rule of law through advocacy, education and legal research. LRWC has Special Consultative Status with the Economic and Social Council of the United Nations (UN).

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