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LEGAL ANALYSIS: THAILAND

Law on the Operation of Not-for-Profit Organizations, 2021

Introduction

ICNL is pleased to share this legal analysis on the draft Operation of Not-for-Profit Organizations, 2021 (Bill), proposed by Thailand's Office of the Council of State. We will submit a Thai translation of this analysis to the Office of the Council of State during the public consultation period ending 31 March 2021.

The following analysis is based solely on a review of the Bill against the backdrop of international law and good regulatory practices as they relate to the freedom of association and not-for-profit organizations. The analysis does not seek to provide a comprehensive overview of all issues raised, but rather seeks to highlight key issues of concern that deserve further consideration by the drafters of the Bill and by civil society organizations likely to be affected by the Bill, if enacted.

The International Center for Not-for-Profit Law (ICNL) is an international organization that provides technical assistance, research, and education to support the development of appropriate laws and regulatory systems for civil society organizations in countries around the world. ICNL has provided assistance to civil society law reform projects in over 100 countries. ICNL has worked closely with international and continental institutions; private foundations; and scores of in-country colleagues. For more information on our work, please visit www.icnl.org.

Executive Summary

While ICNL commends the holding of a public consultation period on the Bill in line with international public participation principles, the Bill itself raises several fundamental concerns. In order to ensure sufficient consultation and compliance with Thailand's international legal obligations, ICNL recommends that the consultation period be extended. We remain available for further discussion and to provide comparative and international resources around NPO laws as helpful.

Concerns with the current Bill include the following:

- **Overbroad definition of not-for-profit organizations (NPOs):** Section 4 of the Bill defines an NPO as "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." This definition could be interpreted to embrace nearly every informal gathering of individuals carrying out almost any activity besides income/profit-sharing activities. Given the mandatory registration requirement for all NPOs (see below), the Bill's broad definition is not only ill-serving to the purpose of effective regulation of actual not-for-profit organizations, but also opens the door to dangerous government overreach. This definition should be narrowed and clarified based on international criteria for associations.

- **Choice of regulatory agency:** Section 4 of the Bill places regulatory authority of NPOs with the Ministry of the Interior and the Department of Provincial Administration. Although the registration or regulatory authority for NPOs varies by country, standard practice is to regulate NPOs under an administrative or neutral agency without a security focus, such as a Social Affairs or Labor ministry. Other countries may regulate NPOs through the court system or a charitable commission. The regulatory agency should have some measure of independence from political control, and sufficient capacity and knowledge of civil society, its diversity, and how NPOs function to effectively regulate the sector.
- **Mandatory registration requirements:** Under Section 5 of the Bill, all NPOs are required to register under the Minister of Interior's criteria. This requirement essentially prohibits the existence of unregistered groups, which constitutes an impermissible restriction on the freedom of association under Article 22 of the ICCPR.
- **Vague registration criteria and potential arbitrary denials.** Section 5 of the Bill states that "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." Such vague and unspecified language leaves open the possibility that registration criteria themselves will be limiting and arbitrary, rather than straightforward and in line with international law.
- **Potential interference with NPO activities.** Section 5 requires organizations to "act in compliance with the criteria, methods and conditions prescribed by the Minister of this Act." None of the criteria, methods, or conditions are specified or defined, leaving this provision open to interpretation and subject to arbitrary application by authorities. Such vague language is often used to control or censor legitimate activities by associations, such as expression critical of government policies, or other protected activities. NPOs should be able to operate independently from arbitrary government restrictions, with the freedom to conduct all lawful activities.

- **Burdensome, intrusive reporting constraints on NPOs.** Section 6 of the Bill requires all NPOs to "disclose sources and amounts of funds or materials used in their implementation each year," as well as annual tax returns. The Bill further empowers the Registrar to enter NPO offices for the purposes of inspecting the "use of money or materials" and to obtain electronic communications of NPOs, purportedly for any reason, and without any suspicion of criminal activity or further due process protections. Such invasive reporting requirements and surveillance powers are a clear violation of privacy rights and the association rights of NPOs, and may compel associations and NPOs into disclosing confidential or proprietary information. They also indicate a failure to recognize the diversity of civil society, applying the same requirements as a blanket approach to all groups, regardless of size, income level or purpose.
- **Restrictions on foreign funding for NPOs.** Section 6 of the Bill permits NPOs to accept money or materials from any non-Thai or non-Thai registered entities "to fund only activities in the Kingdom as permitted by the Minister." This essentially gives the Minister of Interior total discretion to authorize or block any foreign funding for any NPO in Thailand. This type of foreign funding restriction is not in compliance with international standards on free association, which encourage cross-border foreign funding for NPOs and exclude these types of blanket restrictions.
- **No possibility for appeal.** The Bill does not provide any appeal process for decisions taken by the registrar, including suspension or termination. It also does not set out criteria for determining violations of the law that would result in immediate revocation of registration. The lack of procedural safeguards, such as the right to appeal revocation decisions to an independent body, could easily lead to abuses of power and disproportionate actions by authority figures.
- **Criminalization of unregistered groups and disproportionate punishments.** Section 10 of the Bill criminalizes "any person who operates a not-for-profit organization in the Kingdom without getting registered," with penalties of up to 5 years imprisonment and/or fines of 100,000 baht (~$3250 USD). Individuals involved in unregistered associations should be free to carry out activities, and should not be subject to criminal sanctions. The penalty of revocation or termination of NPO registration for failing to comply with designated provisions of the Bill is also disproportionate; under international norms, termination, the severest restriction on free association, is only allowable when there is a clear and imminent danger resulting in a flagrant violation of national law.

- **Inadequate timeline for implementation and registration.** Section 11 of the Bill requires any non-exempt NPO operating in Thailand to register with the Registrar within 30 days of the Act coming into force. Given the potentially burdensome and unknown registration process, this window for registration is extremely limiting and would likely place a significant burden both on NPOs trying to register and on the Registrar processing applications. Most laws in other countries allow a minimum of six months and more often a one-to-two-year period in which NPOs can register following implementation of a new registration regime. This is a more realistic timeframe in which the government can reasonably expect to register numerous organizations under a new system.

International Law

The right to free association is a fundamental norm of international law enshrined in multiple human rights treaties, including the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 22 of the ICCPR, to which Thailand acceded on 29 October 1996, establishes that:

> Everyone shall have the right to freedom of association with others… No restrictions may be placed on the exercise of this right 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, the protection of public health or morals, or the protection of the rights and freedoms of others.

International law creates a presumption against any regulation that would amount to a restriction of recognized rights. It is therefore the state's obligation to demonstrate that any restriction on the freedom of association is justified according to a three-part test. Restrictions are lawful only if they are:

> 1. "Prescribed by law," meaning it is introduced by a legislative body, not an administrative order;[1] and it is sufficiently precise for an individual or civil society organization to foresee violations of the provision;
> 2. Pursued in the interests of only four permissible grounds—national security or public safety, public order, protection of public health or morals, or protection of the rights and freedoms of others; and

[1] United Nations Human Rights Council, Special Rapporteur on situation of human rights defenders, Margaret Sekaggya, "Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" July 2011, at 44.

> 3. "Necessary in a democratic society," meaning that restrictions are proportional to the interests listed above[2] and do not harm "pluralism, tolerance and broadmindedness."[3]

International law creates a presumption against any state regulation that would amount to a restriction of recognized rights.[4] As noted above, the ICCPR lists only four permissible grounds for state interference; those grounds are an exhaustive list. It is the state's obligation to demonstrate that any interference is justified; interference can only be justified where it is prescribed by law, in the interests of a legitimate government interest, and "necessary in a democratic society." The ICCPR Human Rights Committee has stated, in its General Comment 31(6): "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."[5]

Thailand's 2017 Constitution also protects the right of persons in Thailand to the freedom of association as follows:

> Article 42
> A person shall enjoy the liberty to unite and form an association, cooperative, union, organisation, community, or any other group.
> The restriction of such liberty under paragraph one shall not be imposed except by virtue of a provision of law enacted for the purpose of protecting public interest, for maintaining public order or good morals, or for preventing or eliminating barriers or monopoly.

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[2] United Nations International Covenant on Civil and Political Rights Human Rights Committee [hereinafter "ICCPR Human Rights Committee"], CCPR/C/21/Rev.1/Add. 1326, "General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant" May 26, 2004, para. 6 [hereinafter General Comment].
[3] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 32. *See also*, General Comment, *supra* note 2, at para 6: "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."
[4] ICNL and the World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (2008), p. 30.
[5] ICCPR Human Rights Committee, General Comment No. 31(6), Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004); *see also* Maina Kiai 2012, *supra* note 3 at para 17: "When such a pressing social need arises, States have then to ensure that any restrictive measures fall within the limit of what is acceptable in a 'democratic society.' In that regard, longstanding jurisprudence asserts that democratic societies exist only where 'pluralism, tolerance and broadmindedness' are in place. Hence, States cannot undermine the very existence of these attributes when restricting these rights."

Based on these international law principles and Thailand's own Constitution, ICNL is concerned that the Bill contains multiple provisions that constitute unjustified interference with the freedom of association, and do not meet well-established international standards. An overview of the most concerning areas is below. We stand available to discuss and expand on our analysis.

Analysis

1. OVERBROAD, VAGUE DEFINITION OF NOT-FOR-PROFIT ORGANIZATION

Issue: Section 4 of the Bill defines an NPO as "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." This definition is overbroad and could be interpreted to embrace nearly every informal gathering of individuals carrying out almost any activity besides income/profit-sharing activities. At the same time, it is unclear whether the definition is meant to apply to foundations, which have previously held a somewhat separate status under Thai law.

Discussion:

International law contains several definitions of "associations" and not-for-profit organizations that may be helpful in elucidating the standards by which governments frequently define and regulate NPOs. The UN Special Rapporteur on the Freedom of Association and Assembly has noted that "an 'association' refers to any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.[6] An association has further been defined as a group that 1) pursues a defined aim; 2) has more than an ephemeral existence by possessing some "stability of duration;" and 3) has a formal or informal institutional structure that provides members with a sense of belonging.[7] A not-for-profit could be even more specifically defined, for example as some type of legal entity organized and operated for a collective, public or social benefit, in which revenues exceeding expenses are generally directed to the organization's purpose.

The definition of NPO in this Bill, conversely, is so broad that it could embrace not just any association but practically any gathering or assembly of more than one person getting together for almost any non-profit-related activity. The current definition would apply to two friends who get together to play chess, or a family gathering for dinner. In this case, an overly inclusive definition is not particularly helpful, as it would merely create confusion as to who is actually required to be registered under the law. Indeed, given the mandatory registration requirement for all NPOs (see below), such a broad

[6] Maina Kiai 2012, *supra* note 3 at para 51.
[7] Jeremy McBride, International Law on Freedom of Association, Enabling Civil Society, 2003, pg. 10.

definition is likely to create fear among those who do not wish to become subject to the law's severe sanctions. A situation where tens of thousands of informal associations and social groups scramble to apply for registration in order to avoid the criminal penalties proposed in this law cannot be the intent of this Bill, but could be its consequence.

Recommendation: The definition of NPOs should be revised and narrowed in line with the criteria provided under international law. It should also be clarified whether the Bill and its definition of NPOs applies to foundations set up in Thailand.

2. CHOICE OF REGULATORY AGENCY

Issue: Section 4 of the Bill places registration and oversight authority of NPOs with the Ministry of the Interior and the Department of Provincial Administration. NPO regulation is typically best housed under administrative or regulatory agencies without a security focus, such as a Labor or Social Affairs Ministry.

Discussion:

Although the registration or regulatory authority for NPOs varies by country, standard practice is to regulate NPOs under an administrative or neutral agency without a security focus, such as a Social Affairs or Labor ministry. There is no single 'correct' regulatory approach. Some countries may regulate NPOs through the court system. Others rely on administrative or ministerial departments. Still others may establish a charitable commission. Regardless, however, the regulatory agency should have some measure of independence from political control, and sufficient capacity and knowledge of civil society, its diversity, and how NPOs function to be able to regulate the sector effectively and fairly.

For example, an agency that is familiar with the breadth and variety of different-sized NPOs and can target policies appropriately – for instance, reporting requirements for larger organizations with sizable budgets versus minimal requirements for smaller entities with fewer resources (e.g., a local football club) – would be a better fit and lead to more efficient regulatory outcomes. Any entity responsible for NPO oversight should be accessible and communicate well and openly with the sector, as is mandated by various processes, including, for instance, the national risk assessment and sectoral consultations required under Recommendation 8 of the Financial Action Task Force (FATF).

Recommendation: To be consistent with good regulatory practices in other countries, the Bill should remove regulatory authority over NPOs from the Ministry of Interior and instead consider a more appropriate department with a certain measure of independence, neutrality, and knowledge of civil society to oversee NPOs.

3. MANDATORY REGISTRATION

Issue: Under Section 5 of the bill, "a not-for-profit organization must register itself under the criteria, methods and conditions prescribed by the Minister." This assumedly applies to all NPOs (including associations and foundations) not currently registered under existing laws. Anyone operating an unregistered NPO faces fines and imprisonment (Section 10).

Discussion:

Mandatory registration constitutes an impermissible restriction on the freedom of association under Article 22 of the ICCPR. Under Article 22, as well as other major international conventions, "freedom of association is a right, and not something that must first be granted by the government to citizens."[8] That associations and NPOs may be formed as legal entities does not mean that individuals can be *required* to form legal entities in order to exercise the freedom of association. As the UN Special Rapporteur has stated, "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…This is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views or beliefs."[9]

Mandatory registration is particularly problematic when registration is difficult to achieve, as will likely be the case under this Bill. In such circumstances, individuals are forced to choose between operating as an unregistered group – and therefore illegally – or seeking to comply with burdensome registration requirements.

It is, of course, understood that legal entities will reasonably enjoy different legal rights from those groups that do not have legal personality. The rights of a legal entity, such as limited liability for its members/founders, tax incentives, authority to possess a property title, and the ability to sue and be sued in courts, among other rights, have traditionally made registration of a legal entity an attractive option for associations and NPOs. The decision about whether or not to register and become a legal entity, however, should be a purely voluntary one. Individuals retain the right under international law to associate without registering a legal entity.

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[8] Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association Source Book* (Budapest 2003), p. 14.
[9] Maina Kiai 2012, *supra* note 3 at para 56; *see also*, Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 October 2004) page 21 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/533/18/PDF/N0453318.pdf?OpenElement) [hereinafter HRD report] ("[R]egistration should not be compulsory. NPOs should be allowed to exist and carry out activities without having to register if they so wish.")

Moreover, as a policy matter, enforcement of mandatory registration requirements, and the corresponding prohibition of activities carried out by unregistered groups or organizations, may be difficult to implement and unworkable in practice. No regulatory body responsible for gathering such information has the means to pursue every group (two and more) of individuals who gather together with a differing level of frequency and may be performing the broadest variety of imaginable activities, from harvesting crops, to playing chess or mahjong, to producing handicrafts. Furthermore, there is no need for the government to waste its resources in seeking to limit the activities of such groups.

In short, mandatory registration and subsequent criminalization for failure to register is both a violation of international law and also an inefficient approach to regulating non-profits.

Recommendation: To comply with international norms, the Bill should be amended (Sections 5 and 10) to eliminate the mandatory registration requirement and, instead, explicitly allow for unregistered groups to operate.

4. OVERBROAD CONDITIONS TO DENY NPO REGISTRATION

Issue: Section 5 of the Bill states that "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." Such vague and unspecified language means that registration criteria – when finally released - could be limiting and arbitrary, rather than straightforward and in line with international law.

Discussion:

In general, an agreement between two or more persons is sufficient to establish an association, which need not be registered or receive formal recognition from the State. However, Section 5 of the Bill states that "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." The specific criteria, methods and conditions are not defined, potentially empowering the Minister of Interior to deny NPOs both from registering or establishing chapters (Section 7) based on these unspecified elements. Consequently, restrictions that might be imposed by the Minister and that would interfere with the freedom of association (by denying registration, for example) would not be "prescribed by law," as required by the ICCPR in Article 22.

Under international law, to ensure an expeditious and professional registration process,

the procedures for NPO registration should be "simple," "straightforward," "non-onerous," and "expeditious."[10] The registration process therefore should meet certain minimum standards to ensure that "Government officials act in good faith, in a timely and non-selective manner."[11] Moreover, procedural safeguards (currently absent from this Bill) for the registration process should be included, such as time limits for government review of registration applications; a written explanation in case of refusal; and the right to appeal to administrative and/or judicial bodies in case of refusal or revocation of registration (for more on the right to appeal, see below).

NPO registration works well under a notification procedure whereby associations are automatically granted legal personality as soon as the authorities are notified by the founders that an organization was created. In most countries, such notification is made through a written statement containing a number of elements of information clearly defined in the law.[12] Alternatively, a prior authorization regime may be established under which authorities may have a short time limit to respond to submissions for recognition. Simple requirements for receiving NPO registration could include: 1) submission of a straightforward application with address and contact details for the organization 2) statement of purpose or description of activities 3) founding or governing document of the organization. Legitimate grounds for denial of registration are generally quite limited, but may include missing information or an organization possessing the same name as one already registered. Grounds for the decision should be provided to the organization, who should have the right to appeal the decision within a reasonable period of time.

Recommendation: The criteria for registration should be clearly defined and limited, as well as the grounds for denial, in line with international standards on free association.

5. POTENTIAL INTERFERENCE WITH NPO ACTIVITIES

Issue: Section 5 requires organizations to "act in compliance with the criteria, methods and conditions prescribed by the Minister of this Act." None of the criteria, methods, or conditions are specified or defined, leaving this provision open to interpretation and subject to arbitrary application by authorities. NPOs should be able to operate independently from arbitrary government restrictions, with the freedom to conduct all lawful activities.

Discussion:

Under international standards, NPOs have the right to operate free from unwarranted

[10] Maina Kiai 2012, *supra* note 3 at para 56.
[11] *Id.*
[12] *Id.* at para 58.

state interference. While many countries have laws that provide some degree of government oversight over NPOs and other legal entities, such oversight is reasonably restrained, based on a principle of minimum state interference, with a clear legal basis and proportionate to the legitimate aim being pursued in line with international law. Countries are not empowered to control and direct the activities of NPOs, and any language that opens the door to government interference with the implementation of NPO programs and projects should be removed.

In this case, the lack of defined "criteria, methods and conditions" which the Minister may prescribe clearly opens the door to all sorts of potential government interference, which may only be revealed at a later date upon unveiling of implementing rules, or perhaps never publicly elucidated at all. Such vague language is often used to control or censor legitimate activities by associations, such as expression critical of government policies, or other protected activities. Indeed, the Minister would have the power to establish any criteria of his or her choosing and any NPO that did not comply would face potential dissolution. A future Minister might choose to establish a pre-condition that all NPOs be staffed exclusively by men, or have a thousand members, or have headquarters only in Bangkok. Such discretion allotted to one individual clearly opens up avenues for abuse. A better approach would be to set out fair, standard conditions, such as reporting requirements for NPOs above a certain revenue size/threshold, thereby meeting the principles of legality and predictability and allowing actors to voluntarily comply with well-established, clearly understood criteria.

Recommendation: To comply with international norms, the Bill should be revised to remove language providing broad discretion for the Minister to establish criteria, methods, and conditions with which NPOs are forced to comply. Instead, the Bill should include specific provisions upholding the independence of NPOs and their freedom to operate and carry out lawful activities.

6. BURDENSOME REPORTING REQUIREMENTS

Issue: Section 6 of the Bill requires all NPOs to "disclose sources and amounts of funds or materials used in their implementation each year," as well as annual tax returns. The Bill further empowers the Registrar to enter NPO offices for the purposes of inspecting the "use of money or materials" and to obtain electronic communications of the NPOs, purportedly for any reason, and without any suspicion of criminal activity or further due process protections. Such invasive reporting requirements and surveillance powers are a clear violation of privacy rights and the association rights of NPOs. They may also compel associations and NPOs into disclosing confidential or proprietary information, and represent substantial regulatory overreach.

Discussion:

Article 22 of the ICCPR limits government supervisory actions in clear terms: "No restrictions may be placed on the exercise of this right [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." The recognition of freedom of association as a right "that must be respected necessarily entails some limits on the degree of regulation … The very essence of the freedom of association is the ability of those belonging to a body to decide how it should be run; this necessitates both a minimalist approach to regulation and very close scrutiny of attempts to interfere with the choices that associations and their members make about the organization of their affairs."[13]

The government must therefore ensure that it has a clear legal basis for reporting requirements, and that the information demanded is proportional to the legitimate aim pursued. "Reporting requirements, where these exist, should not be burdensome [and] should be appropriate to the size of the association and the scope of its operations…"[14]

The Bill states that "Not-for-profit organizations must disclose sources and amounts of funds or materials used in their implementation each year" (Section 6). It also requires submission of yearly tax returns (Section 6), as well as the reporting of any money or materials received from non-Thai sources (Section 6) and the submission of an annual audited financial report Section 8). These requirements purportedly apply to all NPOs.

Applying the same financial reporting requirements to all NPOs, regardless of size or scope of operations almost certainly amounts to an undue burden – in particular the potentially costly audit requirement – for small or grassroots organizations. Regulatory burdens must be proportionate to the risk being addressed; in this case, a one size fits all approach is not appropriate for small groups that may not have any revenue or donations to report, as well as for more informal or local associations (for instance, social clubs or sporting associations).

Furthermore, allowing the Registrar to enter NPO offices for the purposes of inspecting the "use of money or materials" and to obtain electronic communications of the NPOs, purportedly for any reason (Section 6) represents a breach of the right to privacy as well as procedural and due process safeguards. Such an approach treats all NPOs as potentially criminal entities, without any evidence.

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[13] Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association*, (Budapest 2003), p. 42. Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe states, in section VII (#70) that "No external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent."
[14] Organization for Security and Co-operation in Europe's (OSCE's) Office for Democratic Institutions and Human Rights (ODIHR), "Guidelines on Freedom of Association" December 17, 2014, para. 227, https://www.osce.org/odihr/132371?download=true

In order to safeguard against harassment of NPOs, inspection powers should be explicitly defined in law, including the grounds for inspection, duration of inspection, scope of inspection, and documents needed to be produced during inspections (with due regard to the privacy of members, clients, and founders). Moreover, the law should require advance notice of inspections[15] and allow for appeal to a court, where an inspection violates the rights of an NPO.

As organizational entities, NPOs deal with proprietary and confidential information, and their right to privacy must be respected. Overt surveillance provisions such as these likely violate that right to privacy.[16] In the case of NPOs and associations, where the government is already receiving annual reports on their activities and finances, the justification for these additional inspection provisions is unclear.

As an alternative, one could envision a system where organizations with no tax benefits or public funding would be accountable to their members but would have no public reporting requirements. Organizations below a certain threshold would be subjected to simplified reporting, even if they receive tax benefits or public funding. More fulsome reports would only be required of large organizations receiving substantial tax benefits or public funding. Details and distinctions would be worked out after meaningful consultation with civil society. Such an approach would recognize the diversity of civil society, and would tailor the approach so that a three-member chess club would not be subject to the same regulatory requirements as a 1,000-member professional association. Intergovernmental bodies like the Financial Action Task Force (FATF) increasingly recognize that "one size fits all" approaches are not effective regulatory methods for the non-profit sector, and recommend more tailored approaches taken in consultation with the sector.

Recommendation: To comply with both international standards and good supervisory practices, the Bill should be revised so that organizations do not have to provide copies of their annual reports, proposals and financial agreements to government authorities. A graduated reporting requirement that would exempt smaller organizations from reporting, or at least simplify their reporting obligation should be considered. The criteria and scope for conducting an audit should be explicitly and narrowly defined. Any inspection powers should be tempered by procedural safeguards, including stated justification, sufficient notice, inspection during reasonable office hours, etc.

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[15] *Id. See also*, Maina Kiai 2012, *supra* note 3 at para 65 ("… authorities should not be entitled to: … enter an association's premises without advance notice.")

[16] Article 17 of the ICCPR reads as follows: ""1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." *See also*, Maina Kiai 2012, *supra* note 3 at para 65 ("Authorities must …respect the right of associations to privacy as stipulated in article 17 of the Covenant on Civil and Political Rights.")

7. ARBITRARY DISCRETION OVER AND BLOCKING OF FOREIGN FUNDING

Issue: Section 6 of the Bill allows NPOs to accept money or materials from any non-Thai or non-Thai registered entities "to fund only activities in the Kingdom as permitted by the Minister." This essentially gives the Minister of Interior the power to authorize or block any foreign funding for any NPO in Thailand. Such a restriction on foreign funding is not in compliance with international standards on free association, which encourage cross-border foreign funding for NPOs and disallows these types of blanket restrictions.

Discussion:

Freedom of association protects the ability of civil society groups to seek and secure resources from any legitimate source, domestic or foreign: "The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources."[17] Such sources include individuals, businesses, civil society organizations, Governments and international organizations, from whom both registered and unregistered associations have the right to seek funding.[18] In many countries, domestic funding is very limited or non-existent, leading associations to rely on foreign assistance to conduct their activities. Governments must therefore "allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Government."[19]

Requirements to obtain authorization from the authorities to receive or use funds constitute a restriction to the freedom of association;[20] the government generally should only require NPOs to notify authorities after receiving funds.[21] While governments have a responsibility to address money-laundering and terrorism, this should never be used as a justification to impede the legitimate work of associations. Rather, States should use alternative mechanisms to mitigate any AML/CT risks, such as existing banking laws and criminal laws that prohibit acts of terrorism.[22]

Slightly different rules may apply for political parties, where governments may regulate, limit, or prohibit foreign donations to avoid undue influence of foreign interests in domestic political affairs.[23] For all other associations, however, foreign funding should be encouraged. Such cross-border resources have been essential in the management of

[17] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 8, U.N. Doc. A/HRC/23/39 (24 April 2013).
[18] *Id.* at para 68.
[19] *Id.* at para 69, quoting the Special Representative of the Secretary-General on the situation of human rights defenders.
[20] *Id.* at para. 36.
[21] *Id.* at 37.
[22] Maina Kiai 2012, *supra* note 3, at para 70.
[23] *Id.* at 71.

pandemic relief during COVID-19 and other humanitarian crises.

Recommendation: To comply with international standards relating to the ability to seek and secure resources, the Bill should be revised to remove any restrictions on foreign funding.

8. NO APPEALS PROCESS

Issue: The Bill currently contains no possibility for appeal of government actions that affect NPOs. This includes decisions taken by the registrar, including suspension or termination. It also does not set out criteria for determining violations of the law that would result in immediate revocation of registration. The lack of procedural safeguards, such as the right to appeal revocation decisions to an independent body, could easily lead to abuses of power and disproportionate actions by authority figures

Discussion:

Under international legal standards, "actions by the Government against NGOs must be…subject to appeal and judicial review."[24] Applicants should be provided the opportunity to challenge rejections before an independent and impartial court.[25] Article 14 of the ICCPR enshrines the right to a fair hearing by a competent, independent, and impartial tribunal,[26] and Article 2(3) guarantees the right to an effective remedy.[27]

Given the Bill's severe measures in terms of registration revocation – or essentially termination given that the Bill makes failure to register unlawful – the lack of an appeals process is a serious violation of due process and the right to an effective remedy under international law. This is especially so considering that the Bill seems to specifically provide against appeal, stating in Section 9: "Any pending appeal to the revocation of registration shall have no mitigation on the revocation."

It is standard and best practice for NPOs to be able to appeal decisions concerning their registration and termination – the most extreme regulatory action – to an independent body, such as a court or tribunal. Failure to provide this safeguard raises the possibility

[24] HRD report, *supra* note 9, at 23.
[25] Maina Kiai 2012, *supra* note 3, at para 61.
[26] Article 14 of the ICCPR reads as follows: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law."
[27] Article 2(3) of the ICCPR reads as follows: "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; (c) To ensure that the competent authorities shall enforce such remedies when granted." Article 8 of the Universal Declaration of Human Rights reinforces this principle: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

of abuse of power by the executive without appropriate checks and balances from other branches of governments.

Recommendation: The Bill should be revised to provide for a right to appeal any actions by the Government against NPOs, including denial and/or revocation of registration, as well as requests for inspection and disclosures of proprietary or confidential information.

9. CRIMINALIZATION OF UNREGISTERED GROUPS AND DISPROPORTIONATE PUNISHMENTS

Issue: Section 10 of the Bill criminalizes "any person who operates a not-for-profit organization in the Kingdom without getting registered," with penalties of up to 5 years imprisonment and/or fines of 100,000 baht (~$3250 USD). Section 9 also institutes the penalty of revocation or termination of NPO registration for any NPO which "violates or fails to act in compliance with Section 5 (subarticle 3), 6, 7 or 8."

Discussion:

First, the penalties for conducting activities as an unregistered association or NPO are severe. Unregistered associations or NPOs – meaning those that either fail to register or those that have been deleted from the registry – face criminal sanctions of up to 5 years in jail or significant fines.

Such criminal measures stand in violation of the international law on free association. 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."[28]

This is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as it appears to be in this draft. In such a case, criminalization of unregistered groups could be used as a means to quell dissenting views or beliefs by first creating barriers or denying registration for particular groups, and subsequently prosecuting them. At the same time, given the overbroad definition of NPOs, groups may scramble to register, leading to a flood of applications for which the Registrar may be ill-equipped to process. As mentioned, under the current definition, a chess club would be required to register its activities, as would an alumni group, or a movie or dining club. Fear of criminal penalties might motivate hundreds of thousands of such groups to try to register. It would seem particularly unfair if such groups were to be criminalized after trying and perhaps failing to be registered.

[28] Maina Kiai 2012, *supra* note 3, at para 78.

Second, the administrative penalty for failing to comply with the law is also set at revocation, or essentially termination, the severest restriction on free association. Termination is only allowable when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. Such measures should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient. Failure to comply with overly burdensome reporting or registration requirements does not rise to the level of a legitimate aim or a clear and imminent danger that would justify revocation or termination.

Recommendation: To comply with international norms, the Bill should be revised to remove criminal penalties and fines from the Bill and specifically limit the grounds for revocation to serious infractions, along the following lines: 1) judicial proof that the organization was engaged in criminal activity, with the decision upheld after all appeals processes have been exhausted; 2) a court decision that the organization's operations have become primarily a for-profit business; or 3) proof that the registration was secured through erroneous or fraudulent information, verified through independent means.

10. INADEQUATE TIMELINE FOR REGISTRATION

Issue: Section 11 of the Bill requires any non-exempt NPO operating in Thailand to register with the Registrar within 30 days of the Act coming into force.

Discussion:

Given the potentially burdensome and unknown registration process set forth in the Bill, this brief window for registration is extremely limiting and would likely place a significant burden both on NPOs trying to register and on the Registrar processing applications. Most laws in other countries allow a minimum of six months and more often a one-to-two-year period in which NPOs can register following the enactment of a new registration regime. This is a more realistic timeframe in which the government can reasonably expect to register numerous organizations under a new system.

Organizations cannot be expected to have the capacity to meet potentially burdensome registration requirements during such a short period. This is particularly true for smaller NPOs, or for groups that may not have been formally registered in the past. Unless the government is planning to institute an automatic registration provision whereby at the end of this 30-day period all NPOs who have perhaps filed a simple intent to register notification are automatically registered, this 30-day requirement is likely impractical and could significantly disrupt the smooth functioning of both the responsible government ministries/Registrar, as well as the entire NPO sector in Thailand.

Recommendation: To comply with good regulatory practices, the Bill should provide for at least a 180-day period, and preferably one year or more, for compliance with the registration requirements. Moreover, such a timeframe would ideally be determined in consultation with civil society.

Conclusion

ICNL appreciates the opportunity to provide these brief comments on the Bill. As currently drafted, the Bill diverges so widely from international norms governing the freedom of association that withdrawal of the Bill would be most appropriate. Any revisions to the Bill should be made, as outlined throughout this Analysis, to bring the law more nearly in compliance with international standards and good regulatory practices. We further emphasize that any efforts to revise this Bill or prepare a new Bill should be undertaken through meaningful consultation, engagement and dialogue with Thai civil society organizations. ICNL stands ready to provide any further assistance as required.