



ARTICLE 19



The Draft Act on Operations of Not-for-Profit Organisations, 2021

Submission to Thailand's Office of the Council of State

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The Draft Act on Operations of Not-for-Profit Organisations, 2021 ('Draft Act') proposed by Thailand's Office of the Council of State would reduce the ability of civil society to defend and protect human rights and hold those responsible for human rights abuses to account. Under international human rights law, Thailand must respect, protect, and fulfil the right to freedom of association and ensure an enabling environment for Thai civil society. These obligations are undercut by the Draft Act.

Thailand serves as the regional hub for UN bodies, human rights and humanitarian NGOs, trade associations, and countless networks and groups of varying sizes and levels of formality. A law of this nature would jeopardise the ability of Thailand to serve as the de-facto headquarters for civil society in Southeast Asia.

The Draft Act imposes requirements and restrictions on NGOs that undermine human rights and curtail the ability of civil society to operate freely and effectively. The registration scheme set up by the Draft Act does not provide adequate safeguards against governmental misuse and arbitrary application of the law. Additionally, the Draft Act establishes grossly disproportionate criminal penalties for failure to register—five years' imprisonment and a fine of up to 100,000 Thai baht. The Thai government should facilitate an environment in which civil society groups enjoy more, not less, freedom to defend and promote human rights.

The Draft Act stifles civil society in several ways. First, the definition of 'not-for-profit organisation' under the Draft Act is nearly all-encompassing, opening the door to the arbitrary application of the law against groups that are critical of the government or take unpopular or controversial opinions. Second, the Law grants the Ministry of the Interior ('Ministry') excessive discretion to deny the registration of organisations, to control the activities of registered organisations, and to restrict activities funded by foreign sources. Third, the Draft Act allows the government to monitor civil society activity and gain access to organisations' private communications. Fourth, the penalties established by the law are grossly disproportionate. Finally, the timeline set forth for registration—30 days from the date of enactment—does not provide enough time for the Ministry to process applications from the thousands of currently unregistered organisations and groups operating within the country.

The right to freedom of association

The right to freedom of association is enshrined in Article 22 of the International Covenant on Civil and Political Rights, a treaty that Thailand ratified in 1996. Article 22 outlines a test to determine whether a restriction on the right complies with international human rights law. First, the restriction must be provided by law. Second, it must be necessary in a democratic society for the protection of national security, public order, public health, public morals, or the rights and freedoms of others. This is a comprehensive list: no other government interests can justify a restriction on association.¹

While states are free to create registration schemes for civil society organisations, the procedures for registration must be 'transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal . . . [and] in conformity with international human rights law'.² In addition, both registered and unregistered organisations are protected under international law. It is impermissible under international law to subject individuals involved with unregistered organisations

¹ International Covenant on Civil and Political Rights, Article 19(2).

² Human Rights Council resolution 22/6 on the protection of human rights defenders, U.N. Doc. A/HRC/RES/22/6, 12 April 2013, para. 8, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/22/L.13.

to criminal sanctions or infringe upon their protected rights. According to the Special Rapporteur on the right to freedom of peaceful assembly and of association, criminal sanctions are especially inappropriate ‘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’.³

Expansive definition of ‘not-for-profit organisation’

The Draft Act’s definition of ‘not-for-profit organisation’ is nearly all-encompassing.

Section 4: “*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.’

Almost any non-business group, no matter how informal or unorganised, could potentially be included within this definition. Student groups, community organisations, protest movements, artistic collectives, social clubs, and short-lived associations would all fall within the parameters of the Draft Act and need to register. The Thai authorities could label those that do not register as ‘unregistered not-for-profit organisations’, order that their activities be discontinued, and initiate criminal proceedings against group leaders and participants. In this way, the government could prevent individuals from freely associating or engaging in collective expressive activities.

The Draft Act could not possibly be enforced against every group that fits into Section 4’s expansive definition of ‘not-for-profit organisation’. It will therefore be left to the discretion of Thai authorities to determine which organisations are subject to the requirements of the Draft Act, opening the door to arbitrary application of the law against groups that are critical of the government or take unpopular or controversial opinions.

Ministry control over NGO operations

The Draft Act grants the Ministry the authority and discretion to deny the registration of organisations, to control the activities of registered organisations, and to restrict activities funded by foreign sources.

Section 5, paragraph 1: ‘*a not-for-profit organisation must register itself under the criteria, methods, and conditions prescribed by the Minister.*’

Under international human rights law, any NGO registration process must be safeguarded against governmental misuse. The Draft Act does not provide any details or guidelines concerning the registration process, nor does it establish an appeals process for organisations whose registration applications have been denied. The registration process should be clear as to who must register as well as what steps they must take to register. While the Minister must have some degree of discretion in creating registration policies, restrictions established by law should ensure that authorities do not abuse their powers.

³ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, U.N. Doc. A/HRC/20/27, 21 May 2012, para. 56, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

Section 5, paragraph 2: *'Apart from ensuring compliance with laws concerning the establishment and operation of each not-for-profit organisation and as specifically required by this Act, organizations must act in compliance with the criteria, methods and conditions prescribed by the Minister of this Act as well.'*

Section 5, paragraph 2 of the Draft Act also does not provide any guidelines or restrictions on the Minister's authority to set the 'criteria, methods, and conditions' under which a registered organisation must operate. The Draft Act does not place limits on the Minister's power to restrict the permissible activities and practices of NGOs. Excessive government control over civil society is highly damaging to a robust democratic state. This level of oversight and government entanglement would likely prevent NGOs from effectively defending human rights and providing services essential to the Thai people.

Section 6, paragraph 2: *'Not-for-profit organisations can accept money or materials from natural persons, legal entities or groups of individuals who are non-Thai, or which have not been registered in the Thai Kingdom, as the case may be, to fund only activities in the Kingdom as permitted by the Minister.'*

The Draft Act gives the Minister final authority to approve of activities funded by non-Thai sources. Many NGOs operating in Thailand rely in large part on international funding to operate. Without access to these funds, numerous local organisations would likely be forced to shut down. Moreover, given the number of NGOs which operate in Thailand, it would be impracticable for the Ministry to approve of all the NGO activities funded by foreign donations. Thus, the Ministry would have to be selective about which NGOs it monitored—granting the Ministry the ability to silence organisations at its discretion.

The selection of the Ministry of the Interior as the ministry responsible for regulating NGOs amplifies concerns about the potential arbitrary application of the Draft Act. The Ministry oversees local administration and internal security within Thailand and, as such, frequently comes into conflict with community associations, NGOs, and other groups that would be governed by the Draft Act.

Surveillance of NGO communications and activities

The Draft Act allows the government to gain access to an organisation's private communications, potentially violating their right to privacy, creating a chilling effect on civil society, and putting vulnerable people at risk. Any surveillance of NGOs must be subject to strict judicial oversight and should only be undertaken only in exceptional circumstances when serious crimes or other legal proceedings require it.

Section 6, paragraph 3: *'The registrar shall have the authority to enter the office of a not-for-profit organisation to inspect the use of money or materials, or the implementation of activities ... and have the power to investigate and obtain and make a copy of electronic communications traffic made by the not-for-profit organisation for further investigation.'*

The Law grants government officials a tremendous amount of power to surveil NGOs and gain access to potentially sensitive information. Under Section 6, paragraph 3, the Director of the Department of Provincial Administration ('the registrar') can inspect the funding and activities of registered

organisations, and, more problematically, can access their electronic communications. To exercise these powers, the registrar does not need to make a showing of any suspicion of criminal activity.

Official surveillance and search powers must be subject to judicial oversight and should only be permitted as part of an investigation into an organisation suspected of committing criminal offences or other serious acts that require such exceptional measures. The Draft Act fails to put in place safeguards or assurances of judicial oversight. With no justification necessary, the Draft Act grants the registrar the authority to compel organisations to disclose potentially confidential or proprietary information.

Human rights organisations and other charitable groups have important reasons to preserve the confidentiality or anonymity of sources, beneficiaries, partners, staff members, and others. Individuals' physical safety may be put at risk if their identity or information is accessed by government officials or disclosed to third parties or the public. Others may be at risk of re-traumatisation or profound embarrassment if their stories became public. Many organisations would not be able to function if they could not guarantee privacy and anonymity to the people they serve.

Excessive custodial penalties

The criminal penalties imposed by the Draft Act are highly disproportionate and are impermissible under international law.

Section 10: 'Any person who operates a not-for-profit organisation in the Kingdom without registering with the registrar per Section 5(1) shall be punished with imprisonment not exceeding five years or fined not exceeding one hundred thousand baht, or both.'

The possibility of five years' imprisonment and a large fine simply for 'operating' an NGO is a hugely disproportionate penalty. The Thai term used is 'ดำเนิน' (dam-neern), which can also mean 'to implement' or 'to carry out'. It is likely that this section could be used to impose criminal penalties on any member of an unregistered group that merely participated in a group activity. Under no circumstances would a procedural failure of this nature justify such a draconian punishment. Any length of imprisonment for affiliation with an unregistered NGO is a disproportionate penalty under international law. Moreover, if passed, the Draft Act would impose a longer prison sentence than comparable laws in any other country.⁴

⁴ In Cambodia, Iran, and India, the only possible penalties for failure to register are fines or dissolution of the NGO. In China, serious violations of the NGO registration act can result in up to ten days' imprisonment. In Kenya, a failure to register can result in up to 18 months' imprisonment. In Russia, a foreign NGO worker who fails to register as a foreign agent may face up to two years' imprisonment. Finally, Uganda's law imposes a prison sentence of up to three years for a violation. See Royal Government of Cambodia National Assembly, Law on Associations and Non-Governmental Organizations, 13 July 2015, available at: https://cambodia.ohchr.org/~cambodiaohchr/sites/default/files/Unofficial_Translation_of_5th_LANGO_ENG.pdf; Negar Katirai, 'NGO Regulations in Iran', *The International Journal of Not-for-Profit Law*, 4 September 2005, available at: <https://www.icnl.org/resources/research/ijnl/ngo-regulations-in-iran>; Rahul Tripathi, 'FCRA: Govt eases penalties for violating law, NGOs can now pay fines', *The Indian Express*, 7 June 2018, available at: <https://indianexpress.com/article/india/fcra-govt-eases-penalties-for-violating-law-ngos-can-now-pay-fines-5207373/>; Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China art. 26, available at: <https://www.chinafile.com/ngo/laws-regulations/law-of-peoples-republic-of-china-administration-of-activities-of-overseas>; Non-Governmental Organizations Coordination Act (Kenya), Section 22, available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Non-GovernmentalOrganizationsCo-ordinationAct_No19of1990_.pdf; Freedom House, 'Factsheet: Russia's NGO

The severe criminal penalties for association with an unregistered NGO will likely lead many organisations to shut down or move operations outside Thailand. Organisations would likely be forced to stop operating while they awaited government approval. The risk of imprisonment—compounded by the lack of an appeals process for organisations that are not granted permission to operate—may result in the collapse of entire sectors of civil society.

Implementation period

The timeline set forth for registration—30 days from the date of enactment—does not provide enough time for the Ministry to approve the applications of the many currently unregistered organisations operating in Thailand.

Section 11: ‘Any not-for-profit organisation that has been operating in the Kingdom before the date this Act comes into force and does not have the characteristics prescribed in Section 5, paragraph 2 must register with the registrar within thirty days of this Act coming into force.’

Currently, only 87 of the numerous NGOs operating in Thailand have registered with the government.⁵ Therefore, it seems likely that, with an influx of potentially thousands of applications and a very tight deadline for processing them, the Ministry will not be able to approve every NGO within the 30-day window. Organisations will also struggle to put together the required documentation in such a short period of time.

Conclusion

The Draft Act is fundamentally flawed and incompatible with the right to freedom of association under international human rights law. If passed, the Draft Act will greatly expand the power of Thai authorities to monitor and control the activities of organisations and groups of all types, structures, sizes, and degrees of formality, with devastating impacts on Thai civil society. The Thai government should immediately withdraw the Draft Act from consideration. The Draft Act should not serve as a point of reference for any further efforts to regulate non-governmental organisations or Thai civil society. Rather, new legislative or regulatory efforts should be focused on promoting an enabling environment for civil society and the enjoyment of the right to freedom of association in line with international human rights standards.

Laws’, available at: https://freedomhouse.org/sites/default/files/Fact%20Sheet_0.pdf (accessed 30 March 2021); The Non-Governmental Organisations Act, 2016 (Uganda), Section 40(2), available at: <http://extwprlegs1.fao.org/docs/pdf/uga163576.pdf>.

⁵ Penchan Charoensuthipan, ‘Activist slams rejig of civil society law’, *Bangkok Post*, 25 February 2021, available at: <https://www.bangkokpost.com/thailand/general/2073927/activist-slams-rejig-of-civil-society-law>.