



RESPECT AND PROTECTION OF FUNDAMENTAL RIGHTS IN THE KYRGYZ REPUBLIC

Analysis to support the compliance of national
legislation with constitutional and
international human rights obligations

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EXECUTIVE SUMMARY

The national legal framework of the Kyrgyz Republic recognizes the respect, protection, and promotion of human rights as fundamental principles to achieve the goal of building a free and democratic society.

The ratification of most of the existing international human rights treaties and the recognition of their direct applicability into the national legal system are commendable commitments by the State to uphold and fulfill its obligations. The 2010 Constitution of the Kyrgyz Republic (the Constitution) and a number of national laws successfully meet international human rights protection standards further demonstrating the intention of the legislator to support a rights-based democratic development of the country.

Although the Kyrgyz Republic is a young democracy, it already became a positive example at the regional level for the protection and promotion of human rights as well as for its level of democracy in comparison to all neighboring countries. However, there continue to be a number of challenges requiring persistent efforts to ensure that the full respect of the rule of law remains the main challenge on the path of democracy and promotion of human rights.

It is the core of democracy having and allowing dissenting voices, including those advocating for violations of human rights and fundamental freedoms. However, it is for the State to ensure that its laws and policies are in full compliance with international legal obligations.

In the process of adopting new laws, the highest degree possible of attention has to be given to the respect of the principles of equality and non-discrimination. In order to abide by its international and constitutional obligations, the Kyrgyz Republic must ensure that no provision affects any community, group, or individual on impermissible grounds. In a functioning democracy, the enjoyment of fundamental rights and freedoms must be the rule, and their limitation the exception. Some of these rights and freedoms can be limited only within the strict parameters of international and customary law in accordance with the principles of legitimacy, necessity, and proportionality.

Of particular importance for the development of a truly democratic State is the unhindered and effective participation in the political and civil life of the country of all the diverse components of the society. To achieve that, it is critical to ensure the largest protection possible to the enjoyment of fundamental rights and freedoms such as the freedom of opinion and expression and the freedom of peaceful assembly and association.

Essential and complementary to these goals is also the ability to freely seek, obtain, and share information on any topic of public interest. This principle is predominant over the opportunity to limit the diffusion of information. Restrictions have to respond to strict tests of justification to be considered as legitimate under international and national law. To limit the growth and development of a society by preventing people to access information and share opinions is an attempt to halt the democratic process initiated and supported by the Kyrgyz Republic as the only via

I. INTRODUCTION

The Tian Shan Policy Center (TSPC) of the American University of Central Asia (AUCA) is an innovative nonprofit, public interest organization focused on research, analysis, and implementation of appropriate and effective legislation and policy in the nations and communities of Central Asia. The TSPC considers the promotion and protection of human rights as one of its key priorities. To achieve these goals, the TSPC seeks to collaborate with international organizations, foundations, national and local government, NGOs and other civil society organizations and citizen activists, in order to identify best governmental practices and put them into place through this collaboration.

The TSPC consistently engages with the institutions of the Kyrgyz Republic and with representatives of the civil society on a wide range of human rights-related issues aiming at creating the conditions for the establishment of an environment conducive to the adoption of legislation and policies for the promotion of human rights and rule of law as necessary elements of a democratic, stable, and sustainable development for all communities and groups of Kyrgyzstan.

The purpose of this paper is to support Kyrgyz authorities of the Kyrgyz Republic by providing the legislative and executive bodies of the State with an informed legal analysis of some of its human rights obligations, including the right to equality and non-discrimination, to freedom of expression and opinion, and to freedom of peaceful assembly and association, vis- j-vis some of the proposed draft laws that are expected to be discussed during the next legislative session.

This paper is based on thorough legal desk research as well as consultations with a large number of national and international stakeholders active in the country. The analysis is mainly based on legally binding documents, such as human right treaties ratified by the Kyrgyz Republic and enacted national laws. It does not include provisions from regional treaties or most soft laws to respond to exigencies of clarity and conciseness.

However, the paper intends to be as comprehensive as possible. Due to time constrains and other limiting factors, it may be that a number of legally binding protective provisions have not been included. This applies to all the rights under examinations. Also, it should be considered that the analysis of national legislation is mainly based on unofficial translations of the Kyrgyz laws from Russian into English. Therefore, it is possible that minor discrepancies with regard to technical terminology may be found in the document. However, such possible shortcomings do not negatively or significantly impact the overall content of the publication.

II. HUMAN RIGHTS PRINCIPLES AND THEIR LIMITATIONS

a) Main principles

Human rights are commonly referred to as rights that belong to each and every human being from the moment of birth regardless of sex, race, colour, language, disability, ethnicity, nationality, belief, sexual orientation, gender, age, social origin, political and other convictions, education, background, proprietary and other status as well as other circumstances. These rights are universal, inalienable, indivisible, interdependent, and interrelated.

Universal means that human beings are entitled to have their rights protected, promoted, and fulfilled everywhere in the world. This principle was first enshrined in the 1948 Universal Declaration of Human Rights (UDHR) and then subsequently confirmed in other human rights treaties.

Inalienable refers to the fact that these rights cannot be taken or given away and continue to belong to all human beings at any time. Only in specific situations, a number of rights can be limited. Some others, instead, like the right to recognition as a person before the law or the right to freedom from torture, cannot be limited under any circumstance. Together with the principle of universality, the concept of inalienability is the foundation of the entire human rights system.

Human rights are indivisible because while referring to different aspects of the human life, civil, political, economic, social, and cultural, they form an integral whole which cannot be divided. There is no hierarchy among rights but all have to be protected and respected equally.

From this follows the principle of interdependency which entails that States are legally bound by all rights and cannot arbitrarily decide to fulfill their obligations exclusively on certain rights while neglecting others.

Similarly, interrelatedness stems from the respect and protection of human rights as a whole. The diverse families of human rights have a situation of mutual relationship and the realization of one right also contributes to the realization of others.

In addition to these principles, equality and non-discrimination are cross-cutting elements that apply to all rights and must be taken into account at all times. Equality does not imply that we are all the same, but rather indicates that everyone should have the same opportunities to achieve their potential. The principle of non-discrimination prescribes that distinctions based on impermissible grounds, such as those that aim at prejudicing the realization of other rights, are not permissible.

b) Absolute, nonderogable, and nonabsolute rights

As already stated above, some human rights cannot be limited under any circumstance. These are the right to freedom from torture, and other cruel, inhuman or degrading treatment or punishment,¹ the right to freedom from slavery and servitude,² the right to freedom from imprisonment for inability to fulfill a contractual obligation,³ the prohibition against the retrospective operation of criminal laws,⁴ and the right to recognition before the law.⁵

The International Covenant on Civil and Political Rights (ICCPR) allows for a derogation of some rights in case of officially proclaimed public emergency and strictly for the extent demanded by the requirements of the situation.⁶ Moreover, States have to ensure that the measures adopted and implemented in derogation of these rights are

- Provided by law

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted a broad definition of discrimination including any distinction, exclusion or restriction made on the basis of sex affecting or preventing the enjoyment of fundamental rights and freedoms by women in all spheres of life.⁴⁰ As clarified by the CEDAW Committee, this definition has even a broader scope than the one provided by CERD since it aims at covering not only acts of discrimination in public life by States or its officials but also covers those acts of discrimination carried out privately.⁴¹

x National law

Constitution

The Constitution has a number of provisions aimed at protecting and ensuring the respect of the right to equality and non-discrimination in compliance with international human rights obligations. Already in its preamble the protection of human rights, including the right to equality and non-discrimination, are indicated as the main principles the Kyrgyz Republic has to necessarily adhere to in order to continue to build a free and democratic State. It is also expressly stated that the State and its authorities are mandated to serve the entire population of the Kyrgyz Republic and not only certain parts

The right of equality of all persons regardless of any personal condition, including race, sex, religion, beliefs, and any other fact, is also recognized and guaranteed by the Criminal Procedure Code.⁴⁷

Law on State Guarantees for Ensuring Gender Equality

The main objective of the Law on State Guarantees for Ensuring Gender Equality (Law on Gender Equality) is to protect women and men against discrimination on the basis of sex. The Law on Gender Equality also precisely defines the concept of gender-based discrimination as

obligations with the scope of preventing any form of discrimination in the enjoyment of these rights.⁵³

V. FREEDOM OF OPINION AND EXPRESSION

Freedom of opinion and expression is a fundamental and inalienable right that constitutes the basis for the development of a democratic society. Its protection and promotion are recognized both under international and national laws.

x International law

Universal Declaration of Human Rights

The UDHR explicitly recognizes that everyone has the right to freedom of opinion and expression. To further qualify this right, the UDHR specifies that it includes the right to hold opinions without interference and the right to seek, receive and impart information and ideas through the use of multiple means of communication.⁵⁴

The right to freedom of expression, however, is not an absolute right and can therefore be limited under certain circumstances. The UDHR specifically lists these circumstances as the restriction being provided by law, namely: the respect of the rights of others; the presence of the just requirement of morality; public order, and general welfare of the society.⁵⁵ An additional limitation to this right is the core principles of the United Nations as enshrined in the UN Charter. The enjoyment of this right cannot be in contradiction with them, including promoting or inciting discrimination on any inadmissible ground.

International Covenant on Civil and Political Rights

The ICCPR sets forth in its article 19 the right to freedom of opinion, expression, and information. The right to freedom of opinion is an absolute right and its enjoyment, which has to be free from any external interference, cannot be limited or restricted.⁵⁶ The right to freedom of expression and information can be restricted in a limited number of exceptional circumstances if prescribed by law⁵⁷ under the caveat that the restrictions do not put in jeopardy the right itself.⁵⁸

However, the Human Rights Committee in a number of occasions reiterated that

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These tests, or permissible limiting circumstances, are the respect of the rights and reputation of others, the protection of national security, public order, and of public health or morals.

⁵³ Law on the Ombudsman of the Kyrgyz Republic, art. 3.

The criteria of rights of others imply that freedom of expression cannot be used to cause harm to individuals or groups and in violation of principles protected under International Human Rights Law. The most common example in this sense is hate speech, incitement to discrimination, to violence, and to commit a crime. The ICCPR

or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".⁶⁶

International Covenant on Economic, Social, and Cultural Rights

Although the ICESCR does not specifically mention the protection and promotion of the right to freedom of opinion and expression, it imposes on the State the obligation to ensure the respect of the right of everyone to education which necessarily entails the right under analysis. According to the provisions of the ICESCR, the provision of education has to be directed to the full development of the human personality in a way that strengthens respect for human rights and fundamental freedoms. Additionally, education shall aim at promoting effective participation for all in a free society, as well as understanding, tolerance, and friendship among all groups composing society at large.⁶⁷

Convention on the Elimination of All Forms of Racial Discrimination

The right to freedom of opinion and expression is also explicitly protected under CERD. Its provisions clearly require that the State develops, adopts, and implement measures aimed at guaranteeing the right of everyone without distinctions the enjoyment of

opinion, and the propagation of national, ethnic, racial and religious hatred, gender as well as other social supremacy which calls for discrimination, hostility and violence.⁷⁴

The issue of morals and traditions as limiting elements to the right to freedom of expression is directly regulated in the Constitution. It recognizes as legal only those customs and traditions that do not infringe upon human rights.⁷⁵ This is aimed at preventing the use of alleged, unspecified, and discriminatory traditions, customs, and moral values to limit fundamental rights such as freedom of expression.

No explicit limitations are instead established under the Constitution to the right to freely seek, receive, keep and use information and disseminate it orally, in writing, or otherwise.⁷⁶ In accordance with this principle, any law aiming at restricting this type or modalities of seeking, receiving, and divulging information would necessarily be unconstitutional and a violation of the right to freedom of expression.

General limitations to the enjoyment of rights and fundamental freedoms are prescribed in compliance with the mandatory principles of International Human Rights Law.⁷⁷ Furthermore, the prohibition of forcing a person to express or deny an opinion is expressly recognized⁷⁸

While the right to peaceful assembly is guaranteed under international and national legislation, the law sets some restrictions to the right to freedom of expression in connection to public gatherings and manifestations. Assemblies can be only prohibited if aimed at promoting war propaganda, ethnic, racial or religious hatred, gender-based or another social superiority posing instigation to discrimination, hostility, or violence, if it calls for violation of national security, public order, rights and freedoms of others, or if it is aimed at disrupting another peaceful assembly.⁸⁷

Law on Professional Activity of Journalists

A fundamental provision is made with regard to censorship and access to information by this law. The Kyrgyz Republic committed not to censor journalists and to avoid restrictions on access to information that presents a public interest, or affects the rights, freedoms and legal interests of private citizens.⁸⁸ Additionally, journalists have the right to collect, analyze, and disseminate information, carry out investigations, and publish their findings and opinions⁸⁹ with the limitations imposed by the law which include the authenticity of information and respect of the rights of others.⁹⁰ Finally, journalists are granted with immunity for opinions expressed in their profession.⁹¹

Therefore, such provisions indicate that journalists are free to seek and report on any relevant information without fear of being prosecuted for the opinions expressed while performing their profession and without censorship by State authorities. As a consequence, any law punishing or imposing penalties for the dissemination of information on issues of public interest are in contradiction with the existing guarantees provided by the national legal framework and have to be considered as illegal.

Law on Access to Information Held by Public Bodies and Local Authorities

This law reinforces the constitutional principle that citizens have the right to seek, receive, research, produce, transfer, and disseminate information based on the principles of publicity, objectivity, relevance, transparency, and accuracy.⁹² It also specifies that

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/DZ RQ WKH 3URWHFWLRQ RI 6WDWH¶V HFUHWV

This law, while specifically defining which information can be legitimately covered by institutional secret and therefore their diffusion can be limited, lists topics and subjects that cannot be covered by secret. Among others, the law indicates that restrictions cannot be imposed on those infringing upon rights and legitimate interests of citizens.⁹⁴

For this reason, any limitation imposed on the diffusion of information that is not

FRYHUG E\ 6WDWH¶V VHFUHWV LV LOOHJDO

Other laws limiting the freedom of expression

Within the national legal framework there are a number of laws imposing restrictions on the right to freedom of expression such as the Law on Mass Media and the Law on Television and Radio. These laws list several issues whose dissemination is prohibited. While some are legitimate, specific, and non-controversial, for example

is beneficial not only to the child, but also for the family, the community, the school, the State and for democracy.¹⁰⁶ The Committee expanded the meaning of these rights acknowledging children as rights holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them.

Since the CRC covers all human being below the age of 18, it includes adolescents in a critical stage of life characterized by rapid physical, cognitive and social changes. Their inclusion and effective participation in the society is therefore fundamental for their development and particular attention has to be given to the respect of their rights without discrimination, including with regard to race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, ELUWK RU RWKHU VWDWXV ZKLFK FRYHUV DGROHV status.¹⁰⁷

In order to enable them to fully participate and build their own personality as individuals and members of groups, the Committee prescribes that States provide, and not deny, boys and girls with access adequate information essential for their health and development and for their ability to meaningfully participate in society.¹⁰⁸

x National law

Constitution

The right to freedom of peaceful assembly¹⁰⁹ and association¹¹⁰ are protected in two separate articles of the Constitution which provides that the exercise and enjoyment of both rights are guaranteed to all without any kind of limitation. Moreover, the Constitution expressly states that no prohibition or limitations to peaceful assemblies will be allowed.¹¹¹

This entails a legal obligation on the State not only to authorize the organization of peaceful assemblies regardless of their motivations but also to create the conditions to protect those participating in the assemblies in order to consent the full exercise of their constitutional rights. Any criminalization of people attending peaceful assemblies or of the messages spread during the assemblies is therefore in contradiction with the provisions and spirit of the Constitution.

Equally important for the protection of these rights is the legal obligation assumed by the State to guarantee all citizens to create political parties, professional unions, and associations with the intent to implement and protect their rights and freedoms, and satisfy a vast range of interests, including political, economic, social, and cultural ones.¹¹²

Among the limitations established by this article,¹¹³ the maintenance of the constitutional order is the primary focus. There is no mention of prohibitions based on tradition, morals, or customs of the majority of the population. As a consequence, any prohibition or criminalization related to the creation of associations aimed at the implementation and protection of rights and freedoms has to be considered illegal since it would contravene the principles and obligations set forth in the Constitution.

Criminal code

¹⁰⁶ Committee on the Rights of the Child, Report on the Forty-Third session, September 2006, para. 987.

¹⁰⁷

The Criminal Code punishes the establishment of and participation in the activities of organizations or groups aimed at committing crimes.¹¹⁴ Additionally, it considers the commission of crimes by group of people or criminal organizations as an aggravating circumstance with a consequent increase in the punishment for a large number of crimes.¹¹⁵

Of particular interest for this publication are the provisions criminalizing the unlawful actions aimed at impeding the conduction of an assembly or preventing someone from participating in the assembly, and the infringement of the principle of equality based on inadmissible discriminatory practices, including gender, ethnicity, beliefs, of membership in a public association.¹¹⁶

These provisions further confirm that the right to peaceful assembly and association are strongly guaranteed under the current national legal framework. The fact that impeding the conduction of an assembly may be considered as a criminal offence, it clearly shows that the intention of the legislator was to

international human rights obligations, the implementation of the assembly shall be prioritized.¹²¹ By explicitly expressing the prevalence of the right to peaceful assembly over potential risks deriving from it, the legislator clearly indicated that limitations of this right are the exception in the Kyrgyz system.

This intention is further confirmed by the article listing the only reasons for lawful restrictions of assemblies. These include a real threat to the safety of assembly participants or other citizens, the organization of the assembly to promote war propaganda, ethnic, racial or religious hatred, gender-based on another social superiority, to instigate discrimination, hostility or violence, or to incite violation of national security, public order, rights and freedoms of others. Finally, the organization of a counter-assembly with the purpose of wrecking another peaceful assembly is a legitimate reason for preventing its organization.¹²² No other reasons can be considered as lawful to prevent or prohibit a peaceful assembly.

¹²¹ *Ibid.*, art. 14.5.

¹²² *Ibid.*, art. 15.

