



# 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 viable option for granting a peaceful and prosperous future to its citizens.

The Kyrgyz Republic, its authorities, and officials are encouraged to continue on the path of respect for human rights, fundamental freedoms, and good governance by considering, developing, adopting, and implementing legislation that is in compliance with legal obligations of international and national law, including the right to equality and non-discrimination, freedom of opinion and expression, and freedom of peaceful assembly and association.

## 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-à-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 constraints 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, non-derogable, and non-absolute 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,<sup>1</sup> the right to freedom from slavery and servitude,<sup>2</sup> the right to freedom from imprisonment for inability to fulfill a contractual obligation,<sup>3</sup> the prohibition against the retrospective operation of criminal laws,<sup>4</sup> and the right to recognition before the law.<sup>5</sup>

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.<sup>6</sup> Moreover, States have to ensure that the measures adopted and implemented in derogation of these rights are consistent with other obligations of International Law and are not based on inadmissible discriminatory grounds. The ICCPR, however, indicates a number of rights that cannot be derogated under any circumstance. These are the right to life,<sup>7</sup> and freedom of thought, conscience and religion,<sup>8</sup> in addition to the abovementioned absolute rights.

Other rights can, under certain circumstances, be limited. However, these limitations can only be imposed if they are provided by law, possess a legitimate aim, and have the criteria of necessity and proportionality. The respect, protection, and promotion of the rights must remain the rule. Limitations have to be the exception.

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<sup>1</sup> International Covenant on Civil and Political Rights (ICCPR), art. 7.

<sup>2</sup> *Ibid*, art. 8.

<sup>3</sup> *Ibid*, art. 11.

<sup>4</sup> *Ibid*, art. 15.

<sup>5</sup> *Ibid*, art. 16.

<sup>6</sup> *Ibid*, art. 4.

<sup>7</sup> *Ibid*, art. 6.

<sup>8</sup> *Ibid*, art. 18.

- *Provided by law*

The limitation of a fundamental right or freedom has to be expressly provided by law, be it administrative, civil or criminal. The rationale behind this principle is to prevent individuals from arbitrarily denying the enjoyment of these rights without those legislative procedural guarantees that are usually in place in non-dictatorial form of government. Furthermore, the law imposing the limitations has to meet the criteria of clarity and precision. The combination of these two criteria determines the quality of the law.

Human rights jurisprudence has repeatedly stated that “*a norm cannot be regarded as a law [...] unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*”<sup>9</sup>

Therefore, any valid law that is human rights compliant has to provide citizens with clear and precise guidance on what actions are allowed or forbidden and what are the consequences of a specific conduct. Forbidding or criminalizing conducts or acts using a vague formulation lack the minimum requirements for validity since it fails to specifically identify the actions that cannot be committed, the concept of positive attitude which is *per se* subjective, and the target or groups among which the attitude is developed.

- *Legitimate aim*

The law limiting a fundamental right or freedom must also possess a legitimate aim, in the sense that the scope is to protect a superseding interest. The ICCPR, for example, clearly defines, and therefore limits, the interests that can justify the impositions of restrictions on a fundamental freedom such as that of expression.<sup>10</sup>

In order to assess the existence of this aim, the legislator must consider the purpose of the restrictions and the effects it may produce while also giving consideration to the balance of the right or the freedom that it is intended to be limited. The Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR (Siracusa principles) indicate that in case of conflict between the limitation and the right or freedom in question, the latter is preponderant since the scope of the ICCPR is the protection of the fundamental rights or freedoms.<sup>11</sup>

For this reason, the legitimate aim of a limitation of a fundamental right or freedom has to contain the specific elements necessary to limit them and its purpose and effect have to be more relevant than the right or freedom in question.

- *Necessity and proportionality*

In order to allow a limitation of a fundamental right or freedom, the principles of necessity and proportionality entail the existence of a pressing need to justify the limitation in a democratic society<sup>12</sup> and a balance between the benefit of realizing the need and the harm caused by the restriction, respectively.

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<sup>9</sup> *Inter alia*, European Court of Human Rights (ECtHR), *Lindon, Otchakovsky-Laurens and July V. France*, Applications no. 21279/02 and 36448/02, 22 October 2007, para. 41; ECtHR, *Steel and Others V. The United Kingdom*, Application no. 67/1997, 23 September 1998, para. 54; ECtHR, *The Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, para. 49.

<sup>10</sup> For a detailed analysis of the limitations on the freedom of expression see para. V below.

<sup>11</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (Siracusa Principles)*, 28 September 1984, E/CN.4/1985/4, No. 36.

<sup>12</sup> ECtHR, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 39.

Moreover, these principles require a logic connection between the legislative measures undertaken to limit the fundamental right or freedom and the interest that is intended to be protected or, in other words, an assurance of a reasonable relationship of proportionality to the legitimate aim pursued.<sup>13</sup> To meet this requirement, limiting measures must not be arbitrary, in the sense of being “*founded on prejudice or preference rather than on reason or fact*”,<sup>14</sup> unfair, or based on irrational considerations.

The logic connection also demands that the intrusion into the right or freedom has to be to the lowest degree possible. Additionally, the intrusion must be the most appropriate mean to achieve the intended objective. The draft legislation has to demonstrate that the expected benefit from the derogation to the respect of a fundamental right or freedom is actually more relevant than the negative consequence deriving from such limitation. Furthermore, the proposed measures have to be the most appropriate in comparison to any other adoptable measure.

### III. HUMAN RIGHTS OBLIGATIONS OF THE KYRGYZ REPUBLIC

As of August 2014, the Kyrgyz Republic has ratified the International Bill of Human Rights and most of the core human rights instruments<sup>15</sup> with the exception of the Convention on the Rights of Persons with Disabilities, the Convention on Enforced Disappearances, the Optional Protocol to the International Covenant of Economic, Social, and Cultural Rights (ICESCR), the third optional protocol on the Convention on the Rights of the Child (CRC), and the Rome Statute of the International Criminal Court.

Pursuant to the Constitution, ratified international treaties, universal principles, and norms of international law become an integral part of the national legal framework. Moreover, the Constitution establishes that human rights treaties are directly applicable and have priority over other international treaties.<sup>16</sup> Additionally, the Constitution expressly recognizes the superiority of human rights over other values, making them the basis on which the meaning and content of the activities of the central and local institutions are defined.<sup>17</sup>

By ratifying the treaties and making them directly applicable into its legislation, the Kyrgyz Republic is legally bound to protect, promote, and fulfill its obligations deriving from these instruments. Furthermore, in its second section<sup>18</sup> the Constitution clearly indicates the protected fundamental rights and freedoms under the national legal framework and establishes that compliance of national laws with human and civil rights and freedoms is a prerogative for their existence and validity.<sup>19</sup>

These combined provisions of law guarantee the enjoyment and protection of a significant number of rights and freedoms, including but not limited to the right to life, equality before the law, freedom from discrimination on any ground, freedom of speech, thought, opinion, religion, access to services and information, right to education, right to peaceful assembly, and right to association.

Therefore, the Kyrgyz Government, authorities, and officials, are obliged to uphold these rights by acting in compliance in all their respective functions. Legislative acts which are not in conformity with the general principles explained above and the

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<sup>13</sup> ECtHR, *Tolstoy Miloslavsky v. The United Kingdom*, 13 July 1995, Application no. 18139/91, para. 55; ECtHR, *Fayed v. The United Kingdom*, 21 September 1990, Application no. 17101/90, para. 65.

<sup>14</sup> Definition of arbitrary measures, Black’s Law Dictionary 100, 1537 (7<sup>th</sup> ed. 1999).

<sup>15</sup> For an overview of the ratification of the human rights instruments of the Kyrgyz Republic [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=KGZ&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=KGZ&Lang=EN).

<sup>16</sup> Constitution of the Kyrgyz Republic (Constitution), art. 6.3.

<sup>17</sup> *Ibid.*, art. 16.1.

<sup>18</sup> *Ibid.*, Section II Human Rights and Freedoms, articles 16 – 59.

<sup>19</sup> *Ibid.*, art. 20.

specific legal requirements indicated in the next paragraphs are expected to be considered unacceptable in a Court of law. Moreover, adopting legislation contradicting these principles may lead to the obligation by the Kyrgyz Republic to compensate citizens for damages in accordance with the Constitution.<sup>20</sup>

#### IV. RIGHT TO EQUALITY AND NON-DISCRIMINATION

The right to equality and non-discrimination is one of the main cornerstones of International Human Rights Law and it is guaranteed and protected by the following international human rights instruments ratified by the Kyrgyz Republic and national legislation:

- *International law*

##### *UN Charter*

The recognition of the right to equality and non-discrimination is found in the preamble to the Charter of the United Nations and in several articles.<sup>21</sup> All these provisions clearly stipulate the recognition of the dignity and worth of the human person, the equal rights of men and women, the necessity to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion. The preambles of all Human Rights Treaties make reference to the UN Charter with regard to equality and dignity as inherent elements of all human beings without distinction of any kind.

##### *Universal Declaration of Human Rights*

Subsequent to the UN Charter, the UDHR crystalized these rights in the framework of International Law by recognizing that “*all human beings are born free and equal in dignity and rights*”<sup>22</sup> and that everyone is entitled to the rights set forth in the UDHR without distinction of any kind.<sup>23</sup> More specifically, the UDHR provides protection to these principles by also affirming that all human being are equal before the law, are entitled to equal protection by the law without any discrimination, and equal protection against any discrimination or incitement to discrimination in violation of the rights sanctioned in the UDHR.<sup>24</sup>

##### *International Covenant on Civil and Political Rights*

Further recognition and protection of the right to equality and non-discrimination is guaranteed by the ICCPR with regard to civil and political rights without distinction of any kind.<sup>25</sup> However, it is in article 26 that the right to equality and non-discrimination finds its strongest protection in International law. This article obliges States to prohibit any discrimination in any field of life and to guarantee to all persons equal and effective protection against discrimination on any ground.<sup>26</sup>

In the interpretation of the Human Rights Committee,<sup>27</sup> article 26 is concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply

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<sup>20</sup> *Ibid.*, art. 41.2.

<sup>21</sup> UN Charter, art. 1.3, 13.1(b), 55(c), and 76(c).

<sup>22</sup> Universal Declaration of Human Rights (UDHR), art. 1.

<sup>23</sup> *Ibid.*, art. 2.

<sup>24</sup> *Ibid.*, art. 7.

<sup>25</sup> ICCPR, art. 2.

<sup>26</sup> *Ibid.*, art. 26.

<sup>27</sup> The Human Rights Committee is the body composed of 18 independent experts mandated to monitor the implementation of the ICCPR. Its legal foundations are in Part IV (articles 28 to 45) of the ICCPR.

with the requirement of this article that its content should not be discriminatory.<sup>28</sup> Other relevant provisions impose obligations on the State to ensure equality of men and women,<sup>29</sup> in general and specifically before courts and tribunals,<sup>30</sup> to prohibit any incitement to discrimination,<sup>31</sup> and to guarantee the equal participation in public life of every citizen.<sup>32</sup>

#### *International Covenant on Economic, Social, and Cultural Rights*

Along the lines of the ICCPR, the ICESCR requires that States guarantee the enjoyment of all the rights enshrined in the Covenant without any discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>33</sup> Moreover, the ICESCR protects and promotes equality and non-discrimination with regard to conditions of work, with specific focus on remuneration and fair wages, and opportunities to be promoted to higher levels under the exclusive consideration of seniority and competence.<sup>34</sup>

#### *Convention on the Elimination of All Forms of Racial Discrimination*

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) defines the concept of racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin affecting the enjoyment and recognition of human rights and fundamental freedoms in any field of public life.<sup>35</sup> The CERD requires also the State to condemn racial discrimination, not to engage in any such practices, not to defend or support discrimination, and to review policy and legislations ensuring compliance with the right to equality and non-discrimination.<sup>36</sup>

#### *Convention on the Rights of the Child*

The main purpose of the CRC is to protect and promote the best interest of the child. To achieve this goal, the CRC establishes that States have to respect and ensure the enjoyment of all rights without any discrimination irrespective of the status or opinions of the parents. Additionally, it requires protection against all forms of discrimination based on status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.<sup>37</sup>

The protection of the rights of the child extends also to education, which is prescribed to be achieved progressively and on the basis of equal opportunities.<sup>38</sup> The CRC also poses a number of obligations on the State on how to ensure that quality education is offered and provided to all children. In particular, States must ensure through education “*the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.*”<sup>39</sup>

#### *Convention on the Elimination of All Forms of Discrimination against Women*

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<sup>28</sup> Human Rights Committee, General Comment No. 18, Non-discrimination, (Thirty-seventh session, 1989), HRI/GEN/1/Rev.9 (Vol. I), para. 12.

<sup>29</sup> *Ibid.*, art. 3.

<sup>30</sup> *Ibid.*, art. 14.1 and 14.3.

<sup>31</sup> *Ibid.*, art. 20.2.

<sup>32</sup> *Ibid.*, art. 25.

<sup>33</sup> International Covenant on Economic, Social, and Cultural Rights, art. 2.2.

<sup>34</sup> *Ibid.*, art. 7(a) and (c).

<sup>35</sup> Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 1.

<sup>36</sup> *Ibid.*, art 2(a), (b), (c), and (d).

<sup>37</sup> Convention on the Rights of the Child (CRC), art. 2.1 and 2.2.

<sup>38</sup> *Ibid.*, art. 28.

<sup>39</sup> *Ibid.*, art 29(d).

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.<sup>40</sup> 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.<sup>41</sup>

- ***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 or sectors representing the mainstream majority.<sup>42</sup>

The legal protection of this right is enshrined in Section II of the Constitution where it is explicitly recognized that human rights belong to each person from birth; the commitment by the State to uphold its obligations to all persons under its jurisdiction without discrimination of any sort; and equality of men and women in rights and freedoms before the law and the courts.<sup>43</sup>

In an additional effort to prevent conflicts and establish a prosperous and peaceful environment for the realization of the rights of all diverse groups composing the economic, social, and cultural life of the Kyrgyz Republic, the legislator banned in law and in fact any discourse aimed at supporting national, ethnic, racial and religious hatred, gender as well as other social supremacy which calls to discrimination, hostility and violence.<sup>44</sup>

*Criminal Code of the Kyrgyz Republic (Criminal Code)*

After re-affirming the principle of equality before the law,<sup>45</sup> the Criminal Code recognizes as a crime the direct or indirect violation of the right to equality either committed by a citizen or a public official on the basis of gender, race, ethnic origin, language, social background, property status or official capacity, residence, religious and other beliefs, membership in public associations.<sup>46</sup> Therefore, any omission or act, including the promotion and adoption of discriminatory legislation, are punishable in a court of law.

*Criminal Procedure Code of the Kyrgyz Republic*

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<sup>40</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art. 1

<sup>41</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993), para. 9.

<sup>42</sup> Constitution, art. 5.1.

<sup>43</sup> *Ibid.*, art. 16.

<sup>44</sup> *Ibid.*, art. 31.4.

<sup>45</sup> Criminal Code of the Kyrgyz Republic (Criminal Code), art. 3.

<sup>46</sup> *Ibid.*, art. 134.

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.<sup>47</sup>

#### *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 “any difference, exception or preference, which limits rights and interests of persons on the basis of sex”, and a violation of gender equality as “an active or passive behavior of humiliation, contempt or restriction of rights or rendering of privileges based on a person’s sex.”<sup>48</sup>

Moreover, the Law on Gender Equality stipulates the absolute prohibition of gender-based discrimination in any occasion<sup>49</sup> and sets as main principles for State officials and institutions the protection of the public from propaganda and information aimed at violating the principles of gender equality, as well as the obligation to comply with international norms aimed at the promotion of gender equality.<sup>50</sup>

The unconditional supremacy of the principle of gender equality and non-discrimination within the Kyrgyz system is also demonstrated by the fact that the Law on Gender Equality supersedes norms of common law, traditions, and culture contradicting the spirit of this law.<sup>51</sup>

Based on the analysis of these provisions, it appears evident that any proposed legislation or draft policy potentially limiting, derogating, or in any way affecting the right to equality and non-discrimination have to meet the criteria expressed in the Law on Gender Equality to possess the minimum requirements for validity. Should it fail to comply with these dispositions, the new legislative document would then have to be necessarily declared invalid by a court.

#### *Law on Peaceful Assembly of the Kyrgyz Republic (Law on Peaceful Assembly)*

Anti-discriminatory measures are also foreseen by Kyrgyz law with respect to the right to peaceful assembly. Among the legitimate limitations to prohibit an assembly, the normative framework lists assemblies aimed at the promotion of ethnic, racial or religious hatred, gender-based on other forms of social superiority, posing instigation to discrimination, hostility or violence, as well as in case it calls for violations of the rights and freedoms of others.<sup>52</sup>

#### *Law on the Ombudsman of the Kyrgyz Republic*

In order to ensure full compliance with human rights principles and obligations, the national legal framework foresees the establishment of an Ombudsman mandated to protect human rights and freedoms enshrined in the Constitution, national laws, international treaties, and customary law. Among the duties of the Ombudsman, it is stated that the office shall provide assistance to harmonize legislation with human rights

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<sup>47</sup> Criminal Procedure Code of the Kyrgyz Republic, art. 16.

<sup>48</sup> Law on State Guarantees for Ensuring Gender Equality, art. 1.

<sup>49</sup> *Ibid.*, art. 6.

<sup>50</sup> *Ibid.*, art. 7.

<sup>51</sup> *Ibid.*, art. 8.

<sup>52</sup> Law on Peaceful Assemblies of the Kyrgyz Republic (Law on Peaceful Assemblies), art. 15.2.

obligations with the scope of preventing any form of discrimination in the enjoyment of these rights.<sup>53</sup>

## 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.

- *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.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> The right to freedom of expression and information can be restricted in a limited number of exceptional circumstances if prescribed by law<sup>57</sup> under the caveat that the restrictions do not put in jeopardy the right itself.<sup>58</sup>

However, the Human Rights Committee in a number of occasions reiterated that “*the right to freedom of expression is of paramount importance in any democratic society, and that any restrictions on its exercise must meet strict tests of justification.*”<sup>59</sup> 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.

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<sup>53</sup> Law on the Ombudsman of the Kyrgyz Republic, art. 3.

<sup>54</sup> UDHR, art. 19.

<sup>55</sup> UDHR, art. 29.1 and Human Rights Committee, General Comment No. 10, Freedom of opinion (Nineteenth session, 1983), HRI/GEN/1/Rev.9 (Vol. I), para. 1.

<sup>56</sup> ICCPR, art. 19.1.

<sup>57</sup> For an analysis of the mandatory requirements of the limiting criteria of fundamental rights and freedoms, see para. II b of this paper.

<sup>58</sup> Human Rights Committee, General Comment No. 34, Freedom of opinion and expression, (hundred second session, 2011), CCPR/C/GC/34, para. 21

<sup>59</sup> Communication No. 628/1995, *T. Hoon Park v. the Republic of Korea*, Views adopted on 20 October 1998, para. 10.3; Communication No. 780/1997, *Vladimir Laptsevich v. Belarus*, Views adopted on 20 March 2000, paragraph 8.2; *Leonid Svetik v. Belarus*, Communication No. 927/2000, Views adopted on 8 July 2004, paragraph 7.3; *Vladimir Velichkin v. Belarus*, Communication No. 1022/2001, Views adopted on 20 October 2005, paragraph 7.3.

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 expressly prohibit propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>60</sup>

With regard to the protection of the reputation of others, it has to be considered that any restriction has to possess the genuine purpose and demonstrable effect to protect the reputations of individuals against unlawful and unjustified attacks, exposure to public disdain or hatred. This limitation cannot be used to protect the State or public officials from public opinion or criticism.<sup>61</sup>

The criteria of protection of national security, which has its origin in an official declaration of a state of emergency,<sup>62</sup> relate to a situation that constitutes an exceptional and actual or imminent danger which threatens the life of the nation.<sup>63</sup> Since the dissolution of the State would endanger the enjoyment and protection of all human rights, restrictions on freedom of expression can be justifiable with regard to information such as the movement of troops and military encrypted codes. Vague limitations responding to hypothetical risks cannot be considered as valid. The same applies to any limitation that does not meet the criteria of legality and proportionality despite the existence of a national interest declared by a State.

The concept of public order is connected to those measures aimed at guaranteeing the effective functioning of a society. The Siracusa principles add that respect for human rights is part of public order.<sup>64</sup> According to ICCPR, limitations based on reasons of public order would entail prohibitions on speech that may incite crime, violence or mass panic. The common example is the prohibition to shouting "Fire!" in a crowded place indoor to prevent panic.

Public health may interfere with the right to freedom of expression in cases States have to timely respond to serious health threats against the population. However, there is no jurisprudence of the Human Rights Committee on this issue.

Finally, limitations based on moral grounds have often been misused to limit freedom of expression. However, the admissibility of these criteria has been clearly explained by the Human Rights Committee: "*the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations [...] for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.*"<sup>65</sup> Rather, it has to include all the different visions present in the society adding to the consideration of limitation on moral reasons the universality of human rights and the principle of non-discrimination.

Also the jurisprudence recognizes the predominance of freedom of expression and opinion over moral and tradition as necessary elements to strengthen democracy. In a famous sentence, the European Court of Human Rights ruled that freedom of expression "*is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock*

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<sup>60</sup> ICCPR, art. 20.

<sup>61</sup> Siracusa Principles, No. 37.

<sup>62</sup> Human Rights Committee, General Comment No. 29, Derogations during a state of emergency, (seventy-second session, 2001), HRI/GEN/1/Rev.9 (Vol. I), para. 2.

<sup>63</sup> Siracusa Principles, No. 39.

<sup>64</sup> Siracusa Principles, No. 22.

<sup>65</sup> Human Rights Committee, General Comment No. 22, Freedom of thought, conscience, and religion (forty-eighth session, 1993), HRI/GEN/1/Rev.9 (Vol. I), para. 8.

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".<sup>66</sup>

#### *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.<sup>67</sup>

#### *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 fundamental rights, including the one of opinion and expression.<sup>68</sup>

#### *Convention on the Rights of the Child*

The utmost importance of the right to freedom of opinion and expression is also recognized under CRC as a critical element for the development of a child in a spirit of peace, dignity, tolerance, freedom, equality, and solidarity. The right to freedom of expression of the child includes freedom to seek, receive and impart information and ideas of all kinds. This can be fulfilled through multiple means, including orally, in writing or in print, in the form of art, through media at the national or international levels.<sup>69</sup> Other than the requirements of being provided by law and being necessary to protect the rights or reputations of others, national security, public order, health, or morals as analyzed under ICCPR, no additional limitations to the enjoyment of this right are set forth in the CRC.<sup>70</sup>

With regard to media, the CRC recognizes the importance of access to a plurality of information by children<sup>71</sup> for, *inter alia*, the development of their personality, the respect for human rights and fundamental freedoms, and for the principles enshrined in the UN Charter to prepare them to live in a free society based on the principles of peace, tolerance, equality of sexes, and friendship among all peoples.<sup>72</sup>

- ***National law***

#### *Constitution*

Freedoms of opinion, expression, thought, speech, and press are among the fundamental rights protected by the Constitution.<sup>73</sup> The only limitations that can be imposed on these freedoms are the prohibition of forcing a person to express or deny an

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<sup>66</sup> ECtHR, *Handyside v. The United Kingdom*, 7 December, 1976, Application no. 5493/72, para. 49.

<sup>67</sup> ICESCR, art. 13.

<sup>68</sup> CERD, art. 5.d(viii).

<sup>69</sup> CRC, art. 13.

<sup>70</sup> *Ibid.*, art. 13.2(a) and (b).

<sup>71</sup> *Ibid.*, art. 17.

<sup>72</sup> *Ibid.*, art. 29(a), (b), and (d).

<sup>73</sup> Constitution, art. 31(a) and (b).

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.<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> Furthermore, the prohibition of forcing a person to express or deny an opinion is expressly recognized<sup>78</sup> as well as the absolute prohibition of limiting freedom of thought and opinion.<sup>79</sup>

### *Criminal Code*

Within the national criminal legislation, there are a number of provisions interconnected with the right to freedom of expression and opinion. In accordance with international obligations, the Criminal Code protects the right to privacy with regard to correspondence, telephone conversations, mail, and other messages establishing a pecuniary sentence for violators and reclusion if the violation is committed by a public official.<sup>80</sup>

Additionally, admissible limitations to freedom of expression are established for actions aimed at violently overthrowing the constitutional order,<sup>81</sup> publicly affirming superiority of a race, religion, or nationality over others, or for those directed to the humiliation of national dignity.<sup>82</sup> Similarly, a specific number of actions that could potentially harm national security, such as State's secrets<sup>83</sup> and data about security measures,<sup>84</sup> are criminalized.

Pecuniary fines are foreseen for the dissemination of false information in case it was known this did not correspond to the truth<sup>85</sup> or for intentionally humiliating a person's honor or dignity in an indecent manner.<sup>86</sup> These limitations appear to be in compliance with International Human Rights Law since adequately and proportionately attempt to balance the right to freedom of expression with the right to reputation.

### *Law on Peaceful Assembly*

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<sup>74</sup> *Ibid.*, art. 31(c) and (d).

<sup>75</sup> *Ibid.*, art. 37.

<sup>76</sup> *Ibid.*, art. 33(a).

<sup>77</sup> *Ibid.*, art. 20.

<sup>78</sup> *Ibid.*, art. 20.4(7).

<sup>79</sup> *Ibid.*, art. 20.5(4).

<sup>80</sup> Criminal Code, art. 136.

<sup>81</sup> *Ibid.*, art. 297.

<sup>82</sup> *Ibid.*, art. 299.

<sup>83</sup> *Ibid.*, art. 300.

<sup>84</sup> *Ibid.*, art. 344.

<sup>85</sup> *Ibid.*, art. 127.

<sup>86</sup> *Ibid.*, art. 128.

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.<sup>87</sup>

#### *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.<sup>88</sup> Additionally, journalists have the right to collect, analyze, and disseminate information, carry out investigations, and publish their findings and opinions<sup>89</sup> with the limitations imposed by the law which include the authenticity of information and respect of the rights of others.<sup>90</sup> Finally, journalists are granted with immunity for opinions expressed in their profession.<sup>91</sup>

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.<sup>92</sup> It also specifies that limitation only apply to State's secrets and confidential information.<sup>93</sup>

#### *Law on the Protection of State's Secrets*

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.<sup>94</sup>

For this reason, any limitation imposed on the diffusion of information that is not covered by State's secret is illegal.

#### *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

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<sup>87</sup> Law on Peaceful Assembly, art. 15.2.

<sup>88</sup> Law on Professional Activity of Journalists, art. 4.

<sup>89</sup> *Ibid.*, art. 5.

<sup>90</sup> *Ibid.*, art. 7.

<sup>91</sup> *Ibid.*, art. 8.

<sup>92</sup> Law on Access to Information Held by Public Bodies and Local Authorities, art. 3.

<sup>93</sup> *Ibid.*, art. 5.

<sup>94</sup> Law on the Protection of State's Secrets in the Kyrgyz Republic, art. 4.

State's secret in accordance to the Law on the Protection of State's Secrets and insults of religious views, other limitations fail to meet the required criteria of clarity and precision.

Examples are the extremely vague expressions of insult of civil dignity of people, dissemination of pornography, and the referral to content that can harm the development of younger generations without providing any specification on the grounds for assessing the criteria and parameters to understand what actions are allowed and which ones are prohibited.

The Kyrgyz Republic should review these laws to ensure compliance with the legal principles of clarity and precision. Additionally, in its review, the protection and promotion of the right to freedom of expression and opinion, and the right to equality and non-discrimination must be upheld to their maximum based on the legal obligations analyzed in this publication.

## **VI. RIGHT TO FREEDOM OF ASSEMBLY AND OF ASSOCIATION**

These rights are individual and collective rights closely interdependent and interrelated to each other and to other fundamental rights such as the right to freedom of expression and the right to participation in the political life of a country. These rights are also instrumental to the exercise and enjoyment of a vast range of civil, political, economic, social, and cultural rights and their respect, protection, and promotion by a State represent a significant indicator of the level of democracy in the country.

- ***International law***

### *Universal Declaration of Human Rights*

The right to freedom of assembly and association and the complementary right not to be compelled to belong to any association are jointly guaranteed by the UDHR.<sup>95</sup> Moreover, the right of association is also protected for everyone who intends to join or form trade unions for the protection of their own interests.<sup>96</sup>

### *International Covenant on Civil and Political Rights*

The same principles expressed in the UDHR are repeated and their protection reinforced in the ICCPR. In addition to the recognition of the rights to freedom of peaceful assembly<sup>97</sup> and association,<sup>98</sup> the Covenant also poses restrictions to the admissible limitations to these rights. Consistently with the provisions analyzed above for limitations to the right to freedom of expression, States can interfere with the enjoyment of these rights only if restrictions are prescribed by law, are necessary in a democratic society, and pursue a legitimate aim 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. As previously noted, these provisions are not subject to arbitrary or extensive interpretations but, in order to be legitimate, have to meet strict tests of justification.

Interferences with these rights cannot be justified merely on the basis of disagreements, differences related to views, opinions, traditions, or customs, inconveniences, or possibilities for increased levels of tension. The full enjoyment of these rights continues to represent a superior value in comparison to the possibility of their limitation. Consequently, criminalizing peaceful assemblies or associations for the

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<sup>95</sup> UDHR, art. 20.

<sup>96</sup> *Ibid.*, art. 23.

<sup>97</sup> ICCPR, art. 21.

<sup>98</sup> *Ibid.*, art. 22.

messages they portray, given that this remains within the limit of the ICCPR, exceeds the scope of the Covenant and it is therefore incompatible with it.

The respect and fulfillment by States of the rights to assembly and association as essential components of democracy and the full enjoyment of civil, political, economic, social, and cultural rights by all persons, and in particular those expressing minority or dissenting beliefs, has been further recently reaffirmed by the Human Rights Council<sup>99</sup> and by the European Courts of Human Rights. The latter stressed that it would be incompatible with the values embodied in human rights conventions if the exercise of rights by minority groups were made conditional upon acceptance by majority groups.<sup>100</sup>

The Human Rights Council also called on the State to ensure the maximum protection to these rights also in consideration of the role of new technologies and internet in facilitating the enjoyment of these rights and the crucial role of civil society in promoting the principles of good governance, transparency, and accountability.<sup>101</sup>

#### *International Covenant on Economic, Social, and Cultural Rights*

Although not expressly mentioned, the rights to freedom of assembly and association are guaranteed and protected through the recognition of the right to form trade unions with the scope of protecting economic and social interests. Limitations to these rights are the same as prescribed by the ICCPR.

#### *Convention on the Elimination of All Forms of Racial Discrimination*

The CERD reiterates that everyone, without distinctions as to race, colour, national, or ethnic origin, should have guaranteed by the State the enjoyment of the right to peaceful assembly and association.<sup>102</sup> No limitations to these rights are foreseen by this treaty.

#### *Convention on the Elimination of All Forms of Discrimination against Women*

A more specific protection of the rights under analysis against discrimination based on gender is provided by the CEDAW. According to its provisions, States parties to the Convention assumed the obligation to ensure the right of women to participate in non-governmental organizations and associations and provide their contribution to the public and political life of the country.<sup>103</sup>

#### *Convention on the Rights of the Child*

The provisions of the CRC with regard to the right to assembly and association and their admissible limitations are consistent with those from the other human rights treaties.<sup>104</sup> Of particular interest are the reports of the Committee on the Rights of the Child (the Committee)<sup>105</sup> interpreting and clarifying the scope of the CRC. The Committee stated children have the right to fully participate in public life adding that this

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<sup>99</sup> Human Rights Council, Resolution 15/21, the rights to freedom of peaceful assembly and of association, (Fifteen session, October 2010).

<sup>100</sup> ECtHR, *Alekseyev v. Russia*, 11 April 2011, Applications no. 4916/07, 25924/08 and 14599/09, para. 81.

<sup>101</sup> Human Rights Council, Resolution 21/16 and Resolution 24/5, the rights to freedom of peaceful assembly and of association, (Twenty-first session, October 2012, and Twenty-fourth session, October 2013).

<sup>102</sup> CERD, art. 5.d(ix).

<sup>103</sup> CEDAW, art. 7(c).

<sup>104</sup> CRC, art. 15.

<sup>105</sup> The Committee on the Rights of the Child (CRC) is the body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child. Its legal foundations are in Part II (articles 42 to 45) of the ICCPR.

is beneficial not only to the child, but also for the family, the community, the school, the State and for democracy.<sup>106</sup> 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, birth or other status, which covers adolescents' sexual orientation and health status.<sup>107</sup>

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.<sup>108</sup>

- **National law**

#### *Constitution*

The right to freedom of peaceful assembly<sup>109</sup> and association<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup>

Among the limitations established by this article,<sup>113</sup> 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*

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

<sup>107</sup> Committee on the Rights of the Child, General Comment No. 4, July 2003, para. 6.

<sup>108</sup> *Ibid.*, para 26.

<sup>109</sup> Constitution, art. 34.

<sup>110</sup> *Ibid.*, art. 35.

<sup>111</sup> *Ibid.*, art. 34.2

<sup>112</sup> *Ibid.*, art. 4.2.

<sup>113</sup> *Ibid.*, 4.4.

The Criminal Code punishes the establishment of and participation in the activities of organizations or groups aimed at committing crimes.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup>

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 ensure a high level of protection to this right.

### *Law on Peaceful Assemblies*

This law represents a cornerstone in the Kyrgyz legal system for the protection of the right to freedom of assembly for each person without discrimination.<sup>117</sup> The law recalls the principles set by the ICCPR, other international treaties and customary law, and the Constitution with regard to the fundamental importance of the respect of this right and the limited number of admissible restrictions that can be imposed on it. Furthermore, the law prescribes that no other law of the Kyrgyz Republic can contradict its provisions in order to be valid and no prohibition limiting the right to freedom of peaceful assemblies will be created by hierarchically inferior legislative acts.<sup>118</sup>

Kyrgyz authorities are also obliged to respect and secure the right to freedom of peaceful assemblies without any distinction as of gender, belief, or any other circumstance. Additionally, in the implementation of the procedures to ensure the enjoyment of the right, authorities cannot base their decision on their understanding of the appropriateness of the assembly or prevent the achievement of its purpose.<sup>119</sup> Therefore, any normative act infringing upon this right that lacks compliance with the Law on Peaceful Assemblies is necessarily invalid.

Section two of the law lists obligations, responsibilities, and rights of local authorities, organizers, and participants of peaceful assemblies.<sup>120</sup> All the provisions, including those related to the personal security of participants and of citizens not participating in the assemblies, are aimed at ensuring that the right is fulfilled and its enjoyment guaranteed.

The law also regulates the modalities and reasons for restricting or prohibiting an assembly and the appeal mechanisms available to contest the decision by public authorities. Key to the interpretation of the law is the indication that in case of doubts on the legitimacy of the grounds presented to prohibit or restricting the peaceful assembly due to a possible conflict with the legal provisions of this law, of the Constitution, and of

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<sup>114</sup> Criminal Code, art. 31, art. 231, and art. 259.

<sup>115</sup> *Inter alia*, Criminal code, art. 55, art. 97.17, art. 129, art. 130, art. 139, art. 147, art. 150, art. 156, art. 164 - 168, art. 170, art. 172, art. 173, art. 180 - 186, art. 195, art. 210, art. 219, art. 220, art. 227, art. 229, art. 230.

<sup>116</sup> *Ibid.*, art. 148.

<sup>117</sup> Law on Peaceful Assemblies, art. 1.

<sup>118</sup> *Ibid.*, art. 2.

<sup>119</sup> *Ibid.*, art. 4.1, 4.5(1) and (5).

<sup>120</sup> *Ibid.*, art 4 to 12.

international human rights obligations, the implementation of the assembly shall be prioritized.<sup>121</sup> 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.<sup>122</sup> No other reasons can be considered as lawful to prevent or prohibit a peaceful assembly.

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<sup>121</sup> *Ibid.*, art. 14.5.

<sup>122</sup> *Ibid.*, art. 15.

## VII. RECOMMENDATIONS

Based on the analysis of the international and national human rights legal provisions imposing obligations on the Kyrgyz Republic, the TSPC would recommend to the Kyrgyz Government and the Parliament the following:

- Ensure that all drafted and adopted legislation is in compliance with human rights principles in order to strengthen the level of democracy in the Kyrgyz Republic and to promote sustainable development for all communities and groups without discrimination of any sort;
- Ratify the international human rights treaties to which the Kyrgyz Republic is not party to yet.
- Ensure in legislation and policies the respect of the right to equality and non-discrimination, freedom of opinion and expression, and freedom of peaceful assembly and association as cornerstone of a free and democratic Kyrgyz Republic;
- Repeal any law or any attempt to curb individual or groups' ability to enjoy fundamental rights and freedoms on the basis of the principles of tolerance, peace, equality, and friendship among all peoples without discrimination as indicated by the Constitution;
- Review draft legislation and policies to accurately assess if limitations on fundamental rights and freedoms possess the necessary requirements of being provided by law, legitimate aim, necessity, and proportionality;
- Promote public discussion with full participation of all citizens in the process of adopting legislation potentially affecting fundamental rights and freedoms;
- Increase efforts to include views of minority communities and groups as required in a functioning democracy;
- Consider and include into laws and policies comments and recommendations from national or foreign organizations, national human rights institutions, and civil society in order to ensure compliance with legal obligations and incorporate the diverse visions, beliefs, and positions of the entire society;
- Enable and respect the independence of the judiciary and its powers to declare laws that are not in compliance with international and national norms as unconstitutional.





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