



# Guatemala: Reforms to the Law on Non-Governmental Organizations

Analysis under the international human right to  
freedom of association



**ALIANZA**  
— POR LAS —  
**REFORMAS**

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# Message of the Lawyers Council for Civil and Economic Rights

The Lawyers Council for Civil and Economic Rights considers that the well-being of any society depends on the proper functioning of the rule of law as a basis for the exercise of civil and economic rights and a prosperous national economy. Effective oversight by civil society and strong levels of civic engagement are essential for good governance, ensuring that government respects human rights.

The Council commends the efforts of organizations like *Alianza por las Reformas* to defend basic freedoms of association, assembly, and expression in Guatemala. These rights enable citizens with common interests to share their concerns and collaborate to influence policy-making and ensure democratic governance.

Stringent regulation of civil society organizations hinders oversight, criticism, and accountability of government activities. Specifically, regulations like those approved by the Guatemalan Congress and reviewed in this report discourage dissent from the policies and practices of the government. Particularly in Guatemala, with a history of internal conflict, corruption, and serious human rights violations, civil society organizations serve as a fundamental safeguard of liberty.

As private practicing lawyers, the Lawyers Council recognizes the paramount importance of the rule of law for economic development, including attracting foreign investment. The freedoms of association, assembly, and expression, according to human rights international rules and standards, are vital to the rule of law.



The Lawyers Council for Civil and Economic Rights brings together private practice law professionals in the Americas to support the rule of law, combat corruption and support the work of the civil society. The membership of the Council consists of lawyers of recognized distinction in private practice in their respective countries and of demonstrated sustained civic commitment in their careers.

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## Acronyms

<b>CGC</b>	Comptroller General (acronym in Spanish)
<b>NGO</b>	Non-Governmental Organization
<b>UN</b>	United Nations
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>REPEJU</b>	Registry of Legal Persons (acronym in Spanish)
<b>SAT</b>	Tax Authority (acronym in Spanish)
<b>SEGEPLAN</b>	Presidential Secretariat of Planning and Programming (acronym in Spanish)

# I. Introduction

On February 11, 2020, the Guatemalan Congress approved Decree 4-2020, Reforms to the Law of Non-Governmental Organizations, Decree Number 2-2003 of the Congress of the Republic, and to the Civil Code, Decree Law Number 106 of the Head of State (“the Reforms”), which was signed by President Alejandro Giammattei on February 25, 2020 and subsequently published in the official newspaper. This report presents our analysis of the Reforms in light of international human rights law, organized by three categories of restrictions on the freedom of association posed by the Reforms: (1) the government’s substantial discretion over the cancelation of organizations and its increased control over their activities; (2) the creation of criminal and civil liability for directors of NGOs; and (3) the imposition of new, unnecessary, and onerous reporting requirements. The report begins with a brief review of the legislative history of Decree 4-2020 and a summary of Guatemala’s international human rights obligations. We conclude that the Reforms impose various restrictions that potentially violate freedom of association under international law.

The legal research for this report was conducted by Paul, Weiss, Rifkind, Wharton & Garrison LLP and the Cyrus R. Vance Center for International Justice, for the Alliance for Reforms in Guatemala (*Alianza por las Reformas en Guatemala*).

The **Alliance for Reforms** (“AxR”) is the coalition of thirty-five civil society organizations, including human rights, international, women’s rights, and indigenous people’s rights organizations, as well as research centers and urban groups that coincide with promoting an agenda of social change to strengthen the democratic rule of law.

The AxR was born in 2017, within the framework of the approval of the constitutional initiative to reform the justice system promoted by the International Commission against Impunity in Guatemala (“CICIG”). The AxR has played an important role in defending the rule of law and in continuing the efforts demanded by the fight against corruption. This defense has been exercised through legal and advocacy actions, public forums and coordination with other sectors.

**Paul, Weiss, Rifkind, Wharton & Garrison LLP** is a firm of more than 1,000 lawyers with diverse backgrounds, personalities, ideas and interests who provide innovative and effective solutions to our clients’ most complex legal and business challenges. The firm represents some of the world’s largest publicly and privately held corporations, financial institutions and asset managers, and

clients needing pro bono assistance. Paul, Weiss is widely recognized as having market-leading practices in public M&A, private equity, litigation, white-collar & regulatory defense, and bankruptcy & corporate reorganization, along with equally strong practices in employee benefits & executive compensation, intellectual property, personal representation, real estate and tax law. Throughout the firm's history, it has maintained an unwavering commitment to providing pro bono legal assistance to the most vulnerable members of our society and in support of the public interest. Paul, Weiss lawyers participate in all levels of pro bono work, working directly with individual clients, non-profits and small businesses in a wide range of substantive areas, as well as handling appeals and drafting key amicus briefs before the Supreme Court.

The **Cyrus R. Vance Center for International Justice** advances global justice by engaging lawyers across borders to support civil society and an ethically active legal profession. The Vance Center is a unique collaboration of international lawyers catalyzing public interest innovation. A non-profit program of the New York City Bar Association, we bring together leading law firms and other partners worldwide to pioneer international justice initiatives and provide pro bono legal representation to social justice NGOs.

## II. Legislative History of Decree 4-2020

On January 22, 2003, the Congress of the Republic of Guatemala passed Decree 2-2003, the Law on Development Non-Governmental Organizations (“NGO Law”), which went into effect approximately one month later. The law regulates the creation, inscription, accounting obligations, and dissolution of non-governmental organizations (“NGO”) in Guatemala.

On March 14, 2017, Christian Gabriel Gonzalez, then a congressional representative with the ruling political party, *Frente Convergencia Nacional*, presented “Law Initiative 5257, an initiative to reform Congressional Decree 2-2003, Law Development Non-Governmental Organizations” (“Initiative 5257”). Initiative 5257 originally proposed 13 reforms to the NGO Law. On March 21, 2017, the proposal was sent to the Government Commission in Congress for discussion. On April 24, 2018, the Government Commission approved Initiative 5257 with several additional proposed reforms to the NGO Law and the Civil Code and sent the initiative to the plenary. On May 2 and 3, 2018, the proposal was subject to the first and second plenary debates in Congress, respectively, which are required steps in the Guatemalan legislative process.<sup>1</sup>

Guatemalan NGOs acted quickly to oppose the legislation, citing concerns that the Reforms would violate fundamental freedoms, including the freedom of association. Numerous international actors echoed these concerns, including the Human Rights Committee, the treaty body for the International Covenant on Civil and Political Rights (“ICCPR”),<sup>2</sup> which enshrines the rights to freedom of association and expression. In 2018, the Human Rights Committee noted in its periodic examination of Guatemala’s fulfillment of its obligations under the ICCPR, that “the Committee is further concerned about draft legislation relating to . . . public order and non-governmental organizations that would restrict freedom of expression, assembly and association.”<sup>3</sup> This concern was reiterated by the former Vice-President of the Human Rights Committee, Sarah Cleveland, in an unofficial follow-up visit to Guatemala in 2019, in which she stated that “a series of laws currently pending in Congress are of great concern [including,] the

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<sup>1</sup> See Constitución Política de la República de Guatemala, art. 176 (1985) [hereinafter, Guatemalan Constitution]; Decreto 63-94 del Congreso de la República, Ley Orgánica del Organismo Legislativo, 1 Dec. 1994, art. 112, *Diaro de Centro América*, 21 Dec. 1994.

<sup>2</sup> International Covenant on Civil and Political Rights, art. 22, 19 Dec. 1966, 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) (Guatemala ascension took effect 5 Aug. 1992) [hereinafter ICCPR].

<sup>3</sup> Human Rights Committee, Concluding observations on the fourth periodic report of Guatemala, ¶ 36, U.N. Doc. CCPR/C/GTM/CO/4 (7 May 2018).

proposed reforms to the NGO Law which puts at risk fundamental freedoms of civil society.”<sup>4</sup> The strong opposition by national and international organizations halted the progression of the proposed law in Congress.

On February 11, 2020, Congress unexpectedly added Law Initiative 5257 to the day’s legislative agenda in a proposal to discuss a resolution related to the novel coronavirus pandemic, although it did not appear on the official agenda.<sup>5</sup> According to the official transcript of the session, various representatives and political parties questioned why Initiative 5257 was being discussed as part of a last minute coronavirus discussion and opposed the debate and vote.<sup>6</sup> With over 60 of the 160 representatives absent, Congress completed the third and last required congressional debate without discussion<sup>7</sup> and proceeded directly to article-by-article approval of Law Initiative 5257, which was edited to 21 articles of reform, and was passed as Decree 4-2020 by 81 votes.<sup>8</sup> On February 25, 2020, President Alejandro Giammattei signed Decree 4-2020 into law and it was published in the official gazette on February 28, 2020.

From February 11 to 25, 2020, various NGOs, human rights defenders, and opposition parties in Congress filed constitutional claims against Congress and Decree 4-2020 in the Guatemalan Constitutional Court. These claims asserted that, procedurally, Decree 4-2020 was not passed with the required number of votes for a law that impacts the responsibilities of decentralized and autonomous entities, like the Tax Authority (known by its Spanish acronym, “SAT”) and the Comptroller General (known by its Spanish acronym, “CGC”) among other legislative irregularities, and that, in content, Decree 4-2020 unlawfully restricts fundamental freedoms recognized in the Guatemalan Constitution.

On March 2, 2020, the Constitutional Court issued a provisional injunction against Decree 4-2020, preventing it from going into effect. A hearing on the merits is pending.

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<sup>4</sup> CCPR, Ex Vicepresidenta del Comité de Derechos Humanos de las Naciones Unidas visita Guatemala, 5 Mar. 2019, <http://ccprcentre.org/ccprpages/ex-vicepresidenta-del-comit-de-derechos-humanos-de-las-naciones-unidas-visita-guatemala>.

<sup>5</sup> Congreso de la República de Guatemala, Orden del Día 11 de febrero 2020. *See also* Congreso de la República de Guatemala, Diario de Sesiones 11 de febrero 2020, p. 10 (11 Feb. 2020).

<sup>6</sup> Congreso de la República de Guatemala, Diario de Sesiones 11 de febrero 2020, pp. 27, 28, 34-43 (11 Feb. 2020).

<sup>7</sup> Congreso de la República de Guatemala, Diario de Sesiones 11 de febrero 2020, pp. 46-47 (11 Feb. 2020).

<sup>8</sup> Congreso de la República de Guatemala, Diario de Sesiones 11 de febrero 2020, pp. 47-117 (11 Feb. 2020).

### III. Overview of Guatemala's International Human Rights Obligations

Guatemala's human rights obligations are derived from two main sources; the international human rights system and the Inter-American System of Human Rights.

Guatemala is a member of the United Nations<sup>9</sup> and has ratified over a dozen different international human rights instruments, including the ICCPR and the Optional Protocol to the ICCPR.<sup>10</sup> In its declaration upon ratifying the ICCPR Optional Protocol, Guatemala expressly recognized the competence of the Human Rights Committee to receive and review communications from individuals who claim to be victims of a violation of Guatemala's obligations under the ICCPR. Guatemala's recognition of the Human Rights Committee's competence gives the Committee's precedent on interpreting the content and application of the ICCPR special weight. Importantly, article 22 of the ICCPR protects the right to freedom of association, including the formation of non-governmental organizations and informal organizations.

At the regional level, Guatemala is also a member of the Organization of American States<sup>11</sup> and has ratified the American Convention on Human Rights,<sup>12</sup> through which it recognizes the competence of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights to receive, review, and adjudicate allegations of violations of the American Convention by Guatemala. Similar to the ICCPR, the American Convention also enshrines the right to freedom of association in article 16.

The Guatemalan Constitution itself recognizes the right to freedom of association in article 34.<sup>13</sup> Additionally, the Guatemalan Constitution establishes the preeminence of international human

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<sup>9</sup> Charter of the United Nations, 26 Jun. 1945, 4 U.S.T. 1153 (entered into force 24 Oct. 1945) (ratified by Guatemala on 21 Nov. 1945) [hereinafter U.N. Charter].

<sup>10</sup> Optional Protocol to the International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, 302 (entered into force 23 Mar. 1976) (Guatemala ratified on 28 Nov. 2000) [hereinafter ICCPR Optional Protocol].

<sup>11</sup> Charter of the Organization of American States, 30 Apr. 1948, O.A.S.T.S. No. 1-C & 61, 199 U.N.T.S. 3 (Guatemala's ratification effective as of 6 Apr. 1955) [hereinafter OAS Charter].

<sup>12</sup> Organization of American States, American Convention on Human Rights, 22 Nov. 1969, O.A.T.S. No. 36, 1144 U.N.T.S. 123 (Guatemala's ratification effective as of 18 Jul. 1978) [hereinafter American Convention].

<sup>13</sup> Guatemalan Constitution, art. 34 ("*Derecho de asociación. Se reconoce el derecho de libre asociación.*").

rights instruments ratified by Guatemala over internal law.<sup>14</sup> The Guatemalan Constitutional Court has clarified this relationship on repeated occasions, stating that as a matter of constitutional law, ratified international human rights instruments are self-executing, or of direct application, so that they may complement, inform, or derogate internal laws.<sup>15</sup> In its decision granting the provisional injunction, the Constitutional Court invoked precedent and guidance from the U.N. and Inter-American human rights systems.<sup>16</sup>

Through these instruments, the decisions and guidance given by the Human Rights Committee and other human rights entities of the U.N., as well as those of the organs of the Inter-American Human Rights system, are of particular importance to Guatemala's interpretation and application of international human rights law. Additionally, the experience of other regional human rights systems, including the Council of Europe's European Court of Human Rights and other expert bodies, the African Commission and Court on Human and Peoples' Rights, and the European Court of Justice, provides guidance to Guatemala on the application of international human rights.

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<sup>14</sup> Guatemalan Constitution, art. 46. ("*Preeminencia del Derecho Internacional. Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala, tienen preeminencia sobre el derecho interno.*").

<sup>15</sup> See, e.g., Corte de Constitucionalidad de Guatemala, Expediente 3438-2016, Sentencia, pp. 9-13 (8 Nov. 2016) (discussing the *bloque constitucional* formed and announced on 17 Jul. 2012 in Expediente 1822-2011 holding that Guatemala's international human rights obligations have a regulating function over national legislation and deciding that the absence of an explicit provision of imprescriptibility of grave human rights violations in the Criminal Code is unnecessary in light of Guatemala's obligation under the same *jus cogens* norm).

<sup>16</sup> Corte de Constitucionalidad de Guatemala, Expedientes Acumulados 859-2020, 860-2020, 879-2020, 895-2020, 896-2020, 904-2020, 905-2020 y 1029-2020, Oficio 10o de Secretaria General, pp. 7-8 (2 Mar. 2020).

## IV. Analysis of Decree 4-2020

The reforms contained in Decree 4-2020 to the NGO Law impose several restrictions on freedom of association that may constitute a violation of the freedom of association for exceeding the limitations allowed by international law. Our analysis begins with an examination of the limitations and conditions that the ICCPR and the American Convention impose on restrictions to the freedom of association. These limits are referenced throughout the rest of the analysis, which focuses on specific restrictions imposed by the Reforms that raise significant concerns. Specifically, the government’s substantial discretion over the existence of organizations and its increased control over their activities; the creation of criminal and civil liability for directors of NGOs; and the imposition of new, unnecessary, and onerous reporting requirements. Individually and collectively, these issues create barriers for individuals to exercise the freedom of association and produce a chilling effect on civil society organizations. As a result, the ability of human rights defenders to carry out the essential task of promoting the protection and realization of fundamental freedoms is at risk in Guatemala.

### A. Permissible restrictions on the freedom of association under the ICCPR

The ICCPR and American Convention provide a limited scope by which states may restrict the freedom of association. Article 22.2 of the ICCPR states that “no restrictions may be placed on the exercise of [the freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” Similarly, the American Convention exclusively allows for the same restrictions to the freedom of association as the ICCPR.<sup>17</sup> The Guatemala Constitution does not explicitly provide for any restriction on the right to freedom of association.<sup>18</sup>

The Human Rights Committee has consistently affirmed in its jurisprudence and guidance that “a restriction on the right to freedom of association can be justified only if it cumulatively meets”

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<sup>17</sup> American Convention, art. 16.2 (“The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.”).

<sup>18</sup> Guatemala Constitution, art. 34.

the conditions set out in ICCPR article 22.2 and is proportionate in nature.<sup>19</sup> Therefore, restrictions must (1) be provided for by law, (2) address a clear purpose set out in article 22.2, and (3) be “necessary in a democratic society.”<sup>20</sup> Similarly, the U.N. Special Rapporteur on the situation of human rights defenders has emphasized that “States should always be guided by the principle that the restrictions must not impair the essence of the right.”<sup>21</sup> In this sense, the ability of organizations to operate for lawful aims must prevail over non-critical restrictions.

## **1. Provided for by law**

The first prong of the test, “provided for by law,” comprises a procedural and a content requirement. In terms of process, any restriction on the freedom of association must be set forth in a “duly promulgated law, regulation, decree, order, or decision of an adjudicative body.”<sup>22</sup> Additionally, the content of the restriction must be clearly enunciated to be considered as “proscribed.”<sup>23</sup> This means that the text permits individuals and organizations to foresee whether their actions are allowed or not.

In the case of Guatemala, under the procedural component there is a threshold question as to whether Decree 4-2020 was “duly promulgated.” Therefore, if the NGOs and opposition parties challenging the Reforms are correct in their assertion that Decree 4-2020 was passed without the required majority or legislative steps, then application of the Reforms would violate the freedom of association as an unlawful restriction for failing to be proscribed by law. Since this issue turns on a question of Guatemalan law, it is beyond the scope of this analysis.

Next, even assuming that Decree 4-2020 was properly legislated, it contains several articles that raise questions as to whether the restrictions on the freedom of association are sufficiently clear. This will be discussed in the sections below.

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<sup>19</sup> Human Rights Committee, *Romanovsky v. Belarus*, Communication No. 2011/2010, ¶ 7.2, U.N. Doc. CCPR/C/115/D/2011/2010 (7 Dec. 2015).

<sup>20</sup> European Commission for Democracy through Law (Venice Commission) & OSCE Office for Democratic Institutions and Human Rights (ODIHR), Joint Opinion on draft law No. 6674 on introducing changes to some legislative acts to ensure public transparency of information on finance activity of public associations and of the use of international technical assistance, and on Draft Law No. 6675 on introducing changes to the tax code of Ukraine to ensure public transparency of the financing of public associations and of the use of international technical assistance, ¶ 34, VC Opinion No. 912/2018, OSCE/ODIHR Opinion No. NGO-UKR/321/2018 (16 Mar. 2018).

<sup>21</sup> Maina Kai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Rep. on the right to freedom of association, ¶ 16, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>22</sup> Margaret Sekagya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 27, U.N. Doc. A/64/226 (4 Aug. 2009).

<sup>23</sup> David Kaye (Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression), Rep. on his mission to Tajikistan, ¶ 82, U.N. Doc. A/HRC/35/22/Add.2 (13 Oct. 2017); Margaret Sekagya (Special Rapporteur on the situation of human rights defenders), Rep. on the use of legislation to regulate the activities of human rights defenders, ¶ 86, U.N. Doc. A/67/292 (10 Aug. 2012).

## **2. In the interest of a clear purpose set out in ICCPR article 22.2**

With regard to the second prong, a restriction must fall under one of the permitted purposes under ICCPR article 22.2. In this case, the relevant justification invoked in Decree 4-2020 for the restrictions is public order. The Human Rights Committee has clarified that justifications based on national security or public order must address a “real and not hypothetical threat” which necessitates the restriction on the fundamental right in order to avoid the threat, because “less intrusive measures would be insufficient.”<sup>24</sup> Similarly, the Council of Europe’s expert human rights and rule of law body, the Venice Commission, has stated in guidance that “public order grounds should be understood to involve an interest in preventing imminent violent conduct.”<sup>25</sup> Put simply, a public order justification must meet the high bar of demonstrating concrete necessity for the restriction. Whether the provisions of Decree 4-2020 properly invoke a public order justification will be discussed in the sections below.

## **3. Necessary in a democratic society**

Finally, the Human Rights Committee has explained that the notion of a “democratic society” in the last prong of the cumulative test means a society where associations may “peacefully promote ideas not necessarily favourably received by the government or the majority of the population.”<sup>26</sup> In short, restrictions must respect the freedom of expression and not be used to suppress dissent. Further, for a restriction to be “*necessary* in a democratic society” (emphasis added), the restriction must be proportionate to its objective. Drawing on precedent of the Inter-American Court of Human Rights and European Court of Human Rights in an analysis of national legislation regulating the activities of human rights defenders and organizations, the U.N. Special Rapporteur on human rights defenders stated that “the principle of necessity requires [showing] . . . that the law in question is the best available means of achieving that result [and] . . . that the impact of the law is as targeted as possible, thereby impairing the exercise of the affecting rights

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<sup>24</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 28, U.N. Doc. A/64/226 (4 Aug. 2009). See also Human Rights Committee, *Mikhailovskaya v. Belarus*, Communication No. 1993/2010, ¶ 7.3, U.N. Doc. CCPR/C/111/D/1993/2010 (26 Aug. 2014); Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

<sup>25</sup> European Commission for Democracy through Law (Venice Commission) & OSCDE Office for Democratic Institutions and Human Rights (ODIHR), Guidelines on Freedom of Assembly, ¶ 131, CDL-AD(2019)017 (8 Jul. 2019). See also European Commission for Democracy through Law (Venice Commission) & OSCDE Office for Democratic Institutions and Human Rights (ODIHR), Joint Opinion on draft law No. 6674 on introducing changes to some legislative acts to ensure public transparency of information on finance activity of public associations and of the use of international technical assistance; And On draft law No.6675 on introducing changes to the tax code of Ukraine to ensure public transparency of the financing of public associations and of the use of international technical assistance, ¶ 36, CDL-AD(2018)006, VC Opinion No. 912/2018 (12 Mar. 2018).

<sup>26</sup> Human Rights Committee, *Mikhailovskaya v. Belarus*, Communication No. 1993/2010, ¶ 7.3, U.N. Doc. CCPR/C/111/D/1993/2010 (26 Aug. 2014).

as little as possible.”<sup>27</sup> The Inter-American Court of Human Rights has repeatedly held that the freedoms of association and expression are essential to maintaining democracy and should be given the “maximum protection possible.”<sup>28</sup>

The controls and requirements that Decree 4-2020 imposes on NGOs lack clarity and precision, do not assist in preventing a real threat to public order in any readily apparent manner, are not the least intrusive means for doing so, and threaten to weaken democratic society by reducing pluralism. Therefore, the restrictions imposed on the freedom of association in Decree 4-2020 may violate Guatemala’s obligations under international human rights law.

## **B. Decree 4-2020 creates undue state interference and intrusion into the affairs of NGOs that restrict the freedom of association**

### **1. The government’s power to cancel organizations under articles 13, 16, and 21 of Decree 4-2020 lacks protections of due process**

Articles 13, 16, and 21 of the Reforms significantly expand the government’s power to close organizations. Previously, under the NGO Law, only a competent court could order the closure of an organization, thereby ensuring the affected parties an opportunity to challenge the decision.<sup>29</sup> However, the Reforms create several new bases for involuntary cancellation at the discretion of executive branch bodies. Under article 13, if “an NGO uses donations or foreign financing to alter the public order, it is immediately canceled in the Registry of Legal Persons” (“REPEJU,” by the Spanish acronym).<sup>30</sup> Per article 16 of the Reforms, “any failure to comply with the [provisions of Decree 4-2020] . . . is a basis for the imposition of administrative sanctions,

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<sup>27</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the use of legislation to regulate the activities of human rights defenders, ¶¶ 70-71, U.N. Doc. A/67/292 (10 Aug. 2012).

<sup>28</sup> Corte Interamericana de Derechos Humanos. *López Lone y Otros v. Honduras*, Sentencia, ¶ 160, 5 Oct. 2015 (Excepción Preliminar, Fondo, Reparaciones y Costas). See also Corte Interamericana de Derechos Humanos, *La Colegiación Obligatoria de Periodistas (Arts. 13 y 29 Convención Americana sobre Derechos Humanos)*, Opinión Consultiva, ¶ 4, O.A.S. Ser.A/OC-5/85 (13 Nov. 1985).

<sup>29</sup> Decreto 02-2003 del Congreso de la República de Guatemala, Ley de Organizaciones No Gubernamentales para el Desarrollo, art. 19(c), 18 Feb. 2003, Diario de Centroamérica, 24 Feb. 2003, at 2 (“*Disolución: Las Organizaciones No Gubernamentales podrán disolverse por las siguientes causas . . . (c) Por disposición legal o resolución de tribunal competente.*”).

<sup>30</sup> Decree 4-2020, Article 13 (modifying article 15 of the NGO Law regarding funding) (“*Ninguna donación financiamiento externo puede usarse para realizar actividades que alteren el orden público en el territorio nacional. Si una ONG utiliza donaciones o financiamientos externos para alterar el orden público, será inmediatamente cancelada en el Registro de Personas Jurídicas (REPEJU) del Ministerio de Gobernación y sus directivos responsables, será imputados conforme a la legislación penal y civil vigente, en el entendido que la ONG cancelada no podrá operar bajo esa denominación.*”).

including cancelation” at the determination of the Minister of the Interior.<sup>31</sup> Additionally, REPEJU may cancel NGOs for failing to comply with their own statutes;<sup>32</sup> and under article 21 of the Reforms, an organization “may be dissolved . . . at the request of the Public Prosecutor, the Tax Authority, Comptroller General or Ministry of the Interior, when [an organization’s] activities are determined to be contrary to law and public order.”<sup>33</sup>

***(a) Involuntary cancelation of organizations is a severe and disproportional measure***

International human rights bodies and experts have consistently held that cancelation of an organization is “the most serious sanction[] that the authorities can impose on an organization [and] should be used only when other, less restrictive measures would be insufficient and should be guided by the principles of proportionality and necessity.”<sup>34</sup> Moreover, associations subject to involuntary cancelation should have the right to appeal decisions regarding suspension or dissolution before an independent and impartial court.<sup>35</sup>

Through the direct communication procedure, a mechanism by which the U.N. is able to review specific allegation of human rights violations by a State, the U.N. special rapporteurs on freedom of association, freedom of expression, and human rights defenders have expressed concern over national laws that grant governments the power to dissolve organizations on “broad and vague grounds.”<sup>36</sup> In communications with Sierra Leone, the Democratic Republic of the Congo, and Egypt, these human rights experts reminded States that cancelation “should only be possible

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<sup>31</sup> Decree 4-2020, art. 16 (modifying article 22 of the NGO Law regarding cancelation of NGOs) (“[S]e inscriben conforma la presente Ley; todo incumplimiento a lo estableciendo en el presente Decreto, dependiendo a la gravedad del caso, será motivo de la imposición de sanciones administrativas, incluida la cancelación. El proceso de cancelación se desarrolla en el reglamento, y debe considerar otorgar audiencia. Contra la resolución de cancelación cabe el recurso de revocatoria, el cual resuelve el Ministro de Gobernación.”).

<sup>32</sup> Decree 4-2020, art. 16 (modifying article 22 of the NGO Law regarding cancelation of NGOs) (“El Registro de Personas Jurídicas (REPEJU) del Ministerio de Gobernación podrá actuar a instancia de parte o de oficio a cualquier violación a la normativa contemplada en esta Ley a efecto de que las Organizaciones No Gubernamentales se circunscriban a cumplir con sus estatutos, caso contrario podrá resolver su cancelación.”).

<sup>33</sup> Decree 4-2020, art. 21 (modifying article 25 of the Civil Code) (“También pueden disolverse por acuerdo de la autoridad respectiva, a pedido del Ministerio Público, la Superintendencia de Administración Tributaria, la Contraloría General de Cuentas o Ministerio de Gobernación, cuando se compruebe que sus actividades son contrarias a la ley y al orden público.”).

<sup>34</sup> Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Rep. on a comparative study of enabling environments for associations and businesses, ¶ 38, U.N. Doc. A/70/266 (4 Aug. 2015). See also Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Rep. on the right to freedom of association, ¶ 75, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>35</sup> Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Rep. on a comparative study of enabling environments for associations and businesses, ¶ 38, U.N. Doc. A/70/266 (4 Aug. 2015).

<sup>36</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, Communication to the State of Egypt, p. 7, OL EGY 14/2016 (22 Nov. 2016).

when there is a clear and imminent danger.”<sup>37</sup> In cases of laws that do not clearly articulate other sanctions, the European Court of Human Rights has held that “forced dissolution [of an association that] breached the requirements of the NGO Act” may constitute an indiscriminate application that violates the principle of proportionality and the freedom of association.<sup>38</sup>

Further, the U.N. special rapporteurs on freedom of expression, freedom of association, and human rights defenders have noted in a communication to Egypt on draft reforms to its NGO law that dissolution procedures should not occur through “an accelerated procedure.” Instead, the human rights experts stated that “such measures should only be taken by independent courts.”<sup>39</sup> This is consistent with States’ obligation to ensure “that no discrimination is permitted in the application” of laws.<sup>40</sup>

Articles 13 and 16 of Decree 4-2020 allow for the dissolution of organizations without access to courts. Article 13 allows the REPEJU, an agency under the Ministry of the Interior, and the Minister of the Interior, a cabinet position named by the president, to cancel organizations. This level of arbitrary power concentrated in the executive branch is concerning in a country that experienced a four-decade-long armed conflict in which civil and political rights were severely restricted and the State declared an entire group of citizens to be “internal enemies” based on ethnic discrimination.<sup>41</sup>

Additionally, in a 2015 communication to the government of Kazakhstan, U.N. special rapporteurs expressed concern that a provision in a new law on “non-commercial organizations” allowed for closure of NGOs for non-compliance with administrative reporting requirements.<sup>42</sup>

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<sup>37</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Sierra Leone, p. 8, OL SLE 1/2018 (22 Feb. 2018); Mandats du Rapporteur spécial sur la promotion et la protection du droit à la liberté d’opinion et d’expression; de la Rapporteuse spéciale sur le droit de réunion pacifique et la liberté d’association; et du Rapporteur spécial sur la situation des défenseurs des droits de l’homme, Communication à la République Démocratique du Congo, p. 4, U.N. Doc. OL COD 2/2017 (15 Nov. 2017); Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, Communication to the State of Egypt, p. 7, OL EGY 14/2016 (22 Nov. 2016).

<sup>38</sup> *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, ¶¶ 82, 92, No. 37083/03, Eur. Ct. H.R. (8 Oct. 2009).

<sup>39</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, Communication to the State of Egypt, p. 7, OL EGY 14/2016 (22 Nov. 2016).

<sup>40</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the use of legislation to regulate the activities of human rights defenders, ¶ 86, U.N. Doc. A/67/292 (10 Aug. 2012).

<sup>41</sup> See Comisión de Esclarecimiento Histórico, Guatemala Memoria del Silencio: Tomo V, Conclusiones y Recomendaciones, ¶¶ 9, 11, 15, 24, 31, 58, 61 (the U.N. truth commission’s final report describing civil and political repression through laws and the designation of “Mayans” as “internal enemies of the State”).

<sup>42</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Kazakhstan, pp. 2-3, KAZ 3/2015 (6 Oct. 2015).

Similarly, in reviewing state practice on the implementation of the freedom of association, the U.N. Special Rapporteur on human rights defenders condemned “NGO law[s which allow] the Government to involuntarily dissolve civil society organizations for having departed [from] or not having completely fulfilled the goals for which [they were] established,”<sup>43</sup> such as those set out in their statutes. She further stated that warnings and opportunities to apply corrective measures should first be provided for the failure to file required reports or complying with other provisions of the law.<sup>44</sup>

In this case, the only specified sanction provided by article 16 of Decree 4-2020 authorizes the government to unilaterally shut down NGOs in the first instance for non-compliance with administrative laws or the NGO’s own internal rules. No guidance is provided regarding when a decision to close an NGO would be appropriate. This means that NGOs may not have an opportunity to receive notice of any infractions, will not be able to take corrective measures, and will not be afforded due process to prevent involuntary cancellation. The possibility of a severe sanction imposed for minor administrative infractions means that the provision is likely not proportionate and may improperly restrict the freedom of association.

***(b) Decree 4-2020’s invocation of public order as a justification for cancellation is vague and overly broad***

As discussed above, restrictions on the freedom of association are limited to the enumerated justifications in article 22.2 of the ICCPR: national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Of these, Decree 4-2020 invokes the justification of public order.

The justification of public order may not be invoked to automatically justify restrictions to the freedom of association. The U.N. Human Rights Council has clarified in its resolutions that “legislation designed to guarantee public safety and public order [should] contain[] clearly defined provisions.”<sup>45</sup> This is in line with the principle of legality, which requires that laws be formulated “with sufficient precision to enable the citizen to regulate [their] conduct.”<sup>46</sup>

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<sup>43</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 84, U.N. Doc. A/64/226 (4 Aug. 2009).

<sup>44</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 118, U.N. Doc. A/64/226 (4 Aug. 2009).

<sup>45</sup> Human Rights Council Res. 22/6, Protecting human rights defenders, ¶ 4, U.N. A/HRC/RES/22/6 (12 Apr. 2013).

<sup>46</sup> *The Sunday Times v. The United Kingdom*, ¶ 49, No. 6538/74, Eur. Ct. H.R. (26 Apr. 1979). See also European Commission for Democracy through Law (Venice Commission), Opinion on federal law no. 126-FZ on amending certain legislative acts, ¶ 41, Opinion 814/2016, CDL-AD(2016)020 (13 Jun. 2017).

Articles 13 and 21 of the Reforms, which provide for cancelation of an organization for “altering public order,” are not defined with sufficient precision to provide organizations and their members notice to foresee whether their conduct will “alter public order.” “Public order” is not defined in the Reforms, the NGO Law, the Civil Code, or the Constitution. Guatemala’s Public Order Law, which regulates the declaration of states of emergency, does not provide a clear definition either, but states in article 1 that “this law applies to cases of invasion of the national territory of serious disturbance of the peace, of public calamity, or activities against the security of the State.”<sup>47</sup> It is unclear whether these situations comprise the exhaustive list of situations that would apply to the interpretation of “public order” in Decree 4-2020, or whether the term holds some other meaning in Decree 4-2020. Without a clear definition of what types of conduct may be considered to “alter public order,” the application of the Reforms is open to the discretion and potential abuse by the Ministry of the Interior.

One activity that may possibly be interpreted as “altering public order” is social protests. According to the official record, during the February 11, 2020 debate on Initiative 5257, several representatives explicitly raised the possibility that this provision is broad enough to apply to public protests or strikes.<sup>48</sup> These comments further cause concerns that the application of the Reforms may be discriminatory and seek to silence opposition voice. However, Guatemala is bound by the Inter-American Court on Human Rights’ precedent that the freedoms of association and expression, exercised through peaceful protests, should be given the “maximum protection possible.”<sup>49</sup>

In short, the involuntary closure provisions contained in Decree 4-2020 do not appear to comply with the principles of legality and proportionality and risk weakening the pluralistic nature of a democratic society.

## **2. Government supervision of NGO activities according to internal organizational statutes is an unnecessary intrusion**

The stated purpose of Decree 4-2020 in its preamble is to ensure that “non-profit NGOs operate in accordance with their statutes” and that NGOs be “required to provide accounts of their operations and the activities for which they were created . . . clearly establishing that they act in

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<sup>47</sup> Decreto 7 de la Asamblea Nacional Constituyente, Ley de Orden Público, art. 1 (9 Dec. 1965) (“*Esta ley se aplicará en los casos de invasión del territorio nacional de perturbación grave de la paz, de calamidad pública o de actividades contra la seguridad del Estado.*”).

<sup>48</sup> Congreso de la República de Guatemala, Diario de Sesiones, pp. 83-86 (11 Feb. 2020).

<sup>49</sup> Corte Interamericana de Derechos Humanos. *López Lone y Otros v. Honduras*, Sentencia, 5 Oct. 2015 (Excepción Preliminar, Fondo, Reparaciones y Costas), ¶ 160.

accordance with their statutes and that they are not dedicated to biased activities.”<sup>50</sup> This aim provides context for articles 4, 16, and 19 of the Reforms, which instruct the government to monitor the internal workings of organizations.

Article 4 of Decree 4-2020 reforms the NGO Law to require NGOs to identify their organizational purpose as a specific category, such as a charity, a sports association, a research organization, or a lobbying group. Articles 16 and 19 recall the preamble of Decree 4-2020 and allow the REPEJU to act of its own accord to involuntarily cancel NGOs which do not “circumscribe themselves to fulfilling their statutes”<sup>51</sup> and call on the Ministry of the Interior, the Tax Authority, and Comptroller General to “monitor that the resources of foundations and NGOs are used according to their purpose” and to “denounce any act identified as at odds with the law or public order.”<sup>52</sup>

Independence and non-interference in the internal affairs of organizations are essential elements for the full realization of the freedom of association. The Human Rights Council recognized this principle in a resolution, stating that “reporting requirements placed on individuals, groups and organs of society [should] not inhibit functional autonomy.”<sup>53</sup> The U.N. Special Rapporteur on the freedom of association has observed that governments often use “extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment.”<sup>54</sup> This observation was echoed by the U.N. Special Rapporteur on human rights defenders, who stated that “States should not interfere with the internal management and activities of NGOs.”<sup>55</sup> Excessive State monitoring and internal interference suppress critical voices and weaken democratic debate.

The European and African human rights systems have further developed the understanding of the right of associations to be free of interference from governments. Discussing the freedom of association in the context of a trade union, the European Court on Human Rights held that the

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<sup>50</sup> Decreto 4-2020, Preamble (“*Considerado: Que es necesario establecer que las organizaciones no lucrativas se desempeñen de conformidad con sus estatutos, con la transparencia del caso mediante la inscripción en las distintas entidades del Estado que tengan relación con sus fines, para que obligatoriamente rindan cuentas de sus gestiones y actividades para las que fueron creadas y evitar con ello la utilización de los recursos con que cuenten, sin importar su procedencia, que puede ser nacional o extranjera, estableciendo claramente su actuar con base a sus estatutos y no se dediquen a actividades sesgadas para el cual fueron creadas, facilitándoles con ello el cumplimiento de sus fines y objetivos.*”).

<sup>51</sup> Decree 4-2020, art. 16 (“*El Registro de Personas Jurídicas (REPEJU) del Ministerio de Gobernación podrá actuar a instancia de parte o de oficio a cualquier violación a la normativa contemplada en esta Ley a efecto de que las Organizaciones No Gubernamentales se circunscriban a cumplir con sus estatutos, caso contrario podrá resolver su cancelación.*”).

<sup>52</sup> Decree 4-2020, art. 19 (modifying article 20, subparagraph 2 of the Civil Code) (“*El Ministerio de Gobernación y la Superintendencia de Administración Tributaria, así como la Contraloría General de Cuentas, si corresponde, deberán vigilar por que los bienes de las fundaciones y las ONG se empleen conforme a su destino. Si identifican un acto reñido con la ley y el orden público, presentarán las denuncias correspondientes.*”).

<sup>53</sup> Human Rights Council Res. 22/6, Protecting human rights defenders, ¶ 9, U.N. A/HRC/RES/22/6 (12 Apr. 2013).

<sup>54</sup> Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), ¶ 38, U.N. Doc. A/HRC/23/39 (24 Apr. 2013).

<sup>55</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 121, U.N. Doc. A/64/226 (4 Aug. 2009).

freedom of association “involves . . . the right [of organizations] to draw up their own rules [and] to administer their own affairs.”<sup>56</sup> Complementarily, the African Commission on Human and Peoples’ Rights asserts that States “shall not aim at verifying the compliance of associations with their own internal procedures.”<sup>57</sup> In this sense, “it should be primarily up to the association itself and its members, and not the public authorities, to ensure that [the rules of the organization] are observed.”<sup>58</sup>

The U.N. Special Rapporteur on freedom of association has also said that “best practice dictates that States should not judge the purpose of an association when registering it, so long as it complies with international law.”<sup>59</sup> This was echoed by other special rapporteurs in a communication procedure to Indonesia regarding a draft law on “social organizations.” The human rights experts reminded Indonesia that “the right to freedom of association also entails the ability of [an organization] to conduct its activities freely and to be protected from undue interference.”<sup>60</sup> In the case of a similar draft law in the Democratic Republic of the Congo, U.N. special rapporteurs stated that associations “should be free to determine their statutes, structure, and activities . . . and free of any interference from the State.”<sup>61</sup> More recently, in the case of a new NGO regulation in Sierra Leone, U.N. human rights experts expressed concern that limiting “the scope of . . . permissible activities [of NGOs] . . . could place their independence in jeopardy.”<sup>62</sup> In response to concerns over an NGO bill in Kenya, the U.N. special rapporteurs commented that governmental monitoring of organizations, with “close[] Presidential oversight of the [registration authority] could result in an undue interference in civil society affairs.”<sup>63</sup> In the case of Egypt’s draft law on NGOs, the U.N. special rapporteurs also reminded the

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<sup>56</sup> *Cheall v. The United Kingdom*, No. 10550/83, Eur. Com. H.R. Dec. & Rep. 42, at 178, 185 (13 May 1985).

<sup>57</sup> African Commission on Human and Peoples’ Rights, Guidelines on Freedom of Association and Assembly in Africa ¶¶ 34-35 (2017).

<sup>58</sup> *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, ¶ 78, No. 37083/03, Eur. Ct. H.R. (8 Oct. 2009).

<sup>59</sup> Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Report on a comparative study of enabling environments for associations and businesses, ¶ 27, U.N. Doc. A/70/266 (4 Aug. 2015).

<sup>60</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Indonesia, pp. 3-4. IDN 11/2012 (31 Aug. 2012).

<sup>61</sup> Mandats du Rapporteur spécial sur la promotion et la protection du droit à la liberté d’opinion et d’expression; de la Rapporteuse spéciale sur le droit de réunion pacifique et la liberté d’association; et du Rapporteur spécial sur la situation des défenseurs des droits de l’homme, Communication à la République Démocratique du Congo, p. 3, U.N. Doc. OL COD 2/2017 (15 Nov. 2017) (“*Nous sommes d’avis que les membres d’une association devraient être libres de déterminer les statuts, la structure et les activités de celle-ci et de prendre leurs décisions à l’abri de toute ingérence de l’État.*”).

<sup>62</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Sierra Leone, p. 2, OL SLE 1/2018 (22 Feb. 2018).

<sup>63</sup> Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders, Communication to Kenya, p. 3, KEN 8/2013 (15 Nov. 2013).

government of its positive obligation under the ICCPR “to take positive measures to establish and maintain an enabling environment”<sup>64</sup> for the full realization of the freedom of association.

In the case of Decree 4-2020, article 16 orders the government to monitor NGO compliance with their own *internal* statutes. This restriction injects the government into the internal affairs of NGOs without limitation. As the European, African, and Universal human rights systems have repeatedly expressed, the freedom of association also entitles NGOs to independently manage their own affairs. Whether an NGO always follows the internal procedures set out in its statutes or whether its lawful aims evolve over time is not a concern of the State. Moreover, involuntary cancelation of such *internal* deviations is a significantly disproportionate sanction. Additionally, the intimidation generated by State surveillance of NGOs, under threat of cancelation, may have a severe chilling effect on the participation of NGOs in civic life.

Article 4 of the Reforms forces organizations to box themselves into specific categories and article 16 then orders the government to monitor NGOs’ activities to ensure that they strictly meet the undefined concept of that category. This restriction is not limited in scope and is not necessary for a democratic society. NGOs remain fully subject to Guatemalan law to pursue lawful aims; additional vague restrictions are unnecessary. Further, an organization may evolve its activities over time beyond its original purpose or statutes, but continue to work for lawful aims. For example, a health research organization may develop a charity program to address health issues identified in its research, or engage in lobbying efforts on healthcare policy when relevant. This is even more important in the case of critical voices, such as anti-corruption and human rights organizations which may be targeted because of their activities. The same hypothetical research organization may later decide to join a political act, such as a mass social protest. Far from protecting fundamental freedoms or democracy, this provision of Decree 4-2020 appears to impose improper restrictions on the freedom of association and discourage organizations from engaging in creative problem-solving.

With respect to article 19’s call for the Tax Authority and Comptroller General to monitor NGOs’ activities, as discussed above, the invocation of “public order” to justify restrictions on the freedom of association, especially involuntary cancelation of organizations, must meet the high bar of proportionality and least restrictive means for achieving a purpose necessary for a democratic society. Here, “public order” is no better defined than the other provisions of Decree 4-2020 already discussed and may constitute an impermissible restriction. As such, article 19’s provision may not constitute a permissible restriction on the freedom of association.

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<sup>64</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, Communication to the State of Egypt, p. 6, OL EGY 14/2016 (22 Nov. 2016).

### **3. Government control over foreign funding in article 13 of the Reforms creates a chilling effect on the activities of NGOs**

Access to financing is an essential element in the realization of the freedom of association. The international community, represented by the U.N. General Assembly, has recognized the right of association to encompass the right “to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.”<sup>65</sup> The European Court of Human Rights has similarly held that given the “importance of funding to NGOs, lack of access to funding is tantamount to preventing the NGO from existing, because it is impeded from carrying out its activities.”<sup>66</sup> Similarly, the U.N. Special Rapporteur on freedom of association stated that “[a]ny association, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities.”<sup>67</sup>

The issue of access to funding, particularly foreign funding, has been discussed in detail by human rights bodies. In an opinion on Hungary’s draft law on foreign funding for organizations, the Venice Commission held that “disclosing the identity of all sponsors, including minor ones, is . . . excessive and also unnecessary . . . These sponsors can hardly have any major influence on the relevant organisation and there is thus no legitimate reason and necessity for their inclusion in the list available to the public.”<sup>68</sup> Similarly, in a communication with Indonesia regarding its law on organizations, U.N. special rapporteurs stated that a provision requiring reporting of “any support/donation from foreign citizens and/or institution” caused “serious concern” that the provision contradicts Indonesia’s obligations under the ICCPR.<sup>69</sup> The experts explained that the provisions could “hamper legitimate human rights work” and stated that “associations should

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<sup>65</sup> G.A. Res. 53/144, U.N. Declaration on Human Rights Defenders, art. 13 (8 Mar. 1999) (“Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.”). *See also* Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 91, U.N. Doc. A/64/226 (4 Aug. 2009) (“Access to funding, the ability of human rights organizations to solicit, receive and use funding, is an inherent element of the right to freedom of association. In order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding restrictions.”).

<sup>66</sup> *Ramzanova and Others v. Azerbaijan*, ¶¶ 59, 67-69, No. 44363/02, Eur. Ct. H.R. (1 Feb. 2007) (finding that an NGO’s inability to access funding due to the state’s failure to register the NGO constituted a violation of the freedom of association).

<sup>67</sup> Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Rep. on the right to freedom of association, ¶ 68, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>68</sup> European Commission for Democracy through Law (Venice Commission), Opinion on the draft law on the transparency of organizations receiving support from abroad, ¶ 53, Opinion 889/2017 (20 Jun. 2017).

<sup>69</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Indonesia, pp. 3-4, IDN 11/2012 (31 Aug. 2012).

also have the possibility to access funding freely and without undue obstacles.”<sup>70</sup> In a communication with Sierra Leone, U.N. special rapporteurs concluded that a requirement that organizations inform the Ministry of Justice within 10 days of receipt of funds of “the source and nature of the funds and provide specific details of how and when they will be used” could have an impermissible chilling effect on the fundamental freedoms of organizations.<sup>71</sup> In an analysis of State practice, the U.N. has also expressed concern that restrictions on foreign funding that cite “prevention of money-laundering and terrorist-financing” as justifications “are often merely rhetorical and that the aim is restricting the activities of defenders.”<sup>72</sup>

In the case of Guatemala, article 13 of Decree 4-2020, which modifies article 15 of the NGO Law regarding funding, imposes the very requirements which international human rights bodies have determined unduly restrict the freedom of association. Article 13 requires NGOs to “inform the Ministry of Foreign Relations within thirty days when they receive foreign donations and financing regarding the source and purpose.”<sup>73</sup> Additionally, article 10 of the Reforms orders the creation of a public registry of all information regarding NGOs, “without limitation.” This provision could harm the privacy interests of funders, including small foreign funders whose information is disclosed under article 13. As very similar restrictions in the Hungarian and Indonesia NGO laws were found to disturb the freedom of association, article 13 of Decree 4-2020 likely also violates the freedom of association.

The discriminatory treatment in reporting foreign versus national financing raises a question regarding the true purpose of article 13’s mandatory reporting. Similarly, there is no equivalent reporting requirement for businesses that receive foreign investments.<sup>74</sup> The Ministry of Foreign Relations is neither a law enforcement entity nor an auditing body; therefore, the requirement does not appear to address fiscal or legal issues related to public order. Instead, the motive appears to provide political monitoring of funding of NGOs. Thus, the restriction is not necessary and is likely impermissible. Further, as in the cases of Hungary and Indonesia, this requirement has no minimum threshold that triggers the reporting obligation. Consequently, article 13

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<sup>70</sup> *Id.*

<sup>71</sup> David Kaye (Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression), Rep. on his mission to Tajikistan, ¶ 56, U.N. Doc. A/HRC/35/22/Add.2 (13 Oct. 2017).

<sup>72</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on Elements of a safe and enabling environment for human rights defenders, ¶ 69, U.N. Doc. A/HRC/25/55 (23 Dec. 2013).

<sup>73</sup> Decree 4-2020, art. 13 (“*En los casos en que las Organizaciones No Gubernamentales reciban donaciones y financiamiento nacionales o extranjeras, cualquiera que sea su destino, las ONG tienen que . . . informar al Ministerio de Relaciones Exteriores, cuando sean donaciones y financiamientos de fuente externa, dentro de los treinta días siguientes a su recepción, acerca de las cantidades recibidas, procedencia y destino.*”).

<sup>74</sup> Generally, businesses are only required to register with the Commercial Registry (*Registro Mercantil*) and with the Tax Authority. See Decreto 2-70, Código de Comercio, arts. 8, 14, 17, 218, 352, 371.

creates a disproportionate burden on small organizations to report without a valid need, and risks negatively impacting the full exercise of the freedom of association.

### **C. Creating criminal and civil liability for directors of NGOs that use foreign funds is discriminatory and hampers access to international funding**

In addition to the reporting requirements for foreign financing discussed above, article 13 of Decree 4-2020 reforms the NGO Law such that “if an NGO uses foreign donations or financing to alter the public order, it will be immediately canceled . . . and its responsible directors will be indicted according to criminal and civil legislation.”<sup>75</sup>

In general, the imposition of criminal liability for directors of organizations for the actions of the organization is disfavored by international human rights bodies.<sup>76</sup> Addressing criminalization based on funding sources, the U.N. special rapporteurs for freedom of association, freedom of expression, and human rights defenders stated, in a communication to Kenya on a draft bill, that “no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding.”<sup>77</sup> Similarly, the African Commission on Human and Peoples’ Rights has spoken directly to this issue, stating that “liability shall not be imputed from associations to individuals or vice versa. Offenses committed by particular members of associations shall not be taken as grounds to penalize the association itself.”<sup>78</sup> The creation of criminal liability for vague categories, such as “altering public order,” creates a risk of abusive application of criminal penalties to quell critical voices. As stated above, the Human Rights Committee has emphasized that it is essential for a democratic society to tolerate dissenting ideas.<sup>79</sup>

Here, Decree 4-2020 appears to provide for two forms of liability. Under article 13, an NGO is automatically and involuntarily canceled for a perceived violation, regardless of whether the alleged action was undertaken by an individual without the NGO’s consent. In this sense, the

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<sup>75</sup> Decree 4-2020, art. 13 (“*Si una ONG utiliza donaciones o financiamientos externos para alterar el orden público, será inmediatamente cancelada . . . y sus directivos responsables, será imputados conforme a la legislación penal y civil vigente en el entendido que la ONG cancelada no podrá operar bajo esa denominación.*”).

<sup>76</sup> Maina Kíai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Report on a comparative study of enabling environments for associations and businesses, ¶¶ 34, 37, U.N. Doc. A/70/266 (4 Aug. 2015).

<sup>77</sup> Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders, Communication to Kenya, p. 4, KEN 8/2013 (15 Nov. 2013).

<sup>78</sup> African Commission on Human and Peoples’ Rights, Guidelines on Freedom of Association and Assembly in Africa ¶ 57 (2017).

<sup>79</sup> Human Rights Committee, *Mikhailovskaya v. Belarus*, Communication No. 1993/2010, ¶ 7.3, U.N. Doc. CCPR/C/111/D/1993/2010, ¶ 7.3 (26 Aug. 2014).

actions of individuals are imputed to the organization. On the other hand, the directors of an NGO may be held personally responsible for the actions of the NGO. These provisions produce a severe chilling effect on the exercise of the freedom of association. The Human Rights Committee in its most recent examination of Guatemala specifically singled out Guatemala's record of "abusive use of criminal proceedings directed against defenders, journalists and, in particular, indigenous leaders."<sup>80</sup> The Committee's concern was so high that it required Guatemala to provide an early report on the actions taken to correct the problem within two years, well before its next five-year exam.<sup>81</sup> By targeting directors of NGOs and holding the threat of criminal prosecution over them, Guatemala is deterring NGOs and their members from taking actions that challenge the government, such as protests. Further, if enforced, the prosecution of directors is also a form of targeting social leaders and risks oppressing groups that hold different opinions than the government. Both of these consequences further weaken democratic society by creating fear of expression and reducing diversity of thought.

Moreover, in addition to the cancelation of the NGO, article 13 focuses on recipients of foreign funds to apply criminal sanctions in a way that is not articulated for NGOs that do not receive foreign funds. Since there is not a logical reason why only directors of organizations that receive foreign funds should be targeted, the purpose seems to be to discourage NGOs from seeking or receiving foreign financial assistance.

Additionally, Decree 4-2020 again invokes "public order" as a justification to restrict the freedom of association without providing clearly defined terms that allow associations and individuals to foresee whether their actions are permissible. Therefore, the provision likely violates the principle of legality and may be considered to be "proscribed by law" so as to justify a restriction on the exercise of the freedom of association.

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<sup>80</sup> Human Rights Committee, Concluding observations on the fourth periodic report of Guatemala, ¶ 36, U.N. Doc. CCPR/C/GTM/CO/4 (7 May 2018).

<sup>81</sup> *Id.* ¶ 41.

## **D. The new registration and reporting requirements of Decree 4-2020 are not necessary and weaken bulwarks of a democratic society**

### **1. Decree 4-2020's compulsory registration requirements under articles 2, 9, 17, and 20 and re-registration requirement under article 23 are not necessary restrictions for a legitimate aim under ICCPR article 22.2**

The reforms to the NGO Law and Civil Code in Decree 4-2020 require all organizations to register with the government, subject to the government's approval, without exception. Article 2 of Decree 4-2020 creates article 1*bis* of the NGO Law which stipulates that NGOs "must register in compliance with [the NGO Law] to operate in Guatemala."<sup>82</sup> Article 9 of Decree 4-2020 modifies article 10 of the NGO Law to require that NGOs register with REPEJU in order to be recognized as legal persons.<sup>83</sup> Similarly, articles 17 and 20 of the Reforms, which modify articles 15 and 22 of the Civil Code, respectively, state that "the creation of not-for-profit associations and non-governmental organizations . . . must be duly approved by the relevant authority"<sup>84</sup> and "foreign foundations are subject to [the provisions of the Civil Code] for approval."<sup>85</sup> Additionally, the Reforms "obligate" all previously registered NGOs to submit to a re-registration process or face "automatic" cancellation and dissolution.<sup>86</sup>

Across human right systems, there is agreement that the freedom of association "equally protects associations that are not registered, which means that associations should never be required to register."<sup>87</sup> The U.N. special rapporteurs for freedom of association, freedom of

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<sup>82</sup> Decree 4-2020, art. 2 ("*Las Organizaciones No Gubernamentales u ONG que se hayan constituido y registrado en otro país o territorio tienen, para operar en Guatemala, que ser inscritas y registradas conforme a la presente Ley.*").

<sup>83</sup> Decree 4-2020, art. 9 ("*Las Organizaciones No Gubernamentales para obtener su personalidad jurídica deben inscribirse en el Registro de las Personas Jurídicas (REPEJU) del Ministerio de Gobernación.*").

<sup>84</sup> Decree 4-2020, art. 17 ("*Las asociaciones sin finalidades lucrativas y las Organizaciones No Gubernamentales . . . cuya constitución fuere debidamente aprobada por la autoridad respectiva.*").

<sup>85</sup> Decree 4-2020, art. 20 ("*Las fundaciones extranjeras quedan sujetas a las anteriores disposiciones en cuanto a su aprobación y funcionamiento.*").

<sup>86</sup> Decree 4-2020, art. 23 ("*Toda las ONG que estén registradas y operando en la República de Guatemala, al momento de entrada en vigor de la ley, están obligadas a actualizar su información y cumplir con todos los requisitos de esta Ley, en un plazo no mayor de seis (6) meses . . . Transcurrido el plazo establecido en el párrafo anterior, la ONG que no haya cumplido con la actualización de la información y con el cumplimiento de requisitos en todas las entidades que corresponde, queda automáticamente cancelada y tiene que ser disuelta.*").

<sup>87</sup> Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Rep. on a comparative study of enabling environments for associations and businesses, ¶ 23, U.N. Doc. A/70/266 (4 Aug. 2015). See also *Sidiropoulos and Others v. Greece*, ¶¶ 31, 47, No. 26695/95, Eur. Ct. H.R. (10 Jul. 1998) (holding that if non-registration "prevents the organization from carrying out its activities under law, the state incurs in a violation of the freedom of association"); African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa ¶ 11 (2017) ("States shall not compel associations to register in order to be allowed to exist and to operate freely. Informal (de facto) associations

expression, and human rights defenders emphasized this issue to Egypt in a communication regarding a draft law regulating NGOs. The rapporteurs stated that “the right to freedom of association equally protects associations that are not registered . . . and [unregistered associations] should not be subject to criminal sanctions . . . [which] is particularly important when the procedure to establish an association is burdensome.”<sup>88</sup>

Related to non-imposition of a registration requirement, international human rights bodies stress that when applied, registration procedures should allow for simple “notification procedures” which “automatically grant[] legal personality as soon as the authorities are notified by the founders that an organization was created” rather than “prior authorization procedure[s] that request[] the approval of the authorities to establish an association as a legal entity.”<sup>89</sup>

Furthermore, the Human Rights Council has resolved that when new registration procedures are introduced, they should “avoid requiring re-registration” of NGOs.<sup>90</sup> This has been repeatedly applied by U.N. special rapporteurs in State communications. The U.N. Special Rapporteur on human rights defenders has explained that “newly adopted laws should not request all previously registered associations to reregister so that existing associations are protected against arbitrary rejection or time gaps in the conduct of their activities.”<sup>91</sup> Recently, in 2018, the U.N. special rapporteurs for freedom of expression and human rights defenders expressed concern that a new law on civil society organizations in Sierra Leone, which required organizations to register and previously registered organizations to re-register, would be “highly burdensome” for organizations, “especially for small organizations which don’t have the same financial capacities and resources.”<sup>92</sup>

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shall not be punished or criminalized under the law or in practice on the basis of their lack of formal (de jure) status.”); Edison Lanza, O.A.S. Special Rapporteur on Freedom of Expression, Protesta y Derechos Humanos, O.A.S. Doc. OEA/Ser.L/V/II, ¶ 21 (Sep. 2019) (stating that associations without a formal institutional structure or legal form are protected under the freedom of association).

<sup>88</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, Communication to the State of Egypt, p. 2, OL EGY 14/2016 (22 Nov. 2016).

<sup>89</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, ¶ 58, U.N. Doc. A/HRC/20/27 (21 May 2012). *See also* African Commission on Human and Peoples’ Rights, Guidelines on Freedom of Association and Assembly in Africa ¶ 12 (2017); Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the use of legislation to regulate the activities of human rights defenders, ¶ 43, U.N. Doc. A/67/292 (10 Aug. 2012); Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 59, U.N. Doc. A/64/226 (4 Aug. 2009).

<sup>90</sup> Human Rights Council Res. 22/6, Protecting human rights defenders, ¶ 8, U.N. A/HRC/RES/22/6 (12 Apr. 2013).

<sup>91</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, ¶ 62, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>92</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Sierra Leone, p. 6, OL SLE 1/2018 (22 Feb. 2018). *See also* Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the

Guatemala requires all NGOs to register with the government, without exception to size or resources. Although this requirement is not new, and may have previously violated the freedom of association, the restriction is significantly tightened under Decree 4-2020. Previously, non-registered organizations were able to operate in Guatemala, although they would forgo certain privileges. For example, international NGOs that were constituted under the laws of a foreign jurisdiction were able to operate in Guatemala without registering, so long as their finances and fiscal obligations were managed from the foreign jurisdiction. Similarly, informal organizations, such as NGO alliances which met to coordinate activities, but did not maintain a paid staff, also operated without issue. However, since Reforms require all organizations to register in Guatemala in order “to operate”<sup>93</sup> and withhold recognition of legal personhood unless they register,<sup>94</sup> foreign and informal organizations are further restricted in their activities. For example, article 15, which modifies article 17 of the NGO Law, requires that NGOs use the national bank system and only allows funds to be deposited in accounts that bear the “duly registered and inscribed name of the NGO.”<sup>95</sup> As the European Court of Human Rights has recognized, lack of proper financing prevents organizations from carrying out their purposes and constitutes a violation of the freedom of association.<sup>96</sup> Further, under article 16 of the Reforms, as discussed above, organizations may be sanctioned for not complying with these requirements.<sup>97</sup> This effectively forecloses on the ability of informal organizations to exist.

The Reforms also set a time limit for already registered NGOs to register or face automatic cancellation, a highly disproportionate measure, as previously discussed.<sup>98</sup> For previously existing informal organizations, the financial and administrative burden of registration may force them to cease their existence. Similarly, previously operating international NGOs with foreign bank accounts are now forced to undergo the costly process of reorganizing their funding and financial management. The government has not demonstrated that the significant costs of these

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Special Rapporteur on the situation of human rights defenders, Communication to the State of Egypt, p. 2, OL EGY 14/2016 (22 Nov. 2016).

<sup>93</sup> Decree 4-2020, art. 2.

<sup>94</sup> Decree 4-2020, art. 9 (modifying article 10 of the NGO Law regarding inscription) (“*Las Organizaciones No Gubernamentales para obtener su personalidad jurídica deben inscribirse*”). See also Decree 4-2020, art. 18 (modifying article 18 of the Civil Code) (“*La personalidad jurídica de las asociaciones civiles es efecto del acto de su inscripción en el registro correspondiente.*”).

<sup>95</sup> Decree 4-2020, art. 15.

<sup>96</sup> *Ramazanov and Others v. Azerbaijan*, ¶¶ 59, 69, No. 44363/02, Eur. Ct. H.R. (1 Feb. 2007).

<sup>97</sup> Decree 4-2020, art. 16.

<sup>98</sup> Decree 4-2020, art. 23 (“*Toda las ONG que estén registradas y operando en la República de Guatemala, al momento de entrada en vigor de la ley, están obligadas a actualizar su información y cumplir con todos los requisitos de esta Ley, en un plazo no mayor de seis (6) meses. Transcurrido el plazo . . . la ONG que no haya cumplido con la actualización de la información y con el cumplimiento de requisitos en todas las entidades que corresponde, queda automáticamente cancelada y tiene que ser disuelta.*”).

restrictions are the least restrictive means of achieving an allowable objective under ICCPR article 22.2.

Decree 4-2020's requirements for NGOs to register and re-register with the government are not proportionate or necessary for a democratic society and prevent informal organizations from operating. Therefore, these provisions may constitute a violation of the freedom association.

## **2. The reporting requirements of Decree 4-2020's articles 9 and 11 create an unnecessary and onerous burden on NGOs**

In jurisdictions that allow or require NGOs to register with a State authority, human rights bodies have examined the types of registration and reporting requirements, which permissibly regulate the freedom of association. As a general rule, the U.N. has stated that "registration requirements for NGOs should be clear, simple, transparent, and designed to foster an environment conducive to the establishment of a vibrant civil society."<sup>99</sup> Similarly, the African human rights system is of the opinion that "reporting requirements shall be proportionate to the size and scope of the organization."<sup>100</sup> The U.N. Special Rapporteur on human rights defenders has further stated that registering authorities should be independent from the political government and include civil society participation.<sup>101</sup> U.N. human rights experts have noted that excessive, unnecessary, and complicated reporting requirements "can eventually obstruct the legitimate work carried out by associations."<sup>102</sup> Bureaucratic requirements, including among other things, "the provision of quarterly financial reports . . . may also pose unsustainable burdens on some organizations."<sup>103</sup>

In practice, human rights bodies have frequently applied this criterion in evaluating legislation in other countries. Reviewing draft Ukrainian laws on new financial reporting requirements of "public associations," the Venice Commission and the Office for Democratic Institutions and Human Rights<sup>104</sup> cited in a joint opinion "new burdensome reporting obligations" as an

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<sup>99</sup> David Kaye (Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression), Rep. on his mission to Tajikistan, ¶ 82, U.N. Doc. A/HRC/35/22/Add.2 (13 Oct. 2017).

<sup>100</sup> African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa ¶ 48.d (2017).

<sup>101</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 116, U.N. Doc. A/64/226 (4 Aug. 2009).

<sup>102</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Sierra Leone, p. 7, OL SLE 1/2018 (22 Feb. 2018) (internal citations omitted).

<sup>103</sup> Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), Rep. on the right to freedom of association, the content of the right and its implementation in practice, ¶ 73, U.N. Doc. A/64/226 (4 Aug. 2009).

<sup>104</sup> The Office for Democratic Institutions and Human Rights ("ODIHR") is the Organization for Security and Cooperation in Europe's expert human rights body.

impermissible interference with the freedom of association.<sup>105</sup> Likewise, in a communication to Sierra Leone, the U.N. special rapporteurs on freedom of expression and human rights defenders expressed concern that requirements of NGO registration and re-registration, project registration, submission of funding, tax and financial information, and staffing obligations would unduly burden organizations. In particular, the special rapporteurs said that the strain on the NGOs' budgets could deter smaller organizations from operating, thereby restricting the exercise of freedom of association.<sup>106</sup>

Decree 4-2020 significantly expands the reporting obligations of NGOs in Guatemala. Previously, under the NGO Law, organizations only had to register themselves at the municipal office of REPEJU (previously the Civil Registry) and with the Tax Authority.<sup>107</sup> Under articles 9 and 11 of the Reforms, NGOs are required to publish periodic financial documents<sup>108</sup> and to register with:

- REPEJU, under the Ministry of the Interior;
- the Presidential Secretariat of Planning and Programming (SEGEPLAN, by its Spanish acronym), providing its creation document and names of legal representatives and board of directors;
- the Tax Authority;
- the Ministry of Foreign Affairs, in case of foreign NGOs; and
- the Comptroller, if recipient of a State grant.<sup>109</sup>

Additionally, article 10, which modifies article 11 of the NGO Law, orders REPEJU to create a “centralized registry of NGOs, with all of the information it has stored and updates regarding the

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<sup>105</sup> European Commission for Democracy through Law (“Venice Commission”) & OSCE Office for Democratic Institutions and Human Rights, Joint Opinion on draft law No. 6674 on introducing changes to some legislative acts to ensure public transparency of information on finance activity of public associations and of the use of international technical assistance, and on draft law no. 6675 on introducing changes to the tax code of Ukraine to ensure public transparency of the financing of public associations and of the use of international technical assistance, ¶ 33, VC Opinion No. 912/2018, OSCE/ODIHR Opinion No. NGO-UKR/321/2018 (16 Mar. 2018).

<sup>106</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders, Communication to the Republic of Sierra Leone, p. 6, OL SLE 1/2018 (22 Feb. 2018).

<sup>107</sup> Decree 2-2003, NGO Law, arts. 10, 13.

<sup>108</sup> Decree 4-2020, art. 11 (modifying article 14 of the NGO Law, regarding financial reporting) (“*Toda Organización No Gubernamental autorizada para operar en la República, debe publicar, en cualquier medio, su balance general al cierre de las operaciones de cada ejercicio contable.*”).

<sup>109</sup> Decree 4-2020, art. 9 (modifying article 10 of the NGO Law regarding inscription) (“*Las Organizaciones No Gubernamentales para obtener su personalidad jurídica deben inscribirse en el Registro de las Personas Jurídicas (REPEJU) del Ministerio de Gobernación. Obtenida la personalidad jurídica, se requerirá inscripción en la Secretaría de Planificación y Programación de la Presidencia (SEGEPLAN), únicamente al momento de constituirse y al efectuar cambios en su escritura de constitución y se hagan cambios de representantes legal o junta directiva. En la Superintendencia de Administración Tributaria, al momento de su inscripción y de acuerdo a lo que establecen las leyes fiscales y tributarias del país. Para las ONG constituidas en el exterior, estas se inscriben además en el Ministerio de Relaciones Exteriores. Toda ONG que reciba, administre o custodie recursos financieros del presupuesto nacional o de algún presupuesto municipal, también debe registrarse en la Contraloría General de Cuentas.*”).

creation, inscription, regulation, control and liquidation of the NGOs in the Republic of Guatemala, as well as their members . . . the centralized registry will be open to public access and view, without any limitation.”<sup>110</sup>

Taken together, these requirements do not exhibit a clear need. The creation of a public, central registry raises the question as to why registration is necessary at potentially six different State entities. The registration at SEGEPLAN and the Ministry of Foreign Affairs, which are non-independent, political institutions and play no role in the supervision of NGOs, appears to accomplish no proportional need. The monitoring role of SEGEPLAN, a direct dependency of the president, raises questions regarding the ability of NGOs to maintain their independence free of political interference or intimidation. Instead, the additional bureaucratic requirements will cause NGOs to expend more time and resources to fulfill redundant requirements. NGOs will also be at greater risk of failing to comply with a requirement, thereby exposing them to potential cancellation under Decree 4-2020 article 16, as discussed above.

Further, the requirement for all NGOs to publish periodic financial documents, regardless of size or funding types, appears to discriminate against NGOs. There is universal consensus that registration and reporting obligations should not be more onerous on NGOs than on private business.<sup>111</sup> Likewise, the publication of all information of NGOs contained in a central registry under article 10, without restriction, is an unnecessary and discriminatory measure that chills the freedom of association. The financial information, identities of employees and members, or other internal documents of private businesses are not made publicly available by the government. This invasion of privacy of associations and their members discourages the creation of NGOs. Article 10 does not provide any justification for the explicit unlimited scope of the central registry creating a disproportionate negative impact on the freedom association.

Articles 9, 10, and 11 create a serious risk of depressing the exercise of the freedom of association and weaken the important role that civil society organizations play as service providers, watchdogs, and educators for democratic societies.

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<sup>110</sup> Decree 4-2020, art. 10 (“*El Registro de las Personas Jurídicas (REPEJU) del Ministerio de Gobernación tiene un registro centralizado de Organizaciones No Gubernamentales (ONG), con toda la información que resguarde y actualice todo lo vinculado a la constitución, inscripción, reglamentación, control y liquidación de las Organizaciones No Gubernamentales (ONG) en la República de Guatemala, así como de sus asociados . . . Este registro centralizado es de acceso y consulta pública, sin ninguna limitación.*”).

<sup>111</sup> See, e.g., Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), Rep. on funding of associations and holding of peaceful assemblies, ¶ 79, U.N. Doc. A/HRC/23/39 (24 Apr. 2013); Expert Council on NGO Law, International Standards Relating to Reporting and Disclosure Requirements for Non-Governmental Organizations, ¶¶ 57, 81, 101, Council of Europe, CONF/EXP(2018)3 (27 Nov. 2018); African Commission on Human and Peoples’ Rights, Guidelines on Freedom of Association and Assembly in Africa ¶ 49 (2017).

## V. Conclusion

In sum, multiple provisions of the reforms to the NGO Law and Civil Code contained in Decree 4-2020 raise serious concerns of potentially impermissible restrictions on the freedom of association that conflict with Guatemala's international human rights obligations under the ICCPR and American Convention on Human Rights. In particular, the restrictions may not have been properly legislated and are too vague and overbroad to be considered "proscribed by law." The government is given wide, discretionary power to invoke "public order" to restrict the freedom of association without clearly defined and tailored limits for its application. Finally, the Reforms tend to create pressure to dissuade the formation of new NGOs and discourage NGO opposition to policies and practices of the government.

Moreover, many of the specific restrictions in the Reforms are similar to restrictions in the legislation of other countries that have previously been struck down or condemned by human rights bodies as violating the freedom of association, including involuntary cancellation in the first instance and without access to courts (*see* articles 4, 13, 16, 19, 21, 23), criminal liability for directors of NGOs (*see* article 13), and onerous registration requirements (*see* articles 2, 9, 10, 11, 15, 17, 18, 20, 23). Individually and cumulatively, these restrictions on the right to freedom of association appear to not meet the high bar for permissible restrictions established by international human rights conventions and jurisprudence. As such, if any of these provisions were applied, Guatemala may violate its international human rights obligations.

## VI. Potential Violations by Article

<u>Article</u>	<u>Potential Violation</u>	<u>Text</u>	<u>Analysis</u>
<b><u>Article 2</u></b>	Restricts the freedom of association to registered NGOs only	<i>Las Organizaciones No Gubernamentales u ONG que se hayan constituido y registrado en otro país o territorio tienen, para operar en Guatemala, que ser inscritas y registradas conforme a la presente Ley</i>	Section III.D.1.
<b><u>Article 4</u></b>	Restricts the freedom of NGOs to determine their own lawful purposes and activities by forcing them to be categorized in a limited way	<i>Las Organizaciones No Gubernamentales se constituyen apegadas a los criterios siguientes: [list of activity categories]</i>	Section III.B.2.
<b><u>Article 9</u></b>	Restricts the freedom of association to registered NGOs only	<i>Las Organizaciones No Gubernamentales para obtener su personalidad jurídica deben inscribirse en el Registro de las Personas Jurídicas (REPEJU) del Ministerio de Gobernación</i>  <i>Obtenida la personalidad jurídica, se requerirá inscripción en la Secretaría de Planificación y Programación de la Presidencia (SEGEPLAN), únicamente al momento de constituirse y al efectuar cambios en su escritura de constitución y se hagan cambios de representantes legal o junta directiva. En la Superintendencia de Administración Tributaria, al momento de su inscripción y de acuerdo a lo que establecen las leyes fiscales y tributarias del país. Para las ONG constituidas en el</i>	Section III.D.1.  Section III.D.2.

		<i>exterior, estas se inscriben además en el Ministerio de Relaciones Exteriores. Toda ONG que reciba, administre o custodie recursos financieros del presupuesto nacional o de algún presupuesto municipal, también debe registrarse en la Contraloría General de Cuentas</i>	
<b><u>Article 10</u></b>	Discriminates against NGOs by making public all of the State’s centralized information on NGOs without exception, while an equivalent measure is not imposed on for-profit organizations	<i>El Registro de las Personas Jurídicas (REPEJU) del Ministerio de Gobernación tiene un registro centralizado de Organizaciones No Gubernamentales (ONG), con toda la información que resguarde y actualice todo lo vinculado a la constitución, inscripción, reglamentación, control y liquidación de las Organizaciones No Gubernamentales (ONG) en la República de Guatemala, así como de sus asociados . . . Este registro centralizado es de acceso y consulta pública, sin ninguna limitación</i>	Section III.D.2.
<b><u>Article 11</u></b>	Discriminates against NGOs compared to for-profit companies by requiring NGOs to publicly make available their finances at the end of every fiscal period, without regard to the size and type of organization	<i>Toda Organización No Gubernamental autorizada para operar en la República, debe publicar, en cualquier medio, su balance general al cierre de las operaciones de cada ejercicio contable</i>	Section III.D.2.
<b><u>Article 13</u></b>	Allows for disproportionate application of involuntary cancelation of NGOs on vague and over-broad invocations of the “public order” justification that lack protections of due process  Discriminates against foreign funding of NGOs for no	<i>En los casos en que las Organizaciones No Gubernamentales reciban donaciones y financiamiento nacionales o extranjeras, cualquiera que sea su destino, las ONG tienen que . . . informar al Ministerio de Relaciones Exteriores, cuando sean donaciones y financiamientos de fuente externa, dentro de los treinta días siguientes</i>	Section III.B.1.a. Section III.B.1.b. Section III.B.3. Section III.C.

	<p>legitimate purpose that is distinguishable from domestic funding or foreign commercial investments</p> <p>Disproportionately creates criminal liability for NGO directors based on, among other reasons, an insufficiently precise concept of “public order”</p>	<p><i>a su recepción, acerca de las cantidades recibidas, procedencia y destino</i></p> <p><i>Si una ONG utiliza donaciones o financiamientos externos para alterar el orden público, será inmediatamente cancelada en el Registro de Personas Jurídicas (REPEJU) del Ministerio de Gobernación y sus directivos responsables, será imputados conforme a la legislación penal y civil vigente, en el entendido que la ONG cancelada no podrá operar bajo esa denominación</i></p>	
<b>Article 15</b>	<p>Discriminates against international NGOs that use foreign accounts by forcing organizations to only use national banks</p> <p>Restricts the independence of organizations to manage their funds outside the banking system and consequently limits the existence of NGOs to those who have legal personality through registration</p>	<p><i>Las Organizaciones No Gubernamentales deben obligatoriamente depositar y manejar sus fondos en los bancos del sistema nacional . . . teniendo la obligación de que las cuentas bancarias estén única y exclusivamente a nombre de la ONG, debidamente registrada e inscrita, administrando en los libros por separado las donaciones dinerarias y no dinerarias estableciendo claramente el destino de estos</i></p>	Section III.D.1.
<b>Article 16</b>	<p>Vests the executive branch with the power to interfere in the internal affairs of NGOs and involuntarily cancel NGOs applying broad discretion</p>	<p><i>El Registro de Personas Jurídicas (REPEJU) del Ministerio de Gobernación podrá actuar a instancia de parte o de oficio a cualquier violación a la normativa contemplada en esta Ley a efecto de que las Organizaciones No Gubernamentales se circunscriban a cumplir con sus estatutos, caso contrario podrá resolver su cancelación</i></p> <p><i>Se inscriben conforma la presente Ley; todo incumplimiento a lo estableciendo en el presente Decreto, dependiendo a la</i></p>	Section III.B.1.a. Section III.B.2.

		<i>gravedad del caso, será motivo de la imposición de sanciones administrativas, incluida la cancelación. El proceso de cancelación se desarrolla en el reglamento, y debe considerar otorgar audiencia. Contra la resolución de cancelación cabe el recurso de revocatoria, el cual resuelve el Ministro de Gobernación.</i>	
<b><u>Article 17</u></b>	Subjects NGOs to administrative approval in order to register and effectively exercise the freedom of association, instead of an inclusive notification registration procedure	<i>Las asociaciones sin finalidades lucrativas y las Organizaciones No Gubernamentales . . . cuya constitución fuere debidamente aprobada por la autoridad respectiva</i>	Section III.D.1.
<b><u>Article 18</u></b>	Discriminates against unregistered NGOs by denying them legal personhood	<i>La personalidad jurídica de las asociaciones civiles es efecto del acto de su inscripción en el registro correspondiente</i>	
<b><u>Article 19</u></b>	Subjects NGOs to scrutiny and inference by executive branch entities under a broad and vague invocation of “public order”	<i>El Ministerio de Gobernación y la Superintendencia de Administración Tributaria, así como la Contraloría General de Cuentas, si corresponde, deberán vigilar por que los bienes de las fundaciones y las ONG se empleen conforme a su destino. Si identifican un acto reñido con la ley y el orden público, presentarán las denuncias correspondientes</i>	Section III.B.2.
<b><u>Article 20</u></b>	Limits the freedom of association of foundations by subjecting them to prior government approval in order to operate	<i>Las fundaciones extranjeras quedan sujetas a las anteriores disposiciones en cuanto a su aprobación y funcionamiento</i>	Section III.D.1.
<b><u>Article 21</u></b>	Subjects NGOs to possible involuntary cancelation by executive branch entities under	<i>También pueden disolverse por acuerdo de la autoridad respectiva, a pedido del Ministerio Público, la Superintendencia de</i>	Section III.B.1.b.

	a broad and vague invocation of “public order”	<i>Administración Tributaria, la Contraloría General de Cuentas o Ministerio de Gobernación, cuando se compruebe que sus actividades son contrarias a la ley y al orden público</i>	
<b><u>Article 23</u></b>	Restricts the freedom of association to registered NGOs and automatically subjects non-registered NGOs or NGOs that fail to meet a formal requirement of Decree 4-2020 to involuntary cancelation	<i>Toda las ONG que estén registradas y operando en la República de Guatemala, al momento de entrada en vigor de la ley, están obligadas a actualizar su información y cumplir con todos los requisitos de esta Ley, en un plazo no mayor de seis (6) meses . . . Transcurrido el plazo establecido en el párrafo anterior, la ONG que no haya cumplido con la actualización de la información y con el cumplimiento de requisitos en todas las entidades que corresponde, queda automáticamente cancelada y tiene que ser disuelta</i>	Section III.D.1.



**ALIANZA**  
— POR LAS —  
**REFORMAS**

**Paul | Weiss**



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