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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2905/2016*, **

Communication submitted by:	Adil Turdukulov (represented by counsel, Gyulshaiyr Abdirasoulova)
Alleged victim:	The author
State party:	Kyrgyzstan
Date of communication:	2 August 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 14 December 2016 (not issued in document form)
Date of adoption of Views:	10 March 2023
Subject matter:	Imposition of a fine for breaching the established procedure for conducting a peaceful assembly
Procedural issues:	Exhaustion of domestic remedies; compatibility *ratione materiae*
Substantive issues:	Freedom of assembly; right to a fair trial
Articles of the Covenant:	14 (1) and 21
Article of the Optional Protocol:	5 (2) (b)

1. The author of the communication is Adil Turdukulov, a national of Kyrgyzstan born in 1981. He claims that the State party has violated his rights under articles 14 (1) and 21 of the Covenant. The Optional Protocol entered into force for the State party on 7 January 1995. The author is represented by counsel.

Facts as submitted by the author

2.1 The author is a blogger. He submits that, on 17 December 2015, he was intending to participate in a peaceful assembly in the vicinity of the House of the Government in Bishkek, together with six other participants. The purpose of the assembly was to express solidarity with a journalist, who was at risk of being arrested for failure to pay compensation for moral

* Adopted by the Committee at its 137th session (27 February–24 March 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Koji Teraya, Hélène Tigroudja and Imeru Tamerat Yigezu.

damage ordered by a court in favour of the President of the Kyrgyzstan, due to an infringement of the latter's honour and dignity. The author submits that, on his approach to the venue of the assembly, he was stopped by police officers, who ordered him not to hold the assembly, as the relevant State authorities had not been notified of the event. In response, the author explained that he had a constitutional right to hold and participate in peaceful assemblies and that no notification was required for that. Nevertheless, the police officers arrested and charged him with a violation of the established procedure for holding peaceful assemblies and not obeying the lawful orders of the police – administrative offences under, respectively, articles 392 (1) and 371 (1) of the Code on Administrative Liability.

2.2 On 17 December 2015, the Pervomayskiy District Court of Bishkek found the author guilty of an administrative offence under article 392 (1) of the Code on Administrative Liability[1] and ordered him to pay a fine, according to the author. The Court found that the author had taken part in a peaceful assembly without previously having notified the relevant authorities, which was contrary to Law No. 120 of 23 July 2002 on the Right of Citizens to Assemble Peacefully, without Weapons, and to Freely Hold Rallies and Demonstrations, stipulating that the holding of peaceful assemblies, marches, rallies, demonstrations or other public events was subject to notifying the local administrative authorities in advance. Accordingly, the Court concluded that the holding of the peaceful assembly without prior notification had been unlawful and entailed statutory liability.

2.3 The author appealed against the decision of the Court, contending that he had taken part in a peaceful assembly and had a constitutional right guaranteed by article 34 of the Constitution to participate in it. The author also argued that Law No. 120 was no longer in force at the time of the events, as it had been replaced by Law No. 64 of 23 May 2012 on Peaceful Assemblies. In accordance with the new law, not notifying the local authorities could not act as the basis to prohibit a peaceful assembly. Accordingly, the police order to disperse due to the lack of notification, as well as his administrative conviction for breaching the procedure for conducting a peaceful assembly, had no legal basis.

2.4 On 21 January 2016, the Bishkek City Court (the appeal court) upheld the decision on the author's administrative conviction. The appeal court found that the author had taken part in a peaceful assembly, which had been conducted without notifying the relevant State authorities, and that he had not heeded the lawful orders of the police to disperse. With reference to the provisions of Law No. 120, the appeal court upheld the decision reached by the court of first instance, namely that the holding of peaceful public events without previously notifying the local administrative authorities was unlawful and entailed statutory liability.

2.5 The author lodged a supervisory review complaint before the Supreme Court, reiterating his arguments raised on appeal. On 19 April 2016, the Supreme Court upheld his conviction, having found that he had taken part in a peaceful assembly without previously notifying the relevant State authorities. The Supreme Court accepted the author's argument to the effect that the lower courts had applied legislation, namely Law No. 120, that was no longer in force at the time of the events; however, it found that the applicable legislation in force, in particular article 11 of Law No. 64 on Peaceful Assemblies,[2] also contained a

[1] It transpires from the reasoning part of the judgment of the Pervomayskiy District Court of Bishkek that the author was found guilty of administrative offences under articles 392 (1) and 371 (1) of the Code on Administrative Liability. However, in the operative part of the judgment, the Court pronounced the author guilty of an administrative offence under article 392 (1) only and sentenced him to a fine.

[2] Article 11 of Law No. 64 on Peaceful Assemblies indicates in substance that:

(a) Notification of a planned peaceful assembly should be delivered by the organizers in writing between 2 and 30 days before the event. The notification may be submitted by letter, telegram, facsimile, email or other means;

(b) The notification should include information about the organizer (name of the organization and/or last name, first name and patronymic name of the person) and contact details (location of the organization and/or address and telephone number of the person), information about the venue and/or the itinerary, the start and end date and time, purpose, approximate number of participants, and the use of any sound amplifying equipment or other items during the peaceful assembly. The organizer of

provision on notifying the relevant State authorities of a planned peaceful assembly. In view of the absence of prior notification, the Supreme Court concluded that the author was guilty of an offence under article 391 (1) of the Code on Administrative Liability.

Complaint

3.1 The author claims that the State party has violated his rights under articles 14 (1) and 21 of the Covenant. He submits that the interference by the State party's authorities with the peaceful public event on the grounds of the lack of notification violated his right to freedom of assembly. Furthermore, the courts, in holding him administratively liable for breaching the established procedure for conducting peaceful assemblies, based their decisions on a law that was no longer in force at the time of the events, and disregarded the applicable domestic legislation, which did not oblige organizers of or participants in a peaceful assembly to notify State authorities of the peaceful public event. The author argues that no such obligation is contained in Law No. 64 on Peaceful Assemblies, which was applicable to the events in question. Furthermore, he refers to article 34 of the State party's Constitution, which stipulates that a peaceful assembly may not be prohibited or restricted due to lack of notification. In addition, the organizers of and participants in peaceful assemblies shall not be held liable for the lack of notification of a peaceful assembly or for failure to comply with the form, content and deadline for notification.[3]

3.2 The author asks the Committee to find a violation of his rights under articles 14 (1) and 21 of the Covenant and to request the State party to put in place safeguards against similar violations in the future.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 19 October 2018, the State party submitted its observations on admissibility and the merits of the communication. The State party explains that, in deciding on the author's administrative conviction, the courts of first instance and appeal were guided by Law No. 120, which obliged persons participating in a public event to notify the local administrative authorities of the event no later than 12 calendar days before the planned event. The State party also explains that Law No. 120 became inoperative on 23 May 2012 due to the enactment of Law No. 64 on Peaceful Assemblies. The State party specifies that, according to Law No. 64 on Peaceful Assemblies, preliminary notification of a peaceful assembly is not mandatory.

4.2 The State party notes in this regard that the Supreme Court, in its decision of 19 April 2016, found that the lower courts in the author's case had applied a law that was no longer in

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the peaceful assembly has the right to include other information in the notification, as well as attach other documents to it;

(c) If there is reliable information available regarding the holding of other peaceful assemblies or other circumstances affecting the safety of citizens, State and local authorities have the right to propose changes to the date, location and itinerary of the assembly;

(d) Persons who have notified State or local authorities of a peaceful assembly have the right to request, and such authorities are under an obligation to provide, written confirmation of receipt of the notification;

(e) The written confirmation issued by the State or local administrative authorities must include information about the authorities having received the notification and the signature of the official who accepted it, as well as the date and time of receipt of the notification.

[3] Article 34 of the Constitution, adopted by the referendum of 27 June 2010, indicates in substance that:

(a) Everyone has the right to freedom of peaceful assembly and no one shall be compelled to take part in an assembly;

(b) Everyone has the right to submit a notification to the authorities in order to ensure the holding of a peaceful assembly. A peaceful assembly may not be prohibited or restricted, nor may measures to ensure its holding be denied due to lack of notification or failure to comply with the form, content and deadline of such a notification;

(c) The organizers of and participants in peaceful assemblies shall not be held liable for the lack of notification of a peaceful assembly or for failure to comply with the form, content and deadline of such a notification.

force at the time of the events. However, the Supreme Court also found that the applicable legislation, namely article 11 of Law No. 64 on Peaceful Assemblies, also contained provisions on notifying the State authorities of a public event. The State party is therefore of the opinion that the author's argument, to the effect that the courts in his case erred in law by applying legal provisions that were no longer in force at the time of the events, is invalid.

4.3 The State party argues that, according to the author, article 392 of the Code on Administrative Liability, envisaging liability for violating the established procedure for conducting peaceful assemblies, contradicts the State party's Constitution, in which it is stipulated that the prohibition of or restriction on a peaceful assembly due to the lack of notification is not permissible. In this regard, the State party contends that the author had an opportunity to challenge the constitutionality of the above-mentioned provision of the Code on Administrative Liability before the Constitutional Chamber of the Supreme Court. Given that the author did not challenge the constitutionality of the said provision, the domestic remedies in the present case cannot be said to have been exhausted.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 25 January 2019, the author submitted comments, stating that adjudicating on the basis of legal norms that were no longer in force at the time of the events in question is contrary to fair trial guarantees under the Covenant. He submits that the legislation in force at the time of the events in his case, in particular the Constitution, does not permit a prohibition of or restriction on a peaceful assembly due to lack of notification. The Constitution also prohibits holding one liable for the lack of notification of a peaceful assembly. In its article 34 (2), the Constitution guarantees everyone the right to submit a notification of an assembly. In this regard, the author argues that a mechanism to realize this constitutional right is provided for in article 11 of Law No. 64 on Peaceful Assemblies, which was in force at the time of the events in question and which guarantees the right to hold an assembly both with and without prior notification.

5.2 In relation to the State party's argument about the non-exhaustion of domestic remedies, the author submits that the argument is irrelevant, as the subject matter of his claim does not relate to the question of the constitutionality of article 392 of the Code on Administrative Liability, but concerns the violation of his rights under the Covenant on account of his administrative conviction due to the lack of notification of a peaceful assembly.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the communication is inadmissible for non-exhaustion of domestic remedies, as the author did not challenge the constitutionality of the Code on Administrative Liability before the Constitutional Chamber of the Supreme Court. In this regard, the Committee notes the argument provided by the author to the effect that he does not question the constitutionality of the Code on Administrative Liability; the essence of his complaint is the violation of his rights under the Covenant on account of his administrative conviction due to the lack of notification of the peaceful assembly. In view of the subject matter of the complaint, as formulated by the author, the Committee sees no grounds to conclude that the author has failed to exhaust domestic remedies for the reasons specified by the State party. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4. With regard to the author's claim that his rights under article 14 (1) of the Covenant were violated, the Committee recalls that the right to a fair and public hearing by a competent,

independent and impartial tribunal is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. It further recalls that criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion, however, may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[4] In this respect, the Committee notes that the author was sentenced to an administrative fine for violating the established procedure for conducting peaceful assemblies under the relevant provisions of the Code on Administrative Liability. The Committee also notes that, although administrative according to the State party's law, the sanction imposed on the author had the aims of repressing, through penalties, the offence alleged against him and serving as a deterrent for others – the objectives analogous to the general goal of the criminal law. It further notes that the legal rules, the infringement of which was imputed to the author, are of a general character and directed towards anyone who, in his or her individual capacity, participates in a peaceful assembly. Therefore, the general character of the rules and the purpose of the penalty, being both a deterrent and punitive in nature, suffice to establish that the offence imputed to the author was criminal within the meaning of article 14 of the Covenant.[5] Accordingly, the Committee considers the author's claim raised under article 14 (1) of the Covenant admissible *ratione materiae*, insofar as the proceedings in relation to the author's administrative conviction fall within the ambit of "the determination" of a "criminal charge" under article 14 (1) of the Covenant.

6.5 The Committee considers that the author has sufficiently substantiated the claims under articles 14 (1) and 21 of the Covenant for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its examination of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that his right to freedom of assembly guaranteed by article 21 of the Covenant has been violated, as he was sanctioned under the relevant provisions of the domestic legislation for breaching the established procedure for conducting public events on account of his failure to notify the relevant State authorities of a peaceful public event. The issue before the Committee is therefore to determine whether the administrative sanction imposed on the author amounts to a violation of his rights under article 21 of the Covenant.

7.3 In its general comment No. 37 (2020), the Committee stated that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, was a fundamental human right, essential for public expression of an individual's views and opinions and indispensable in a democratic society. Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs. They are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches.[6] No restriction on the right of peaceful assembly is permissible, unless it (a) is imposed in conformity with the law; and (b) is necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), protection of public health or morals or protection of the rights and freedoms of others. The State party is under an obligation to justify the limitation of the right protected by article 21 of the Covenant.[7]

7.4 The Committee further recalls its position that notification systems requiring those who intend to organize a peaceful assembly to inform the authorities in advance and provide certain salient details are permissible to the extent necessary to assist the authorities in

[4] General comment No. 32 (2007), para. 15.

[5] *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), paras. 7.3–7.5; and *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), para. 13.7.

[6] General comment No. 37 (2020), para. 6.

[7] *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.

facilitating the smooth conduct of peaceful assemblies and protecting the rights of others. This requirement must not be misused to stifle peaceful assemblies and must be justifiable on the grounds listed in article 21.[8] A failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful and must not in itself be used as a basis for dispersing the assembly or arresting the participants or organizers, or for imposing undue sanctions, such as charging the participants or organizers with criminal offences. Where administrative sanctions are imposed on organizers for failure to notify, this must be justified by the authorities.[9] Lack of notification does not absolve the authorities from the obligation, within their abilities, to facilitate the assembly and to protect the participants.[10]

7.5 Turning to the circumstances of the present case, the Committee observes that the author was sanctioned for breaching the established procedure for conducting peaceful assemblies due to his failure to notify State authorities of the peaceful assembly. The author claims that the restriction imposed on him was not provided for by law, as there was no obligation under the domestic law in force at the time of the events to notify State authorities of a peaceful assembly. The Committee, therefore, must consider whether the administrative sanction imposed on the author in the circumstances of the case constituted a restriction that was "in conformity with the law", as is envisaged in the second sentence of article 21 of the Covenant.

7.6 The Committee notes, in light of the material before it, that there is an agreement between the parties as to the peaceful nature of the event in question. The parties disagree as to whether the provisions of domestic legislation were correctly interpreted and applied in the circumstances of the present case. The Committee observes that, in finding the author guilty under the relevant provisions of the Code on Administrative Liability, the courts of first instance and appeal were guided by Law No. 120, which contained an obligation to notify State authorities of a planned peaceful assembly, although it had been repealed by the time of the events in question. The Committee further observes that the Supreme Court of the State party acknowledged that the law applied by the lower courts in sentencing the author was no longer in force at the time of the events in question. Nevertheless, the Supreme Court upheld the conviction on the grounds that the applicable legislation in force at the material time, namely article 11 of Law No. 64 on Peaceful Assemblies, also contained provisions relating to notifying State authorities of a peaceful public event (para. 2.5 above). In this regard, the Committee takes note of the State party's explanations provided in its observations on admissibility and the merits to the effect that notifying State authorities of a peaceful assembly under Law No. 64 on Peaceful Assemblies is not mandatory (para. 4.1 above). Furthermore, the Committee takes note of the provisions of the State party's Constitution, as was in force at the material time, in particular its article 34 (2) and (3), which explicitly stipulates that (a) a peaceful assembly may not be prohibited or restricted due to lack of notification of a peaceful assembly or failure to comply with the form, content and deadline for notification; and (b) the organizers of and participants in peaceful assemblies should not be held liable for the lack of notification of a peaceful assembly or for failure to comply with the form, content and deadline for notification.

7.7 Against this background, the Committee is of the opinion that the State party has failed to demonstrate that the restriction on the author's rights, namely his administrative conviction for breaching the established procedure for conducting peaceful assemblies due to the lack of notification of the peaceful assembly, was imposed in conformity with the law, as required by article 21 of the Covenant. The Committee considers, with reference to the provisions of the State party's Constitution cited above, as well as the explanations provided by the State party as to the non-mandatory nature of the notification system under domestic legislation, that, in the absence of a legal obligation in domestic law to notify State authorities of a peaceful assembly, there was no legal basis for sentencing the author to an administrative fine for his failure to notify State authorities of the peaceful public event. Accordingly, the Committee considers that the restriction imposed on the author's rights was not "in

[8] *Kivenmaa v. Finland* (CCPR/C/50/D/412/1990), para. 9.2; and *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 9.4.

[9] *Popova v. Russian Federation* (CCPR/C/122/D/2217/2012), paras. 7.4 and 7.5.

[10] General comment No. 37 (2020), paras. 70 and 71.

conformity with the law", as required by the provisions contained in the second sentence of article 21 of the Covenant. In view of the above finding, the Committee considers that there is no need to examine whether the restriction in question was justified by one of the legitimate aims set out in article 21. In the absence of any further explanations by the State party, the Committee concludes that the State party has violated the author's rights under article 21 of the Covenant.

7.8 In the light of the finding above, the Committee decides not to consider separately the claims under article 14 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under article 21 of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take appropriate steps to provide the author with adequate compensation, including reimbursement of the fine imposed on him and any legal costs incurred. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.