

**THE ENABLING ENVIRONMENT CONFERENCE**  
Effective Private Sector Contribution to Development in Afghanistan

**CHALLENGES PRESENTED BY THE LEGAL,  
REGULATORY, ADMINISTRATIVE AND FISCAL  
FRAMEWORK GOVERNING CIVIL SOCIETY**

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**I. INTRODUCTION**

This paper aims to address the legal framework for civil society and sector sustainability that would provide an enabling environment for private initiative in Afghanistan. Within this context, it is important to first describe the universe of organisations that will be considered. The organisations are referred to in Dari or Farsi as *Jame'a Madani*, *sozman-e khair-e dawlati*, or *sozman-e-ijtima*. The English terms for such organisations are civil society organisations (CSOs) or non-governmental organisations (NGOs). None of these organisations are part of the government, nor are they political parties or business organisations (though they include associations of business organisations). They are all organised as not-for-profit bodies, whether they are mutual benefit organisations (MBOs) meaning that they benefit members of the organisation, or public benefit organisations (PBOs) meaning organisations that benefit a significant segment of the public.

*Some examples of MBOs in Afghanistan include:*

- ♦ Organisations of origin – tribes, ethnic groups, clans, *qawm*
- ♦ Organisations of religion – shias, sunnis, sufis, salafis, wahabis

- ♦ Traditional organisations that manage daily life – shuras, mirab, haqaba, aasher, *komites* (for people from Pakistan)
- ♦ New organisations that manage daily life – “new shuras”, community development councils (CDCs)
- ♦ Organisations for the betterment of a profession or trade (bazaar merchants associations, traditional guilds of, for example, weavers or silversmiths, workers or farmers unions and different kinds of cooperatives<sup>1</sup>)
- ♦ Organisations of cultural or recreational life – Buzkashi teams, wrestling teams, pigeon flying groups, singing, poetry and dancing associations

*Some examples of PBOs in Afghanistan include:*

- ♦ Zakat committees – usually organised through mosques
- ♦ Foundations (e.g. Massoud Foundation, Bayat Foundation) which make grants to local CSOs
- ♦ Service providing organisations offering, for example, education (particularly madrassahs), health (e.g., Aga Khan Hospital in Bamyan), loans through microfinance provision, and technical assistance for agriculture, such as irrigation canals

- ◆ Democracy and human rights organisations (e.g., Independent Human Rights Commission, various women's organisations etc.)
- ◆ Research organisations – Afghan Research and Evaluation Unit (AREU) and others
- ◆ Groupings of CSOs – Forum for Culture and Civil Society (FCCS), ACBAR, ANCB and ACSF

Within reference to these types of civil society organisations,<sup>2</sup> the consultants have concluded that the current legal framework for civil society organisations (CSOs) in Afghanistan, while somewhat redundant and confusing, has many of the attributes that are requisite for an “enabling” legal framework for CSOs. Many of the laws, however, are old and in need of modernisation. In addition, their application appears haphazard, and certain aspects of the way in which they relate to each other have created considerable confusion for CSOs, the government and funding organisations. Moreover, some legal reform efforts (e.g., the effort to write the NGO Law, which was adopted in 2005) have taken time and attention away from more complex issues raised by the legal system for CSOs in the country.

*Finally, there are systemic problems that inhibit the growth of a healthy civil society in Afghanistan. These include the:*

- ◆ Lack of a culture of trust and mutual support
- ◆ Lack of a culture of philanthropy
- ◆ The questionable legitimacy of some organisations that are classified as CSOs

To address these problems, legal reforms should look holistically at what further efforts are needed to make it easier for the Afghan people to establish and fund all kinds of CSOs.

*In order to address the systemic problems described above, law reform efforts should:*

- ◆ Aim to reinforce social development by providing the underpinnings for a more stable and indigenous civil society
- ◆ Ensure that the laws are comprehensive and straightforward in their provisions and transparent and consistent in their application
- ◆ Adopt a modern view of the traditional Afghan and Muslim legal forms, one that is consistent with notions of Islamic philanthropy developing in other Muslim nations. The approach to legal reforms recommended in this report is structured in terms of

the traditional Afghan legal framework, which comes fundamentally from the basic civil laws promulgated in 1921 in a *nizamnama* of King Amanullah. This framework was updated in the Civil Code (CC) and adopted in 1977, which is still applicable today. The report also suggests revisions in the current framework for CSOs to correct provisions drafted in ignorance of those traditions.

## II. CASE STUDIES<sup>3</sup>

The report is based on a series of case studies, which are described here. They involve legal problems faced by both domestic and foreign<sup>4</sup> CSOs seeking to operate in the country, as well as the problems faced by the government agencies seeking to process CSO applications and exercise effective oversight of the operations and activities of CSOs.

### Case Study 1: Domestic CSO – membership organisation (association)

*Organisation set up for water project implementation in partnership with a foreign organisation*

A local *shura* has been contacted by an international development organisation that wishes to implement a project to build water supply systems for drought relief near Kabul. It has been asked to partner with the international organisation or to find a group of citizens that will set up an organisation to partner with the international organisation. The *shura* would like to assist with the project in the local community because the needs are great, but it will need to be registered as an association in order to do so.

*Association of doctors wishing to establish a community medical clinic*

A local group of doctors wants to establish a medical clinic to provide medical care in a poor neighbourhood in Herat. An entrepreneur has donated the building and equipment, so there is little start-up cost. Since the doctors and nurses will volunteer their time, there is little need for additional resources for operations, but the group may need to import some medical supplies. The doctors expect to receive contributions from wealthy members of the community to support the clinic and pay for imports.

*Association set up by deaf people to assist themselves in their social, economic and cultural life*

A group of deaf people has decided to establish a self-help organisation because of the lack of job opportunities and insufficient family and governmental support systems for deaf children and adults. The group expects to raise money from membership fees and government grants.

Each of these groups and the *shura* will need to decide whether to register as an NGO under the 2005 NGO Law or as a Social Organisation (SO) under the 2002 Social Organisations Law. If it registers an SO, it will register with the Ministry of Justice (MoJ), and if it registers as an NGO, it will register with the Ministry of the Economy (MoE). Each of these legal forms requires a membership governance structure, which will be appropriate for the types of CSOs mentioned here, as the contemplated activities are typical membership organisation activities. (See Art. 9 and Art. 23 of the SO Law, which incorporates CC Arts 403-439 by reference; NGO Law Art. 14.5)

Unfortunately, it is difficult to advise these groups as to which registration system to use because certain issues are not settled under one or both of these laws.

*These include:*

- ◆ Issues regarding the application process (including how many members an organisation must have to register and whether it can have foreign members)
- ◆ Lack of clarity about reporting requirements once an organisation is registered
- ◆ Lack of clarity about internal governance requirements for a domestic CSO registered in Afghanistan
- ◆ Whether an organisation can have access to foreign funding
- ◆ The extent to which the organisation and its donors will receive tax benefits (including exemption from income taxes and customs duties)

**Case Study 2: Domestic CSO – non-membership organisation (foundation)**

*Grant-making secular foundation*

A wealthy person in Afghanistan wishes to establish a foundation that functions like

foundations in other civil law countries by making grants to support civil society organisations within the country that are engaged in a variety of reconstruction or development projects. The wealthy person does not want to have a membership organisation (an association) because members would be able to elect the Board of Directors; he wants control of the organisation to remain with his family.

*Grant-making foundation that will also receive contributions*

The family of a dead Afghan hero wishes to establish a traditional foundation in his name. Similar to the wealthy person, the family does not want to establish a membership organisation because it wishes to control the Board of Directors. In addition, the foundation knows that it will be able to raise money abroad and use it for the support of civil society activities in Afghanistan.

*Aufac*

A wealthy figure (an Arbab or Zamindar) wishes to establish an *aufac* for the benefit of a mosque in a village so that it can continue to provide needed social services to the poor. He has been told that he can do so by consulting with the Ministry of Haj, Ershad and Aufac, but he can find no one to help him or give him information about what he should do.

The organisers of each of these organisations understand that the Civil Code provides for the form of “foundation” or *aufac* and that other organisations have already registered as foundations (*buniyat*) or *aufac* in Afghanistan. Yet, none of them can find good information on how and where to register their organisations. There is also no information available with respect to whether tax benefits are available for gifts to the organisations, either from the founder(s) or others, or what the rules are about fund-raising abroad.

**Case Study 3: International/foreign CSO – branch office to carry out an education project for women and girls**

An international or foreign organisation is seeking to set up a branch office to carry out education projects for women and girls in Afghanistan. It realises that it will face political and social problems, but it believes it can resolve these by partnering with local organisations that are already involved in these issues. However, it must deal with the question of how to register a branch organisation to carry out its projects in Afghanistan.

It is already established as a domestic organisation in Germany, and it has been promised funding from GTZ to carry out its work in Afghanistan.

#### Case Study 4: Government Ministries

##### *Ministry of Justice*

Registration and oversight of the approximately 80 political parties and over 450 Social Organisations in Afghanistan is in the hands of the MoJ's Department of Coordination, Evaluation, and Registration of Political Parties and Social Organisations. The MoJ reviews applications for registration to obtain legal entity status, but it appears not to require annual reports from the SOs subject to its jurisdiction.

##### *Ministry of Economy*

The Ministry of Economy's NGO Department registers and oversees the approximately 1,100 NGOs registered in the country (of which more than 850 are domestic and 250 are foreign). It is apparently staffed with high quality professionals who understand their work.<sup>5</sup>

##### *Ministry of Haj, Ershad and Aufac*

There is no indication from interviews or in the literature that this Ministry is functioning at all with respect to CSOs despite the role envisioned for it by the Civil Code.<sup>6</sup>

##### *Ministry of Finance / Tax Administration / Customs Administration*

There is no indication that the Ministry has begun to administer Article 11 of the Income Tax Act, which provides tax exemption for various public benefit organisations. It is also unclear to what extent the Ministry is dealing with customs exemptions except on an ad hoc basis.

### III. ANALYSIS OF THE CASE STUDIES AND THE ISSUES THEY RAISE

#### Successes and gaps in the current legal enabling environment – technical analysis

##### *Successes*

One significant success at present is that the numbers of CSOs and NGOs registered in Afghanistan are increasing, and most of them appear to be doing good work focused largely on the reconstruction and development of the country.

It also appears that the government's antagonism toward NGOs has receded in response to the enactment of the NGO Law in 2005. Nonetheless, there is clearly a real desire on the government's part to control foreign funding of domestic CSOs (most certainly those that are registered as NGOs), and this needs to be considered in any legal reform process. In addition, there are the overarching systemic problems mentioned in the introduction, which must be recognised and considered as part of the legal reform process.

##### *Gaps*

Despite these successes, problems arise at the policy level due to a general lack of understanding of good legal structures for civil society. Problems arise at the implementation level due to inadequate funding and staffing, and applications for registration not having been adequately streamlined by the agencies. This report does not suggest that there is any lack of good will on the part of the MoJ, the MoE and the MoF, but rather that the constraints they face make effective, consistent and efficient application of the existing policy framework almost impossible. This section analyses the current gaps in the legal environment for CSOs as it applies to the Case Studies from Section 2. It looks principally at technical issues, reserving the analysis of the systemic issues in the below sub-section (iii) titled "Overview of current successes and current systemic problems".

##### *Domestic membership organisations*

Almost all domestic CSOs currently operating in Afghanistan are membership organisations (associations, in the terminology of the civil law). They have membership governance structures; with a General Assembly as the highest governing body of the organisation (see CC Arts 429-436). The Civil Code, the SO Law and the NGO law require this structure. The three organisations set up to deal with the water project, the medical clinic and aid to the deaf described in the Case Studies will thus be membership organisations.

Aspects of the legal regime that would militate in favour of each of the organisations registering as SOs include the following:

**Application process.** The application process for NGOs at the MoE, which involves both the "Technical Commission within the NGO Department of the Ministry of Economy" and a "High Evaluation Commission" for final review of registration applications, is problematic because of its complexity and the possibility of inconsistent, or perceived inconsistent, application of the process,

sometimes for political or personal reasons. The intricacies of the process provide various opportunities for bribery to take place.

Furthermore, it appears that the process set up by the NGO Law confuses two issues: 1) the acquisition of legal entity status and 2) the certification of an organisation to engage in development activities.

It is highly unlikely that a CSO that did not want to engage in development activities would register as an NGO. Even an organisation arguably involved in development, such as the medical clinic, would find it advantageous to register as an SO with the MoJ rather than an NGO with the MoE because the MoJ process is simpler and quicker. After being registered in Kabul, it could apply for a licence from the appropriate line local ministry office in Herat (e.g., to the Ministry of Health for permission to operate the medical clinic). No licence would be required for the self-help organisation for the deaf; registration under the simpler process for SOs at the MoJ would suffice.

The time period within which the MoJ must act on an application for registration of an SO is unclear because of a conflict between the Civil Code (60 days) and the SO Law (30 days) that needs to be resolved. However, since the registration process for SOs cannot take longer than 60 days and is much less cumbersome than the process under the NGO Law, there appears to be a significant advantage to registering as an SO.

**Reporting requirements.** The NGO Law imposes quite burdensome reporting requirements, and these could become even more burdensome if the amendments proposed by the MoE are passed by Parliament.<sup>7</sup> A significant reason for this is that the NGO Law seems in fact to be aimed at controlling foreign funding for development and not organisations that are domestically funded either by government or by private donations. The Civil Code imposes reporting requirements on all associations, which would include NGOs as well as SOs,<sup>8</sup> but these are apparently not enforced by the MoJ vis-à-vis registered SOs, and the MoE appears to apply only the reporting requirements of the NGO law.

Confusion about the reach of NGO and SO laws may mean that the domestic organisation set up to carry out the water project, even though clearly a foreign-funded development project, can avoid the reporting requirements of the NGO Law by registering as an SO. There appears to be uneven application of the rules: some organisations register only as an NGO or an SO, while others register as both SOs (to receive legal entity status) and as

NGOs (to be able to engage in NGO-type development activities). This means that such organisations will go through a two-step process (which the NGO Law appears to have been designed to avoid). It is easy to understand why there is confusion and frustration about the system not working properly.

**Governance requirements.** The SO Law provides significant and useful guidance as to the internal governance of an organisation, including rights and duties of members and the roles of the General Assembly and the Board of Directors, because it includes by reference the governance provisions of the Civil Code applicable to associations. Thus, all three organisations mentioned in the Case Studies should refer to the formal requirements of the SO Law/Civil Code in drafting their articles of association. Although the NGO Law has no internal governance standards of its own and makes no reference to the provisions of the Civil Code, these Code provisions should be regarded as necessarily applicable, for NGOs are a form of association.

**Non-distribution constraint.** Both the Civil Code and the SO Law are clear that the non-distribution constraint applies to SOs.<sup>9</sup> The NGO Law does not have a comprehensive non-distribution constraint, although it does forbid the distribution of profits (Art. 22(4)) and, in a separate article, distributions on dissolution (Art. 37(1)). However, the provision in the NGO Law Art. 22 (4) stating that "Directors, officers, and employees may not carry out any economic transaction with the organisation" is too strict as it forbids transactions favourable to the organisation as well as those that might be unfavourable. This might influence an organisation to register as an SO.

*On the other hand, there are also three possible reasons why an organisation may want to register as an NGO instead of an SO:*

**Access to foreign funding.** Some have suggested that the MoJ does not permit SOs to receive foreign grants and that only NGOs – but not SOs – are project implementers. If that were true, then the proposed domestic organisation in the Case Study that will carry out the water project would seek to register as an NGO.

Evidence suggests that both assertions are untrue in terms of actual practice. Many prominent SOs, such as the Afghan Civil Society Forum (ACSF), Foundation for Culture and Civil Society (FCCS) and the Massoud Foundation receive foreign funding and implement projects. Statements by SOs about the situation<sup>10</sup> also clarify that SOs can both legally receive foreign funds and implement projects.<sup>11</sup> Nevertheless, confusion about the issue

continues, and this may cause some development organisations to think that they must register as NGOs.

**Foreign members.** A domestic organisation might want to register as an NGO as opposed to an SO if it wanted to include foreigners as members. While the Civil Code is at best vague about whether foreigners can be members (and the SO Law does not forbid it), the NGO Law is clear that foreign membership (including as founders) is permitted. It should be clarified that all domestic organisations are permitted to have foreigner members.

**Number of founding members.** The NGO Law requires only two founders while the SO Law requires 10. This may cause some organisations to seek registration as NGOs. A useful change in the SO Law would reduce the number of founders to three or even two.

A further issue to consider is one that some think is decisive but which, upon examination, turns out not to favour one form of registration over the other. That is the issue of tax privileges.

**Income tax exemption.** Any non-profit-distributing Afghan domestic organisations that are organised for and engage in education, cultural, literary, scientific or charitable purposes are exempt from income tax under Art. 11 of the 1965 Income Tax Act (as amended in 2005). Income from commercial activities of such organisations that is "not in keeping with the purposes of the organisation" is, however, subject to tax. What this appears to mean is that all public benefit CSOs will be exempt from income tax on their income from gifts, grants, membership fees, investment income, and perhaps income from commercial activities that further the public benefit purposes of the organisation.

The self-help organisation for the deaf mentioned in the Case Studies can argue that it should be tax exempt because it is both educational and charitable, but whether this argument will prevail is uncertain because the tax authorities have yet to issue regulations or guidance as to what will be considered to fall within Art. 11.

**Customs duties.** Art. 27 (2) of the 2005 Customs Code by its terms grants exemptions for goods imported into the country "by or for public and private foreign and International relief and development agencies approved by the Government". Therefore, if a domestic CSO (whether an SO, an NGO or a foundation) were carrying out a relief or development project for an approved foreign or international agency, it would have a strong argument that goods imported for that

project should be exempt from customs.<sup>12</sup> The provision of the NGO Law allowing for a "Customs Law" exemption for NGOs for goods "related to and necessary for not-for-profit and charitable purposes," however, is both broader and more narrow than the Customs Code, as it is limited to NGOs and purports to make exemptions available even for projects not carried out for approved foreign or international relief or development agencies. The Customs Code states specifically that "[i]f any provisions from this law are in conflict with the provisions of any other legislation, the provisions of this law shall prevail."<sup>13</sup> This would make the provision in the NGO Law invalid to the extent it is inconsistent with the Customs Code. Furthermore, any goods imported for the water project should be exempt from customs even if the organisation registers as an SO, at least if the international organisation funding the project has been approved by the government. On the other hand, medical supplies imported by the medical clinic would not be entitled to customs exemption under Article 27(2) of the Customs Code (unless funded by an approved foreign or international agency), though it might be entitled to exemption under other provisions that, at least in translation, are not clear.<sup>14</sup>

**Benefits for donations.** At the present time, there are no benefits for charitable contributions to public benefit CSOs, which may limit the possibility for the medical clinic to receive the donations it needs to sustain itself.

#### *Domestic non-membership organisations*

Although most CSOs in Afghanistan are associations, with a membership governance structure, some call themselves foundations (e.g., Foundation for Culture and Civil Society (FCCS), Massoud Foundation, Bayat Foundation, Foundation for Free and Fair Elections). It is difficult to determine in each instance whether or not they really are foundations in the traditional civil law meaning of the term (i.e., non-membership organisations); some organisations either are or want to be, such as the Bayat Foundation.

Unfortunately, although the Civil Code provides for foundations and *aufac*, there appears to be no interpretation or implementation of these Civil Code provisions, whether the organisation is a private foundation that makes grants, a publicly supported foundation, or an operating foundation carrying out its own projects. There is also a lack of clarity about what the rules are for *aufac* and whether or not the Ministry of Haj, Ershad and Aufac is currently registering such organisations. The Ministry does not appear to exercise any

oversight with respect to them. In addition, although some of the current foundations raise funds abroad, it is not clear what the legal rules are for bringing these funds into Afghanistan.

The 1977 Civil Code provisions on foundation registration either are no longer implemented or have been overtaken by developments in society – they specify registration at local registration offices, which appears not to occur (in keeping with the centralisation of government functions).<sup>15</sup> Although no registration or supervisory role for foundations has been assigned to the national office of the MoJ, some foundations apparently have registered there. The 1977 Civil Code assigns oversight responsibility with respect to oversight of all foundations or endowments to the Ministry of Haj, Ershad and Aufac, but this is not currently occurring due to a lack of capacity with regard to both *aufac* and foundations, and a lack of competence with regard to foundations.

In addition, regardless of how the question of the registration of foundations is resolved, the current legal framework leaves large gaps with respect to the internal governance and reporting requirements for foundations and *aufac*, and the extent to which they may receive foreign funding. The customs duty issues raised above regarding associations should presumably be resolved by making the treatment of foundations and *aufac* consistent with the treatment of domestic membership organisations.<sup>16</sup>

The inadequate and uncertain regulation of foundations and *aufac* not only represents a huge gap in the legal framework for domestic CSOs, but also raises concerns for one of the most potentially important vehicles of resource development and financial sustainability of the CSO sector in Afghanistan. Without a functioning system for registering foundations and *aufac* and exercising oversight with respect to them, there are, in principle, no legal vehicles for the development of local fund-raising structures such as private *zakat* funds (which resemble Western community foundations but could be established as *aufac*) or private endowed foundations that could provide grants to domestic CSOs for the support of social and economic progress. Other civil law countries, including Muslim ones such as Yemen, have well-defined legal rules for non-membership CSOs, which support the formation and functioning of foundations. The gaps in the Afghan legal environment, as well as practices elsewhere, suggest that there are significant legal issues for non-membership organisations that need urgent resolution as part of a comprehensive reform process in Afghanistan. In sum, the foundation for the dead Afghan hero and the *aufac* to aid the poor

through a local mosque mentioned in the Case Studies are currently left without any useful legal guidance.

#### *Foreign and International CSOs*

An international CSO, like the German one in the Case Study, which wishes to conduct projects in Afghanistan, faces different issues from those that confront a domestic organisation. Consistent with rules applied in other countries, a foreign or international CSO is able to establish a branch in Afghanistan by applying first to the Ministry of Foreign Affairs for clearance and then registering a branch office with the MoE (it really has no choice but to use the NGO Law to register its branch, as the SO Law would not apply to it). If the GTZ-funded organisation does successfully complete the MoE registration process, it will be recognised as a foreign or international organisation under Art. 5 of the NGO Law, and it will be subject to the oversight provisions contained in the NGO Law. The rules for registration and oversight of foreign and international CSOs under the NGO Law are fairly straightforward.

Problems arise, however, with respect to all sorts of administrative issues once the organisation begins to do its work in the country (licence plate renewals, visas, etc.). It is doubtful that complete resolution of these issues is possible in the present climate, where there is considerable suspicion about foreigners and foreign funding.

One current confusion in the NGO Law as written (but apparently not as applied) will be cleared up once the proposed amendments to it are made. This concerns the scope of the law as it applies to foreign organisations, which clearly do not want to have to establish themselves as separate, domestic organisations.<sup>17</sup>

With regards to taxes, foreign and international CSOs are on the same footing as domestic organisations when it comes to income taxes. They are, however, currently treated more favourably than domestic organisations with respect to customs duties (Art. 27 (2) of the Customs Code by its terms grants exemptions for goods imported by or for approved international and foreign organisations, at least to the extent that import of construction materials is not involved),<sup>18</sup> although it does appear that some domestic organisations have been receiving customs duty exemptions through special, one-off applications.

## Roles and responsibilities

There is significant confusion about roles and responsibilities between the MoE and MoJ because of confusion about which laws apply to which types of organisations and how they should interact with each other. It would be possible to clear up much of that confusion by making the entire NGO "registration" process a second step after acquisition of legal entity status. Thus, all domestic CSOs, whether membership or non-membership organisations, would obtain legal entity status by registering with the MoJ as set out in the Civil Code and the SO Law. If they were then to desire to engage in reconstruction or development projects, they would register as "NGOs" with the MoE. This would force all CSOs to have effective oversight if they were to receive foreign funds for social and economic development activities. This separation of functions would allocate responsibilities between the two ministries according to their relevant competencies; this is suggested in the Recommendations in Section 4.

### *Ministry of Justice*

Various studies<sup>19</sup> of the MoJ Department of Coordination, Evaluation and Registration of Political Parties and Social Organisations indicate that the Department is understaffed (it has only 15 staff members and they are all based in Kabul) as well as underfinanced. Its role is complicated by the fact that the laws governing reporting obligations and oversight responsibilities are unclear with respect to the organisations it registers. While there is some guidance in the Civil Code and the SO Law about how SOs are supposed to function in terms of internal governance, there seems to be no oversight exercised by the MoJ in this regard.<sup>20</sup> Clearly, the laws regarding the MoJ duties and powers need to be clarified and its competence and capacity strengthened.

### *Ministry of Economy*

The MoE NGO Department appears to be adequately staffed and competent. Nevertheless, the Department is under-funded which could lead to future problems with bribery (because salaries are so low). More financial resources should be allocated to this Department in order to prevent this from happening. In addition, a proper division of duties between the MoJ and the MoE might relieve some of the pressure on the MoE. The MoE's NGO Department is currently most concerned with operating a licensing system for CSOs seeking to conduct development projects in Afghanistan with foreign funding. It seems to be little engaged with ensuring that such organisations practice good governance or have high standards. We suggest that

the best division of labour would be to have the MoJ engage in registration (to achieve legal entity status) and oversight functions for all CSOs, with the MoE in charge of overseeing only those that receive foreign funds (to certify them to pursue their development activities and to oversee them to ensure they do so properly). This separation of functions would be similar to that in other countries, such as Bangladesh, India and Pakistan.

### *Ministry of Haj, Ershad and Aufac*

Studies indicate that this Ministry, which administers the registration of all mosques in the country, is incapable of even achieving this task, not to mention the other responsibilities it may have with respect to *aufac*.<sup>21</sup> It is difficult to discern what other functions it might be able to accomplish with respect to philanthropy in Afghanistan at the present time, due to the heavy concentration of its resources on the Haj. Serious consideration needs to be given to providing the Ministry with adequate resources and a clear mandate to register and oversee *aufac* or to transfer these responsibilities elsewhere, presumably to the MoJ.

### *Ministry of Finance / Tax Administration / Customs Administration*

No regulations have been issued by the Ministry or the tax authorities to define what constitutes a "public benefit" CSO in Afghanistan within the meaning of Article 11 of the Income Tax Act. This makes it difficult for organisations like the self-help organisation in the Case Studies to know whether it is entitled to income tax exemption.<sup>22</sup>

Regarding its duties to enforce the Customs Code, the Ministry appears to be granting applications for exemptions to domestic organisations with respect to their imports for development projects. This appears to be an area of some confusion for CSOs registered as NGOs, because they think that NGO registration guarantees them automatic exemption, and, as indicated above, this is not necessarily the case.

Thus, lack of understanding of the process has led to frustration and the belief that there is an uneven application of the law to various organisations. It would be useful for the Ministry to issue a circular with detailed guidance about when exemptions will be available to domestic organisations.<sup>23</sup> It would also be appropriate to amend the NGO law to be consistent with the Customs Code, or even to rethink the entire question of customs exemption.

### *Sector and government agencies*

Unlike countries with powerful umbrella organisations of indigenous organisations that can enforce internal governance and external accountability and transparency standards, there is an absence of effective self-regulatory mechanisms in Afghanistan that would help the two functioning oversight ministries to do their jobs. For example, requirements or methods for publishing annual reports do not exist, and there are no effective self-regulatory bodies that include all or most CSOs.

ACBAR and ANCB have promulgated an NGO Code of Conduct that sets up processes for accountability and for obtaining relief in case of harm done by NGOs. ACBAR and ANCB have agreed to hold their members accountable to it, but it is too early to gauge whether they have had any success in doing so. In addition, this Code focuses only on NGOs and deals principally with their accountability to donors. There should be a rigorous Code of Conduct for all Afghan CSOs, principally for the benefit of Afghans who are their beneficiaries, and it should have clear enforcement mechanisms.

### **Overview of current successes and current systemic problems**

Despite all the technical problems discussed in the previous section, and as indicated at the outset, there are many successful civil society organisations in Afghanistan among domestic SOs (e.g., ACSF, FCCS), domestic NGOs (e.g., Afghan Women's Organisation, Afghan League for Human Rights), and foreign CSOs (e.g., Counterpart International, BRAC). There also appear to be successful secular foundations (Bayat and Massoud Foundations, though it is unclear whether they are actually registered as non-membership CSOs). There are also two networks for NGOs (ACBAR and ANCB) and one for NGOs and CSOs (ACSF). The numbers of registered organisations appear to be rising, and both the Ministry of Economy and the Ministry of Justice are working to improve their respective registration processes.

Nonetheless, the current system is not as healthy as it might appear because of the systemic problems mentioned in the introduction.

Most of the CSOs in Afghanistan are funnels for foreign development aid, whether directly from bilateral or multi-lateral donors or indirectly from foreign/international NGOs with bilateral or multi-lateral funding. As such, they are not what some would define as "legitimate" civil society organisations -- those that are home-grown and are

accountable to domestic beneficiaries/constituents instead of foreign donors.<sup>24</sup> Others have classified NGOs in Afghanistan as civil society organisations but also question the "genuineness" of this inclusion.<sup>25</sup>

The other issues of great significance to many of those interviewed are the lack of trust and mutual support, and the absence of a culture of philanthropy in Afghanistan. Many of the people interviewed by the consultants described Afghans as having little ability to work together for the common good (for example, through mutual aid associations or community foundations) because of the tremendous problems they have faced in recent decades and deep ethnic and religious animosities. And, although there are a substantial number of people in Afghanistan with considerable wealth, most of them do not appear to be supporting charitable causes and social and economic development. Some good work is surely being done by *aufac* (e.g., poverty alleviation) but there is no data or hard information available to judge the nature and magnitude of this potentially important charitable activity.

Concerted efforts need to be started to indigenise civil society and to create a climate of self-reliance, mutual support and philanthropy. Difficult as this is, it is clearly not enough to merely provide the legal mechanisms for supporting truly indigenous organisations. The need to do this becomes all the more acute when one considers that foreign funding will not be available to sustain Afghanistan's social and economic development forever. At some point, the donors will become fatigued or will turn to other priorities. When that time comes, it will be critically important to have a mature system in place so that a functioning indigenous civil society can take on the necessary tasks of providing humanitarian relief and social and economic development.

### **Possible consequences of maintaining the status quo or of not following through on the recommendations**

The current system is, to a measurable extent, operating to deliver important reconstruction and development aid to Afghanistan and its people at this crucial time in their recovery from decades of war and civil strife. Both NGOs and SOs are being registered and are carrying out their work, but the current situation is not sustainable over the longer term. Although it is entirely possible for a strong civil society sector to develop and carry out important tasks when the legal situation is confused and incomplete, it is uncommon for this to happen.<sup>26</sup> In addition, the systemic problems for

Afghanistan are pervasive and reduce the capacity of CSOs to address long-term issues without fairly major legal reforms. Leaving the status quo as it is, or not following through on the recommendations, would not accomplish the goals of achieving a well-regulated and well-funded sector that could contribute extensively to the social and economic development of Afghanistan over the long-term.

#### IV. RECOMMENDATIONS

This section proposes a set of recommendations to resolve some of the problems mentioned in the previous section, by reference in part to international practices.

##### Opportunities in the present context

Because the current situation is fluid, it provides an opportunity for a rational and thorough legal reform process that is led by Afghans and carried out by Afghans, with foreign technical assistance as appropriate. It is a major plus that the basic underlying law, the Civil Code, has not been repealed, so that the needed structures for civil society can be created in the context of a systematic set of laws related to civilian life (family law, torts, contracts, property, etc.) in Afghanistan.

##### Recommendations for discussion

*Recommended changes in the current legal and sustainability frameworks include the following:*

**CSOs.** CSOs should be defined broadly to include all organisations that permit both natural and legal persons to associate, whether or not such entities aim to provide public goods (e.g., environmental protection organisations, humanitarian relief organisations, private schools/madrassahs) or are for mutual enjoyment and protection (e.g., self-help organisations, singing clubs, professional *shuras*, *Buzkashi* teams). This can be accomplished by bringing the current Civil Code definition of associations up to date and moving most of the detailed provisions to a separate law on associations.

**Non-membership CSOs.** Defining non-membership CSOs to include both secular (*buniyat*) and religious (*aufac*) foundations and reinvigorating the civil and religious law systems applicable to them in a way that would once again make them important vehicles for charity as well as social and economic development (strong private and community foundations – *zakat* funds), could contribute significantly to the social and economic

development of Afghanistan. It may well be that the current *shari'ah* law is adequate with respect to the *aufac*, and that more clarity is needed only for the *buniyat*, though further research and investigation is necessary to confirm this. International practice would suggest both updating the Civil Code to provide for general rules and having separate laws for each type of foundation (secular, on the one hand, and religious, on the other). *Zakat* funds deserve separate legal attention, because the pattern in other Muslim countries is that they operate more like Western community foundations and are devoted to a wider range of social and economic development and relief issues than are traditional *aufac*.<sup>27</sup>

**Registering CSOs.** It would be important to ensure that purely private CSOs could easily establish themselves as associations and foundations (thus achieving consistency with civil law traditions and giving effect to Article 35 of the 2004 Constitution of the Islamic Republic of Afghanistan) as well to make certain that they were subject to adequate oversight by the Ministry of Justice.<sup>28</sup> Achieving an easy, inexpensive and fairly quick registration process is extremely important because only by permitting CSOs easy access to legal personality can the law ensure the adequate protection of the freedom of association. This would mean that, consistent with international good practices, all domestic secular CSOs, whether associations or foundations, would be registered with the Ministry of Justice.

**NGO certification.** It would also be important to confine the NGO registration and oversight process to certification of organisations engaged in reconstruction and development who are entitled to receive foreign funding, as is done in other countries, such as Bangladesh, India and Pakistan. Qualifying as an NGO authorised to carry out foreign-funded development projects in a country is entirely separate from the process of conferring legal status, and should be seen as such.

**Determination of PBO status.** There is the question of whether public benefit CSOs (often called public benefit organisations or PBOs) should have their status as PBOs determined by a special independent CSO, such as the Pakistan Centre for Philanthropy (PCP). At the present time the Ministry of Finance seems to be incapable of administering the special income tax benefits that are available to the PBOs. As was done in Pakistan in a similar situation, perhaps it is best to delegate this responsibility to an outside organisation.

**Effective self-regulation.** There is a need to develop effective self-regulatory mechanisms that are applicable to the entire CSO sector and that have their roots and legitimacy in Afghan society.

This would suggest that more time be spent on developing a Code of Conduct that applies not just to NGOs but to all CSOs, though such a Code is unlikely to be adopted in the present climate given the antagonism among organisations. As other countries with experience in this regard such as South Africa have learned, such a process is often a long and difficult one.<sup>29</sup>

**Public accountability.** There is also a need to rely principally on public accountability – as opposed to donor oversight – to ensure that Afghanistan’s indigenous civil society remains attuned to the needs of Afghans and not primarily to the foreign policies of donor countries implementing relief and democracy-building programmes. This will require amending the laws to provide for effective public reporting by all public benefit CSOs, as well as ensuring that the government oversight bodies, and whatever self-regulatory agencies are developed, fully implement the newly developed rules.<sup>30</sup>

Some of the recommended reforms for Afghanistan have precedents in other Muslim countries, such as Indonesia, Malaysia, Pakistan and Yemen, and these models will prove to have a more lasting impact on legal and sector sustainability reforms than the import of ideas from non-Muslim traditions.

## V. CONCLUSION

This paper has discussed an approach to reform Afghanistan’s current legal and sector-sustainability frameworks. It suggests a reform agenda that could be developed to look holistically at what further efforts are needed to make it easier for the Afghan people to establish and fund CSOs, and it seeks to place that reform agenda in the context of Afghan legal and social traditions. In addition, it shows that the approach to reform must ensure that the written laws are comprehensive, straightforward and consistent, and that they are transparent and consistent in their application. It also makes clear how important it is to adopt a modern view of traditional Afghan and Muslim legal forms that is consistent with notions of Islamic philanthropy developing in other Muslim nations.

## LIST OF ANNEXES

- ♦ **Annex A:** Defining “Civil Society Organisations”
- ♦ **Annex B:** A description of the different types of Afghan CSOs
- ♦ **Annex C:** Discussion of proposed amendment to NGO Law
- ♦ **Annex D:** Comments on possible amendment to SO Law
- ♦ **Annex E:** Non-distribution constraint under Afghan law.
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**ANNEX A: DEFINING  
"CIVIL SOCIETY  
ORGANISATIONS"  
IN AFGHANISTAN**

How is civil society defined in Afghanistan, and to what extent do the various definitions reflect various cultural biases? What are the roles of CSOs, broadly conceived? How do the definitions affect reform proposals?

Determining the scope of what constitute "civil society organisations" or "CSOs" in Afghanistan is important to provide a baseline for the reforms suggested in this paper. This issue has been the subject of several recent analyses and surveys, all of which understandably demonstrate some cultural biases.

Richard Holloway describes Afghan CSOs as follows:

- ◆ Organisations that a person is born into – tribes, ethnic groups, clans, *qawm*
- ◆ Organisations of a person's religion – shias, sunnis, sufis, salafis, wahabis
- ◆ The organisations that have traditionally managed a person's daily life- *shuras*, *mirab*, *haqaba*, *komites* (from Pakistan)
- ◆ New organisations that have been set up to manage daily life – "new *shuras*", community development councils (CDCs)
- ◆ Organisations for profession or trade (bazaar merchants associations, traditional guilds of, for example, weavers or silversmiths, ex-Soviet Union of Afghan Workers, Farmers unions, different kinds of cooperatives etc.)
- ◆ Organisations for cultural or recreational life – *Buzkashi* teams, wrestling teams, pigeon flying groups, singing, poetry and dancing associations

**Harpikven, Strand and Ask (2002) (HSA)**, academic experts from Norway, criticise Amnesty International's 1999 Report for suggesting that civil society in Afghanistan is comprised of organisations formed by the educated elite. In their definition of civil society, HSA include community councils, religious networks (*ulemas*), NGOs, voluntary associations and interest groups,<sup>31</sup> but as to NGOs they state:  
"A large part of the NGO sector can more appropriately be seen as an extended arm of the UN-backed Transitional Administration of Afghanistan than as genuine civil society fostering popular participation and social organisation, or

being representatives of the local communities or groups."

Thus, HSA assert that more traditional organisations are part of civil society in Afghanistan and must be perceived as such.

**The Foundation for Culture and Civil Society (2005) (FCCS)**, an indigenous Afghan organisation, does not include *shuras/jirgas* and *ulemas* in its definition of civil society because it views them as "regressive forces in society [which are] not elected and only rarely include women and youth." FCCS are also highly sceptical about the inclusion of most NGOs in its definition, because many of them are not indigenous and comprise "a new social elite, unaccountable to both the population and the government."

**Counterpart (2005)**, a U.S. development agency funded by USAID, includes "voluntary organisations" formed by donors to carry out projects, 32 *shuras/jirgas*, as well as NGOs and social and cultural organisations, noting also the presence of umbrella organisations.

For purposes of the proposed legal reforms, the consultants have chosen the broadest possible definition of CSO, while at the same time remembering that there are inherent cultural biases in such a definition; FCCS would insist, for example, that it is Western-inspired. On the other hand, the aim of the recommendations is not to limit the scope of reform but rather to try to develop a rational policy for registration and oversight for all CSOs, consistent with the Civil Code and respectful of Afghan social and legal traditions. Thus, *shuras/jirgas* have traditionally been treated as community associations pursuant to the Civil Code, and they should not fall by the wayside as the legal reform process moves ahead. In addition, *ulemas* are in many cases quite helpful for Afghan development and should also be included in a comprehensive reform effort.

By the same token, local NGOs<sup>33</sup> should be included as CSOs for the proposed reforms. At least those that are genuine CSOs<sup>34</sup> should be required to register as associations in accordance with the Civil Code and its related legislation (the Social Organisations Law 2002) or as NGOs under an amended NGO Law. Those that are not subject to the non-distribution constraint should be required to register as commercial entities.<sup>35</sup> Such a legal regime would be consistent with traditions in the civil law and in Afghanistan under the Civil Code as interpreted by the 2002 Law on Social Organisations.

In addition, religious or charitable *auqaf* and the secular *buniyat* are also CSOs, despite the fact that they have not been counted in previous surveys of the sector. Article 354 of the Civil Code provides that all charity endowments (for mosques or public institutions) must be permanent, and Article 359 forbids the person who endows such a *waqf* from revoking all or part of the endowment. It is thus clear that such institutions are subject to the non-distribution constraint and thus are part of civil society as broadly conceived. *Zakat* funds which pool the *zakat* of many people and distribute it for community benefit probably come within the provisions of the Civil Code dealing with *auqaf*, though it would be appropriate to have more clearly articulated legal rules for them. These funds, which are like community foundations derived from religious contributions, could either exist in perpetuity or have a limited existence/purpose.

*In short, the report proposes a broad definition of CSO for purposes of this analysis that includes:*

- ◆ All organisations in which the assets and revenues are dedicated to public benefit purposes and are subject at all times to the non-distribution constraint<sup>36</sup>
- ◆ Mutual benefit organisations that may distribute assets to members upon dissolution but which serve as important building blocks of civil society (e.g., community and professional associations; social clubs; certain types of cultural organisations, etc.)

## ANNEX B: DIFFERENT TYPES OF CSOs IN AFGHANISTAN

Civil society organisations currently subject to regulation in Afghanistan, the law(s) that regulate(s) them, the functions of those laws and the oversight ministry:

Traditional organisations (shuras / jirgas)	Civil Code 1977; SO Law 2002	Registration to obtain legal existence; oversight	MOJ
Associations of all types (including public benefit and charitable associations, including those regulated by SO Law 2002)	Civil Code 1977	Registration to obtain legal existence; internal governance, oversight	MOJ
"Social, cultural, educational, legal, artistic and vocational" activity associations	SO Law 2002	Registration to obtain legal existence and oversight of specific types of associations, but not all that are permitted by the Civil Code	MOJ
Foundations (auqaf, buniyat)	Civil Code 1977	Registration by Document Registration Office to obtain legal existence (or MOJ?)	MRA (or MOJ?)
"NGOs"	NGO Law 2005 (and Civil Code 1977)	Registration; oversight	MOE

MOJ – Ministry of Justice

MRA – Ministry of Haj and Religious Affairs

MOE – Ministry of Economy

## ANNEX C: DISCUSSION OF PROPOSED AMENDMENT TO NGO LAW

*Comments on the Proposed Amendments to the Law on Non-Governmental Organisations, 2005, of the Islamic Republic of Afghanistan*

Amendments Prepared by the Ministry of Economy  
Tabled in Parliament

September 24, 2006

### Introduction

The International Center for Civil Society Law, a U.S. not-for-profit corporation, was requested to provide these comments to assist in the analysis of the amendments proposed by the Ministry of Economy (MOE) to the 2005 NGO Law as they are considered by Parliament; ICCSL's comments will also aid NGOs and donors in understanding the scope for improvement both in the amendments and in the 2005 NGO Law itself. Although more technical comments on the Law and the proposed amendments will be made at a later time, the comments contained in this document provide an overview of both strengths and weaknesses of some of the most significant of the proposed amendments.

*Major issues to be addressed include the following:*

- ◆ The scope of the law and its application to domestic organisations
- ◆ A proposed reorganisation of the law so as to make it clear how it applies differently to domestic organisations and branches of foreign organisations
- ◆ The need for expanded and clearer definitions in the law
- ◆ The expansion of permitted activities to allow construction projects by NGOs
- ◆ The advisability of adding yet another Commission (the Dissolution Commission) to what is already a very complex structure

By and large the proposed amendment tends to clarify issues of concern raised by ICCSL and other commentators;<sup>37</sup> however, adding an additional new Commission may not be helpful or necessary.

### Specific Issues

*The scope of the law and its application to domestic organisation*

One of the most troublesome of the provisions in the 2005 NGO Law (NGO Law) is the assumption that it could be made applicable to *all* domestic "non-governmental, non-political, and not-for-profit organisations". That would be entirely inconsistent with the Civil Code (CC), which contains extensive provisions for both associations and foundations (*auqaf*), as well as the Social Organisations Law of 2002 (SO Law), which was enacted to give additional substance to the Civil Code provisions on certain types of associations.<sup>38</sup> Thus, limiting the application of the NGO Law to domestic organisations "established within Afghanistan according to this law," is more consistent with both reality (many Afghan organisations register as Social Organisations, not NGOs) and Afghan legal traditions.<sup>39</sup> The NGO Law as amended will continue to allow a domestic organisation that seeks to become a legal entity to do so under the NGO Law by registering with the Ministry of Economy. It also respects the fact that social organisations and other associations may not be interested in registering as NGOs and will seek registration with the Ministry of Justice, under the SO Law and the applicable provisions of the CC.<sup>40</sup>

*A proposed reorganisation of the law so as to make it clear how it applies differently to domestic organisations and branches of foreign organisations*

Consistent with the reduction in the NGO Law's scope as it applies to domestic organisations, we would suggest that there be some careful redrafting and reorganisation of the NGO Law so that it is clearer in its application to different types of entities (domestic and foreign).

**Legal entity status.** First and foremost, it is important to recognise that a domestic organisation can be established and obtain legal personality as an NGO under the NGO Law. But obtaining legal personality in Afghanistan is generally irrelevant to a foreign organisation; most such organisations will want only to establish a *branch* (which is not a separate legal entity that needs legal status) to operate in the country for as long as they expect to carry out their projects.<sup>41</sup> There is some confusion on this point in the current text of the NGO Law – Article 5 (3) refers to a foreign organisation as one that is "established" (in other words, has legal entity status) in a foreign country. On the other hand, Article 20 says that an organisation acquires legal entity status in Afghanistan when it is

registered under the NGO Law. Thus, Article 20 should be amended to make it only applicable to domestic organisations. Once that is clarified, then the application of the NGO Law to foreign organisations becomes less confusing.

**Reorganising Chapter Two.** Consistent with the suggestion in the previous paragraph, it would be useful to reorganise Chapter Two in the following manner:

- ◆ **Chapter Two** itself should contain provisions applicable to both domestic organisations seeking to be established pursuant to the provisions of the NGO Law and foreign organisations seeking to register branches to work in Afghanistan (such as not using a similar name, what needs to be in an application for registration, etc.).
- ◆ **Chapter Two A** should contain provisions that are only applicable to domestic organisations (such as the contents of statute 43).
- ◆ **Chapter Two B** should contain provisions that are only applicable to foreign organisations that are registering branches in Afghanistan (such as the requirements of Article 15 (3) and (4) with regard to Ministry of Foreign Affairs (MOFA)).

The following chart explains how the NGO Law should apply to registration of domestic organisations (D-NGOs) and foreign organisations (F-NGOs).

D-NGOs:

- ◆ Step One: Application to MOE
  - ◆ Step Two: Registration by MOE
  - ◆ Step Three: D-NGO is established and becomes a legal entity
- F-NGOs:
- ◆ Step One: Application to MOFA (with information on establishment in foreign country)
  - ◆ Step Two: Application to MOE for registration of branch in Afghanistan; accompanied by MOFA certification of establishment in foreign country
  - ◆ Step Three: F-NGO's branch registered in Afghanistan

*The need for expanded and clearer definitions in Article 5 of the NGO Law and for clearer language throughout*

One of the current failings of the NGO Law as enacted in 2005 is that while Article 5 contains a

number of useful definitions of terms that are applicable throughout the Law, it does not include nearly enough. For example, the NGO Law usefully defines such terms as “nongovernmental,” “non-political,” “line ministry,” and “board of directors.” In addition, the Law should use terms with consistency and clarity – it is obvious that the NGO Law means to provide that both an organisation’s objectives (purposes) and its activities must be stated in its statute and must conform to various other requirements (not be partisan, political or terrorist, for example), but the language used, at least in English, is not always consistent and is confusing as a result.

*The expansion of permitted activities to allow construction projects by NGOs*

Although this was an issue of some contention when the NGO Law was originally enacted, the solution in 2005 was to not permit any registered NGOs to engage in such projects. That was clearly a mistake – if an NGO has a health project that requires the building of a clinic, why should it be forbidden to do that? While it is clear that some for-profit construction companies abused the term NGO, that problem has a different solution.<sup>42</sup> The problem, even though it is a real one, does not require the forbidding of all construction activities by legitimate NGOs. The solution that is now proposed seems reasonable – it will require the NGO to pay customs duty on any supplies it imports so that it will not have an unfair advantage vis-a-vis a for-profit construction company.

*The advisability of adding yet another commission (the Dissolution Commission) to what is already a very complex structure*

The NGO Law currently provides for two commissions: the High Evaluation Commission<sup>43</sup> and the Dispute Resolution Commission. The former, as described in Article 21, is made up of government officials, and is supposed to review the documents submitted for registration of an NGO. The latter, which includes both government representatives and representatives of the coordinating bodies of the NGOs, is described in Chapter Six. It is charged with “resolv[ing] disputes between organisations and governmental departments resulting from implementation of this law.” While it might have been useful to combine the activities of the two commissions into one, which would function in a way that is similar to the Charity Commission of England and Wales or the Charities Commission in New Zealand, that issue can be explored at some other time.<sup>44</sup> It is troubling to us that the amendments that have now been proposed would add yet another commission, with a third function, to this regime.

According to proposed Article 35 (2) "The Dissolution Commission shall be established upon proposal from the Ministry of Economy and approval of the Presidency of the Islamic Republic of Afghanistan for the completion of the dissolution process of NGOs in the centre and in the provinces." It seems that this new commission would act on behalf of the Ministry of Economy and its decisions would be "verified" by the High Evaluation Commission and subject to appeal to the Dispute Resolution Commission. With limited staff and limited financial resources, it also seems that it might be unnecessary to set up such a commission. The safeguards of review by the High Evaluation Commission and appeal to the Dispute Resolution Commission are already in place in the current NGO Law.

### Conclusion

Our review of the proposed amendments to the NGO Law indicates that they will provide for some improvements in the Law, particularly in reducing the scope of its application to domestic NGOs and in permitting wider latitude for the conduct of construction activities by NGOs. We would urge the Ministry and the Parliament to go further, however, and to clarify some aspects of the law's application to foreign NGOs. We would also urge consideration of our proposal that the new Dissolution Commission not be developed, in part because precious resources will be saved and, most importantly, because safeguards are already in place to ensure that dissolutions are appropriately carried out.

### ANNEX D: COMMENTS ON POSSIBLE AMENDMENT TO SO LAW

The National Assembly will soon be considering the Law on Social Organisations, which was adopted by the Cabinet in 2002. It will be possible to propose amendments to the Social Organisations Law (SOL), and consideration should be given to amending the SOL to bring into it some of the more important provisions of the Civil Code as it applies to associations. You have asked us to provide you with comments that will be relevant in the course of the amendment of the SOL. While avoiding controversial issues, this memorandum proposes amendments to the SOL that would improve it and that should be acceptable to the Ministry of Justice, which has oversight of SOs,<sup>45</sup> and the National Assembly.

**Accepting the relevance and primacy of the Civil Code.** Background information for considering what amendments would improve the SOL must place it in context: it was adopted in 2002<sup>46</sup> to implement the provisions of the Civil Code of 1977 dealing with associations, Articles 403 to 439.<sup>47</sup> The general principle of civil law systems, and Afghanistan follows the civil law, is that the Civil Code is superior to the laws that implement it, so that in the event of inconsistency, the Civil Code prevails. This memorandum thus assumes that the Civil Code of Afghanistan prevails over any inconsistent provisions of the SOL.

With this background, and as a first step, it seems necessary to amend Article 23 of the SOL which currently, in English translation, states that "those Provisions which have not been anticipated to this law the command of articles no. 403 to 439 of civil [code] is applicable." This wording suggests that the Civil Code is only to fill in gaps in the SOL and that, in the event of an inconsistency between them, the SOL will prevail. This is contrary to the general principle of the civil law. It would be appropriate to amend Article 23 to read as follows: "Articles 403 to 439 of the Civil Code apply to all matters dealt with in this law and will prevail in case of any inconsistency." Additionally, some of the more important provisions from the Civil Code could be carried over into the SOL when it is amended. These are indicated below.

### Correcting inconsistencies with the Civil Code.

The next step should be to amend the SOL to correct any significant inconsistencies with the Civil Code. The following suggestions are listed in the order in which they appear in the SOL, not according to their importance, although the amendments to Article 2 may well be the most important:

#### Article 2

- ◆ Art. 403 of the Civil Code (CC) allows associations to be established to achieve “charity, public welfare, scientific, literary and artistic objectives,” while Article 2 of the SOL [mis-numbered “1” in the English translation] permits social organisations (SOs) to be established for “social, cultural, educational, legal, artistic and vocational” objectives. SOs could be formed directly under the CC for any of the purposes listed in Art. 403, so it seems appropriate, and indeed highly desirable, to amend Art. 2 of the SOL to permit all objectives allowed under the CC.
- ◆ CC Art. 403 does not limit the persons who may form an association to domestic persons, and therefore neither should the SOL. Permitting foreign persons (both natural and legal) to be founders and members of associations is consistent with international good practice.<sup>48</sup> The statement in Art. 18 of the SOL that foreign persons may have “honorary membership” in a social organisation should be eliminated as unnecessary.<sup>49</sup>
- ◆ In implementing the CC the SOL has appropriately expanded the objectives for which an SO may be formed. These ought to be retained in the new SOL to be enacted by the National Assembly. Taking these three points together, it would be appropriate to suggest that Article 2(1) of the SOL be revised to read as follows:

*Social organisations (communities and associations) are the voluntary unity of domestic or foreign real persons or bodies corporate organised to achieve charitable, public welfare,<sup>50</sup> scientific, literary, artistic, cultural, educational, legal, social, or vocational objectives.*

#### Article 6

- ◆ Article 403 of the CC does not specify how large the group of founders of an association must be, while the SOL specifies that 10 founders are needed. This would seem to be an acceptable limitation on the vague provision of Article 403, though it would be more consistent with international practice if only seven members were required.<sup>51</sup>
- ◆ The time period for consideration of an application for registration is stated to be 30 days in SOL Art. 6 (2). CC Art. 411 provides that the Ministry of Justice has 60 days within which to make a decision, but if 60 days elapse without any action on the part of the Ministry “the association shall be considered as legally proclaimed.”<sup>52</sup> This inconsistency must be resolved, and it appears that the Civil Code has primacy.
- ◆ Art. 6 (3) of the SOL refers to the issuance of an “activity permit” by the Ministry of Justice. It is not clear what this refers to. Normally a permit of this type would be issued by a line ministry (e.g., the Ministry of Health for a rural health clinic). The Civil Code does not mention such permits, but providing for them, including that they be issued by the relevant line ministry, would not contradict the Civil Code.

#### Article 8

- ◆ SOL Art. 8 states only that social organisations “must keep proper accounting records and books.” While this is a useful general statement of the record-keeping requirements for associations, the CC provides considerable detail as to what sorts of records must be kept (e.g., Art. 413). The National Assembly should consider adding the more detailed provisions of the CC to the SOL.

#### Articles 10 – 15

The rules in these articles regarding the dissolution of SOs need to be looked at in light of Arts. 437-439 of the CC, both as to the grounds for dissolution and the procedures to be followed. These items in the SO law need to be revised so that they are not inconsistent with the Civil Code.

##### *Grounds for dissolution*

CC Art. 437 specifies the grounds for dissolution as follows:

- ◆ When an association cannot meet its obligations

- ◆ When it allots its properties to the aims provided
- ◆ When it “violates the provisions of its constitution or acts against the law, the objectives of its establishment and public decency standards and manners”

SOL Arts. 10 and 11 specify the grounds for dissolution as follows:

- ◆ When an association decides to dissolve in accordance with its constitution
- ◆ For “non-observance of commitments mentioned in th[e] constitution”
- ◆ For “performance of the activity against the provisions of the constitution”

*Procedures for dissolution*

In general the procedures for dissolution of a social organisation under Arts 13-14 of the SOL should be amplified by incorporating provisions 438 – 439 of the CC. Article 16

- ◆ SOL Art. 16 says that “financial resources of the social organisations are open.”
- ◆ CC Art. 421 says “Gifts and donations can be collected only in the name and account of the association in accordance with regulations enacted by the government.”
- ◆ It would appear that the SOL intends to permit SOs to have access to all types of gifts and donations, whether from inside or outside Afghanistan. Thus, the Ministry of Justice should not attempt to apply to social organisations its January 2005 decree restricting the right of political parties to access foreign funds, at least without amending the Civil Code.<sup>53</sup>

**Adding provisions from the Civil Code to clarify the SOL.** The third step should be to amend the SOL to add several important amendments that will bring some of the salutary provisions of the CC, which apply in any event, explicitly into the new SOL.

- ◆ Stressing the applicability of the non-distribution constraint to social organisations.

While it seems to be clear that the SOL intends that neither income nor assets of an SO may be distributed to members, founders, etc. either during an organisation’s lifetime or upon its dissolution, the provisions of the CC may be clearer in this regard. Therefore, it might be useful to consider

amending the SOL in light of Arts. 406(1) and 415 of the CC.

- ◆ Adding governance provisions from the CC to the SOL.

The current SOL is seriously deficient because it does not include any provisions on governance of social organisations. The provisions of the Civil Code dealing with the Board of Directors<sup>54</sup> (Arts. 424-428) and the General Assembly (Arts. 429-436) do apply, however, and could, and perhaps should, be introduced into the SOL in their entirety.

- ◆ Adding reporting provisions from the CC to the SOL.

Under CC Art. 422 associations are required to inform the Ministry about meetings of their General Assembly. This is an outdated kind of provision that is not found any longer in progressive laws on associations, and, if literally applied, would be too intrusive. The potential problem raised by CC Art. 422 would be resolved if the SOL were to state that an annual report filed with the Ministry of Justice satisfies the requirement of Art. 422. Art. 454 already requires such a report for cultural organisations, and it would be consistent to apply that rule to all social organisations.

*Other issues:*

- ◆ Intermediate sanctions

Although the SOL and the CC provide for dissolution as a sanction when an SO does not comply with its legal obligations, there is a need for some sanctions short of dissolution. These might include warnings, fines, etc. We can provide examples of intermediate sanctions legislation if requested.

- ◆ Building the capacity of the Department of Coordination, Evaluation and Registration of Political Parties and Social Organisations of the Ministry of Justice.

Various commentators have suggested that the MOJ Department needs substantial additional capacity, including better trained staff, additional physical resources, etc. Although this is not something that can be remedied by amendments to the SOL, it is something worth the attention of the MOJ and the National Assembly.

## Definition of Public Benefit

After five years of intensive public debate, England has settled on the following definition of public benefit or, in its terminology, "charity":

### *Charitable purpose*

An organisation having any of the following purposes has a charitable purpose if it is for the public benefit:

- (a) The prevention or relief of poverty
- (b) The advancement of education
- (c) The advancement of religion, including a religion that involves belief in more than one god or does not involve belief in a god
- (d) The advancement of health or the saving of lives, including the prevention or relief of sickness, disease or human suffering
- (e) The advancement of citizenship and the promotion of civic responsibility, volunteering, the voluntary sector, or the effectiveness or efficiency of charities
- (f) Economic and social development of communities, including rural or urban regeneration
- (g) The advancement of the arts, culture, heritage or science
- (h) The advancement of amateur sports that involve physical skill and exertion
- (i) The advancement of human rights, conflict resolution, reconciliation, or the promotion of religious or racial harmony, equality or diversity
- (j) The advancement of environmental protection or improvement
- (k) The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage, including the provision of accommodation or care
- (l) The advancement of animal welfare
- (m) The promotion of efficiency of the police or armed forces of England and Wales
- (n) Any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within subparagraphs (a)-(m)
- (o) Any other purpose beneficial to the community as determined from time to time by the [Charity] Commission

In 2001 a group of civil society law experts in Central Europe, as part of developing Model Provisions for Public Benefit Laws, agreed upon the following list of public benefit activities:

A Public Benefit Activity is any lawful activity that supports or promotes public benefit by supporting or promoting one or more of the following:

- (a) Amateur athletics
- (b) Arts
- (c) Assistance to, or protection of, physically or mentally handicapped people
- (d) Assistance to refugees
- (e) Charity
- (f) Civil or human rights
- (g) Consumer protection
- (h) Culture
- (i) Democracy
- (j) Ecology or the protection of environment
- (k) Education, training and enlightenment
- (l) Elimination of discrimination based on race, ethnicity, religion or any other legally proscribed form of discrimination
- (m) Elimination of poverty
- (n) Health or physical well-being
- (o) Historical preservation
- (p) Humanitarian or disaster relief
- (q) Medical care
- (r) Protection of children, youth and disadvantaged individuals
- (s) Protection or care of injured or vulnerable animals
- (t) Relieving the burdens of government
- (u) Religion
- (v) Science
- (w) Social cohesion
- (x) Social or economic development
- (y) Social welfare
- (z) Any other activity that is determined by the Public Benefit Commission to support or promote public benefit

No list of public benefit activities is perfect, and each needs to be tailored to the needs, traditions and capacities of the country in question. These two lists, however, may be useful in the future as the National Assembly considers how best to give greater precision and clarity to the terms "charity" and "public benefit."

**ANNEX E: NON-DISTRIBUTION OF  
THE ASSETS OF AN  
ASSOCIATION**

*Provisions of the Civil Code of Afghanistan  
Chapter One (Legal Persons), Topic (Chapter)  
Three (Associations) (all references to Civil  
Code preceded by CC)*

CC Article 406 (1) provides: "The members of association cannot include such points in the constitution of the association which would permit the transfer of goods to them, to their families or heirs upon dissolution of the association."

CC Article 415 provides in part: "Properties belonging to the association shall be used for achieving the defined aims set."

CC Article 438 provides: "Where the court orders the dissolution of the association, it shall appoint one or several persons to clear up its accounts and distribute the property of the association with due consideration to the provisions of the respective constitution. Where there is no provision in the constitution of the association about the distribution of the property of the dissolved association, the court may transfer such property to another association or institution which would have common aims."

*Provisions of the Social Organisations Law  
(2002)*

Article 15 is similar to CC Article 406 (1) and provides as follows: "The founders of the social organisation cannot include the subjects in the constitution, which authorise to transfer the revenue (sic) of the social organisation to the individuals, families or their heirs after its dissolution."

Article 16 second sentence is similar to CC Article 415 and provides as follows: "The social organisation can spent (sic) its resources only for achieving the goals of the organisation."

Article 14 is similar to CC Article 438, above, and it provides as follows: (section 2) "If there is no provision in the constitution on distribution of revenue (sic), the court can transfer this revenue to the social organisation, institution or association which their goal and objective are close to the dissolved social organisation."

*Provisions of the NGO Law (2005)*

◆ Article 22

(3) "Income derived from the economic activities of the organisation may not be used or distributed, directly or indirectly, for the personal benefit of any founder, officer, member, director, employee, or donor of the organisation."

(4) "Directors, officers, and employees may not carry out any economic transaction with the organisation."

◆ Article 32

(1) "In case of dissolution or transformation (from the not-for-profit to profit), the movable and immovable properties... shall be distributed to an organisation with similar activities... If there are no such organisations, the movable and immovable properties belong to the government."

(2) "The movable and immovable properties of the dissolved organisation shall not be distributed to any of the founders, members, directors, officers, employees, donors and/or their relatives."

## ANNEX F: BIBLIOGRAPHY

### Laws and regulations

- ♦ Afghanistan Constitution (2004)
- ♦ Civil Code of Afghanistan (1977)
- ♦ Income Tax Act (2005)
- ♦ Customs Code (2005)
- ♦ NGO Law (2005)
- ♦ Social Organisations Law (2002)
- ♦ Regulations for the activities of the national and international NGOs in Afghanistan (Taliban Regulation) (2000)

### Articles and other documents

- ♦ ACSF, organisational overview
- ♦ Antuono, Meeks, Miller & Watchou, "Evaluating NGO Service Delivery in South Asia: Lessons for Afghanistan" (2006), University of Wisconsin La Follette School of Public Affairs
- ♦ AREU, GUIDE TO GOVERNMENT IN AFGHANISTAN (excerpt) (Evans, Manning, Osmani, Tully & Wilder)
- ♦ AREU, "Land Rights in Crisis" (Liz Wily, 2003)
- ♦ Badwi, "Zakat: A New Source of Development Finance?" available at <http://www.iol.ie/~affi/Articles/zakat.htm>
- ♦ Counterpart Consortium, "Afghanistan Civil Society Assessment" (2005)
- ♦ FCCS, "Afghan Civil Society Baseline Report, Provincial Analysis" (2005)
- ♦ Habib, "The Role of Zakah and Awqaf in Poverty Alleviation," (2004), [http://www.isdb.org/english\\_docs/idb\\_home/Occasional%20Papers/OP\\_IRTI\\_Role\\_zakat\\_Awqaf%20in%20poverty%20alleviation.pdf](http://www.isdb.org/english_docs/idb_home/Occasional%20Papers/OP_IRTI_Role_zakat_Awqaf%20in%20poverty%20alleviation.pdf)
- ♦ Harpviken, Strand, and Ask, "Afghanistan and Civil Society" (2004)
- ♦ Islamic Republic of Afghanistan, "Peace Reconciliation and Justice Action Plan" (2005), available at [http://www.aihrc.org.af/tj\\_actionplan\\_19\\_dec\\_05.htm](http://www.aihrc.org.af/tj_actionplan_19_dec_05.htm)
- ♦ Padamsey, "Toward a Legitimate Civil Society in Afghanistan, in Review of International Social Questions" (2004), available at <http://www.risq.org/article391.html>
- ♦ Rahmani, "Local Governance and Provision of Social Services in Afghanistan," (OSI, 2006)
- ♦ Saito, "Perception Change of NGOs in Afghanistan: The Next Step" (undated) (First Secretary of the Embassy of Japan in Afghanistan)
- ♦ Sedra & Middlebrook, "Beyond Bonn: Revisiting the International Compact for Afghanistan" (2005), available at [www.fpif.org](http://www.fpif.org)
- ♦ Sayara, "NGO perception assessment" (2004)
- ♦ TLO (Tribal Liaison Office) "Strategy and Background, Southeast" (2005-2006)
- ♦ United States Institute of Peace, Establishing the Rule of Law in Afghanistan (2004), available at [www.usip.org](http://www.usip.org)
- ♦ Wardak, "Jirga: A traditional Method of Conflict Resolution in Afghanistan" (undated)
- ♦ Zakhilwal, "State-building in Afghanistan: a Civil Society Approach" (CIPE, 2005)

### Websites

- ♦ Afghanistan Independent Human Rights Commission: <http://www.aihrc.org.af/indexeng.htm>
- ♦ Bayat Foundation: <http://bayatfoundation.org>
- ♦ Massoud Foundation: <http://www.ahmdshahmassoud.com>
- ♦ Pakistan Centre for Philanthropy: <http://www.pcp.org.pk>
- ♦ University of Michigan Law Library: <http://www.law.umich.edu/library/refres/resguides/pdfs/afghanistan.pdf>

<sup>1</sup> At least those that cannot distribute profits

<sup>2</sup> Others have defined Afghan civil society more narrowly. See Annex A.

<sup>3</sup> Annex B contains a description of the different types of CSOs subject to regulation in Afghanistan at the present time.

<sup>4</sup> Although the working definition of CSOs refers only to domestic organisations, foreign organisations remain a very important part of the development process in Afghanistan. Thus, one Case Study will consider a foreign organisation.

<sup>5</sup> The consultants visited with Engineer Shah Aqa, who has recently taken over the leadership of the Department. He has been at the Ministry for 30 years. The Department appears to have a competent staff that he assured us is not corrupt.

<sup>6</sup> Its energies and resources appear to be devoted almost exclusively to the *Haj*.

<sup>7</sup> These are discussed in Annex C.

<sup>8</sup> These provisions should be revised, updated, and enforced as soon as possible.

<sup>9</sup> See Annex E.

<sup>10</sup> Apparently MoJ issued a decree in spring 2005 stating that political parties could not receive foreign funding. The Directorate of Political Parties and Social Organisations sought to apply this to SOs, but apparently backed off when confronted by the SOs. See research of the Forum for Culture and Civil Society.

<sup>11</sup> The Civil Code contains no restrictions on SOs with respect to the receipt of foreign funding or any on development implementation. See CC Art. 421. It does allow the MoJ to set restrictions more generally on the collection of gifts and donations. This may only mean that the government can set up procedures regarding public solicitations, but clarification would be useful. Art. 16 of the SO Law states that the "financial resources of the social organisations are open."

<sup>12</sup> Goods imported for government projects funded by loans are also exempt. The exact language of Art. 27 (2) 5 reads as follows: "Goods provided for government projects funded by loans or imported into the country by or for public and private foreign and International relief and development agencies approved by the government." Translation available at <http://www.commerce.gov.af/pdf/AfghanCustomsCodeEnglish.pdf>.

<sup>13</sup> Customs Code Art. 193.

<sup>14</sup> Medical supplies might come under the special provisions of Art. 27(16) and (17), despite rather confused translation of the terminology; most countries exempt medical supplies from the application of duties, at least those imported for humanitarian purposes.

<sup>15</sup> The Civil Code actually says that they are supposed to be registered in the Document Registration Office, which implies that they could register with the local branches of the MoJ instead of the Kabul national office as required for SOs.

<sup>16</sup> This is currently the case under the Income Tax, which treats all organisations the same depending on their activities, not their legal form.

<sup>17</sup> See Annex C.

<sup>18</sup> The controversy over construction project materials is addressed in the Comments on the Proposed Amendments to the NGO Law, attached as Annex C

<sup>19</sup> The consultants were unable to visit the MoJ officers in charge of the Department, but they did have a meeting with Judge Ashraf Hegazy, who is an Egyptian jurist

working with the Embassy of Italy "Italian Justice Ministry Project," which is helping to build capacity for the MoJ.

<sup>20</sup> Annex D contains comments on possible amendments to the Social Organisations Law, which were requested by ACSF.

<sup>21</sup> Most people interviewed believe that the Ministry spends almost all of the budget allocation it receives on administering the *Haj*.

<sup>22</sup> The other two domestic associations would clearly be public benefit CSOs, as would the three foundations.

<sup>23</sup> The law appears to be clear with respect to foreign organisations, which receive exemptions if they are "international relief and development agencies approved by the government." Failing to provide uniformity between foreign and domestic organisations in this regard may be one source of enmity between them.

<sup>24</sup> See, e.g., Salima Padamsey, *Toward a Legitimate Civil Society in Afghanistan*, in *Review of International Social Questions*, 17 December 2004, available at <http://www.risq.org/article391.html>.

<sup>25</sup> See Harpviken, Strand and Ask (Annex A).

<sup>26</sup> See Lester M. Salamon and Stefan Toepler, *The Influence of the Legal Environment on the Development of the Nonprofit Sector*, Center for Civil Society Studies: Working Paper Series No. 17 (Baltimore, MD: Johns Hopkins University, 2000), 4.

<sup>27</sup> Although the Koran directs that *zakat* be used only for "the poor, the needy, the *Zakat* collector, the slaves to buy their freedom, those whose hearts you seek to win, those who have crippling debts or loss of property, the warriors, and the needy traveller," some argue that *zakat* can be used for development projects aimed at alleviating poverty and need. See Zaki Badwi, "Zakat: A New Source of Development Finance?" <http://www.iol.ie/~afifi/Articles/zakat.htm>. Government administered *zakat*, such as in Pakistan, is increasingly being used for education. See <http://www.sindhedu.gov.pk/Links/zakat%20topstory.htm>.

In Indonesia some nongovernmental *zakat* collector institutions have joined together to form the Committee on *Zakat* for Humanity. See Asia Pacific Philanthropy Consortium, *Strengthening Philanthropy in the Asia Pacific: An Agenda for Action – Background Paper: Indonesia* (July 2001), 14-15. In Kashmir *zakat* is increasingly paid into community controlled *zakat* committees (*bait-ul mals*) which use the funds for education, training, and income generation projects for the poor. In December 2005 the Prime Minister of Malaysia convened an Extraordinary Summit of the Organisation of Islamic Countries (OIC) to promote the formation of an International *Zakat* Board to distribute *zakat* to relieve poverty in OIC member countries. See <http://webevents.bernama.com/events/zakat/index.php?nav=2>. See generally Ahmed Habib, "The Role of Zakah and Awqaf in Poverty Alleviation." (2004), [http://www.isdb.org/english\\_docs/idb\\_home/Occasional%20Papers/OP\\_IRTI\\_Role\\_zakat\\_Awqaf%20in%20pove%20alleviation.pdf](http://www.isdb.org/english_docs/idb_home/Occasional%20Papers/OP_IRTI_Role_zakat_Awqaf%20in%20pove%20alleviation.pdf). This scholarly paper, prepared for the Islamic Development Bank Group, surveys the historic role of these institutions and explores how they can be modernised to play a more effective role in social and economic development.

<sup>28</sup> This approach would suggest that local branches of international NGOs should, as a matter of policy, also be able to be established easily, but it is important to bear in

mind that foreign organisations have no right under international law or the Afghan Constitution to establish branches. As a practical matter, however, it is obvious that many have been permitted to do so, and the suggestion here is that this practice should continue, probably under the registration process of the “NGO Law” of 2005.

<sup>29</sup> In 2003 17 Asia and Pacific nations had adopted or were developing self-regulatory mechanisms. See <http://www.asianphilanthropy.org/pdfs/post/appcpostconfissue.pdf>.

<sup>30</sup> The most effective organisation promoting public information on the non-profit sector is Guidestar, which is now operating in a number of countries. See <http://www.guidestar.org>.

<sup>31</sup> They also include political parties, but we will not do so in our analysis.

<sup>32</sup> This terminology appears to have a broader scope than the Community Development Councils or CDCs.

<sup>33</sup> Foreign NGOs should be permitted to register branches in Afghanistan; see separate annex on amendments to the NGO Law.

<sup>34</sup> Those that are subject to the non-distribution constraint. See note 9, *infra*.

<sup>35</sup> Pursuant to the Commercial Code.

<sup>36</sup> The importance of the non-distribution constraint is underlined by existing legislation in Afghanistan.

<sup>37</sup> David Moore, Civil Society Law Reform in Afghanistan, available at [http://www.icnl.org/knowledge/ijn/vol8iss1/art\\_1.htm](http://www.icnl.org/knowledge/ijn/vol8iss1/art_1.htm).

<sup>38</sup> The Social Organisations Law omits reference to charity associations and public welfare associations, which are clearly provided for in the Civil Code. Further comments on the Social Organisations Law will also be provided in the course of the next few weeks.

<sup>39</sup> Afghanistan is a civil law country, whose Civil Codes date back to one promulgated by a royal *nizamnama* in 1921. The current Civil Code, adopted in 1977, remains in force, as is amply clear from other legislation, such as the Social Organisations Law.

<sup>40</sup> Or, in the case of *auqaf*, with the Ministry of Haj and Auqaf.

<sup>41</sup> Some organisations will want to set up a separately organised domestic entity, in which event that entity will be a domestic organisation.

<sup>42</sup> There is no question that for-profit organisations set up as NGOs should be dissolved and required to re-register as companies.

<sup>43</sup> This Commission is similar to the High Council described in the NGO Regulation from the year 2000 (and it may have the same name in Dari).

<sup>44</sup> One important concern is how to rationalise the ways in which the various laws apply to domestic civil society organisations (CSOs). Putting aside foreign NGOs, which should be required to register a branch with the MOE before carrying out activities in Afghanistan, our research reveals a great deal of confusion among domestic civil society organisations about whether they are NGOs or SOs or something else entirely. If a “charity commission” structure is adopted, it would be useful to discuss the ways in which it should certify all public benefit CSOs as such.

<sup>45</sup> The Civil Code refers to the “Competent Authority” having oversight of associations and responsibility for their registration. The responsibility for registration and oversight has been delegated by the SOL to the Ministry

of Justice, which includes a Department of Coordination, Evaluation, and Registration of Political Parties and Social Organisations. See Art. 19, SOL.

<sup>46</sup> The 2002 SOL was an update of a Soviet era law.

<sup>47</sup> The SOL specifically refers to these articles of the Civil Code. There are additional provisions of the Civil Code specifically dealing with public welfare, charity, and cultural associations, as well as institutes, which may be relevant to some or all social organisations, but those are not referenced in the SOL.

<sup>48</sup> See Irish, Kushen & Simon, GUIDELINES FOR LAWS AFFECTING CIVIC ORGANISATIONS (Open Society Institute, 2d ed., 2004) Section 3.1 J, p. 29.

<sup>49</sup> It may well be, however, that CC Art. 413(5) was intended to include such special category of membership for foreigners. This needs to be resolved, but it should be resolved by allowing foreigners to be members of associations/social organisations.

<sup>50</sup> Defining “charitable” and “public welfare” more precisely will be necessary at some point, but it may be appropriate to defer that rather intricate and difficult discussion until less controversial amendments and updates to the SOL have been made. Attached are two relatively recent lists of what constitutes “public benefit” or “charity.” These may provide useful starting points for the National Assembly when it decides to deal with this complex and difficult issue.

<sup>51</sup> For example, the German Civil Code requires a registered association to have seven members. BürgerlichesGesetzBuch § 56.

<sup>52</sup> Such a “default registration” rule can be found in the Law on Associations and Foundations of the Republic of Yemen, Art. 9.

<sup>53</sup> We are informed that when the social organisations protested the application of the decree to them, the Ministry of Justice backed down and does not apply the decree to them. It is, in any case, not consistent with international good practice to limit the access of associations to foreign funds.

<sup>54</sup> Interestingly the Board of Directors referred to in the SOL appears to function more like a management board than an oversight (supervisory) board, though the practice of SOs seems to be to use the term “board of directors” to refer to its oversight (supervisory) board. Either now or later, it would be desirable to amend the CC and the SOL to provide that each association have both a supervisory board, to set policy and exercise oversight, and a management board, to handle day-to-day operations. This would make Afghani law consistent with the traditional approach of the civil law.