

CREATING AN ENABLING ENVIRONMENT FOR CIVIL SOCIETY IN AFGHANISTAN

Legal Framework and Sector Sustainability

Prepared for the
Conference on the Enabling Environment
for Private Initiative in Afghanistan
of the
Aga Khan Development Network

by
Dr. Leon E. Irish and Prof. Karla W. Simon
International Center for Civil Society Law

1. INTRODUCTION: CONTEXT OF THE PAPER, THE ISSUES RAISED, AND FRAMEWORK FOR THE PROPOSED LEGAL CHANGES

As international legal consultants with considerable experience in developing legislation for civil society organizations in countries around the world, including several Muslim countries,¹ the authors were asked to address the Legal Framework for Civil Society and Sector Sustainability in a background paper for the Conference on the Enabling Environment for Private Initiative in Afghanistan, to be held in Kabul in June 2007.

Within that context, it is important to first describe the universe of organizations that will be considered. The organizations are referred to in Dari or Farsi as *Jame'a Madani*, *sozman-e khair-e dawlati*, or *sozman-e-itjima*. The English terms for such organizations are civil society organizations (CSOs) or non-governmental organizations (NGOs). None of these organizations are part of the government, nor are they political parties or business organizations (though they include associations of business organizations). They are all organized as not-for-profit bodies, whether they are mutual benefit organizations (MBOs) meaning that they benefit members of the organization, or public benefit organizations (PBOs) meaning organizations that benefit all members of the public. .

Some examples of MBOs in Afghanistan include:

- Organizations of origin – tribes, ethnic groups, clans, “qawm;”
- Organizations of religion – shias, sunnis, sufis, salafis, wahabis;
- traditional organizations that manage daily life -- shuras, mirab, haqaba, aasher, “komites” (for people from Pakistan);
- New organizations that manage daily life -- “new shuras”, community development councils (CDCs);

¹ These include Bangladesh, Egypt, Indonesia, Jordan, Malaysia, Pakistan, and Yemen.

- Organizations for the betterment of a profession or trade (bazaar merchants associations, traditional guilds of (for example) weavers or silversmiths, , workers or farmers unions, different kinds of cooperatives²; and
- Organizations 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 organized through mosques;
- Foundations (e.g., Massoud Foundation, Bayat Foundation) which make grants to local CSOs;³
- Service providing organizations providing, for example, education (particularly madrassahs), health (e.g., Aga Khan Hospital in Bamyan), loans through micro-finance provision, and technical assistance for agriculture, such as irrigation canals);
- Democracy and human rights organizations (e.g., Independent Human Rights Commission, various women’s organizations);
- Research organizations – AREU (Afghan Research and Evaluation Unit) and others; and
- Groupings of CSOs – Forum for Culture and Civil Society (FCCS), ACBAR, ANCB, ACSF.

Within reference to these types of civil society organizations,⁴ the consultants have concluded that the current legal framework for civil society organizations (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 modernization. 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 organizations. 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.
- the lack of a culture of philanthropy, and
- the questionable legitimacy of some organizations 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

² At least those that cannot distribute profits.

³ Roshan, a local business, also makes grants to CSOs, but it is not formally a CSO.

⁴ Others have defined Afghan civil society more narrowly. See Annex A.

should aim to reinforce social development by providing the underpinnings for a more stable and indigenous civil society. Law reform efforts should also ensure that the laws on the books are comprehensive and straightforward in their provisions and transparent and consistent in their application. It is also important for the reforms to 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) 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.

2. CASE STUDIES⁵

The report is based on a series of case studies, which are described here. They involve legal problems faced by both domestic and foreign⁶ 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.

a. Domestic CSO – membership organization (association)

i. Organization set up for water project implementation in partnership with a foreign organization

A local *shura* has been contacted by an international development organization 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 organization or to find a group of citizens who will set up an organization to partner with the international organization. The *shura* would like to assist with the project in the local community because the needs are great, but it will need to be register an association in order to do so.

ii. 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 neighborhood in Herat. An entrepreneur has donated the building and equipment, so there is little start-up cost. Since the doctors and nurses will volunteer

⁵ Annex B contains a description of the different types of CSOs subject to regulation in Afghanistan at the present time.

⁶ Although the working definition of CSOs refers only to domestic organizations, foreign organizations remain a very important part of the development process in Afghanistan. Thus, one Case Study will consider a foreign organization.

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.

iii. 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 organization 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 Organization (SO) under the 2002 Social Organizations Law. If it registers an SO, it will register with the Ministry of Justice (MoJ), and if it registers 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, for the contemplated activities are typical membership organization 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:

- a. issues with regard to the application process (including how many members an organization must have to register and whether it can have foreign members);
- b. lack of clarity about reporting requirements once an organization is registered,
- c. lack of clarity about internal governance requirements for a domestic CSO registered in Afghanistan;
- d. whether an organization can have access to foreign funding; and
- e. the extent to which the organization and its donors will receive tax benefits (including exemption from income taxes and customs duties).

b. Domestic CSO – non-membership organization (foundation)

i. 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 organizations in the country which are engaged in a variety of reconstruction or development projects. The wealthy person does not want to have a membership organization (an association) because members would be able to elect the Board of Directors; he wants control of the organization to remain with his family.

ii. 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 organization 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.

iii. Auqaf.

A wealthy figure (an *Arbab* or *Zamindar*) wishes to establish an *auqaf* 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 Auqaf*, but when he goes there he can find no one to help him or give him information about what he should do.

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

c. International/foreign CSO – branch office to carry out an education projects for women and girls

An international or foreign organization is seeking to set up a branch office to carry out education projects for women and girls in Afghanistan. It realizes that it will face political and social problems, but it believes it can resolve those by partnering with local organizations that are already involved in these issues. However, it must deal with the question of how to register a branch organization to carry out its projects in Afghanistan. It is already established as a domestic organization in Germany, and it has been promised funding from GTZ to carry out its work in Afghanistan.

d. Ministry of Justice

Registration and oversight of the approximately 80 political parties and over 450 Social Organizations in Afghanistan is in the hands of the MoJ’s Department of Coordination, Evaluation, and Registration of Political Parties and Social Organizations. 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.

e. Ministry of Economy

The Ministry of Economy's NGO Department registers and oversees the approximately 1100 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.⁷

f. Ministry of *Haj, Ershad, and Auqaf*

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.⁸

g. 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 organizations. It is also unclear to what extent the Ministry is dealing with customs exemptions except on an ad hoc basis.

3. ANALYSIS OF THE CASE STUDIES AND THE ISSUES THEY RAISE

A. 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 that needs to be considered in any legal reform process. In addition, there are the over-arching 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, applications for registration have not adequately been 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

⁷ 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.

⁸ Its energies and resources appear to be devoted almost exclusively to the *Haj*.

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 for subsection C, below.

a. Domestic membership organisations

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

Aspects of the legal regime that would militate in favor of each of the organizations 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 in that process, sometimes for political or personal reasons. The intricacies of the process provide various opportunities for bribery to take place. Further, 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 organization 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 for an organization arguably involved in development, such as the medical clinic, it would be 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 license from the appropriate line local ministry office in Herat (e.g., to the Ministry of Health) for permission to operate the medical clinic. No license would be required for the self-help organization 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 not clear because of a conflict between the Civil Code (60 days) and the SO Law (30 days) that needs to be resolved. Since the registration process for SOs cannot take longer than 60 days, however, 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 those could become even more burdensome if the amendments proposed by the MoE are passed by Parliament.⁹ A significant reason for this is that the NGO Law seems in fact to be aimed at controlling foreign funding for development and not organizations 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,¹⁰ 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 organization 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 organizations register only as an NGO or an SO, while other 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 organizations 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 organization, 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 organizations 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, those 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.¹¹ 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)). The provision in the NGO Law Art. 22 (4) stating that “Directors, officers, and employees may not carry out any economic transaction with the organization,” is too strict, however, for it forbids transactions favorable to the organization as well as those that might be unfavorable. This might influence an organization to register as an SO.

⁹ These are discussed in Annex C.

¹⁰ These provisions should be revised, updated, and enforced as soon as possible, as the Technical Recommendations make clear. See Annex F.

¹¹ See Annex E.

On the other hand, there are also three possible reasons why an organization 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 organization 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 situation¹² also clarify that SOs can both legally receive foreign funds and implement projects.¹³ Nevertheless, confusion about the issue continues, and that may cause some development organizations to think that they must register as NGOs.

- **Foreign members.** A domestic organization 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 organizations are permitted to have foreigner members.
- **Number of founding members.** The NGO Law requires only two founders while the SO Law requires 10. That may cause some organizations 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 favor one form of registration over the other. That is the issue of **tax privileges**.

- **Income tax exemption.** Any non-profit-distributing Afghan domestic organizations that are organized for and engage in education, cultural, literary,

¹² Apparently MoJ issued a decree in spring 2005 stating that political parties could not receive foreign funding. The Directorate of Political Parties and Social Organizations 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.

¹³ The Civil Code contains no restrictions on SOs with respect to the receipt of foreign funding nor 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 organizations are open."

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 organizations that is “not in keeping with the purposes of the organization” 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 organization.

The self-help organization 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,” so 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 are exempt from customs.¹⁴ 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, for it is limited to NGOs and purports to make exemptions available even for project 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.”¹⁵ This would make the provision in the NGO Law invalid to the extent it is inconsistent with the Customs Code. Further, any goods imported for the water project should be exempt from customs even if the organization registers as an SO, at least if the international organization 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.¹⁶

¹⁴ 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.” Unofficial translation available at <http://www.commerce.gov.af/pdf/AfghanCustomsCodeEnglish.pdf>.

¹⁵ Customs Code Art. 193.

¹⁶ 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..

- **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.

b. Domestic non-membership organizations

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 they really are foundations in the traditional civil law meaning of the term (i.e., non-membership organizations), but some either are or want to be (e.g., the Bayat Foundation).

Unfortunately, although the Civil Code provides for foundations and *auqaf*, there appears to be no interpretation or implementation of these Civil Code provisions, whether the organization 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 *auqaf* and whether or not the Ministry of *Haj, Ershad*, and *Auqaf* is currently registering such organizations. Further, that 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 those 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 centralization of government functions)¹⁷ 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 *Auqaf*, but this does not occur at the current time due to lack of capacity with regard to both *auqaf* and foundations and lack of competence with regard to foundations.

In addition, no matter 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 *auqaf*, and the extent to which they may receive foreign funding. The customs duty issues raised above with respect to associations should presumably be resolved by making the treatment of foundations and *auqaf* consistent with the treatment of domestic membership organizations.¹⁸

¹⁷ 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.

¹⁸ This is currently the case under the Income Tax, which treats all organizations the same depending on their activities, not their legal form.

The inadequate and uncertain regulation of foundations and *auqaf* not only represents a huge gap in the legal framework for domestic CSOs, but it is also one that concerns one of the most potentially important vehicles for resource development and the financial sustainability of the CSO sector in Afghanistan. Without a functioning system for registering foundations and *auqaf* 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 *auqaf*) or private endowed foundations that can 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 with regard to 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 organizations that need urgent resolution as part of a comprehensive reform process in Afghanistan. In sum, the foundation for the dead Afghan hero and the *auqaf* to aid the poor through a local mosque mentioned in the Case Studies are currently left without any useful legal guidance

c. 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 organization. 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 organization does successfully complete the MoE registration process, it will be recognized as a foreign or international organization 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 organization begins to do its work in the country (license 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. That concerns the scope of the law as it applies to foreign organizations, which clearly do not want to have to establish themselves as separate, domestic organizations.¹⁹

As to taxes, foreign and international CSOs are on the same footing as domestic organizations when it comes to income taxes. They are, however, currently treated more favorably than domestic organizations 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 organizations, at least to the extent that import of construction

¹⁹ See Annex C.

materials is not involved),²⁰ although it does appear that some domestic organizations have been receiving customs duty exemptions through special, one off applications.

B. Roles and responsibilities

There is significant confusion about roles and responsibilities as 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 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, and that is what is suggested in the Recommendations in Section 4.

a. Ministry of Justice

Various studies²¹ of the MoJ Department of Coordination, Evaluation and Registration of Political Parties and Social Organizations indicate that the Department is under-staffed (it has only 15 staff members and they are all based in Kabul) as well as under-financed. Its role is complicated by the fact that the laws are not clear about the reporting obligations of, and its oversight responsibilities with respect to, the organizations 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.²² Clearly, the law needs to be clarified with respect to the duties and powers of the MoJ and the competence and capacity of the MoJ Department need strengthening.

b. Ministry of Economy

The MoE NGO Department appears to be adequately staffed and competent. Nevertheless, the Department is under-funded and this could lead in the future to problems with bribery (because salaries are so low). More financial resources should be allocated to this Department in order to prevent that 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

²⁰ The controversy over construction project materials is addressed in the Comments on the Proposed Amendments to the NGO Law, attached as Annex C

²¹ 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.

²² Annex D contains comments on possible amendments to the Social Organizations Law, which were requested by ACSF.

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 organizations practice good governance, or have high standards. As we suggest, the best division of labor would be to have the MoJ engage in registration (to achieve legal entity status) and oversight functions for all CSOs, with the MoE tasked to oversee 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, Pakistan, etc.

c. Ministry of Haj, Ershad and Auqaf

Studies indicate that this Ministry, which is charged with registering all mosques in the country, is incapable of achieving even that task, not to mention whatever responsibilities it may have with respect to *Auqaf*.²³ 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 *auqaf* or to transfer those responsibilities elsewhere, presumably to the MoJ.

d. 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 organizations like the self-help organization in the Case Studies to know whether it is entitled to income tax exemption.²⁴

As to its duties to enforce the Customs Code, the Ministry appears to be granting applications for exemptions to domestic organizations 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, that 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 organizations. It would be useful for the Ministry to issue a circular with detailed guidance about when exemptions will be available to domestic organizations.²⁵ It would also be appropriate to amend the

²³ Most people interviewed believe that the Ministry spends almost all of the budget allocation it receives on administering the *Haj*.

²⁴ The other two domestic associations would clearly be public benefit CSOs, as would the three foundations.

²⁵ The law appears to be clear with respect to foreign organizations, which receive exemptions if they are “international relief and development agencies approved by the government.” Failing to provide uniformity between foreign and domestic organizations in this regard may be one source of enmity between them.

NGO law to be consistent with the Customs Code, or even to rethink the entire question of customs exemption.

e. Sector and the 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, no requirement of, or method for, publication of annual reports exists, and there are no effective self-regulatory bodies that include all or most CSOs.

ACBAR and ANCB have promulgated an NGO Code of Conduct 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 is focused 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.

C. 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 organizations in Afghanistan among domestic SOs (e.g., ACSF, FCCS), domestic NGOs (e.g., Afghan Women’s Organization, 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 organizations 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 organizations, namely, those that are home grown and are accountable to domestic beneficiaries/constituents instead of foreign donors.²⁶ Others have classified

²⁶ 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>.

NGOs in Afghanistan as civil society organizations but also question the “genuineness” of this inclusion.²⁷

- 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, they do not appear to be supporting charitable causes and social and economic development. Some good work is surely being done by *auqaf* (e.g., poverty alleviation) but there are 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 indigenize civil society and to create a climate of self-reliance, mutual support, and philanthropy. Difficult as this is, it is clearly not enough merely to 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 they will turn to other priorities. When that time comes, it will be crucially 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.

D. 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.²⁸ 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 can contribute extensively to the social and economic development of Afghanistan over the long haul.

²⁷ See Harpikven, Strand and Ask (Annex A).

²⁸ 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.

4. 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.²⁹

Opportunities in the present context

Because the current situation is fluid, it provides an opportunity for a rational and thorough-going 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:

1. **CSOs.** CSOs should be defined broadly to include all organizations that permit both natural and legal persons to associate, whether or not such entities aim to provide public goods (e.g., environmental protection organizations, humanitarian relief organizations, private schools/*madrassahs*) or are for mutual enjoyment and protection (e.g., self-help organizations, 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.
2. **Non-membership CSOs.** Defining non-membership CSOs to include both secular (*buniyat*) and religious (*auqaf*) foundations and reinvigorating the civil and religious law systems applicable to *auqaf* and *buniyat* in a way that will make them once more 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 *auqaf*, 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, for the pattern in other Muslim countries is that they operate more like Western community foundations

²⁹ Other, more technical reforms, are discussed in Annex F.

and are devoted to a wider range of social and economic development and relief issues than are traditional *auqaf*.³⁰

3. **Registering CSOs.** Ensuring that purely private CSOs can be established easily as either associations or foundations (thus achieving consistency with civil law traditions as well as giving effect to Article 35 of the 2004 Constitution of the Islamic Republic of Afghanistan) and that they are subject to adequate oversight by the Ministry of Justice.³¹ 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.
4. **NGO certification.** Confining the NGO registration and oversight process, not for conferring legal status, but for certification of organizations 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 authorized to carry out foreign-funded development projects in a country is entirely separate from the process of becoming a legal person and should be seen as such.
5. **Determination of PBO status.** Considering whether public benefit CSOs (often called public benefit organizations 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

³⁰ 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 Extrordinary Summit of the Organization 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>.

³¹ 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 organizations 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.

PBOs. As was done in Pakistan in a similar situation, perhaps it is best to delegate this responsibility to an outside organization.

6. **Effective self-regulation.** Developing 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 organizations. As other countries with experience in this regard have learned (e.g., South Africa), such a process is often a long and difficult one.³²
7. **Public accountability.** Relying 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 programs. 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.³³

Some of the recommended reforms for Afghanistan have precedents in other Muslim countries, such as Indonesia and Pakistan, 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.

5. Conclusion

This paper has discussed an approach to reform of both the legal and sector sustainability frameworks currently existing in Afghanistan. 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 laws on the books are comprehensive, straightforward, and consistent, and that they are transparent and consistent in their application. It also makes clear how important it is that a modern view of traditional Afghan and Muslim legal forms be adopted, taking a view that is consistent with notions of Islamic philanthropy developing in other Muslim nations.

³² In 2003 17 Asia and Pacific nations had adopted or were developing self-regulatory mechanisms. See <http://www.asianphilanthropy.org/pdfs/post/appcpostconfissue.pdf>.

³³ The most effective organization promoting public information on the nonprofit sector is Guidestar, which is now operating in a number of countries. See <http://www.guidestar.org>.

LIST OF ANNEXES

Annex A	Different definitions of civil society in Afghanistan
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.
Annex F	Technical recommendations

Annex A

Non-distribution of the Assets of an Association

1. 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.

2. Provisions of the Social Organizations Law (2002)

Article 15 is similar to CC Article 406 (1) and provides as follows: The founders of the social organization cannot include the subjects in the constitution, which authorize to transfer the revenue (sic) of the social organization 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 organization can spent (sic) its resources only for achieving the goals of the organization.

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 organization, institution or association which their goal and objective are close to the dissolved social organization.

ANNEX B

Rules and Regulations for Associations in Afghanistan (problems noted in red)

1. Establishment

- a. Registration for all associations said to be with MOJ under SO Law 2002, Art 6 (1); CC refers only to the “competent authority.” Anecdotal evidence suggests that, at least with respect to cultural organizations and perhaps some others, including the “new” *shuras/jirgas*, the registration authority has been delegated to local authorities. **This poses problems and confusion for entities concerning their legal existence; is there a proper legal delegation order and what does it say?**
- b. SO Law 2002 says that ten members required; CC Art 403 does not indicate a required number. **This seems to be a case in which the more specific legislation properly places a limitation on the more general CC.**
- c. CC Art 411 says that MOJ must register an association within 60 days of the submission of proper papers; SO Law Art 6 (2) gives MOJ only 30 days; CC Art 411 contains a default registration rule, while SO Law does not. **It is unclear which rules apply.**
- d. SO Law Art 6 (3) calls for an “activity permit” to be issued to a registered association. **What is this permit and does it conflict with the “registration” certificate issued by the Ministry of Economy to “NGOs” under the NGO Law 2005?**
- e. The Civil Code contains normal provisions with regard to the proper documents to be filed, etc., in order to obtain registration. See CC Art 405. See also SO Law Art 9.

2. Governance & Conflicts of Interest

- a. Governance bodies
 - i. General Assembly
 1. CC Art 429 requires the General Assembly to be composed of all members of the association.
 2. CC Arts 429-436 describe normal rules for the functioning of the General Assembly.
 3. **The oversight powers of the “competent authority” under CC Art 436 are probably too intrusive.**
 - ii. Board of Directors
 1. CC Art 428 describes this in such a way as to make it clear that a management board is intended.
 2. CC Arts 424-428 describe normal rules for the functioning of a management board, subject to oversight by the General Assembly.
 - iii. **The procedures do not envision the appointment of committees, such as an Executive Committee, which would make it easier for a large association to function; this needs to be discussed.**

- b. Conflicts of interest
 - i. CC Art 434 states: “The member of the association shall not be entitled to [vote] on matters in which his own interest would be involved. Voting in election of the Board of Directors shall be an exception.”
 - ii. **This undoubtedly needs to be amplified and clarified.**
- c. Books and records
 - i. CC Art 413 contains extensive rules with regard to the records that an association must keep. SO Law Art 8 confirms these requirements.
 - ii. CC Art 416 requires the annual budget to be approved by the General Assembly.
 - iii. CC Art 419(1) states: “The name of the association, the number of [illegible] and the scope of its activities shall be embodied in its books, records and publications.”

3. Activities

- a. CC Art 417 states: “An association shall not carry out any activity which is not mentioned in its constitution.”
- b. CC Art 418 provides that an association may not conduct “any financial business.” **The purpose of this provision is not clear, nor is it clear what constitutes a “financial business.”**
- c. CC Art 415 provides that an association must invest all assets not needed for its activities “in safe areas (?) provided it would not affect its original activities.” **Does this imply a restrictive investment policy that would impede asset enhancement?**
- d. No mention is made about the fact that associations are not political parties, but CC Art 403 does prescribe that only “not-profit-making” “charity, public welfare, scientific, literary, and artistic objectives” are permissible. **It would be good to clarify this and perhaps to add to the list of objectives in a way that is consistent with Afghan needs and traditions.**

4. Resource Mobilization

- a. CC Art 418 provides that an association may not conduct “any financial business.” **This may impede asset resource mobilization, depending on how it is interpreted.**
- b. No mention is made of whether an association may conduct a commercial business or whether it may own all the shares of a commercial venture or whether it may enter into partnership with a commercial venture. **This needs to be clarified.**
- c. There need to be provisions about asset management and prudent investment that will provide for growth of funds held by associations, foundations, including *aqwaf*.

5. Dissolution³⁴

- a. Both CC Arts 437 – 439 and SO Law 2002 Arts 10 – 15 have provisions on dissolution of associations that seem to comport with general good practice in this area. It is not clear, however, the extent to which the current administrative law permits an appeal from a dissolution order under Art 11 of SO Law 2002. **This needs to be investigated.**
- b. These rules do not correspond with the rules provided in the “NGO Law” Arts 35 -36
- c. **It would be interesting to know whether there have been problems with involuntary dissolutions, as opposed to “de-registrations” under the “NGO Law.”**

6. MOJ Role

- a. **Has MOJ been able to establish the office provided for in Art 19 of the SO Law? Have the members of staff been trained, etc.?**
- b. **Has MOJ delegated registration and oversight of local CSOs to local offices of MOJ? How is this system functioning?**

³⁴ The CC also has provisions with respect to mergers and amalgamations of associations and endowments, as well as changes in purpose. Those are not elaborated here, but they are part of any legal framework for CSOs and should be reviewed as reforms go forward.

7. PBOs

- a. As noted in the text, there is no body to make the distinction between MBOs and PBOs, even though this is critical to a well-functioning system applicable to domestic Afghan CSOs.
- b. This portion of our analysis should be integrated with that of the PCP.

Annex C



INTERNATIONAL CENTER FOR CIVIL SOCIETY LAW

304 KYLE ROAD
CROWNSVILLE, MD 21032 USA
(410) 923-0543 (TEL AND FAX)
www.iccsl.org

**Comments on the
Proposed Amendments to the
Law on Non-Governmental Organizations, 2005
of the
Islamic Republic of Afghanistan
Amendments Prepared by the Ministry of Economy
Tabled in
Parliament
September 24, 2006**

**Comments Prepared by the
International Center for Civil Society Law³⁵
October 4, 2006**

Introduction The International Center for Civil Society Law is a U.S. not-for-profit corporation whose mission is to protect human freedoms by improving the laws that affect the freedoms of belief, expression, association, assembly, information, and participation. ICCSL is the most important and noted resource in the world for information on the legal environment for civil society and citizen participation.³⁶ It and its partners are based in Washington, D.C., Cape Town, South Africa, and Beijing, China.

³⁵ Kabul address (until Monday, October 9, 2006): Dr. Irish and Prof. Simon, Serena Hotel; phone number 079 654 000; mobile: 0799 400 135.

³⁶ Since 1984 ICCSL and its founders have served as partners to civil society leaders, public officials, and the donor communities in over 60 countries around the world. The ways in which ICCSL affects developments with regard to the enabling environment for civil society are influenced by a core belief in bottom-up approaches to development and social theory – power-

ICCSL 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:

1. The scope of the law and its application to domestic organizations.
2. A proposed reorganization of the law so as to make it clear how it applies differently to domestic organizations and branches of foreign organizations.
3. The need for expanded and clearer definitions in the law.
4. The expansion of permitted activities to allow construction projects by NGOs.
5. 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;³⁷ however, adding an additional new Commission may not be helpful or necessary.

Specific Issues:

1. The scope of the law and its application to domestic organizations.

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 organizations.” That would be entirely inconsistent with the Civil Code (CC), which contains extensive provisions for both associations and foundations (*aqwaf*), as well as the Social Organizations Law of 2002 (SO Law), which was enacted to give additional substance to the Civil Code provisions on certain types of associations.³⁸ Thus, limiting the application of the NGO Law to domestic organizations “established within Afghanistan according to this law,” is more consistent with both reality (many Afghan organizations register as Social Organizations, not NGOs) and

enhancing programs for a people-centered approach to law reform. These ideas animate ICCSL and the people who work with it – people from all parts of the world and all sectors of society.

³⁷ David Moore, *Civil Society Law Reform in Afghanistan*, available at http://www.icnl.org/knowledge/ijnl/vol8iss1/art_1.htm.

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

Afghan legal traditions.³⁹ The NGO Law as amended will continue to allow a domestic organization 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 organizations 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.⁴⁰

2. A proposed reorganization of the law so as to make it clear how it applies differently to domestic organizations and branches of foreign organizations.

Consistent with the reduction in the NGO Law’s scope as it applies to domestic organizations, we would suggest that there be some careful redrafting and reorganization 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 recognize that a domestic organization 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 organization; most such organizations 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.⁴¹ There is some confusion on this point in the current text of the NGO Law – Article 5 (3) refers to a foreign organization 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 organization 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 organizations. Once that is clarified, then the application of the NGO Law to foreign organizations becomes less confusing.

Reorganizing Chapter Two Consistent with the suggestion in the previous paragraph, it would be useful to reorganize Chapter Two in the following manner:

- **Chapter Two** itself should contain provisions applicable to both domestic organizations seeking to be established pursuant to the provisions of the NGO Law and foreign organizations 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 organizations (such as the contents of the statute⁴²); and

³⁹ 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 Organizations Law.

⁴⁰ Or, in the case of aqwaf, with the Ministry of Haj and Aqwaf.

⁴¹ Some organizations will want to set up a separately organized domestic entity, in which event that entity will be a domestic organization.

⁴² A foreign organization’s statute will contain information required by the laws of the country in which it is established. If the Ministry of Economy needs more information, then it must ask the organization to provide it but not require it to amend its statute.

- **Chapter Two B** should contain provisions that are only applicable to foreign organizations 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 organizations (D-NGOs) and foreign organizations (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

3. 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, it the NGO Law usefully define such terms as “nongovernmental,” “nonpolitical,” “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 organization’s objectives (purposes) and its activities must be stated in it 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.

4. 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.⁴³ 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 à vis a for-profit construction company.

5. 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 Commission⁴⁴ and the Dispute Resolution Commission. The former, as described in Article 21, is made up of government officials, and it 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 organizations 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 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.⁴⁵

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 center 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.

⁴³ There is no question that for-profit organizations set up as NGOs should be dissolved and required to re-register as companies.

⁴⁴ 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).

⁴⁵ One important concern is how to rationalize the ways in which the various laws apply to domestic civil society organizations (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 organizations 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.

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

Concrete Examples that Illuminate Key Problems, Facts, and Situations

Kandahar: Necessary Procedure for Project Execution for NGOs

(from the description found on the JUCA website) First, in order to implement a project a domestic or foreign organization must discuss it with the target community to obtain initial agreement and cooperation with the local people. Second, the written agreement with local community must be submitted to the Department of Planning, Kandahar Provincial Government, which, if it approves, gives it to the Governor for approval. The approved agreement is often also sent to the local “leader” who has power within the community in order to seek his understanding and cooperation. Without the latter, the project may not be completed successfully.

<http://www.unitar.org/hiroshima/PilotPhase/UNITARResMisAfghInfo.htm>.

ACBAR

FCCS reports that ACBAR (Agency Coordinating Body for Afghan Relief) is trying to ‘clean up’ the image of Afghan NGOs, especially since many of its core members are precisely these big Afghan NGOs that were fostered during the anti-government ‘jihad.’ Because of these members, ACBAR lacks a certain amount of credibility with the Afghan people. Further, it does not really seem to know whether its members are part of civil society or not. See also Sayara NGO perception assessment, 2004.

FCCS

As described on its website, “The national Afghan Foundation for Culture and Civil Society was established in March 2003 as an independent social organization by a group of Afghans concerned with the fate of Afghan culture and the strengthening of Afghan civil society. Its board member include senior member of the Academy of Sciences, the Human Rights Commission, the Judiciary, members of artists' and research organization of Kabul University, and the Director of the National Museum.

”The foundation is registered with the Ministry of Justice as an independent social foundation. Its staff is fully Afghan, although it benefits from the advice given by foreigners. The Chairman, Mir Ahmad Joyenda, is a veteran in government and international agency work and has wide experience in culture and research activities. The headquarters are in a historic building in the center of Kabul, where it can accommodate up to 300 people in its weekly socio-cultural events.”

FCCS appears to believe that it should be registered in accordance with normal local registration procedures as an Afghan organization. This is also true of other organizations, such as ACSF.

Ministry of Justice

According to FCCS, although Art 19 of the SO law of 2002 requires that the MOJ establish an “office for studying coordination of the work and to study the request of the social organization as well as its constitution (organized under a separate regulation),” the

capacity of MOJ to carry out its responsibilities remains limited. The department dealing with CSOs and political parties seems to be confused about what each type of organization does.

Annex E

Non-distribution of the Assets of an Association

1. 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."

2. Provisions of the Social Organizations Law (2002)

Article 15 is similar to CC Article 406 (1) and provides as follows: "The founders of the social organization cannot include the subjects in the constitution, which authorize to transfer the revenue (sic) of the social organization 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 organization can spent (sic) its resources only for achieving the goals of the organization."

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 organization, institution or association which their goal and objective are close to the dissolved social organization."

3. Provisions of the NGO Law (2005)

Article 22

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

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

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 organization with similar activities...If there are no such organizations, the movable and immovable properties belong to the government.”

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

Annex F Persons Interviewed

AKDN:

Chris Eaton, CEO AKF-A
Shahid Punjani, Programme Support Officer, AKDN
Shair Baz Hakemy, AKDN and State Minister

CSOs:

Anja de Beer and M. Hashim Mayar, ACBAR
Aziz Rafiee, Managing Director ACSF
Paul Fishstein, AREU
Dr. M. Saeed Niazi, Head of Civil Society Unit, FCCS

Ministry of Economy:

Engr. Shah Aqa, General Director of NGO's

Ministry of Justice:

Judge Ashraf Hegazy, Advisor to the Italian Justice Project Office
Marcello Rossoni, Legal Officer

Others:

Kaja Borchgrevink, International Peace Institute, Oslo
Zahid Elahi, Governance Technical Advisor CIDA
Jean S. Renouf, Armed Conflict Analyst, LSE
Aemal Sanjeeda, Legal Advisor, Counterpart International I-PACS program
Aman Mojadidi and Louis Meunier, Altai Consulting

Annex G -- Bibliography

Laws and regulations:

Afghanistan Constitution (2004)

Civil Code of Afghanistan (1977)

Income Tax Act (2005)

Customs Code (2005)

NGO Law (2005)

Social Organizations Law (2002)

Regulations for the activities of the national and international NGOs in Afghanistan (Taliban Regulation) (2000)

Articles and other documents:

ACSF, organizational 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/~afifi/Articles/zakat.htm>

Counterpart Consortium, "Afghanistan Civil Society Assessment" (2005)

FCCS, "Afghan Civil Society Baseline Report, Provincial Analysis" (2005)

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

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

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)

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>