

THE LAW AFFECTING CIVIL SOCIETY IN ASIA

Developments and Challenges for Nonprofit and
Civil Society Organizations

2019 REVISED VERSION

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I. INTRODUCTION

Mark Sidel and David Moore¹

The Paradox of Asia and the Scope of this Report

Asia presents a paradox. Many of the more than forty countries in this vast region are home to vibrant civil society sectors, engaged in everything from social services to advocacy to mutual benefit activities and other pursuits that fall within the definitions of non-profit or charitable activity. Yet in many countries of Asia, government regulatory controls on civil society are restrictive or highly restrictive. Indeed, based on reports from countries as diverse as India, China, Thailand and Vietnam, among many others, the legal operating environment is becoming more restrictive, particularly for advocacy and other groups engaged in independent civil society activity.

This report is an overview of the regulatory environment affecting civil society and civil society organizations (CSOs)² across Asia, focusing on a number of countries and key themes. These themes include: general constitutional and legal frameworks; types of organizational forms of CSOs; establishment requirements; registration and incorporation requirements; termination and dissolution procedures; state supervisory requirements; legal treatment of foreign organizations; and rules related to funding sources, including cross-border philanthropy and economic activities. While this report may make reference to any country in Asia, it focuses predominantly on Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan (Central Asia); Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka (South Asia); Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam (Southeast Asia); China, Hong Kong, Japan, Mongolia and South Korea (East Asia); and Fiji (Pacific).

This report is intended to identify key trends in the regulation of civil society and CSOs across Asia. As readers will note, it is not a detailed study of each country, and not all issues are covered for each country. For more detail, we invite readers to consult other

¹ Mark Sidel is Doyle-Bascom Professor of Law and Public Affairs, University of Wisconsin-Madison and Consultant for Asia, ICNL. David Moore is Vice President for Legal Affairs, ICNL. We are grateful to Parker Conover, a JD student at the University of Wisconsin Law School, for his excellent work in updating information and citations and commenting on the original 2016 version of this report.

² The “civil society” sector has been labeled variously as the “third” sector, “voluntary” sector, “nonprofit” sector, “charitable” or “independent” sector, and the “social economy”. The organizations making up civil society come in a diverse range of forms, which may include associations, foundations, non-profit corporations, public benefit companies, development organizations, community-based organizations, religious congregations and faith-based organizations, hospitals, universities, mutual benefit groups, sports clubs, advocacy groups, arts and culture organizations, charities, unions and professional associations, humanitarian assistance organizations, non-profit service providers and charitable trusts. Taken together, they are often referred to as non-governmental organizations (NGOs), not-for-profit organizations (NPOs), or civil society organizations (CSOs). For purposes of this report, ICNL defines civil society organizations as non-state actors whose aims are neither to generate profits nor to seek governing power. This definition is intended to embrace the diverse range of organizational forms listed above, but to exclude political parties.

ICNL reports, such as the *Global Country Notes* prepared by ICNL for the Council on Foundations,³ the country reports of the *Civic Freedom Monitor* series,⁴ and other detailed resources. There have been few other attempts to take a broad, regional look at the regulation of CSOs in Asia, and we are pleased to make this report of trends in the region available to a wider audience.⁵

As noted when the first version of this report was published in 2016, we are grateful to the Asia Pacific Philanthropy Consortium for its support of this work, and to the late Barnett Baron for his guidance in this area, both for this report and over many years of activities.⁶



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3 For U.S. International Grantmaking country reports, see <http://www.cof.org/global-grantmaking/country-notes>.

4 For *Civic Freedom Monitor* country reports, see <https://www.icnl.org/resources/civic-freedom-monitor>.

5 For earlier efforts, see, e.g., Silk (ed.), *Philanthropy and the Law in Asia* (Jossey Bass, 1999), particularly the introduction; Sidel and Zaman (ed.), *Philanthropy and the Law in South Asia* (APPC, 2004, updated 2007), particularly Sidel and Zaman, *Philanthropy and Law in South Asia: Key Themes and Key Choices* (Introduction); Barnett F. Baron, *The Legal Framework for Civil Society in East and Southeast Asia* (2002), 4(4) *International Journal of Not-for-Profit Law*, at http://www.icnl.org/research/journal/vol4iss4/art_1.htm.

6 ICNL is grateful to Parker Conover, a JD student at the University of Wisconsin Law School; Margaret Scotti, Zach Lampell and Julie Hunter, ICNL Legal Advisors; Mona Qureshi, extern at ICNL; and to the University of Wisconsin-Madison for research support for this report.

II. PROVISIONS OF GENERAL LAWS

a. Consistency and Clarity of Laws

The consistency and clarity of laws remain problematic throughout Asia. That is perhaps to be expected given the enormous diversity of countries, of legal systems, and of approaches to civil society. But both inconsistent laws and ambiguous laws open the door to excessive state discretion in their implementation, weak judicial or administrative oversight of executive implementation, and high costs for CSOs in attempting to comply with inconsistent and vague regulation.

We see these issues throughout the region. In China, a plethora of laws and regulations govern the nonprofit and civil society sector, ranging from long-outdated regulations on foundations, social associations and other forms of nonprofits; to newly enacted national legislation, such as the Charity Law and the Law on the Management of Overseas NGO Activities in the People's Republic of China (PRC); to new local regulations that in some cases provide more flexibility for both organizations and local governments; to vague and inconsistent provisions concerning tax and other issues. And yet, for some organizations, inconsistent and vague laws and regulations, which enable the state to use wide discretion, also create gaps and possibilities for nonprofits to operate in the gaps of regulation. That, too, is part of the paradox of the Asian regulation of nonprofits and philanthropy.

b. General Constitutional Framework

Another paradox of regulation of civil society in many Asian countries is the wide freedom accorded to associational life under constitutional provisions and the restrictive implementation and wide state discretion that exists in actual practice. China's Constitution (Art. 35) guarantees the freedoms of association and of assembly, but state discretion in implementing these freedoms and the lack of mechanisms to enforce these constitutional guarantees undermines the constitutional protection. We see this problem in many other countries around the region. Many countries have strong textual protections in the constitutions for freedom of association, including Afghanistan (Arts. 34-36); Bangladesh (Arts. 37-39); Bhutan (Arts. 7-12); Cambodia (Arts. 41-42); Fiji (Arts. 18-19); India (Art. 19); Japan (Arts. 16, 21); Indonesia (Arts. 28, 28E); Kazakhstan (Arts. 5, 23); Kyrgyzstan (Arts. 4-2, 31); Malaysia (Art. 10); Mongolia (Art. 16-10); Pakistan (Art. 17); the Philippines (Secs. 4, 8); Singapore (Art. 14); and many others.

In all these countries the broadest protection available for nonprofit and civil society activity is in the constitution. When translated into more detailed laws and regulations

and executive implementation, however, the freedoms are whittled down via state discretion, restrictive provisions, and lack of redress. Indeed, often the constitutional text itself provides explicit rationales for limiting associational freedoms. For example, in some cases, constitutions make the exercise of freedom of association dependent on national law:

- The 2004 Afghan Constitution protects the right to form social organizations “in accordance with the provisions of the law.” (Art. 35)
- The 1993 Cambodian Constitution enshrines the right to establish associations, but goes on to state, “These rights shall be determined by law.” (Art. 42)

More often, constitutions include limits based on national security, public order, or public morality.⁷ For example:

- The Constitution of Bangladesh affirms the freedom of association, “subject to any reasonable restrictions imposed by law in the interests of morality or public order.” (Art. 38)
- The Fijian Constitution, ratified in 2013, limits the freedom of association “in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections,” amongst other limitations. (Art. 17(3)(a))
- Mongolia’s Constitution of 1992 affirms the “right to freedom of association in political parties or other public organizations on the basis of social and personal interests and conviction.” However, “The political parties and other mass organizations shall uphold the public order and State security, and respect and enforce the law. (Art. 16(10)).
- Paragraph 354 of the 2008 [Constitution](#) of Myanmar protects fundamental freedoms, including freedom of association, “if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality ...”
- The [2015 Nepali Constitution](#) guarantees for citizens the freedom of opinion and expression, the freedom to “assemble peacefully and without arms, and the freedom to form unions and associations.” However, each of these freedoms is subject to a separate clause on “reasonable restrictions” on acts that may undermine, among others, the “nationality, sovereignty, independence, and indivisibility of Nepal”; “national security”; or the “harmonious relations” between federal units or people of different castes, ethnicities, religions, or communities. (Art. 17:1-6)

⁷ Depending on implementation, limitations based on national security, public order, etc., may comport with the ICCPR. The examples of constitutional limitations listed here often go beyond the grounds listed in the ICCPR.

- The Constitution of Pakistan affirms the right to form associations, “subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.” (Art.17)
- The Singaporean Constitution allows restrictions on fundamental rights where “necessary or expedient” for the “security of Singapore ..., public order or morality.” (Art. 14)

Such constitutional provisions may limit the ability of individuals and CSOs to challenge domestic laws based on violations of the country’s constitution. While there have been few examples of such constitutional law challenges within Asia, we take note of certain notable litigation successes in recent years. In Indonesia, for example, in two decisions announced on December 23, 2014, the Constitutional Court of Indonesia acknowledged that the Law on Societal Organizations (2013) restricts the freedom of association protected in the Constitution. While the Court ruled that the law is not excessive in nature and, thus, is constitutional as a whole, it found several individual provisions of the law to be unconstitutional or “conditionally unconstitutional” (that is, depending on the way the provision is implemented).⁸ In India, the Delhi High Court ruled in January 2015 that the government’s decision to block Greenpeace from receiving foreign funding was unconstitutional; the court ordered authorities to release more than \$310,000 in funds that Prime Minister Narendra Modi’s government had frozen since the summer of 2014.⁹

c. Types of Organizations

In a region where civil society activity is often subject to restriction and is coming under increasing pressure in certain countries, we might expect a relatively narrow list of permitted domestic nonprofit forms in the legal framework. That is certainly not the case, at either country or regional level—another paradox of the regulation of nonprofits and civil society in Asia. A few examples indicate the diversity of forms (types) of organizations that countries in the region allow: Afghanistan permits associations and nongovernmental organizations (as a defined category). Bangladesh permits societies, trusts and non-profit companies. China permits social associations, foundations, civil non-enterprise institutions (providing social services, such as schools), and companies that undertake nonprofit activities. India recognizes trusts, societies, and nonprofit companies (Section 8 companies). Japan has general associations and foundations, public interest associations and foundations, special non-profit corporations, social welfare corporations, and other forms. Kazakhstan recognizes non-commercial institutions, public associations, consumer cooperatives, unions of associations, and other forms. Malaysia permits societies, companies limited by guarantee, and trusts. Pakistan recognizes societies, public charitable trusts, voluntary social welfare agen-

⁸ *Civic Freedom Monitor: Indonesia*, at <https://www.icnl.org/resources/civic-freedom-monitor/indonesia>.

⁹ Bengali, Shashank. “Court orders Indian government to release Greenpeace funds.” *Los Angeles Times*, January, 20, 2015, available at <http://www.latimes.com/world/asia/la-fg-india-greenpeace-funds-20150120-story.html>.

cies, and nonprofit companies. Singapore permits societies, charities, mutual benefit organizations, and cooperative societies. South Korea recognizes associations, foundations, and corporations under special laws (for example for social welfare, private schools and other special purposes). Indonesia permits several forms of associations and foundations. Sri Lanka permits societies, non-profit companies, cooperative societies, and voluntary social services organizations, among others.

Thus, we see two distinct categories based on the dominant orientation of the legal system in the country:

1. Countries with roots in the common law tradition (including those that were subject to British colonialism) offer a range of forms typically found in common law systems, including associations or societies as types of membership organizations; and trusts and/or non-profit companies as alternative forms. Such is the case in Bangladesh, India, Malaysia, Pakistan, Sri Lanka, and Singapore.
2. Countries with a stronger civil law tradition typically provide for associations (as the membership-based form) and foundations (as the non-membership-based form). Examples include China, Japan, Indonesia, Mongolia, and South Korea. In some of these countries, of course other organizational forms may be available, such as social welfare organizations or non-commercial institutions.

Notably, some countries have chosen to define a ‘non-governmental organization’ or ‘NGO’ as a discrete organizational form. Examples include countries that have undergone legal reform of the non-profit sector in more recent years, such as Afghanistan (Law on Non-Governmental Organizations, enacted in 2005) and Cambodia (LANGO, enacted in 2015).

d. Purposes (Permissible or Prohibited Purposes for Organizations)

In defining the scope of the permissible purposes of organizations, laws or regulations sometimes include broad statements of prohibition and allow wide discretion to government regulators. Such limitations, depending on implementation, may prevent CSOs from engaging in a wide range of legitimate activity, such as those relating to vulnerable communities, ethnic and religious minorities, environmental protection, government monitoring, and other areas of advocacy work.

We see at least three broad categories of restrictions. First, and perhaps most common, are limitations based on national security or public order.¹⁰ Examples include:

¹⁰ Such limitations, even where the legislative language mirrors ICCPR limitations, is often interpreted in subjective and arbitrary ways to limit certain kinds of associational activities, including, e.g., human rights advocacy, support for vulnerable communities, environmental advocacy, and dissent.

- China bars a wide range of purposes, including opposing the ruling Communist Party or engaging in divisive or splittist activity.¹¹
- Vietnam also prohibits a broad range of objectives, including harming national security; social order; social morality; the national good; customs, practices and traditions; and legitimate rights and interests of organizations and individuals.¹²
- Kazakhstan prohibits pursuing a violent change of the constitutional system, violation of the integrity of the Republic, undermining the security of the state, inciting social, racial, national, religious, class and tribal enmity, as well as formation of unauthorized paramilitary units.¹³
- Pakistan allows restrictions “in the interest of religion, security and/or defense of the state, friendly relations with foreign states, public order, decency and morality, or incitement to an offence.”¹⁴
- Malaysia permits its Registrar of Societies to refuse to register an applicant society “where it appears to him that [it] ... is likely to be used for ... any purposes prejudicial to or incompatible with peace, welfare, security, public order, good order or morality....” or where it “appears ... to mislead or be calculated to mislead members of the public as to the true character or purpose of the society....”¹⁵
- The Thai Civil and Commercial Code allows registration of an association to be denied if “the object of the association is contrary to the law or good morals or likely to endanger public order or national security...”¹⁶

Second, many countries limit engagement in “political” activities, often left undefined. Such limitations can discourage CSOs from engaging in a wide range of advocacy activity that could possibly be considered “political.” For example:

- India bars CSOs from engaging in policy campaigns or legislative activities, with an exception for certain kinds of non-political lobbying for general public utility.¹⁷
- Afghan law bars NGOs and associations from engaging in political activities, which, while not defined in the law, are generally understood as campaign-

11 *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

12 Vietnam, Decree 45/2010/ND-CP on Establishment, Operation and Management of Associations, Art. 24(1).

13 Art. 5 of the Constitution.

14 Pakistan Constitution, Art. 19.

15 Societies Act of 1966, Act 335, Part 1, 7(3)(d)(iii) Malaysia.

16 Thailand, Civil and Commercial Code, Section 82, available at: <http://library.siam-legal.com/thai-law/civil-and-commercial-code-juristic-persons-sections-78-109/>.

17 *Civic Freedom Monitor: India*, at <https://www.icnl.org/resources/civic-freedom-monitor/india>.

ing and electioneering rather than as advocacy.¹⁸

- Cambodia’s Law on Associations and NGOs, in Article 24, mandates both foreign and domestic organizations to “maintain their neutrality towards political parties in the Kingdom of Cambodia.”¹⁹
- Indonesia’s Law No. 17 of 2013 (Law on Societal Organizations) prohibits all societal organizations from propagating an ideology that conflicts with state principles (*Pancasila*) – a clear restriction on freedom of expression.²⁰
- Mongolia’s Law on Non-Governmental Organizations of 1997, in Article 20, explicitly forbids non-governmental organizations from making any political contributions to political parties, coalitions or candidates in state, federal or presidential elections.²¹

Third, some laws also include certain substantive limitations:

- China and Vietnam prohibit nonprofit organizations from operating in a geographic area where another organization working in the same field is already active.²²
- The Afghan Law on NGOs prohibits NGO participation in construction projects and contracts (Article 8.8).²³
- Fiji’s Charitable Trusts Act, the sole legislation related to NGOs in Fiji, requires that NGOs be formed, and subsequently incorporated as charitable trusts, only for “religious, educational, literary, scientific, or charitable purposes.”²⁴

18 *Civic Freedom Monitor: Afghanistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/afghanistan>

19 Law on Associations and Non-governmental Organizations, Ch. 5, Art. 24 (Cambodia).

20 *Civic Freedom Monitor: Indonesia*, at <https://www.icnl.org/resources/civic-freedom-monitor/indonesia>.

21 Law on Non-Governmental Organizations of 1997, Ch. 4, Art. 20 (Mongolia).

22 See Vietnam, Decree 45/2010/ND-CP on Establishment, Operation and Management of Associations Association, Art. 5(1); *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

23 See *supra*, note 18.

24 Charitable Trusts Act, Part II (Fiji).

III. ESTABLISHMENT REQUIREMENTS

Laws governing various forms of CSOs often set forth certain criteria for the formation or establishment of organizations – requirements relating to eligible founders of organizations or the minimum number of members needed to form an organization. How the law addresses these criteria is crucial as restrictive limits on eligibility or high membership criteria may amount to direct interference with the freedom of association.

In defining the eligible founders or members of CSOs, laws in Asia often impose limits on foreign citizens and/or non-citizens, as well as on minors. For example:

- In Afghanistan, foreign citizens, stateless persons, and youth under the age of 18 are restricted from serving as founders of associations.²⁵
- In Bangladesh, membership of non-profit organizations, irrespective of the specific organizational form, is limited to adult citizens; thus, non-citizens and minors are excluded from founding or belonging to non-profit organizations.
- In Kazakhstan, foreign citizens and stateless persons may not be founders of public associations, although they can be members of public associations (other than political parties) if such membership is specified by the charter of the association.²⁶
- In Malaysia, the Societies Act (1966) does not explicitly prohibit the participation of non-Malaysians, but the Registrar may require the office-bearer to be Malaysian under the arbitrary powers afforded by Section 7. Moreover, persons under the age of 17 cannot be office-bearers. In addition, under the Universities and University Colleges (Amendment) Act (2012), universities can forbid students from participating in any organization they deem “unsuitable to the interests and well-being of the students or the University.”²⁷
- In Nepal, foreign persons do not have the right to participate as founders of an association or members with voting rights. The law requires all of the founding members to submit their citizenship certificates upon application for registration; this requirement, in practice, excludes not only foreigners

²⁵ Association Law, Art. 7, at https://www.icnl.org/research/library/afghanistan_assoclaw/.

²⁶ *Civic Freedom Monitor: Kazakhstan*, at <https://www.icnl.org/resources/civic-freedom-monitor/kazakhstan>.

²⁷ Societies Act of 1966, Act 335, Part 1, 7 (Malaysia); Universities and University Colleges Act of 1971, Act 30, Part 3, 15 (Malaysia).

from enjoying the right to association, but also the many people who are born and live in Nepal but do not possess citizenship certificates.²⁸

By contrast, under the various laws governing the establishment of non-profits in India, there is no specific bar on foreigners as founders or trustees of societies, trusts, or non-profit companies. Fiji, also, does not specifically bar foreigners as founders or trustees of charitable organizations. Similarly, in Afghanistan, founders of an NGO (as opposed to an association) may be domestic or foreign, natural or legal persons, at least one of whom has a residence and exact address in Afghanistan (Association Law, Art. 11(1)). The Mongolian Law on Non-Governmental Organizations also permits “[f]oreign citizens and stateless persons legitimately residing in Mongolia” to join or establish NGOs (Art. 5(6)).

In addressing the formation of associations and other membership forms, laws will typically impose minimum membership requirements. These minimum membership requirements range from high and difficult to meet to lower and more reasonable levels.²⁹ To give a sense of the range of membership requirements:

- To form a national-level association in Turkmenistan, the law requires at least 400 founding members.³⁰
- Social organizations in China, at the time of application for registration, must have at least 50 individual members or 30 institutional members, in addition to a long list of other requirements.³¹
- In Kazakhstan, a minimum number of ten Kazakh citizens are required in order to form a public association.³²



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28 *Civic Freedom Monitor: Nepal*, at <https://www.icnl.org/resources/civic-freedom-monitor/nepal>.

29 It is considered good regulatory practice for laws to set minimum membership requirements of no more than 2-3 members.

30 *Civic Freedom Monitor: Turkmenistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/turkmenistan>.

31 *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

32 *Civic Freedom Monitor: Kazakhstan*, at <http://www.icnl.org/research/monitor/kazakhstan.html>.

- Thailand also requires ten members to establish an association.³³
- In Malaysia, the Societies Act 1966 requires a minimum of seven founders to establish a society.³⁴ Similarly, in Nepal, the Association Registration Act requires a minimum of seven founders.³⁵ The Societies Ordinance in Sri Lanka also requires seven persons, as well as a capital of 10,000 rupees.³⁶ And the Societies Registration Act of 1860 in India likewise requires at least seven founding members to establish a society.³⁷
- In Afghanistan, to establish a domestic NGO, the Law on NGOs requires at least two founders (Article 11(1)) – a requirement that is fully consistent with the best regulatory practice.³⁸

33 Civil and Commercial Code, Section 81 (Thailand).

34 Societies Act of 1966, Act 335, Part 1, 2 (Malaysia).

35 Associations Registration Act, 1977, 20134, 4 (Nepal).

36 Sri Lanka, Societies Ordinance, No. 16 of 1891, as amended 2005, Clause 5(1), available at <http://www.srilankalaw.lk/Volume-VII/societies-ordinance.html>.

37 The Societies Registration Act, 1860, 21, 1 (India).

38 While the Afghan Law on Associations includes no minimum membership requirement, the Regulation on Procedure of Establishment and Registration of Associations requires that associations consist of no fewer than 10 founding members; Law on Non-Government Organizations, 876, Ch. 1, Art. 11 (Afghanistan).

IV. REGISTRATION/ INCORPORATION REQUIREMENTS

a. Registration: Voluntary or Mandatory?

In direct violation of international legal standards, the laws in several countries in Asia make registration mandatory for associations and sometimes reinforce these requirements with criminal sanctions. For example:

- In Kazakhstan, the creation and operation of unregistered public associations is prohibited; the members of such illegal informal associations are subject to administrative and criminal liability.
- In Malaysia, the Societies Act (the SA 1966) prohibits the formation or operation of unregistered groups. The SA 1966 states that committing a breach of the provision and carrying out activities through unregistered organizations will incur a penalty of up to RM 5,000 (about \$1,300 USD) and RM 500 (about \$130 USD) for every day of continuing default.³⁹
- In Nepal, the formation of an unregistered association is considered a violation and subject to a fine “of up to 2,000 Rupees (about \$20 USD) on each member of the management committee of such an association.”⁴⁰
- The Afghan Law on Associations (2013) expressly states that “An association initiates its work after receiving a registration certificate” implying that registration is mandatory – that is, associations cannot carry out activities as unregistered groups.⁴¹
- According to the Civil and Commercial Code in Thailand, all associations must be registered⁴² - although this is apparently not strictly enforced, as unregistered groups exist in Thailand.
- In China, public associations must be registered with the Ministry of Civ-

³⁹ Societies Act of 1966, Act 335, Part 1, 7 (Malaysia).

⁴⁰ Association Registration Act, Arts. 3, 12 (Nepal).

⁴¹ Law on Associations, Art. 14 (Afghanistan).

⁴² Civil and Commercial Code, Sec. 78 (Thailand), available at: <http://library.siam-legal.com/thai-law/civil-and-commercial-code-juristic-persons-sections-78-109/>.

il Affairs local civil affairs bureau. The registration process is dependent on what type of public association is being formed and requires extensive documentation.⁴³

Mandatory registration is not, of course, the sole regulatory approach in Asia. The laws of several countries contain no bar against the formation and existence of unregistered groups. For example:

- The law in India does not specifically prohibit the formation and operation of “unregistered” groups. In fact, the Income Tax Act 1961 recognizes both incorporated and unincorporated “association[s] of persons.”⁴⁴ There are no sanctions or penalties for carrying out activities through an unregistered organization, except tax implications.
- In Indonesia, there is no law that specifically prohibits the formation and operation of ‘unregistered’ groups. Indeed, Law No. 17 of 2013 on Societal Organizations recognizes a category of “societal organizations without legal entity status.”⁴⁵

Notably, Myanmar’s Association Registration Law of 2014 affirms the voluntariness of registration: “Domestic organizations, *upon their voluntary decision* ... shall submit an application to the registration committee concerned ...”⁴⁶

b. Responsible State Agencies

In a region of wide diversity, there are generally, at the country level, only a limited range of state organs or agencies responsible for the registration or incorporation of CSOs. Complicating this picture to some degree are the multiple forms of organization that are usually available in each country; in many cases, the registration body may vary with each particular kind of organization. But generally, the key state agencies responsible for registration/incorporation include: ministries of civil affairs (also called interior, home affairs, or other terms); ministries of social welfare, development or planning; ministries dealing with particular fields, such as health or education (and usually for nonprofits within those fields); stand-alone registration authorities for nonprofit organizations (a registrar of societies or similar body); company registration agencies; a body within a president’s or prime minister’s office; the governor of a province or state; in some cases the police or security agencies; and other agencies.⁴⁷

Two other factors also complicate this picture. One is the rise of sub-national actors in the

43 *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

44 Income Tax Act of 1961, Sec. 2(31) (India).

45 Law No. 17 of 2013, Art. 10 (Indonesia).

46 Association Registration Law of 2014, Art. 7 (Myanmar) (emphasis added).

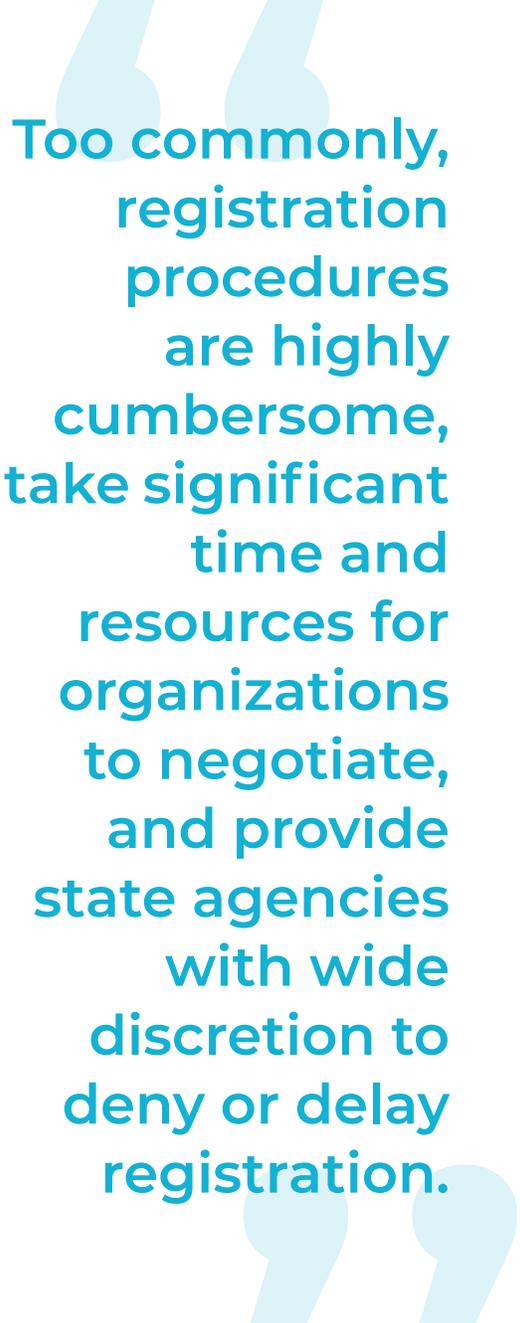
47 Foreign or international CSOs, discussed in section VII below, often fall under the regulatory mandate of the Ministry of Foreign Affairs.

registration and incorporation process, particularly at the provincial (state) level. This has long been a feature of the registration and incorporation process in India, where laws governing societies and trusts make state authorities the key agencies for incorporation and registration for several organizational types. In Myanmar, the Association Registration Law of 2014 envisions a decentralized system with registration committees extending from the central to the provincial, district and even township levels. The Law on Associations in Afghanistan of 2013 similarly requires the Ministry of Justice to provide access to registration at the provincial level, though this has not been implemented; associations must still apply for registration in the capital. Although such decentralized approaches may be laudable for broadening geographic access to registration, they create distinct challenges regarding the consistency and professionalism of implementation, as local officials may interpret legislation differently or impose ad hoc requirements not based in the law.

The second factor is the long-time and increasing role of security agencies in the registration and incorporation process. Within many countries of Asia, security and police authorities have long had a role in registration of nonprofit and civil society groups, including the investigation of applicants and, in some countries, veto powers in the registration process. Those roles may be unwritten or informal, but are increasingly being formalized into law. In Bangladesh, for example, prior clearance from National Security Intelligence (NSI) was recently made mandatory for registration under the Societies Registration Act. In Myanmar, the Association Registration Law (2014) envisions the establishment of registration committees whose members include, among others, police officers. This “securitization” of registration is perhaps particularly noteworthy as some countries seek to regularize, make more consistent, or tighten the registration and activities of foreign NGOs and foundations. This topic is dealt with further below.

c. Registration Procedures

The details of registration procedures vary widely across Asia. Too commonly, registration procedures are highly cumbersome, take significant time and resources for organizations to negotiate, and provide state agencies with wide discretion to



Too commonly, registration procedures are highly cumbersome, take significant time and resources for organizations to negotiate, and provide state agencies with wide discretion to deny or delay registration.

deny or delay registration. Within this unfortunate trend, we can discern several restrictive regulatory approaches, including the following:

MULTI-STEP REGISTRATION PROCESS

In several countries, CSOs must request approval of multiple government bodies. China has been well known for its “dual management” system, in which organizations generally must first obtain the sponsorship of a “professional supervising unit” such as a government ministry or provincial government agency, then seek registration and approval from the Ministry of Civil Affairs in Beijing or a local civil affairs bureau, and remain under the dual control of both agencies throughout their organizational life. (For certain kinds of organizations, that cumbersome and difficult “dual management” structure is now being replaced by a single organization supervisory system.) In Vietnam, associations must first form a preparatory group, which must be approved after submission of voluminous paperwork. Then the preparatory group seeks permission to form an organization, again through voluminous paperwork, and the state has relatively wide discretion to deny registration. After obtaining the certificate of establishment, the association must apply for “field operational permission” from another state agency. Then the association must hold its assembly to agree on the charter, which must be submitted to the state agency for approval.

APPROVALS REQUIRED FROM MULTIPLE GOVERNMENT ACTORS

This approach is distinct from the first in that even where applicants may only need to file for approval with one government department, the application may then be ‘vetted’ by one or more other government departments. The result may often be registration delayed or denied. In Bangladesh, for example, registration applicants often require clearance from the Ministry of Home Affairs, the police, and/or the domestic intelligence agencies. In Afghanistan, the review of NGO registration applications is conducted first by a ‘Technical Commission’ consisting of staff from the Ministry of Economy, and second by a ‘High Evaluation Commission’ consisting of staff from no fewer than five governmental ministries. In Myanmar, the new Association Registration Law (2014) envisions the establishment of registration committees consisting of representatives from no fewer than five ministries.⁴⁸

BURDENSOME REQUIREMENTS OF “VOLUMINOUS PAPERWORK”

Registrants are sometimes overwhelmed by required documents, seals, approvals, lists, forms and the like. The result, in many countries, is an exceptionally difficult set of registration procedures that, again in many countries, show no signs of easing. For example, in China, social organizations seeking registration must supply, among other things, a document of approval from its sponsoring government unit, a record of assets, proof of the right to use their premises, a draft constitution that also must meet several requirements, and verification of the “identity and basic situation” of founders and leaders.⁴⁹

⁴⁸ Associations Registration Law, 2014, Art. 5 (Myanmar).

⁴⁹ People’s Republic of China, Regulations on the Registration and Management of Social Organizations (1999), Art. 11, available at <http://www.usig.org/countryinfo/laws/China/Regulations%20Social%20Organisations.doc>

There are, however, more enabling approaches to registration. In 2013, Kazakhstan introduced amendments to its nonprofit registration procedures that significantly simplified CSO registration and dissolution processes,⁵⁰ and registration of non-commercial organizations is regarded as “relatively straightforward,” taking about ten days.⁵¹ Similarly, the Indian registration system, while sometimes complex and involving significant choice of organizational form and structure, is generally not considered a restrictive or harassing process.⁵²

d. Grounds for Refusal of Registration

The grounds for refusal of registration of CSOs in Asian countries are understandably diverse but generally follow three types of patterns.

1. TECHNICAL GROUNDS

The first are technical grounds, generally relating to the completeness or accuracy of the application. For example:

- In Afghanistan, denial of registration may follow if documents are incomplete or the name of the applicant is so similar to another organization that confusion is likely to result.
- In China, the registration of private non-enterprise units may be denied where “fraud and falsification are resorted to in applying for its establishment.”

2. POLITICAL GROUNDS

The second are what might be termed political grounds, generally relating to constraints on the ability of CSOs to engage in political purposes or activities, or more broadly, limitations linked to public order and national interest. Such grounds, especially if vaguely stated, may invite the exercise of excessive state discretion in deciding on registration. For example:

- The Registrar of Societies in Singapore must deny registration if it is satisfied that “the specified society is likely to be used for ... purposes prejudicial to public peace, welfare or good order in Singapore” or, in the case of political associations, “its rules do not provide for its membership to be confined to citizens of Singapore or it has such affiliation or connect with any organization outside Singapore as is considered by the Registrar to be contrary to the national interest.”⁵³

50 See Kazakhstan, *The 2013 Sustainability Index for Central and Eastern Europe and Eurasia*, at <http://www.slideshare.net/liyabudiyanskaya/csosi-for-kazakhstan>.

51 *Civic Freedom Monitor: Kazakhstan*, at <https://www.icnl.org/resources/civic-freedom-monitor/kazakhstan>.

52 India, however, reserves its restrictions and controls for receipt of foreign funding, providing significant scrutiny of such organizations. So the patterns of restriction and control can and often do differ significantly from country to country.

53 Societies Act of 1996, Ch. 311, Sec. 4(2) (Singapore).

- The Association Registration Law (2014) in Myanmar provides for acceptance of registration “if there is no reason that shall affect the rule of law and security of the state.”⁵⁴
- Under the Societies Act 1966 in Malaysia, the Registrar may refuse to register a local society “where it appears to him that the local society is unlawful under the provisions of the Act or any other written law or is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia.”⁵⁵
- Under Thailand’s Civil and Commercial Code, registration may be denied because “the object of the association is contrary to the law or good moral or likely to endanger public order or national security...”⁵⁶

3. SUBSTANTIVE GROUNDS

Finally, we find a variety of substantive grounds that are almost certainly overreaching grounds for denial:

- In China, private non-enterprise units (as well as social associations) may be denied registration where there is no need for their establishment – that is, where “there already exist private non-enterprise units whose business scopes are either identical or similar to those of the proposed private non-enterprise units in the same administrative area.”
- In Cambodia, the Law on Associations and Non-Governmental Organizations (LANGO) provides that an organization may be denied registration, if its purpose and goal would endanger, among other things, “national unity, cultures, traditions, and custom of the Cambodian national society.”⁵⁷
- In Bangladesh, a draft Volunteer Social Welfare Organizations (Registration and Control) Act, proposed in 2019, provides no grounds at all for the denial of initial registration or a renewal request, thereby opening the door to subjective government decision-making.⁵⁸

e. Procedural Safeguards in the Registration/Incorporation Process

Procedural safeguards in the registration/incorporation context can take many forms, including time limits for government review; automatic registration/incorporation if the executive authority does not act within a certain time; requirement of a written ex-

⁵⁴ Association Registration Law, 2014 (Myanmar)

⁵⁵ Societies Act of 1966, Act 335, Part 1, 7(3) (Malaysia).

⁵⁶ Civil and Commercial Code, Section 82 (Thailand).

⁵⁷ Law on Associations and Non-Governmental Organizations, 2015, Art. 8 (Cambodia)

⁵⁸ *Civic Freedom Monitor: Bangladesh*, at <https://www.icnl.org/resources/civic-freedom-monitor/bangladesh>.

planation in case of refusal; rights to appeal to administrative and/or judicial bodies; and other safeguards. The existence of these safeguards varies significantly across Asia. Yet, over time, we are indeed seeing the development of more procedural safeguards in more countries. This is the case even in one-party states such as China and Vietnam, where limited procedural safe-guards have been initiated in some new or revised regulatory frameworks over time.

Procedural safeguards seem to follow patterns of introduction as well. The first procedural safeguards to emerge were usually requirements that registration authorities act within a specific time (China, Vietnam, Singapore, some parts of India, and other countries), or that they provide a written explanation in case registration is refused (now a number of countries around the region). Looking at typical time periods for government re-view, we see a requirement of 15 days (for the review of registration applications submitted by NGOs to the High Evaluation Commission in Afghanistan); 30 days (for the review of applications submitted by institutions in China); 60 days (for the re-view of applications submitted by private non-enterprise units or social organizations in China); 90 days (for the review of applications submitted by associations to the Union Registration Committee in Myanmar); and four months (for the review of Specified Non-Profit Corporations in Japan). Adherence to these timelines varies. For example, in Vietnam, the prescribed timeline is not often followed.⁵⁹

Less common are procedural safeguards involving the right to appeal to an administrative agency or a court. Indeed, we see more examples of recourse to an administrative agency than potential recourse to the judicial branch. Many countries (for example, China, Vietnam, Cambodia, Thailand, Laos, and others) continue to provide no judicial recourse for a negative registration decision. In Afghanistan, the Law on Non-Governmental Organizations (2005) envisions the establishment of a “Dispute Resolution Committee” to handle challenges to the denial of registration, among other issues; notably, however, the committee has yet to be established. In Myanmar, the Association Registration Law (2014) provides that associations

59 For a table on the timeline of the Civil Freedom Monitor, visit www.icpl.org/resources/civic-freedom-monitor.



Over time, we are seeing the development of more procedural safeguards in more countries. This is the case even in one-party states ... where limited procedural safeguards have been initiated in some new or revised regulatory frameworks over time.

denied registration can inquire into the reasons for denial with the relevant registration committee and can re-apply after fulfilling requirements, but there is no right to appeal to a judicial body.⁶⁰ In Sri Lanka, under the VSSO Act, a person aggrieved by the registration decision can only appeal to the “Secretary to the Ministry of the Minister in charge of the subject of Social Services...”⁶¹

f. Territorial Limitations on Registration Status

In some countries in Asia, laws governing CSOs impose limits on the territorial range of activities. Such limits may amount to undue interference in the freedom of association, especially where requirements to operate nationally are burdensome. For example:

- In Kazakhstan, the Public Associations Law categorizes public associations by territorial status as local, regional and national public associations. Though the Law does not explicitly restrict an organization’s activity to coincide with its territorial status, in practice, associations that do not so limit their activities are under threat of violating Article 489 of the Administrative Code, which penalizes any minor deviation from the charter objectives or any violation of Kazakh legislation.⁶²
- Similarly, in Turkmenistan, the Law on Public Associations of 2014 categorizes public associations by territorial level: those operating nationally (at least 400 founding members), those operating internationally (at least 50 members), and those operating at the local (municipal) level (at least five members).⁶³
- In Myanmar, the Association Registration Law of 2014 envisions a multi-tiered system, with an association’s territorial reach limited to the township, district, regional or national level, as determined by the level of registration.⁶⁴

60 See, e.g., Associations Registration Law (2014), Art. 9, Arts. 17-18 (Myanmar).

61 Voluntary Social Services Organizations Act, No. 31, Art. 6 (Sri Lanka).

62 Public Associations Law, Art. 7 (Kazakhstan).

63 Law on Public Associations of 2014, Art. 8 (Turkmenistan).

64 See generally, Association Registration Law of 2014 (Myanmar).

V. ENDING THE CIVIL SOCIETY ORGANIZATION:

DISSOLUTION, TERMINATION, LIQUIDATION

Civil society laws and regulations in many Asian countries contain a significant amount of detail on the “death” of a nonprofit through termination, dissolution and winding up. The Chinese Charity Law, for example, contains a number of articles on the termination and liquidation process. In general, the detailed procedures mandated by these provisions represent the state’s desire to (1) retain the discretion to shut down organizations that are perceived as political irritants and/or (2) retain control over a CSO’s dissolution, often motivated by a concern that the assets not go missing or wind up with a for-profit entity, individuals, or CSOs that are frowned upon by the government for various reasons.⁶⁵

a. Voluntary Termination or Dissolution

Consistent with the theme of complicated regulation, voluntary termination procedures for CSOs around Asia are highly detailed and often disproportionate to the amount of attention given to other areas of CSO operations, such as fundraising, investment of assets, governance, and other important areas. In general terms, the voluntary termination procedures embody multiple steps and require, at each step, approval of the governing body of the organization and either (or both) the state supervisory agency for that organization and/or another administrative or judicial agency. This detailed regulation has contradictory effects. On the one hand, it can often make voluntary termination cumbersome and very difficult. On the other hand, it can serve to protect assets from leaking away to individuals, for-profit entities, or unrelated organizations. For example, societies and not-for-profit (Section 8) companies in India undergo detailed voluntary procedures, with the aim of ideally transferring remaining resources to a society or Section 8 company with similar objectives. The procedure requires at least three-fifths of members of the society to determine that the society should be dissolved, and the society must undergo all procedures set out in its rules to settle all property, claims, and liabilities.⁶⁶

⁶⁵ See *China’s 2016 Charity Law*, at <https://www.icnl.org/post/tools/faq-chinas-2016-charity-law>. Though, we note, that in some countries post-dissolution assets may be distributed to members under certain provisions, i.e. in Singapore.

⁶⁶ Societies Registration Act, Secs. 13 and 14 (India); see also Council on Foundations, India report: <http://www.cof.org/content/india#Dissolution>.

These detailed provisions and complex procedures are not the case across the board, however. In Singapore, for example, voluntary dissolution of a society is relatively quick and painless, and the process appears reasonably straightforward (if perhaps more complicated than in Singapore) in Japan as well.

b. Involuntary Termination and Liquidation

Many of these same issues pervade the involuntary termination and liquidation context – heavy, detailed regulation, cumbersome procedures, and multiple internal and external approvals. Yet beyond these concerns lies a deeper and more problematic issue – the capacity of the state, in its discretion and usually authorized by law, to pursue involuntary termination or liquidation as a means to shut down organizations that the state disagrees with or that are perceived to threaten the state. At times the discretionary or political reasons to undertake involuntary dissolution mirror the grounds for denial at the registration stage, providing a remedy through dissolution or termination for organizations that, in the government’s view, should never have been registered or subsequently violated a prohibited purpose after registration.

For example, as noted above, the Registrar of Societies in Singapore must deny registration to societies that the Registrar is satisfied are likely to be used for purposes prejudicial to public peace, welfare or good order.⁶⁷ In turn, societies may be involuntarily dissolved if, among other potential reasons, it appears to the relevant government authority that a society is being used for purposes prejudicial to public peace, welfare or good order.⁶⁸ A similar parallel exists for political associations that have affiliations with organizations outside Singapore that are “contrary to the national interest.”⁶⁹ In Thailand, the Registrar has the power to order the name of an association struck off the registrar if (1) it appears that the object of the association is contrary to the law or public moral or is likely to endanger the public peace or national security and an order for alteration of such object has been given by the Registrar, but the association fails to comply therewith within a period of time fixed by the Registrar; or (2) it appears that any activity conducted by the association is contrary to the law or public moral or is likely to endanger the public peace or national security.⁷⁰

Thus the issues encountered with involuntary termination and liquidation proceedings are two-fold – technical, in the sense of overly detailed requirements and procedures, and political, in the sense that the involuntary context is used as another discretionary weapon to close unwelcome nonprofits and civil society groups. Moreover, involuntary termination is often accompanied by few procedural safeguards or opportunities to be

67 Societies Act of 1996, Sec. 4(2)(b) (Singapore).

68 Societies Act of 1996, Sec. 24(1)(a) (Singapore).

69 Societies Act of 1996, Sec. 4(2)(d) (Singapore).

70 See section 102 of Thailand’s Civil and Commercial Code: <http://library.siam-legal.com/thai-law/civil-and-commercial-code-juristic-persons-sections-78-109/>.

heard or to appeal.

Furthermore, the liquidation process may envision that organizational assets escheat to the government, providing perverse incentives for government action. The preferred practice is for any remaining funds to be transferred to another CSO performing the same or similar activities as the dissolved organization, especially in cases where the CSO is designated as a public benefit or tax-exempt organization. As examples:

- In Bangladesh, in the case of involuntary dissolution, the government assumes ownership of the remaining assets and may reconstitute the executive committee for running the CSO.
- In Nepal, the Association Registration Act states that “[i]f an Association is dissolved due to its failure to carry out the functions pursuant to its Statute or for any other reasons whatsoever, all the assets of such Association shall devolve on Government of Nepal.” Thus, dissolution may follow where there is a failure to carry out statutory functions or “for any other reasons whatsoever”; coupled with this broad discretion, the assets of the associations are transferred to the State.⁷¹

By contrast, in a number of other countries, such as Singapore and Japan, involuntary termination or dissolution is relatively straightforward and generally involves opportunities to be heard, other procedural safeguards, or administrative and other appeals processes. For example, under Singapore’s Charities Act 22 of 1994, revised in 2007, a charity can appeal a de-registration decision by the Commissioner of Charities to the High Court.⁷²

71 Association Registration Act, Sec. 14 (Nepal).

72 Charities Act, 1994, Act 22, Art. 6 (Singapore).

VI. STATE SUPERVISION

State supervision of CSOs is at the heart of state regulation of this sector in Asia. The primary state concern centers on registered organizations for it is, by definition, registered organizations that are subject to greater levels of state supervision. We note, however, that unregistered groups remain a significant state concern and are often, as discussed above in section IV-a, prohibited from forming and operating. Key elements of state regulation relate to making sure that registered organizations stick to their programmatic mandates, maintain required accountability and transparency, and do not undertake (or do not undertake too much) unapproved or illegal fundraising, investment or other activities.

a. Regulatory Authorities

Across Asia, the regulatory authorities for civil society organizations follow relatively established patterns. Depending on the country context, the regulatory authorities may be the same as the registration authorities, or they may be different state agencies. In some countries, established and registered groups still report to two supervisory “masters” – a general supervisory authority (such as a ministry of civil, home or interior affairs), and a substantive ministry or agency that guides or approves of their professional and substantive work (such as a ministry of health, education, social welfare, labor, or others). China, for example, has long had the “dual master” system, but is now moving away from that structure for a number of social organizations at local and national levels.⁷³

Whether the regulatory authority is the same as the registration authority, and whether nonprofits and civil society groups must report to one or multiple agencies, the roster of those supervisory agencies is a relatively straightforward – if diverse – group of government agencies. They include: ministries of interior, home affairs or civil affairs; ministries of social welfare, development or planning; ministries dealing with particular functional fields, such as health, education, labor and social welfare; stand-alone, quasi-autonomous supervisory authorities for nonprofit organizations, such as a Registrar of Societies or Registrar of Titles; company regulatory agencies (particularly for nonprofit companies); a body within a president’s or prime minister’s office; in some cases police or security agencies; and other agencies.

Certain trends have come into sharper focus over time. First, in some countries, states are moving away from the “dual master” system of management to a somewhat simpli-

⁷³ *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

fied system, which involves reporting to and supervision by one government agency. This does not, we hasten to emphasize, imply a reduction in government scrutiny. It is more of a risk assessment that dual reporting and supervision is not needed for a wide range of nonprofits, and that even where gaps and problems occur in a single reporting system, policy and security agencies can pick up the regulatory slack.

Secondly, in some countries (though certainly not on a consistent basis across the wide diversity of Asia), we note that sectoral ministries (e.g., health, education, labor, social welfare, urban affairs, rural affairs, and others) seem to be taking on more of the supervisory and regulatory burden for nonprofits and civil society groups that work within their functional spheres. This seems to reflect a policy decision in many countries that functional agencies are best able to carry out these tasks and that the security issues that remain (from the state's perspective) can be easily handled through the police and other means. It also reflects an aspect of the "new public management" in many countries, in which governments, usually through professional ministries, are collaborating more with the nonprofit sector on service delivery and in many locations entering into contractually collaborative arrangements with nonprofits. In such circumstances, regulatory supervision is sometimes made consistent with collaborative activities.

b. Reporting

The gradual change in the roster of supervisory and regulatory agencies in some countries, as discussed above, does not imply any sort of significant easing in reporting requirements. Civil society organizations across the region remain subject to heavy, detailed and difficult reporting requirements, with burdens of at least two general types. One is the volume of required reporting information, which can be daunting and highly burdensome to CSOs in many countries. The other, related to volume, is the timing of required reporting obligations, which can extend down to detailed and voluminous reporting requirements on a quarterly basis in some countries. So reporting requirements, a key aspect of state supervision and regulation, remain continuing issues of concern in many countries of the region. Moreover, the failure to comply with reporting requirements may serve as a basis for termination.

For example:

- In Bangladesh, CSOs must submit activity reports and audited financial reports of the preceding year, and activity plans (programs) and the budgets of the coming year to their respective registration authority on an annual basis. The government can suspend activities of a CSO or even cancel its registration for non-submission of reports to its respective registration authority.⁷⁴
- In Afghanistan, NGOs are required to submit reports on a semi-annual ba-

⁷⁴ *Civic Freedom Monitor: Bangladesh*, at <https://www.icnl.org/resources/civic-freedom-monitor/bangladesh>.

sis, with a separate reporting form required for each project of the NGO. In addition, according to Article 35(1) of the Law on NGOs, the failure to submit the annual report may result in dissolution of the NGO. Indeed, the Ministry of Economy has repeatedly terminated NGOs for the failure to submit reports.⁷⁵

Audits are also required from certain categories of CSOs (based on revenue or expenditure thresholds) in countries throughout the region.

- In Nepal, under the Association Registration Act, all associations are required to undergo an annual audit conducted by a certified accountant or a registered auditor appointed by the annual general assembly. If an organization fails to submit the proper financial documentation to the District Administration Office (DAO), the DAO may impose a fine of up to 500 Rupees on each member of the management committee.⁷⁶
- In Sri Lanka, the Societies Ordinance requires societies to undergo a yearly audit by an appointed public auditor, “who shall have access to all the books and accounts of the society, and shall examine the general statement of the receipts and expenditure, funds and effects, of the society..” The results of the audit must be submitted along with an annual return.⁷⁷
- In Indonesia, in a more narrowly tailored approach, the Law on Foundations requires every foundation that receives donations from the state, overseas parties, or third parties totaling 500 million Indonesian rupiah (IDR) or more, or that possesses assets other than endowed assets of over 20 billion IDR, to be audited by a public accountant and have their annual report summaries published in an Indonesian-language daily newspaper.⁷⁸

Coupled with the reporting and auditing requirements, supervisory authorities often are authorized to make document requests and/or conduct follow-up inspections. For example:

- In Singapore, the Registrar of Societies has wide authority to demand information or documents “relating to” a society at any time and virtually unlimited powers to enter and search premises. Moreover, the failure to abide by such demands is itself an offense subject to substantial penalty.⁷⁹
- In Sri Lanka, under the VSSO Act, the Registrar has the power “to enter and

75 *Civic Freedom Monitor: Afghanistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/afghanistan>.

76 *Civic Freedom Monitor: Nepal*, at <https://www.icnl.org/resources/civic-freedom-monitor/nepal>.

77 Societies Ordinance, No. 16 of 1891, as amended 2005, Clause 8 (Sri Lanka).

78 *Civic Freedom Monitor: Indonesia*, at <https://www.icnl.org/resources/civic-freedom-monitor/indonesia>.

79 Societies Act of 1996, Sec. 10 (Singapore)

inspect at all reasonable hours of the day” the premises of an organization registered under the Act.⁸⁰ The Societies Ordinance authorizes “any person having an interest in the funds of the society to inspect the books and names of the members at all reasonable hours...”⁸¹

c. State Enforcement/Sanctions

While reporting may be the primary tool governments use to ensure some degree of accountability among CSOs, it is by no means the only one. Other examples include:

- Advance approval requirements. In Afghanistan, NGOs are required – prior to the commencement of work, and after the examination and assessment of the line department – to submit committed project documents to the Ministry of Economy for verification and registration.⁸²
- Power to suspend governing board members. In Bangladesh, the 1961 Voluntary Social Welfare Agencies Ordinance gives the Department of Social Services (DSS) the power to suspend the executive committee of a voluntary social welfare organization (VSWO), without giving any right to appeal.⁸³ At the same time, the governing body of a VSWO cannot dissolve itself without the approval of the DSS.
- Power to intervene in internal affairs. In China, the government may intervene in the appointment of directors, trustees or senior staff; narrow the boundaries of the work that organizations may engage in by reference to the government-approved original organizational application or charter; govern the banking arrangements of various kinds of charitable groups in detailed ways; undertake investigations of operational activities and terminate organizational activities through application of tax laws; and undertake other restrictions on operational activities.⁸⁴

Furthermore, tools of state enforcement and sanctions are available to reinforce the range of supervisory requirements. Concerns with these enforcement measures are several. First, sanctions can be applied on a discretionary, inconsistent basis, and often are in a number of countries. Second, sanctions can be applied with draconian force in a number of countries, particularly against organizations that have run afoul of the state for advocacy or political reasons. In China, Vietnam, Laos, and many other countries, for example, CSO representatives or board members may be subject to punitive fines, detention,

80 Voluntary Social Services Organizations Act, No. 31 of 1980 (as amended, 1998), Art. 9 (Sri Lanka).

81 Societies Ordinance, No. 16 of 1891, as amended 2005, Clause 8 (Sri Lanka).

82 Association Law, Ch. 2, Art. 9 (Afghanistan).

83 Act to Amend the Voluntary Social Service Organizations (Registration and Supervision) Act, No. 31 of 1980, Sec. 14A (Bangladesh).

84 *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

arrest or even imprisonment, often for relatively small violations. Third, as with registration and other regulatory decisions, there are often few or no procedural safeguards for state enforcement and sanctions; they are often formally or effectively unreviewable or non-appealable. Such an enforcement and sanctions regime may create fear or result in a chilling effect among CSOs; moreover, the application of draconian sanctions on a discretionary basis likely amounts to interference with the freedom of association.⁸⁵

For example:

- In Kazakhstan, the Administrative Code, which came into effect on January 1, 2015, contains provisions that provide severe administrative punishments for leaders or members of a public association that carried out activities outside of the goals and tasks defined by its charter.⁸⁶
- In Malaysia, the failure to comply with the Societies Act 1966 will subject registered societies to various penalties, including fines of up to RM 15,000 and terms of imprisonment of up to five years, or both.⁸⁷

Increasingly, governments are relying on a wide range of methods to restrict civil society groups at both the registration and enforcement stages. Many of the existing laws in Malaysia still represent that approach, despite promises of less restrictive laws:

[D]espite the guarantee of freedom of association under Article 10 of the [Malaysian] Federal Constitution, several national laws exist in direct contravention of this fundamental right. One such law is the Societies Act 1966, which governs political parties and non-governmental organizations (NGOs). The Societies Act is not only restrictive in the initial registration process, which is lengthy and often delayed, but also in the many conditions imposed on activities, the burdensome reporting provisions and the omnipresent threats of deregistration or dissolution, all of which are amplified by the broad and arbitrary powers afforded to the Registrar of Societies and the Minister of Home Affairs. Because of the many difficulties faced by NGOs in their efforts to register as societies, including the dismissal of their applications, most resign themselves to undertake their advocacy activities illegally. Others choose to circumvent the Societies Act by registering as companies; however, that in itself presents many legal and bureaucratic obstacles to raising money for their causes.

Moreover, restrictions to freedoms of expression and assembly through various laws such as the Peaceful Assembly Act 2012 (which, despite being amended in July 2019, remains problematic), the Sedition Act 1948 and the

⁸⁵ See generally, *Civic Freedom Monitor*, at <https://www.icnl.org/resources/civic-freedom-monitor>.

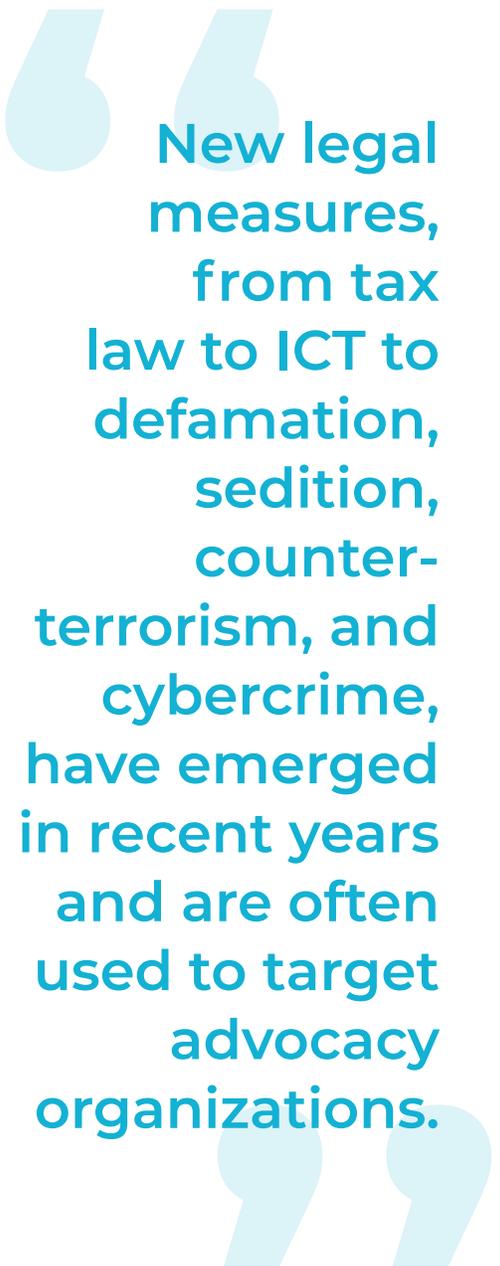
⁸⁶ *Civic Freedom Monitor: Kazakhstan*, at <https://www.icnl.org/resources/civic-freedom-monitor/kazakhstan>.

⁸⁷ *Civic Freedom Monitor: Malaysia*, at <https://www.icnl.org/resources/civic-freedom-monitor/malaysia>.

Printing Presses and Publications Act 1984, among others, have seriously curtailed the work of many NGOs and civil society groups in Malaysia.⁸⁸

New legal measures, from tax law to ICT (information and communications technology) to defamation, sedition, counter-terrorism, and cybercrime, have emerged in recent years and are often used to target advocacy organizations. For example, in China and other countries around the region, advocacy nonprofits have been targeted based on violations of tax law. Information and communications technology legislation has been increasingly used to restrict nongovernmental and civil society activity, or to cause fear of such restriction in the future.⁸⁹ In Bangladesh, the 2018 Digital Security Act (and formerly Section 57 of the ICT Act), has been used to target civil society activists.⁹⁰ Pakistan adopted the Prevention of Electronic Crimes Act (PECA) in 2016; PECA, beyond focusing on computer-related crimes, gives authorities broad power to block or remove online content, and thereby take action against journalists, bloggers and civic activists. Civil society organizations and activists in Indonesia have likewise been concerned that the defamation provisions in the 2008 law on electronic information and transactions may be used against them. And Indian groups have lauded the Indian Supreme Court's declaration that a key section of the Information Technology Act is unconstitutional; that section 66A had been used to harass and arrest civil society activists.⁹¹ In Malaysia, the Evidence Act, amended in 2012:

“holds Internet account holders and intermediaries liable for content published through its accounts/services. Under the new provision, if an anonymous person posts content deemed offensive or illegal using another person's Internet ac-



New legal measures, from tax law to ICT to defamation, sedition, counter-terrorism, and cybercrime, have emerged in recent years and are often used to target advocacy organizations.

88 Id.

89 *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

90 *Civic Freedom Monitor: Bangladesh*, at <https://www.icnl.org/resources/civic-freedom-monitor/bangladesh>.

91 "Prior to this, section 66A of the IT Act was often misused by politicians, political parties and their followers to silence critics through the power to arrest and jail those who spoke their minds, especially on social media....The court, however, still upheld the validity of section 69B and the 2011 guidelines for the implementation of the IT Act, which allow the government to block websites if their content has the potential to create communal disturbance, social disorder or affect India's relationship with other countries." *Civic Freedom Monitor: India*, at <https://www.icnl.org/resources/civic-freedom-monitor/india>.

count, it will be account holders that will be held liable.... [T]he burden of proof is placed on Internet account holders rather than the prosecutor/investigator.”⁹²

It should also be noted that too often government harassment goes beyond even the most stringent implementation and enforcement actions. In Bangladesh, Cambodia, China, India, and other countries, CSOs that undertake advocacy and are regarded as enemies by the government may be subject to harassment that, while often formally legal under broad and discretionary statutes and regulations, goes beyond appropriate bounds. This can include extra-judicial surveillance, overly frequent inspections and demands for documents, harassment of families of staff, detention of leadership, demands for bribes, and other methods.⁹³ In Cambodia, for example, domestic land rights and human rights NGOs have been harassed through means that include requiring government permission for citizens or organizational personnel to travel between villages or other areas; monitoring and photographing meetings; detaining, arresting and charging organizational members and leaders; threatening communities that work with NGOs; causing police disturbances at meetings; and restrictions on freedom of expression; among other actions.⁹⁴ In the Philippines, continued pronouncements by the president and his supporters against critics, activists, and human rights defenders have created an unnerving environment for many CSOs, particularly in the National Capital Region, nearby provinces, and Mindanao.⁹⁵

Sometimes the failure of regulation comes from the other direction – not, for the most part, harassment from government, but a failure of government to provide adequate protection to citizens who are working in or with CSOs against the threats and violence meted out to them by non-state actors. This has been a serious problem in a number of countries, including Indonesia, Pakistan and the Philippines. In each of these states, civil society activists and citizens have been subjected to violence and killings, but governments have appeared unwilling to act to protect citizens and lawful organizations that seek to engage in lawful, constitutionally-protected activities.⁹⁶

d. Self-regulation

Even fifteen years ago, a review of trends in nonprofit and civil society regulation in Asia would not have included any significant discussion of nonprofit self-regulation.⁹⁷ Nonprofit self-regulation emerged in Asia only in the 1990s, with the formation of the

⁹² *Civic Freedom Monitor: Malaysia*, at <https://www.icnl.org/resources/civic-freedom-monitor/malaysia>.

⁹³ See generally, *Civic Freedom Monitor*, at <https://www.icnl.org/resources/civic-freedom-monitor>.

⁹⁴ *Civic Freedom Monitor: Cambodia*, at <https://www.icnl.org/resources/civic-freedom-monitor/cambodia>.

⁹⁵ USAID, CSO Sustainability Index: Philippines, at <https://www.usaid.gov/sites/default/files/documents/1866/2017-CSO-Sustainability-Index-for-Asia.pdf>.

⁹⁶ See, e.g., *Civic Freedom Monitor: Indonesia*, at <https://www.icnl.org/resources/civic-freedom-monitor/indonesia>.

⁹⁷ Silk (ed.), *Philanthropy and Law in Asia* (Jossey Bass, 1999); Sidel and Zaman (eds.), *Philanthropy and Law in South Asia* (Asia Pacific Philanthropy Consortium, 2004, updated 2007).

Philippine Council for Nonprofit Certification (PCNC); in South Asia, for example, the first meeting on nonprofit self-regulation was held in New Delhi in 2000.⁹⁸

Today the world of nonprofit self-regulation in Asia looks very different indeed. There are umbrella association rules, codes of conduct, certification mechanisms, accreditation schemes, ranking methods, and many other forms of self-regulation in effect in many of the Asian countries included in this report. India has multiple self-regulation initiatives underway, both for different types of organizations and in different parts of the vast country. Cambodia has seen the emergence of multiple codes of conduct for NGOs and nonprofits, and at least one certification scheme. Afghanistan, Indonesia, Japan, Nepal, the Philippines, South Korea and many other countries have self-regulatory codes, models, initiatives and experiments underway.

Yet the rapid rise of self-regulatory impulses and initiatives should not be taken to imply a weakening of state regulation. Self-regulation has many motivations – as an educational tool to strengthen nonprofit quality and effectiveness; as a means to try to forestall even stricter government regulation; as a community unifying and bonding device in the nonprofit sector; as a means for self-regulatory entrepreneurs and umbrella groups to extend their influence. But, across Asia, it almost never, at least to date, substitutes for or ameliorates strict government regulation of the nonprofit and civil society community. And rarely if ever does the government cede any regulatory authority to self-regulatory initiatives; they exist alongside continuing and often tightening government regulation. Perhaps the only exception to this is the PCNC in the Philippines referenced above.⁹⁹ Nonetheless, they have been an important development in the nonprofit and civil society community in Asia and will bear close watching in the years ahead.¹⁰⁰

98 The first survey of self-regulatory activities in Asia, also conducted for APPC, was Sidel, *Trends in Nonprofit Self-Regulation in the Asia Pacific Region: Initial Data on Initiatives, Experiments and Models in Seventeen Countries* (APPC and University of Iowa, 2003). For a more recent discussion in the Asian context, see Sidel, *The Promise and Limits of Collective Action for Nonprofit Self-Regulation: Evidence from Asia*, *Nonprofit and Voluntary Sector Quarterly* 39(6), 1039-56 (2010).

99 PCNC is a private voluntary, non-stock, non-profit corporation whose main function has been to certify non-profit organizations that meet established minimum criteria for financial management and accountability in the service to underprivileged Filipinos. A Memorandum of Agreement (MOA) between the Department of Finance and the PCNC authorized the PCNC to accredit NGOs applying for donee institution status; the PCNC certification then serves as the basis for the Bureau of Internal Revenue (BIR) to grant donee institution status to NGOs. For more information, see: <http://www.pcnc.com.ph/aboutus.php>.

100 For more recent work on self-regulation that includes some discussion of Asia, see Breen, Dunn and Sidel, *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation in the Nonprofit Sector* (Cambridge University Press, 2016).

VII. FOREIGN ORGANIZATIONS

Foreign organizations (such as NGOs, foundations, some trade associations, and others) working within civil society have always occupied a special place in the regulatory attention of many Asian states. This special concern is closely related to the particular interest in foreign funding, a long-time focus of political and security attention and regulation for many governments across Asia. At the same time, however, Asian states have commonly kept a close watch even on foreign organizations that do not provide funding but rather undertake development, relief, poverty alleviation, or rights-based work. This regulatory scrutiny, beyond the foreign funding issues that are discussed below, falls in two broad areas: registration, and reporting and supervision.

a. Registration

Across the region, registration for foreign organizations that seek to carry out nonprofit activities in Asian states or territories ranges from the fairly benign and relatively smooth to extremely difficult and burdensome. In Hong Kong, Indonesia, Mongolia, Taiwan, the Philippines, Japan, Singapore and South Korea, for example, registration as a foreign organization to carry out most development, relief and poverty alleviation work, while not without burdens, is arguably considerably less burdensome than in other parts of the region. Even in these jurisdictions, however, registration without an approval mechanism is relatively rare; instead, registration typically includes an approval element and often a requirement to identify and enter into a partnership, collaboration and supervision arrangement with a ministry or key local government agency or nonprofit as a prerequisite to registration. Other countries present even more obstacles to registration as a foreign organization. For example:

- In Nepal, foreign CSOs can establish branch offices under a general agreement with the Social Welfare Council, but they must implement their programs through local CSOs by entering into project-specific agreements. This can be a burdensome process because the project-specific agreement requires approval from as many as seven different ministries.¹⁰¹
- In Indonesia, the Law on Foundations permits foreign foundations (i.e., foundations established under foreign laws) to operate in Indonesian territory, provided that the operation is in partnership with an Indonesian foundation and only in the areas of social, religious and humanitarian issues. Additionally, partnership with an Indonesian foundation should be justified

¹⁰¹ *Civic Freedom Monitor: Nepal*, at <https://www.icnl.org/resources/civic-freedom-monitor/nepal>.

from a political, judicial, technical or security perspective.¹⁰²

- In Pakistan, foreign civil society organizations must sign a Memorandum of Understanding with the government in order to receive recognized legal status for their activities. Approved international organizations will be registered for specific field(s) of work and specified location(s) or areas of operation. Notably, in 2019, the Pakistani government rejected the registration application of 42 international organizations that sought to sign MoUs with the Economic Affairs Division.¹⁰³
- In China, foreign CSOs have long had a difficult time registering, and many foreign CSOs were registered as business entities, or unregistered and work quietly through Chinese partners. In April 2016, China's National People's Congress enacted a Law on the Management of Domestic Activities of Overseas NGOs that moves the registration and supervision function to the Ministry of Public Security and requires foreign organizations to sign an agreement with an approved Chinese partner in order to apply for office registration; or, with a Chinese partner as well, to make a one year temporary activities filing. In this recent move, China represents both the increasing focus on foreign organizational activity and the "securitization" of regulation over the work of foreign groups.¹⁰⁴
- In Cambodia, according to the 2015 Law on Associations and NGOs, a foreign association or NGO "shall discuss and agree with public authority on projects/programs before submitting an application for a memorandum of understanding with Ministry of Foreign Affairs and International Cooperation ..." A

102 Govt. Reg. No. 63, Art. 26 (2008) (Indonesia).

103 *Civic Freedom Monitor: Pakistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/pakistan>.

104 Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in China (2016); see also *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.



Registration without an approval mechanism is relatively rare; instead, registration typically includes an approval element and often a requirement to identify and enter into a partnership ... with a ministry or key local government agency or nonprofit as a prerequisite to registration."

letter issued by the public authority to support the projects of the foreign NGOs must be included as part of the application process.¹⁰⁵

- Under Thai regulations, foreign organizations wishing to operate in Thailand—even only to hold a meeting or seminar—must seek permission from a committee established under the Ministry of Labor and Social Welfare, which includes national security and intelligence representatives, among others. The committee has wide latitude in deciding to grant permission to operate, needing only to “take into account the policy of economic and social development, national security, the good relationship between Thailand and other countries, the objectives and operation plan of such foreign private organization, as well as opinions and recommendations of the government agencies concerned.”¹⁰⁶ Foreign organizations must have objectives that are “in conformity with the development policy and security of Thailand...” and “activities shall not be contrary to morals, Thai custom and culture...”¹⁰⁷ Permission to operate is given for one year for the first applications, with extensions of two years each time.¹⁰⁸

b. Reporting and Supervision

Reporting and supervisory measures can be significant and burdensome as well. Organizations may be required: to report any new activities, new partners, or operation in new parts of a country; to report on a quarterly or other very frequent basis; to report in detail and for approval before activities are carried out; to report in detail after activities are carried out; to report to one or multiple state authorities and partners; and/or to report voluminous, highly detailed information at any step in the activity process. On the supervisory side, state authorities may, by virtue of law, have widespread rights to enter foreign institutional premises; inspect or remove papers and data; listen to communications; question local or foreign employees or partners; or carry out other significant supervisory or investigative methods. Sanctions may include fines, detention, arrest and imprisonment. We look to three recent examples:

- Since 2015, Cambodia has required foreign NGOs to submit the annual report on “activities and finances status” to the Ministry of Foreign Affairs and Ministry of Economy and Finance “within thirty days from the date of submission to donors.” Foreign NGOs are also required to submit copies of all proposals and financial agreements with donors to the Ministry of Foreign Affairs and Ministry of Economy and Finance within thirty days of the

105 Law on Associations and Nongovernmental Organizations of 2015, Art. 15 (Cambodia)

106 Thailand, Rule of the Ministry of Labour and Social Welfare on the Entry of Foreign Private Organizations to Operate In Thailand, B.E.2541 (1998), Clauses 7, 9, 10, available at: http://wp.doe.go.th/ngo/documents/rule_2541_eng.pdf.

107 Id. at Clause 12, 14(2).

108 Thailand, Rule of Committee on Consideration of the Entry of Foreign Private Organization (2000), Clause 7, available at: http://wp.doe.go.th/ngo/documents/rule_2543_eng.pdf.

donor agreeing to the proposal. Notably, this requirement is not limited to proposals and financial agreements for projects taking place within Cambodia.¹⁰⁹

- The Government of Pakistan has adopted the Policy for Regulation of International Non-governmental Organizations (INGOs) in Pakistan, which imposes a broad array of approval and reporting requirements on INGOs. For example, INGOs must obtain prior government permission to access foreign funds, hire foreign nationals, provide direct or indirect assistance to other NGOs, and dispose of assets. The government's power to compel disclosure from INGOs is virtually unlimited. Furthermore, INGOs must report to the government every six months on the flow of foreign resources, staffing, activities, and payments above 20,000 rupees.¹¹⁰
- Since 2016, under the Overseas NGO Law, China has required detailed reporting for approval to both program partners and the public security authorities of programmatic activities before they are undertaken, and similarly detailed reporting for approval to both the program partners and security authorities of activities after they are undertaken, at the end of program years. It gives the security authorities broad rights to enter into, view, take and use virtually any information from a foreign nonprofit group, and provides broad sanctions up to and including imprisonment of individuals and closure of organizations for violations.¹¹¹

109 Law on Associations and Nongovernmental Organizations of 2105 (Cambodia).

110 Policy for Regulation of International Non-governmental Organizations (2015) (Pakistan). See also *Civic Freedom Monitor: Pakistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/pakistan>.

111 Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in China (2016); see also *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

VIII. ACCESS TO RESOURCES/ FUNDING SOURCES

Over many years, the attention of domestic nonprofit and CSOs in countries throughout Asia, and of their regulators, has been drawn to the difficult and complex problem of locating sufficient funding for these groups. Despite the wide diversity of countries, organizational roles, and funding situations, three basic funding sources constitute the core streams of revenue for the programmatic activities of nonprofits in Asia, including foreign funding; domestic philanthropic and charitable giving; and income generated by CSO engagement in economic activities. Each has proved quite complex and controversial at times, and each has attracted, and continues to attract, different forms of regulatory attention by governments. Any individual organization may rely more heavily on one category of income than on another, but when considering the sustainability of the sector as a whole, it is crucial to consider each and every category of funding. If any of these pillars are weakened by legal constraints, the sector becomes vulnerable.

a. Foreign Funding

The flow of foreign funding into Asian countries, including from government-related entities, international NGOs and foundations, corporate programs, and individuals, is subject to increasing scrutiny in many countries in Asia. Perhaps the most well-known such scheme is the Foreign Contributions Regulation Act, 2010 (FCRA) in India, which imposes significant limits on the foreign funding that a wide range of Indian nonprofits and political groups can receive, requiring either that recipients secure a place on an approved listing to receive foreign funding and remain on that list (not an easy task), or secure permission on a case-by-case basis to receive foreign funding (“prior permission”). This regulatory framework has been in place for 40 years and continues to be strengthened.¹¹²

Similar legislation – likely inspired by the Indian example – has been proposed or enacted in other countries as well. (Even where not adopted, the political environment that gives rise to such proposals may have a chilling effect on the receipt of funding or the willingness of donors to undertake work in such countries.) Indeed, the restrictive trend is particularly strong within South Asia:

¹¹² For more information on the FCRA, an important part of the regulatory scheme for the nonprofit sector in India and by extension South Asia and beyond, see the excellent materials by Sanjay Agarwal available at the AccountAid (Delhi) website, www.accountaid.net, and the brief description of FCRA at *Civic Freedom Monitor: India*, at <https://www.icnl.org/resources/civic-freedom-monitor/india>.

- In Bangladesh, there is a complex system of regulatory approval for foreign funding. This system has been in place for years and has been reinforced by the *Foreign Donations (Voluntary Activities) Regulation Act* of 2016. In brief, the Act (1) requires all organizations wishing to receive and use foreign donations/contributions to register with the NGO Affairs Bureau; and (2) requires all organizations seeking to carry out activities with foreign donations to secure advance project approval.¹¹³
- In Nepal, the Social Welfare Act requires CSOs to receive prior permission to receive external funding on a case-by-case basis. The process requires CSOs to submit a project proposal and application and a government council to vet each funder for the project within 45 days.¹¹⁴
- In Pakistan, the Policy for Regulation of Organizations Receiving Foreign Contributions, 2013 requires organizations in Pakistan to register with the Economic Affairs Division before using foreign monies, services, and goods. In addition, they must sign a Memoranda of Understanding (MOU) with the government, which will stipulate, among other things, the work and geographical area of the organization.¹¹⁵

The other major form of regulatory initiative with direct impact on foreign funding is a broader or omnibus statute or regulation that governs the work and activities of foreign NGOs and funding bodies within specific countries. Such broader statutes generally include funding provisions as well. Indeed, some of those broader framework statutes or regulations may target the donors as well as, or in substitution for, the recipients of foreign funding.

The new Chinese law on the management of overseas NGOs, for example, goes well beyond foreign funding in its registration, reporting, approval, and other requirements for a wide range of foreign organizations working in China, but clearly includes foreign funding among the objects and regulatory controls of the law.¹¹⁶ Under Thai regulations, where a foreign private organization seeks not to operate in Thailand but to provide financial or other assistance, the donor organization and the recipient must together submit an application for approval to the government, specifying the objectives and activities of the donor organization and the details of the project it wishes to support.¹¹⁷ Vietnam allows foreign funding, but gives the government wide discretion to approve,

113 Foreign Donations (Voluntary Activities) Regulation Act of 2016 (Bangladesh).

114 Social Welfare Act, 1992, Sec. 16 (Nepal).

115 *Civic Freedom Monitor: Pakistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/pakistan>.

116 *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

117 Rule of the Ministry of Labour and Social Welfare on the Entry of Foreign Private Organizations to Operate in Thailand, B.E.2541 (1998), Clause 13(2), available at: http://wp.doe.go.th/ngo/documents/rule_2541_eng.pdf.

delay or disapprove specific projects and funds.¹¹⁸

In an era when domestic wealth and philanthropy is growing, governments may see less of a reason to welcome foreign funders than they may have in the past. Moreover, some governments seem to view foreign funding as a means of interference in domestic political processes. In such cases, even in the absence of formal legal constraints on foreign funding, governments may back a demonizing narrative that labels organizations receiving foreign funding as “foreign agents.”¹¹⁹

At the same time, however, in a continuing display of the diversity of civil society regulation in Asia, some states and territories in the region are taking a lighter approach to foreign funding, including Afghanistan, Taiwan, South Korea, and others, with relatively few, if any, restrictions.

b. Philanthropy

Domestic sources of giving are now far more important for nonprofits and CSOs in Asia than they were even 15 years ago. Philanthropic communities are growing rapidly – sometimes with extraordinary speed – throughout the region. There are now more than 4,000 foundations and rapidly increased giving through institutions and online channels in China; a rapidly growing wealthy community with roots in technology, real estate and manufacturing in India; an explosion of giving and philanthropic activity in Singapore, the Philippines, Indonesia, and other countries of the region; modest increases in Vietnam and Cambodia; new activity in Japan after economic stagnation; and a recovery in giving and philanthropy in South Korea after economic difficulties.

Governments are responding to the growth in charitable giving and philanthropic activities in several ways – and generally not keeping up with the diverse means, including new technologies, through which this giving is expanding. Governments generally support the application of private funds for charitable and public purposes and seek to encourage such giving. A number of new statutes, regulations and policies throughout Asia reflect this encouragement of domestic giving and philanthropy.

For example, several countries are seeking to expand the legal space for domestic grant-making, whether through foundations or trusts or *zakat*. They therefore are considered a crucial source of support for CSOs addressing public benefit causes. Specifically:

- In Afghanistan, the Ministry of Justice is supporting the development of a progressive Law on Foundations, which has been prepared with input from CSOs through a task force on private giving.¹²⁰

118 Decree 93/2009/ND-CP on Management and Utilization of Aid from International Non-governmental Organizations (Vietnam)

119 *Civic Freedom Monitor: Malaysia*, at <https://www.icnl.org/resources/civic-freedom-monitor/malaysia>.

120 *Civic Freedom Monitor: Afghanistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/afghanistan>.

- Indonesia in 2011 passed the *zakat* (Islamic mandatory alms) management bill into law. The law affirms the right of individuals to establish zakat collection agencies under government supervision, provided that they meet all administrative requirements.¹²¹
- In China, it is becoming much easier to register foundations – there are now over 5,000 private foundations, some with significant assets/endowments. The 2004 Foundation Regulations have been redrafted – a process that has been ongoing for a number of years. The foundation story in China is one of facilitation under a controlling legal regime, but not prevention.

In addition, countries may support the enactment of charity laws as a way of ensuring objective standards are applied to differentiate CSOs and to promote public benefit activity. For example:

- Kyrgyzstan introduced in 2013 the draft law on Charitable Organizations and Charitable Activity for public discussion. The goal of the draft law is to create incentives to encourage charitable activity among CSOs. Many CSOs operating in Kyrgyzstan today would qualify as public benefit organizations under European law, but cannot enjoy such status in Kyrgyzstan because of gaps in legislation.
- In China, drafting and debate over of a national Charity Law was under discussion for a number of years, including the question of tax incentives. The Charity Law was finally adopted in the spring of 2016.

Ultimately, promoting charitable or public benefit activities is a question of fiscal privileges – and therefore a question of tax law. Fiscal privileges may take the form of tax exemptions for CSOs as organizations or tax incentives for donors.

- In Afghanistan, a civil society supported task force on private giving has developed proposed amendments to the tax code, which would introduce tax incentives for donors giving to tax-exempt organizations for the first time in Afghanistan.¹²²
- In Fiji, registered charitable organizations are exempt from paying income tax.¹²³
- In Japan, public interest incorporated associations/foundations receive tax exemption on income from their public interest activities, even for-profit activities if considered as part of the public interest activities. Individuals who donate to these associations/foundations can receive a tax deduction of up to 40 percent of income. Corporations can receive a tax write-off.¹²⁴

121 *Civic Freedom Monitor: Indonesia*, at <https://www.icnl.org/resources/civic-freedom-monitor/indonesia>.

122 *Civic Freedom Monitor: Afghanistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/afghanistan>.

123 See Fiji, Revenue and Customs Authority at <http://www.frca.org.fj/non-profit/>.

124 See Japan, Tax Incentives Under the New Public Interest Corporation System (2012).

- In Singapore, according to the Inland Revenue Authority of Singapore, a variety of donations (cash, shares, computers, etc.) are eligible for a tax deduction of generally 2.5 times the amount of the donation, if the donation is made to approved institutions. For example, cash donations by individual or corporate donors to any approved Institution of a Public Character (IPC) or the Singapore Government that benefit the local community is tax-deductible.¹²⁵
- In the Philippines, Implementing Republic Act No 8424 (1998) (amending the National Internal Revenue Code) provides for donor incentives for non-stock, non-profit corporations/organizations that are created for one of more of the following purposes: religious, charitable, scientific, athletic, cultural, rehabilitation of veterans, or social welfare. Individual donations to these organizations are eligible for limited deductibility up to 10%, and corporate donors are eligible for limited deductibility up to 5%. Full deductibility of a donation to certain accredited organizations is allowed, subject to certain conditions.

In addition to laws on foundations, *zakat*, charities, and tax laws, there may also be rules relating to fundraising – that is, the solicitation of donations.

- In China, after a lengthy period in which fundraising was not formally allowed, there are now more enabling fundraising regulations in place in a number of provinces and major cities that have begun the process of expanding the range of organizations that may publicly fundraise. General provisions allowing fundraising have been written into the Charity Law and draft regulations on fundraising have been issued as well. The long-term scene in China is for liberalized limits on fundraising, particularly for social service organizations (but generally not for advocacy organizations), under continued state monitoring.¹²⁶
- In some countries, where fundraising is now more clearly permitted, a number of provisions understandably seek to prevent fraud and “sharp behavior” (i.e., manipulating or tricking people, but not necessarily rising to the level of legal fraud) in the fundraising process. One example among many is Japan, where the Public Interest Corporate Act prohibits continuous solicitation of persons who have already declared their intent not to donate; soliciting donations with coarse or violent speech or behavior or in an offending manner; or engaging in actions that could cause the usage of donated property to be misunderstood; and other sharp or fraudulent behavior.

Furthermore, we see in some countries innovative programs underway relating to corporate social responsibility (CSR).

¹²⁵ *Civic Freedom Monitor: Singapore*, at <http://www.icnl.org/research/monitor/singapore.html>.

¹²⁶ *Civic Freedom Monitor: China*, at <https://www.icnl.org/resources/civic-freedom-monitor/china>.

- Notably, India adopted a “comply or explain” approach in the 2013 Companies Law – requiring companies that meet certain set of financial criteria to spend at least 2% of their average profits in the last three years towards CSR activities, or explain why they have not done so.¹²⁷
- Interestingly, China’s 2006 Company Law (Art. 5) is one of the few pieces of national legislation in the world that explicitly mentions CSR. It obligates domestic companies to “comply with the laws and administrative regulations, social morality and business morality” and to “act in good faith, accept the supervision of the government and the general public, and bear social responsibilities,” though there is no apparent enforcement mechanism.

Against this backdrop, governments often seek to ensure that they can retain regulatory control over the movement of what may become truly large sums of philanthropic capital. So through new laws, new or revised regulations, or policies, they seek to keep some control over the pace of tax incentives; the degree to which philanthropic capital may be used beyond social service provision for advocacy or more sensitive purposes; and other objects of regulation. In some cases, as in India, the government continues to try to mold and channel philanthropic giving by providing special tax incentives for giving to government entities that conduct relief or support non-governmental initiatives, a method that may be gaining some more currency around the region.

c. Economic Activities

If there is any theme, aside from foreign funding, that has excited controversy and debate relating to the regulation of CSOs in Asia in recent years, it is the regulation of economic (usually, commercial or fee-for-service) activities of CSOs. Debates on the permissible forms and extent of economic and commercial activity have emerged in recent years in Bangladesh, Cambodia, China, India, Indonesia, Japan, Kazakhstan, Laos, Pakistan, the Philippines and Vietnam, and elsewhere in the region. These debates take many local forms, but fundamentally they revolve around two core issues: (1) what range of economic or commercial activity should CSOs be permitted to conduct, and (2) how should the revenues from that activity be treated for tax and statutory purposes?

Traditionally, in most of Asia, CSOs were prohibited from engaging in most economic activity and almost all commercial activity. In many countries, CSOs were prohibited from fundraising or could only fundraise in very limited ways; operated under strict limits on how they could invest their money (often only through checking or basic savings accounts or through government bonds or government investment vehicles); could not engage either in economic or commercial activity or only in activity very directly related to their nonprofit aim, with all funds generated to be passed through to programmatic activity and not to assets or endowment. In addition, significant tax barriers

¹²⁷ Companies Law, 2013 (India).

applied to using the proceeds of economic and commercial activity.

Currently, the regulatory approaches vary widely and restrictions remain, but more and more countries are allowing room for economic activities. In a number of countries, the question of nonprofit commercial/ economic activity is resolved differently depending on the type of organization under discussion.

- For example, in Indonesia, associations generally refrain from engaging in economic activities, though there is no legal restriction preventing associations from doing so. Indeed, some associations establish business units under their organization. At the same time, foundations are allowed to engage in a range of commercial activities relating to their objects and permitted to use their capital as shareholdings up to 25% of the foundation's assets.¹²⁸
- Japan allows but seeks to limit business revenue for public interest corporations primarily to operation of the business, with remaining revenue going to the public interest activities of the corporation.¹²⁹
- In Afghanistan, the Law on Non-Governmental Organizations affirmatively allows NGOs to conduct economic activities: "An organization can perform economic activities to reach the statutory not-for-profit goals of the organization." The Law on Associations is silent about economic activities, but Article 15.3 authorizes any other activity assisting in the fulfillment of the objectives of the association, as outlined in its statute. This provision could open the door to economic activities in pursuit of the objectives of the association.¹³⁰
- Kazakhstan does not significantly restrict what is called 'entrepreneurial activity' by domestic non-commercial organizations, the key form of non-profit organization in Kazakhstan. At the same time, however, income from entrepreneurial activity is subject to taxation in the same manner as for a commercial organization.¹³¹
- Similarly, in Tajikistan, profit from the economic activities of CSOs, including charities, is generally taxed in the same manner as for commercial organizations.¹³²

Closely related to the issue of CSO engagement in economic activity is the innovative work happening in the form of social enterprises. A social enterprise is an organization that applies commercial strategies to maximize improvements in human and environ-

128 *Civic Freedom Monitor: Indonesia*, at <https://www.icnl.org/resources/civic-freedom-monitor/indonesia>.

129 *Civic Freedom Monitor: Japan*, at <http://www.icnl.org/research/monitor/japan.html>.

130 *Civic Freedom Monitor: Afghanistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/afghanistan>.

131 *Civic Freedom Monitor: Kazakhstan*, at <https://www.icnl.org/resources/civic-freedom-monitor/kazakhstan>.

132 *Civic Freedom Monitor: Tajikistan*, at <https://www.icnl.org/resources/civic-freedom-monitor/tajikistan>.

mental well-being, rather than maximizing profits for external shareholders. Social enterprises can be structured as a for-profit or non-profit and may assume a variety of organizational forms. Within Asia several intriguing initiatives have emerged relating to social enterprises:

- In South Korea, social enterprises are defined as organizations engaged in business activities while pursuing a social objective targeting the local population, such as providing social services and creating jobs.¹³³ About 1,200 entities had been recognized as social enterprises as of February 2015.¹³⁴ The Korea Social Enterprise Promotion Agency was established to promote social enterprises.
- In Vietnam, on November 26, 2014, the National Assembly adopted a new Law on Enterprises that defines a social enterprise as a business whose main aim is to address a social or environmental issue and which re-invests a minimum of 51% of its annual profits towards its social or environmental objectives and provides that the government will “introduce policies to encourage, support and boost the development of social enterprises.” The law also allows them to obtain sponsorship from Vietnamese and foreign individuals, enterprises and NGOs to cover their operational and administration costs.¹³⁵
- In Thailand, in February 2019, Thailand passed a Social Enterprise Promotion Act, which establishes a formal legal entity for social enterprises, to include favorable tax treatment and government support through pooled funding and capacity-building opportunities.¹³⁶
- Often there is no separate legal entity for social enterprises. For example, in Hong Kong, social enterprises are normally registered as companies or NPOs. The Hong Kong Government defines social enterprises as businesses that achieve specific social objectives, with its profits principally reinvested in the business for the social objectives that it pursues, rather than distribution to its shareholders. In recent years, venture philanthropy organizations, such as Social Ventures Hong Kong, have been set up to invest in viable social enterprises with a significant social impact.

133 Social Enterprise Promotion Act (am. 2010), Art. 2 (South Korea), available at https://www.icnl.org/research/library/south-korea_socent/.

134 Rufina Park, *South Korea's Young Social Entrepreneurs: A Solution to a Broken Education System?*, Kennedy School Review, July 2015, available at <http://harvardkennedyschoolreview.com/south-korea-social-entrepreneurs/>.

135 See Law No. 68/2014 on Enterprises, Art. 10 (Vietnam), available at <http://www.economica.vn/ChangePages.aspx?IDKey=OL6649H1510T465668&c=0&f=1>

136 Prapha, Werapong, “Social enterprises are no proxy for welfare.” *Bangkok Post*, March 21, 2015; Social enterprise is set to take off in Thailand, *British Council*, <https://www.britishcouncil.org/society/social-enterprise/news-events/news-social-enterprise-set-to-take-off-in-thailand>, <https://www.pioneerspost.com/news-views/20190308/south-east-asia-s-social-entrepreneurs-should-be-free-innovate>.

IX. CONCLUSION

This report has sought to provide an overview of key aspects of the legal framework affecting civil society in several countries within Asia and, based on this review, to glean what challenges CSOs are facing in Asia. Civil society in Asia is as diverse as the countries that make up the region, so any general statement is likely to be subject to multiple exceptions. From a legal perspective, however, the dominant trend in the region is clear: government regulatory controls on civil society are becoming increasingly restrictive, particularly for advocacy and other groups engaged in independent civil society activity.

With this in mind, it becomes imperative to identify legal reform priorities affecting civil society in Asia. We recognize that, as a matter of sovereignty, governments throughout Asia have the duty to create an enabling legal framework for civil society that is both appropriate to their national context and also consistent with international law.¹³⁷ Within that framework, an illustrative list of legal reform measures intended to strengthen the role of civil society in national development might include some or all of the following priorities:

EASE THE FORMATION OF CSOS

Laws in too many Asian countries restrict the ability to found and/or join CSOs to citizens only, in direct violation of international norms. Moreover, laws in several countries set minimum membership criteria (at least for associations or other membership forms) at unnecessarily high levels. Instead, the laws should facilitate the formation and establishment of organizations so that all individuals in a country's jurisdiction may freely exercise their freedom of association and their ability to pursue non-profit missions through organizations.

PROVIDE FOR VOLUNTARY REGISTRATION

Too often laws mandate that all existing groups must seek and attain legal entity status, in direct violation of international law. This compulsory approach is aggravated by criminal sanctions against unregistered groups, which are also far too common. Instead, laws should recognize the right of unregistered groups to exist and operate, while also providing a notification or registration procedure for those that voluntarily aspire to act with legal personality. The enactment of the Association Registration Law in Myanmar (2014) offers a positive example of a voluntary registration approach.

STRENGTHEN THE INDEPENDENCE AND PROFESSIONALISM OF REGISTRATION BODIES

While the appropriate registration body will vary from country to country, those registration authorities most able to carry out their duties effectively do share certain common characteristics, including sufficient expertise in civil society and the valuable role they play, decision-making authority limited by objective standards, and meaningful

¹³⁷ We thank Barnett Baron, a pioneer in research and action on the enabling environment for civil society and philanthropy in Asia, for discussing this important point with us shortly before his death in December 2015.

independence from political control or influence. Where registration decision-making is given to the Ministry of Interior, Ministry of Home Affairs, or similar bodies, the concern is that the focus on security will overshadow the focus on civil society and frustrate the objective, independent and professional decision-making.

STREAMLINE REGISTRATION PROCEDURES

There are multiple ways that laws could be revised to ensure a more expeditious registration process, so that states can comply with their obligation to facilitate – rather than impede – registration. For example, laws can provide for a “one-stop” registration process involving the submission of an application to a single government focal point (rather than a multi-step process involving multiple government actors). Laws can reduce the amount of required documentation at the time of registration to facilitate applications (instead of burdening applicants with difficult-to-secure documents). Laws can provide for objective grounds for denial of registration (as opposed to vague grounds that invite subjective and arbitrary application). Laws can expand procedural safeguards by imposing time limits on government action and by providing for appeal to an independent arbiter.

ABANDON OR REFORM TERRITORIAL LIMITS

A decentralized registration system may be laudable where it leads to greater access to registration, but should not be linked with limitations on the geographic sphere of activities for registered organizations.

SIMPLIFY TERMINATION AND DISSOLUTION

Laws could be improved in many countries by simplifying the voluntary termination procedures, which would enable (and encourage) CSOs to pursue voluntary termination rather than simply becoming inactive. Involuntary termination should be available by law only as a measure of last resort to address cases of extreme misconduct, and where procedural safeguards are in place. And assets, upon dissolution, should be transferred to another non-profit organization with the same or similar purpose.

REFRAIN FROM OR REDUCE INVASIVE SUPERVISORY APPROACHES

Where supervisory approaches in Asian countries are overly invasive, legal reform efforts should seek to ensure that supervisory measures are proportionate to the risk involved. Reporting requirements may be appropriate, at least for certain categories of CSOs, but rules that require advance approval for CSO activities or empower government interference with internal affairs should be eliminated. Sanctions for violations of law should be also be proportionate to the offense, including warnings and, in limited cases, fines, but never imprisonment. In addition, the overuse of broad counter-terrorism approaches or broad provisions in technology and communications laws against CSOs should cease.

REMOVE OR REDUCE FOREIGN FUNDING RESTRICTIONS

The rising restrictions against foreign funding and cross-border financial flows – notably extant in, but not limited to, South Asia – is a troubling trend. The legal constraints, by interfering with CSOs' access to resources, may violate their freedom of association. Legal reform efforts that remove, or at least reduce, such barriers would be worthwhile efforts, but likely only successful over the longer term.

FACILITATE PHILANTHROPIC GIVING

With the rising levels of income in many parts of Asia, countries have good reason to facilitate the flow of private giving to support public benefit causes. There are a variety of legal tools available, including laws on charitable or public benefit organizations; laws on foundations; tax incentives for giving; and relaxation of limits on fundraising.

FACILITATE, WITHIN APPROPRIATE LIMITS, THE ABILITY FOR CSOS TO ENGAGE IN ECONOMIC ACTIVITIES

Income generated from economic activities can be a crucial source of funding for any particular CSO and for the civil society as a whole. Laws should enable CSOs to pursue economic activities, within appropriate limits.

ICNL welcomes feedback both on these reform priorities and on how to advance enabling legal reform, as necessary and appropriate, in Asia.

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