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Briefer - Mongolia

Analysis of Draft Laws on Associations, Foundations, and Public Benefit Activities

Introduction

The Mongolian government has introduced three new draft framework laws to regulate the establishment and operation of non-governmental organizations (NGOs) in the country, with one law regulating associations, another regulating foundations, and a third regulating public benefit activities. In introducing the new draft laws, the Mongolian government cited the need to update the regulatory framework for NGOs, which was implemented with the 1997 Law on Non-Governmental Organizations, as a result of significant changes in the direction, scope, and organizational structure of NGOs in the 20 years since the 1997 law came into force.

The stated purpose of the Law of Mongolia on the Legal Status of Associations (hereinafter referred to as the "Law on Associations" or "Associations Law") is to "…ensure citizens' freedom of association declared by the Constitution of Mongolia, to support the development of civil society, and to regulate relations in connection with the legal status and activities of associations."[1] The law defines an association as "a non-profit legal entity with a membership, established by several persons on a voluntary basis with a unified and specific purpose,"[2] and excludes religious organizations, political parties, political party organizations, and branches and representative offices of international and foreign associations.[3] Positively, the Law on Associations recognizes the ability of individuals to form unregistered associations without the rights of a legal entity, in conformity with international standards.[4] Further, the law states that, in the event of any inconsistency between the Association Law and any

[1] Law on Associations Article 1.1
[2] *Id.* Article 4.1.1
[3] *Id.* Article 3.2 and 3.4
[4] *Id.* Article 3.3

international treaty to which Mongolia is a party, the provisions of the treaty shall prevail.[5]

The stated purpose of the Law of Mongolia on the Legal Status of Foundations (hereinafter referred to as the "Law on Foundations" or "Foundations Law") is to "…support the development of civil society and to regulate general relations related to the legal status of foundations, their registration, reporting and activities." The law defines a foundation as a non-membership, non-profit legal entity established by one or several persons through fundraising."[6] The Foundation Law excludes from its scope the Government Special Fund, Investment Fund, Civil Society Development Support Fund, and branches and representative offices of international and foreign foundations.[7] Positively, like the Associations Law, the Foundations Law also states that an international treaty to which Mongolia is a party will prevail in the event of any conflict.[8]

The stated purpose of the Law of Mongolia on Public Benefit Activities (hereinafter referred to as the "Law on Public Benefit Activities" or the "Public Benefit Law") is to "…regulate relations related to organization and financing of public benefit activities."[9] The law defines public benefit activities as "…activities carried out by a for-profit or non-profit legal entity for a fee or free of charge for the social welfare and common interests."[10] As with the Associations Law and Foundations Law, the Public Benefit Law defers to the provisions of international treaties to which Mongolia is a party in the event of a conflict.[11]

Upon the request of civil society actors, ICNL has prepared this analysis based on an unofficial English translation of the three draft NGO laws, examining the provisions of the draft laws in light of international standards and good regulatory practices related to the freedom of association. This analysis does not seek to provide a comprehensive review of the draft laws, but rather to highlight key issues of concern.

ICNL believes that sound legislation is the result of a fully participatory and inclusive consultation process, which provides sufficient opportunity for meaningful dialogue between the government and civil society. ICNL stands ready to provide additional

[5] *Id.* Article 2.2
[6] Law on Foundations, Article 4.1.1
[7] *Id.* Article 3.1 and 3.2
[8] *Id.* Article 2.2
[9] Public Benefit Law, Article 1.1
[10] Public Benefit Law, Article 4.1.1
[11] *Id.* Article 2.2

information or technical assistance as necessary and appropriate.

Executive Summary

Areas of key concern with the draft laws are as follows:

- **The draft Associations Law limits the right to establish associations to only those 18 and above, violating the right of children to associate under Article 15 of the Convention on the Rights of the Child (CRC).** In addition, the draft law limits the freedom of association to those individuals without tax arrears, thereby making the freedom of association conditional upon tax law compliance; this is a violation of Article 22 of the International Covenant on Civil and Political Rights (ICCPR), which extends the freedom of association to "everyone."
- **The draft laws address the internal governance of associations and foundations with excessive detail and rigidity, particularly with respect to associations.** For example, the requirement that every association have a board of directors and a supervisory committee[12] imposes an unwieldy and unnecessary governance structure on small organizations and thereby amounts to interference in the association's internal affairs. Such internal governance choices would be more appropriately left to the individual discretion of associations.
- **The draft laws' reporting requirements assumes an overly broad and burdensome "one size fits all" approach to organizations engaged in public benefit activities.** Specifically, any association or foundation engaged in public benefit activities – no matter to what extent – must submit its operational and financial reports to the Civil Society Development Support Council within the first quarter of the following year[13] and make its annual operational and financial reports open to the public.[14]
- **The provisions of the draft Associations Law and Foundations Law related to engaging in economic activities could undermine the financial independence of organizations**. Specifically, the ability of associations and foundations to undertake economic activities only up to 20% of their total activities [15] is quite limiting, since many organizations rely significantly on

[12] *Id.*, Article 15.3
[13] Law on Associations, Article 13.2. Law on Foundations, Article 12.2
[14] Law on Associations, Article 13.7. Law on Foundations, Article 12.7.
[15] Law on Associations, Article 6.1. Law on Foundations, Article 5.1.

economic activities in furtherance of their purpose and goals. This limitation may constrain the ability of associations to achieve their objectives.

- **The scope and purpose of the draft Law on Public Benefit Activities is not clear.** The most common regulatory approach toward public benefit activities is to define and recognize a "public benefit" status, which typically encompasses both fiscal benefits and enhanced accountability; a regulatory approach that seeks to encourage public benefit activities without a clear link to a defined "public benefit" (or "tax-exempt") status is highly unusual. Moreover, certain provisions of the draft law seem to include for-profit entities within the ambit of the Law on Public Benefit Activities,[16] which is also highly unusual.
- **The draft law on Public Benefit Activities fails to provide for any criteria or process – whether by certification or registration – through which non-profit legal entities can be 'recognized' as public benefit organizations.** Conversely, the draft Associations and Foundations laws also impose certain reporting requirements on any organization engaging in public benefit activities,[17] regardless of whether they desire to avail themselves of the fiscal benefits typically available to a public benefit entity. Organizations primarily or exclusively pursuing a public benefit purpose should have the option to seek recognition on a voluntary basis as a public benefit entity, which would simultaneously make available certain fiscal benefits and subject them to more stringent governance and accountability requirements.

International Standards

The right to freedom of association is enshrined in international law, including in Article 20 of the Universal Declaration of Human Rights (UDHR) and Article 22 of the ICCPR, to which Mongolia acceded in 1974. Article 22 of the ICCPR states:

> *Everyone shall have the right to freedom of association with others… No restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.*

[16] Article 4.1.1 defines "public benefit activity" to mean "activities carried out by a for-profit or non-profit legal entity for a fee or free of charge for the social welfare and common interests." (emphasis added). Article 5.2 affirms that a "for-profit legal entity shall engage in public benefit activities as a social responsibility only free of charge."
[17] Law on Associations, Article 13.2. Law on Foundations, Article 12.2

It is the state's obligation to demonstrate that any interference in the ability of individuals and organizations to associate is justified. Any restrictions to the freedom of association are lawful *only* if the restrictions are:

1. "Prescribed by law," meaning they are introduced by a legislative body, not an administrative order;[18] and are sufficiently precise for an NGO to foresee violations;
2. Pursued only in the interests of national security, public safety, public order, protection of public health or morals, or protection of the rights and freedoms of others; and
3. "Necessary in a democratic society," meaning that restrictions are proportional to the interests listed above[19] and do not harm "pluralism, tolerance and broadmindedness."[20]

International law creates a presumption against any state regulation that would amount to a restriction of recognized rights. The ICCPR lists only four permissible grounds for state interference; those grounds are an exhaustive list, and it is the state's obligation to demonstrate that any interference is justified according to the three-part test above. The ICCPR's implementing body, the Human Rights Committee, has stated in its General Comment 31(6):

> Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[21]

In order to comply with the requirements of the ICCPR, blanket restrictions on the rights of individuals to associate must be avoided, as these are not considered lawful.[22]

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[18] United Nations Human Rights Council, Special Rapporteur on situation of human rights defenders, Margaret Sekaggya, "Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" July 2011, at 44, http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf.
[19] United Nations International Covenant on Civil and Political Rights Human Rights Committee (hereinafter "ICCPR Human Rights Committee"), CCPR/C/21/Rev.1/Add. 1326, "General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant" May 26, 2004, para. 6, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%
[20] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 32, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf
[21] ICCPR Human Rights Committee, CCPR/C/21/Rev.1/Add. 1326, "General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant" May 26, 2004, para. 6.
[22] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 54, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

Analysis of Key Issues

Based on international law, international standards, and good regulatory practices relating to the freedom of association, key concerns with the draft NGO laws relate to unclear or overbroad definitions; criteria for establishment of associations and foundations; governance and state supervision; access to resources; termination and dissolution; and structural gaps in the regulation of organizations engaging in public benefit activities.

1. ESTABLISHMENT

Eligible Founders of Associations

The draft Law on Associations limits the ability of several categories of individuals to establish associations and foundations. [23]

The draft Associations Law defines eligible founders of associations to include (1) citizens of Mongolia, 18 years and older; (2) legal entities (other than state entities, state-funded and state-owned enterprises and public legal entities); and (3) foreign citizens and stateless persons (residing in Mongolia for private purposes). Two restrictions raise concerns, however, one explicit and one implicit.[24] First, the draft Law limits eligible founders to "persons without tax arrears." The freedom of association of association cannot be made conditional on tax compliance; this constraint almost certainly violates Article 22 of the ICCPR. Second, the draft Law recognizes the right to establish associations only to those 18 and above, which implicitly prohibits minors from establishing an association; such a prohibition violates the right of children to associate under Article 15 of the CRC, to which Mongolia acceded in 1990.

The minimum required membership to establish an association restricts the ability of small associations to form. It is considered international best practice to require no more than two persons to establish an association.[25] The Associations Law requires a minimum of five persons to establish an association, which may restrict the

[23] The discussion of establishment is distinct from the issue of registration. ICNL has not reviewed the Law on State Registration of Legal Entities that governs registration.
[24] Article 12.5 of the draft Law also authorizes restricting the right of a foreign citizen or stateless person to establish an association, "[i]n accordance with Article 18.5 of the Constitution of Mongolia." ICNL defers to local Constitutional experts in determining the extent of the potential limitations on the freedom of association of foreign citizens and stateless individuals.
[25] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 54, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

ability of small associations to form. While a minimum membership requirement of five persons is not a high threshold, the government purpose in preventing groups of two, three or four persons from forming an association is not clear.

Definition of Foundation

The definition of "Foundation" as a non-membership, non-profit legal entity established by one or several persons"[26] is fully consistent with good regulatory practice. A concern arises, however, with the definitional reference to "through fundraising."[27] This would seemingly impede the establishment of foundations by donation or bequest, which is perhaps the most common means of creating a foundation. Definitions of "private foundation"[28] and "public foundation"[29] rest exclusively upon the source of financing and do not relate to the purpose of the foundation; it would strengthen the definition to specify that private foundations pursue a private purpose (e.g., a foundation set up for the education of one's own children); and that public foundations pursue a public benefit purpose. Moreover, both categories of foundation should be able to generate investment income.

Permissible Activities

The prohibitions on implementing activities of political parties, political party organizations, and religious organizations are overbroad and present potential violations to freedoms recognized under international law. The draft Associations Law and Foundations Law impose prohibitions on associations and foundations from implementing activities of political parties and political party organizations or financing them,[30] from making material and other forms of donations to political parties, [31] and from implementing the activities of religious organizations such as preaching and spreading religion.[32] These prohibitions potentially violate Article 18 (on freedom of thought, conscience, and religion), Article 19 (the right to freedom of expression, including the right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers"), in addition to Article 22 of the ICCPR.

[26] Law on Foundations, Article 4.1.1
[27] *Id.*
[28] *Id.* Article 4.1.2
[29] *Id.* Article 4.1.3
[30] Law on Associations, Article 9.2.1. Law on Foundations, Article 7.2.1
[31] Law on Associations, Article 9.2.4. Law on Foundations, Article 7.2.2
[32] Law on Associations, Article 9.2.2. Law on Foundations, Article 7.2.4

While laws commonly seek to distinguish between associations and foundations on the one hand and political parties on the other, the line should be drawn so as not to prohibit associations and foundations from addressing issues of public importance. As worded, the provisions are overly broad and could be interpreted to prevent associations and foundations from engaging in a range of legitimate activities, such as holding a fundraising event or educational event on a particular issue. For example, under the current provisions, a debate society that invites a political candidate with expertise on a particular issue to speak at its meeting might be prohibited from doing so by virtue of providing a platform for the candidate, which could be considered a form of donation. Similarly, the prohibition on implementing the activities of religious organizations, such as preaching and spreading religion, is also too broad and could be interpreted to limit a range of permissible activities that are not related to proselytizing but focused solely on providing services to those in need. For example, a baking club that wants to donate baked goods to a church bake sale might be prohibited from doing so if the proceeds support a variety of church activities, and a faith-based organization providing services may be viewed as spreading religion by virtue of people being grateful for the support received.

The prohibition in the draft Associations Law and Foundations Law on paying fees of citizens, business entities, and organizations[33] is vague and should be clarified. As worded, the prohibition might inadvertently include certain legitimate activities of organizations. For example, a ski club whose members pay regular dues might be prevented from paying various fees on behalf of its members during a ski trip.

The prohibition on organizations changing their main goals and activities[34] is overly restrictive. Organizations are typically able to make some changes to their charters, such as to their activities, by filing a notification of amendments. This is good practice and allows organizations some flexibility to shift their operations based on changing needs or conditions.

The prohibition in the Associations Law[35] **on discrimination on the basis of various categories of identity (e.g., ethnicity, language, race, sex, etc.) violates the freedom of association.** Associations should be free to choose their members and decide on membership criteria.[36] The freedom of association allows the association to determine membership criteria based on the association's purpose. This provision

[33] Law on Associations, Article 9.2.3. Law on Foundations, Article 7.2.3
[34] Law on Associations, Article 9.2.3. Law on Foundations, Article 7.2.3
[35] Law on Associations, Article 9.2.11.
[36] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 55, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

envisions too broad of a restriction for member benefit groups and would prevent the formation of a judges' association, or Mothers against Drunk Driving, or youth fighting climate change, as but a few examples.[37]

Names of Organizations

The draft laws' limitations on permissible names for associations and foundations are overly restrictive. Both the Associations Law and Foundations Law contain prohibitions on the use of the words "Mongolian," "National," and "United" in the name of an association or foundation. [38] These provisions unduly restrict associations and foundations who want to use these words (which may be relevant to their purpose). For example, individuals desiring to establish an association of Mongolian students studying in the United States would be limited from naming themselves accordingly. Particularly in light of the draft laws' requirements that associations and foundations include their organizational form in their name, [39] any potential confusion with an organization being state-affiliated would be alleviated.

Documentation

Some of the documentation requirements in support of the establishment of an association are overly burdensome, particularly for smaller organizations. The requirement for organizations to disclose their sources of funding in their charter[40] may present a difficulty for associations that have no funding or plans to seek funding. As membership-based organizations, the law should not require associations to have any assets at the time of registration. Similarly, the requirement that associations disclose information about their founder[41] is both vague in terms of asking for open-ended information, and misleading in that associations have multiple founders. A typical regulatory approach might ask for the name and address of the founding members of an association in its charter.

[37] Article 9.2.6 in the Law on Associations, while unclear, potentially raises similar concerns.
[38] Law on Associations, Article 10.4 Law on Foundations, Article 8.4
[39] Law on Associations, Article 10.2. Law on Foundations, Article 8.2
[40] Law on Associations, Article 11.2.7
[41] Law on Associations, Article 11.2.10

2. INTERNAL STRUCTURE AND GOVERNANCE

Articles 16-29 of the draft Law on Associations address the management and internal governance of associations in substantial detail and may be overly rigid and prescriptive in their approach, considering the diversity of the NGO sector.

"Members of associations should be free to determine their statutes, structure and activities and make decisions without State interference."[42] It is important to note also that civil society is diverse, and while the law defines basic rights, powers, and limits of NGOs, it should not try to address the full range of possible regulatory scenarios, and should leave space for organizations to regulate individually or collectively, or through donor regulations. Each of these components adds layers onto governance requirements, but attempting such all-encompassing governance through the law may result in requirements being uniformly and unreasonably imposed on all organizations, including small organizations that may struggle to comply. For example, it is unnecessary and potentially burdensome to mandate that all associations set up a Board of Directors and supervisory committee.[43] Typically, association laws require that the general assembly of all members serve as the highest governing body. But other governing bodies – including the board of directors and supervisory committee – may or may not be necessary, particularly for smaller organizations. For example, a small birdwatching association made up of five volunteer members may choose to formally register in order to receive funding from a local university to study an endangered bird species; requiring such an organization to have a board of directors and supervisory committee would be unreasonable. The decision to include additional governing bodies is therefore commonly left to the discretion of the association itself.

In addition, the Associations Law contains detailed provisions around membership requirements.[44] While governing documents for associations should be required to contain membership rules, such as the requirements for membership, rules governing suspension and expulsion, etc., the law should generally leave the specifics of these requirements and details of procedures to the discretion of the association itself. Therefore, the details contained in the draft law may be unnecessary.

The Associations Law also sets out detailed requirements related to a quorum for the general meeting.[45] Here again, founders are generally given considerable discretion to

[42] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 64, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf
[43] Law on Associations, Articles 15.2 and 15.3
[44] Law on Associations, Articles 19, 20, and 21
[45] Law on Associations, Article 23

design the internal structure and governance to suit the association's particular needs, so long as they are spelled out in the governing documents. While laudable that the draft law often allows the founders to vary procedures as stated in the law through the charter (via the language, "Unless otherwise provided in the charter …"), the draft law does set forth several requirements (e.g., Article 23.5: "Decisions of the general meeting shall be valid by a majority vote of the members present at the meeting") that may better be left to the discretion of the founders, provided they are addressed in the charter.

3. REPORTING

The draft laws' reporting requirements are overly broad and burdensome. Specifically, any association or foundation engaged in public benefit activities must submit its operational and financial reports to the Civil Society Development Support Council within the first quarter of the following year' [46] and keep their annual operational and financial reports open to the public.[47]

International law creates a presumption against any state regulation that would amount to a restriction of recognized rights, including the right to freedom of association. Supervision, whether through reporting or otherwise, should not be used to control or pre-determine NGO activities. NGOs are independent legal entities and need to be treated as such to operate effectively. According to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, "States have a negative obligation not to unduly obstruct the exercise of the right to freedom of association."[48]

Reporting is a common tool for promoting NGO accountability and transparency. NGOs receiving more than minimal benefits from the state or engaging in a significant amount of public fundraising are typically required to file annual reports on their finances and operations with the state agency responsible for general supervision of NGOs. Such disclosure of information is in the public interest and promotes transparency of and trust in the civil society sector. [49] An organization that does not receive significant benefits or funding from the state or the public or engage in activities that substantially affect the public should generally be entitled to as much privacy as an individual, whether the organization is large or small. Many, if not most, NGOs are small, community-based organizations that may or may not be registered, often rely to some extent on volunteer services rather than paid employees, and receive little to no

[46] Law on Associations, Article 13.2. Law on Foundations, Article 12.2
[47] Law on Associations, Article 13.7. Law on Foundations, Article 12.7.
[48] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 64, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf
[49] For example, ICNL publishes its annual report on its website.

public funding, whether in the form of tax exemptions or direct subsidies or grants. Reporting requirements should be graduated and take into account local circumstances, so that such NGOs are not subject to burdensome reporting requirements.

The reporting and disclosure requirements in the draft laws apply to all associations and foundations engaged in public benefit activities, without regard to the size or income level of the organization, and without regard to the extent of the public benefit activities. Small, community-based organizations that engage in public benefit activities only on an episodic basis should not be subject to the same reporting requirements as large, professional organizations exclusively dedicated to public benefit activities. Under the provisions as drafted, a chess club that has been formed primarily to provide its members a forum to play, discuss strategies, and stay informed about competitions, but which occasionally provides free classes for underprivileged children to learn chess, would be required to submit operational and financial reports annually and make these open to the public.

It would seem more appropriate to establish a graduated reporting system, that imposes reporting requirements more narrowly on those organizations whose size, income level, and extent of public benefit engagement rises above a designated threshold. Organizations that fall below the threshold would then either be subject to simplified reporting requirements or exempt from reporting requirements.

4. TERMINATION/DISSOLUTION

The provisions in the draft Associations Law[50] and Foundations Law[51] governing the involuntary dissolution of organizations are overbroad and lack procedural safeguards, running counter to international law and best practice.

The freedom of association applies to the entire operational life of an association.[52] As such, the involuntary dissolution of associations "…should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law."[53] Involuntary dissolution of associations should only be provided for in cases of the most severe misconduct. At a minimum, involuntary dissolution must be preceded by notice and hearing, and followed by a right to appeal.

[50] Law on Associations, Articles 31.2 and 33.9
[51] Law on Foundations, Article 24.2
[52] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 75, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf
[53] *Id.*

The draft Associations Law provides for dissolution of associations on the basis of an association having financed or implemented activities of political parties and political party organizations, carried out activities of religious organizations, changed its main goals and activities, paid the fees of citizens, business entities, and organizations, or discriminated on the basis of one of several categories of identity.[54] An association may also be deregistered by the state registration authority for non-compliance with financial reporting requirements.[55] The Foundations Law provides for dissolution and deregistration of foundations on the same grounds as the Association Law.[56]

In the section above on "Permissible activities," this commentary raises concerns with the prohibitions on implementing activities of political parties, political party organizations, and religious organizations; on paying fees of citizens, business entities, and organizations; on changing the main goals and activities; and on discrimination on the basis of various categories of identity. For the same reasons, involuntary termination on the ground of violating these prohibitions must be questioned as potentially overbroad and overreaching. Involuntary termination "should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient."[57] The grounds for involuntary termination envisaged by the draft Associations Law and Foundations Law do not clearly rise to the level of necessity mandated by international norms and could instead be dealt with through fines after organizations have been given an opportunity to remedy the violation. Moreover, in cases of involuntary termination, notice and an opportunity for hearing should precede the termination, and the ability to appeal should follow it.

[54] Law on Associations, Article 31.1.3
[55] Law on Associations, Article 31.1.5, referencing Article 26.1 of the Law on State Registration of Legal Entities, which states that the "State registration authority shall publicly announce in its website the proposal of state central administrative organ in charge of finance and budget to exclude from state registration a legal entity that has not submitted and audited financial statements by its corresponding financial organ for eight or more quarters, and shall exclude the legal entity from state registration if no written offer and complaint have been submitted, no bankruptcy case has been filed, no financial statement has been submitted and no debt has been defined by court within 6 months from the announcement."
[56] Law on Foundations, Articles 24.2 and Article 24.1.5
[57] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 55, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

5. ACCESS TO RESOURCES

Both the draft Law on Associations and Law on Foundations limit the ability of these organizations to engage in economic activities.

The ability for NGOs to access funding and resources is an integral and vital part of the right to freedom of association.[58] Moreover, any association, whether registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, NGOs, governments and international organizations.[59] While governments themselves do not have an obligation to provide funding, they do have an obligation to create an enabling environment for organizations to seek funding. Put differently, in regulating potential income sources for NGOs, the regulatory intent should be to help ensure that organizations have access to a diverse range of potential income to fulfill their mission purposes.

Provisions in the draft Associations Law and Foundations Law restrict the economic activities of organizations to 20% of their total activities,[60] which is unnecessarily limiting. Economic activities are a major source of funding for Mongolian NGOs—comprising around 31% of revenue for NGOs generally, and around 36% of revenue for NGOs based in Ulaanbaatar[61]—and indeed, NGOs are increasingly engaging in a broad range of economic activities to increase their income and diversify their funding base. NGOs should be allowed to engage in lawful economic activities so long as they abide by the non-distribution principle (which prevents income generated from economic activities from being distributed to members, officers, etc.) and so long as they invest the income into the non-profit purpose of the organization. Such income may also be appropriately reinvested in economic activities that sustain the organization. While some cap on economic activities may be appropriate, a 20% cap is a significant constraint for organizations seeking to diversity their funding base.

Economic activities are a critical source of funding for many NGOs, particularly where there is a lack of sustained and diversified public and private funding, or there is a need for funding that is not only project or activity-focused, but that allows for institutional and organizational development. Engaging in economic activities not only increases

[58] United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 67, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf
[59] *Id.* at 68.
[60] Law on Associations, Article 6.1 and Law on Foundations Article 5.1
[61] Ts.Batsugar and O.Saranchuluun, *Exploring the Current State of Civil Space and Identifying Its Need for a Favorable Legal Environment Survey: Full Report*, Page 31, 2021

the self-reliance of NGOs, thereby increasing their independence, it also allows NGOs greater autonomy in choosing to engage in activities that further their mission and goals. For those NGOs engaged in public benefit activities, economic activities can also be a means to carry out these activities (e.g., if an NGO offers a workshop on human rights for a fee, this also provides an economic benefit to the organization while simultaneously serving a public benefit purpose of promoting human rights awareness). Common regulatory approaches to the economic activities of NGOs take the position that economic activities must not be the NGO's primary purpose or main activities, but rather, should constitute additional/accessory activities; economic activities should relate to the NGO's statutory objectives and should be necessary to accomplish the NGO's goals; economic activities should be identified in the NGO's founding documents; and that economic activities should be declared as a source of income.

In addition, we note that both draft laws contain prohibitions that may impact income sources and would benefit from clarification:

- Both draft laws prohibit making cash transactions through unregulated financial channels.[62] While this may seem like a sound constraint, we question whether this would impede an organization from undertaking crowdfunding[63] campaigns, or from engaging in occasional fundraising activities, by, for example, selling homemade handicrafts or donated items. It may be preferable to establish a threshold below which organizations could freely make cash transactions, while limiting transactions above the designated threshold.
- In addition, both draft laws require that, for donations or inherited property exceeding one million tugrik (approximately 350 USD), the names of the donor or 'bequeather' must be included in the fund report.[64] This could discourage anonymous donations. Increasing the threshold amount could be appropriate.
- Furthermore, both draft laws prohibit accepting donations from "foreign special services and their cover organizations",[65] it is unclear, however, how such organizations are being defined.

While the draft laws' prohibitions relating to cash transactions and disclosing donor information for donations exceeding one million tugrik in value, as well as the prohibition on organizations accepting donations from "foreign special services and their cover organizations" are presumably aimed at addressing money-laundering and terrorism, such efforts must be narrowly tailored and should never be used as a

[62] Law on Associations, Article 9.2.9, Law on Foundations, Article 7.2.9
[63] "Crowdfunding" refers to the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the internet.
[64] Law on Associations, Article 14.2, Law on Foundations, Article 13.2
[65] Law on Associations, Article 14.3, Law on Foundations Article 14.3

justification to undermine the credibility of NGOs, nor to unduly impede them in legitimate work. NGOs are at minimal risk of money laundering and are over-regulated in comparison to the private sector, in which most money laundering activity is concentrated.[66] With respect to anti-money laundering and counter-terrorism policy, states should use alternative mechanisms to mitigate any risks, such as established banking laws and criminal laws.

6. REGULATION OF PUBLIC BENEFIT ACTIVITIES

Scope of Law

The draft law sets out to regulate public benefit 'activities' rather than public benefit 'entities' and creates confusion with respect to the inclusion of for-profit legal entities in the scope of the law.

The most common regulatory approach toward public benefit activities is to define and recognize a "public benefit" status. The underlying rationale for introducing public benefit status is to promote public benefit activities. Governments recognize that public benefit organizations (PBOs) more effectively serve the needs of local communities and society as a whole. By addressing social needs, PBOs supplement obligations of the state or provide services that are under-supplied. They often identify and respond to social needs more quickly than governments and are capable of delivering services more efficiently and directly. In addition, in the provision of their services, PBOs may raise private funds, which complement and save state money and mobilize larger community support.

By introducing public benefit status, governments generally want to ensure that fiscal (tax) benefits granted to non-profit legal entities are related to purposes and activities which are of benefit for the public and society. Public benefit status is thus, fundamentally, an issue of fiscal regulation. States generally introduce this status as a response to the question: who should be eligible for state benefits and under what requirements; how can we assure that funds from private donors are channeled for purposes of public benefit? States typically answer these questions by linking fiscal (tax) benefits to non-profit organizations with public benefit status. (See below for a discussion of common fiscal benefits.)

In light of this background, a regulatory approach that seeks to encourage public benefit activities without a clear link to a defined "public benefit" (or "tax-exempt") status is

[66] ICNL can provide additional resources and guidance on FATF/AML/CT regulations for non-profits.

highly unusual. Moreover, certain provisions of the draft law seem to include for-profit entities within the ambit of the Law on Public Benefit Activities,[67] which is also highly unusual. Laws do (and should) recognize that organizations not fully dedicated to the public benefit (e.g., mutual benefit organizations) can still engage in public benefit activities. For example, a beer-lovers association may hold occasional events raising awareness of the dangers of drunk driving; occasional public benefit activities, however, do not, in most countries, result in supporting such a mutual benefit association with fiscal benefits. As discussed below in more detail, the state generally does not want to extend benefits to all CSOs indiscriminately; instead, the state typically extends benefits to a subset of these organizations who engage principally or exclusively in public benefit activities.

Definition of 'Public Benefit'

The definition of "public benefit activities" articulated in section 5.3 contains 16 public benefit activities. ICNL defers to local partners as to whether the list of public benefit activities is appropriate for Mongolia. It is important that countries choose public benefit purposes that reflect their needs, values, and traditions. For example, German tax law defines its tax-exempt status to include public health care, general welfare, environmental protection, education, culture, amateur sports, science, support of persons unable to care for themselves, and churches and religion. In France, the tax law defines public benefit to include, among others, assistance to needy people, scientific or medical research, amateur sports, the arts and artistic heritage, the defense of the natural environment and the defense of French culture. In Hungary, public benefit legislation lists 22 different purposes, including health preservation, scientific research, education, and culture.[68]

A good regulatory practice is to include a "catch-all" category, which simply embraces "other activities" deemed to serve the common good. This is an effective way to ensure that enumerated purposes are not interpreted in an overly restrictive manner and that the concept of public benefit remains flexible, keeping pace with changing social circumstances. Public benefit definitions lacking such a "catch-all" category may impede the inclusion of emerging activities that serve the public benefit. The law could simply include a provision similar to the following: "Any other activity that is determined to support or promote public benefit." This approach may obviate the need,

[67] Article 4.1.1 defines "public benefit activity" to mean "activities carried out by a for-profit or non-profit legal entity for a fee or free of charge for the social welfare and common interests." (emphasis added). Article 5.2 affirms that a "for-profit legal entity shall engage in public benefit activities as a social responsibility only free of charge."
[68] This article contains an illustrative list of public benefit activities, compiled from reviewing the public benefit laws (including tax laws) in several countries in Europe: https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

seemingly articulated in section 5.4, for the government to periodically determine "direction of public benefit activities."

'Recognition' Process

The draft law fails to provide for any criteria or process – whether by certification or registration – through which non-profit legal entities can be 'recognized' as public benefit organizations. Conversely, as discussed above, the draft Associations and Foundations laws impose certain reporting requirements on any organization engaging in public benefit activities, thereby implying that any organization engaging in such activities will be treated as a public benefit entity, regardless of whether they desire to be.

In most countries, the law defines a process to recognize that a certain organization is a "public benefit" (or "tax-exempt" or "charitable") organization. Public benefit entities typically have certain state benefits available to them, and in most countries, the state does not want to extend benefits to all CSOs indiscriminately; instead, the state typically extends benefits to a subset of these organizations, based on their purposes and activities. In return, it requires a higher level of governance and accountability for these organizations.

The decision to seek and attain public benefit status – i.e., whether to avail itself of the benefits of such status and subject itself to the increased governance and accountability requirements – is generally considered to be voluntary. Importantly, non-profit legal entities without public benefit status should still be able to undertake public benefit activities without being subject to additional reporting or other requirements. As articulated previously, laws should recognize that organizations not fully dedicated to the public benefit (e.g., mutual benefit organizations) can still engage in public benefit activities.

The criteria for receiving public benefit status differ among countries and are drafted to reflect the goals of the legislation, the needs of the society and the local circumstances and traditions. Generally, the following criteria are considered when granting public benefit status: qualifying activities for public benefit status, eligible organizations, the extent to which PBOs must be organized and operated for public benefit, target beneficiaries, and financial and governance requirements.

Of these criteria, the draft law includes qualifying activities (section 5.3) and eligible organizations (section 5.1, 5.2) but is silent as to the extent to which an organization must be organized and operated for public benefit. Many countries require that the

organization be organized and operated principally to engage in public benefit activities, however defined. In other countries, the law requires that an organization receiving tax benefits carry out its public benefit activities exclusively and directly. In this way, organizations that are primarily focused on member/mutual benefits would not be considered eligible to seek public benefit status merely because they conduct a few activities for the broader public benefit. "Principally" may mean more than 50% or virtually all, depending on the country. There are various ways of measuring whether the "principally" test has been satisfied – for example, by measuring the portion of expenditures or the circle of beneficiaries.

To be clear, the goal of these criteria – including financial and governance requirements – is to ensure that the organization is focusing predominantly on public benefit activities, that it is not engaged in other activities to the detriment of its public benefit mission, and that it maintains appropriate standards of transparency. Finally, the certification or registration process should be clear, quick, and straightforward, and specific rules about when public benefit status is denied should be prescribed.

The lack of specific criteria in the draft law suggests that the law-drafters do not necessarily envision a "public benefit" status for a limited subset of organizations, but consequently, the ultimate purpose of the draft law is unclear.

Benefits

Article 7 of the draft law outlines state support for "non-profit legal entities engaged in public benefit activities." While the categories of support envisioned in the draft law are consistent with what we find in many other laws, more detail will be needed to clarify each category, and the available "tax incentives and exemptions" in particular. Public benefit recognition would have no real meaning if there were no state benefits provided to facilitate the work and sustainability of PBOs. State benefits typically come in the forms of tax exemptions on organizational income, tax incentives for the organization's donors, and VAT relief. PBOs may also receive state subsidies or grants, and preferential treatment in procuring certain government contracts. Crucial to encouraging private philanthropy to support public benefit activity are tax incentives to individuals and corporations donating to PBOs. Such tax incentives may take the form of tax credits, or more typically, tax deductions.

In providing state benefits to public benefit organizations, the draft law recognizes the distinctive role played by public benefit organizations. At the same time, the provision of these benefits underscores the importance of the questions raised above relating to the 'recognition' process. Is it the goal of the law to provide these benefits and privileges

to any organization, including for-profits, that engage in public benefit activities, even if only to a limited extent? Or would it be preferable to ensure that the organization is focusing principally or exclusively on public benefit activities and that it is compliant with appropriate standards of transparency?

Accountability and State Supervision

Article 8 of the draft law creates the Civil Society Development Support Council as the primary regulatory body for public benefit activities. ICNL defers to local partners as to whether such a regulatory body would be appropriate for Mongolia. The question of what body regulates public benefit activities has critical implications for the regulation of the entire nonprofit sector. In most countries, the regulatory body has the authority to grant (and sometimes revoke) public benefit status and may also be responsible for supervising and supporting the work of public benefit organizations.

There is no single right answer to the question of who the regulatory body for public benefit activities/entities should be. Instead, countries have adopted a variety of different approaches. In some countries, regulatory power is vested in the tax authorities. In other countries, the courts or a governmental entity, such as the Ministry of Justice, confers public benefit status. Others have empowered independent commissions to decide the question. Each approach has distinct advantages and disadvantages.

As previously mentioned, the regulatory approach envisioned in the draft law is more limited, as the Council is not vested with the authority to grant and revoke public benefit status, but only to supervise and support entities engaged in public benefit activities. Moreover, the composition of the Council and procedures to establish the Council are unique; ICNL is unaware of other countries that have adopted a similar approach. Key questions relating to the fitness of a regulatory body to regulate public benefit activities/organizations relate to its expertise on civil society and public benefit issues, its capacity to carry out its functions, and its independence from political control. We must defer to our Mongolian partners with respect to the fitness of the Civil Society Development Support Council.

Article 9 authorizes the Council to "receive public benefit… reports of non-profit legal entities." When read alongside the draft Law on Associations and Law on Foundations, this amounts to an overly broad reporting requirement. To ensure that PBOs are transparent and accountable, the state has legitimate interests in receiving information. Relevant information includes (1) financial information (e.g.,

annual financial statements, an accounting of the use of assets obtained from public sources and claimed to be used for public benefit) and (2) programmatic information (e.g., a report on activities made in the public interest). Most commonly, a PBO files an annual tax return with the tax authorities and an annual activity reports with the supervisory ministry/agency. In addition to reporting obligations, governments may employ other monitoring tools, such as government audits, inspections, or public disclosure requirements, at least for certain categories of PBOs.

In many countries, accountability requirements differ according to the size of the PBO, with simplified reporting for small PBOs, and more sophisticated reporting and accounting for large PBOs. The threshold is generally set according to a specified annual income level. For example, in England, those charities with gross annual revenue levels below £5,000 need not register or file any reports with the Charity Commission,[69] while charities with income levels below £10,000 need only complete the relevant sections of an annual return to meet the legal obligation to keep registered details up-to-date.[70] Three additional tiers of reporting and independent examination requirements exist for charities with gross income between £25,000 and £250,000, those with revenue between £250,000 and £1,000,000, and those with revenue exceeding £1,000,000, with the latter category requiring the most detailed level of annual reporting and a full audit by a registered auditor.[71]

The draft law raises several concerns, particularly as the requirements are applicable to all entities carrying out public benefit activities:

- Articles 5.6 prescribes detailed reporting requirements, including "the place and time of the activities, individuals and social groups participating in the activities …" Depending on the amount of public benefit activity an organization engages in, this requirement could be tremendously burdensome, if such reporting is required for each individual activity undertaken.
- Article 5.8 authorizes the Council to monitor public benefit activities and to require an external audit be undertaken, with costs paid for by the organization itself. This is particularly concerning, as small organizations will not likely be able to afford to pay for an external audit. In practice, such an audit requirement would likely deter non-profits from undertaking occasional or episodic public benefit activities – precisely the opposite outcome that the law should want to promote.

[69] Charity Commission for England and Wales, *Guidance: Charity reporting and accounting: the essentials November 2016 (CC15d)*, p. 6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/571142/CC15d.pdf
[70] *Id.* p. 5
[71] *Id.* p. 11

- Article 6.1 authorizes the Council to evaluate the outcome of public benefit activities, without specifying the basis for evaluation. The power to evaluate raises questions about how the Council can be expected to have sufficient expertise to engage in meaningful evaluation of the full range of public benefit activities that entities may pursue. Moreover, it is not clear what the implications of negative evaluation findings would be.
- Article 9.1.1 authorizes the Council to "take enlightenment measures" without defining what such measures could include. Such an Orwellian phrase raises questions about whether this could invite undue government interference in the internal affairs of organizations.
- Article 9.1.8, 9.1.9, and 9.1.19 authorize the Council to undertake surveys and risk assessments, and to monitor non-profits in relation to anti-money laundering and counter-terrorism concerns. What such monitoring would mean in practice is an open question.

Conclusion

ICNL appreciates the opportunity to provide comments on the draft NGO laws. While the initiative to update the legal framework for NGOs in Mongolia is commendable and the laws contain positive features, certain provisions would benefit from revision or clarification, as discussed throughout the analysis. Furthermore, additional consultation with and input from Mongolian civil society could help ensure that the proposed laws take into account practical realities faced by NGOs on the ground, and create an enabling environment for civil society.

ICNL remains available to provide further comment and technical assistance, as appropriate.
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