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International NGO and NPO Committee

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International NGO and NPO Committee

KARLA W. SIMON*

This Year-in-Review focuses on providing updates to certain issues covered by earlier years' reports, including: Japan's new legislative environment for public benefit organizations; new developments in legislation and regulations affecting the NGO/non-profit sector in various countries (including tax legislation); and important case law developments in this sector from around the world. Of particular interest in this report are developments regarding religious NPOs in various countries, including Russia, Kazakhstan, and Kyrgyzstan. There is also an interesting report by Freedom House, which indicates that there has been a marked decline in respect for the freedom of association in many countries around the globe in recent years.

I. Legislation/Regulations

A. ETHIOPIA

Human Rights Watch (HRW) has analyzed and strongly criticized the draft law on Charities and Societies considered by the Parliament in Ethiopia in October 2008.¹ HRW criticized the draft law because it would make it very difficult for NPOs/NGOs, especially foreign-funded NGOs, to operate in Ethiopia. The draft law would give the government oversight authority over NGOs receiving at least ten percent foreign funding, including money from Ethiopians living abroad. It also prohibits these NGOs from promoting the advancement of human and democratic rights, gender equality, or the rights of children and the disabled.

Assistant Secretary of State David Kramer² has also criticized the draft law because it could force the closure of several aid projects funded by the U.S. government. Kramer stated: "My bureau for example funds programs that deal with issues of women's empow-

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1. See Human Rights Watch (HRW), *Analysis of Ethiopia's Draft Civil Society Law* (2008), available at <http://hrw.org/pub/2008/africa/HRW.NGO.Law.Analysis.pdf>.

2. Assistant Secretary for Democracy, Human Rights and Labor.

erment, with media, with conflict resolution, and based on my understanding of the latest version of the proclamation that I've seen so far, those programs could be adversely affected."³

The other problems cited by HRW pertain to the excessive bureaucratic hurdles that would face even domestic NPOs/NGOs; the criminal penalties that would attach to even minor offenses; and the creation of an oversight agency with powers to dismiss staff and board members of an NPO/NGO. The agency would itself be able to act against an organization without seeking court permission.⁴

B. INDIA

In the amendments to the Income Tax Act in the 2008-09 Budget of the Government of India, amended the definition of charitable purpose to "exclude entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes from claiming that their purposes also fall under 'charitable purpose.'" According to the Budget Speech of the Finance Minister, "Genuine charitable organisations will not in any way be affected."⁵ This means the amendment does not change the status of organizations involved in activities such as relief of the poor, medical relief, and education.⁶

C. JAPAN

On December 1, 2008, the new legal framework for associations and foundations went into effect in Japan. The reforms were passed by the Diet (Parliament) in 2006;⁷ once they are fully in place (after a transition period), the following changes will have been made:

- A new legal framework for "general not-for-profit corporations" will be provided for in the Civil Code of Japan.⁸ The present general public benefit corporations (PBCs) will fall under the new category of not-for-profit corporations as will the mutual benefit form of organization (*chukan bojin*), and those two current legal forms will be eliminated.⁹ The new "General Not-for-Profit Association and Foun-

3. See statement of Assistant Secretary Kramer, available at http://ethiopolitics.com/news_1/20081021669.html. See also U.S. Says Draft Ethiopian NGO Law Would Close Political Space, ETHIOPOLITICS.COM, Oct. 21, 2008, http://ethiopolitics.com/news_1/20081021669.html.

4. See HUMAN RIGHTS WATCH, *supra* note 1, at 6.

5. P. Chidambaram, India Minister of Fin., Budget Speech 2008-2009 (Feb. 29, 2008), available at <http://indiabudget.nic.in/ub2008-09/bs/speecha.htm>.

6. Finance Act, 2008, No. 17, Acts of Parliament, Explanation 3, 2008, available at <http://indiabudget.nic.in/ub2008-09/fb/bill31.pdf>. A more technical discussion of the change can be found in ICCSL, *India—Proposed Amendment of Income Tax Act*, available at <http://www.iccsl.org/pubs/India-Budget-May-N.pdf>.

7. See Morihisa Miyakawa, *An Outline of the Three PBC Related Reform Laws*, INT'L J. CIVIL SOC. L., Oct. 2006, at 64, 68, available at <http://www.iccsl.org/pubs/06-10-IJCSL.pdf>.

8. There are several issues about overlapping coverage of the new laws with the Specified Non-Profit Corporation (SNPC) legislation, but they are not explored here. See Karla W. Simon, *Enabling Civil Society in Japan Reform of the Legal and Regulatory Framework for Public Benefit Organizations*, J. JAPAN L. (forthcoming 2009).

9. The third piece of legislation passed in May 2006 will require amendments to the Civil Code and 300 other pieces of legislation. See Miyakawa, *supra* note 7, at 70. The 2001 legislation on *chukan bojin* will be

dation Act” (General Act) contains provisions that will be incorporated in the Civil Code to apply to all organizations that seek to become legal entities irrespective of whether they wish to apply for recognition of “charitable status.”¹⁰

- Under the new Civil Code provisions, there will be a simplified legal process for incorporation, making it entirely non-discretionary and applying standards similar to those for for-profit corporations. Thus, the General Act permits CSOs to apply for registration at the local Registry Office, after a notary has inspected the corporate documents for conformance with the Act.¹¹
- A new application system for not-for-profit corporations that seek to be classified as “authorized public benefit corporations” or APBCs¹² is introduced. This status will be determined by a “Public Benefit Corporation Commission (*koeki nintei tou iinkai*) (PBCC).”¹³ The Commission has been established in the Cabinet Office,¹⁴ and it includes a mix of academics, scholars, and sector professionals.¹⁵
- Similar “councils”¹⁶ are established to carry out the authorization and oversight functions at the local prefectural level in addition to the one at the national level.
- The new legislation contains strict rules dealing with governance and oversight, and it addresses various technical problems inherent in the PBC system prior to the reforms.

D. JORDAN

The new Societies Act was published in the Official Gazette on September 16, 2008, with the effective date of the legislation to be ninety days later. Premier Nader Dahabi

repealed, and all associations and foundations, whether for public or mutual benefit, will easily be allowed to register themselves as legal entities without any permission or approval required. This change is significant because it will for the first time bring the Japanese Civil Code into line with, e.g., the German Civil Code in regard to associations and foundations.

10. Miyakawa, *supra* note 7, at 68.

11. *Id.*

12. Although the unofficial translation provided on the government website at <http://www.cas.go.jp/jp/seisaku/hourei/data/AAPII.pdf> refers to these organizations as “public interest” corporations, I intend to continue using the term “public benefit,” as it is more consistent with the term used in other countries to designate organizations serving the public. The Japan Association of Charitable Organizations (JACO) had recommended that all foundations be required to be public benefit foundations under the new system, but that view did not prevail. See Tatsuo Ohta, *Public Benefit Organizations in Japan: Present Situations and Remaining Challenges*, INT’L J. CIVIL SOC. L., Oct. 2006, at 72, 85-86. With the reforms in place, the Japanese situation will be much like that in Germany, where private interest foundations (*Stiftungen*) are permitted. According to a recent study, half the countries in Europe require foundations to have a public benefit purpose, while the other half permit them to have any lawful purpose. See THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH 62 (Klaus J. Hopt et al. eds., 2006).

13. This is variously also translated as “Committee.” See, e.g., Miyakawa, *supra* note 7, at 64.

14. Technically, the authorizing administrative agency is the Prime Minister’s Office itself. See Kouekishadanhoujin oyobi Kouekizaidanhoujin no Ninteitounikansuru Houritu [Act on Authorization of Public Interest Incorporated Association and Public Interest Incorporated Foundation], Law No. 49 of 2006, art. 3, translation available at <http://www.cas.go.jp/jp/seisaku/hourei/data/AAPII.pdf>. But that office delegated the authority to the Commission pursuant to Article 59 of the Act.

15. There are seven members of the Commission; see Simon, *supra* note 8.

16. The “councils” are intended to assist the prefectural governors, who are technically the authorizing administrative agencies at the local level.

said the government was considering amending the controversial law¹⁷ despite Parliamentary endorsement. During a meeting with charity society representatives, the Premier noted: "If the government finds there are valid reasons, it will reconsider the 2008 Societies Law."¹⁸ He noted that "one of the potential options for the government is to add new amendments to the law and present it to the Lower House under emergency status."¹⁹ NPOs/NGOs in Jordan were concerned that the law imposes very difficult and bureaucratic burdens on them, which is what caused the law to be controversial. It does not appear, however, that any changes were made prior to the effective date.

E. KAZAKHSTAN

In November 2008, the Parliament of Kazakhstan passed a restrictive new law on religion. According to Forum 18 News Service, the Law on Amendments and Additions to Several Legislative Acts on Questions of Freedom of Conscience and Religious Associations amends numerous articles of the current Religion Law, the Code of Administrative Offences, and several other laws.²⁰ What is interesting about the passage of the legislation is that Parliament passed the Law despite an agreement reached on November 25, 2008, "for the Organization for Security and Co-operation in Europe (OSCE) to conduct a legislative review of the latest text of the controversial new amendments."²¹ The law as passed thus ignores suggestions contained in the OSCE/Venice Commission Guidelines for Review of Legislation Pertaining to Religion or Belief.²²

F. KYRGYZSTAN

The Parliament of Kyrgyzstan unanimously passed a restrictive religion law in November 2008, which will make it more difficult for religious congregations to register as legal entities. As reported by Forum 18 News Service,²³ the Law as passed states "that 200 people will be needed to register a religious organisation, contrary to assurances that Deputy Zainiddin Kurmanov, Chair of the Parliamentary Committee for Constitutional Law, Legality and Human Rights, gave a visiting delegation from the European Parliament."²⁴ Kurmanov is the main author of the law. Apparently the proposal had been to require only fifty members, but the deputies unanimously agreed to increase the number to 200. With such a high number of members required for registration, it seems clear that the law

17. HRW also criticized this piece of legislation. See HRW Criticise the draft Public Assembly and NGO Laws in Jordan, <http://www.jordanwatch.net/archive/2008/7/610824.html> (July 6, 2008, 10:38 CST).

18. Rana Hussein, *Activists Call for Amending Controversial Societies Law*, JORDANTIMES, Sept. 25, 2008, <http://www.jordantimes.com/?news=10983>.

19. *Id.*

20. See Felix Corley, *Kazakhstan: Restrictive Amendments on Religion Go to the President*, F18NEWS, Nov. 26, 2008, http://www.forum18.org/Archive.php?article_id=1222.

21. *Id.*

22. See OSCE, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (2004), available at http://www.osce.org/odihr/item_11_13600.html.

23. The text of the law was not publicly available as this article went to press. See Mushfig Bayram, *Restrictive Religion Law Passes Parliament Unanimously*, F18NEWS, Nov. 6, 2008, http://www.forum18.org/Archive.php?article_id=1215.

24. *Id.*

violates Kyrgyzstan's international obligations by so severely restricting freedom of religion.

G. NAGORNO KARABAKH

President Bako Sahakyan of the internationally unrecognized entity of Nagorno-Karabakh is considering a restrictive new Religion Law, according to a report published by Forum 18 News Service.²⁵ The draft law "imposes vaguely formulated restrictions, including: an apparent ban on unregistered religious activity; state censorship of religious literature; an undefined 'monopoly' given to the Armenian Apostolic Church over preaching and spreading its faith, while banning 'soul-hunting' and restricting others to undefined 'rallying their own faithful.'" One of the comments was that the law is "like rubber," noting that "you can't see exactly how it's going to be put into practice."

H. RUSSIA

In November 2008, The Ministry of Justice prepared a list of fifty-six centralized religious organizations that are earmarked for court liquidation because of failures to comply fully with the terms of the registration laws. A news article published by Forum 18 News Service²⁶ indicated that over half of all centralized religious organizations in Russia belong to the Russian Orthodox Church, but that none of them are on the list.

I. UNITED STATES

Vermont became the first state in the nation to enact a statute permitting a new form of organization: the low-profit limited liability company (L3C).²⁷ This form of organization is intended to blend elements of for-profit and nonprofit corporations. The entity can produce some profits, but must have a purpose to pursue social benefits. The statute's supporters noted it would be particularly useful as a form of organization for an entity wishing to signal to private foundations that it would be an appropriate recipient of program-related investments. As entities may form in any state, now that the L3C is available in Vermont, organizations across the country may choose to try this new organizational structure. Of course, using the L3C form may still be risky for many charities, as questions still remain about how the I.R.S. will regard the L3C.

J. ZIMBABWE

The Government of Zimbabwe wrote on June 13, 2008, to all NGOs/PVOs to give clarification on the order to suspend the field operations of all NGOs/PVOs. In a press

25. See Felix Corley, *Nagorno Karabakh: "The Law Is Like Rubber,"* F18NEWS, Dec. 4, 2008, http://www.forum18.org/Archive.php?article_id=1225.

26. See Geraldine Fagan, *Russia: 56 Major Religious Organizations to Be Shut Down?*, F18NEWS, Nov. 12, 2008, http://www.forum18.org/Archive.php?article_id=1216.

27. For more information on this legal form, see Vermont Secretary of State, *Low-Profit Limited Liability Company*, <http://www.sec.state.vt.us/corps/dobiz/lle/lc/l3c.htm> (last visited Mar. 25, 2009).

release on its website,²⁸ NANGO, the National Association of NGOs, stated that according to the letter of clarification from the Acting Permanent Secretary in the Ministry of Public Service, Labour and Social Welfare, Sidney Mhishi, “the suspension of field operations [on June 7, 2008,] does not imply banning or deregistration of PVOs/NGOs.”²⁹ This latest communiqué from the government appears to contradict the position stated by the Deputy Minister of Information, Bright Matonga, which was carried in the government’s official newspaper, *The Herald*, on June 7, 2008. The statement published in the newspaper had “indicated that government had suspended all licenses of NGOs and would require them to re-apply for re-registration.”³⁰ The clarification notice³¹ indicates that the only issue at stake is PVOs/NGOs engaging in political activities. The Standard reported on June 22, 2008, that war veterans and Zanu PF youth militia continued to block relief agencies and HIV and AIDs service organizations from accessing areas in dire need of aid in rural and peri-urban areas. This was despite assurances from the government that the NGOs could resume their humanitarian operations, NANGO said. The government suspended all NGO licenses, accusing them of being conduits of foreign interference in Zimbabwe’s politics. But there was an apparent about-turn on the blanket ban, with the government announcing that more than 400 organizations working in the HIV/AIDs sector would be allowed to operate after local and international NGOs protested at the ban. NANGO’s spokesperson Fambai Ngirande said it was still impossible for the organizations to operate. The government later indicated that all NGOs would be permitted to receive monies from overseas and distribute aid freely within the country; they would, however, be subject to restrictions on voicing political views and additional bureaucratic hurdles would need to be overcome.³²

II. Important Case Law

A. EGYPT

According to an October report, “[t]he Observatory for the Protection of Human Rights Defenders, a joint program of the World Organization Against Torture (OMCT), the International Federation for Human Rights (FIDH), and the Euro-Mediterranean Human Rights Network (EMHRN), welcomed the decision by the Egyptian judiciary to allow the Association of Human Rights and Legal Aid (AHRLA) to continue its activities in Egypt.”³³ According to the information received by OMCT and FIDH:

the Administrative Court in Egypt decided on October 26, 2008 to stop the implementation of the authorities’ order to dissolve and liquidate (AHRLA), a non-govern-

28. See Press Release, NANGO, Clarifications on NGO Suspension (June 20, 2008), available at <http://www.nango.org.zw/campaigns/view.asp?id=830>.

29. *Id.*

30. *Id.*

31. Letter from Ministry of Public Service, Labour and Social Welfare to PVOs/NGOs (June 12, 2008), available at http://www.iccsl.org/pubs/Zim_Notice_of_Clarification_June_2008.pdf.

32. See *Zimbabwe: Ban on NGOs Lifted*, ALLAFRICA.COM, Aug. 29, 2008, <http://allafrica.com/stories/200808290964.html>.

33. See Press Release, Euro-Mediterranean Human Rights Network, AHRLA Finally Authorised to be Officially Re-registered (Oct. 30, 2008), available at <http://www.euromedrights.net/pages/511/news/focus/62462>.

mental organisation providing legal assistance to victims of torture. The Observatory for the Protection of Human Rights Defenders and the EMHRN recall[ed] that AHRLA was closed down in September 2007 following an order issued by the Ministry of Solidarity, alleging financial transgressions. AHRLA appealed the Government's decision to an administrative court, which was due to rule on October 21, 2007. The appeal procedure [had] been regularly delayed since then [until the recent ruling]. The Observatory for the Protection of Human Rights Defenders and the EMHRN acknowledge[d] this as a positive step towards freedom of association, and encourage[d] the Egyptian judiciary to continue its efforts in this regard.³⁴ (citation omitted)

B. TURKEY

Turkey's Constitutional Court decided on July 30, 2008, not to ban the ruling Justice and Freedom Party, AKP, which had been accused of undermining the country's secular system.³⁵ But the judges did cut half the AKP's treasury funding for 2008. The AKP, which won a huge poll victory in 2007, denies it wants to create an Islamist state by stealth. It called the case an attack on democracy. The powerful military, on the other hand, sees itself as the guardian of the modern secular state founded by Mustafa Kemal Ataturk. The Court President, Hasim Kilic, said the financial sanctions imposed on the AKP were a "serious warning" to it. It is also relevant that the Court was deeply split, with six judges favoring the ban. Seven would have been needed to uphold it.

C. UNITED STATES

In a retrial of the Texas-based Holy Land Foundation for Relief and Development—a Muslim charity—and five of its former leaders, the government was successful in obtaining convictions of all defendants for funding the Palestinian militant group Hamas, designated a terrorist group in the United States.³⁶ The group was accused of giving more than \$12 million to support Hamas. The Holy Land group was convicted by a Dallas, TX jury on thirty-two counts. A sentencing date has yet to be announced. The convicted individuals and the charity plan to appeal the verdict. A previous trial of Holy Land and its leaders ended in some confusion, with the jury deadlocked, prompting a mistrial verdict and the subsequent retrial.

34. *Id.*

35. See *Turkey's Top Court Warns AKP, but Rules Not to Close the Ruling Party*, TURKS.US, July 30, 2008, <http://www.turks.us/article.php?story=20080730113627683>.

36. See Jason Trahan & Tanya Eiserer, *Holy Land Foundation Defendants Guilty on All Counts*, DALLAS MORNING NEWS, Nov. 25, 2008, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/112508dnmetholylandverdicts.1e5022504.html>.

III. Miscellaneous

A. FREEDOM HOUSE REPORT INDICATES DOWNTURN IN RIGHT OF ASSOCIATION IN MORE THAN TWENTY PERCENT OF COUNTRIES

More than twenty percent of the world's countries are experiencing a disturbing reversal in freedom of association, according to a new Freedom House report entitled *Freedom of Association Under Threat: The New Authoritarians' Offensive Against Civil Society*.³⁷ The report examines the increasingly sophisticated tactics authoritarians are using to restrict nongovernmental organizations, human rights groups, and independent trade unions. A Freedom House Press Release³⁸ states that the report examines freedom of association worldwide between 2004–2007 by analyzing data from *Freedom in the World*, Freedom House's annual survey of political rights and civil liberties. The new report also provides in-depth reports on twelve countries where associational rights are particularly threatened.

37. See FREEDOM HOUSE, *FREEDOM OF ASSOCIATION UNDER THREAT: THE NEW AUTHORITARIANS' OFFENSIVE AGAINST CIVIL SOCIETY* (2008), available at http://www.freedomhouse.org/uploads/2008_11_14_FOA_Report.pdf.

38. Press Release, Freedom House, *Freedom of Association Under Threat: The New Authoritarians' Offensive Against Civil Society* (Nov. 13, 2008), available at <http://www.freedomhouse.org/template.cfm?page=383&report=74>.