

# Commentary on the Law on Non-Governmental Organizations (NGOs) of the Islamic Republic of Afghanistan

Prepared by the  
International Center for Not-for-Profit Law



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## **Commentary on Law on Non-Governmental Organizations (NGOs)**

In June 2005, President Karzai signed a new Law on Non-Governmental Organizations. The signing of the Law culminated a three-year process of developing a comprehensive new legal framework for NGOs. It marked a significant step toward creating a more conducive environment for NGOs to operate in Afghanistan and toward repairing relations between NGOs and the Afghan Government. The Law is still pending review and approval by the Afghan National Assembly. Nonetheless, until the Law is amended and approved by the National Assembly, the June 2005 Law will remain the governing law for NGOs in Afghanistan.

To aid in the understanding of the legal framework regulating NGOs, the International Center for Not-for-Profit Law (ICNL) has prepared the following *Commentary on the Law on Non-Governmental Organizations (NGOs)*. The Commentary contains the full text of the Law on NGOs, with comments following each article. The comments seek to highlight key issues raised by each article so that government regulators, NGO practitioners, lawyers and lay people can better understand the rights and obligations of all parties under the Law. In addition, the comments compare the Afghan Law to good regulatory practices adopted in other countries, pointing out where the Law conforms to good practice and where it diverges from good practice.<sup>1</sup> ICNL recognizes that other laws and regulations also impact on NGOs – such as the income tax law and the labor law, for example – but this commentary is limited to a review of the Law on NGOs.

### **Chapter One: General Provisions**

#### **Article 1: Purpose**

- (1) *This law is enacted for the purpose of regulating the activities of the domestic and foreign non-governmental organizations (NGOs) in Afghanistan.*
- (2) *The terms of establishment, registration, administration, activity, internal supervision, dissolution, and liquidation of properties of domestic and foreign non-governmental organizations are regulated according to the provisions of this law.*

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<sup>1</sup> The phrase “good regulatory practice” refers to the legal and regulatory approaches used in other countries as part of an enabling legal framework for civil society and NGOs. Although there is no model law, or single correct approach to most issues, there are regulatory approaches that help to facilitate the work of legitimate NGOs while also ensuring their transparency and accountability.

**Comment:** Article 1 defines the purpose of the Law, that is, to regulate the activities of both domestic and foreign NGOs in Afghanistan. The Article also defines the scope of the Law and makes clear that the Law will address a wide spectrum of issues – from establishment to dissolution and liquidation – which make up the “life-cycle” of an NGO. The Law conforms to good regulatory practice in immediately stating its purpose and scope.

Depending on the legislative tradition within a country, a legislative act may open with a preamble stating the concerns and needs to which the given law is responding. While the Law on NGOs contains no preamble, the concerns and needs which it seeks to address are clear. Prior to the enactment of the Law, NGOs were subject to the Taliban-issued *Regulation on the Activities of Domestic and Foreign Non-Governmental Organizations in Afghanistan*. Not surprisingly, the Regulation contained numerous deficiencies, both from the perspective of international norms and in terms of practical application. The very definition of an “NGO” was unclear in the Regulation, and opened the door to the registration of both for-profits and not-for-profit organizations.

Consequently, NGOs operated in an environment increasingly marked by feelings of suspicion and distrust. Many in the government and among the general public believed that NGOs were engaged in profit-making activities and in siphoning foreign aid money away from the Afghans for whom it was intended. NGOs became the scapegoat for a wide range of perceived abuses, from wasting billions of dollars of development aid to driving sports utility vehicles, from hiring the most talented local staff to paying inflated salaries to foreign consultants, from living luxurious lifestyles to throwing wild parties.

Thus, the Law was developed out of recognition of the need to clarify the rights and responsibilities of NGOs and government regulators. In some ways, the Law succeeded in accomplishing that goal. At the same time, however, the positive impact of the Law has been muted in part due to problems with the implementation of the law.

## **Article 2: The Acronym**

*Domestic and foreign non-governmental organizations (NGOs) are hereinafter referred to as “organization” in this Law.*

**Comment:** Article 2 simply clarifies that the term “organization”, used throughout the Law, embraces both domestic and foreign NGOs. The title of the Article, “The Acronym”, is misleading, as an acronym is a word made from the first letters or syllables of other words, and usually pronounced as a word in its own right (e.g., “ACBAR” is the acronym for the Agency Coordinating Body for Afghan Relief). The term “organization” is not an acronym.

It is also troubling that the Law uses a term to embrace both domestic and foreign NGOs, as certain provisions of the Law are only applicable to one

category of NGO or the other. In some cases, the Law makes the distinction clear; for example, Article 15(3, 4) applies only to “a foreign organization”. In other cases, however, the Law mistakenly assumes that both domestic and foreign NGOs are equally subject to the reach of a provision; for example, Article 11 states that “an organization may be established by at least two domestic or foreign, natural or legal persons ...” This provision is clearly only applicable to domestic organizations, that is, NGOs established in Afghanistan. Foreign organizations, established in their home countries, were necessarily established according to the legislation in their home countries, not according to Article 11 of the Afghan Law. This problem may work itself out in the implementation process, but is confusing in the language of the Law. The Law could therefore be improved by distinguishing between those provisions applicable to all NGOs, and those applicable only to a specific category of NGOs, be it domestic NGOs or foreign NGOs.

### **Article 3: Observance of Law**

*An organization shall observe the provisions of the Constitution and other applicable legislation in the implementation of its activities.*

**Comment:** Article 3 underscores that all NGOs regulated by this Law are subject also to the Afghan Constitution and other applicable legislation. This is true, of course, not only for NGOs, but for all natural persons and legal entities in Afghanistan.

### **Article 4: Registration Body**

*The Ministry of Economy is the registration, supervision, and coordination body for the activities of organizations in Afghanistan.*

**Comment:** Article 4 places regulatory authority over NGOs in the Ministry of Economy. It is the Ministry of Economy that is responsible for the registration of NGOs (granting formal legal status to applicants) and the supervision of NGOs (through reporting and inspection). The meaning of “coordination” is not clear in this context and could suggest direct Ministry involvement in and guidance of NGO activities. At the very least, “coordination” seems to reflect a lower degree of NGO independence and freedom to act. As such, it is objectionable, and would best be removed from the Law.

By implication, the Article excludes other ministries and government agencies from exercising the general registration and supervision oversight of NGOs. This is not to say that line ministries cannot exercise oversight of NGOs, where appropriate. For example, the Ministry of Health works routinely with health-based NGOs; the terms of the relationship can be defined in the terms of the contract or grant agreement. But governmental bodies have no right to control or interfere in the activities of NGOs without a legal basis. Unfortunately, there have reportedly been cases where, for example, the governor of a province or

the police interfered with the work of an NGO through unnecessary and unauthorized inspections and questioning.

In designating a ministry for responsibility over registration and supervision, Afghanistan is not unusual. That said, there is considerable variety among the legal systems in the choice of the responsible state agency that is vested with registration and/or supervisory responsibility. Responsible state bodies may include, for example, a designated ministry, the courts, or a specialized agency or commission. There are advantages and disadvantages to each system.

Courts may be thought of as preferable to administrative agencies for registering civic organizations because judges are supposed to be careful and fair in administering laws. This is not uniformly true, however, and in practice there have been drawbacks to utilizing courts. Some courts treat establishment as if it were a trial under the civil law, which inevitably results in delays. Because registration is performed in a court, the attorney for the state may intervene, which may also bring delays. In addition, there is often no requirement that a court's refusal to register a civic organization be accompanied by a statement of reasons that can be appealed to a higher court. These problems can be remedied by appropriate amendment of the law to require simple, quick, and well-documented procedures if courts are to be used. Another problem cannot be fixed so easily. Courts generally are not staffed, and judges not trained, to provide supervision and oversight of civic organizations.

The use of one ministry has the advantage of centralizing expertise about civic organizations in one agency, but sometimes the approach taken by the ministry to civic organizations is too colored by the principal mission of the ministry. For example, a ministry of justice may be too involved with administrative details and a ministry of the interior may be excessively concerned about security risks. If the local branches of a ministry are involved with registration duties, there will always be difficulty in achieving national uniformity of decision-making. This can be ameliorated in the case of denials of registration by allowing administrative appeals to the central office, but no appeals will be taken from excessive leniency, thereby raising the possibility of forum shopping.

There is no uniformly correct answer to the question of where to place authority for registration of civic organizations; the system chosen will depend on the legal and political traditions and realities of the country involved. Any of the described arrangements can be made to work well by able people of good will, and any arrangement can also be administered badly or incompetently. In the end, the problems of establishment and registration can best be served by having establishment and registration criteria that are as few, simple, and objective as possible.

## **Article 5: Definitions**

*The following terms used through out this law shall have the following meanings:*

- (1) An "organization" is a domestic or foreign non-governmental, non-political, not-for-profit organization.*
- (2) A "domestic organization" is a domestic non-governmental organization which is established to pursue specific objectives.*
- (3) A "foreign organization" is a non-governmental organization which is established outside Afghanistan according to the laws of a foreign government and which accepts the terms of this law.*
- (4) An international foreign organization" is non-governmental organization which's established outside Afghanistan according to the law of a foreign government and which is operating in more than one country. United Nation organizations and their related organs shall not be included in this definition.*
- (5) Not-for-profit:*
  - a) An organization cannot distribute its assets, income or profit to any person, except for the working objectives of the organization.*
  - b) An organization cannot use its assets, income or profits to provide private benefits, directly or indirectly, to any founder, member, director, officer, employee, or donor of the organization, or their family members or relatives.*

**Comment:** Article 5(1) defines an organization as having three characteristics: non-governmental, non-political and not-for-profit. The first two terms are not explicitly defined in the Law. Based on common practice, it can be said that the term "non-governmental" emphasizes the fact that NGOs are private, autonomous and independent organizations; government may regulate the sector to the extent necessary to further legitimate government interests, but may not place undue restrictions on NGOs, and may not dictate or control the activities of NGOs.

The term "non-political" is more difficult to define, as it means different things in different countries. In Afghanistan, in practice, NGOs are engaged in raising awareness of many political issues, including parliamentary elections, as well as a wide range of issues of public importance, from women's rights to minority rights to environmental issues, to healthcare and education. Thus, the term "non-political" does not appear to limit NGOs from engaging in advocacy activity, but rather limits NGOs from engaging in electioneering activities, such as campaigning or fundraising for political parties or candidates. Any restriction of advocacy or expressive activity around issues of public importance may potentially run counter to fundamental freedoms protected by the Afghan Constitution and international legal norms binding on Afghanistan.

The term "not-for-profit" is explicitly defined in Article 5(5). The definition of "not-for-profit" prevents NGOs from distributing as profit any assets, income or profits, directly or indirectly, to any founder, member, director, officer, employee, or donor of the organization, or their family members or relatives. This principle is

known as the non-distribution principle or non-distribution constraint. It is the fundamental defining characteristic of an NGO – the bright line that separates NGOs from business entities.

It is widely-held misperception that NGOs cannot engage in for-profit activities. Nothing in the Law – in the definition of “not-for-profit” or elsewhere – prevents NGOs from generating a profit or surplus during the financial year. The limitation or constraint relates instead to how that profit or surplus is used; an NGO cannot distribute this profit to its members or founders, as can a business entity. Rather, an NGO must channel its profit to support the activities of the NGO, and thereby to help achieve the not-for-profit mission of the organization. Thus, in practice, NGOs may generate income through for-profit activities, provided that the income derived through this activity is used to support the mission purpose and not used for the private benefit of the founders, members, employees, etc. or their family members or relatives. See Article 22.

Article 5(2, 3, 4) distinguishes between domestic, foreign and international NGOs. A domestic organization is established inside Afghanistan to pursue specific objectives. A foreign organization is established outside of Afghanistan. An international foreign organization is established outside of Afghanistan and is operating in more than one country. [The meaning of the distinction between a foreign organization and an international foreign organization for purposes of this Law is not clear. Any foreign organization operating in Afghanistan is necessarily also an international foreign organization (that is, it is operating in more than one country). The Law does not later provide for distinct regulatory treatment of the two categories of foreign NGO.]

Having been established outside of Afghanistan, a foreign NGO seeking to operate inside Afghanistan should therefore be permitted to set up a branch or representative office rather than going through separate establishment procedures. As a branch office, a foreign NGO would not be considered a separate legal entity but would be authorized to conduct its activities. As a branch office, all of the assets of the entire organization stand behind any contract or obligation it may incur in the host country. Instead, under the Afghan Law, as is made clear in Chapter Two of the Law, there is no ability to set up a branch office. Rather, the Law requires foreign NGOs to undergo establishment as a separate legal entity in very much the same way as domestic NGOs, only subject to additional registration requirements. It would be preferable for the Law to allow clearly for branch office registration.

United Nation organizations are specifically excluded from the meaning of “NGO” and therefore from the reach of this Law. This is fully appropriate, as U.N. organizations are established by the U.N., a multi-lateral governmental organization. NGOs, by contrast, are private legal entities.

## **Article 6: Expenditure of Assets**

- (1) The assets, income, and profits shall be used only to carry out the not-for-profit objectives of the organization.*
- (2) An organization shall be transparent and accountable in its activities, and shall be reasonable in paying employee salaries, the rent of office and housing space, and other administrative and logistical expenses, in order to gain the public trust.*

**Comment:** Article 6 addresses the expenditure of assets, underscoring the non-distribution principle contained in Article 5(5). In other words, Article 6(1) is the necessary positive implication of the non-distribution constraint: the assets, income and profits are to be used only to fulfill the objectives of the organization.

Article 6(2) is more of a statement of general principle than a well-drafted legal provision. While the legislative intent is clear and laudable, the enforceability of the provision is unclear. There is no definition of what it means to be “transparent and accountable” or what is “reasonable” in relation to salaries, office rent and administrative expenses. In part this recognizes the difficulty (and perhaps inadvisability) of providing more detail on some of these issues. Subsequent provisions in the Law, however, do impose transparency and accountability standards on NGOs. See Articles 31-33.

## **Article 7: Legal Restrictions**

*Restrictions on the objectives and activities of an organization can only be determined by law.*

**Comment:** Article 7 is apparently a limitation on the ability of the Government or other actors to restrict the objectives and activities of NGOs, by requiring that restrictions can only be determined by law. Arguably, the provision is unnecessary in that restrictions should clearly fall within the law. At the same time, however, the provision does affirm that NGOs are due to the protection of law.

## **Article 8: Illegal Activities**

*An organization shall not perform the following activities:*

- 1. Participation in political activities and campaigns;*
- 2. Payment to or fundraising for political parties and candidates;*
- 3. The promotion of violence and participation in military activities;*
- 4. The production, import, or trading of weapons and ammunition and military trainings of individuals;*
- 5. Engagement in terrorist activities or support, encouragement or financing of terrorism;*
- 6. Assistance in the cultivation, production, processing, trading, import, export, supply, storage, use, transport, and ownership of narcotics or providing facilities in that regard;*

7. *The use of financial resources against the national interest, religious rights, and religious proselytizing;*
8. *Participation in construction projects and contracts. In exceptional cases, the Minister of Economy may issue special permission at the request of the Chief of the Diplomatic Agency of the donor country.*
9. *Import and export for commercial purposes;*
10. *The performance of other illegal activities.*

**Comment:** Article 8 lists 10 illegal activities, some of which are prohibited criminal activity (“engagement in terrorist activities), and some of which are legal activities that NGOs are specifically prohibited to conduct (“fundraising for political activities and candidates”). The most controversial among them is Article 8(8), which prohibits participation in construction projects and contracts.

Looking at each in turn:

- Article 8(1) does not define “political activities”, but it is generally understood to prohibit only those activities connected with campaigns (i.e., electioneering), and not in any way to prohibit advocacy activities or engagement in public policy activities more broadly.
- Article 8(2) is clear and direct in prohibiting payment to and fundraising for political parties and candidates. Moreover, while practice varies widely from country to country, this is not an uncommon restriction for NGOs.
- Article 8(3-4) restricts NGOs from engaging in military activities, which is fully appropriate, especially in the Afghan context.
- Article 8(5-6) prohibits NGOs from engaging in certain criminal activities, including engagement in terrorist activities and the production and trade of narcotics. Since these activities are already prohibited in the criminal law, it is not clear why they should be specifically mentioned here. NGOs as legal entities and NGO representatives as individuals are fully subject to criminal prohibitions and sanctions.
- Article 8(7) prohibits NGOs from using financial resources against the national interest, which, while vague, is understandable, but then goes on to restrict the use of financial resources against religious proselytizing, which is not clear. It is likely that the law drafters intended to restrict NGOs from engaging in religious proselytizing, but this is not what is stated.
- Article 8(8), more than any other provision, stirred controversy before the enactment of the Law. The language in the original draft (February 2005) excluded NGOs from bidding altogether. The meaning of “bidding” was unclear. Was the intent to exclude NGOs from bidding on GOA projects only or on all donor-supported projects? Did the exclusion apply to bidding for grants or contracts or both? A revised draft issued in early March limited the bidding exclusion to construction projects. Then, in late March, the Cabinet of Ministers issued a new draft, which restored the original language and contained the blanket exclusion from bidding. It was this draft – with Cabinet-level backing – that led to such a strong

reaction from NGOs and the international donor community. Finally, the Law as enacted bars NGO “participation” in construction projects – rather than bidding on construction projects. Donors and NGOs engaged in construction activity – especially much-needed community redevelopment projects that include the building of wells, health clinics, or schools – are deeply concerned about this limitation and have felt its negative impact. Although the Law does provide an escape hatch (“In exceptional cases, the Minister of Economy may issue special permission at the request of the Chief of the Diplomatic Agency of the donor country”), it is narrow and exceptions are not based on objective criteria. Several NGOs have suggested that the prohibition be removed in its entirety. Alternatively, the Law could carve out an exception for construction activities that are directly related to the public benefit purposes of the NGO; this narrower category of construction activity would not be likely to pose any competitive threat to local businesses.

- Article 8(9) prohibits import/export for commercial purposes, which is not problematic.
- Article 8(10) is a catch-all category, prohibiting NGOs from engaging in “other illegal activities”. Like sections 5-6, this provision is unnecessary in that NGOs, like any other legal entity, are subject to all criminal laws and prohibitions.

#### **Article 9: Umbrella Organizations**

- (1) For the purpose of expansion, improvement and implementation of activities and the completion of projects, organizations may create a working structure (as an umbrella organization). To acquire legal entity status, the umbrella organization must be confirmed by the High Evaluation Commission.*
- (2) Three or more organizations, for the purpose of cooperation and better coordination of their work with relevant government agencies, shall form a coordinating organization as a non-governmental organization, according to the provisions of this law.*
- (3) Organizations specified in paragraph 2 of this Article shall organize their activities in cooperation with the High Evaluation Commission.*

**Comment:** Article 9 addresses the formation of two specialized kinds of NGO – an umbrella organization and a coordinating organization.

Where legal entities are allowed to serve as founders of NGOs, umbrella organizations can be established. Umbrella organizations are typically established by NGOs or other legal entities to represent the interests of a specific sector; for example, NGOs working on children’s issues may form an umbrella group to represent their interests vis-à-vis the Government. ANCB, ACBAR, AWN and SWABAC are all examples of umbrella organizations active in Afghanistan. Article 9(1) specifically affirms the right of organizations to create umbrella groups, and requires them to be registered by the High Evaluation

Commission (that is, presumably, to undergo the same registration process applicable to all NGOs seeking legal entity status).

Article 9(2-3) addresses coordinating organizations. Unlike umbrella organizations, coordinating organizations must be founded by three or more organizations. Besides the founding criteria (the minimum membership requirement), the distinction between an umbrella group and a coordinating organization is not clearly stated in the Law. The intent of the law drafters may have been to define a coordinating organization as a body more broadly representative of the sector, as is the case with ANCB and ACBAR, but this is only a guess.

### **Article 10: Membership in International Organizations**

- (1) An organization, for the purpose of carrying out its relevant activities, may voluntarily obtain membership in international organizations.*
- (2) An organization may establish branch offices in other provinces of the country if necessary and in accordance with its statute. In such a case the branch offices shall not have independent legal status, but shall be considered as a branch of the central office.*

**Comment:** Article 10 affirms the right of NGOs to join international organizations and to establish branch offices. This is commendable and in accord with good regulatory practice. First, membership in international organizations can strengthen domestic NGOs, and helps ensure the healthy exchange of ideas, information, and expertise; to restrict this right, or require government approval, would arguably violate international norms relating to the freedom of association and expression. Second, the ability to set up branch offices in a country as large and populous as Afghanistan may be critical to the successful operations of many NGOs.

## **Chapter Two: Establishment Criteria and Registration Procedures**

### **Article 11: Establishment Criteria**

- (1) An organization may be established by at least two domestic or foreign, natural or legal persons, at least one of whom has a residence and exact address in Afghanistan, and the natural person is of legal age; the organization may be established by the founders with an establishment documents and statute. An organization shall only act in accordance with its approved establishment document and statute.*
- (2) The President, vice presidents, chair-persons and the members of the National Council, the Chief Justice and members of the Supreme Court, ministers, deputy ministers, members of the leading body of the Attorney General, heads of independent commissions, heads of independent governmental departments, and heads of political parties do not have the right to establish or join an organization.*

**Comment:** Article 11 defines the establishment criteria for NGOs, i.e., who is permitted to create an NGO and how. As mentioned before, the establishment criteria listed here can only apply to domestic organizations, although the Law fails to make an explicit distinction.

The Law adopts a liberal approach toward establishment, consistent with good regulatory practice. Both domestic and foreign persons, and both natural and legal persons, may serve as founders. Natural persons are individuals and legal persons are legal entities as defined in Afghanistan, potentially including both for-profit and not-for-profit forms (e.g., NGOs and social organizations).

The only restrictions relate to the following:

- By requiring natural persons to be of legal age, the Law restricts minors from serving as founders. This restriction may impede the formation of youth groups, at least without the involvement of an adult; restrictions against minors must be weighed against the rights contained in the International Convention on the Rights of a Child, ratified by Afghanistan on 27 April 1994.
- The Law requires, not unreasonably, that at least one of the founders have a residence and exact address in Afghanistan.
- Article 11(2) bars those holding certain governmental, judicial and political party positions from establishing or joining an NGO. This is an anomalous provision but seems to be responsive to specific concerns relating to potential conflicts of interest and corruption in Afghanistan. Still, the restriction may run counter to the freedom of association as protected by the International Covenant for Civil and Political Rights (ICCPR), ratified by Afghanistan on 24 April 1983.

#### **Article 12: Not Using a Similar Name**

- (1) An organization shall be entered into the registry book in one or more of the official languages.*
- (2) A newly established organization may not use the name or logo of a previously dissolved organization.*
- (3) An organization may not use a name similar to other organizations, governmental companies and private companies.*

**Comment:** Article 12, by title, addresses restrictions on the use of certain designated names by an NGO. In addition, Article 12(1) addresses entry into the registry book in one or more of the official languages. This article offers an example of a recurring drafting problem throughout the Law: the lack of thematic consistency and coherence within certain articles or even within certain chapters of the Law. Article 11 addresses the issue of establishment criteria and Article 12 leaps ahead to the issue of entry into the registry book, which, in actual time, only follows completion of formal registration procedures.

As for the substance of the provision, Article 12(1) requires an NGO to be entered into the registry book “in one or more of the official languages”. In Afghanistan, there are two official languages: Dari and Pashto. See Afghanistan Constitution, Article 16(1). In addition, other designated languages are the third official language, in areas where the majority speaks them. See Afghanistan Constitution, Article 16(2).

Articles 12(2-3) restrict an NGO from using either a name or logo of a previously dissolved organization or a name similar to other organizations, governmental bodies or private companies. The first restriction seems to restrict use of the *same* name as a dissolved organization, while the second restriction applies more broadly to *similar* names, without defining the term “similar”. It would have been preferable to limit the reach of the restriction to the use of a name “so similar that confusion is likely to result,” as is specified in Article 19 of the Law (“Denial of the Application”), and as is commonly provided for in NGO legislation in other countries.

### **Article 13: Contents of the Application**

- (1) *An organization may be established for a limited or unlimited time period.*
- (2) *An organization shall have its own name, symbol, logo and exact address, and shall use them in its activities.*
- (3) *The application for establishment of an organization shall contain the following information:*
  - *Official name and acronym of the organization;*
  - *Address of the organization and identification of the founders;*
  - *Organizational structure;*
  - *Period of organizational activity;*
  - *Goals and type of activity;*
  - *E-mail address for keeping communication, if applicable.*

**Comment:** Article 13, by title, addresses the contents of the application and section 3 indeed lists the content of the application for establishment. Sections 1 and 2, however, address issues not directly related to the application, but rather related to the duration of an NGO’s existence and the use of name, symbol and logo in its activities. While each individual section is generally clear and consistent with good regulatory practice, the Article as a whole lacks coherence.

Article 13(1) very appropriately allows NGOs to be established for a limited or unlimited time period. Where an NGO chooses to limit the duration of its existence (e.g., 3 years), then termination will follow at the expiration of that time period, unless the organization amends its governing documents to reflect an extension of the time period. Most NGOs opt for establishment for an unlimited time period, and therefore are not faced with automatic termination.

Article 13(2) legitimately requires NGOs to have a name, symbol, logo and exact address. In a minor inconsistency, the application for establishment, in Article

13(3), only requires the NGO to list its name, acronym and address, and makes no reference to the symbol or logo.

Article 13(3) lists the required content of the application for establishment. Although the term “application” is used, this document is presumably the “establishment document” mentioned in Article 11(1) (“the organization may be established by the founders with an establishment document and statute”). Thus, the establishment document is one of two key governing documents for a domestic NGO and contains only basic identification information, including the name, acronym, address, founders, structure, duration, goals and types of activity and e-mail address, if any. The statute is the more detailed document and is addressed in Article 14.

#### **Article 14: Contents of Statute**

*(1) The statute of an organization shall contain the following information:*

- 1. Official name and address;*
- 2. Goals and scope of activities;*
- 3. Procedures for election and dismissal of board of directors;*
- 4. Procedures for holding meetings;*
- 5. Power and responsibilities of general assembly and board of directors;*
- 6. Procedures for reporting to general assembly and board of directors;*
- 7. Power and responsibilities of officers and members;*
- 8. Procedures for using assets of the organization;*
- 9. [Rules and procedures] for amending the statute, merger, separation, transformation and dissolution of the organization;*
- 10. Procedures for use and distribution of the assets of the organisation in the event of suspension or dissolution, and termination;*
- 11. Procedures for internal supervision of organizational activities;*
- 12. The beginning and end of the organization’s working year.*

*(2) Where the statute is amended, the organization shall within 30 days of the date of the amendment notify the Ministry of Economy in writing of the amendment with the decision of the general assembly or other authorized body attached as an appendix.*

*(3) The NGO Department of the Ministry of Economy shall record the amendment specified in paragraph 2 of this Article in the registry book.*

**Comment:** As mentioned above, Article 14 lists the contents of the statute, one of two governing documents for domestic NGOs. The statute is the more detailed document, spelling out the governance structure and internal procedures at length. The founders of an NGO have discretion regarding what kind of structure is most appropriate to fulfill the mission of the organization; they are required, however, to address all of the issues listed in Article 14.

A potentially confusing issue relates to the governing bodies. Article 14 makes reference to the board of directors and to the general assembly. The typical civil law system regulatory approach is to define the general assembly as the highest governing body of a membership organization (e.g., association), and to define the board of directors as the highest governing body of a non-membership organization (e.g., foundation or non-profit company). The Law, however, makes no reference, here or elsewhere, to permissible forms, such as a membership or non-membership organization. The Law also makes no reference to internal governance requirements, by requiring, for example, that the general assembly serve as the highest governing body. One could argue that in making reference to both governing bodies, the Law is assuming that all NGOs are membership organizations. This position, however, contradicts the actual practice on the ground in Afghanistan, where registered NGOs may be either membership or non-membership organizations. Alternatively, therefore, one could argue that the Law allows for the founders of an NGO to structure the organization as a membership or non-membership organization and to set up either a general assembly and/or a board of directors.

Finally, Article 14(2-3) requires NGOs to notify the Ministry in writing of amendments to the statute within 30 days of the amendment. Such a requirement is an important safeguard to ensure NGO transparency and accountability and is fully consistent with good regulatory practice. Moreover, notification is preferable to registration, as it is a far speedier and less bureaucratic process.

#### **Article 15: Filing an Application**

- (1) An organization shall submit a registration application to the Ministry of Economy in the capital and to its provincial departments in the provinces, and shall collect standardized forms for filling out the required information. The provincial departments shall immediately send the registration applications to the Ministry of Economy.*
- (2) An organization shall fill out the registration form and submit its name, acronym, statute, organizational structure, economic objectives, initial capital, exact address in Afghanistan, and a list of its relevant equipment and material; after approval by the High Evaluation Commission, a domestic organization shall pay the amount of 10,000 Afghanis and a foreign or international organization shall pay 1000 USD as a registration fee to the government revenue account. The receipt shall be attached to the documentation.*
- (3) A foreign organization, in addition to providing documents set forth in paragraph 2 of this Article, shall also provide valid proof of its registration and operation in another country, shall attach this proof to the application, and shall submit this to the Ministry of Foreign Affairs.*
- (4) A foreign organization shall submit a written statement through an authorized representative of the organization's headquarters, stating the goals and activities of the organization, and, after receiving confirmation*

*from the Ministry of Foreign Affairs, shall submit it to the Ministry of Economy.*

**Comment:** Once formally established, an NGO can seek legal entity status, which requires registration with the Ministry of Economy. Article 15 outlines the procedures for filing an application for registration.

Article 15(1) seems to require an NGO to submit its application to both the Ministry in Kabul *and* also to provincial departments in the provinces. In practice, however, it seems that NGOs have the choice of filing the application wherever it is most convenient. This would certainly accord with good regulatory practice. Those interested in registering an NGO based in the provinces are not required to travel to Kabul, but can instead submit the registration application to the provincial department of the Ministry of Economy. In a country as large as Afghanistan, and where travel is so difficult, a de-centralized registration process is critical. It is the Ministry's responsibility to provide a standardized application form to applicants, and the responsibility of the provincial department to forward completed applications to the Ministry in Kabul.

Article 15(2) first lists the required application information. Somewhat strangely, it requires applicants to submit the registration form and governing statute, but makes no mention of the establishment document (or "application" as described by Article 13). In addition, it requires certain specific information (such as name, acronym, organizational structure) most of which is contained in the two required documents and therefore is unnecessarily repetitive. It would seem more straightforward to simply require the three documents (establishment document, statute, and application form). It should also be noted that the requirement to submit "economic objectives" is not clearly required elsewhere, although the registration form does require information regarding funding sources.

Article 15(2) goes on to require a registration fee after approval by the High Evaluation Commission. It is legitimate to require a registration fee to cover the administrative costs of the registration process, but they should not be set so high as to burden registration applicants or to deter organizations from registering. Indeed, high registration fees make it more likely that groups will operate informally and carry out unregistered activities and may prevent Afghan citizens from realizing their right to establish NGOs. From another perspective, high registration fees may encourage the Government to register illegitimate NGOs. By comparison with other countries, the registration fee in Afghanistan is unusually high. Consider, for example, the registration fee for NGOs in the neighboring Central Asian countries:

- Kazakhstan: \$57
- Kyrgyzstan: Free of charge
- Tajikistan: \$19 for a local public association, and \$38 for a national public association.

- Uzbekistan: \$61 for a local public association, \$121 for a national public association.

Article 15(3-4) contains additional filing requirements applicable only to foreign NGOs. The requirements – proof of registration in the respective home country and a written statement from an authorized representative stating the goals and activities of the organization – are both standard and in accord with good regulatory practice. It is the two-tiered registration process that is divergent from good practice: the foreign NGO is required to submit its documentation to first to the Ministry of Foreign Affairs (MFA) and then to the Ministry of Economy. The intermediary submission to the MFA seems unnecessary, especially since the MFA participates in the High Evaluation Commission. Moreover, two-tiered registration procedures diverge from good regulatory practice.

### **Article 16: Assessment of the Application**

- (1) The submitted application and attached documents shall be assessed by the Technical Commission within the NGO Department of the Ministry of Economy and shall be presented to the High Evaluation Commission for final review. In order to facilitate the filing of a registration application in the provinces, the Minister of Economy may delegate the duties of the Technical Commission to the provincial departments.*
- (2) Upon receipt of the registration application of a foreign organization, the NGO Department of the Ministry of Economy shall, if the documents have defects, send a copy of the filed documents to the Ministry of Foreign Affairs within a week. The Ministry of Foreign Affairs shall assess the documents and notify the Ministry of Economy of its conclusion in writing within a month. Otherwise, the High Evaluation Commission shall proceed with the review of the application for registration.*
- (3) In the event that the Ministry of Foreign Affairs has an objection to the registration of an organization, it shall present its objection with the evidence and documents to the Ministry of Economy. The NGO Department of the Ministry of Economy shall file and forward the documents and evidence to the High Evaluation Commission for decision.*

**Comment:** Articles 16-19 address the government's duties regarding the assessment of application for registration. Two government commissions are empowered to review the applications: the Technical Commission and the High Evaluation Commission.

Article 16(1) authorizes the Technical Commission to assess the applicant's documentation and present it to the High Evaluation Commission. The Technical Commission is comprised of staff from the Ministry of Economy's NGO Department. The Article also allows the Minister of Economy to delegate these assessment duties to the provincial departments for reviews of applications in the provinces. In practice, the provincial departments routinely conduct the initial reviews of the applications, rather than the Technical Commission.

Article 16(2-3) addresses the application of foreign NGOs and the relationship between the Ministry of Economy and the Ministry of Foreign Affairs. As previously mentioned, this two-tiered system seems overly bureaucratic and likely to create unnecessary delays in reviewing applications. Regardless, however, the two-tiered approach runs counter to good regulatory practice.

### **Article 17: Composition of High Evaluation Commission**

*(1) The High Evaluation Commission shall be comprised of the following:*

- *An authorized representative from the Ministry of Economy as Head;*
- *An authorized representative from the Ministry of Foreign Affairs as a member;*
- *An authorized representative from the Ministry of Finance as a member;*
- *An authorized representative from the Ministry of Justice as a member;*
- *An authorized representative of the Ministry of Labor and Social Affairs as a member.*

*(2) The High Evaluation Commission shall review the registration application and shall within 15 days of the date of submission of the registration application decide on approval or denial of the application.*

**Comment:** The true power for approval or rejection of an application lies with the High Evaluation Commission (HEC). Article 17 lists those participating in the HEC: authorized representatives from five ministries. This article needs to be amended, because the Ministry of Labor and Social Affairs has been closed, with one part being subsumed into the Ministry of Economy, and a second part subsumed into the Ministry of Martyrs and Refugees.

Article 17(2) requires the HEC to conduct its review within 15 days of the date of submission of the registration application. While it is commendable and consistent with good practice to set time limits for government action, this time limit applies only to the HEC review and the Law fails to set a time limit on the overall governmental review process. In most countries, the law will give the registration authority a fixed time period to review and decide on registration applications; time periods range most typically from 15 days to 30 days, and sometimes closer to 45 or 60 days. The Afghan Law, by contrast, gives NGO applicants no assurances of a definite time period within which they will hear back from the MoE; the Law could be improved by providing this important procedural safeguard.

### **Article 18: Issuance of Registration Certificate**

*(1) If the High Evaluation Commission approves the registration, the Ministry of Economy shall issue a registration certificate signed by the Minister or his authorized representative.*

- (2) *After approval by the High Evaluation Commission, the Ministry of Economy shall send a copy of all documents of a foreign organization to the Ministry of Foreign Affairs and the relevant line ministry.*
- (3) *If the registration is denied, the Ministry of Economy shall issue a written explanation of the reasons for denial to the applicant.*
- (4) *The Ministry of Economy shall provide the Ministry of Interior with identification information of the registered organization in order to ensure security.*
- (5) *The Ministry of Economy shall, if necessary, provide the line ministries with a copy of necessary documents of the registered organization.*

**Comment:** Article 18 addresses what happens following the High Evaluation Commission (HEC) decision, whether that is approval or denial of the application.

Article 18(1) requires the MoE, upon approval of registration, to issue a registration certificate. Article 18(3) requires the MoE, upon denial of registration, to issue a written explanation of the reasons for denial to the applicant. This is fully in accord with good regulatory practice. The certificate of registration is critical for an NGO to prove its legal entity status, especially in dealings with third parties, such as banks, other government agencies, donors, individuals, etc. And the written explanation upon denial is a particularly significant procedural safeguard; the government should not be able to deny registration without a clearly articulated reason.

Article 18(2, 4-5) relates to communications between ministries. Following approval, the MoE is obliged to send a copy of all documents of a foreign organization to the MFA, to send identification information to the Ministry of Interior, and, if necessary, to provide line ministries with a copy of necessary documentation.

### **Article 19: Denial of the Application**

- (1) *The High Evaluation Commission shall deny an application for registration for the following reasons:*
  - a. *In case the statute, registration documents and evidence are contrary to the terms set forth in this law;*
  - b. *In case the documents are not complete;*
  - c. *In case the name of the applicant is so similar to a previously registered governmental or non-governmental organization or to the name of a private company or private enterprise that confusion is likely to result;*
  - d. *If two or more organizations submit registration applications under the same name, the application first submitted shall be approved and the later applicant shall be given the opportunity to choose a different name.*
- (2) *In case of defects in the documents submitted to the High Evaluation Commission, the Commission shall, within 30 days from the date of*

*receipt of the application, remand the documents to the applicant through the Technical Commission to rectify the application. In this case, the applicant shall rectify the application and re-submit it within 20 days.*

**Comment:** Article 19(1) lists the grounds for denial of a registration application. There are four potential bases on which the High Evaluation Commission (HEC) can deny registration – though in reality they amount to three: where the documentation is “contrary to the terms set forth in this law”, where the documents “are not complete”, and where the applicant’s name is so similar to a previously registered organizations that confusion is likely. These three bases are commonly found in the laws of other countries and are therefore reasonably consistent with good regulatory practice.

The grounds for denial could be more artfully stated. Most importantly, it is critical to clarify that this is an exhaustive list – that is, that these are the *only* bases for denial; that said, the current formulation would not appear to allow the HEC to deny the application for arbitrary or subjective reasons. Second, the first basis for denial should focus on whether the stated purposes and activities are contrary to the law, although this is likely implied by the current language.

Commendably, Article 19(2) includes another important procedural safeguard by providing an opportunity for revision in case of defects in the application. The HEC, through the Technical Commission, must return the application to the applicants within 30 days after the receipts of the application; the applicant, in turn, has 20 days to revise and re-submit the application to the HEC. This too is consistent with good regulatory practice and helps to avoid denials on grounds which are easily and quickly correctable.

### **Article 20: Legal Personality**

*An organization shall acquire status as a legal entity in Afghanistan upon issuance of a certificate of registration from the Ministry of Economy.*

**Comment:** Article 20 identifies the specific time at which an NGO acquires legal entity status: upon issuance of a certificate of registration. With legal entity status come the following advantages:

- A registered NGO can open a bank account, employ staff and have assets in its own name.
- A registered NGO is responsible for its action, and the board members and staff are insulated from personal liability.
- A registered NGO is in a better position to find funding. Donors generally have more trust in a registered NGO, and are more likely to award grants and contracts to a registered NGO.
- A registered NGO’s activities are protected and supported by law.

Here again, the Law apparently applies to both domestic and foreign NGOs. As highlighted in reference to Article 5 (see p. 7 of the Commentary), foreign NGOs

are able in most countries to set up a branch office or representative office, which does not have separate legal entity status, but does enable the organization to conduct its activities in the host country. Instead, in Afghanistan, the Law contemplates that foreign NGOs must re-establish themselves through a separate legal entity. The Law could be improved by limiting the scope of Article 20 to domestic NGOs only – and by clarifying that foreign NGOs are indeed able to set up a branch office.

#### **Article 21: Need for Previous Documentation**

*The related department shall make available previously registered documents to an organization where needed by the organization.*

**Comment:** Article 21 requires the “related department” to make “previously registered documents” available to an organization “where needed by the organization.” The intent and purpose of this provision is not fully clear. It can be assumed to bind the NGO Department to provide a registered NGO with copies of its own documentation upon request.

The provision should go further and require the NGO Department to maintain a registry of NGOs and to make publicly available, upon request and for a reasonable copying fee, basic (and non-confidential) information relating to any registered NGO. A publicly accessible registry is an important way of enhancing the transparency of NGOs. Through a publicly accessible registry, other government agencies, businesses, donors, the media and interested members of the public can easily obtain basic information relating to NGOs, including the name, stated purposes and activities, and registration date of an organization.

### **Chapter Three: Economic Activities, Sources of Funding and Taxation**

#### **Article 22: Prohibition against Economic Activities**

- (1) An organization can perform economic activities to reach the statutory not-for-profit goals of the organization.*
- (2) Income derived from the economic activities of the organization shall only be used to carry out the specified goals and purposes of the organization.*
- (3) Income derived from the economic activities of the organization shall not be used or distributed directly or indirectly for the personal benefit of the founders, officers, members, directors, employees, and donors.*
- (4) Directors, officers, and employees shall not carry out any economic transaction with the organization*

**Comment:** Article 22 addresses the extent to which NGOs are permitted to engage in economic activities. Strangely, the Article is titled “Prohibition against Economic Activities” but actually permits NGOs to engage in economic activities, in conformity with good regulatory practice.

Article 22(1) authorizes NGOs to engage directly in economic activities to reach the statutory goals of the organization. Article 22(2-3) sets additional limits regarding how the income derived from economic activities can be used. These limits, requiring that the income be used to carry out the organizational goals and not be distributed as profit, underscore the already existing non-distribution constraint in the Law. In other words, they are limits inherent in the nature of a not-for-profit organization; their inclusion here is to emphasize that the ability to engage in economic activities does not affect the bright-line separation between NGOs and business entities.

It should be stressed that income from economic activity is fundamental to the financial sustainability of NGO sectors in many countries. Indeed, studies have revealed that in some countries, self-generated income (including income from economic activity, as well as membership dues) is a more significant source of sectoral income than government funding or private giving. See *Global Civil Society: An Overview* by Lester Salamon, S. Wojciech Sokolwski and Regina List of the John Hopkins Comparative Nonprofit Sector Project (2003) at <http://www.jhu.edu/~ccss/pubs/pdf/globalciv.pdf>.

Article 22(4) contains a final limitation, prohibiting directors, officers and employees from carrying out any economic transaction with the organization. The intent here seems clearly to prevent transactions tainted by a conflict of interest, through which individuals are unjustly enriched at the expense of the organization. Such an outright prohibition is not common in the laws of other countries, and diverges from good regulatory practice, as it will prevent NGOs from taking advantage of potentially beneficial resources. Instead, most countries recognize the risk of conflicts of interest and respond to it not through an outright prohibition but rather through requirements for disclosure and recusal of the concerned individuals from organizational decision-making. Restrictions relating to conflict of interest may be found in the legislation regulating NGOs, or in other legislation relating to legal entities more broadly.

### **Article 23: Commencement of Work**

- (1) Prior to the commencement of work, and after the examination and assessment of the line ministry, an organization shall submit committed project documents to the Ministry of Economy for verification and registration.*
- (2) The provision of paragraph (1) of this Article does not apply to emergency humanitarian projects. After the completion of the project, an organization shall submit a report to the relevant department.*

**Comment:** Article 23 requires NGOs to submit “committed project documents” to the Ministry of Economy (MoE) for verification and registration “prior to the commencement of work”. In other words, the Article seems to require advance project approval for NGOs for all projects, with the exception, provided in section 2, of emergency humanitarian projects.

This is a disturbing provision, which runs counter to good regulatory practice. Generally, following registration as a legal entity in most countries, there is no further requirement of advance project approval. [Engaging in certain activities, such as healthcare, education, social services, will often require licensing, but the licensing requirements apply to NGOs, business entities, individuals or public agencies engaged in such activities.] The governments in most countries rely on annual reporting for information on NGO activities and finances. There is recognition that advance project approval necessarily leads to delay and opens the door to corruption. Moreover, it is not clear how advance project approval would lead to enhanced accountability.

The Afghan Law properly requires NGOs to file routine reports. Through the receipt of regular reports, the MoE gathers information about what NGOs are doing. To require advance project approval, however, would place a tremendous burden on both NGOs and the Ministry, and lead to inevitable delays in project implementation. Moreover, the Law says nothing of the grounds for denial of a project, nor provides any procedural safeguards to guard against arbitrary and subjective government decision-making. Understandably, therefore, this provision has not been enforced routinely against NGOs.

#### **Article 24: Employment Criteria for Organizations**

- (1) An organization shall provide employees with a safe working environment in the performance of economic activities and projects and appropriate incentives in hardship environments.*
- (2) In recruitment, an organization shall consider the qualifications of the applicant. The director and the board of directors of the organization may not employ family members or close relatives of the director or board of directors.*
- (3) In recruitment, priority shall be given to qualified Afghan nationals.*
- (4) In recruiting foreign workers, an organization shall obtain prior permission from the relevant authorities and shall inform the Ministry of Foreign Affairs in writing of their arrival, commencement and termination of work. In emergency humanitarian circumstances, the requirement of prior permission for the recruitment of foreign workers does not apply.*

**Comment:** Article 24 addresses issues relating to the recruitment, hiring and employment of staff by NGOs. As a threshold point, this is an anomalous provision. Employment issues are dealt with in the Labor Law and need not be separately addressed in the Law on NGOs. It is not certain how a conflict between the two laws would be resolved. NGOs, as legal entities, should be entitled to the same rights, and subject to the same obligations as all other legal entities.

Article 24(1) legitimately requires NGOs to provide a safe working environment for employees, but does not define the vague terms “appropriate incentives” or “hardship environments.”

Article 24(2) legitimately requires NGOs to recruit staff based on the qualifications of the applicant, and prohibits the hiring of family members or close relatives of the director or board of directors. This section is apparently responsive to concern with nepotism.

Article 24(3) requires NGOs to give priority to qualified Afghan nationals in recruitment. This clearly arises from a concern that foreign nationals are being hired by NGOs to carry out tasks that could be fulfilled by Afghans. It is not clear how this provision is being implemented.

Article 24(4) is troubling in that it creates administrative barriers to the hiring of foreign staff, which is likely to have a disproportionate impact on foreign NGOs, which are more reliant on foreign staff. The Article requires NGOs seeking to hire foreign staff to first receive approval from the relevant authorities (presumably the Ministry of Foreign Affairs). In light of the fact that nearly all foreigners must secure visas (receive diplomatic permission to enter and remain in Afghanistan), this additional requirement is unnecessary and overly burdensome. Government concern with security is of course perfectly legitimate, but can be met through immigration and visa requirements that apply to all foreigners, and not only to the foreign staff of NGOs. Indeed, it would be curious if foreign staff of NGOs were deemed to pose a greater threat than the foreign staff of business organizations or foreigners generally. It is not clear how this provision is being implemented and enforced.

### **Article 25: Sources of Funding**

*An organization may be funded by the following sources:*

- 1. Donations and gifts;*
- 2. Bequests, legacies and grants;*
- 3. Membership fees;*
- 4. Movable and immovable property;*
- 5. Income generated from lawful economic activities.*

**Comment:** Article 25 lists the potential sources of income for NGOs. This is a standard provision in the laws of many countries and can help ensure that NGOs have access to a diverse range of potential income to fulfill their mission purpose. The income categories listed in Article 25 are all important and properly recognized.

The Law could be improved, however, through the recognition of additional categories. Other legitimate sources of income include, for example:

- Financial assets allocated from the government budget;
- Contracts concluded with natural and legal persons;
- Income acquired from passive investment activity;
- Income generated from other lawful activities undertaken by the NGO.

Of these, the most important is the catch-all category (“income generated from other lawful activities undertaken by the NGO”). With the catch-all category, NGOs would be protected in receiving income from all lawful sources.

#### **Article 26: Criteria for Using Property**

- (1) An organization may own movable or immovable properties according to the law and may use these properties for accomplishing its not-for-profit purposes and goals.*
- (2) Movable and immovable properties shall be registered in the name of the organization and copies shall be sent to the Ministries of Economy and Finance.*
- (3) Movable and immovable properties may not be purchased or registered in the name of the founders, board members, employees or their close relatives.*
- (4) The income from movable and immovable properties of the organization shall be spent for not-for-profit goals under the supervision of a governing body and/or the representative designated by the statute, and according to the provisions of this law and the relevant statute.*

**Comment:** Article 26 addresses the ownership and use of property by NGOs – specifically “movable or immovable properties”. “Movable and immovable properties” is the traditional distinction drawn in later Roman law and modern systems between the kinds of things subject to ownership and possession. Taken together, the phrase embraces all NGO assets, from property that can be moved or displaced, such as office equipment and cash to what is typically considered immovable property, including real estate and buildings.

The Article affirms and emphasizes the not-for-profit nature of an NGO. It authorizes NGOs to own movable and immovable property, but limits the use of the property – and the spending of income from the property – to accomplishing the not-for-profit purposes and goals of the NGO. It requires that the property be registered in the name of the organization and not be bought or registered in the names of individuals (founders, board members, employees, or close relatives) associated with the NGO. These limitations comply with good regulatory practice, and are a fundamental safeguard against private inurement and self-dealing.

#### **Article 27: Financial Auditing**

- (1) An organization shall keep annual financial records and shall prepare a report of this record according to the provisions of this law, and make it available to the Ministry of Economy during monitoring.*
- (2) An organization shall prepare an audit of its annual financial statements according to international standards and shall submit a copy of its report to the Ministry of Economy, Ministry of Finance and to donor agencies. The MoE and MoF in consultation with Coordination Bodies of the*

- Organizations shall seek alternative methods for organizations that lack the financial capacity to prepare an audit by international auditors.*
- (3) *The board of directors and other officers shall be responsible for illegal financial activity.*

**Comment:** Article 27 addresses the financial record-keeping and financial auditing of NGOs. The Article recognizes the importance of ensuring basic levels of accountability and transparency within NGOs.

Section 1 requires NGOs to maintain financial records and make those records available for inspection by the Ministry. This is consistent with good regulatory practice and critical to NGO transparency.

Section 2 requires NGOs to prepare an audit of their annual financial statements according to international standards and submit the report to the Ministry; the auditing requirement is an important regulatory tool to ensure transparency and accountability, but in most countries, is only applied to large, public benefit NGOs – that is, those NGOs engaged in public benefit activities and therefore receiving public support (through tax benefits or direct financing) or those NGOs with a significant annual turnover (based on threshold limit). To require all NGOs to fulfill this requirement is almost certainly unnecessary and would be difficult or even impossible for many NGOs to afford. Professional audits are expensive and raise administrative expenses considerably; many small NGOs relying primarily on volunteer labor and without significant income cannot comply with an auditing requirement. The Law recognizes this in section 2 by allowing for “alternative methods for organizations that lack the financial capacity”. What these alternative methods are is not clear.

Finally, section 3 places responsibility for illegal financial activity on the board and officers. This is appropriate; while board members and officers (as well as staff) are normally insulated from personal liability for the debts of the organization, they can and should be held liable for illegal activity.

#### **Article 28: Supply of Equipment and Vehicles**

- (1) *An organization shall obtain its material, machinery, vehicles and other necessary equipment for approved projects from inside the country. Importation is permissible where such equipment is unavailable within the country or in case of a substantial price difference.*
- (2) *An organization shall have authorization from the relevant governmental departments through the Ministry of Economy for importing any material and equipment.*
- (3) *An organization may not sell its vehicles and equipment or remove them from the country. An organization may sell its vehicles and equipment for not-for-profit purposes to individuals and the private sector on the basis of public auction under the supervision of authorized representatives of the Ministries of Finance and Economy. In this case, tax shall be paid*

*according to the law. In the event vehicles or equipment are sold to other organizations, then the seller is exempt from taxation.*

- (4) An organization shall through the Ministry of Economy obtain advance approval from the Ministry of Communication for importing and activating communication equipment.*

**Comment:** Article 28 addresses the supply of equipment and vehicles for NGOs, as well as the supply of communication equipment. In the basic NGO framework legislation in most countries, these issues are not addressed. Rather, the importation of goods and equipment is regulated separately.

Section 1 sets a general requirement for NGOs to purchase material, machinery, vehicles and other necessary equipment inside Afghanistan, but allows NGOs to import equipment that is unavailable in the country, or where there is a substantial price difference. Section 2 requires NGOs seeking to import material and equipment to secure approval from “the relevant governmental departments through the Ministry of Economy.” Similarly, section 4 requires NGOs seeking to import communication equipment to secure approval from the Ministry of Communications through the Ministry of Economy.

In practice, therefore, an NGO seeking permission to import goods must write a letter specifying the need for the equipment and submit the letter to the NGO Department within the Ministry of Economy. Then the NGO Department may review the need for the equipment and its unavailability in Afghanistan, and if satisfied, will issue a permission letter to the NGO. Only with this approval can the NGO proceed with the purchase and import.

Section 3 restricts the sale of vehicles and equipment for commercial purposes, but allows NGOs to sell vehicles and equipment for not-for-profit purposes, provided the sale occurs through a public auction and under the supervision of the Ministries of Finance and Economy.

#### **Article 29: Bank Account**

- (1) An organization shall locate its Afghani and foreign currency accounts in a designated bank account within the country.*
- (2) Banks shall provide the necessary facilities to organizations to open a bank account and foreign currency account.*

**Comment:** Article 29 requires NGOs to use a designated bank for local and foreign currency accounts and requires banks to provide the necessary facilities. This requirement is not inconsistent with good regulatory practice, and can enhance the transparency of NGOs.

#### **Article 30: Tax Exemption**

- (1) An organization is exempt from any kind of tax and customs duty on the importation of material and equipment which are related to and necessary*

- for not-for-profit and charitable purposes, according to the Income Tax Law and the Customs Law.*
- (2) A foreign citizen of an organization shall pay the visa tax, according to the provisions of law.*
  - (3) Employees of an organization shall pay income tax, according to the provisions of the Income Tax Law.*

**Comment:** Article 30 seeks to address specific aspects of the tax treatment of NGOs. Like Article 24, which regulates the employment issues, Article 30 is an anomalous provision, as the tax treatment of NGOs is subject to specific regulation in the Income Tax Law (2005, as published in Official Gazette number 867). Moreover, the Ministry of Finance has taken the position that any provisions in other laws which purport to regulate taxation and conflict with the Income Tax Law are null and void. Article 30 simply makes reference to the Income Tax Law and Customs Law, and thereby is not inconsistent with tax law; as such, these provisions are likely to be considered sound, even if unnecessary. That said, a generic cross-reference to the Income Tax Law would certainly suffice. For more information on tax issues affecting NGOs, see the Afghan Ministry of Finance's Income Tax Manual, available on the Ministry website (<http://www.mof.gov.af/?p=info&nid=10>).

## **Chapter Four: Reporting of the Organizations**

### **Article 31: Submitting a Report**

- (1) An organization shall submit its annual activity report to the Ministry of Economy within three months of the end of the fiscal year.*
- (2) An organization shall submit its semi-annual activity report to the Ministry of Economy, using the standard forms of the Ministry of Economy, which will be updated as necessary.*
- (3) The semi-annual report shall be prepared in one original and three copies for submission to the Central and Regional Offices of the Ministry of Economy, in return for a receipt. The Regional Offices shall immediately send the report to the Central Office of the Ministry of Economy.*
- (4) The semi-annual report shall be written in one of the official languages of the country.*
- (5) An organization shall send a copy of its semi-annual report to the relevant line ministry.*

**Comment:** Perhaps the most basic tool governments use to ensure the accountability of NGOs is reporting. Through regular reporting, NGOs provide both narrative and financial information relating to past activities. Typically, the laws in most countries exempt smaller NGOs from any reporting requirement, and only require larger NGOs, or those receiving more than minimal public support, to prepare and submit reports. And most commonly, these reports are required on an annual basis, due on a specific date.

Section 1 requires NGOs to submit an annual activity report to the Ministry of Economy (MoE) within three months of the end of the fiscal year. There is no standard form used for the annual report; instead, NGOs are permitted to prepare the report in any format they deem appropriate.

Section 2 requires NGOs to submit a semi-annual activity report to the MoE, using standard forms issued by the Ministry. In practice, there are two reporting forms – Forms 01 and 02 – which may need to be completed in connection with the semi-annual report. Form 01 is applicable to all registered NGOs. Form 02 is applicable only to those foreign NGOs, which give grants to other NGOs operating in Afghanistan. NGOs are expected to submit reports every six months, at the end of the month of Sonbola (after the 21<sup>st</sup> of September), and again at the end of the year, as measured by the Afghan calendar.

Section 3 requires that the semi-annual report be prepared in one original and 3 copies for submission to the MoE, either to the provincial departments or directly to the Ministry in Kabul. It is the duty of the provincial departments to forward report to the central Ministry. It is not clear if this requirement also applies to the annual report.

Section 4 requires the semi-annual report to be written and submitted in one of the official languages (Dari or Pashto). Some foreign NGOs operating in Afghanistan have complained that this requirement is difficult to comply with, time-consuming and expensive. While reporting inevitably raises the administrative expenses, it is fundamental to transparency and accountability, and it is legitimate that reports be submitted in the local language.

Section 5 requires NGOs to send a copy of their semi-annual report to “the relevant line ministry.” This is a largely unenforceable provision, as not all NGOs will be engaged in activities that clearly correspond to a specific ministry. Others will be engaged in a range of work areas corresponding to multiple ministries.

For more detailed information regarding reporting requirements, please see the *NGO Reporting Guidelines* (©2008 ICNL) a brochure designed to explain the reporting requirements under the Law on NGOs.

### **Article 32: Analysis and Assessment**

- (1) *The Ministry of Economy shall analyze and assess the semi-annual report within 90 days of the receipt of the semi-annual report and shall inform the respective organization about the result.*
- (2) *The Ministry of Economy shall, after analysis and assessment, send a summary copy of the annual report of foreign organizations to the Ministry of Foreign Affairs.*

**Comment:** Article 32 establishes the governmental duty to analyze and assess the semi-annual reports.

Section 1 requires the Ministry of Economy (MoE) to review the reports within 90 days of receipt and to inform the NGO of the result. While the intent of the provision is to ensure timely and thorough reviews, the requirement to inform NGOs of the result will likely prove burdensome or to be ignored. It is rarely required in the legal systems of other countries. The supervisory agency of course is authorized to follow up on reports, where problems are apparent or more information is needed, but there is no requirement to inform NGOs of the results.

Section 2 requires the MoE to send a summary copy of the annual report of foreign NGOs to the Ministry of Foreign Affairs.

**Article 33: Supervision, Monitoring and Submission of the Project**

- (1) Supervision and monitoring shall focus on the quality and quantity of work accomplished and the implementation of the project according to the contract.*
- (2) An organization shall provide working facilities to the inspection team of the Ministry of Economy and relevant line ministries for the on-site inspection and supervision of approved projects.*
- (3) The relevant line ministries shall monitor and supervise on an ongoing basis the technical implementation and activities of the project according to its specifications and shall submit a report to the Ministry of Economy.*
- (4) An organization shall inform the Ministry of Economy and relevant line ministries in writing of the completion of the project according to the signed contract.*

**Comment:** After reporting, the ability to monitor NGO activities through inspections is one of the most useful tools in ensuring transparency and accountability. It is essential, however, that government supervision be balanced by appropriate procedural safeguards to ensure against arbitrary government interventions or harassment.

Article 33(1) requires that supervision focus on the quality and quantity of work and “the project activity according to the contract.” This focus on contract-based work is somewhat odd, in that much NGO activity, whether in Afghanistan or any other country, is not based on contract. NGOs receiving foreign assistance or government assistance may indeed be engaged in activities pursuant to a grant agreement or contract. Other NGOs may pursue activities simply based on volunteer efforts, or with income derived from economic activities, or with the support of private donations – none of which is likely to be “project activity according to the contract.” This Article would therefore be more inclusive were it to require that supervision focus on whether an NGO’s activity is in compliance with its governing documents (establishment act and statute).

Article 33(2) requires that NGOs provide “working facilities” to the inspection team of the Ministry of Economy and relevant line ministries for on-site inspections. The meaning of “working facilities” is not defined in the Law. Inevitably, this provision is likely to lead to confusion through differing interpretations. According to at least certain NGO representatives, government inspectors expect NGOs to provide vehicles for transportation, and lunch to inspectors. The meaning of the term “working facilities” depends on the local context in Afghanistan, and clearly NGOs should cooperate and facilitate the on-site inspection by making documentation available as requested. That said, NGOs should not be asked to fund what is a government task. The Government of Afghanistan – in this case, the Ministry of Economy – should conduct inspections according to the need for inspections and within the bounds of its own resources. Moreover, in most countries, few NGOs are subject to on-site inspections, as the supervisory authority must focus its limited resources only on those few NGOs that are potentially problematic.

Article 33(3) requires the line ministries to monitor and supervise “the implementation and activities of the project according to its specifications” and to submit a report to the Ministry of Economy. This provision therefore seeks to ensure good inter-ministerial communication, and to share supervisory duties among the line ministries. An NGO supported by funding (through a grant agreement or contract) from a line ministry (for example, an NGO seeking to improve healthcare might be funded by the Ministry of Health to carry out a project) is likely to be subject to supervision and reporting requirements, according to the terms of the agreement or contract. It is not known if the line ministries are in fact submitting a report to the MoE.

Article 33(4) requires an NGO to inform the MoE and relevant line ministries in writing of “the completion of the project according to the signed contract.” Here again, as in 33(1), the provision limits its focus to contract-based project work. More importantly, however, it is not clear if this provision is an additional reporting requirement – or is rather underscoring the reporting requirement established in Article 31. In other words, NGOs will necessarily inform the MoE in writing of completed projects through the submission of annual and semi-annual reports. Indeed, this should be sufficient. If interpreted to require an additional report, Article 33(4) would be duplicative and burdensome.

## **Chapter Five: Transformation, Merger, Dissolution and Liquidation of Organizations**

### **Article 34: Change in Legal Personality**

- (1) After communicating with the Ministry of Economy, an organization may transform, separate, or merge with another or other organizations that have similar goals.*
- (2) Upon merger or transformation, the newly registered organization shall be responsible for all liabilities of the previous organization.*

- (3) *Upon separation of organizations from each other, each organization shall be responsible for its liabilities, unless otherwise agreed upon by contract.*
- (4) *An organization may not transform its legal personality into or merge with a for-profit organization.*

**Comment:** Article 34 addresses the issue of transformation – or changes in legal personality of the NGO.

Section 1 allows an NGO to transform, divide or merge with/into other organization(s). This is consistent with good regulatory practice, in that the law should allow NGOs to merge, divide or modify themselves in ways permitted for other legal entities. Moreover, the decision to do so should be voluntary. The apparent limitation that transformation should be limited to organizations “that have similar goals” is not common in other laws, as there may be good reasons for organizations with different purposes to merge (consider the example of a children’s rights NGO merging with a cancer-prevention society merging to address leukemia, a form of cancer that affects children predominantly).

Sections 2-3 address the liability of transformed entities. In the case of merger (two or more organizations coming together), the newly formed organization is responsible for all liabilities of the previous organizations. For example, where A merges into B, then B becomes responsible for the liabilities of A. Similarly, where A and B merge to form a new organization (C), then C becomes responsible for the liabilities of both A and B. In the case of division (one organization splitting into two or more), each new organization is responsible for all the liabilities of the previous organization, unless otherwise agreed. These are important safeguards for creditors and third parties; it is fundamental that transformation not be used as a means to avoid liabilities. These provisions are in accordance with good regulatory practice.

Lastly, section 4 restricts the transformation of an NGO into a for-profit organization. This restriction accords with good regulatory practice, and is indeed fundamental to the distinction between for-profits and not-for-profits. Allowing an NGO to merge with a business would invite abuse and undermine the integrity of the sector. Transformation of an NGO into a business would open the door to the unscrupulous, who, through an NGO, might attract private donations or benefit from tax exemptions, and then, upon transformation into a for-profit, could pocket those funds through corporate distributions.

### **Article 35: Dissolution**

- (1) *An organization shall be dissolved:*
  - a) *Where the fixed period of establishment has expired, unless the time period, upon request, is renewed;*
  - b) *Based on a voluntary decision of its highest governing body according to the relevant statute;*

- c) *Where the organization does not provide the Ministry of Economy with its annual report within one year of the end of the fiscal year;*
  - d) *Where the organization does not re-register within 6 months, according to the Article 47.1 of this Law;*
  - e) *Where the High Evaluation Commission establishes that activities of the organization are contrary to the public interest, provisions of this law and other valid laws.*
- (2) *The Ministry of Economy shall notify the organization in writing of the deficiencies relating to paragraph 1 (a), (c), (d) of Article 35. If the organization fails to rectify the deficiencies within 30 days of the date of notification, the organization shall be dissolved after the verification of the High Evaluation Commission.*
- (3) *In case of announcement of dissolution or expiration of the time period established for appeal, the Ministry of Economy shall delete the organization from the registry.*
- (4) *The organization may file its complaint to the Dispute Resolution Commission.*

**Comment:** Article 35 addresses the issue of dissolution, also known as termination, whereby the formal legal existence of an NGO is ended.

Section 1 lists the grounds or bases for dissolution. According to good regulatory practice, the law should allow for both voluntary and involuntary dissolution, and the listed grounds for involuntary dissolution should be clear, objective and exhaustive. The law should not allow for involuntary dissolution on subjective or arbitrary grounds. Article 35 of the Afghan Law generally complies with these good practices, although it could be improved further. Looking at each ground in turn:

(a) The expiration of the fixed period of an NGO's existence leads to dissolution, unless the NGO seeks a renewal (extension) of the time period. It should be noted that most NGOs will not be bound by a fixed period of existence; those organizations whose existence is limited by time have voluntarily made that choice in their governing documents.

(b) An NGO may seek dissolution through a voluntary decision of its highest governing body. This is fully appropriate.

(c) Involuntary dissolution will follow where the NGO does not provide the Ministry of Economy with its annual report within one year of the end of the fiscal year. This is clear and objective and emphasizes the fundamental importance of reporting to accountability.

(d) Involuntary dissolution will follow in case of failure to re-register according to Article 47.1. On the basis of this provision, some 1600 NGOs were

dissolved in February 2006, at the close of the mandatory re-registration process following the enactment of the new Law. This provision is now moot alongside the re-registration process, and can no longer serve as the basis for dissolution in the future.

(e) Involuntary dissolution may follow where the High Evaluation Commission establishes that an NGO is acting “contrary to the public interest, provisions of this law and other valid laws.” The concern with this provision is that it is overly broad and vague, potentially inviting government officials to dissolve an NGO in less than necessary circumstances. Where legislative language is vague, all depends on implementation – in this case, on the interpretation of “public interest”. One potential solution is to interpret the public interest in light of Article 8’s list of prohibited activities. Another is to interpret its meaning in light of international guidelines; the International Covenant on Civil and Political Rights (ICCPR), to which Afghanistan is party, states that no restrictions may be placed on the exercise of the freedom of association other than those “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.” (See Article 22 of the ICCPR).<sup>2</sup>

Section 2 describes the procedural steps of dissolution. First the Ministry of Economy (MoE) must notify the NGO in writing of potential deficiencies relating to grounds a, c, d. The NGO then has 30 days from the date of notification to rectify the deficiencies. Should the NGO fail to do so, the High Evaluation Commission (HEC) must verify the need for dissolution. And finally, following HEC verification, the NGO is dissolved. Commendably, the Law provides appropriate safeguards against arbitrary dissolution: the requirement of notification, the opportunity for rectifying problems, and the need for verification by the HEC. Interestingly, however, the safeguards apparently do not apply to dissolution based on section (1)(e).

Section 3 simply provides for the removal of a dissolved NGO from the registry, which follows upon the “announcement of dissolution or expiration of the time period established for appeal.”

Section 4 provides for another important procedural safeguard: the opportunity to appeal the decision to dissolve an NGO. An organization may file its appeal, or complaint, to the Dispute Resolution Commission (DRC). The DRC is established through Chapter 6, Articles 37-39. As of the time of writing, the DRC has not yet been established.

### **Article 36: Consequences of Dissolution**

*(1) In case of dissolution, or transformation of the organization (from not-for-profit to profit), the movable and immovable properties remaining*

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<sup>2</sup> Afghanistan ratified the ICCPR on 24 January 1983.

*after the payment of liabilities and debts shall be distributed to an organization with similar activities, with the approval of the High Evaluation Commission. If there are no such organizations, the movable and immovable properties belong to the government.*

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

**Comment:** Article 36 spells out the consequences of dissolution and the distribution of assets.

Section 1 states clearly that the assets (movable and immovable properties) remaining after payment of debts and liabilities “shall be distributed to an organization with similar activities,” with the approval of the High Evaluation Commission (HEC). This approach complies with good regulatory practice. The NGO itself can name the recipient NGO through its own governing documents; indeed, Article 14(1)(10) requires NGOs, in their statute, to define procedures for the distribution of assets in case of dissolution. Where no such NGO is named, it is the government’s obligation to ensure that remaining assets are given to an NGO with similar activities. In this way, the Law helps to ensure that assets are ultimately used in the way that founders, donors and others intended.

Section 1 also states that if there are no organizations with similar activities, the movable and immovable properties belong to the government. While this is not inappropriate, it would be more consistent with good practice to require the government to use the assets as nearly as possible for the intended mission purpose. In other words, the assets of an NGO dedicated to children’s health should be used by the government to help address children’s health issues. Such a limitation would also guard against perverse incentives for termination.

According to the language of Article 36(1), these same rules of distribution to an NGO with similar purposes and to the government apply also to the assets of an organization that has been transformed from an NGO to a for-profit organization. This possibility, however, is in direct contradiction to Article 34, which prohibits the transformation of an NGO into a for-profit organization. Given that Article 34 directly addresses the issue of transformation, one may infer that its inclusion in Article 36 is mistaken.

Section 2 states the principle against reversion of assets. In other words, the assets of a dissolved organization should not be distributed to its founders, members, directors, officers, employees, donors and/or their relatives. This underscores the non-distribution principle by stressing its application upon dissolution.

## **Chapter Six: Dispute Resolution Commission (DRC)**

**Comment:** In order to hear and resolve disputes between NGOs and the government, and out of recognition of the lack of current capacity within the Afghan judicial system, this Chapter creates the Dispute Resolution Commission (DRC) as an administrative appellate commission. As of July 2008, the DRC has not yet been established. Thus, Articles 37-39, which we review below, exist only on paper and have not been applied in practice.

### **Article 37: Composition of the Commission**

- (1) A Dispute Resolution Commission (DRC) shall be established to resolve disputes between the organizations and governmental departments resulting from implementation of this law.*
- (2) The Commission shall be comprised of five members, of whom three members are appointed on the recommendation of the Ministry of Economy and approval of the President, and two members are introduced by Coordinating Bodies of non-governmental organizations. They shall perform their duties with independence and impartiality.*
- (3) The members of the Commission shall be introduced by the relevant parties to serve a term of two years, which can only be extended by one additional term.*
- (4) The Chair of the Commission shall be elected from among the members on a rotating basis for a term of one year.*
- (5) The members of the Commission shall meet the following criteria:*
  - University degree and a minimum of 5 years' work experience.*
  - No criminal background.*
- (6) The Commission may promulgate additional procedures to fulfill their responsibilities.*

**Comment:** Article 37 defines the Dispute Resolution Commission (DRC) and its composition. According to 37(1), the DRC is intended “to resolve disputes between the organizations and governmental departments resulting from implementation of this law.” In other words, it is designed to provide NGOs with an administrative appellate procedure. For example, in case of the denial of registration, or in the case of dissolution, an NGO may file a complaint with the DRC.

Section 2 provides for a 5-member Commission, of which 3 are appointed by the MoE, and 2 are nominated by the NGO “coordinating bodies”. Although approved by the President, the Law requires the Commission members to act with independence and impartiality. The mixed, cross-sectoral composition of the Commission should help lead to more independent decision-making. Furthermore, section 5 requires Commission members to meet minimal criteria, including a university degree and 5 years of work experience, as well as to have no criminal background.

Sections 3-4 and 6 address the internal governance of the Commission. Section 3 establishes term limits, restricting Commission members to two 2-year terms.

Section 4 provides that the members elect the Chair of the Commission from among themselves, for a term of one year, on a rotating basis. Section 6 allows the Commission to issue additional procedures to fulfill their responsibilities.

#### **Article 38: Examining the Complaint**

- (1) The complainant may file its objection in writing to the Dispute Resolution Commission.*
- (2) The Commission, immediately after receiving the objection, shall specify a time for the disputing parties to appear and shall decide the case within one month.*
- (3) The Commission shall collect necessary evidence from both parties and shall allow each party to argue orally or in writing before the Commission.*

**Comment:** Article 38 addresses the procedures for filing and examining the complaint. Section 1 requires the complainant to file its objection in writing to the DRC. Section 2 then requires the DRC, immediately after receiving the objection, to schedule a hearing for the disputing parties. Section 3 requires the DRC to collect evidence from both parties and to allow each party to present both oral and written evidence before the DRC. The procedures governing the hearing are not spelled out in detail, but presumably may be detailed by the DRC directly, according to the Article 37(6). Finally, the DRC must make its decision within one month (of the hearing, it may be presumed), according to 38(2). This is an appropriate time limit to ensure speedy decision-making.

#### **Article 39: Decision of the Commission**

- (1) The decision of the Commission shall have binding effect. In case either party is not satisfied with the decision of the Commission, it may file an appeal with the relevant court.*
- (2) The disputing parties shall have the right to use an attorney during the hearing.*

**Comment:** Article 39 addresses the impact of the Commission's decision. The decision is considered binding, but can be appealed by either party to the relevant court. It is important to note that the Law therefore does make available a judicial appeal. The DRC is thus an intermediate-level administrative appeal. Section 2 adds that disputing parties have the right to use an attorney during the hearing, which is appropriate.

### **Chapter Seven: Final Provisions**

#### **Article 40: Non-Interference in Organization Affairs**

- (1) Governmental and non-governmental organizations may not interfere in the performing affairs of organizations, but according to the provisions of this Law.*
- (2) The line ministries are an exception to paragraph (1) of this Article.*

**Comment:** Prior to the enactment of this Law, there were many examples of governmental interference with NGOs, especially in the provinces. Article 40 is designed to protect NGOs from governmental interference. The Article follows in the wake of Article 4, which defines the Ministry of Economy as the registration and supervision body for NGOs in Afghanistan. Article 40(1) prohibits government from interfering in the affairs of NGOs, except according to the provisions of the Law. Strangely, however, section 2 then undermines the strength of section 1 by carving out an exception for line ministries.

#### **Article 41: Vehicle License Plate**

*An organization, after receiving a certificate of registration, shall prepare a temporary license plate for its vehicles, according to the law.*

**Comment:** Upon the receipt of its registration certificate, a NGO, if it owns vehicles, shall prepare a temporary license plate, in accordance with the law. This provision is almost certainly unnecessary, as vehicle licensing rules already apply to NGOs as to all other legal entities.

#### **Article 42: Voluntary Contributions**

*The contribution and cooperation of natural and legal persons as volunteers, political parties, trade associations, social organizations, military bases and religious worship centers are not bound by the provisions of this law.*

**Comment:** Article 42 seems to address the scope of the Law. If so, its title of “Voluntary Contributions” is misleading. Instead, its substance says that the provisions of the Law do not apply to political parties, trade associations, social organizations, military bases and religious worship centers, as well as to the contributions of volunteers. These exclusions are generally sensible.

#### **Article 43: Employee Recruitment**

*In the recruitment of related employees, an organization shall observe the labor law and other valid legislation of the country.*

**Comment:** Article 43 simply directs NGOs to observe the labor law, which, as legal entities, they are already bound to do.

#### **Article 44: Enactment of Implementing Regulations**

*(1) The Ministry of Economy shall supervise the implementation of the provisions of this Law.*

*(2) The Ministry of Economy, for better implementation of the provisions of this Law, shall issue rules and regulations.*

**Comment:** As the registration and supervision body for NGOs, the Ministry of Economy is responsible for supervising the implementation of the Law. Article 44 authorizes the MoE to prepare and issue implementing rules and regulations.

Indeed, in July 2005, immediately following the enactment of the Law, the MoE issued Regulations relating to re-registration. Because the re-registration period has been concluded, it is not clear to what extent, if at all, these Regulations remain applicable.

#### **Article 45: Confidentiality**

*Officers and members of an organization may not release confidential information concerning projects, documents, historic or cultural archives, or military bases for their personal and for-profit purposes inside or outside the country.*

**Comment:** Article 45 seeks to protect NGOs from the release of confidential information by imposing on officers and members of NGOs the duty not to release such information. The inclusion of information concerning military bases and historic or cultural archives is somewhat anomalous, but not objectionable. It is considered good regulatory practice for officers and members of an NGO to comply with duties of confidentiality.

#### **Article 46: Acquiring Information**

*Security bodies can acquire information concerning the activities of organizations only through the Ministry of Economy.*

**Comment:** Article 46 seeks to protect NGOs from interference or harassment by security bodies (Ministry of Interior, police, etc.) by requiring the same to obtain information on NGOs directly from the Ministry of Economy. This is appropriate.

#### **Article 47: Obligations of the Organization**

- (1) An organization which previously received a certificate of registration prior to the enforcement of this Law shall, within 6 months from the enforcement date, submit its registration application along with relevant documentation to the NGO Department of the Ministry of Economy.*
- (2) In case the organizations specified in paragraph 1 of this Article paid the registration deposit prior to the enforcement of this law, the paid amount shall be counted as the registration fee.*
- (3) The NGO Department of the Ministry of Economy shall submit the application and relevant documentation within 1 week to the High Evaluation Commission. The High Evaluation Commission shall, within 90 days of the completion of the application, decide on the approval or denial of the application.*
- (4) The Ministry of Economy shall issue a certificate of registration upon approval of the application and related documentation, according to the provisions of this Law.*
- (5) The Ministry of Economy shall submit the grounds for denial in writing to the organization, according to Article 19 of this Law.*
- (6) In case the organization violates the following upon the confirmation of the High Evaluation Commission, from 1000-500,000 Afghanis, shall be fined:*

- a. *Submission of incorrect annual report;*
- b. *Failure to submit the annual report within the period specified in Article 31.1 of this Law;*
- c. *Failure to facilitate the supervision according to Article 33.2 of this Law*

**Comment:** Article 47 primarily focuses on the re-registration process, which it makes mandatory for all NGOs registered at the time of enactment (June 2005). The six-month re-registration process, which was completed in February 2006 (after being extended by the Ministry of Economy), led to the termination of some 1600 NGOs. Because the re-registration period has been completed, sections 1-5 of Article 47 no longer have relevance and we will not comment on these provisions here.

Article 47(6), however, may be intended for broader application, irrespective of the re-registration process. It provides for fines against NGOs (limited to a range of 1000-500,000 Afghanis), where an NGO has submitted an incorrect annual report, failed to submit a timely annual report, or failed to facilitate the supervision by the Government, in accordance with provisions in this Law. Presumably, the High Evaluation Commission, which is required to confirm fines, has discretion in setting the level of the fine according to the gravity of the offense. The availability of fines as sanctions for legal violations accords with good regulatory practice; indeed, it is important that the Law provide the government with supervisory tools other than dissolution to guard against legal violations.

#### **Article 48: Entry into Force**

*This law shall be enforced from the date of endorsement and shall be published in the official gazette. With the enforcement of this law, the Regulation on the Activities of Domestic and Foreign Non-Governmental Organizations (NGOs) in Afghanistan, as published in the official gazette Number 792, in the Year 1421 (2000) shall be repealed.*

**Comment:** As is common with the enactment of a new law, Article 48 specifies when the Law will take effect (upon publication in the official gazette), and confirms that the enactment of this Law repeals the Taliban-issued *Regulation on the Activities of Domestic and Foreign Non-Governmental Organizations in Afghanistan*.