

CIVIL SOCIETY REGULATION AND SPACE IN ASIA AND THE TURN AGAINST POLITICS

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The space for civil society action in Asia and the Pacific is narrowing. That has been the conclusion, now for several years, of NGO and civil society activists, progressive policymakers, and academics both around Asia and those who study the region.¹ But if that is occurring, how is it occurring, and what are the methods being used to achieve it?

This theme of the narrowing of civic space is at the centre of a number of international organisation and civil society efforts in Asia - at the country level, in countries such as India, Cambodia, Pakistan, China, and elsewhere, and at the regional level, through the United Nations and other groups. This short article has its roots in a discussion paper that I wrote for a vibrant, policy-oriented roundtable discussion (of about seventy people) on civic space in Asia convened by the United

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1 This article is dedicated to the memory of Martha Farrell, a distinguished Indian CSO leader, activist and teacher who was working with Afghan colleagues on workshops on gender in Kabul when she was killed in a terrorist attack in May 2015. See 'Sad Demise of Dr Martha Farrell' *PRIA International Academy* (14 May 2015) available at: http://pria.org/blogs.php?action=view&blog_ibid=2932; SR Chowdhury, 'Kabul Terror Victim Went Where Others Feared To Go' *The Times of India* (16 May 2015) available at: <http://timesofindia.indiatimes.com/india/Kabul-terror-victim-went-where-others-feared-to-go/articleshow/47303268.cms>; J Gavena and J Merrifield, 'Martha Farrell Obituary' *The Guardian* (4 June 2015) available at: <http://www.theguardian.com/education/2015/jun/03/martha-farrell-obituary>

Nations Development Programme in Bangkok in August 2015.² That two-day conversation brought together activists, NGO leaders, and a few academics and policymakers to discuss the turn away from politics and democratic debate among civil society organisations in Asia - a reduction in civic space and an increased democracy deficit that is being strongly promoted and mandated by governments throughout the region.³

In the relatively dry words of the United Nations, this conversation sought to further United Nations Sustainable Development Goal (SDG) 16, which seeks to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels',⁴ with a focus on the challenges to civil society and its advocacy roles. In more specific terms, the United Nations, collaborating with civil society groups and others around Asia, is increasingly concerned about restrictive regulatory environments for civil society across a range of fronts.

The Role of Civil Society and the Paradox of Civil Society in Asia

If the goal of Sustainable Development Goal 16 is '[p]romot[ing] peaceful and inclusive societies for sustainable development, provid[ing] access to justice for all and build[ing] effective, accountable and inclusive institutions at all levels', then what is the role of civil society in this process? Some of the targets of SDG are particularly relevant to the role of civil society, including:⁵

16.3 Promote the rule of law at the national and international levels, and ensure equal access to justice for all ...

2 See N Booth and B Gebrezghi, 'For Asia and Pacific, Stronger Civil Society Voices Could Be Key To Post-2015 Challenges' *UNDP in Asia and Pacific* (18 August 2015) available at <http://www.asia-pacific.undp.org/content/rbap/en/home/blog/2015/8/18/For-Asia-civil-society-will-be-a-key-partner-in-achieving-the-Post-2015-development-agenda.html>

3 I am grateful to Sanjay Agarwal, Barnett Baron (deceased), Le Quang Binh, Nick Booth, Oonagh Breen, Chen Yimei, Mathew Cherian, Noshir Dadrawala, Nguyen Thi Bich Diep, Dana Doan, Alison Dunn, John Fitzgerald, Beniam Gebrezghi, Peter Geithner, Nguyen Phuong Linh, Le Mai (deceased), David Moore, Pham Quang Nam, Doug Rutzen, Rajesh Tandon, Nguyen Van Thanh, Le Thi Nham Tuyet (deceased), Iftekhar Zaman, Zhang Ye, Zhu Jiangang, Mary Zurbuchen and many others for many discussions on these issues over the years. My thanks to the UNDP Bangkok Regional Hub for convening the Roundtable Discussion and commissioning the Discussion Paper that led to this article, and to David Moore, my co-author on the ICNL Asia report that significantly informs this discussion.

4 For more detailed information on the sustainable development goals, see 'Sustainable Development Topics' available at: <https://sustainabledevelopment.un.org/topics>

5 SDG 16 and other targets are also discussed in 'Sustainable Development Goals' available at: <https://sustainabledevelopment.un.org/sdgs>

- 16.6 Develop effective, accountable and transparent institutions at all levels
- 16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels
- 16.8 Broaden and strengthen the participation of developing countries in the institutions of global governance ...
- 16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements ...
- 16.b Promote and enforce non-discriminatory laws and policies for sustainable development.

Thus, in the view of at least the international community that is convening some of the discussions in Asia on shrinking civil society space, the SDG 16 goal (and other of the SDG goals) cannot be reached without a vibrant, active and creative civil society at national levels. And the specific targets listed above (and others among the SDG 16 targets that could be cited) cannot be reached or sustained without the active role of civil society.⁶

Yet today in Asia, there is a paradox to civil society activity. In much of Asia and the Pacific, civil society is indeed thriving for many groups. Yet, at the same time, and often in the same countries, civic space is under threat of restriction and constraint - and in a number of countries, those restrictions and constraints are clearly visible. If this paradox exists, it in part may be because of the success of civil society in becoming recognised actors in social services, advocacy and other areas over the past several decades. In some of the countries of the region, that historic emergence as a force has also led to a backlash of a kind that we are now seeing.

In many of the countries of the region - from Myanmar to Indonesia to Vietnam to the Philippines to China - the positive experiences and trends are clear. The number of civil society organisations is growing, and in many countries across the region a wide variety and array of organisational forms are permitted. They are conducting more social service, advocacy and other programs, and raising more funds to do so. They are (with significant gaps discussed below) participating more in the discussion and formulation of national policies than before.⁷

6 See Booth and Gebrezghi (n 2).

7 For an early look at some of these developments, see M Alagappa (ed), *Civil Society and Political Change in Asia* (Stanford University Press 2004).

They are serving more people, and representing broader as well as more defined interests in society. They are, in many of the countries represented here today, able to communicate far more broadly their activities, accomplishments and goals to the broader society. So on one side of the paradox of civil society in Asia, the situation is indeed positive. If we compare the situation with thirty or fifty years ago, civil society in many countries in Asia today is more active, more vibrant, and more representative. In many countries in Asia, civil society can do more.

That is, of course, not the only side of the story. This paradox includes significant negative experiences and trends as well - characterised, in broad headings, by restrictions on the existence, registration, and activities of civil society organisations, and their ability to undertake resource development. Those negative experiences and trends are discussed in considerably more detail below.

The Role of Regulatory Environments Affecting and Restricting Civil Society

It is now axiomatic that the regulatory environment is crucial in determining the roles played by civil society and whether the roles and activities of civil society are expanding or under constraint. The regulatory environment is not the only determinant of the vibrancy of civil society, in Asia or beyond, nor does it stand separate from politics, economic developments, and other factors. But the regulatory environment is - in countries and regions from India to Thailand to Malaysia to Hong Kong to Bangladesh - a key determinant and factor as to whether the role and scope of civil society is rising and falling, and it is the key indicator of which levers, with respect to which kinds of civil society groups, that governments are prepared to use to stifle, constrain and restrict civil society and its activities.

Governments use the regulatory framework to constrain and restrict - or to empower - the civil society sector in many ways. Some of the key regulatory means used in Asia, discussed in this short article, and at greater length in a report that David Moore and I completed for the International Center for Not-for-Profit Law in August 2015,⁸ include:

⁸ M Sidel and D Moore, *The Law Affecting Civil Society in Asia: Developments and Challenges for Nonprofit and Civil Society Organizations* (International Center for Not-for-Profit Law 2015) (hereafter ICNL Asia report) available at <https://media.law.wisc.edu/m/fjfgn/SidelMooreICNLAsiaLawAug2015.pdf>. At ICNL, we are grateful to the Asia Pacific Philanthropy Consortium and the University of Wisconsin-Madison for their support in the research and production of the ICNL Asia report; to Barnett Baron - a friend and colleague to many working on these issues - for his many years of leadership and guidance in this area and for working with APPC and ICNL to enable the report to be written; and to Margaret Scotti and Mona Qureshi at ICNL for their work on the ICNL Asia report.

- Establishment, registration and incorporation requirements for civil society organisations (CSOs);
- Prohibited and permitted purposes and activities for CSOs;
- Government supervisory and management requirements and measures vis-à-vis CSOs
- The legal treatment of foreign organisations and foreign funding; and,
- The regulatory treatment of CSO resources, including fundraising, CSO economic activities, investment, and related issues.⁹

Additional and usually more detailed discussion of the themes here, and other important regulatory themes for civil society organisations, can also be found in other ICNL reports, such as the United States International Grantmaking (USIG) country reports,¹⁰ the country reports of the NGO Law Monitor series,¹¹ and other detailed resources written and made available by ICNL.¹²

But to set the scene, as Moore and I wrote in the ICNL Asia report:¹³

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

We see these issues throughout the region. In China (and throughout the region), a plethora of laws and regulations govern the nonprofit and civil society sector, ranging from: long-outdated regulations on foundations,

9 Many other regulatory issues, of course, also significantly affect what CSOs can do in virtually all of the countries in Asia. They include termination and dissolution procedures and a number of other issues. For those interested in the broader issues, I invite a look at *ibid.*

10 ‘Country Notes’ *Council on Foundations* available at <http://www.cof.org/global-grant-making/country-notes>

11 ‘NGO Law Monitor’ *International Center for Not-for-Profit Law* available at <http://www.icnl.org/research/monitor>

12 ‘Resources by Theme’ *International Center for Not-for-Profit Law* available at <http://www.icnl.org/research/resources/>

13 Sidel and Moore (n 8) 3.

social organizations and other forms of nonprofits; to new local regulations that in some cases provide more flexibility for both organizations and local governments; to vague and inconsistent provisions concerning tax and other issues. And yet inconsistent and vague laws and regulations, which enable the state to use wide discretion, also create gaps and possibilities for nonprofits to exist in the gaps of regulation. That, too, is part of the paradox of the Asian regulation of nonprofits and philanthropy.

The paradox here - frequently but not always - is one of textual protection for associational and civil society life and rights, but highly restrictive implementation and wide governmental discretion. That begins with constitutional provisions on freedom of association, assembly, and expression.

As we note in the ICNL Asia report, the constitutions of many countries guarantee freedoms of association, assembly and expression, but these constitutional protections are profoundly undermined by state discretion in implementing these freedoms and the absence of enforcement mechanisms. This serious problem exists in many other countries around the region - including Afghanistan, Bangladesh, Cambodia, China, India, Indonesia, Japan, Kazakhstan, Malaysia, Nepal, Pakistan, and Singapore.¹⁴

In all these countries the broadest protection available for nonprofit and civil society activity is in the constitution, but when translated into more detailed laws and regulations and executive implementation, the freedoms are whittled down through state discretion, restrictive provisions, and lack of redress. Indeed, in a number of countries the constitutional text itself provides explicit rationales for limiting associational freedoms as well as granting them.

Those limits may be based on national security, public order, public morality, national sovereignty, or with many other qualifying phrases. Or they may be conditioned on broad phrases such as 'in accordance with the provisions of the law' (Afghanistan), 'shall be determined by law' (Cambodia) or similar phrases. It can be spectacularly difficult to challenge either these provisions or their implementation, either through judicial means or in the political arena, though recent decisions show the Indonesian Constitutional Court and the Delhi High Court in India have at least taken these issues seriously.¹⁵

14 *ibid.*

15 ICNL is beginning some work on judicial decisions in Asia that either support or weaken associational freedoms; in many countries, judiciaries have been an arm of restriction, but we are beginning to note some countervailing tendencies, which we hope to map in the future.

Establishment, Registration and Incorporation Requirements for CSOs

As the ICNL Asia report indicates, a key way in which governments encourage, constrain or engage in differential treatment toward CSOs are the laws and regulations governing the establishment, registration and incorporation of CSOs. There are many issues here, and many ways for governments to restrict civil society. Here I only outline a few of the most important such restrictions.¹⁶

Requirements for the establishment of an organisation

Law and regulations for CSOs often set out establishment requirements - such as qualifications for the founders of an organisation, the minimum number of members needed to establish a group, and other criteria. They may restrict foreigners, non-citizens, minors, stateless people, or other groups from forming groups. They may require the submission of specific documents, such as proof of citizenship, age, residency or other criteria.

We see these kinds of establishment requirements at work throughout Asia. These requirements are not restrictive per se, but they can be drafted or enforced in restrictive or arbitrary ways. And there may be no administrative or judicial recourse if they are imposed.

Registration/incorporation requirements

As the ICNL Asia report points out, '[i]n direct violation of international legal standards, the laws in several countries in Asia make registration mandatory for associations and sometimes reinforce these requirements with criminal sanctions.'¹⁷ We cite as examples Afghanistan, which requires registration and thus implies that associations cannot carry out activities on an unregistered basis; Kazakhstan, where the creation and operation of unregistered public associations is prohibited; Malaysia, where unregistered groups are prohibited under the Societies Act; and Nepal, which also prohibits formation of unregistered associations. At the same time, on a positive note, some countries in Asia do not have mandatory registration requirements and make registration voluntary for at least some groups - these include India, Indonesia and Myanmar.

State agencies supervising the civil society sector

Here the regulatory environment provides multiple government agencies responsible for managing the civil society sector. And, often, different

16 See the full ICNL Asia report (n 8) for more details on these regulatory tools.

17 *ibid* 10.

government agencies regulate and supervise different kinds of organisations, under different laws and regulations. Again, these are not discriminatory, restrictive or arbitrary rules per se, but they may be enforced in that way, and some state agencies may take a highly restrictive and controlling practice toward the civil society sector.

Generally, the key state agencies responsible for registration and/or incorporation include ministries of civil affairs (also often called interior, home affairs, or other terms); ministries of social welfare, development or planning; ministries dealing with particular fields, such as health or education (and usually for nonprofits within those fields); stand-alone registration authorities for nonprofit organisations (a registrar of societies or similar body); company registration agencies; a body within a president's or prime minister's office; the governor of a province or state; the police or security agencies; and other agencies.

As we note in the ICNL Asia report:¹⁸

two other factors also complicate this picture. One is the rise of sub-national actors in the registration and incorporation process, particularly at the provincial (state) level. This has long been a feature of the registration and incorporation process in India, where laws governing societies and trusts make state authorities the key agencies for incorporation and registration for several organizational types. In China, registration of many nonprofit groups that operate in particular provinces is now being decentralized to the provincial level, and even further down in the government apparatus for organizations with even more local activities. In Myanmar, the Association Registration Law of 2014 envisions a decentralized system with registration committees extending from the central to the provincial, district and even township levels. The Law on Associations in Afghanistan of 2013 similarly requires the Ministry of Justice to provide access to registration at the provincial level. Although such decentralized approaches may be laudable for broadening geographic access to registration, they create distinct challenges regarding the consistency and professionalism of implementation, as local officials may interpret legislation differently or impose ad hoc requirements not based in the law.

The second and a very serious factor is the long-established and increasing role of security agencies in the registration and incorporation process.¹⁹ Within many countries of Asia, security and police authorities have long had a role in

18 *ibid* 12 (adapted).

19 *ibid*.

registration of nonprofit and civil society groups, including the investigation of applicants and, in some countries, veto powers in the registration process. Those roles may be unwritten or informal, but are increasingly being formalised into law. We see this occurring in Bangladesh, China (for foreign organisations), Myanmar, and a number of other countries. The ‘securitization’ of control over both domestic and international CSOs of various kinds seems to be increasing and quickening in a number of countries.

Registration procedures and processes

Here we have many different processes and models at work throughout Asia. But, as we state in the ICNL Asia report, ‘[t]oo commonly, registration procedures are highly cumbersome, take significant time and resources for organizations to negotiate, and provide state agencies with wide discretion to deny or delay registration’.²⁰

Even within the many different procedures at work, there are some special problems in the registration process. In many countries, registration is a highly cumbersome and very difficult process involving multiple steps with several regulators, or multiple steps with one key regulator. We see this at work in China (though for some organisations that situation is beginning to improve), Vietnam, and other countries.

Approval is often required from several regulators - either formal approval by several agencies, or the ‘passing around’ of files by one agency for the views or accession of others. Either way, this makes the registration process very difficult. We see this at work in Afghanistan, Bangladesh, Myanmar, and many other countries. The paperwork can be extraordinarily heavy and daunting. As we note in the ICNL Asia report, ‘[r]egistrants are literally drowned in required documents, seals, approvals, lists, forms and the like’.²¹ We see this throughout the region.

And yet, in some places there are bright spots, as we note in the ICNL Asia report. In 2013, Kazakhstan introduced amendments to its nonprofit registration procedures that significantly simplified CSO registration and dissolution processes. In some areas of China, registration for some domestic organisations has been simplified for some nonprofits, including through a ‘one stop’ system. Registration in India, as we note in the ICNL Asia report, is ‘sometimes complex

20 *ibid* 13.

21 *ibid* 14.

and involve[s] significant choice of organizational form and structure’ but ‘is generally not considered a restrictive or harassing process’.²²

Grounds for refusal of registration

The grounds for refusal of registration of CSOs in the region vary, as we discuss at length in the ICNL Asia report. But they are often used to restrict or control the registration process and to deny registration to various kinds of groups disfavoured by authorities.

Sometimes technical grounds are used to refuse registration, and we see that in many countries of Asia. Sometimes registration is refused on political grounds, public order, the national interest, national security, national sovereignty, national unity, national culture, national customs and other grounds. Sometimes - but not always - refusal is linked to an assumption or charge that particular organisations intend to engage in political activities, lobbying, or other prohibited arenas. Again, these kinds of grounds are at work in many countries of the region, including Bangladesh, Cambodia, China, Malaysia, Myanmar, Singapore, and Vietnam.²³

Safeguards and the ability to dispute refusal of registration/incorporation

Procedural safeguards and the ability to challenge the decisions of state agencies to refuse registration or incorporation are woefully inadequate in many countries. Many countries have no, or very limited, provisions: mandating time limits for government review; automatically registering or incorporating if the executive authority does not act within a certain time; requiring a written explanation in case of refusal; or including rights to appeal to administrative and/or judicial bodies. And yet, in some countries there are signs of improvement, although usually very slowly and very fitfully. This is, as we note in the ICNL Asia report, ‘the case even in one-party states such as China and Vietnam, where limiting procedural safeguards have been initiated in new or revised regulatory frameworks over time’.²⁴ Procedural safeguards appear to come in stages, as we describe in much more detail in the ICNL Asia report, often first involving requirements that registration authorities act within a specific time, or that they provide a written explanation in case registration is refused. We saw these initial safeguards in very few countries around the region twenty years ago or even ten years ago; but they are present, and used, in a number of countries now.

22 *ibid.*

23 *ibid* 14–15.

24 *ibid* 16.

The capacity to challenge an adverse decision is much rarer, and even harder to exercise. As might be expected, we see in more countries the addition of a right to challenge an adverse decision through an administrative process, rather than in the courts. And many countries of the region continue to have no, or virtually no, recourse for an adverse registration or incorporation decision.

Territorial/geographic limitations on registration

There continue to be, in many countries of the region, territorial or geographic limits on the activities that CSOs can undertake, which is a significant problem for freedom of association. We note this in many countries of the region, including China, Indonesia, Kazakhstan, Myanmar, Turkmenistan, Vietnam, and elsewhere.²⁵

Prohibited and Permitted Purposes and Activities for CSOs

There are a number of ways in which governments limit the purposes and activities in which CSOs may engage. In the ICNL Asia report, we have noted three distinct categories, each usually broadly or ill-defined, and each permitting very wide discretion to government regulators, police or others to charge or close CSOs, with little or no administrative or judicial or other recourse available. Those broad categories are:²⁶

- Restrictions based on national security or public order;
- Restrictions based on political activities, politics, or advocacy, each usually broadly or ill-defined; and,
- Special substantive limitations on the activities or purposes of CSOs.

Many countries in Asia restrict the purposes for which a CSO (regardless of form) may exist, or the activities it may carry out, under one or more of these purpose/activity-based broad constraints. Many countries use several. Many countries in the region, including China, Kazakhstan, Malaysia, Pakistan, Vietnam, have restrictions based on national security or public order. Also widely used in the region is the second category, restrictions based on political activities, politics, lobbying, legislative activities, state ideology, or advocacy. Countries that apply such restrictions include Afghanistan, Cambodia, India and Indonesia. With respect to the third category - substantive limitations on the activities or purposes

25 *ibid* 17–18.

26 *ibid* 7–8.

of CSOs - the countries and limitations tend to vary. For example, the Afghan Law on NGOs prohibits NGO participation in construction projects and contracts. Vietnam and, at times, China sometimes seek (both through law and enforcement) to prohibit nonprofit organisations from operating in a geographic area where another organisation working in the same field is already active.²⁷

In all of these categories, I should note, these purpose and activity-based restrictions usually fall hardest on advocacy organisations, such as those working on civil rights, human rights, environmental rights and protection, the rights of ethnic and religious minorities, and other such groups. Because of the work that social service groups do, these purpose and activity-based restrictions generally do not fall, or fall only lightly, on these kinds of groups - but they serve as the clearest form of warning, in many countries, as to the advocacy and policy directions that social service groups should not follow.

Government Supervisory and Management Requirements and Measures vis-à-vis CSOs

The core of either encouragement or restraint of civil society organisations in Asia and the Pacific is arguably the role of government supervisory and management agencies. If government agencies are facilitative, a vibrant CSO sector can develop. If they are highly constraining, the CSO sector will have a much more difficult time growing and thriving. The methods used by government agencies to supervise and manage the sector differ substantially between countries - but we can say for the region in general that state management is a strong feature of CSO life. For some countries, that is a significant understatement.

Changes in the mix of supervisory and control agencies

There are many different features and elements of state supervision and management. Registered and unregistered groups may be treated very differently, with unregistered groups subjected to considerably more surveillance and control. Governments may focus on inspecting the programmes of CSOs; their financial, fundraising, commercial and investment activities; the accountability and transparency steps they are required to take; and other supervisory matters.

And the registration agencies and regulatory agencies may not be the same, forcing CSOs to deal with multiple agencies that may take different attitudes toward them and impose different formal or informal requirements.

In some countries, we note in the ICNL Asia report, established and registered groups still report to two supervisory ‘masters’ - a general supervisory authority (such as a ministry of civil, home or interior affairs), and a substantive ministry or agency that guides or approves of their professional and substantive work (such as a ministry of health, education, social welfare, labour, or others). China, for example, has long had the ‘dual master’ system, but is now moving away from that structure for a number of social organisations at local and national levels.²⁸ Not, though, for foreign organisations, as I discuss further below.

The range of regulatory agencies is as broad as the range of registration authorities discussed above. They include, as we note in the ICNL Asia report, ‘ministries of interior, home affairs or civil affairs; ministries of social welfare, development or planning; ministries dealing with particular functional fields, such as health, education, labor and social welfare; stand-alone, quasi-autonomous supervisory authorities for nonprofit organisations, such as a Registrar of Societies; company regulatory agencies (particularly for nonprofit companies); a body within a president’s or prime minister’s office; in some cases police or security agencies; and other agencies’.²⁹

We are seeing certain developments increase over time. First, the move from a dual or multiple system of CSO management to a more simplified system by one agency does not necessarily mean a reduction or lightening of government scrutiny or inspection. It is, as we note in the ICNL Asia report, ‘more of a risk assessment that dual reporting and supervision is not needed for a wide range of nonprofits.’³⁰ And here the ‘securitization’ problem rears its head even in societies where the supervision of CSOs has become ostensibly less onerous. Where there are problems, police and security agencies often step into the breach.

Second, as we note in more detail in the ICNL Asia report, ‘sectoral ministries (such as health, education, labor, social welfare, urban affairs, rural affairs, and others) seem to be taking on more of the supervisory and regulatory burden for nonprofits and civil society groups that work within their functional spheres.’³¹ This is national policy in many countries of the region these days, although this policy goes back decades for some countries, for example in parts of South Asia.

28 *ibid* 21.

29 *ibid*.

30 *ibid* 22.

31 *ibid*.

Reporting requirements

Despite changes in supervision and regulatory agencies, reporting requirements have not lightened in many countries of Asia and the Pacific. The amount and the required timing of CSO reporting remains cumbersome and daunting for many tens of thousands of CSOs throughout the region, and can lead to termination of CSOs. We see cumbersome and overly daunting reporting requirements at work throughout the region, for different kinds of nonprofits, in literally too many countries to name, but certainly including Afghanistan, Bangladesh, China, Indonesia Nepal, Singapore. Advance reporting (in effect, approval of project activities and spending) is required in many countries.³²

Enforcement and sanctions

Many other tools are used as well, and we describe those in considerably more detail in the ICNL Asia report. They include authority to attend internal meetings (Tajikistan); the power to suspend governing board members (in many countries of the region, including Bangladesh for certain groups); and the power to intervene in internal affairs (also in many countries of the region, including China and Vietnam).

Beyond those mechanisms, as we discuss in the ICNL Asia report, enforcement and sanctions can be applied, ‘on a discretionary, inconsistent basis, and often are in a number of countries. [And] sanctions can be applied with draconian force in a number of countries, particularly against organizations that have run afoul of the state for advocacy or political reasons.’³³ Again, we see this in many countries around the region, often applied in ways that are not subject to procedural safeguards, review, or appeal.

In recent years, other areas of law have been used to sanction and target CSOs, especially advocacy organisations. Two key examples are tax law, and information and communications technology regulation. As we note in the ICNL Asia report:³⁴

In China and other countries around the region, advocacy nonprofits have been targeted based on minor or esoteric violations of tax law. Information and communications technology legislation has been increasingly used to restrict nongovernmental and civil society activity, or to cause fear of such restriction in future. In Bangladesh, provisions on

32 The ICNL Asia report discusses these requirements in more detail. See *ibid* 22–23.

33 *ibid* 24.

34 *ibid* 25–26.

technology security have been used to target civil society activists, and they have been proposed (through cybercrime legislation) in Cambodia and Pakistan. Civil society organizations and activists in Indonesia have likewise been concerned that the defamation provisions in the 2008 law on electronic information and transactions may be used against them. And Indian groups have lauded the Indian Supreme Court's declaration that a key section of the Information Technology Act is unconstitutional; that section 66A had been used to harass and arrest civil society activists. In Malaysia, similar provisions have also been enacted.

Finally, enforcement and sanctions can go beyond even draconian legal norms. As we note in the ICNL Asia report:³⁵

[i]n Bangladesh, Cambodia, China, India, Malaysia, and other countries, civil society organizations that undertake advocacy and are regarded as enemies by the government may be subject to harassment that, while formally legal under broad and discretionary statutes and regulations, goes beyond appropriate bounds. This can include extra-judicial surveillance, overly frequent inspections and demands for documents, harassment of families of staff, detention of leadership, and other methods.

Violence can be, and is, used as well.

As we further note:³⁶

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

The rise of self-regulation

I would be remiss if I did not mention another element in supervision and management, one that may come as a surprise to some readers. That is self-regulation of the nonprofit sector (or areas within it) by the nonprofit sector itself.

35 *ibid* 26.

36 *ibid* 26-27.

Why would we even mention self-regulation in the context of government supervision and management of CSOs? In many cases, self-regulation is being used by the nonprofit sector to impose requirements that mirror government mandates (or may even go beyond them), in part to forestall stricter government regulation. In that sense - and while there are also many positive elements to self-regulation - this means that the sector is taking on regulation of itself in place of the state. And that has worrying implications, at least in some countries of the region. Today the world of nonprofit self-regulation in Asia looks very different indeed than even 15 years ago. There are:³⁷

umbrella association rules, codes of conduct, certification mechanisms, accreditation schemes, ranking methods, and many other forms of self-regulation in effect in many of the Asian countries included in this report. India has multiple self-regulation initiatives underway, both for different types of organizations and in different parts of the vast country. Cambodia has seen the emergence of multiple codes of conduct for NGOs and nonprofits, and at least one certification scheme. Even Vietnam, which has a relatively nascent nonprofit sector compared to many other countries in Asia, now has a self-regulatory code drafted by an NGO umbrella group that is intended to strengthen transparency and accountability. Afghanistan, Indonesia, South Korea, Japan, the Philippines (of longest standing in Asia) and many other countries have self-regulatory codes, models, initiatives and experiments underway.

Yet, as we note in the ICNL Asia report:³⁸

[T]he rapid rise of self-regulatory impulses and initiatives should not be taken to imply a weakening of state regulation. Self-regulation has many motivations - as an educational tool to strengthen nonprofit quality and effectiveness; as a means to try to forestall even stricter government regulation; as a community unifying and bonding device in the nonprofit sector; as a means for self-regulatory entrepreneurs and umbrella groups to extend their influence. But, across Asia, it almost never, at least to date, substitutes for or ameliorates strict government regulation of the nonprofit and civil society community.

And rarely if ever [the Philippines being perhaps the only counter-example] does the government cede any regulatory authority to self-regulatory initiatives; they exist alongside continuing and often tightening government regulation ...

37 *ibid* 27.

38 *ibid* 28.

The Legal Treatment of Foreign Organisations

Asian and Pacific governments have always paid special political and regulatory attention to foreign NGOs, funders, some trade associations, bilateral donors, foreign religious groups, and other extra-national groups. This of course relates centrally to the problem of foreign funding, what we call in the ICNL Asia report ‘a long-time focus of political and security attention and regulation for many governments across Asia’.³⁹ The foreign funding issues are discussed in the next section. But the concern for foreign organisations goes well beyond funding to their existence and activities within many countries. And it focuses on three key issues: registration of foreign groups; supervision of them and their reporting obligations; and (in the next section of this article) the continuing issues of foreign funding.

Registration of foreign organisations

There is a remarkable diversity in provisions for registration by foreign groups, both between countries and often within them as well. As we note in the ICNL Asia report, this ranges⁴⁰

from the fairly benign and relatively smooth to extremely difficult and burdensome. In Hong Kong, Indonesia, Taiwan, the Philippines, Japan, Singapore and South Korea, for example, registration as a foreign organization to carry out most development, relief and poverty alleviation work, while not without burdens, is arguably considerably less burdensome than in other parts of the region. Even in these jurisdictions, however, registration without an approval mechanism is relatively rare; instead, registration typically includes an approval element and often a requirement to identify and enter into a partnership, collaboration and supervision arrangement with a ministry or key local government agency or nonprofit as a prerequisite to registration. In addition, substantive requirements are imposed on foreign organizations in some of these countries; in Singapore, for example, a required number or proportion of board members for the international organization’s local entity must be Singaporean citizens. But other countries present more obstacles to registration as a foreign organization, even one that does not provide or use funding.

Thus there are different levels and burdens of registration requirements throughout the region, including in such countries as Cambodia, China, Indonesia, Nepal,

39 *ibid.*

40 *ibid.* 29.

Pakistan and many other states. And this is a dynamic situation, with requirements for foreign groups sometimes changing on an annual basis, as in China, where a new draft law governing overseas NGOs and other groups has prompted enormous concern in both domestic and overseas communities.

Supervision of and reporting by foreign organisations

The supervision of and reporting by foreign NGOs, foundations and other foreign organisations can be and often is highly burdensome, cumbersome and daunting across many countries of Asia. As we write in the ICNL Asia report:⁴¹

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

These dynamics are at work throughout the region, including most recently in well-known and controversial drafting and enforcement episodes in Cambodia, Pakistan, and China - but certainly elsewhere as well.

The Regulatory Treatment of CSO Resources and Resource Development, including Foreign Funding, Fundraising, CSO Economic Activities, Investment, and Related Issues

Facilitative or restrictive legal frameworks on the treatment of CSO financial resources and resource development can have a major effect on whether organisations can grow, be active, and develop. Throughout the Asia Pacific region, governments and CSOs have focused on three key areas that constitute the core revenue sources for civil society groups: foreign funding; domestic philanthropic and charitable giving, tax incentives, and fundraising; and income generated by CSO engagement in economic activities. Along with these three key sources is the related process of investment of CSO funds.

41 *ibid* 30.

Governments have regulated each of these sources and the investment process. As we note in the ICNL Asia report, '[i]f any of these pillars are weakened by legal constraints, the sector becomes vulnerable.'⁴²

Foreign funding

This is an area of strong regulation in many countries, and is increasing. The flow of foreign funding into Asian countries, including from foreign government-related entities, international NGOs and foundations, corporate programs, and individuals, is subject to increasing scrutiny in many countries in Asia. Certainly the most well-known such scheme is the Foreign Contributions Regulation Act 2010 (FCRA) in India, which imposes significant limits on the foreign funding that a wide range of Indian nonprofits and political groups can receive, requiring either that recipients secure and retain a place on an approved listing to receive foreign funding (not an easy task), or secure permission on a case-by-case basis to receive foreign funding ('prior permission'). This regulatory framework has been in place for 40 years, and continues to be strengthened.⁴³

Similar legislation has been proposed or enacted in other countries as well. Even where such restrictions on foreign funding are not immediately adopted, the political environment that gives rise to such proposals may have a chilling effect on the receipt of funding or the willingness of donors to undertake work in such countries. We see continuing proposals for more restrictions and more required approval on foreign funding in Bangladesh, China (through an umbrella statute in draft governing foreign NGOs that goes well beyond but includes the foreign funding issue), Nepal, Pakistan, and other countries. And in a number of other countries, such as Malaysia, 'governments may [undertake] a demonizing narrative that labels organizations receiving foreign funding ... as "foreign agents"'.⁴⁴

Yet even here, we are also seeing some states begin to lighten their regulation on foreign funding. This lighter approach can be noted in Afghanistan, Indonesia, Kazakhstan, Taiwan, South Korea and others, with relatively few, if any, restrictions. And so a paradox is at work - some countries are explicitly

42 *ibid* 32.

43 On the Indian FCRA, see the fine work by Sanjay Agarwal and AccountAid, including S Agarwal, *Accountable Handbook - FCRA 2010: Theory and Practice* (2nd ed Account Aid 2012) available at <http://www.accountaid.net/Books/FCRA/FCRA%202010%20Cover%20to%20Cover%20rev%20300413.pdf>. For an account of a single NGO's struggles with FCRA and related issues, see M Sidel, 'States, Markets, and the Nonprofit Sector in South Asia: Judiciaries and the Struggle for Capital in Comparative Perspective' (2004) 78 *Tulane Law Review* 1611.

44 ICNL Asia report (n 8) 32-33.

strengthening their restrictions on foreign funding, while others are beginning to let their foot off that particular pedal.

Philanthropic and charitable giving, tax incentives, and fundraising

I say with confidence that throughout Asia and the Pacific (with the exception of very few states, such as North Korea) there has been a rise - often a very significant increase - in charitable and philanthropic giving. These domestic sources of giving have become far more important for CSOs than they were even 15 years ago. Philanthropic communities are growing rapidly throughout Asia. Governments are responding to the growth in charitable giving and philanthropic activities, but they are almost never keeping up with the diverse means, including new technologies, through which this giving is expanding. Many governments in the region generally support the application of public funds for charitable and public purposes, and seek to encourage such giving and the institutions that support it. So we have seen new, more facilitative regulation of charitable giving, foundations, trusts, zakat and other institutional forms in many countries, including Afghanistan, China, Indonesia, Kyrgyzstan and many other countries.

Tax law and tax incentives for domestic charitable giving and philanthropy have, perhaps understandably, lagged behind, in part because of government caution and in part because finance ministries and tax authorities are highly reluctant to give up revenue as part of more amorphous national policies to increase charity and philanthropy. Yet even here, there is some slow movement in a number of countries in the region and some countries, such as India, Japan, the Philippines, Singapore, now have tax provisions that do at least begin to seek to incentivise giving.

And gradually, over time, there is beginning to be some movement on an issue that many governments have been highly suspicious of for many years - public fundraising by civil society and nonprofit organisations. For example, new subnational fundraising regulations designed to begin opening up some domestic fundraising have been enacted in over twenty Chinese provinces and major cities - a cautious, controlled, and yet somewhat facilitative approach.

And in many countries, the new, cautious openness to fundraising is also, understandably, paired with more provisions intended to prevent fraud and 'sharp behaviour' (i.e. manipulating or tricking people, but not necessarily rising to the level of legal fraud) in the fundraising process.

In related processes, many countries around the region are facilitating corporate social responsibility programs and corporate giving, including new tax incentives for corporate philanthropy. For example, a new statute and program in India

mandates that certain companies provide certain levels of CSR funding, or explain why they are not doing so.⁴⁵

Yet regulation is also being used - again, often understandably - by governments (as the ICNL Asia report notes):⁴⁶

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

CSO economic activities and investment of CSO resources

Throughout Asia, societies are debating (or litigating) controversies over the economic or commercial activities of CSOs. Debates - even major court cases in some countries - on the permissible forms and extent of economic and commercial activity by CSOs have emerged in recent years in Bangladesh, Cambodia, China, India, Indonesia, Japan, Kazakhstan, Pakistan, the Philippines and Vietnam, and many other countries in the region. These debates take many local forms, but fundamentally they revolve around two core issues: (1) what range of economic or commercial activity should CSOs be permitted to conduct; and (2) how should the revenues from that activity be treated for tax purposes?

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

45 These developments are discussed in *ibid* 33-36.

46 *ibid* 36.

We are now seeing - in fits and starts, often accompanied by significant controversies and loud debates - more room for CSO economic and commercial activities and more flexibility on investment of funds, in many countries of Asia and the Pacific, often expressed through regulatory drafting and amendment.

The Road Forward, and an Example from Asia

It is tempting to provide policy recommendations for states, activists and others who seek to reverse the seemingly accelerating restrictions on civil space in the Asia Pacific region. As we discuss in the ICNL Asia report,⁴⁷ those reforms would include, in many countries:

- Relaxing restrictions on the formation, registration and incorporation of CSOs;
- Permitting voluntary (not mandated) registration by CSOs;
- Strengthening the independence and professionalism of registration bodies;
- Making registration and incorporation easier in many ways;
- Allowing CSOs to operate across territorial and geographic borders;
- Relaxing overly draconian and intrusive state supervision and management of CSOs;
- Lifting or significantly relaxing restrictions on foreign funding and cross-border philanthropic flows;
- Facilitating domestic charitable and philanthropic giving, fundraising, and gradually increasing the tax incentives for domestic individual and corporate giving;
- Facilitating corporate giving and fiscal incentives for that giving; and,
- Facilitating, depending on country conditions and debates, CSO power to engage in economic and commercial activities and wider investment activities for their resources.

But there are several problems with such recommendations, even at their most specific. All of these are recommendations at the country level, and change at the country level can only come through a deep engagement with a country's

47 *ibid* 37.

particular context and dynamics. So while some of the regulatory means outlined above for re-invigorating civic space in particular countries may be feasible, it is ultimately up to local activists, legislators, lawyers, academics and state officials to sort out the feasible from the impossible.

Secondly, focusing on regional changes appears illusory and unproductive. The regulatory framework for civic space in Asia and the Pacific is, at root, a matter of national debate, national policy, and national regulation. It can be influenced - substantially influenced, to be sure - by regional and international debates, criticism and competition. But the road to relaxing what appear to be, in many countries, the growing restrictions on civic space and civil society appears to focus on national laws, regulations and policies.

Finally, we must recognise the interest of the state in regulating civil society organisations and civic space, often beyond where we might wish that regulation to reach. For those of us in the donor or academic communities (or both), we have spent decades seeking to build state, activist, academic and other capacity across Asia. It is ironic - but perhaps not entirely unpredictable - that now, as both state confidence and the role of the NGO and civil society communities have grown, that confident and anxious states alike would seek to rein in civil society space. We may not agree with that, but it is, for better or worse, an exercise of state sovereignty and state capacity, and thus to some degree must be understood and even respected in that light.⁴⁸

A recent case illustrates many of the themes outlined in this article, and many of the complications and obstacles in the way of reinvigorating civil society space at a time when it is under threat. In late 2014, the Chinese Ministry of Public Security (pursuant to a direction from the relatively new Chinese National Security Council) proposed a draft Law on the Management of Overseas Nongovernment Organizations. That draft Law, if it were to come into effect in a form close to that proposed (and revised in a second draft issued in April 2015), could severely impact the work of thousands of foreign NGOs, foundations, universities, trade associations and other foreign nonprofit groups in China.⁴⁹

48 We are grateful to Barnett Baron for raising this important point shortly before his death.

49 See, among many other commentaries, 'China Philanthropy Times: the Overseas NGO Management Law Affects More than Just NGOs' *China Development Brief* (21 May 2015) available at <http://chinadevelopmentbrief.cn/news/china-philanthropy-times-the-overseas-ngo-management-law-affects-more-than-just-ngos/>; Y Feng, 'Non-Government Organizations Are Not Anti-Government Organizations' *China Development Brief* (3 August 2015) available at <http://chinadevelopmentbrief.cn/articles/feng-yongfeng-non-governmental-organizations-are-not-anti-governmental-organizations/>; I Belkin and J Cohen, 'Will China Close Its Doors?' *The New York Times* (1 June 2015) available at: <http://www.nytimes.com/2015/06/02/opinion/will-china-close-its-doors.html>

Of direct interest for our purposes here, the draft Law brought together and used most of the tools outlined above for the restriction and limitation of civil space. It would make the registration of foreign nonprofit organisations considerably more difficult in China, requiring organisations to register in a two-step process that involves approval by a host professional organisation and approval by the Ministry of Public Security. It would ‘securitize’ foreign nonprofit work in China, making the Ministry of Public Security (China’s internal security and policy service) the primary organisation governing and management foreign nonprofits. It would impose broad and highly discretionary prohibitions on activities by foreign nonprofits, and allow them to work only in particular defined fields. There would be no recourse for foreign nonprofit organisations that were unable to make it through this registration gauntlet - and all unregistered organisations would be illegal.

The problems go further. The draft legislation would require detailed pre-action reporting of activities planned by foreign nonprofits, in the year before activities were to be carried out, and subject to approval by Chinese authorities. And it would also require post-programming reporting to the same authorities by the same organisations, a burdensome and complicated set of pre- and post-action reporting. Governance mechanisms would be made considerably more intrusive. Chinese staff could only be hired with the permission of Chinese state agencies. Sanctions would be increased, including the availability of criminal sanctions for Chinese employees of foreign nonprofits.⁵⁰

This is one example of the restriction on civic space that is at work in Asia today. The Chinese case mentioned relates directly to foreign nonprofit groups, while in many other parts of Asia civic space restrictions are also being applied to domestic groups. And the Chinese case is of special interest not only because it has aroused significant criticism by foreign and Chinese groups alike, but also because it is a kind of perfect storm of civic space restriction employing, as mentioned above, a wide range of the restriction methods identified above - sometimes, it appears, almost the full menu of restrictions available. Only time will tell in this particular situation whether China is successful at reducing this particular form of civil space, or whether the significant domestic and foreign criticism of these proposed

50 For an English translation of the Overseas NGO Management Law, see ‘CDB English Translation of the Overseas NGO Management Law (Second Draft)’ *China Development Brief* (8 May 2015) available at <http://chinadevelopmentbrief.cn/articles/cdb-english-translation-of-the-overseas-ngo-management-law-second-draft/>. Some suggestions and criticisms on the law are available in English from *China Development Brief* at: <http://chinadevelopmentbrief.cn/research/>. Many more are available in Chinese. For an academic and policy analysis, including the China case and other examples from Pakistan, Cambodia and several other countries, see M Sidel, ‘Nonprofit Oversight Under Siege: The Reorientation and Securitization of Nonprofit Oversight in Asia’ (2016) *Chicago-Kent Law Review* (forthcoming).

regulatory restrictions causes them to be ameliorated, delayed, or even perhaps effectively withdrawn. But the more general trend - the restriction of civil society and civic space in many countries of Asia, and through multiple regulatory forms - is underway, and appears to be increasing.