

COMMENTS

Draft Concept on the Development of Civil Society in Mongolia

Introduction

In February 2020, the International Center for Not-for-Profit Law (ICNL) received an unofficial English translation of Mongolia's 2012 draft "Concept on the Development of Civil Society" ("the Concept") from the International Republican Institute (IRI). IRI had obtained a copy of this document from respected civil society leaders, including the Democracy Education Center (DEMO). In 2016, the European Center for Not-for-Profit Law (ECNL) prepared an analysis of the draft Concept at the request of a number of Mongolian NGOs. ICNL agrees with ECNL's analysis, which remains relevant and is included as a stand-alone document along with this analysis.

It is ICNL's understanding that our civil society partners are seeking to use this draft policy as the basis for a revised and improved state policy, in line with best practices and international standards on civil society and government cooperation. This updated state policy would then be submitted to the Office of the President or an MP to introduce to the State Great Khural (Mongolian Parliament). ICNL supports these efforts to improve cooperation and dialogue between civil society organizations and government, and appreciates the opportunity to provide comments on the draft Concept.

This analysis is not a comprehensive overview of all relevant issues in the proposed Concept. Rather, it highlights a few key points and themes that could benefit from additional attention and development, and offers some policy suggestions based on ICNL's comparative and international expertise.

For additional detail, we refer interested parties to ECNL's analysis.

The International Center for Not-for-Profit Law (ICNL) is an international organization that facilitates and supports the development of an enabling environment for civil society and civic participation. ICNL provides technical assistance, research and education to support the development of appropriate laws and regulatory systems for civil society organizations in countries around the world, including Afghanistan, Bangladesh, Cambodia, China, India, Indonesia, Mongolia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, and Vietnam. For more information, please visit: <http://www.icnl.org>.

Background: Policy Documents for Cooperation

Policy documents for cooperation (PDCs) aim to support the development of civil society and foster cooperation between the state and CSOs. They map out the existing framework and practices of cooperation, the external environment of the civil society sector, and the vision for future partnership and development of the sector. PDCs typically assign responsibilities to bodies within the state administration to ensure that the results that they seek to accomplish, as well as specific measures and activities, can be implemented within a set timeline.

Policy documents may take different forms depending on their content and goals. These include:

- Bilateral documents (often called agreements or compacts) concluded between a state body and CSO representatives, which outline the goals and principles of cooperation and the undertakings of both parties.¹
- Unilateral documents (often called strategies) adopted by a state body, which express commitments by the government.

Numerous examples of PDCs exist in Europe,² as well as a number in the Middle East, Asia, and other regions.³ Oftentimes, policy documents will provide a starting point for cooperation, with the expectation that they will later develop into formal framework documents. PDCs will often also identify one or more new or existing mechanisms or institutions to be responsible for implementing various provisions. For example, the Bulgarian Strategy for Support to the Development of Civic Organizations in the Republic of Bulgaria (2012-2015) envisaged the establishment of two new mechanisms, a Council for Civil Society Development, under the authority of the Prime Minister, as well as a mechanism for funding of the civic sector in Bulgaria.

PDCs can be adopted not only at the national level, but also by a local government entity, such as a regional, provincial, or communal council. They can cover all of civil society's work or just one area. Furthermore, some governments have encouraged regions, states, or municipalities to agree to the commitments contained in the federal-level PDC. For example, the Brazilian government consulted with civil society to develop a National Policy for Social Participation (PNPS). In addition to including a set of guidelines and commitment to promote social dialogue and participation through various mechanisms, the PNPS also encouraged States and municipalities to join the commitment.⁴ In Afghanistan, a "Memorandum of Understanding" recently concluded by government bodies and CSOs at the national level also focused on provincial-level cooperation.

Keys to success

Based on our experience with numerous PDCs adopted worldwide, ICNL and ECNL consider the following elements as key to success:

1. The document is developed through a participatory process:

Participatory process ensures that the document responds to actual and priority needs. It also provides stakeholders with ownership over the document, and makes it more likely that they will undertake responsibility for the implementation of commitments. Broad participation also serves to raise awareness about the issues, which can further commit public authorities and CSOs to implement the PDC. It is therefore essential that the policy document is developed in a highly participatory manner.

2. Implementation issues are considered from the very beginning of the drafting process:

Issues of implementation must be discussed at the earliest stage of development of the policy document. This will help ensure that the document is realistic, and make clearer who is responsible for implementation and how many resources will be needed to put the PDC's recommendations into effect.

3. The PDC includes a plan for follow up:

The adoption of an action plan, which details the specific commitments and includes provisions regarding actual activities, responsibilities, timeline, and funding, can facilitate successful implementation. An evaluation and monitoring plan is recommended to periodically assess implementation and make necessary adjustments to ensure that commitments are being enforced.

General Comments on the Draft Concept

ICNL notes that the draft Concept emerged from discussions of a working group involving multiple CSOs from different parts of the country, with opportunities for input from numerous stakeholders. It is our hope that such a wide-ranging and participatory process will continue as the Concept is refined.

We agree with ECNL that the Concept effectively reaffirms the importance of civil society to Mongolia as a whole, and recognizes the value of civil society to a democratic and dynamic nation. We applaud the recognition of the importance of human rights, citizen

¹ For additional information, please see Eszter Hartay, "Models to Promote Cooperation between Civil Society and Public Authorities," ECNL and ICNL, 2013, available online at [http://dev01.icnl.org/programs/mena/Models to Promote Cooperation English.pdf](http://dev01.icnl.org/programs/mena/Models%20to%20Promote%20Cooperation%20English.pdf).

² For instance, in Bosnia and Herzegovina, Bulgaria, Croatia, Denmark, France, Germany Hungary, Latvia, Kosovo, Montenegro, Scotland, and Slovenia, among others.

³ For more examples, please see ICNL, Civil Society & Government Cooperation, <https://www.icnl.org/our-work/civil-society-government-cooperation> (last accessed Feb 25, 2020). The Philippines also has a policy on volunteerism to integrate efforts of the voluntary sector, entitled "Institutionalizing a Strategy for Rural Development, Strengthening Volunteerism and for Other Purposes," (also known as the Volunteer Act of 2007). *Id.*

⁴ Government of Brazil, "Final Assessment Report of the Second National Action Plan," Open Government Partnership, October 2016, available online at <https://www.opengovpartnership.org/country/brazil/assessment>. By 2015, 10 states and 29 municipalities had joined the commitment. Each locality agreed to provide a more participatory role for civil society and publish an action plan for plan for improving participation. Priscila Zanandrez Martins, "The National Policy of Social Participation" available online at <http://participedia.net/en/methods/national-policy-social-participation>.

participation, democratic norms, and a strong and independent civil society. We also support the numerous provisions emphasizing public and citizen participation, including broad public consultations on legislative and policy measures, as well as mechanisms for meaningful participation of civil society in decision-making.

The document begins with several sections on concepts and values, before moving on to a policy framework and areas for implementation. This general structure and approach make sense. However, for purposes of streamlining and clarity, we suggest a few structural and semantic changes:

1. Consider changing the first section, “General Provisions,” to a “Preamble.”
2. Consider converting the second section, “Concepts related to civil society,” into a “Definitions/Terms” section, where the term “civil society” is clearly defined, ideally in a concise but comprehensive manner according to the definition agreed upon through consultations among members of civil society.⁵

It may make sense to note that the definition may not be all-encompassing, and that “civil society” is often an evolving concept requiring a certain degree of flexibility in its definition.

3. Consider condensing section three’s “Values and Principles Shared by State and Civil Society” to a “General Principles” section, shortening and collapsing some of the values included in this section to avoid repetition and to focus on the most important ones.

It may also make sense to include the principles around social capital, social innovation, and social economy (which may also have some overlap with each other) in the Principles section, rather than in the following “Policy Framework” section.

4. The Policy Framework section could be focused more directly around the three goals and strategic areas of state policy that are currently highlighted, namely (1) “Promotion of democratic political culture”; (2) “Expansion of citizen participation”; and (3) “Strengthening of cooperation between State and civil society.” The aims listed under each of these sections form a solid basis for further discussion and refinement.

5. We note the existence of a section (five) on “Implementation Systems,” and are encouraged that mechanisms for implementation have been included in the Concept. This inclusion is in line with best international practice.

⁵ If helpful, ICNL can provide some sample definitions of civil society, from UN and other international sources.

That said, we recommend that in the next version of the Concept, the implementation provisions be made more specific.

In particular, it could be helpful to identify which institution within the state will be responsible for coordinating cooperation with civil society organizations, or to consider whether a new organ will need to be formed. Civil society may wish to propose or identify an agency, rather than deferring to government officials to make this choice. Notably, in more restrictive environments, some governments have chosen to regulate NGOs under their security or defense divisions, which is not in keeping with good regulatory practice. That said, it would be wise to consult with government representatives when the Concept is being discussed, to consider which agencies and/or institutions have the capacity and resources to carry out this function – and if they lack that capacity, what would be needed in terms of financing and capacity to successfully implement the policy.

6. We agree with ECNL that the sixth section may make more sense as introductory material placed at the beginning of the Concept.

Additional Specific Considerations

CAUTION REGARDING LANGUAGE THAT MAY PROVIDE THE GOVERNMENT WITH EXCESS OVERSIGHT POWERS

Although fully recognizing the positive spirit behind developing an enabling partnership between civil society and government, there are a few problematic provisions in the Concept that may undermine the solid foundation needed for healthy government-CSO cooperation.

- 1) The fifth clause of the initial “General Provisions” section states that the Concept:

Departs from the premise that the citizenry forms the basis for the existence of the State and the will of citizens is the source of state power, and recognizes the principle of equality, not dominance, in the partnership between government and civil society.

It is not clear why the Concept would choose to *depart* from the premise that the citizenry form the basis for the State’s existence; general democratic principles would indicate that the will of citizens *is* the source of state power, and that therefore the citizenry do form the basis for the existence of the State. Perhaps this is just a translation or word choice issue, but we recommend changing “Departs from” to “Recognizes/Affirms.”

Additionally, while it makes sense to recognize that the government does not occupy a dominant position vis-à-vis civil society, one could argue that under democratic principles, civil society is not typically conceptualized as an ‘equal’ partner of the government, as it is government – and government alone – that shoulders the burden of

establishing and implementing a legal framework that protects the rights and freedoms of individuals and civil society. Indeed, the Special Rapporteur on the Freedom of Association and Assembly has stated that “[t]he right to freedom of association obliges States to take positive measures to establish and maintain an enabling environment” for civil society.⁶ Thus, the relationship between government and civil society could be better characterized as one of mutual respect and dialogue, but not necessarily as ‘equality’.

2) The definition of “civil society” may be overly limited in the Concept. Section 2.3 lists the characteristics of civil society organizations to include, among others, a “public benefit” purpose. While true that many civil society organizations are dedicated to a public benefit purpose, it is important to recognize that many other civil society groups are “mutual benefit” associations, whose focus is on the members of the organization versus the broader public good.⁷ Examples include a judicial association or veterans’ association or football club, which focus on judges, veterans and football-playing members, respectively, without necessarily having a clear public benefit purpose. That said, there is no bright line between a “public benefit” and “mutual benefit” association; a judicial association may be successful not only in improving working conditions for judges, but also in strengthening the independence of the judiciary, which is beneficial to the public as a whole. To ensure a fully inclusive definition, Section 2.3.1 could be amended to state, “... they have a purpose of public benefit or mutual benefit ...”

3) Certain provisions in the Concept assume a false equivalence between government and civil society. Specifically, provisions 3.2.7 and 3.2.8 on “Transparency” and “Accountability” (respectively), require equivalence between the State and civil society on openness and transparency before the public with respect to budgets and expenditures. The principle of ‘equality’ is problematic here, as the State and civil society are not equivalent actors under international law and should not be held to the same standards of transparency and accountability.

While a democratic state, whose officials are publicly elected and whose resources come from public tax revenue, should indeed be transparent and accountable in many areas – particularly in the area of budgets and expenditures – the same is not necessarily true for civil society or non-profit organizations, which are generally not dependent on public resources. As private, autonomous entities, non-profit organizations cannot and should not be held to the same standards of transparency and accountability as

⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, Human Rights Council, A/HRC/20/27, 21 May 2012, para 63. This is also recognized in the OSCE/ODIHR Guidelines on Freedom of Association, Council of Europe, <https://www.osce.org/odihr/132371?download=true>, at para 71 [OSCE Guidelines].

⁷ See, e.g., Guidelines for Laws Affecting Civic Organizations, Open Society Institute [OSI Guidelines], at 30-31, <https://www.opensocietyfoundations.org/publications/guidelines-laws-affecting-civic-organizations>: “One of the strengths of civil society is that individuals are free to form sporting clubs, singing groups, or whatever sort of social organizations that best enable them to pursue their shared interests. Such mutual benefit organizations (MBOs) are as deserving of legal existence and protection as organizations operated primarily for the benefit of the public or some segment thereof (public benefit organizations or PBOs).”

government. Moreover, as private, autonomous entities, non-profit organizations are protected by the right to privacy to the same extent as other private, corporate entities.⁸ Within a properly calibrated regulatory framework, standards of transparency and accountability become more stringent where organizations engage in public fundraising or receive public support through state subsidies, contracts or tax benefits. But for voluntary organizations that rely on volunteer labor or private donations or grants, there can be no expectation of transparency before the public with regard to budget planning, expenditure and results.⁹

We therefore recommend that the Concept refrain from calling for a blanket obligation for all CSOs to publicly release their internal operational and/or financial information.

4) The Concept must be careful not to encourage government interference in the internal affairs of civil society organizations.¹⁰ As one example, section 4.2.2.d envisions that civil society organizations “shall develop and establish procedures ensuring meaningful participation of members, constituencies and citizens in their decision-making activities ...” While meaningful participation is a laudable goal, it may not be fully appropriate for all categories of civil society. Think tanks and foundations, for example, often depend on a different governance approach than membership organizations. Each civil society organization, as a private, autonomous organization should be free to determine its own governance structure and method of internal decision-making. For government to mandate a blanket approach would undermine the independence of organizations.

5) Certain provisions in the Concept seem to mandate cooperation on the part of civil society with government, and provide openings for what, ultimately, may end up encouraging over-regulation by the State. Specifically, section 5.2.2 envisions that civil society organizations “will establish ... a joint structure with oversight, coordination and capacity development functions, which will collaborate with public bodies ...” While it is important for the law to allow for, and even encourage, civil society groups to engage in voluntary self-regulation, it is equally important for government law and policy to refrain from mandating self-regulation.

While cooperation and a positive relationship with the State should be an important goal of civil society, civil society also retains the right not to cooperate with the State in all instances. Cooperation must remain a voluntary choice of any individual civil society organization, and not a mandatory requirement. It is therefore important not to blur

⁸ *Id.* at para 65: “Authorities must also respect the right of associations to privacy as stipulated in article 17 of the Covenant on Civil and Political Rights.”

⁹ See, e.g., OSI Guidelines, *supra* note 7, at 69: “So long as an organization does not receive significant benefits or funding from the state or the public or engage in activities that substantially affect the public, its affairs should be entitled to as much privacy as those of an individual, whether the organization is large or small.”

¹⁰ See, e.g., *id.* at para 64: “Members of associations should be free to determine their statutes, structure and activities and make decisions without State interference.” This is also recognized in the OSCE Guidelines, *supra* note 6, at para 29.

the line between civil society and government, so that civil society maintains its independence and operational flexibility.

OTHER BEST PRACTICES

Two other points deserve mentioning. As part of the policy framework and section four on “Cooperation between state and civil society,” the Concept calls for:

Redefin[ing] the registration and reporting rules and procedures for civil society organizations to make them responsive to the size and capacity of the organizations and free of undue bureaucratic and financial burden on their activities. Thoroughly defin[ing] the grounds for refusal of registration and introduc[ing] a procedure of providing written explanation of the causes of non-registration.

ICNL, in its comments on Mongolia’s draft Non-Profit Law, expanded on some of the best practices with respect to civil society registration, and is happy to expand further on registration issues. However, as an initial matter, we suggest including in this section mention of *voluntary registration* as a best practice and established principle of the international law on freedom of association.¹¹

In addition, on the issue of government support to civil society organizations (included in Section 4.2.3.c-1), drafters could consider including a provision allowing cross border and/or international funding of CSOs as one form of critical support to non-profits that should not be subject to onerous regulation or disproportionate security oversight.¹² It is important to note that private, donor, and external sources of funding may be critical to CSO independence, and that financial support to civil society should not come exclusively from government, in order to maintain the independence and objectivity of civil society actors.

That said, tax exemptions, grants/contracts, and other economic benefits are important for fostering growth of the sector and should be encouraged and implemented by the State.

¹¹ See, e.g., Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, Human Rights Council, A/HRC/20/27, 21 May 2012, para 56: the “Special Rapporteur underlines that the right to freedom of association equally protects associations that are not registered (e.g. Canada, Republic of Moldova, Slovenia and the United States). Individuals involved in unregistered associations should indeed be free to carry out any activities, including the right to hold and participate in peaceful assemblies.” This is also recognized in the OSCE Guidelines, *supra* note 6, at para 49.

¹² *Id.* at para 68: “ Any associations, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, civil society organizations, Governments and international organizations.” Furthermore, “ [i]n many countries, domestic funding is very limited or non-existent, leading associations to rely on foreign assistance to conduct their activities. The Special Rapporteur echoes the recommendations put forward by the then Special Representative of the Secretary-General on the situation of human rights defenders who affirmed that ‘governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments’”. *Id.* at 69. This is also recognized in the OSCE Guidelines, *supra* note 6, at para 218.

Conclusion

The draft Concept offers a strong basis for cooperation between Mongolian civil society and the State. Further updating and streamlining will help to finalize the Concept and ensure that it can be successfully implemented by the Mongolian government and civil society actors.

Again, these comments are meant to provide high-level suggestions for further discussion as the consultations on the Concept continue. ICNL is happy to provide additional PDCs from other country contexts, as well as more specific recommendations on any particular area of the draft Concept. We remain at your disposal for more detailed discussion and any further questions.

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