



The Legal Framework for NGOs and the Voluntary Sector: Recommended Principles

Introductory Note: This document presents conclusions from the “Regional Dialogue on GO-NGO Relations in Asia: Prospects and Challenges for Improving the Policy Environment for People-Centered Development” held in Chiangmai, Thailand, on 11-15 May 1991 under the sponsorship of the Asia Pacific Development Centre (APDC) and the Asian NGO Coalition for Agrarian Reform and Rural Development (ANGOC), with the assistance of the United Nations Development Programme (UNDP).¹

Almost three decades have passed since that dialogue but the principles remain valid and relevant as ever. Unfortunately, there appears to be a growing trend towards the curtailment of civil and political rights in the region. Some of the threats come in the form of restrictions on media and cases brought against of journalists, stifling of protests, and harassment of opposition leaders and activists. With NGOs, the threats may come in more subtle, institutional forms – registration requirements, restrictions on foreign funding, investigative inquiries, and others.

At the same time, land and resource conflicts have increased in numbers and intensity. Studies reflect a strong correlation between land conflicts and human rights violations for CSO workers, land rights defenders and members of the communities. Incidences of killings and harassments exist with the struggle for land rights amid the onslaught of mining, plantations, and rise of economic zones. Farmers, fisherfolk, indigenous peoples, land rights activists and CSO workers either disappear or get killed as they assert their basic human rights and rights to land. They are also threatened with various harassment cases filed by State authorities with the courts to silence them.

In most instances, the judicial system is restricting public participation/right to seek redress as cases related to public interest are monitored. This has an effect of limiting space available to CSOs for demanding accountability from the State and other stakeholders. It is thus important to reassess the legal and policy environment for civil society and non-profit development organizations.

The current COVID-19 pandemic further aggravates the situation as some States are using lockdown measures and policing social media to restrict movements and to suppress freedom of speech of CSOs and activists as they perform their monitoring role. There have been numerous reports of arrests of activists and warrantless arrests of civilians, those who are perceived as “enemies of the State.” Some of these arrests are being linked by authorities to seeming violations of community quarantine and lockdown guidelines.

Thus, ANGOC is re-issuing this document as a reminder of the basic principles in relation to voluntary action that must be respected, promoted and upheld in accordance with the Universal Declaration of Human Rights.

¹ The views expressed in this document do not necessarily reflect the positions of APDC and UNDP.

The regulations governing NGOs vary significantly throughout the Asian region. This brief does not review nor critic these differences. Rather, it suggests a number of basic principles to be applied in framing a regulatory environment for voluntary action in general and for non-governmental organizations (NGOs) engaged in service delivery, community empowerment, advocacy and public education in particular. This should serve as a take-off point for defining principles used as standards in creating and assessing national policy and regulatory environments for NGOs.

The principles suggested here are derived from the provisions of the Universal Declaration of Human Rights of the United Nations concerning freedom of expression and association, and due process. These are inalienable rights vested in the individual and enshrined in international law which the nations of the world have committed themselves to uphold.

Propositions

Ten propositions are set forth herein particularly referring to the legal rights and responsibilities of persons and organizations engaged in voluntary action, specifically those working for people-centered development.

1. People-centered Development and Human Rights

The fundamental premise of people-centered development is that people have certain basic and universal human rights as defined in the Universal Declaration of Human Rights of the United Nations. Furthermore, it is a fundamental responsibility of every government to respect and protect these rights. These rights are of two types: (a) those that relate to basic human well-being, such as rights to: food, shelter, livelihood and security of family and person, and freedom of movement, religion and thought; and (b) those that people must have to protect their right to security and well-being against the misuse of government's coercive powers, such as: the rights to freedom of expression and association, the right of redress of grievances, and due process. Both set of rights are fundamental to people-centered development. It is the second set of rights that is of most concern when dealing with the rights and responsibilities of NGOs.

2. Voluntary Action as a Human Rights

Voluntary action is an expression of both basic human right and a civic responsibility to participate actively in the life of the community. Indeed, voluntary is one of the highest forms of citizenship as it represents action in the service of community without expectation or pursuit of personal economic or political gain. Voluntary action may be either individual or collective. Collective action may range from purely informal temporary forms of cooperation involving no defined organizational structure to large corporate organizations with professional staff and significant assets. NGOs as legal organizational entities are one vehicle for the expression of voluntary action. Our immediate concern is primarily with organized action, but the same basic principles relate to individual voluntary action as well.

3. Rights Vested in the Individual

The exercise of a basic right that resides with the individual requires no permission from any government. Nor does the intention or act of exercising such a right require public notification. The formation of an NGO represents an exercise of such a basic right and therefore is not legitimately subject to government review, approval or registration – so long as no grant of special privilege is requested from and granted by the government. Nor is there any obligation to make any public announcement or notification of the formation of such an organization.

4. Government Authority and the Will of the People

The authority of government derives from the will of the people and may be exercised only in accordance with that will. *It follows therefore that it is the right and responsibility of the people, not the government, to determine what constitutes the public good.* This is fundamental to the principle that the authority of government is derived from the will of the people. Government is an instrument of the people, created by the people to serve their will. Those government officials whose actions reveal an underlying belief that their positions confer on them a superior wisdom and a right to regulate the behavior of others by their personal definition of the public interest are engaged in a misuse of government's coercive power, violate the public trust that has been vested in them, and demonstrate that they are unfit for government service.

5. Minimum Use of Coercive Power

The best governments are those that maintain the public order essential to the exercise of the full range of basic human rights with the least use of coercive power. The protection of the free and full exercise by the people of their basic human rights is the first and primary responsibility of any government. A government properly exercises its coercive power only in situations where an exercise of rights by one individual or group infringes on the free exercise of the rights of others; and it does so by due process in accordance with the established laws freely instituted by the people and their elected representatives through an open democratic process.

6. Individual Responsibility of the Law

The responsibility to respect and observe the law rightfully and necessarily falls first and foremost on the individual citizen. Government's responsibility is limited to prosecuting and punishing illegal actions in accordance with the law. In too many cases, however, the necessary and appropriate social contributions of NGOs are being constrained by laws and regulations that attempt to pre-empt imaginary threats by subjecting NGO activities to prior review and approval procedures that are inappropriate, unnecessary, and represent a violation of basic human rights. It is not legitimate for government to restrict the exercise of a basic human right on the ground that exercise of such right might lead to a violation of the law.

Selected Articles from the Universal Declaration of Human Rights

Article 11. [1] Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in public trial at which he has had all guarantees necessary for his defense.

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20. [1]. Everyone has the right to freedom of peaceful assembly and association.

Article 21. [3]. The will of the people shall be the basis of the autonomy of the government.

Article 29. [1]. Everyone has duties to the community in which alone the free and full development of his personality is possible.

Article 29. [2]. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

7. Regulatory Concerns Not Specific to NGOs

The use of government authority to restrict NGO or other voluntary sector activity should be limited to very specific and clearly identified public concerns relating to the infringement of the rights of others. These would include, for example, protecting the public against fraudulent fund-raising practices, danger to public health and safety, tax fraud, and infringements of the people's sovereignty by foreign economic and political interests. In general, these concerns are not limited to NGOs, hence laws relating to such practices should apply to NGOs as well as to other organizations. Consequently, as a matter of principle, there should be few if any instances in which there is need for regulations specific to NGOs. Their functions should be covered by the normal laws of the land such as the civil code, and the tax code – the same laws that apply to individual citizens and other forms of corporations.

8. Foreign Funding

With specific regard to the concern many governments have about foreign funding, NGOs should have the same right as any individual or organization to receive and use funds from abroad subject to established foreign exchange and regulations relating to the receipt of foreign funds. Governments have no basis for subjecting such receipts by NGOs to special oversight or procedures not generally applied to exchange transactions by other parties or organizations. Some governments are concerned that such funds may find their way to support groups engaged in illegal activities, such as armed insurgency.

If a given activity or its funding are illegal under such established law, then government has both the right and responsibility to prosecute and punish any individual or group engaged in such infractions based on evidence of actual wrongdoing. If there is concern that foreign money may be used to influence political campaigns or legislation to the advantage of foreign over national interests, a government may choose to place legal limits or prohibitions on the provision and/or acceptance by any individual or group of political contributions originating from foreign sources. Here again, violations should be prosecuted and punished according to the law.

There is no particular reason to single out NGOs. They are by nature among the groups least likely to engage in such practices. Nor is it appropriate for government to single out NGOs as potentially subject to inappropriate influence by foreign donors so long as government itself allows foreign governments and international agencies to dictate its economic and political policies as condition of receiving international funding. While NGOs should be seeking to reduce their dependence on foreign funding in the interest of increasing their own independence, this dependence presents threats primarily to the individual NGO, not to the national sovereignty.

Finally, some governments feel a responsibility to foreign donors to assure that funds made available to NGOs are properly used. So with any private financial transaction, the primary responsibility for the proper use of funds is that of the parties in agreement. Presumably each country has legal remedies in place relating to breach of contract or fraud that can be applied as appropriate in such instances.

9. Rights and Privileges

In determining what areas are appropriate regulatory concerns of government, it is important to clearly distinguish between rights and privileges. Many governments treat the formation of an NGO as privileges granted by government. This represents confusion of the basic distinction between rights and privileges. As noted in Proposition Two above, the formation of an NGO is in itself, a right, not a privilege, and therefore not legitimately subject to government regulation. However, when special privileges are requested and granted – such as a corporate charter giving the organization an independent legal identity, or an exemption from taxes – which are not inherent individual rights, certain corresponding legal obligations directly related to the nature of the privilege are appropriately incurred. It also becomes the duty of NGO to fulfill these in accordance with the relevant laws. Generally these obligations should relate directly to the privilege – for example the requirement that a corporation must have a board of directors that assumes legal responsibility for its affairs, and that a specified number of these directors must be outsiders (not employees of the organization); or that a tax exempt organization must confine its activities to its approved tax exempt purposes as defined by law, file periodic financial reports with tax authorities, and make its financial statements publicly available.

10. Accountability

The formal accountability of a legally incorporated NGO is to its board of directors or trustees. Irrespective of their title, the members of this board act in a position of public trust. If the NGO is a membership organization, its directors or trustees administer this trust on behalf of the members by whom they are elected and by whom they are accountable. If it is not a membership organization, the board is generally self-perpetuating. It is fully appropriate, particularly in the case of nonprofit or tax exempt organizations for government to specify that a majority of the directors or trustees be outsiders without a personal financial stake in the organization. Directors or trustees may also incur certain legal liabilities with regard to their oversight responsibilities. In any event, the directors or trustees of an NGO assume three primary obligations relating to the public interest:

- ⇒ *To supporters:* An ethical obligation, which may also be legally enforceable under civil or criminal statutes, to assure that the organization's purpose is fully and accurately disclosed to the people who provide it with financial or other support, that this support is used for the purpose for which the contributors provided it, and that these uses are fully disclosed to them.
- ⇒ *To beneficiaries:* An ethical obligation, which may also be legally enforceable elements under civil or criminal statutes, to any people to whom the NGO provides services to assure that the NGO presents itself fairly and accurately to them and meets appropriate standards of service quality.
- ⇒ *To the law:* A legal obligation to oversee the NGO's observance of applicable laws. These include: [a] those laws that apply generally to all individuals and organizations, such as laws regarding fraud and embezzlement, foreign contributions to political organizations, standards for medical practice, foreign exchange transactions, and zoning regulations; and [b] legal obligations incurred as a consequence of special privileges requested by and granted to the organization by government, such as corporate legal status, or exemption from certain taxes.

There are NGOs that engage in illegal actions, just as there are such organizations and individuals in every sector. Where there is specific evidence of illegal activity, offending NGOs and the responsible individuals should be prosecuted under the law as would be any other individual or organization.

NGOs are assuming increasingly important roles as agents of democratic expression and citizen innovation – contributing to the search of more just, sustainable, and inclusive approaches to national development. It is important and timely that the governmental policies and regulations relating to their formation and function be re-examined and revised within the framework of universally accepted human rights and principles. □