

Regulation *of* Nonprofit *and* Philanthropic Organizations: *An International Perspective*

by Mark Sidel

Despite the great diversity in local, regional, and international nonprofit sectors, there are important trends on the international scene vis-à-vis civil society. While this is generally seen as an important component of democracy, there are also active attempts to shut down dissent and exclude foreign influences on issues such as human rights.

THE WORLD IS A REMARKABLY DIVERSE PLACE, SO any attempt to discuss recent trends in international regulation of nonprofits is fraught with difficulties. Comparing countries is very challenging, and local context differs from place to place. Well over two hundred countries have various forms of regulation of nonprofit and philanthropic organizations in place—which is to say that virtually all countries do (with the exception of a few places, like North Korea). Discussing such trends is thus always subject to the dreaded caveat, “but in x. . . .”

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Yet, even with an understanding of the broad diversity of local context and national approaches, we can see important trends under way in recent years in the regulation of nonprofit and philanthropic groups in countries around the world. Over the past year, a key development has been the increase of constraints on civic space—and those constraints are often accomplished using regulatory means. In order to give some specificity to this, I use China as an example, but this trend is occurring in a number of other countries and regions, as well.

The Complex Picture of Nonprofit and Philanthropic Regulation

There can be no doubt that we are seeing constraints on nonprofit organization and advocacy in a number of countries. The International Center for Not-for-Profit Law (ICNL, with which I work), the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, and many other national and international bodies have labored over the past several years to document that shrinking space around the world.

Developments in China illustrate the complexities of this trend. On the one hand, China is clearly moving to limit civic and organizational space through regulatory action. Particularly since the Xi Jinping administration came to power in 2012, labor and feminist activists have been jailed, an array of advocacy organizations have been closed, liberal intellectuals have been criticized, and a pall has descended on some public and advocacy aspects of Chinese life. In the regulatory sphere, the strongest example of this trend is the new Chinese Law on the Management of Domestic Activities of Foreign Nongovernmental Organizations (Foreign NGO Law), which was adopted in late April.

The Foreign NGO Law employs virtually the entire spectrum of constraints on foreign NGOs and foundations that is available to a state: restraints on and restrictive processes for registration; state management and supervision; requirement of local partners—and legal responsibility on those partners for the work of foreign NGOs; pre-reporting and approval and

postactivity reporting of planned activities; and restraints on financial activities, among many others. It is not going too far to say that, in this area, it is as if China had catalogued the ways in which governments can restrain local nonprofits through legal means and then employed virtually all of those means in regulating foreign NGOs. Other countries also regulate the work of foreign NGOs, but often in more targeted ways; India, for example, targets foreign funding through the Foreign Contributions Regulation Act, which has been in place since 1976. China has chosen a wider brush.

On the other hand, while the growing restrictions against and repression of domestic advocacy groups and legal constraints against foreign NGOs are an illustration of nonprofit and philanthropic regulatory developments, they are not the entire picture: the Chinese state uses a broad brush yet chooses its targets carefully: While domestic advocacy groups and at least some foreign NGOs are under significant constraint, numerous other groups continue to expand and develop in China, in perhaps the most extensive development of a nonprofit sector anywhere in the world in the past several decades.

In China, domestic social services organizations, social enterprises, and other groups that are perceived as valuable to the state are not seeing the levels of constraints that the advocacy and foreign sectors are experiencing. The new domestic Charity Law in China, adopted earlier this year, illustrates this. While the Chinese nonprofit community is most certainly not free from constraints and controls, it views the Charity Law quite differently from the new Foreign NGO Law. It is seen as at least partly facilitative of the growth and expansion of the Chinese nonprofit sector and of legislative reforms in regulation—such as more streamlined registration for domestic charitable organizations—that the Chinese nonprofit sector has long requested and with which China has experimented in certain areas of the country.

In China, if not always abroad, there is some recognition that the Chinese state is molding its nonprofit sector—encouraging the formation and development of groups that it sees as useful,

while constraining, bureaucratizing, and repressing domestic advocacy groups that are perceived to threaten the state and the Communist Party.

Does International Law Play a Role in Ameliorating Constraints on Civic Space?

All of this points to a key element in the development of nonprofit and philanthropic law around the world. These developments are almost always country-based, not regional or international, and regional or international legal arrangements play relatively little role in ameliorating constraints on civil society.

A number of actors would like more regional and international regulation of nonprofit and philanthropic action. Usually, these are groups focused on ensuring broader rights to freedom of association and supporting efforts to reform restrictive legal frameworks in various countries. There is regional and there is international regulation in a number of other areas, of course, but expanding it for nonprofits and philanthropy currently seems difficult. Organizations and commentators like ICNL and the UN Special Rapporteur are engaged in uncovering what little in international law seems to apply to the nonprofit arena. Expanding regional and international legal standards to provide a more enabling environment for nonprofit and philanthropic organizations is a long-term—and certainly worthy—project. But, on the relatively rare occasions where regional or international law on freedom of association comes to the fore, it is often, regrettably, in a restrictive mode.

Two examples of this regionalization of nonprofit law will suffice. Since shortly after the September 11 terrorist attacks, the Financial Action Task Force (FATF), an international legal body combating terrorist financing, has included a provision (Special Recommendation VIII) that primarily seeks to prevent nonprofit and charitable organizations from being used as conduits by terrorist groups. The goal is laudable, but in many countries implementation of that measure has led to unnecessary and unfortunate restrictions on the work of nonprofits. Sometimes, those limitations are a good-faith attempt to implement the international legal strictures against the use of

nonprofits by terrorists. But all too often nations are using the broad language of Special Recommendation VIII to, for instance, restrict funding to nonprofit organizations or certain advocacy work that nonprofit organizations do, well beyond the international legal requirement and in ways that constrain the work of the sector. Being able to term such restrictions an implementation of international antiterrorist funding provisions can be a legitimizing convenience for some governments.

A second example is how constraining legal environments are referenced and at times even copied by other nations that seek to impose the same restrictions. A good illustration of this is the proliferation in South Asia of regimes for restriction of foreign funding. For instance, there are restrictions on foreign funding in India that go back to 1976, when the original Foreign Contributions Regulation Act was enacted. Since then—with increasingly restrictive amendments—it has become harder and harder for NGOs and other charitable groups in India to access funding offered by foreign donors and other groups. That's a national system in India—and what's regional about that? What's regional is that, in recent years, other nations in South Asia have sought to impose their own restrictions on foreign funding to their own domestic NGOs and other groups, often in very similar terms to the original—and highly persistent—Indian law. In Bangladesh, for one, the government is deeply suspicious of the role of the country's vibrant and effective NGO sector, and has sought to enact a permission-based regulatory scheme for foreign funding of charitable organizations. Similarly, in Pakistan, the government has introduced restrictions on foreign funding in recent years.

Problems in the “Closing of Civic Space” Narrative

Over the past several years, the environment for civil society has shrunk and tightened worldwide—a trend that ICNL and a number of other organizations have documented in Egypt, China, and dozens of other countries. Many meetings have been held and many articles published on the “closing space” phenomenon—indeed, it could be said that we are in an era of the closing

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of civic space. Two decades ago, as civil society expanded around the world, Lester Salamon, in a well-known piece he wrote for *Foreign Affairs*, called the development an “associational revolution.”¹ Today, as governments around the world shrink the space for civil society, we are seeing, rather, an associational *counter*revolution underway. But the “closing space” narrative has become something of a mantra for nonprofit development around the world. It has been stated overbroadly and without sufficient nuance, and it requires some careful thinking for the following reasons:

1. Constraints on nonprofits and regulatory tightening are often far more complex than the “closing space” theme allows. In a number of countries, for example, there isn’t a closing of civic space across the board but rather for a carefully selected range of nonprofits on which the state is focusing—often advocacy organizations. Other valuable and effective organizations such as social enterprises, social service groups, and others may, in fact, see their space remaining similar to what they once had—or even opening up. This is the case, to some degree, even in a country like China. There has perhaps been no greater development of nonprofit and hybrid organizations anywhere in the world over the past decade than in China. At the same time, the Chinese state has put significant constraining pressure on advocacy organizations, grassroots organizations, and some foreign NGOs. To describe all this as merely “closing space” oversimplifies the process of molding and channeling the nonprofit sector that is under way in China and many other countries.
2. The “closing space” mantra and criticism show little regard for national sovereignty. I (and others) may not like what the Chinese state is doing to restrain the civic and advocacy space available to grassroots, advocacy, and some foreign nonprofit groups—including their new Foreign NGO Law. But implicit—and often stated—in the external analysis of “closing space” developments is the idea that countries carry out these policy shifts illegally and illegitimately. Thus, in recent years, we

have heard discussions of the Chinese overexercising sovereignty over advocacy and foreign NGOs, or “using” sovereignty for repressive means. There is an irony here: in the long sweep of decades of strengthening the capacity of states such as China, a process in which many foreign foundations and NGOs have participated actively and with Chinese support, we are now in an awkward position when a stronger China decides to use its strengthened capacity in ways with which we disagree.

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The “closing space” phenomenon and debate will continue to dominate global dialogue on nonprofit and philanthropic regulation for at least several years to come. More work must be done vis-à-vis the developments of these regulatory constraints on countries around the world, and groups like ICNL and the UN Special Rapporteur are doing that quite effectively—indeed, I applaud their work (and participate in ICNL’s work on this). But we must practice caution in our approach to the “closing space” mantra, and try to ensure that it does not oversimplify the complex developments we are witnessing during a crucial time for the development of nonprofit and philanthropic sectors around the world.

NOTE

1. Lester M. Salamon, “The Rise of the Nonprofit Sector,” *Foreign Affairs* 73, no. 4 (July/August 1994): 109–22.

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