

# U.S. INTERNATIONAL GRANTMAKING

## Country Information

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# Afghanistan

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### I. Summary

Afghanistan's legal system has undergone several dramatic changes since 2002, with profound consequences for civil society and not-for-profit organizations (NPOs).

First, in November 2002, the Transitional Government of Afghanistan adopted the Law on Social Organizations, enacted in light of Afghanistan's 1964 Constitution.

Then in January 2004, a new Afghan Constitution was adopted. Article 35 of the Constitution grants the citizens of Afghanistan the "right to form social gatherings for the purpose of securing material or spiritual aims in accordance with the provisions of the law." The

Constitution also recognizes the freedoms of expression and assembly (or "demonstration"). (Articles 34, 36)

In June 2005, President Karzai signed a new Law on Non-Governmental Organizations (NGOs), which became effective immediately upon signing. The Law created a new legal framework for NGOs in Afghanistan, replacing the Regulation for the Activities of Domestic and Foreign NGOs in Afghanistan (NGO Regulation), enacted in 2000 by the Taliban regime. Both the Law on NGOs and the Law on Social Organizations remain pending before the Afghan National Assembly, as part of the process by which all laws enacted before the seating of the Afghan National Assembly must be reviewed and approved by the Assembly.

#### A. Types of Organizations

Afghanistan has two main categories of registered, nongovernmental, not-for-profit organizations with legal entity status:

- \* Nongovernmental Organizations (NGOs), which number 1756; and
- \* Social Organizations (SOs), which number 1335.

Under a January 2005 Cabinet of Ministers' decision, social organizations face additional (though somewhat undefined) constraints in receiving foreign funding. (See Section III-A below.) Actual practice has shown, however, that the foreign funding prohibition is not being enforced, at least not in connection to social organizations. This Note will provide information relating to both organizational forms.

Several other types of NPOs are also largely excluded from this Note. [1]

#### B. Tax Laws

The Income Tax Law establishes a category of exempt organizations, which includes organizations that meet the following criteria:

- \* The organization must be established under the laws of Afghanistan;
- \* The organization must be organized and operated exclusively for educational, cultural, literary, scientific, or charitable purposes; and

\* Contributors, shareholders, members or employees either during the operation or upon dissolution of the organization mentioned in sub-paragraphs 1 and 2 of this paragraph must not benefit from the organization.

Qualifying organizations are exempt from taxation on contributions received and on income from "necessary operations."

The Customs Law does not exempt NPOs per se, but does exempt certain categories of goods, including: those imported by private foreign and international relief and development agencies and certain other goods, upon recommendation and approval of the Minister of Finance and the Council of Ministers respectively.

## II. Applicable Laws

\* [The Constitution of the Islamic Republic of Afghanistan](#), Official Gazette no. 818/2004

\* [Law on Social Organizations](#), Official Gazette no. 804/2002

\* [Decision of the Cabinet of Ministers](#), issued 24 January 2005

\* Ministry of Justice Proposal, issued 28 October 2006

\* [Law on Non-Governmental Organizations](#), Official Gazette no. 857/2005

\* Implementing Regulations for the Law on Non-Governmental Organizations (2005)

\* [Income Tax Law](#), Official Gazette no. 867/2005

\* [Customs Law](#), Official Gazette no. 848/2005

\* Labor Law, Official Gazette no. 790/1999

\* [Civil Code of 1977](#), Madani Qanun Decree no. 1458 of 05/01/1977

## III. Relevant Legal Forms

### A. General Legal Forms

There are two primary forms of registered, not-for-profit organizations in Afghanistan: Non-Governmental Organizations (NGOs) and Social Organizations.

NGOs are defined broadly in the 2005 Law on Non-Governmental Organizations (NGO Law) to include both domestic and foreign non-governmental organizations. A domestic NGO is simply "a domestic non-governmental

organization which is established to pursue specific objectives." (Article 5(2)) To establish a domestic NGO, the Law requires at least two founders, who may be domestic or foreign, natural or legal persons, at least one of whom has a residence and exact address in Afghanistan. (Article 11(1)) To become registered, NGOs must apply to the Ministry of Economy. (Article 4) As of May 2009, the NGO Department within the Ministry of Economy, reported that 1756 NGOs (including both foreign and domestic) were currently registered in Afghanistan.

The Law on Social Organizations (November 2002) addresses a more specific category of organization. "Social organizations (communities and associations)" are defined as "the voluntary unions of natural or legal persons, organized for ensuring social, cultural, educational, legal, artistic and vocational objectives." [\(Article 2\(1\)\)](#) Social organizations must seek registration with the Ministry of Justice [2] and consist of no fewer than 10 founding members. (Article 6(1)) Foreign citizens are restricted from serving as founders (Article 2(2)), although they can obtain honorary membership after receiving permission from the Ministry of Justice. (Article 18) A January 2005 Cabinet of Ministers' decision on foreign funding provides that Social Organizations (and political parties) cannot receive foreign funding ("funding from foreign governments or international organizations"). In practice, according to the Ministry of Justice, the prohibition is not being routinely applied against social organizations. Nonetheless, grantmakers should be alert to the risk of the application of the prohibition. As of May 2009, some 1335 Social Organizations were registered with the Ministry of Justice.

#### B. Public Benefit Status

The Law on Non-Governmental Organizations does not create a public benefit status for NGOs. Instead, NGOs currently are able to pursue any legal purpose (whether mutual benefit or public benefit). (See also Law on NGOs, Article 8: enumerating functions forbidden to NGOs.)

The Law on Social Organizations requires social organizations to pursue "social, cultural, educational, legal, artistic and vocational activities," which could include either mutual benefit or public benefit purposes. (Law on SOs, Article 2(1))

Afghanistan follows the U.S. approach by creating a category of "tax exempt organizations" in the Income Tax Law. Article 10 of the Tax Law restricts "exempt organization" status to those organizations "organized and operated exclusively for educational, cultural, literary, scientific, or charitable purposes." Organizations dedicated to these public benefit purposes and meeting other mandatory criteria are exempt from taxation on "contributions received and income from the necessary operations." (Income Tax Law, Article 10)

#### IV. Specific Questions Regarding Local Law

##### A. Inurement

NGOs are bound by the non-distribution constraint and by a prohibition against private inurement, as follows:

\* An NGO cannot distribute its assets, income or profits to any person, except for the working objectives of the organization. (NGO Law, Article 5(5))

\* An NGO cannot use its assets, income or profits to provide private benefits, directly or indirectly, to any founder, member, director, officer, employee, or donor of the organization, or their family members or relatives. (NGO Law, Article 5(5))

Social organizations are limited to spending assets only for achieving the goals of the organization. (Law on SOs, Article 16) The Law also prohibits the distribution of assets, upon dissolution, to individual founders, their family members or heirs. (Law on SOs, Article 15) There is no direct statement prohibiting private inurement more broadly.

##### B. Proprietary Interest

The Law on NGOs provides that an NGO may use its assets for accomplishing its not-for-profit purposes and goals and that movable and immovable property shall be registered in the name of the organization. Even more directly, the Law states that the organization's "movable and immovable properties may not be purchased or registered in the name of the founders, board members, employees, or their close relatives." (NGO Law, Article 26(3))

The Law on Social Organizations does not address this issue directly, but instead makes reference to the Civil Code. (Law on SOs, Article 23) The Civil Code, in turn, requires the association "to deposit cash in the name of the association at a bank or other place upon the permission of the authority concerned" (Civil Code, Article 414) and restricts the use of organizational property "for achieving the definite aims set" (Article 415), but allows "[t]he remaining part" to be "invested in safe areas provided it would not affect its original activities." (Article 415) Moreover, upon leaving the organization, a member shall be "deprived of the property of the association unless otherwise provided by the law." (Civil Code, Article 407)

### C. Dissolution

In the case of dissolution, an NGO's remaining assets "shall be distributed to an organization with similar activities, with the approval of the High Evaluation Commission. If there are no such organizations, the movable and immovable properties belong to the government." (NGO Law, Article 36.1) The High Evaluation Commission is composed of representatives from the Ministries of Economy, Foreign Affairs, Finance, Justice, and Labor and Social Affairs. (NGO Law, Article 17) Its primary duty is registration, and it remains unclear how it will implement the dissolution provision. Article 36.2 provides additional protection by prohibiting the remaining assets from being distributed "to any ... founders, members, directors, officers, employees, donors and/or their relatives."

Social organizations facing dissolution are assigned by the court one or more persons to handle the liquidation of the organization and to distribute its assets. (Law on SOs, Article 14(1)) Remaining assets should be distributed according to the provisions of the governing statute, or in the absence of such provision, to a social organization or association with similar goals and objectives to the dissolved organization. (Article 14(2))

### D. Activities

#### 1. General Activities

NGOs are generally permitted to undertake any lawful, legitimate activities. The Law defines domestic NGOs as those "established to pursue specific objectives." (NGO

Law, Article 5.2) Article 8, however, lists illegal activities and includes, notably, "Participation in construction projects and contracts." This prohibition has had a definite impact on the many NGOs engaged in community development projects that include a construction component. Article 8.8 provides an escape clause: "In exceptional cases, the Minister of Economy may issue special permission at the request of the Chief of the Diplomatic Agency of the donor country," but this provision is not being implemented with clarity and transparency.

Although the new Law on NGOs is a significant improvement over the ambiguity of the prior legal framework, it does allow the Government of Afghanistan to exercise considerable control over the operation of NGOs. In particular, Article 23 requires NGOs, "prior to the commencement of work," to submit "committed project documents" to the relevant line Ministry for examination and to the Ministry of Economy for verification and registration. There are differing reports regarding how this provision is being implemented.

As previously noted, social organizations are permitted to pursue social, cultural, educational, legal, artistic and vocational activities (Law on SOs, Article 2) and may not perform activities that are not contemplated in the provisions of their governing statutes. (Article 12)

## 2. Public Benefit Activities

As stated above, NGOs are generally permitted to undertake any legitimate activities, whether mutual benefit or public benefit. The Law does not limit the ability of NGOs to pursue public benefit activities, except to the extent that the prohibition against construction activity (as stated above) may affect community development and other kinds of projects, such as building schools and health clinics.

Similarly, the Law on Social Organizations allows social organizations to pursue public benefit activities, and many social organizations are indeed pursuing activities for the public benefit.

## 3. Economic Activities

Under the NGO Law, "an organization can perform economic activities to reach the statutory not-for-profit goals of

the organization." The Law also specifies that the income derived from the economic activities "may only be used to carry out the specified goals of the organization." (NGO Law, Article 22.1 and 22.2 respectively)

Social organizations are not specifically authorized to conduct economic activities by the Law on Social Organizations, nor are these activities expressly prohibited by the Law. The Civil Code, however, specifies that an association "may not carry on any financial business" (Civil Code, Article 418), which could be interpreted to restrict economic activity.

#### 4. Political Activities

Among the illegal activities listed in Article 8 of the NGO Law are "(1) Participation in political activities and campaigns" and "(2) Payment to and fundraising for political parties and candidates." Although the Law nowhere defines "political activities," the context suggests that the phrase refers to campaigning and electioneering, as opposed to public advocacy.

The Law on Social Organizations does not specifically mention political activities.

#### E. Discrimination

Article 22 of the Constitution states that "Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited" and that "The citizens of Afghanistan - whether man or woman - have equal rights and duties before the law." No laws, however, address discrimination in private education, and nothing in the NGO Law or Law on Social Organizations specifically addresses discrimination.

#### F. Control of Organization

Under the NGO Law, it is possible that an NGO may be controlled, perhaps indirectly, by a for-profit entity or by an American grantor charity (which requires that the charity specifically so provide in the affidavit).

#### V. Tax Laws

## A. Tax Exemptions

Afghanistan's Income Tax Law, enacted in 1965 and amended in 2005, was modeled on U.S. tax law. [3] The Income Tax Law defines a category of "Tax Exempt Organizations." (Article 10) To qualify as an exempt organization, an organization must be (1) "established under the laws of Afghanistan," (2) "organized and operated exclusively for educational, cultural, literary, scientific, or charitable purposes," and (3) "[c]ontributors, shareholders, members or employees either during the operation or upon dissolution of the organization ... must not benefit from the organization." The contributions received and income from the necessary operations of qualifying organizations are exempt from taxation. (Income Tax Law Article 10(1))

The Afghan Ministry of Finance has made available an Income Tax Manual, which provides guidance on application procedures for exempt status, as well as the application form. The Income Tax Manual underscores the fact that it is the Ministry of Finance, and not the organization itself, that determines whether or not the organization qualifies for the exemption. [4]

## B. Incentives for Philanthropy

There are currently no tax incentives available for either individual or corporate donors making cash or in-kind contributions to NPOs in Afghanistan.

## C. Customs Duties

The Customs Law does not provide for exemptions from customs duties for NPOs per se, but does exempt goods mentioned in Chapter 5, Article 27(2) of the Law. Significantly, the Law offers a blanket exemption for "[g]oods provided for government projects funded by loans or imported into the country by or for public and private foreign and International relief and development agencies approved by the government." (Article 27(2)(5)) Thus it appears that the imported goods of many foreign organizations - as private relief and development agencies - may qualify for exemptions.

In addition, NPOs may also be able to benefit from a few general exemptions, such as those covering fuel and certain medical goods. Article 27(2)(16-17) Finally, Article

27(2)(18) provides the possibility of an exemption to other goods "upon recommendation of Minister of Finance and approval of Council of Ministers as required."

#### IV. Knowledgeable Contacts

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#### Footnotes

[1] An assessment prepared by Counterpart International, Inc. concluded that, as was the case before the recent legal reforms, two additional broad categories of civil society organization exist in Afghanistan. The remainder of this Note will not address them, but we list them here: First, village organizations are local aid committees formed by donors to advise or oversee the administration of a particular form of assistance. They include community development councils, educational committees, and other development committees. The number of village organizations has increased dramatically in recent years due to the Afghan Government's National Priority Programs. Foremost among the National Priority Programs is the National Solidarity Program, a mechanism intended to provide block grants of up to \$200 per family to communities for infrastructure-related community improvement projects. Applications for the block grants must come through community development councils (CDCs); in response, more than 5,000 CDCs have been created. The CDCs register with the Ministry for Rural Rehabilitation and Development. While this "registration" supports the National Solidarity Program mechanism, the "registration" is not based on specific legislation.

Second, Shuras/Jurgas are traditional local councils that villages or tribes establish themselves, usually for the purpose of self-government but also to represent a community's interests to other parts of society. Shuras/Jurgas are local decision-making bodies that are arguably the most traditional building blocks of civil society in Afghanistan. They generally consist of the village elders and operate on an informal basis (that is,

as unregistered groups). Any Shura that wants to become eligible for a grant will generally register as a Social Organization or an NGO under the respective laws.

See Afghan Civil Society Sector Assessment Report 2005, prepared by Counterpart International and available on Counterpart's website at <http://www.counterpart-afg.org/csa.html>.

This Note also does not address political parties, professional unions, endowments (foundations), and institutes.

[2] Based on a Ministry of Justice "Proposal," which reportedly does have legal effect, the Ministry of Justice can issue permission for interested foreign social organizations to operate in Afghanistan until such time as the Law on Social Organizations is approved by the Afghan National Assembly. It is important to note that the Ministry Proposal does not apply to foreign individuals but to the ability of foreign social organizations to set up branch offices in Afghanistan. According to information received from the Head of the Department of Political Parties and Social Organizations, no foreign social organization has yet been registered.

[3] For more information, please see the "Summary of Significant Changes with the 2005 Income Tax Law". <http://www.mof.gov.af/download/en/1203935635.doc>

[4] The Income Tax Manual is available at <http://www.mof.gov.af/?p=info&nid=10>