Draft NGO Law

September 2016

An Overview

October 5, 2016
Background

On September 8, 2016, the Egyptian Cabinet announced that it approved a draft NGO law. Once reviewed by the State Council, the draft bill will be submitted to the Parliament for a vote.

Attempts to reform the legal and regulatory environment guiding the establishment and operation of non-governmental organizations (NGOs) date back to the eighties. Egyptian civil society organizations, particularly human rights groups, for years, have been calling for improving the NGO legal and regulatory environment, and in various occasions developing and sharing with the government drafts laws that meet international standards. However, and while at times, the government appeared receptive and willing to enter into some dialogue with civil society over the issue, unfortunately, the results of such efforts have been, at best, fruitless. The draft NGO law, prepared in 2013, is a case in point. The draft was a product of a committee led by the Ministry of Social Solidarity (MOSS) and comprised of governmental and non-governmental experts with the purpose of developing a draft NGO law that is in line with international standards and best practices. This 2013 draft was discarded by the current Minister, and after some maneuvering over the past two years; MOSS produced the current 2016 draft bill, ostensibly in consultation with NGOs. As noted above, the draft will be submitted to the Parliament after the review by the State Council.

While this paper does not attempt to compare the latest draft of September 2016 with earlier drafts, however, it should be noted that, grosso modo, the September 2016 draft represents a major relapse in the freedom of association as compared to the 2013 draft which was discarded. With minor changes, it is akin to other restrictive drafts, such as that of 2012.
This review examines the 2016 draft NGO law against the background of international and regional norms and standards relating to freedom of association and NGOs. It is also informed by best practices contained in other national NGO laws. While comparative best practices are valuable, particular attention should be given to the context and environment in which the NGO is operating. In countries like Egypt, where checks and balances, found in functioning democracies, that limit arbitrary action by the executive are still missing, arguing for including some provisions contained in NGO law of established democracies, ignores the Egyptian government’s increasing actions to constrict public space for pluralistic debate and peaceful expression of views.

**Discussion**

Rights to the freedom of opinion and expression, and peaceful assembly and association are deeply rooted in multiple international and regional instruments. Articles 19 and 20 of the Universal Declaration of Human Rights of 1948 confirm these rights. Subsequently, a wide-range of international treaties, legally binding on all states who have signed and ratified its provisions, in the lead the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), guaranteed these rights, and required States Party to adopt laws or other measures assuring protection for these rights. On a regional level of relevance to Egypt, both the African Charter on Human and Peoples’ Right and the Arab Charter on Human Rights, protect these rights.

As for standards on freedom of association, these have been developed in particular by the United Nations Human Rights Committee and by the European Court of Human Rights. More so, specific standards on the legal status of non-governmental organizations have further been set out in Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of
Europe to member States on the legal status of non-governmental organizations in Europe and further clarified by the Council of Europe’s Expert Council on NGO law of the International Conference of NGOs. Standards applicable to associations active as human rights defenders are also set out in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders) and clarified in its Commentary [Source: European Commission for Democracy Through Law (VENICE COMMISSION)-“Some Preliminary Reflections on Standards and Legislation Relating to Freedom of Association and Non-Governmental Organizations (NGOS) - (Strasbourg, March 28, 2013).

NGOs, are one of the many forms through which citizens can enjoy these rights. The importance of having a vibrant, independent and strong civil society sector to the overall social, economic and political development of any society has been well-documented. In this regard, creating an enabling legal and regulatory to guide the establishment and operation of NGOs is not only important as key to the upholding of citizens’ rights as enshrined in international obligations, but is also critical to allow their meaningful and effective contribution in the advancement of their societies.

The principal underpinnings for the establishment and operation of non-governmental organizations are to be found in the Egyptian Constitution in addition to the guarantees established in universal and regional human rights treaties for the right to freedom of association, to which Egypt have signed and ratified. Accordingly, this review is guided by both the Egyptian Constitution, in addition to general principles and international standards, norms and practices, which are based on international instruments. The review also is informed by a well-developed literature on best practices related to freedom of association. The Egyptian constitution, Article (75), grants citizens the right to establish associations. It stipulates that
the legal personality of the NGO is to be affirmed upon notification. The article further confirms the right of NGOs to operate with freedom and without undue bureaucratic interference by the state. Dissolving of association, their board of directors or trustees, is to be limited to judicial action. Establishment of association which statues or operations are secretive, military or paramilitary are prohibited. As such, the constitutional provision clearly provides three explicit elements to guide the NGO legislation:

1) affirmation of the legal personality by notification;

2) prohibiting dissolutions of NGOs (and their board) without judicial action and,

3) Banning organizations which statues or activities are secretive, military or paramilitary.

While the Constitution affirms the general principle that NGOs are to operate with freedom from state intervention, it does not include specific language to detail this principle. Accordingly, generally accepted international standards, norms and practices guiding the development of an enabling NGO legal and regulatory environment are used to assess the extent to which the draft law upholds such freedom. In addition to the sources cited below, “A compendium of International Legal Instruments and Other Intergovernmental Commitments Concerning Core Civil Society Rights” developed by CIVICUS (updated in 2012) provided a valuable source of information. Following are the main sources consulted:

1. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development- Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Human Rights Council Twentieth session, May 2012);

2. Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organizations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the
Ministers’ Deputies);

3. European Commission for Democracy Through Law (VENICE COMMISSION)–“Some Preliminary Reflections on Standards and Legislation Relating to Freedom of Association and Non-Governmental Organizations (NGOS) – (Strasbourg, March 28, 2013);

4. European Commission for Democracy Through Law (VENICE COMMISSION)–“Interim Opinion on the Draft Law on Civic Work Organizations of Egypt - (Strasbourg, 18 June 2013);


6. International Principles Protecting Civil Society devised by the International Center for Not for Profit Law and the World Movement for Democracy Secretariat;

It should be noted that this review is by no means exhaustive. It only focuses on a number of key areas which are fundamental to the establishment and operation of an NGO, including: Acquiring legal personality; Permissible objectives and activities, Fundraising and access to Foreign Funds; Establishment of foreign NGOs and, Penalties.

In general, the draft law reflects the traditional official trepidation about the NGOs in general, and human rights and foreign NGOs in particular. Traditionally, government has always taken a very hesitant, sometimes hostile attitude toward civil society. On one hand, the government realizes the need for NGOs to assist with mounting socio-economic problems. Yet, on the other hand, the government continues to be quite wary and suspicious of civil society, opting to develop a “preemptive law” that can help keep civil society checked as needed. This latter sentiment is particularly dominant in the current times.
Before examining, in some detail, an overall key concern should be noted. By and large, the draft bill relegates many important issues to the Executive Regulations. This, in and of itself, is quite unsettling, as they pertain to critical issues, which are at the heart of the free of association. Noting the trepidatious attitude of the government towards civil society, one cannot discount that likelihood that MOSS will impose further restrictions through these regulations. Examples of issues relegated to the Executive Regulations include: procedures and rules for withdrawal from membership of an association; rules and regulations pertaining to associating, joining or partnering with foreign NGOs, and opening up branches outside Egypt; rules and regulations for receiving in-country donations and fund-raising; conditions regulating the entry of the representative of MOSS to the premises of the association, and the procedures for licensing foreign in addition to rules related to the renewal, amendment and cancelation of these licenses, and the disposal of the monies of the NGOs.

1. Acquiring Legal Personality and Registration

Article (75) of the Egyptian Constitution stipulates that an NGO legal personality shall be affirmed by notification. However, the draft law does not automatically affirm the legal personality on the NGO upon notifying MOSS. The procedures stipulated in the relevant article of the draft renders the process as de facto registration rather than a notification process. While the draft bill stipulates that MOSS is required to enter the articles of incorporation in a register once it is notified, it also stipulates that if within thirty (30) working days, from receiving the establishment notification, MOSS determined that the NGO included some proposed purpose/activity that violates the Penal Code or any other relevant criminal law, it has the right to refuse entering the articles of incorporation in the register. In this instance, MOSS has to
notify the founders’ representative in writing of its decision, providing the reasons for its decision. The draft law stipulates that the personality, and the capacity to operate, is affirmed only once MOSS deems the notification to be valid and enters the articles of incorporation in its records. In this regard, and in light of the procedure of registration rather than notification as stipulated in the Constitution, the burden of challenging the decision of MOSS before a court falls on the entity rather than MOSS—thereby creating extra burdens on the individuals in accessing their right. Aside of being inconsistent with the Constitution, significant in and by itself, the draft law is also inconsistent with the opinion that a “notification procedure”, rather than a “prior authorization procedure” that requests the approval of the authorities to establish an association as a legal entity, complies better with international human rights law and should be implemented by States [Source: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development— Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Human Rights Council Twentieth session, May 2012]. Aside from the requirement for acquiring the legal personality, the draft includes requirements that are viewed as creating further obstacles to establishing organizations. For example, it requires ten founding members for establishing an association and providing an officially notarized document as evidence of the presence of a physical premise. In addition, it increased, compared to the current law, the establishment fees from LE 100 to LE 1000 for association, and from LE 5000 to LE 50,000 for establishing foundations.

2. Admissible Objectives and Scope of Activities

Article 75 of the Constitution bans the establishment or continuity of NGOs which statues or activities are secretive or of military or paramilitary nature. Article 7 of the draft law specifies “development and social welfare in addition to rights, legal and constitutional awareness—
raising activities” as admissible fields for NGO engagement. The article qualifies these activities as “falling within the parameters of the state development plans and the needs of the society”. It further details the prohibited areas that could be summarized as follows: paramilitary formations; activities that discriminate based on sex, origin, religion, colour, language or belief, and racist-oriented and hate-inciting activities; funding or supporting electoral campaigns or candidates; granting of professional licenses and scientific certificates (without partnership with relevant government universities or entities); activities which practice require a license from a government entity, and activities that aim primarily at profit-making or profit-making activities that benefit its members.

International standards provide that NGOs should be able to pursue activities as long as both the objectives and the means employed are consistent with the requirements of a democratic society. More so, NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law. NGOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties. NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorization being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned. In the instance that any limits are imposed on permissible objectives/activities, they must correspond to a “pressing social need” as otherwise a refusal of legal personality by reference to them will not be regarded as being for reasons that are relevant and sufficient [Source: Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organizations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the
Ministers’ Deputies).]

**Comment:**
While it is normal to place some restrictions on paramilitary activities and profit making, specifying the scope of activities as cited above, and adding a further qualification—that such activities be within the domain of the state plans, is problematic and is not consistent with agreed to international principles and standards. More so, specifying permissible activities in the area of rights within the boundaries of “awareness raising” could be interpreted by MOSS bureaucrats to exclude advocacy activities, or other activities related to research and studies or any other activities relevant to the protection of human rights (such as providing health and psychological care for victims of torture).

### 3. State Interference

While there is always a need to safeguard against fraud, abuse, and infringement of NGOs against the rights of others, however, the general principle is that any associations, including unregistered associations, should be allowed to function freely, and their members operate in an enabling and safe environment. More so, associations should be free to determine their statutes, structure and activities and to make decisions without State interference.

**Comment:**
The draft law allows for excessive governmental interference in the operation of NGOs. Examples for undue interference include: granting MOSS the right to request the association to withdraw any decision if deemed in violation of the law or the bylaws of the association; dictating the decision-making process for the board of directors; granting MOSS the right to
object to, and request that the association withdraw the nomination of a member of the board if they deem that the nomination violates the conditions contained in the law; allowing representatives of MOSS entry to NGO to supervise/monitor all aspects of its activities (this supervisory mandate also extends to “NGO-type of activities” carried out by entities that are not registered under the law (such as civil companies and law firms)); granting MOSS the right to request the dismissal of the board of the NGO (via a court ruling) in the instance for example, the NGO changes its premises without prior notification or failure to hold the general assembly meeting for two consecutive years; granting MOSS the mandate over the opening up of in-country branches or offices, and stipulating the mandatory membership for the specialized and regional federations in the General Federation of NGOs. More so, the draft bill mandates that one percent (1%) of the value of each approved grant be allocated to the Associations and Foundations Support Fund.

4. Funding Considerations

a) Fundraising and Access to Foreign Funding:

The general principle is that NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties. [Source: Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organizations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies)]. Specifically for fundraising activities, no prior authorization should be required. [European Commission for Democracy Through Law (VENICE COMMISSION)–” Some Preliminary Reflections on Standards and Legislation Relating to Freedom of Association and
Non-Governmental Organizations (NGOS) - (Strasbourg, March 28, 2013)]. It may be appropriate to require advance registration of public fundraising campaigns with a public agency responsible for issuing permits and, for in-person solicitations, issuing badges and other identification materials to the fundraisers. However, the government should not be permitted to screen or require approval of specific grants or sources of funds [Guidelines for Laws Affecting Civic Organization: Open Society Institute, Second Edition, 2004]. As for foreign funding, it is justified to require the utmost transparency in matters pertaining to foreign funding. In this regard, an authority may be entrusted with the competence to review the legality (not the expediency) of foreign funding, using a simple system of notification – not one of prior authorization. The procedure should be clear and straightforward, with an implicit approval mechanism. The administrative authority should not have the decision-making power in such matters. This should be left to the courts [Source European Commission for Democracy Through Law (VENICE COMMISSION)-” Interim Opinion on the Draft Law on Civic Work Organizations of Egypt - (Strasbourg, 18 June 2013)]. More so, generally speaking, the legal rules for foreign and domestic funding should be the same [Guidelines for Laws Affecting Civic Organization: Open Society Institute, Second Edition, 2004].

Comment:
The draft Law, requires an NGO notify MOSS, thirty (30) working days, before embarking on any public fundraising activity, or receiving any funding from in-country sources– specifically from Egyptian natural or legal persons. Similar to other provisions, the draft law stipulates that details– procedures and requirements are to be contained in the executive regulations. It is worth noting here, that while a notification for conducting a fund-raising campaign might sound reasonable, requiring a one-month notification prior to receiving donations is not practical and is likely to deter individual donors. That said, at the face of it, this provision seems to be consistent with international standards in so far that it does not require a prior approval,
however, a final assessment of this issue is contingent on what the executive regulations stipulate.

**b) Access to Local Funding:**

As for receiving out-of-country funding—defined as sourced “from Egyptian natural or legal persons or foreign natural and legal persons”—the draft law sets significantly different rules to guide such funding compared to the rules set for receiving in-country funding as explained above. It should be noted that the law does not address funding from foreign entities, whether natural or legal persons, who are in-country (example Care, Save the Children, or foreigners residing in Egypt). Aside from stipulating different rules, which are inconsistent with general international principles, the rules set for receiving out-of-country funds, at best, could be described as unduly restrictive, dilatory, and inconsistent with international standards and principles. Article 14 stipulates that the NGO need to notify the Coordinating Committee in the instances of receiving out-of-country funding. While the NGO can deposit the funds in its bank account, the Coordinating Committee may object to the funding within 60 working days of being notified. During this 60-working day period, the NGO cannot use the funds. Relegating the approval of out-of-country funds to an overly cumbersome committee, without even providing any specificity that would ensure that adequate checks are in place so as to limit the competency of the committee to reviewing the legality of the request and not beyond, is also not in line with international standards. The draft does not specify the grounds on which a request can be rejected, which should be limited to it violating the article listing the unlawful/banned activities for NGOs (those contained in Article 7 of the draft bill, notwithstanding our reservations noted earlier). More so, the draft law does not address the course to be sought by NGOs in the instance the request is rejected. As proposed, the provision represents disproportionate interference to the right to freedom of association guaranteed by international standards.
5. Foreign NGOs

Generally speaking, the law should provide a level playing field for foreign and domestic organizations, permitting the former to participate actively in another country’s civic activities [Guidelines for Laws Affecting Civic Organization: Open Society Institute, Second Edition, 2004]. However, it is not uncommon that foreign non-governmental organizations may be required to obtain authorization to operate in a country other than the one in which they have been established. However, they should not be required to establish a new and separate entity for this purpose. Foreign non-governmental organizations can be subjected to the same accountability requirements as non-governmental organizations with legal personality in their host country but these requirements should only be applicable to their activities in that country [Source: European Commission for Democracy Through Law (VENICE COMMISSION) – “Some Preliminary Reflections on Standards and Legislation Relating to Freedom of Association and Non-Governmental Organizations (NGOS) – (Strasbourg, March 28, 2013)].

Comment:
On all counts, the draft law exposes foreign NGOs to extraordinarily severe restrictions, and is inconsistent with international standards and principles. For one, foreign NGOs are subject to exceptionally different rules than those stipulated for domestic groups. For example, licensing foreign NGOs rests with an expansive Coordinating Committee. The procedures are extremely excessive, and not tailored to safeguard against the government encroachment on the rights of foreign NGOs. As such, they are bound to be a major barrier to foreign NGOs establishment and operation in Egypt. For example, the draft stipulates that the exact procedures for the licensing foreign NGOs, which are subject to renewal, will be included in the Executive Regulations. It also allows 60 working days, from the time of submitting the request, for the Coordinating
Committee body to make a decision. In the instance the request is denied, the NGO can seek a legal course. Similar to the case with the Egyptian NGOs though, the draft stipulates that activities of foreign NGOs need to be consistent “with the needs of the Egyptian society and the priorities set in the development plans”. Such a parameter is extremely vague and subject to different interpretation, and could be used as a pretext for denying licensing of a group. More so, in the draft gives the Minister the right to administratively halt one of the activities of the foreign NGO or cancel its license if the NGO violates any of the provisions of the law or the rules guiding the execution of its activities. Such discrimination is inconsistent with the principle of equal treatment of domestic and foreign NGOs.

6. Penalties

In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality [Source: Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organizations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies) ]. More so, best practices confirm that while the general criminal laws (e.g. against embezzlement) should apply to individuals involved with civic organization just as with other legal persons, it is generally inappropriate to impose criminal penalties (e.g. imprisonment) for violation of the provisions of a law dealing with civic organizations [Guidelines for Laws Affecting Civic Organization: Open Society Institute, Second Edition, 2004].
Comment:

The provisions on sanctions in the draft law are excessive and not consistent with international standards and/or best practices. Article 63, qualifies the listed sanctions with the statement “without prejudice to any greater penalty stipulated in the Penal Code or any other law”. It also expands on what is considered a violation to fall under the purview of the listed sanctions (e.g. conducting field research or opinion polls without obtaining approvals, assisting or participating with a foreign organization in performing activities without obtaining a permit; granting a license to any entity to perform an activity of associations or foundations). While imposing crippling fines for violating the provisions of the law (reaching 1 million Egyptian pound), the draft law, in effect, maintains the imprisonment sanctions contained in the current law. For example, the referenced Penal code stipulates a life imprisonment for the establishment of an NGO without license, or violating the conditions of registration.
Conclusion

From the above review, and notwithstanding other issues in the draft law that represent undue and excessive interference by the state in the affairs of NGOs, it is safe to conclude that the draft law, in many respects, is neither in line with the Egyptian Constitution, nor with the international principles and standards guiding the legal frameworks for NGOs. While an enabling environment for civil society goes beyond the legal and regulatory framework and include other considerations such as the social, economic, cultural, and political environments in which an NGO operate, yet creating an enabling legal and regulatory environment is a key determinant of the extent to which civil society can significantly contribute to the advancement of society. Not only to meet its international obligations, but also to maximize the value added of civic organizations, Egypt needs to confront its well-ingrained trepidation of civil society organizations and embark on developed a legal framework that is clear, well-defined, consistent with the Constitution, meets international standards and the aspiration of many who are voluntarily engaged in developing their society.