



**INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW**

**VOLUME IV ISSUE I**

**JANUARY 2006**

## IJCSL EDITORIAL BOARD

Professor Karla W. Simon  
Catholic University of America  
**EDITOR-IN-CHIEF**

Paul Bater  
International Bureau of Fiscal  
Documentation  
**SENIOR EDITOR**

Maureen McCarthy  
**MANAGING EDITOR**

Dr. Leon E. Irish  
Visiting Professor of Law  
Central European University  
**SENIOR EDITOR**

Alaina Van Horn  
**ASSOCIATE EDITOR**

Sarah Bagley  
**ASSOCIATE EDITOR**

Nasira B. Razvi  
**NEWSLETTER EDITOR**

Laura Ardito  
**ASSOCIATE EDITOR**

Tapera Kapuya  
**ACCSL NEWSLETTER EDITOR**

Donna M. Snyder  
**EDITORIAL ASSISTANT**

Stephen Young  
**REFERENCE LIBRARIAN**

### CONTRIBUTING EDITORS & CONTRIBUTORS

Professor Myles McGregor-  
Lowndes & Professor Susan  
Woodward  
**AUSTRALIA**

Dieter Hergner  
**AUSTRIA**

Daniela Pais Costa  
**BRAZIL**

Terrance Carter  
**CANADA**

Professor Debra Morris  
**CAYMAN ISLANDS**

Professor Ge Yunsong  
**CHINA**

Dr. Petr Pajas  
**CZECH REPUBLIC**

Daniel Bekele  
**ETHIOPIA**

Frits Handius  
**ROVING REPORTER, EUROPE**

Michael Ernst-Pörksen  
**GERMANY**

Paul Opoku-Mensah  
**GHANA**

Noshir Dadrawala  
**INDIA**

Renata Arianingtyas  
**INDONESIA**

Zahra Maranlou  
**IRAN**

Dr. Hadara Bar-Mor  
**ISRAEL**

Dr. Alceste Santuari  
**ITALY**

Tatsuo Ohta  
**JAPAN**

Dr. Abdullah El-Khatib  
**JORDAN**

Elkanah Odembo  
**KENYA**

Bayarsetseg, J.  
**MONGOLIA**

Qadeer Baig  
**PAKISTAN**

Beatriz Parodi Luna  
**PERU**

Karen Nelson  
**SOUTH AFRICA**

Dr. Christine Barker  
**UNITED KINGDOM**

Karin Kuntsler Goldman  
**UNITED STATES**

Dr. Antonio Itriago  
**VENEZUELA**

Phuoc Luong Huu  
**VIET NAM**

Paul Bater  
**WESTERN EUROPE**

Blessing Chimhini  
**ZIMBABWE**

January 31, 2006

Dear Readers,

This issue of the **International Journal of Civil Society Law** comes to you at a time of increasing scrutiny of and by the civil society sector in many countries. Some of this scrutiny has led to new legislation that has attracted public attention, as in Russia (the new legislation on “NGOs” is discussed in the latest issue of IJCSL-N). Other situations have seen sector-led efforts result in the development of better disclosure by public bodies, which aims to increase public oversight of governance, as in the Cayman Islands (referred to below). All the attention being given to the sector – whether good or bad – seems finally to have raised public and government awareness of the issues this **Journal** considers.

The issue you are about to read considers some of the pertinent questions with regard to the role the sector plays in promoting good governance, the ways in which it is regulated, and its relationship with the state in terms of providing social services that the state cannot offer in as sensitive a manner. Our feature articles cover a wide range of subjects:

- In her article about delegation of child care services to non-commercial organizations in Moldova, Caroline Loussouarn Newman deals with a timely topic – how to best provide child care in a situation in which government would like to outsource provision of the care.
- Hari Prasad takes a different tack in his article about India and its regulation of telephony, where he concludes that the interests of India’s citizens in protection of their privacy are not met by current regulations.

Other and widely disparate issues are addressed in the Country Notes in this issue – the one for Germany discusses the proposed changes in the regulatory framework for NPOs as does the one for Japan. The Country Note for the Cayman Islands deals with the Freedom of Information Bill, recently introduced in the Parliament, while the Country Note for China considers the ways in which the Chinese government keeps its secrets secret under the document classification system applicable to government documents. Finally, Dr. Otmar Oehring deals with two important issues in Turkey, both of which concern the sector and non-Muslim religions.

The staff and I wish you a pleasant read,

Karla W. Simon  
Editor-in-Chief

## TABLE OF CONTENTS

<b>IJCSL EDITORIAL BOARD</b>	2	
<b>LETTER FROM THE EDITOR</b>	3	
<b>TABLE OF CONTENTS</b>	4	
<b>IJCSL EDITORIAL POLICY</b>	5	
<b>ARTICLES</b>		
<i>Prospects for Delegation of Childcare Services by Public Authorities to Non-Commercial Organizations – An Assessment of the Legislation of the Republic of Moldova</i>	6	Caroline L. Newman
<i>A Legal Perspective on Telecom Growth in the Indian Subcontinent</i>	14	Hari Prasad K.V.
<b>COUNTRY NOTES</b>		
<b>ASIA &amp; PACIFIC</b>		
<i>China’s Internal Publication System</i>	23	David Cowhig
<i>Japan Update</i>	26	Karla W. Simon
<b>LATIN AMERICA / CARIBBEAN</b>		
<i>Cayman Islands Government Takes a Vital Step to Let the “Sunshine” In</i>	38	Government Information Service, Government of the Cayman Islands
<b>WESTERN EUROPE</b>		
<i>Germany Update</i>	43	Karla W. Simon
<i>Religious Communities Need Fundamental Reform of the Constitution</i>	48	Dr. Otmar Oehring

## IJCSL EDITORIAL POLICY

January 2006

Dear Reader

**CONTENT—IJCSL PUBLISHES ARTICLES ON A VARIETY OF TOPICS**, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed do not necessarily reflect the views of IJCSL or its editorial staff.

**STYLE—IJCSL PUBLISHES ARTICLES BY CONTRIBUTORS FROM AROUND THE WORLD.** Therefore, IJCSL uses a flexible editorial policy regarding questions of style. Articles submitted by persons for whom the English language is native are edited based on the author's original syntax and spelling. Articles submitted by persons for whom the English language is not native are edited according to American English style. Occasionally, IJCSL publishes articles in languages other than English. In those instances, articles are published as submitted and IJCSL provides an English-language summary.

**QUESTIONS & COMMENTS—IJCSL WELCOMES READERS' QUESTIONS & COMMENTS** on items published in its pages. If you have a question or comment, please contact

Karla W. Simon, Editor-in-Chief  
Maureen McCarthy, Managing Editor

[simon@cua.edu](mailto:simon@cua.edu)  
[40mccarm@cua.edu](mailto:40mccarm@cua.edu)

**IJCSL RETAINS FINAL EDITORIAL CONTROL** of all aspects of publication and will share copyright with authors.

We look forward to hearing from you.

Thank you.

PLEASE CITE AS

3 INT. CIV. SOC. LAW *at* <http://www.law.cua.edu/Students/Orgs/IJCSL>

## ARTICLES

# PROSPECTS FOR DELEGATION OF CHILDCARE SERVICES BY PUBLIC AUTHORITIES TO NON-COMMERCIAL ORGANIZATIONS –AN ASSESSMENT OF THE REPUBLIC OF MOLDOVA

BY CAROLINE LOUSSOUARN NEWMAN\*

### INTRODUCTION

The Republic of Moldova is today facing a situation where services provided by state institutions hosting children in difficulty are no longer appropriate while alternative social services for children in difficulty have been introduced essentially by Moldovan “non-commercial organizations” (NCOs).<sup>1</sup> These alternative service providers are making available essential services to the families of these children, thus enabling them to avoid institutionalization of the children. Although these services are currently paid for essentially out of foreign donor funds, they do provide a public service. Such public benefit services should not be discontinued with the withdrawal of foreign funding, and their continuity should be secured by the Moldovan public authorities.

Various public funding mechanisms are available for public authorities to finance social services provided by NCOs including public procurement practices, subsidies, or the granting of “personal budgets” to the children who are beneficiaries. In Moldova, procurement mechanisms are regulated in the Law on Procurement of Goods, Works and Services for Public Needs and subsidies are authorized to certain types of NCOs. However, mechanisms for the award or monitoring of subsidies to NCOs providing childcare services is not regulated and “personal budgets” have not been introduced. Each of these three mechanisms will be reviewed in this paper under the relevant Moldovan law and related public policies.

### I. PROCUREMENT MECHANISMS

Procurement mechanisms are transactional relationships under which the government is in the position of a consumer selecting an adequate supplier, who will satisfy the demand in terms of

---

\* Caroline Loussouarn Newman is an independent consultant working on civil society law issues in Budapest. She can be reached at [caroline.newman@laposte.net](mailto:caroline.newman@laposte.net). She is currently the Senior Legal Expert of the *TACIS program: Capacity Building in Social Policy Reform* in Moldova, under a consortium led by EveryChild. An earlier version of this paper was prepared for the aforementioned organization in July 2005 and is published here with the permission of the author.

<sup>1</sup> The Moldovan Civil Code provides for three organizational legal forms of not-for-profit organizations, referred to as “non-commercial organizations”: public associations, foundations, and institutions. The establishment of institutions is not implemented, the necessary secondary legislation not having been adopted to this day.

price and quality of service (or goods) and will offer the most advantageous bid.<sup>2</sup> The duty of the government is to identify through a tender the most competitive provider of the required services in order to responsibly allocate budget resources. Therefore, the procurement should be open to any person able to provide the needed service, whether it is a for-profit, a not-for-profit entity, or an individual.

Because entering into a transaction resulting from a procurement process is similar to a purely commercial transaction and the legal or the tax framework for NCOs in New Independent States (NIS) countries do not usually authorize NCOs to engage in a direct economic activity, it is almost impossible in these countries for NCOs to participate in a procurement process. Fortunately, Moldova is one of the rare exceptions, having modeled its legal framework and tax legislation affecting NCOs on good international practice. Moldovan law provides that an NCO can directly engage in a commercial activity when the activity is related to its statutory purpose or it can establish a commercial subsidiary in order to carry out unrelated economic activities.<sup>3</sup> Further, in accordance to article 52 (6) of the Moldovan Tax Code, related economic activities of NCOs which have been certified as public benefit organizations (PBOs), in compliance with article 19 of the Law on Foundations and articles 34 through 37 of the Law on Public Associations, are exempt from income tax. Therefore, transactions resulting from a procurement process for child welfare services would be exempt for PBOs engaging in the tender. This would provide PBOs with a relative advantage in comparison to commercial entities or other NCOs engaged in the same bid, which do not benefit from the tax exemption.<sup>4</sup>

For all procurement procedures, with an estimated contract cost is above 10,000 Lei (about € 830), open tenders are generally mandatory under the procurement legislation; alternative mechanisms, such as restricted procedure or single source procurement may be used where appropriate.

The Moldovan procurement legislation, while very well suited for the participation of business entities, is, however, to a certain extent problematic for the effective participation of NCOs. Security bonds – in the form of a bank guarantee, other forms of security, “stand by” letters of credit, bank checks, cash deposits, bills of exchange, or promissory notes<sup>5</sup> – are required from tendering parties. The amounts required are no more than 3% of the estimated tender cost at the time of submission of tenders, and no more than 15% at the time of conclusion of the

---

<sup>2</sup> Articles 43 and 44 of the Law on Procurement of Goods, Works and Services for Public Needs.

<sup>3</sup> Article 188 of the Civil Code, article 28 of the Law on Public Associations, article 23 of the Law on Foundations, article 13 of the Law on Charity and Sponsorship.

<sup>4</sup> The Law on Charity and Sponsorship also provides that “Charities” can benefit from tax exemptions. However, the purpose of this law is not clear as its provisions are redundant with provisions of the Civil Code, the two afore mentioned framework laws and the Tax Code. It seems to create a parallel registry of legal entities in the Ministry of Finance for which the loss of the charity status, status granting tax and other public benefits, would entail the loss of legal personality as well. Therefore providing no reasonable grounds for choosing to register as a “charity” instead of an association or a foundation. According to ICNL’s *Survey of Tax Laws Affecting NGOs in Newly Independent States*, (ICNL, Washington DC, October 2003, p 69) it seems that the Law on Charity and Sponsorship, while formally in force, is not implemented in Moldova. Further, this survey also provides the information that in practice some non-certified NCOs manage to be listed as “exempt organizations” for the purpose of corporate income tax exemptions. Such practice would then be in violation of the Law on Public Association and the Law on Foundations.

<sup>5</sup> Article 1 of the Law on Procurement of Goods, Works and Services for Public Needs.

contract.<sup>6</sup> Given their generally tenuous financial footing, it will be difficult for many NCOs to advance funds for the purpose of providing the required security bond. Whereas it is clear in the law that security requirement is mandatory for the procurement of goods and works above 100,000 lei (about € 6,500), it is not clear whether this requirement also applies to the procurement of services. Flexibility in respect to this requirement is desirable in order to enable NCOs to participate in procurement process. It is recommended that in the case of procurement of social services, only symbolic security bonds be required from bidders and contractors. Ideally, the law could be amended to specify that security requirements will always be waived in cases of procurement of certain services, such as social, medical, recreational, cultural, and employment services, which are services typically provided by NCOs. It would be good public policy for such waivers of security bonds when the social services are contracted out by public entities.<sup>7</sup>

At the present time, restricted procedures, including single source procedures, are most likely to be used in the case of procurement of social services in Moldova. Moldovan law provides that restricted procedures are authorized if the estimated cost of the contract is below 225,000 Lei (about € 15,000) or if there are a very limited number of existing providers.<sup>8</sup> Given that the cost of social services may be rather low or the number of existing providers still rather limited, even to the point that only one provider may be supplying a given service, restricted procedures are likely to take place for the procurement of social services. In cases where only one provider exists in a given market, the single source method of procurement would be authorized by law.<sup>9</sup>

In both single source and restricted procedures, it is important for the State to know which providers exist in the market. Typically, procurement bodies can conduct a restricted procurement procedure only if they invite all providers of a given service invited to participate in the tender. The Law on Procurement of Goods, Works and Services for Public Needs makes a reference to “suppliers selected in advance” in such cases, indicating that they must be known in advance.<sup>10</sup> My understanding is that at the current time there is no comprehensive nor centralized information available to State bodies with regard to services provided by NCOs in Moldova. It is important that systematized information on NCOs providing services affecting children, including detailed information on the types of services they provide, be gathered and centralized in order to enable these mechanisms to take place in a reasonable manner, which is consistent with good public policy. The Moldovan civil society has an interest in developing such a database for future use by the public authorities.

## **II. SUBSIDY MECHANISMS (GRANTS)**

Subsidies are support mechanisms provided by public authorities to NCOs in order to assist them in providing their services to the population. Subsidies can be provided in the form of financial

---

<sup>6</sup> Articles 34 and 35 of the Law on Procurement of Goods, Works and Services for Public Needs.

<sup>7</sup> The proposed list of services for which waivers would be permissible complies with the list of services which procurement proceeds can be simplified in relation to the requirements of EU council directive N92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

<sup>8</sup> Article 21 of the Law on Procurement of Goods, Works and Services for Public Needs.

<sup>9</sup> Article 24 of the Law on Procurement of Goods, Works and Services for Public Needs.

<sup>10</sup> Article 21 of the Law on Procurement of Goods, Works and Services for Public Needs.

or in-kind support. Of the traditional types of subsidies encountered in international practice, in-kind subsidies, project-based subsidies, minor subsidies, and national budget line subsidies have all been identified by my study as among the types of subsidies awarded to Moldovan NCOs.<sup>11</sup>

In-kind subsidies are a common practice in transition countries and therefore it is not surprising that such subsidies are currently awarded to Moldovan NCOs. For example, these can take the form of transfer of property title of municipal property to NCOs providing social services or in the form of preferential rental rate for office space.<sup>12</sup>

Project-based subsidies are allocated to a specific project or activity. The NCO sends to the relevant public authority a solicited or an unsolicited proposal describing the project it wishes be funded, along with a justified detailed budget exclusively related to the activities carried out under the project. This is done in the same manner used when NCOs apply to foreign donors for project grants. Such subsidies are currently awarded by the Moldovan national and local ecological funds. The funds provide subsidies on a-competitive basis to projects of local public authorities, natural and legal persons<sup>13</sup> who send in their applications. Projects funded out of the funds have to meet the purposes of the fund, such as environmental protection. An agreement is then concluded between the ecological fund and the grantee. The grantee must provide financial and narrative reports demonstrating compliance with the terms of the agreement and the ministry of ecology monitors the implementation of the project.<sup>14</sup>

It is curious that commercial organizations are also eligible for state support under this system. This has the potential to create unfair competition between commercial entities and is not a recommended practice. Further, in relation to NCOs, the fact that the support is not limited to PBOs and in practice has been awarded to NCOs without the PBO status, such a practice violates the Law on Public Associations.<sup>15</sup>

It is interesting to note, and a practice that is worthy of emulation, that civil society is involved in the selection process for both the national and local ecological funds.<sup>16</sup> The administrative bodies of the funds, which are competent for selecting the winning projects, are each composed of five members, of whom one is a representative of the “non-governmental” sector. I could not find a definition of “non-governmental–organizations” in the reviewed legislation and therefore assume that the term refers to NCOs and commercial entities. This deserves to be clarified. The establishment by the Ministry of Ecology of special funds in order to finance ecological projects is an interesting precedent, which deserves further consideration by

---

<sup>11</sup> Another major type of subsidy existing in the international practice but not encountered in Moldova at the current time are “operational subsidies”, usually granted by central authorities to organizations carrying out specific activities often on the basis of an accreditation which principle consist of funding the administrative costs of an NGO for the upcoming fiscal year based on the costs foreseen and calculated in function of the estimated number of beneficiaries for the given year.

<sup>12</sup> An earlier study of this form of subsidy to social and cultural organizations in Central and Eastern Europe was identified in Karla W. Simon “Privatization of Social and Cultural Services in Central and Eastern Europe: Comparative Experiences”, Boston University Law Review, 1995.

<sup>13</sup> Article 15 of the Regulation on Ecological Funds.

<sup>14</sup> *Ibid.*

<sup>15</sup> Article 36 of the Law on Public Associations.

<sup>16</sup> Article 14 of the Regulation on the Ecological Funds.

the Ministry of Health and Social Protection for financing social projects of Moldovan NGOs.

Minor subsidies are usually not awarded on a competitive basis and their purpose is to complement activities funded through another source and to stimulate an organization to pursue a particular activity. As a usual practice, such subsidies are awarded to organizations whose sources of funding are highly diversified, for example, that subsist mainly from the profits from their ancillary economic activities or who have funding from various donors. These subsidies are to be used only to supplement the total budget of a project and are to amount to a small portion of the total project cost, for example no more than 20%. It appears that the current practice in Moldova under which local authorities contribute to the utility expenses of NCOs carrying out activities in the field of childcare is a type of minor subsidy.

National budget-line subsidies. It seems that in Moldova, as in many transition countries, direct government allocations out of the state budget are provided to certain NCOs (creative unions such as the “society for the handicapped”) specifically named in the budget. I assume that these are granted according to the same principles encountered in other transition countries when, annually, the budget act grants subsidies to such NCOs. Usually the funds allocated to these organizations may be used only to cover expenses related to their not-for-profit activities. This type of national budget line subsidy raises important concerns over the transparency of the process and the criteria used for granting the support. As a result there is little opportunity for other organizations to seek this type of support.<sup>17</sup>

Summary and discussion. Up until this time, subsidies granted to NCOs carrying out activities in the area of childcare were awarded in a very informal and un-transparent manner. It is a good practice for any type of subsidy, including in-kind subsidies, to be allocated to NCOs in a transparent manner and, when appropriate, on a competitive basis. Further, it could be argued that the fact that these benefits were granted on an *ad hoc* basis currently violates Moldovan law, indeed, article 11 of the Law on Public Associations provides that benefits in the form of preferential rental rates or other-benefits granted to PBOs are to be granted in compliance with the established procedure and cannot be granted on an individual basis.

In addition, Moldovan law provides that only PBOs are eligible for Moldovan state support,<sup>18</sup> which would mean support received through any kind of subsidy mechanism. This requirement, which complies with good international practice, seems to have been infringed on several occasions; many NCOs, which are currently granted minor subsidies, have not been certified as PBOs by the Certification Commission. It is desirable that the NCOs which are currently benefiting from such subsidies correct the violation of the law by seeking the PBO certification at the earliest possible time.

Moldovan NCOs are certified by the Certification Commission as PBOs provided that they engage exclusively in a public benefit activity such as the defense of human rights, education,

---

<sup>17</sup> The so-called “percentage laws” in countries like Hungary or Slovakia have allowed a “democratization process” in the awarding of national budget line subsidies to NCOs. It is the tax-payer himself who designates the NCO of his choice to be subsidized. In Hungary, salaried employees can make a request through their employer that up to 1% of their income tax withheld at the source be earmarked to the NCO of their choice. If a taxpayer does not allocate 1% of their taxes to an NCO of their choice, then the allocation will be made by the parliament as part of the budget process.

<sup>18</sup> Article 36 of the Law on Public Associations and article 19 of the Law on Foundations.

health care, social assistance, culture, arts, amateur sports, environment.<sup>19</sup> This list is not exhaustive and it is the role of the commissioners to determine whether the activities an NCO engages in do serve the public good. NCOs which carry out public benefit activities but support a political party or candidate in an election cannot be certified.<sup>20</sup> These requirements are important but not sufficient in relation to good international practice, in particular for PBOs that are beneficiaries from subsidies. It is important that, in addition to these requirements, PBOs benefiting from public support be required to (i) have their financial and narrative statements open to the public, (ii) carry out audits of their accounts, and (iii) in case of liquidation of the organization, provide that the remaining assets after the discharge of all debts and liabilities be distributed to another PBO to be used for purposes similar to those of the liquidated PBO. While all Moldovan foundations do have to comply with such requirements,<sup>21</sup> public associations are not required to do so under the law as it is currently written. Therefore, such requirements will have to be stipulated either by amending the law or by requiring that subsidized public associations insert such provisions in their articles of association. .

Article 11 of the Law on Public Associations stipulates that support to NCOs is to be carried out in compliance with the procedure established by the government. To our knowledge no regulation has been adopted permitting the implementation of this provision of the law. It is important that the issues raised in the previous paragraph be addressed in the norms that will regulate the award of subsidies to PBOs.

Other issues would benefit from being regulated by law or by regulations adapted and adopted by each level of public administration. These include:

- How should selections of PBOs for subsidies be carried out and by whom?
- In which cases should the award of a grant be the result of a competition?
- What type of reporting should be required from grantees?
- How should the monitoring of allocated funds and of activities be carried out and by whom?
- What should be the sanctions in case of misuse of funds.
- What should be done with unused funds?

### **III. “PERSONAL BUDGETS” (VOUCHERS)**

The ultimate goal for public authorities to delegate the provision of social services to the non-governmental sector is to ensure that beneficiaries are receiving the assistance they are entitled to. It seems that some public authorities have been hesitating to support the activities of certain NCOs providing much-needed services to disabled children because these NCOs also provide services to non-disabled children. The public authorities want some guarantee that only the activities related to the disabled children will be supported from allocated public funds because the priority target group of the support is to be exclusively disabled children. While it would be

---

<sup>19</sup> Article 2 of the Law on Public Associations.

<sup>20</sup> Article 39 of the Law on Public Associations.

<sup>21</sup> The Law on Foundations stipulates that:

- Foundations which assets are superior to 1 million Lei must establish an independent revision commission which function include carrying out annual audits of the accounts (article 29).

- Once a year foundations must publish their annual report including narrative and financial statements.

Further any interested person should be granted access to these reports (article 33).

- at liquidation, remaining assets of a foundation are transferred to another foundation with similar purposes (article 36(7)).

possible to verify this information by requiring that NCOs adopt specific accounting standards, another option would be to provide “personal budgets” in the form of vouchers to the legal representative of the disabled children, enabling them to redeem the voucher with any provider of their own choice. This mechanism would guarantee that the public funds are used for the intended beneficiaries only. The provider having provided the service against the payment by the voucher would then be able to reclaim the fee for the service provided to the public authorities.

The adoption of such a mechanism would require that a proper assessment and follow up of the children and the care they have received would need to be carried out by the authorities that provide the vouchers. The project of child-care commissions at the raion level being developed under the TACIS project “Capacity Building in Social Policy Reform in Moldova” could effectively serve this purpose. Further, it is important that the voucher be redeemed by the beneficiaries by using them with appropriate service providers. In this case, the accreditation of service-providers where the vouchers can be redeemed would be necessary to guarantee that the services provided comply with minimum established standards. The Law on Social Assistance stipulates that the Ministry of Labor and Social Protection is responsible for developing mechanisms of accreditation of social assistance providers,<sup>22</sup> but this provision is yet to be implemented.<sup>23</sup> The mechanism provided for in the Law on Licensing of Several Types of Activities could also serve as a basis for elaborating accreditation mechanisms for social services in the same manner that educational and health care services are covered by the licensing law.

Compliance with minimum standards could at this stage be required from entities that have entered into a procurement contract or a subsidy agreement with public authorities but in the case of public funding through vouchers, the accreditation mechanism would be the only mechanism guaranteeing that the State is funding a service complying with minimum standards.

## CONCLUSION

The Moldovan law does not present major obstacles for the public authorities to be able to delegate the delivery of childcare services to NCOs. In many respects it provides a good basis for the development of such mechanisms.— Nonetheless, for the implementation of the mechanisms described in this paper each level of public authority should have a clear understanding of its responsibility in relation to childcare services. Each level of public administration should be contracting out or supporting only those services the provision of which it must secure.

At present, the Moldovan Law on Local Public Administration (LPA) does not, however, provide for a clear picture of the responsibility of local public administrations at the first and second levels. For example the Law on LPA provides that the responsibility of “social protection of the population, including of the unemployed” have been delegated to both the second level and first levels of public administration.<sup>24</sup> Both levels are also responsible for providing social assistance to the population,<sup>25</sup> but the law does not provide for a distribution of responsibilities between the two levels in relation to the types of social assistance or beneficiaries. The Law on Social Assistance also fails to provide a clarification on the distribution of responsibility. This issue needs to be addressed and clarified. The current practice in budget formation at the local

---

<sup>22</sup> Article 12 (2) of the Law on Social Assistance.

<sup>23</sup> At the time of elaboration of this report, a draft regulation was reported to exist. However the draft was never communicated to us.

<sup>24</sup> Articles 12 and 13 of the Law on Public Administration.

<sup>25</sup> Articles 10 and 11 of the Law on Public Administration.

levels may provide a basis to determine how to distribute these responsibilities.

#### LAWS AND NORMATIVE ACTS REVIEWED IN THIS ASSESSMENT

##### **LAWS:**

- Civil Code of July 6, 2002
- Law n. 837 on Public Associations of My 17, 1996
- Law n. 581-XIV on Foundations of July 30, 1999
- Law n. 1420-XV on Charity and Sponsorship of October 31, 2002
- Tax Code of June 16, 2000
- Law n. 1166-XIII on Procurement of Goods, Works and Services for Public Needs of April 30, 1997
- Law n. 123-XV on Local Public Administration of March 18, 2003
- Law n. 547-XV on Social Assistance of December 25, 2003
- Law n. 451-XV on Licensing on Several Types of Activities of July 30, 2001

##### **NORMATIVE ACTS:**

- Regulation on Working Group for Procurement of Goods, Works and Services of March 5, 2003
- Regulation n. 952 on Single Source Procurement of August 4, 2003
- Regulation n. 988 on Ecological Fund of September 21, 1998.

# A LEGAL PERSPECTIVE ON TELECOM GROWTH IN INDIAN SUBCONTINENT

BY HARI PRASAD K.V.\*

## INTRODUCTION

India became independent in the year 1947 after a protracted rule of 200 years by the British Empire. Post independence, slow growth was witnessed for almost five decades. The Government of India (GoI) initiated Liberalization & Privatization policies in the year 1991 during the tenure of the then Finance Minister Dr. Manmohan Singh,<sup>1</sup> who is incidentally the present Prime Minister of India under the leadership of the Congress Party. World-wide, developed countries have digested the idea of ‘Global Business’ stretching out from their respective domestically confined cocoons. Developing countries have started inculcating this idea with a refinement that is suitable to their respective countries.

The growth of a civil society in developing countries experiences the impact of the availability or non-availability of “Basic Needs.”<sup>2</sup> In the present era, one such need, rather more a necessity, is ‘Communication’ among people. Telephony has become the essential medium for communicating among people utilizing tools like basic landline phone, mobile phone (Cellular phone), VoIP (Voice-over-Internet), Video Bridge, etc., for voice communication and tools like Internet, Electronic mail (E-mail), Mobile messaging, etc., for Data communication. E-commerce is another such growing area utilizing the telephony segment for doing business in cross-border international trade. Further, Telecommunication companies are thriving towards seamless mobility (connectivity on the move) with emerging tools like Wireless Fidelity (WiFi - hotspots), Wireless Internet on Laptops, etc. Against this backdrop, different countries have drafted and implemented varied strategic policies and diversified legislation to promote and regulate the telecommunications industry suitable to their countries. One such attempt was made in India during the last one and half decades and its purpose was in part to encourage social and economic development throughout India.

This paper chronicles the development of the telecom legislation in India following

---

\* *The author is associated with Business Advisory Wing of KPMG International, Kuwait. The views expressed are author’s own and need not necessarily concur with that of his employer or the publisher of the International Journal of Civil Society Law. He can be contacted at [kvhprasad@gmail.com](mailto:kvhprasad@gmail.com)*

<sup>1</sup> Dr Manmohan Singh was the then Finance Minister under the Congress Prime Ministership of P V Narasimha Rao, to bring in the concept of privatization under the liberalization policies. Slashing subsidies, partial privatization of state-run companies, inviting foreign investors, dismantling license raj (calling for government approval on every single decision of businessmen) were the key features of the economic reforms in 1991.

<sup>2</sup> Abraham Maslow propounded (between 1940-1950s) the five-tier ‘Hierarchy of Needs’ theory namely, Biological & Physiological needs, Safety needs, Belongingness and Love needs, Esteem needs and Self-Actualization needs. In the present era, communication can also be viewed as an extension of the need-based theory.

independence, and it discusses the new regulatory scheme set-up, with its independent regulator and an appellate tribunal to sort out disputes. It then proposes reforms that will grant more access to telephony and related new technologies for India's people, while at the same time recognizing the enormous potential of current data-gathering mechanisms for invasions of the right to privacy.

## **POLICY MAKING INITIATIVE**

The National Telecom Policy<sup>3</sup> (NTP) was introduced in the year 1994, with the following stated intention.

*“The new economic policy adopted by the Government aims at improving India's competitiveness in the global market and rapid growth of exports. Another element of the new economic policy is attracting foreign direct investment and stimulating domestic investment. Telecommunication services of world- class quality are necessary for the success of this policy. It is, therefore, necessary to give the highest priority to the development of telecom services in the country”.*

The objectives<sup>4</sup> of NTP 1994 were quite generic. The striking feature was the inclusion of Cellular Mobile Telephone (CMTS) in Valued Added Services (VAS) without visualizing the growth of mobile phone segment over landline telephones. It can be acknowledged, on the other hand, that this second National level policy document was designed to promote telecommunications throughout the country. Until the 1994 policy document, the incumbents, BSNL and MTNL<sup>5</sup> were running the show and providing telephony service in the country in a leisurely pace. Nevertheless, the NTP 1994 might have benefited from a dip stick survey and an estimate of needs prior to its enactment, which would have given a sense of customer perspective on what was needed.

The National Telecom Policy 1999 moved more towards creating an environment which “enables continued attraction of investment in the sector and allows creation of communication infrastructure by leveraging on technological development”. The striking feature of NTP 1999

---

<sup>3</sup> In line with the economic reforms, Government of India recognized the importance of telecommunications sector in the socio-economic development and had introduced the first National policy of its kind named ‘The National Telecom Policy – 1992’. Please refer to <http://www.dot.gov.in/ntp/ntp1994.htm> for details.

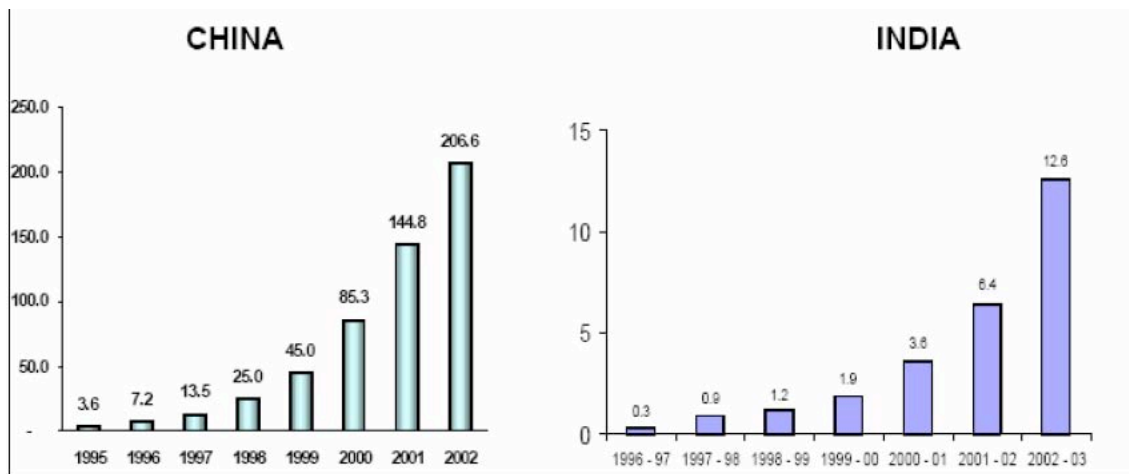
<sup>4</sup> NTP 1994 was set up with the following objectives:

- a) The focus of the Telecom Policy shall be telecommunication for all and telecommunication within the reach of all. This means ensuring the availability of telephone on demand as early as possible.
- b) Another objective will be to achieve universal service covering all villages as early as possible. What is meant by the expression “universal service” is the provision of access to all people for certain basic telecom services at affordable and reasonable prices.
- c) The quality of telecom services should be of world standard. Removal of consumer complaints, dispute resolution and public interface will receive special attention. The objective will also be to provide widest permissible range of services to meet the customer's demand at reasonable prices.
- d) Taking into account India's size and development, it is necessary to ensure that India emerges as a major manufacturing base and major exporter of telecom equipment.
- e) The defence and security interests of the country will be protected.

<sup>5</sup> MTNL (Mahanagar Telecom Nigam Limited) operates in Delhi and Mumbai. BSNL (Bharat Sanchar Nigam Limited) operates in the entire country except Delhi and Bombay.

was to demarcate the licenses based on services<sup>6</sup> and removing CMTS from VAS and making it a separate licensed service. Specific targets set by the NTP 1999 were to make the telephone available on demand by the year 2002 and sustain it thereafter so as to achieve a tele-density<sup>7</sup> of 7 by the year 2005 and 15 by the year 2010. However, the reality surpassed the expectation. The present tele-density exceeded 10 by July 2005. Interestingly, the number of mobile telephones became greater than the number of land-lines in early 2005. Further, statistics reveal that the average annual growth of the telephone customer base during the 1948-1998 is 0.37 million/year as against 11.5 million/year during the period 1998 to 2005.

Witnessing the growth in these eight years, it is quite evident that the growth appetite in telecommunications industry in India was not recognized at an early stage, which resulted in putting itself in a back-seat compared to its regional competitor China. Growth of mobile phones (in millions) in China and India the chart below<sup>8</sup> are self-explanatory to prove this. Has improper handling of policy matters by think tanks resulted in delayed growth? It is clearly a debatable issue in the Indian context.



## THE LITIGATION PERIOD

Interestingly, the GoI introduced a new concept called ‘Limited Mobility’<sup>9</sup> which is mobile service within an SDCA.<sup>10</sup> This license was granted to Fixed Service Providers (FSPs) are also

<sup>6</sup> The New Policy Framework (*NTP 1999*) has looked at the telecom service sector as follows:

(a) Cellular Mobile Service Providers, Fixed Service Providers and Cable Service Providers, collectively referred to as ‘Access Providers’ Radio Paging Service Providers (b) Public Mobile Radio Trunking Service Providers (c) National Long Distance Operators (NLDO) (d) International long Distance Operators (ILDO) (e) Other Service Providers (f) Global Mobile Personal Communication by Satellite (GMPCS) Service Providers and (g) V-SAT based Service Providers

<sup>7</sup> Teledensity is the unit to measure the number of customer per hundred of the total country’s population.

<sup>8</sup> Adapted from TRAI consultation paper titled “Recommendation on Unified License”. Full text can be referred at <http://www.trai.gov.in/recom.htm>

<sup>9</sup> Limited Mobility is offered in CDMA technology by Fixed Service Providers as against the GSM technology used by Cellular Mobile Service Providers.

<sup>10</sup> SDCA - Short Distance Charging Area is app. 50 kms coverage with a specified telephone exchange.

called Basic Service Operators),<sup>11</sup> which has created a great deal of confusion in the industry and has ultimately landed up in the Courts of Law. Cellular Mobile Service Providers (CMSPs) have challenged the decision of the Central Government in the Department of Telecommunications (DoT) dated 25 January 2001, allowing FSPs to provide mobility to its subscribers with Wireless Access Systems limited within local area i.e. SDCA. It was not clear whether it was mooted with a *mala fide* intention by DoT or TRAI.

Honorable Justice D P Wadhwa<sup>12</sup> gave a strongly worded minority Judgment 2:1 in the Telecom Disputes Settlement Appellate Tribunal (TDSAT)<sup>13</sup> in the Petition No 1 of 2001 dated 8 August 2003 in the action *Cellular Operators Association of India (COAI) & Others v. Union of India*<sup>14</sup> He wrote as follows: “Judicial discipline restrains us from using strong language but the whole thing proceeded on specious pleas to grant benefit to FSPs. Look at the track record of FSPs when against target of 42856 VPTs,<sup>15</sup> only 12 VPTs had been provided till September 1999. Instead of taking action for breach of terms of the licence even to the extent of revoking the license, Government rewarded FSPs by passing the impugned guidelines”. He further added “We<sup>16</sup> regret we are unable to agree with the report of GOT-IT in spite of its constitution of profound persons. But for this it is DOT, which is to be blamed as relevant record was suppressed from GOT-IT. Even TRAI failed in its legal obligations and gave faulty recommendations.”

The whole process of consultation, recommendation and implementation of Limited Mobility concept was found faulty by the sole Judicial Member on the Bench then. He wrote as follows: “The first and foremost question should have been if the WLL<sup>17</sup> is permissible at all. You cannot give correct answer when you start with a question whether WLL with mobility should be permitted.”<sup>18</sup> All said and done, it was a minority report of Justice Wadhwa and the majority Judgment propounded as “we have seen no illegality or arbitrariness in either the procedures followed or the final decision taken by the Government to permit the Basic Service Operators to provide Limited Mobility Services as a value-added service within the ambit of their license. We also hold that allowing WLL with limited mobility in the basic service stream does not go against the spirit of NTP-1999.” Thus, Limited Mobility granted to FSPs was allowed to continue.

## CHANGE IN THE LEGISLATION

---

<sup>11</sup> DoT guidelines issued on 25/01/2001 and in pursuance of which the FSPs licenses were amended.

<sup>12</sup> The only Judicial Member on the Bench of TDSAT besides the other two Non-Judicial members R U S Prasad and P R Dasgupta.

<sup>13</sup> Telecom Disputes Settlement Appellate Tribunal (TDSAT) has come into effect with the TRAI (Amendment) Act, 2000. The functions are to adjudicate any dispute between a licensor and licensee, between two or more service providers, between a service provider and a group of consumers, and to hear and dispose of appeals against any decision or order of TRAI.

<sup>14</sup> Refer the full text of judgment at <http://www.tdsat.nic.in/judgements.htm>.

<sup>15</sup> As per license conditions each of the Licensee has to fulfill Village Pay Telephony (VPT) obligation by the

<sup>16</sup> On the day of pronouncement of Judgment he said that the Judgment was typed ‘We’, however should be read as ‘I’

<sup>17</sup> Limited Mobility is offered with Wireless in Local Loop (WLL) in CDMA technology.

<sup>18</sup> TRAI in its recommendations which it sent on 8.1.2001 said that it considered four main questions namely: (i) whether WLL with mobility should be permitted; (ii) if it is permitted, what should be the extent, (iii) likely economic consequences of the mobility so granted and their impact on the main stake holders and (iv) In case of the likely consequences of the grant of mobility are adverse to any of the stake holders to what extent such mitigation. It would be seen the approach itself was faulty. It posed a wrong question and got wrong answer.

The National Telecom Policy 1999 has, *inter alia*, provided the following:

*Para 9.0 "Changes in legislation: The Indian telecommunications system continues to be governed by the provisions of the Indian Telegraph Act, 1885 (ITA 1885) and the Indian Wireless Act, 1933. Substantial changes have taken place in the telecommunications sector since 1992. ITA 1885 needs to be replaced with a more forward looking Act".*

Accordingly, in the August session of Parliament, The Communication Convergence Bill 2000<sup>19</sup> was introduced in the lower house of the Parliament, which was drafted by the eminent Jurist F S Nariman. Communication sector comprises of Telecommunications, Broadcasting, and Information Technology.<sup>20</sup> This Bill, second of its kind in the world,<sup>21</sup> intended to promote and develop the Communications sector in India. This bill has yet to be passed by both the houses of Parliament.

In line with the Convergence Bill and to cover up the aberrations created in the Limited Mobility process, GoI & TRAI has started the first phased process of Unified License<sup>22</sup> which is the convergence of CMSPs, FSPs, NLDOs, ILDOs and ISPs licenses. This first phase of convergence means a single license-making the technology, which is neutral, thus allowing licensees to operate any of these services. This is a welcome step towards growth. However, added to the complexity, GoI has made TRAI the nodal regulator for Cable Operations in the country. This means, in simpler terms, an enhanced role for TRAI.

## **FUNCTIONS, POWERS AND CHALLENGES**

TRAI has a special role to play in regulating the telecom services in India. The functions enshrined in section 11 of TRAI Act, 1997 clearly specified the role the regulator. Of the functions, focus is drawn towards the following sub clauses of Section 11(b):

- (i) ensure compliance of terms and conditions of license;
- (iii) ensure technical compatibility and effective inter-connection between different service providers;
- (iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
- (v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunications service;

Equally, focus is drawn towards the powers of the regulator under section 12 of the TRAI

---

<sup>19</sup> The entire text can be viewed at <http://www.mit.gov.in/conbill.pdf>

<sup>20</sup> Information Technology Act 2000 has come into effect with a preamble "An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

<sup>21</sup> Malaysia is the first country to have a legislation specific to convergence in communication industry.

<sup>22</sup> TRAI has issued consultation paper on "Recommendation of TRAI on Unified License" dated 27<sup>th</sup> Oct 2003.

Act, 1997. Accordingly, *inter alia*, the following clauses attract attention.

Section 12 (1) Where the Authority considers it expedient so to do, it may, by order in writing,

- (a) call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require; or
- (b) appoint one or more persons to make an inquiry in relation to the affairs of any service provider; and
- (c) direct any of its officers or employees to inspect the books of account or other documents of any service provider.

These Functions and Powers enshrined in the Act make the regulator an independent agency to monitor and regulate the telecommunications industry in the country in an effective and efficient manner.

The following are a few major areas where a disorganized and untimely approach has been made in resolving issues. TDSAT, The appellate tribunal set up to correct the misapplication of the law has had to step in to correct the situation many times:

- a) Dealing with interconnect issues and delays in resolving operational hiccups among service providers.
- b) Providing unbiased recommendations (*suo motto* or otherwise) on policy matters to DoT from time to time.
- c) Enforcing the compliance of ‘Non-Discrimination’ clause in Tariff Management
- d) Monitoring compliance standards on ADC<sup>23</sup> with all service providers.
- e) Enforcing rules to fulfill license conditions especially with respect to VPTs and rollout obligations.

## **THE ROAD AHEAD**

Going forward there are enough challenges before the DoT, in the capacity of Licensor and the TRAI, in the capacity of Regulator. Effective management by both these bodies may probably reduce the work of “Umpires”<sup>24</sup> in the TDSAT, the Adjudicator. A brief look at the following would provide an overview of the few areas to be taken up.

- Number Portability: Includes both Mobile Number portability and Fixed Number portability, where in customers can retain the same number, even if they change the service provider.
- Career Access Code (CAC): Customers opting to choose the long distance operator in directing their call to be carried by a specified carrier. This provides effective competition

---

<sup>23</sup> ADC - Access Deficit Cost is the deficit which the incumbent has incurred over a period in providing basic telephony services at a subsidized cost. Service providers are per license conditions need to pay ADC to incumbent.

<sup>24</sup> Judge John Roberts, the nominee to be Chief Justice of the Supreme Court in US, has provided a metaphor on the role of a Judge as “Umpire” in his recent hearings before the Judiciary Committee of US Senate.

in long distance segment.

- Conditional Access System (CAS): Customer choosing the paid channels of their choice. An attempt is already made by GoI to implement in select metros (Delhi and Mumbai) but in vain. However, TRAI has greater role to play to implement this across the country.
- Spectrum Management: A scarce resource, efficient management is the only method in keeping a healthy competition among service providers.
- Voice over Internet Protocol (VoIP): This is an area which challenges the long distance segment. This can also be looked vis à vis from Internet Service Provider licenses with VPN issues.
- Anti Spam Legislations: Spam is a contagious software disease which needs a special attention. Incidentally, only few countries have passed bills in bringing out anti spam legislations. This area requires attention in light of the growing subscriber base.
- Containing gray market<sup>25</sup> in the international long distance segment.
- Customer focused regulations: With increased tele-density, telemarketing is at its peak which infuriates customers with unwanted calls. Regulations like Do-Not-Call-Registry in line with FCC<sup>26</sup> regulations should be a healthy move.

As I was writing this paper, the sensex at the Bombay Stock Exchange had just exceeded 8500 points. This is the first time in the history of the Indian stock market that the milestone of the 8500 peak was reached. Surprisingly, it has taken only eight sessions days to gain 500 points from 8000. SEBI<sup>27</sup> have voluntarily taken up screening all the volatile scrips, which are suspicious. RBI<sup>28</sup> has been asked to screen all the bank accounts to monitor the funds diverted towards scrips through customer accounts. This goes to say the kind of vigilance these regulators are taking up. Understandably, any corrections in the market would make governments relatively unstable.

No less is the role of TRAI, however, in this huge infrastructural telecom market in dealing with various puzzling issues existing in the industry. A proactive, vigilant, and unbiased role is what is expected out of an independent regulator. Predominant issues that need an immediate attention from both licensor and regulator are:

- Addressing policy matters that are ending up in litigation every now and then due to improper consultations, unbiased recommendations and untimely propositions. Handling them requires a diligent approach.
- Monitoring and containing the gray market, which is growing tremendously. Gray markets are posing challenges and are a threat to the business of Long Distance Operators. Special attention is required in this area to protect the interests of carriers, who

---

<sup>25</sup> Per Industry estimates, Rupees 17 to 20 Billion of revenue per year is lost due to grey market operations.

<sup>26</sup> Federal Communication Commission (FCC) regulated a National Do-Not-Call-Registry. Accordingly, commercial telemarketers are not allowed to call numbers that are on the registry, subject to certain exceptions. As a result, consumers can, if they choose, reduce the number of unwanted phone calls. *See* [http://www.fcc.gov/cgb/donotcall/ for how to register yourselves \(applies to US residents\) to utilize this service.](http://www.fcc.gov/cgb/donotcall/for%20how%20to%20register%20yourselves%20(applies%20to%20US%20residents)%20to%20utilize%20this%20service.)

<sup>27</sup> Security Exchange Board of India (SEBI) is the Regulator of Stock Exchanges in India.

<sup>28</sup> Reserve Bank of India (RBI) is the Banking Regulator in India.

have invested huge amounts in satellite and undersea cables.

- Diffusing frauds<sup>29</sup> that are fast emerging and having a considerable impact on the financial situations of legitimate carriers. Regulators should make service providers monitor their network elements and information systems efficiently and report on the set compliance so as to lessen frauds. In the present context, the role of External Auditor under the Companies Act, 1956 is also worth mentioning. Clause (xxi) of The Companies (Auditors Report) Order, 2003<sup>30</sup> read with section 227 of The Companies Act 1947 specifies the auditor to report and comment on “whether any fraud on or by the company has been noticed or reported during the year; If yes, the nature and the amount involved is to be indicated.”

## TELEPHONY AND THE CIVIL SOCIETY

Hampered by the delayed growth (since independence) in the industry, tardy policy initiatives, and regulatory bottlenecks, the telecom industry has nonetheless been helping the civil society in providing legal evidence in civil and criminal law cases in India to bring many culprits to book. It has helped the executive branch of the Government (police) in monitoring various illegal transactions to contain further damage. The recent cases to mention include a cricketer’s match fixing, underworld mafia links, exposing bribery in government departments, Bollywood illicit links, cross-border criminal transactions etc. These are a few to name.

Violations of the right to privacy for India’s citizens is also a focus area for civil society telephony interactions. In the initial days, ‘Voice interception’ and ‘Phone tapping’ was usually confined to Intelligence Bureau (IB) and Research and Analysis Wing (RAW) of the Central Government. The Indian Telegraph Act, 1885 gives the Central and the State Governments the power to intercept any communication in the case of ‘public emergency’ and ‘in the interest of public interest’. In a judgment in 1996 on Writ Petition (C) No. 256 of 1991, *Peoples Union for Civil Liberties v. The Union of India and Others*, The Supreme Court of India had laid down certain guidelines to curb the arbitrary power of surveillance enshrined therein to the Government. Accordingly, the conditions are that the orders for tapping should initiate from the Home Secretary Level; such orders must be issued only when the required information cannot be collected by other means; and such orders should be to a limited period of time.

With the advent of increased service providers and advanced technologies, the service providers are able to provide online tapping to surveillance agencies almost with a short notice period. Against this backdrop, more stringent safeguards are required from the citizen rights point of view. Before India becomes an eavesdropper’s paradise, it is probably the right time to bring in proper legislation on phone tapping to safeguard the right to privacy. After all, the growth of any industry its related legislations and their cumulative impact on the civil society needs to be weighed from a citizen’s point of view. Making this tool of freedom of expression into an instrument of privacy invasion requires rigid attention from the people who safeguard civil rights in India as well as the NGOs that help to enforce the protections granted by the Constitution of India and human rights instruments that it has signed an ratified, such as the International

---

<sup>29</sup> Frauds like eavesdropping, SIM cloning, SMS spoofing; Illegal call routing, EPBX frauds etc are common in present day telecom industry.

<sup>30</sup> The Companies (Auditors Report) Order, 2003, (CARO, 2003) has replaced The Manufacturing and other Companies (Auditor's Report) Order 1988 (MAOCARO, 1998) and has come into effect from 1st day of July, 2003.

## Covenant on Civil and Political Rights (ICCPR).

For example, the Human Rights Act 1993,<sup>31</sup> clearly speaks about rights of India's citizens to life, liberty, equality, and dignity. Although the Constitution of 1950 does not expressly recognize the right to privacy,<sup>32</sup> the Supreme Court first recognized in 1964 that there is a right of privacy implicit in the Constitution under Article 21, which states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>33</sup> This issue has been picked up in a paper written for the Commission in 1997,<sup>34</sup> and it needs further attention in light of increased availability of the use of telephony for increased spying on citizens.

## CONCLUSION

This paper has discussed the development of the telecom legislation in India following independence, as well as the new regulatory set-up, with its independent regulator and an appellate tribunal to sort out disputes. It has proposed reforms that will grant more access to telephony for the citizens of India as well as to related new technologies. At the same time it is important to recognize the enormous potential of current data-gathering mechanisms for invasions of the right to privacy. Relying on the Constitution and case law, the paper has suggested ways in which Indian citizens can and should be protected against such invasions.

---

<sup>31</sup> [Human Rights Act, 1993.](#)

<sup>32</sup> Constitution of India, November 1949 <http://www.alfa.nic.in/const/a1.html>.

<sup>33</sup> *Kharak Singh v State of UP*, 1 SCR 332 (1964).

<sup>34</sup> R.C. Jain, National Human Rights Commission, India, Indian Supreme Court on Right to Privacy, July 1997.

## COUNTRY NOTES

### ASIA PACIFIC:

#### CHINA

### CHINA'S INTERNAL PUBLICATION SYSTEM

BY DAVID COWHIG\*

**INTRODUCTION** Chapter Three of He Qinglian's 2005 book *MEDIA CONTROL IN CHINA* [Zhongguo zhengfu ruhe kongzhi meiti], available in Chinese on the Human Rights in China website at [http:// www.hrichina.org/public/contents/20205](http://www.hrichina.org/public/contents/20205), explains the Chinese internal document publication system. He Qinglian was born in Hunan in 1956. Sent as a teenager to work in the countryside on a railway construction site, she studied history at Hunan Normal University and economics at Fudan University in Shanghai, finishing in 1985. After teaching jobs in Changsha and Guangzhou, she moved to Shenzhen, working first in the publicity department of the municipal Party Committee, and then on the Shenzhen Legal Daily.

In August 1996 she completed a book on the social and economic ills of China after two decades of reform policies. It was turned down as too explosive by eight or nine publishers. But after it appeared in Hong Kong in 1997 under the title *China's Pitfall*, an expurgated version was published in Beijing as *Modernization's Pitfall* in January 1998, with a preface by Liu Ji, Vice-President of the Chinese Academy of Social Sciences, then an adviser to Jiang Zemin. The book was an immediate sensation, as a blistering indictment of far-reaching inequality and corruption in the PRC, selling 200,000 legal copies and many more pirated ones. Ms. He now lives in New York.

**DESCRIPTION OF THE SYSTEM** The Chinese internal document system protects China's officials from being blinded by their own elaborate system of media control. There are many grades and types of internal documents [neibu wenjian]. Many are restricted to a certain level of official - such as county level, provincial level or down to a certain level of official in a ministry.

#### DEFINITIONS

- Formal Documents [zhengshi wenjian] are written and issued by leading organizations of the PRC Communist Party and government. These instructions [zhishi], regulations [guiding], and notices [tongzhi] are binding on lower level units. The most important formal documents are CCP Central Committee documents [zhonggong zhongyang wenjian].

- Status Reports [dongtai jianbao] are written and issued by Party, government and military leading departments provide comprehensive reports to higher levels and bulletins to guide the work of lower level units. In news organizations the most important is the monthly evaluation entitled the Situation Report [qingkuang tongbao]. The Situation Report lists incidents in which the media violated guidelines and the penalties imposed in each instance. The Report is an essential management tool of the Propaganda Department of the Communist Party for controlling news media so that the various PRC media do not violate propaganda discipline or as the propaganda department puts it "self-discipline."

- Reference Materials [cankao ziliao] are edited and published by larger news units such as Party

newspapers or government newspapers. According to news discipline, any matter that the media outlets believe would harm the image of the Party or government, threaten social stability and unity, or other matters not suitable for open publications such as corruption, social unrest, and larger business swindles are often reported internally rather than in the mass media. Many well-done reports by conscientious journalists are placed in internal channels rather than in the mass media. These “internal materials” are often printed in only a few dozen copies for distribution to leaders and certain organizations. The most authoritative are the three types of internal reference edited by the New China Press Agency.

The PRC State Secrecy Protection Law [Baoshou Guojia Mimi Fa] Section Nine stipulates has three grades of state secrets top secret (juemi), secret (jimi) and confidential (mimi) as well as a fourth grade of information, internal materials (neibu ziliao) that may be read by Chinese citizens only. The PRC State Secrecy Protection Law Implementing Regulations [Baoshou Guojia Mimi Fa Shichi Banfa] section two defines these grades of secrecy and the permissions allowed to government departments at each level. In each Chinese administrative region, Party organizations such as committees and disciplinary committees; government organizations such as people's congresses, governments, and consultative congresses; and military organizations such as military districts and their provincial military districts; and the hundreds of agencies subordinate to them issue these three types of internal documents.

The level of classification is tied to the administrative levels of Party and government in China. The higher the administrative level of the issuing office, generally the more secret the document is. In local government the issuing grades are province [sheng], region (or city directly subordinate to a province) [diqu or shengzhixiashi] and county [xian]; grades within government organs are ministry [bu], bureau [ju] and office [chu]; in the military corps ([jun], division [shi], and regiment [tuan]. The most authoritative documents are drafted by the Central Committee to convey instructions from CCP leaders. Documents with Chinese Communist Party Central Committee Document [Zhonggong Zhongyang Wenjian] at the top in red letters are the most authoritative. **Internal News Publications for Senior Party and Government Officials:** The first three publications are internal news edited and distributed within the PRC news control system are edited and distributed by the Second Editorial Office of the Domestic News Department of the New China News Agency and by the Chief Editor's Office of the People's Daily. The fourth publication is devoted to policy suggestions and reports and also reaches relatively low-level officials.

- Domestic Developments Foundry Proofs [Guonei Dongtai Qingyang] edited by New China News Agency once or twice daily to report on important domestic events and important proposals at the high level of the CCP. Generally called Big Reference [da cankao], it is 2 - 6 pages long and distributed to the central committee leaders, officials of ministerial rank, and to provincial governors and Party secretaries. This top-secret document must be returned after being read those who lose it assume political responsibility. Unlikely to leak overseas, but some of the content might pass by word of mouth. Domestic Developments is a bulletin for the leaders; more detailed analysis of matters that will not be reported in the mass media such as certain social disturbances, appear later in Internal Reference.

- Internal Reference [Neibu Cankao] edited by the New China News Agency twice weekly, 40 - 60 pages to report major domestic developments and statements. This secret document is circulated as far down as the regional and divisional levels and is the only formal channel to provide domestic classified information to middle and higher ranking Party members.

- Internal Reference Selections [Neibu Xuanbian] edited by the New China News Agency

weekly, 30 - 40 pages. Provides confidential level information to grassroots cadres down to the district and township leader level as well as to officials at the higher county and regimental level. After the mid 1990s very little true confidential matters appeared in it and it was no longer collected after reading. Readership was extended to the deputy office director level.

- Internal Readings [Neibu Canyon] edited by the People's Daily. Internal Readings is a secret level news document that contains policy suggestions and some survey reports of sensitive matters such as corruption in government and studies of problems of village government. From the mid 1990s cadres at the vice office director level have been allowed to subscribe privately to Internal Readings.

The news monopoly has enabled the CPC to filter the news although this has become more difficult since the Internet arose in the 1990s. Security has weakened and many units no longer collect Internal Reference Selections or Internal Readings. Sometimes these publications are sent out with the trash. However private citizens are not allowed to hold secret or above classified material, and some people have been prosecuted for that offense. The scope of state secrets can be expanded at the Party's convenience. In some cases, He Qinglian writes, formerly open materials have become classified. After June 4, 1989, for the sake of protecting China's image, many documents issued by the Propaganda Department of the Communist Party to guide the media have been classified at the top secret or secret levels or have been passed orally.

There can be some confusion between neibu as a restricted classification and neibu referring to internal documents that might themselves carry a security restriction all the way from neibu all the way up to top secret (juemi). The classification grades of juemi, jimi, and mimi that correspond closely to what in the US government is called top secret, secret and confidential as well as neibu is restricted but not as sensitive as mimi. There are various types of internal materials which can carry various classification levels some merely neibu and some [juemi] top secret. The use of the word neibu can be confusing -- in one context meaning restricted but less sensitive than confidential while there is a whole variety of internal documents also referred to loosely as internal.

# JAPAN

## PROPOSED CHANGES IN THE LEGAL FRAMEWORK FOR NPOs IN JAPAN

BY KARLA W. SIMON\*

*Introduction.* In the spring of 2002, the Cabinet of the Japanese Government began to discuss possible far-reaching reforms of the legal and fiscal framework for not-for-profit organizations (NPOs)<sup>1</sup> in Japan. This discussion has come on the heels of

- reforms carried out in 1998, which created a new type of NPO, the Specified Nonprofit Activities Corporation (SNC),
- tax legislation affecting a subset of such organizations passed in 2001, and
- reforms of the SNC legislation and the related tax law in 2002, which broadened the application of the SNC legislation and permitted tax deductible contributions to be made to a larger subset of such organizations.

Importantly, the discussions are also taking place within the context of the larger administrative reforms of the Japanese state, which date back to the latter part of 2000 and which are part of Prime Minister Junichiro Koizumi's structural reforms to Japan's bureaucratic state.<sup>2</sup>

These are important developments, but they have both positive and negative aspects. Most significantly they will create a new system for NPOs in a country that has rigidly adhered to 19<sup>th</sup> Century thinking at least with respect to the traditional Civil Code entities -- associations and foundations. As described below, the reforms, when they are fully implemented, will make it easier to set up associations and foundations without a dual permitting process, they will create a new public benefit commission to oversee (parts of) the sector, and they will clarify and amplify the existing cumbersome regime for tax exemption and tax deductibility of contributions. On the other hand, they will not entirely rationalize the current highly complex legal framework by doing away with unnecessary forms, they will not create opportunities for access to government funds under mechanisms such as those used in the Republic of Korea, they will make the administration of the law cumbersome by setting up commissions at the prefectural level, and they will take years to be implemented (full implementation is not expected before 2008).

Given the importance of the developments, this paper describes various developments and their origins. It also discusses future reform prospects, as the basic legislation is not expected to be

---

\* Prof. Simon is grateful to Tatsuo Ohta and Morihisa Miyakawa of the Japan Association of Charitable Organizations (JACO), Prof. Masayuki Deguchi of the University of Ethnology, and Prof. Yoshi Nomi of the University of Tokyo, and others who have aided her research in this area. Ohta-san and Miyakawa-san are frequent contributors to IJCSL and at international forums where reforms of laws affecting civil society are discussed. Each has made invaluable contributions to the development of the legal framework for civil society organizations in Japan.

<sup>1</sup> This term is used as it is most commonly around the world, to apply to all organizations in the not-for-profit sector. In Japan, the use of the term NPO briefly had currency at the time the Specified Nonprofit Corporation legislation was passed in 1998, but most Japanese now use the term NPO more broadly and refer to those organizations as SNCs or as SNPOs. Indeed, it will become necessary to use the term NPO more broadly as soon as the new legislation passes, as it will refer to *hieru hojin*, or "not-for-profit corporation."

<sup>2</sup> See JAPAN TIMES editorial, *Another step in bureaucratic reform*, 12/28/2004, commenting on the Cabinet decision of December 24, 2004.

introduced into the Diet until March 2006, with the tax legislation not expected to be introduced until 2007 or 2008. The paper includes a documentary supplement for purposes of easy reference. The bills dealing with the reforms have now been published in conceptual format, but not with legislative language attached.<sup>3</sup>

*Background.* According to a chapter in a book published in 2001 on the legal framework for NPOs in Japan, the current legal framework is exceptionally complex.<sup>4</sup> As the book chapter points out, there are currently ten forms of legal entity that could be called NPOs, and most of these require a high level of government involvement in the process of establishment. A chart derived from the book chapter can be found below. For example, both associations and foundations (public interest corporations or *koeki hojin*)<sup>5</sup> must have permission (*kyoka*) to be established, while social welfare corporations, educational corporations, and medical corporations must have approval from the relevant ministry.<sup>6</sup> This complexity, coupled with additional regulatory complexity as discussed in the book chapter, makes it difficult to set up an NPO in Japan.

It has until now been more difficult for many not-for-profit groups to acquire legal personality (*houjinka*) in Japan than in most other industrialized democracies. Although Article 21 of the Japanese Constitution provides for the freedom of association, this broad guarantee applies to voluntary and informal groups of citizens and, at least until 1998 when the SNC law (for the entities called *tokutei NPO hojin*) was passed, it did not imply that any group can easily obtain juridical personality.<sup>7</sup> Small organizations can operate in Japan informally, without legal status, but they are at a significant disadvantage; groups that are not legal persons cannot sign contracts or open bank accounts. This means, for example, that as a group they cannot hire staff, own property, sign lease agreements for office space, undertake joint projects with domestic government bodies, or even, on a mundane level, lease a photocopy machine. Legal status is important not simply because of its operational ramifications, but because it confers legitimacy on groups themselves and on civil society as a whole.

---

<sup>3</sup> See below for their contents.

<sup>4</sup> ROBERT PEKKANEN & KARLA SIMON, *The Legal Framework for Voluntary and Not-for-Profit Activity in Japan*, in *THE VOLUNTARY AND NONPROFIT SECTOR IN JAPAN* (Stephen P. Osborne ed.), Routledge, London, Tokyo 2001.

<sup>5</sup> The *koeki hojin* forms were permitted by the Civil Code of 1896/97, and they reflect the fact that the Civil Code is based on the German Civil Code of the same era. That Code, in turn, emulates the Code of Justinian, which laid down centuries of Roman Law and referred to both associations (*universitas personarum*) and foundations (*universitas rerum or bonarum*).

<sup>6</sup> These types of organizations were created by legislation during the Occupation, with the thought that they would make it easier to establish an NPO in Japan, at least one designed to carry out necessary social activities to aid in the country's recovery. The similarity in numbers of social welfare organizations and foundations and associations suggest that the theory is not correct.

<sup>7</sup> Under Japan's Civil Code system, as of 2001 only 26,089 groups gained legal status as not-for-profit *koeki hojin* versus the 1,140,000 American not-for-profit organizations formed as legal entities. This comparison is a little misleading, however, as NPOs in the United States are formed under a variety of state laws, while the figure used for the *koeki hojin* in Japan represents only those organizations formed as such; as is made clear in the text, *koeki hojin* are only the Article 34 entities and thus one of several types of NPO legal forms. Nonetheless, no one doubts that there are many more NPOs in the United States than in Japan.

**Table 5-2 Categories of Not-for-Profit Public Benefit Legal Entities in Japan<sup>8</sup>**

Entity	Governing Law (Date)	Purpose of the entity	Central Permitting Body	Permitting Standard	Number of Existing Agencies
Association <i>shadan hojin</i>	Civil Code, Article 34 (1897)	<b>Associations with the objective of worship, religion, charity, education, arts and crafts, and other activities for public interest, and not for profit</b>	Competent Governm't Agency	Permission <i>kyoka</i>	11,867
Foundation <i>zaidan hojin</i>	Civil Code, Article 34 (1897)	<b>Foundations with the objective of worship, religion, charity, education, arts and crafts, and other activities for public interest, and not for profit</b>	Competent Governm't Agency	Permission <i>kyoka</i>	12,814
Social Welfare Corporation <i>shakai fukushi hojin</i>	Social Welfare Business Law, Article 22 (1951)	<b>Corporations established under the law with the objective of social welfare businesses</b>	Ministry of Health and Welfare	Approval <i>ninka</i>	13,307
Educational Corporation	Private School Law, Article 3 (1949)	<b>Corporations established under the law for the purpose of establishing a private school</b>	Minister of Education	Approval <i>ninka</i>	11,765
Religious Corporation <i>shyuukyoku hojin</i>	Religious Corporation Law, Article 4 (1951)	<b>Corporations having the purpose of evangelizing, conducting religious rites, and educating and nurturing believers</b>	Minister of Education	Certification <i>ninshou</i>	183,894
Medical Corporation	Medical Law, Article 39 (1950)	<b>Associations or foundations whose objectives are to establish a hospital or clinic where doctors and dentists are regularly in attendance, or a facility for the health and welfare for the elderly</b>	Ministry of Health and Welfare	Approval <i>ninka</i>	14,048
Public Charitable Trust	Trust Law, Article 66 (1923—applied 1977)	<b>Trusts with the objectives of worship, religion, charity, education, arts and crafts, and other purposes in the public interest</b>	Minister of competent governm't agency	Permission <i>kyoka</i>	433
Approved Community-Based Organization	Local Autonomy Law 260 (2) (1991)	<b>Organizations formed by residents of a community</b>	Mayor or town or village headperson	Notification <i>todokede</i>	841

<sup>8</sup> Source: Pekkanen, 2000c (data as of 2000).

Special Nonprofit Activities Legal Person “SNC”	Special Nonprofit Activities Promotion Law (1998)	<b>Nonprofit entities whose activities include those in promotion of health, welfare, education, community development, arts, culture, sports, disaster relief, international cooperation, administration of organizations engaging in these activities, etc. (11 examples)</b>	Economic Planning Agency	Certification <i>ninshou</i>	1,012
---	---	---	--------------------------	------------------------------	-------

A further type of NPO was added to this group in 2001, the *chukan hojin* (“intermediate” *hojin*), which is used by citizens to establish mutual benefit organizations or MBOs. The process for establishing such organizations is a certification process.

SNC legislation and tax legislation affecting SNCs. The amendments in 2002 were made to the SNC Law and the tax law as it affects SNCs to address specific issues that have hampered the growth of Japan’s not-for-profit sector. A supplementary provision in the original law had stipulated the re-evaluation of the specified nonprofit corporation system within three years, and this effort at review and reform was thus carried out pursuant to that provision.<sup>9</sup>

The principal amendments that resulted from the process, which were approved in December 2002 and came into effect on May 1, 2003, are as follows ([see the full text of the amended NPO Law](#) on the website of the Japan Center for International Exchange, JCIE)):

- The expansion of the authorized fields of nonprofit activity from 12 to 17 to allow a greater range of not-for-profit organizations to be incorporated under the SNC Law. The following five fields were added as appropriate SNC activities: information technology, science and technology, economic revitalization, job training, and consumer protection.
- The provision requiring adherence to a pre-set budget (Article 27) was removed in order to allow greater flexibility in operations of SNCs. According to the JCIE, this reflects the rejection “of the notion that “good governance” implies that organizations must adhere strictly to the budget they establish at the beginning of the fiscal year. [SNC]s in Japan now have increased flexibility to respond to urgent concerns in their field of activity that may arise after the start of the fiscal year.”<sup>10</sup>
- Measures to prevent criminal organizations from becoming incorporated as SNCs were strengthened.
- The application process was simplified. The original law had required the submission of 16 types of documents in the application process, but the amendment has reduced these categories to 11 and streamlined the process.

Amendments to the tax provisions for approved SNCs (*nintei NPO hojin*). Along with these amendments to the NPO Law, the tax law that applies to the *nintei NPO hojin* also underwent

<sup>9</sup> According to the Japan Center for International Exchange, “NPOs played an active part in the amendment process through a liaison council set up in June 1999. The council worked closely with the nonpartisan Parliamentary Caucus on NPOs, which was formed in August 1999. The council submitted an amendment proposal to the Caucus and held public forums throughout Japan to provide the opportunity for legislators to hear local opinions on reforms to the taxation and incorporation systems for NPOs and NGOs.” See Japan Center for International Exchange (JCIE), *New Legal Reform Efforts Receive Mixed Welcome*, in

<sup>10</sup> JCIE, *op.cit.*

revision. There had been sharp criticism from the sector, the Cabinet Office, and various ministries because they viewed the law as being far too restrictive.<sup>11</sup> In addition, the Special Diet Committee on Third Sector Organizations recommended prompt attention to the perceived problems.<sup>12</sup> These were as follows: contrary to the bill's original purpose of enabling SNCs to become eligible for tax-deductible status, the provisions that determined eligibility for tax-deductible status for SNCs were overly restrictive and the application process was cumbersome and confusing. In fact, after more than a year of operations under the legislation, only 10 SNCs had been authorized to receive the special tax privileges, a figure representing an authorization rate of 0.1 percent. The major changes enacted in 2003 were as follows:

- Various aspects of the “public support test,” which stipulates that more than one-third of an organization's total revenues must come from donations and grants, were relaxed. For example, the one-third minimum was lowered to one-fifth for a trial period of three years (this is expected to become permanent in 2006).
- The condition requiring SNCs to conduct their activities in more than one municipality in order to become eligible for tax deductibility has been removed. This amendment has made it possible for small-scale community-based nonprofits to obtain tax-deductible status.
- The requirement that SNCs approved for tax deductibility must submit advance notification to the National Tax Administration Agency before making overseas remittances or taking money abroad has been amended. Now, notification is only required for amounts exceeding ¥2 million. (Amounts equaling ¥2 million or less can be reported to the agency at the end of the fiscal year.)
- The unique type of tax-exempt donation (*minashi kifukin*) available for the public interest corporation system was made available for SNCs. This “internal deduction” system permits up to 20 percent of an NPO's taxable income from profit-making activities that is used toward nonprofit activities will be treated as this type of donation.

Nevertheless, SNCs remain taxable on all their income as if they were for-profit entities, which is not the case with respect to other forms of not-for-profit public benefit organizations in Japan.<sup>13</sup>

*Reform of the Public Benefit Corporation System.* The decision by the Cabinet Office to pursue another reform program, which is outlined below, came in 2002 as the reforms to the legal framework for SNCs were pending. Many changes in the current situation were contemplated at the outset of the public benefit corporation system, one of the most far-reaching of which would have involved completely scrapping the current system and moving to a mutual benefit—public benefit classification system. According to the Cabinet Decision of March 2002, it was originally intended that “there will be a radical and systematic review of the system of public benefit juristic persons, including related systems (NPOs, nonprofit mutual benefit corporations, charitable trusts, taxation, etc.).”<sup>14</sup> Now, however, the proposals are more moderate and are only directed at *koeki hojin* and *chukan hojin*. Apparently the SNCs were suspicious of what the government might do and elected to remain outside the proposed new system until they can see how it will

---

<sup>11</sup> See Yuka Ishikawa, Challenges of NPOs in Japan – focus on Japanese legislation (on file with the author).

<sup>12</sup> JCIE, *op.cit.*

<sup>13</sup> The tax system is exceedingly complex and is discussed in some detail in the book chapter by Pekkanen and Simon. See also the Japan *Country Note* published at [www.usig.org](http://www.usig.org).

<sup>14</sup> See Document A in the Documentary Supplement. See also Satako Itoh, *Governance, Organizational Effectiveness and the Nonprofit Sector: Japan Country Report*, at <http://www.asianphilanthropy.org/staging/about/JAPAN1.pdf>.

work.<sup>15</sup>

At the present time the new system is expected to address the following:<sup>16</sup>

- Creating a new legal framework for “general nonprofit corporations.” The present public interest corporations would fall under the new category of nonprofit corporations as would *chukan hojin*, and the current forms would be eliminated.
- Simplifying the legal process for incorporation by allowing it to be entirely non-discretionary and applying standards similar to those for-profit corporations.
- Introducing an application system for nonprofit corporations that can be classified as public benefit corporations. This status would be determined according to well-established criteria currently in place in the “Standards for Supervisory Guidance” published by the Ministry that oversees most NPOs in Japan (Internal Affairs and Communications), and the decision-maker would be an “independent committee” made up of sector and public representatives.
- Establishing such committees at the prefectural level in addition to the one at the national level.
- Dealing with governance, oversight, and various technical problems inherent in the system as it exists today.
- Tax measures will also be reformed and the tax changes will probably go into effect at the time the new legal system is in place. Exactly what the tax changes will be remains to be seen.

*Process of Moving Toward Reforms.* Instead of keeping the reform process to itself, the Cabinet Office recognized the importance of receiving public input in order to achieve valid and acceptable reforms. This may in part have been due to the way in which the SNC legislation developed (it ended up being introduced in the Diet as a member’s bill), but it is probably also due to the increasing awareness that Japan needs NPOs to meet its social development goals. For example, the second in the series of documents released by the Cabinet Office contains this language:

It has become difficult to adequately address the diversified needs of the people through administrative and commercial sectors alone. Private-sector nonprofit activities will thus be positioned positively and developed with flexibility and mobility.

In addition, the government was well aware of the increasing lobbying power of the sector, which was being demonstrated at the time the *koeki hojin* reforms were announced in the form of lobbying for reforms of the SNC legal framework.

Accordingly the Cabinet Office appointed an “Expert Commission,” known generally as the Fukuhara Commission, after its Chair Yoshiharu Fukuhara, Honorary Chairman of Shiseido Corporation. The Commissioners included experts, such as Prof. Yoshi Nomi of the University of Tokyo Law School (Vice Chair), as well as sector representatives and government lawyers. The Commission met 26 times during the course of the year between its appointment and the release of its report on November 19, 2004. The Working Group on Non-profit Corporations, chaired by Prof. Nomi, held 14 meetings during that period of time. In addition, the oversight staffs of the Administrative Reform Ministry and the Ministry of the Interior and Communications contributed tremendously to the effort to write useful legislation.

---

<sup>15</sup> Notes of conversations on file with the author.

<sup>16</sup> See Report of the Expert Meeting on Reform of the Public Interest Corporation System (full report on file with the author).

*Bills to be introduced.* On December 26, 2005, the Cabinet Office released the concept of legislation to be introduced in the Diet in March. The bills have three parts – the Nonprofit Corporations Law, the Charitable Recognition Law, and the Conversion of Existing Public Benefit Corporations Law (to deal with transition issues). It will be best to defer consideration of what issues remain to be addressed once commentators have had an opportunity to look at the actual draft legislation. Nevertheless, it is expected that the proposals will address the issues raised by the Fukuhara Commission and its Working Group on Non-profit Corporations and adopt many of the recommendations of those groups.

## Documentary Supplement

### A. ORIGINAL CABINET DECISION TO INTRODUCE REFORMS

#### REFORM OF THE SYSTEM OF PUBLIC BENEFIT JURISTIC PERSONS

*(Provisional translation)*

Cabinet Decision

March 29, 2002

1. With a view to positioning nonprofit activities positively within the socioeconomic system in line with recent developments in socioeconomic conditions, as well as dealing appropriately with various problems pointed out in connection with public benefit juristic persons (i.e., corporations established under the provisions of Article 34 of the Civil Code), there will be a radical and systematic review of the system of public benefit juristic persons, including related systems (NPOs, nonprofit mutual benefit corporations, charitable trusts, taxation, etc.).
2. This review will be organized by the Cabinet Secretariat, which will arrange a system for promotion and, with the cooperation of related ministries and experts from the private sector, will formulate “Guidelines for Reform of the System of Public Benefit Juristic Persons, etc.” (tentative title) during FY2002. This document will clarify the basic framework, schedule, and other factors concerning reform. Legal and other measures needed to implement this are to be established by the end of FY2005.

### B. SECOND DOCUMENT RELEASED IN THE REFORM PROCESS

#### PERSPECTIVES & PROBLEMS FOR A SWEEPING REFORM OF THE SYSTEM OF PUBLIC BENEFIT JURISTIC PERSONS (*OUTLINE*)

*(Provisional translation)*

APRIL 2, 2002

Administrative Reform

Promotion Office,

Cabinet Secretariat

1. Purpose of the reform
  - To establish a socioeconomic system that promotes private-sector nonprofit activities.
    - It has become difficult to adequately address the diversified needs of the people through administrative and commercial sectors alone. Private-sector nonprofit activities will thus be positioned positively and developed with flexibility and mobility.
  - Providing fine-tuned services that address diverse public needs
  - Building a stable and energetic society
  - Contributing to the creation of “mini-government” (“administrative reform”)
  - The importance of reviewing the system of public benefit juristic persons
    - The system of public benefit juristic persons should be reconstructed to meet the demands of the times, in view of so-called “system fatigue” and opinions that the system should be reviewed—including its possible abolition.

#### 2. Directions for reform of the system of public benefit juristic persons

(Basic principles)

- A review of administrative involvement in the establishment, operation, etc., of corporations,

after clarifying the conditions for establishing corporations, the standards for judging them, and the rules on which their operation, etc., should be based.

- A system that facilitates proper and autonomous activities by corporations.  
(Approach)
- A zero-based review of the system of public benefit juristic persons in line with Article 34 of the Civil Code.
- Debate focusing on the system of authorization for establishment.
- Comparative study and coordination with the systems of NPOs and nonprofit mutual benefit corporations.
- Reference to case examples in other countries.

(Key points for study)

#### **ESTABLISHMENT OF CORPORATIONS**

- The current system of authorization for establishment at the discretion of competent ministries will be reviewed from scratch.
- Establishment standards will be clarified and published, and establishment procedures simplified as far as possible.

#### **GUIDANCE & SUPERVISION**

- Guidance and supervision by competent ministries will be reviewed. When given, guidance and supervision will be limited and subject to clear criteria.

#### **GOVERNANCE, DISCLOSURE**

- Desirable forms of governance and disclosure in line with the review of corporate establishment.

#### **TAXATION SYSTEM**

- Future directions for acquisition of corporate status and tax privileges, a fair balance with profit-making corporations and others (particularly in cases when there is a large proportion of revenue-earning business), in conjunction with the zero-based review of the system of authorization for establishment.
- Transition (conversion).
- Legal and tax treatment of transitions (conversions) to nonprofit mutual benefit corporations and profit-making corporations.

#### **PUBLIC BENEFIT JURISTIC PERSONS THROUGH ADMINISTRATIVE COMMISSION**

- Account should be taken of criticisms, including that public benefit juristic persons should not handle surrogate administrative functions and that there is unfairness vis-à-vis profit-making corporations and others in terms of market participation.

## C. THIRD DOCUMENT RELEASED IN REFORM PROCESS

### OUTLINE OF PROGRAM TOWARD A SWEEPING REFORM OF THE SYSTEM OF PUBLIC BENEFIT JURISTIC PERSONS

*(Enumeration of Key Points)*

*(Provisional translation)*

August 2, 2002

Administrative Reform

Promotion Office,

Cabinet Secretariat

#### **1. BACKGROUND**

Following a Cabinet Decision on March 29, 2002, to implement a radical and systematic review of the system of public benefit juristic persons, including related systems, the requisite preparatory work is now underway. The key points in connection with sweeping reform are enumerated herein, partly based on the results of six hearings featuring 27 experts between April and June.

#### **2. CONTENT**

##### THE NEED FOR A SWEEPING REFORM OF THE SYSTEM OF PUBLIC BENEFIT JURISTIC PERSONS

The system of public benefit juristic persons has not been radically reviewed since it started more than 100 years ago. To the contrary, some have pointed out that the system architecture has been made more complicated by the creation of corporation systems based on special laws, as well as by the enactment of the NPO Law and the Nonprofit Mutual Benefit Corporations Law. Moreover, although public benefit juristic persons have played a certain role as representative bodies taking care of private-sector nonprofit activities, they have also been subject to criticism concerning their style of operation, guidance and supervision, governance, and other matters. This includes the issue of authorization for establishment and the general powers of guidance and supervision by competent ministries and agencies.

Therefore, bearing in mind that the Commercial Code (the basic law governing profit-making corporations) has been greatly revised in recent years and that repeated resolutions have been passed by the Diet, the system of public benefit juristic persons, including related systems, should now be radically and systematically reviewed and rebuilt as a nonprofit corporation system that can truly meet the demands of the times.

##### THE IDEAL SHAPE OF THE NONPROFIT CORPORATION SYSTEM

The ideal shape of the nonprofit corporation system should have the attributes of simplicity, objectivity, autonomy, transparency, and flexibility.

##### **DIRECTIONS FOR REFORM OF THE NONPROFIT CORPORATION SYSTEM**

###### **(1) Classification of corporations, etc.**

- a. Reform pattern (pattern for basic study)

The categories of public benefit juristic persons and nonprofit mutual benefit corporations would be merged into the single category of “nonprofit corporations” (tentative name), and corporate status would be acquired simply through company registration (rule-based principle).

The judgment of public benefit nature could be made only with respect to the application of taxation law, and not via the corporate system. Alternatively, the corporate system could also include the concept of public benefit nature.

b. Reform pattern (pattern for reference)

Corporations could be classified into two types, namely “nonprofit and public benefit corporations” (tentative name) for those with a public benefit nature, and “nonprofit mutual benefit corporations” (tentative name) for nonprofit, non-public benefit corporations (existing nonprofit mutual benefit corporations).

Acquisition of corporate status would be through authorization by administrative agencies in the case of “nonprofit and public benefit corporations” (authorization-based principle), and by company registration alone for “nonprofit mutual benefit corporations” (rule-based principle).

**(2) Ensuring proper operation**

- a. Establishing self-governance (a system of corporate autonomy).
- b. Establishing a disclosure system.
- c. Conversion to a post-facto checking system, etc.

**(3) Taxation measures**

Studies involving radical examination will be promoted by the Ministry of Finance, the Ministry of Public Management, Home Affairs, Posts and Telecommunications, and other related ministries, to ensure that basic directions can be indicated before the formulation of “Guidelines for Reform of the System of Public Benefit Juristic Persons, etc.” (tentative title) during FY2002. In conjunction with this review of the corporate system, new taxation measures related to charitable donations also need to be studied, partly with a view to fostering a “charitable donation culture.”

**(4) Transition of existing public benefit juristic persons to other corporate categories**

Existing public benefit juristic persons will need to be reorganized in line with the post-reform shape of the system of nonprofit corporations. When doing so, a fair and rational system of transition will have to be constructed to ensure that no improper gains can be made from the succession of assets.

**3. FUTURE SCHEDULE**

- a. Publication scheduled for Friday, August 2 (enumeration of key points only; no Cabinet Decision status).
- b. For 40 days after publication, opinions will be invited from experts, related parties, etc.
- c. Formulation of “Guidelines for Reform of the System of Public Benefit Juristic Persons, etc.” (tentative title) by the end of this fiscal year (March 2003). [Ministry of Public Management, Home Affairs, Posts, and Telecommunications]

D. FOURTH DOCUMENT RELEASED IN REFORM PROCESS – CABINET DECISION OF JUNE 27, 2003 (NOT AVAILABLE IN ENGLISH)

E. FIFTH DOCUMENT RELEASED IN REFORM PROCESS

Report of the Expert Meeting on Reform of the Public Interest Corporation System,  
November 19, 2004

Summary available at

<http://www.law.cua.edu/students/orgs/ijcsl//cabinet.pdf>

F. SIXTH DOCUMENT RELEASED IN REFORM PROCESS

Future Policies for Administrative Reform

Cabinet Decision

December 24, 2004

<http://www.law.cua.edu/students/orgs/ijcsl//ohtareport.pdf>

G. SEVENTH DOCUMENT RELEASED IN REFORM PROCESS

Tax Commission initial report (not available in English); the gist of the recommendations is discussed in IJCSL-N for July 2005 (see ICCSL website)

H. CONCEPT OF LEGISLATION RELEASED DECEMBER 26, 2004

This is not available in English. The basic principles of the legislation include three sections: A “Not-for-Profit Corporations Law;” a “Charitable Status Recognition Law;” and a law governing conversions of existing public benefit corporations to new not-for-profit charitable corporations.

**LATIN AMERICA/CARIBBEAN  
CAYMAN ISLANDS**

**CAYMAN ISLANDS GOVERNMENT TAKES A VITAL STEP**

**TO LET THE ‘SUNSHINE’ IN**

**BY GOVERNMENT INFORMATION SERVICE,  
GOVERNMENT OF THE CAYMAN ISLANDS\***

A new era of openness and transparency in government was heralded in the Legislative Assembly on Friday 4 November 2005, when the Leader of Government Business, the Hon. D Kurt Tibbetts, laid before the House the “Freedom of Information Bill, 2005.” The bill was unveiled as a discussion draft in advance of a public consultation exercise. Government will shortly announce its programme and timetable for the consultative process, which the Minister anticipates being completed in 90 days.

“Responses will be given the serious consideration they deserve,” the Minister said. Following that, Government will move forward with agreed amendments and prepare the bill for its safe passage in the Legislative Assembly.

The bill’s aim is to give effect to constitutional democracy, by ensuring government accountability and transparency, and fostering and facilitating public participation in national decision-making. It balances the public’s right of access against obligations to preserve confidentiality of sensitive governmental, commercial or personal information.

“The modern trend has been to create a fair balance between the right of the government to govern without always being in the glare of the public and the right of the public to access certain information,” said the Leader of Government Business. The bill achieves its objectives with regard to “greater justice to the individual by rewriting the rules on secrecy of government documents,” Mr. Tibbetts said.

The Minister acknowledged that the operations of government are often shrouded in mystery. “A document may be classified as ‘secret’ or ‘confidential’ even if it does not contain anything that is really sensitive,” he allowed, adding that sometimes this can work to the disadvantage of private citizens who may be mentioned in classified documents with little recourse to redress wrongs.

“In some cases the document may even contain false or misleading information,” the Minister continued, adding: “Regardless of what the case might be, the private citizen may require that information so that he can make a case before a public authority or in private dealings, and yet he or she does not have access to it or have a chance to correct the details contained in it.”

The remarks of Hon D Kurt Tibbetts upon laying before the House on 4 November the

---

\* Kindly made available by the Editorial Board member representing the Cayman Islands, Debra Morris, Professorial Lecturer, University of the Cayman Islands.

Government's landmark "Freedom of Information Bill, 2005" as a discussion document are as follows:

"Mr. Speaker and Members of the Legislative Assembly, I wish to lay before this Honourable House the Freedom of Information Bill, 2005, as a discussion paper for public consultation.

Mr. Speaker, the most logical point to begin in this matter has to be the debate we had in this House in 1998, seven years ago now. In that year, as a Member of the Opposition, I seconded a motion moved by the Hon. Roy Bodden, then a Member of this House and the previous Education Minister. That motion was aimed at urging Government to enact a freedom of information/official information act. The Government of the day, supported the motion and I thanked them on that occasion for that laudable decision.

In the course of that debate I said in this House, and I quote: "...while the government has accepted the motion amended, the timing of the legislation is going to be very important. My challenge to the government is to get on with it immediately." (*Hansard*, 1 July 1998, column 1).

During that same debate, I went on to state and I quote: "The Government of the day should not - and if I have anything to do with it in the future, will not - hold a monopoly on information. It has been used in the past, that is, information and facts, to seek political advantage. Today, this country is still paying the price for that type of action." (*Hansard*, 1 July 1998, column 2).

Mr. Speaker, I stand in this House today to say the same thing that I said seven years ago, which is that we should move immediately towards the enactment of this legislation as soon as possible. Whereas I was disappointed that previous Governments did not proceed to present to this House a bill for the enactment of a law on freedom of information for all these years, I do not wish to be negative. I have no doubt that the Opposition will give their support to this motion and eventually the bill when it is presented for enactment.

Mr. Speaker, even up to the run-up to the last elections, we were singing the same song. During the campaign, the PPM promised a government in the sunshine. In other words, we promised that we would change in fundamental ways the manner in which these Islands were being governed. The bill that I seek to table today before this House and through it to the nation, namely, the Freedom of Information Bill, 2005, is one of the significant ways in which the People's Progressive Movement intends to deliver on this promise.

The House will be aware, Mr. Speaker, that the operations of government are often shrouded in mystery. A document may be classified as "secret" or "confidential" even if it does not contain anything that is really sensitive. Further, such classified documents may be very important for the private citizen who may be mentioned in it. In some cases the document may even contain false or misleading information. Regardless of what the case might be, the private citizen may require that information so that he can make a case before a public authority or in private dealings, and yet he or she does not have access to it or have a chance to correct the details contained in it. The modern trend has been to create a fair balance between the right of the Government to govern without always being in the glare of the public and the right of the public to access certain information. This bill, Mr. Speaker, seeks to ensure greater justice to the individual by rewriting the rules on secrecy of government documents.

I will now endeavour, Mr. Speaker, to highlight some of the provisions of this important piece of legislation. The objects of the bill are: "...to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely -

- (a) governmental accountability;
- (b) transparency; and
- (c) public participation in national decision-making, by granting to the public a general right of access to official documents held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature.”

Mr Speaker, you will notice that in this bill we have included the objects in a substantive provision of the law so that it may remain on the statute book even after the bill becomes law. This is to ensure that each and every one of its provisions will be interpreted by users, and even by the courts, in accordance with these clear tenets.

Having stated the objects, Mr. Speaker, let me now proceed to state what institutions will be bound by this law and the documents to which it will apply.

Firstly, the law will apply to every “public authority”. A “public authority” is defined as meaning: (a) a ministry, portfolio or department; (b) a statutory body or authority, whether incorporated or not; (c) a government company which is wholly owned by the Government or in which the Government holds more than 50% of the shares, or a government company which the Governor in Cabinet designates as one to which the law should apply; (d) any other body or organization which provides services of a public nature which are essential to the welfare of Caymanian society. In other words, Mr. Speaker, we are saying two things. One is that any institution which is run exclusively or substantially using the people’s money must open its documents to scrutiny by the people. Further, we are also saying that if you are an organisation that holds itself out to the people as being committed to doing public good, the people must have access to your documents.

Secondly, not all documents will be liable to production. One restriction under this head has to do with the age of a document. Accordingly, one cannot ask for a document which is more than 30 years old. Thus upon the passing of this bill, a member of the public will be able to exercise the rights conferred by this act in relation to documents that have just been created, but cannot reach back more than 30 years. However, Mr. Speaker, as in any such legislation, there will be exceptions. Whereas we would like the public to have access to official documents, we are fully cognizant of the fact that certain documents must not be disclosed if we are to protect our economy. Thus certain categories of documents will not be liable to disclosure. For example, certain documents referred to under the Monetary Authority Law will not be liable to disclosure. Documents relating to exempt companies under the Companies Law will also not be disclosed.

Mr. Speaker, we have identified these two categories as two obvious areas where it is important to retain confidentiality. However, out of an abundance of caution, we have included a provision which will allow the Governor in Cabinet, by order, to protect any other class of information. Honourable Members are asked to note, Mr. Speaker, that this is not a power to decide on an ad hoc basis that a particular document be kept confidential. It will allow the Governor in Cabinet only to name a category of documents or information. This will ensure that the provision does not appear to be imbued with too much discretion.

As to the general right itself, Mr. Speaker, the bill provides that every person shall have a right to obtain access to an official document other than an exempt document. Care has been taken to ensure that this right is not indirectly undermined. Thus, there is a provision which makes it clear that an applicant for access to an official document shall not be

required to give any reason for requesting access to that document. This provision is there because, once a person shows that he or she has a right to access to any document, government does not wish to interfere with his or her privacy by seeking to know why he or she requests access.

Mr. Speaker, it is important to note, however, that exemptions will not go on forever. In this regard, the bill provides that after 20 years, all exemptions shall cease and documents will be declassified. However, again to be on the safe side, as this is new legislation, and we are a small jurisdiction whose economy is not very diversified, we propose to retain a power on the part of the Governor in Cabinet to provide for a longer or shorter period after which documents will be declassified and made public.

Mr. Speaker, my Government is well aware that it is not meaningful to grant a right which is too expensive to enjoy. Thus we have provided that any fee that is charged for the granting of access to information shall not exceed the actual cost of searching for, reproducing, preparing and communicating the information requested. In fact, we have gone even further. The Governor in Cabinet will be given power to make regulations to provide that no fee is to be charged in certain categories of cases.

Mr. Speaker, having outlined above what the general right of access to information will entail, allow me now to move on to another important area, namely, that of exemptions. These are cases, as I have said, in which access to information will be restricted or prohibited. The exemptions relate to: documents affecting security, defence or international relations; cabinet documents; documents relating to law enforcement; documents that are covered by legal professional privilege as well as those whose disclosure would infringe upon the privileges of this Honourable House; documents affecting the national economy; documents revealing the deliberative processes of government; documents relating to business affairs; documents whose disclosure may result in the destruction of, damage to, or interference with, the conservation of heritage sites and other areas relating to the environment; and documents relating to personal affairs. I must hasten to add, Mr. Speaker, that each of these provisions must be read carefully as not all of them are blanket exemptions. Some of them are narrower than the general heading might indicate.

Mr. Speaker, in every system, no matter how well crafted the legal provisions might be or how well-administered in practice the system might be, in order for justice to be done to both sides, there will be a degree of discretion on the part of officials who will make decisions whether or not to grant access. The bill before the House, therefore, provides for appeals. Appeals will be at two levels. Firstly, an aggrieved party may appeal by way of internal review of any decision not to grant access. Where such an appeal is made in certain specified categories that relate to policy, the Minister or Official Member will reconsider the matter. In all other cases, the Chief Officer of the entity concerned will make the decision. Secondly, if the applicant is still dissatisfied by a decision of the Minister, Official Member or Chief Officer, he may appeal to a tribunal appointed by the Governor in Cabinet.

Mr. Speaker, it is not enough to provide for appeals. We must always remember that before matters become contentious, systems must be in place to promote openness. Thus the bill provides that every public authority must appoint an information officer who, under the general and specific supervision of the head of the public authority concerned, will promote best practices in relation to document maintenance, archiving and disposal. This officer will also be responsible for receiving complaints and assisting people seeking information. Such officers, Mr. Speaker, will operate under guidelines set by the Chief Secretary.

In legislation of this kind, Mr. Speaker, one needs to protect those people who, in the public interest, reveal some wrongdoing on the part of public authorities. To meet this need, the legislation will protect whistleblowers. Therefore, a person who reveals wrongdoing, will be protected from any administrative or employment-related sanction if he reveals in good faith: (a) the commission of a criminal offence; (b) failure to comply with a legal obligation; (c) miscarriage of justice; or (d) corruption, dishonesty, or serious maladministration.

Now, in some rare cases, once access is granted to information, the person seeking that information may find that it is incorrect. This legislation provides for that eventuality. It stipulates that where a person seeking access to information about himself or herself finds that it is incomplete, incorrect, out of date or misleading, he or she may apply for amendment or annotation of such information. This ensures that the right of access to such information is meaningful and offers the government a chance to maintain records that are fair and accurate.

Finally, Mr. Speaker, we do not want this new and very important legislation to be relegated to the back burner. We want it to take on a conspicuous existence and to be given the attention it deserves. To this end, the bill provides that after one year from the date when it comes into force, it will be reviewed. And it will be reviewed not by the Governor in Cabinet or by a committee of the Government Executive, but by a committee of this Honourable House.

As usual, Mr. Speaker, there are a number of provisions that are ancillary to the ones that I have outlined. Only a reading of the entire bill will give a fuller understanding of all the details of this important piece of legislation.

In closing, Mr. Speaker, let me emphasize one thing. It would be absurd for me to be speaking about open government and yet restrict consultation on the very bill whose main purpose is to guarantee and encourage open government. It is for this reason that government decided that this bill be made public and be discussed by all those who are going to be affected by it, that is, employees of all public authorities and especially the person in the street. Indeed, this will also give all Honourable Members of this House, both the Government and the Opposition, enough time to study it and consult with the people they represent. I trust that this dialogue will be fruitful and benefit all concerned. On behalf of Government, I promise that in considering the final draft of what will eventually be presented for passage, all views expressed will be accorded the serious consideration that they deserve.”

## WESTERN EUROPE

### GERMANY

#### PROPOSALS FOR CHANGE IN THE LEGAL FRAMEWORKS FOR

#### PUBLIC BENEFIT ORGANIZATIONS: THREE TAKES ON THE ISSUE

BY KARLA W. SIMON & DEUTSCHER KULTURAT

With the acceptance of reform of the law governing public benefit organizations having been agreed in the partnership agreement between the CDU and the SPD that underlies the new Grand Coalition government in Germany, the positions taken by various entities and individuals with respect to what such reforms should contain have grown in importance. On the other hand, the new Chancellor, Angela Merkel, is according to one of the participants in the process, not much interested in civil society. The most comprehensive look at possible reforms – as yet unpublished – was undertaken by a large task force consisting of representatives of many of the large associations in social services sectors.

The latest position to be published is that of the Deutscher Kulturat, a nonpartisan, nongovernmental organization that deals with issues related to culture in Germany. The views of the Kulturat are available at <http://www.kulturrat.de/detail.php?detail=634&rubrik=4> and are reprinted below.

In September 2005 the Maecenata Institut of the Humboldt University in Berlin had already made public its proposals for reform, and these are available at [http://www.maecenata.de/dokumente/1500\\_publicationen/Opuscula/2005\\_Opusculum19.pdf](http://www.maecenata.de/dokumente/1500_publicationen/Opuscula/2005_Opusculum19.pdf).

Dr. Michael Ernst-Pörksen (C.O.X. Steuerberatungsgesellschaft), IJCSL's Country Editor for Germany, commented on the proposals of the Maecenata Institut in November 2005, and his suggestions can be found at [http://www.cox-steuerberatung.de/index\\_maecenta.htm](http://www.cox-steuerberatung.de/index_maecenta.htm).

Some of the issues presented include the following:

1. The extent to which organizations should be entitled to rely on the fact that they do not distribute profits as the principal aspect of their differentiation from for-profit organizations.
2. Whether there should be a new commission, like the Charity Commission of England and Wales, to accredit and oversee the sector.
3. The extent to which organizations can or should receive less support from State (including all levels of the State as well as the European Community) and more from private philanthropy.
4. Whether new purposes should be added to the definition of public benefit and the extent to which these should be defined by the tax authorities or by the proposed Charity Commission.
5. How more transparency for the sector should be accomplished.

One particular problem that has been pointed out by Dr. Ernst-Pörksen are the current difficulties confronting associations that are being struck from the register of not-for-profit associations because they receive fees from carrying out their not-for-profit purposes (e.g.,

entrance fees for museums, school fees, etc.). Under their reading of section 21 of the Bürgerliches Gesetzbuch (BGB), association registration authorities in various Länder feel justified in striking such associations even if they operate solely for public benefit and do not distribute profits. They claim that “public benefit” is a tax concept, not one of what form is permitted by the BGB. Of course this will mean that associations will need to conduct any fee-paying activities through a subsidiary, which is cumbersome and simply creates more work for lawyers.

Dr. Ernt-Pörksen also points out that language in a draft law that would amend the association provisions in the BGB to make them more sensitive to the needs of 21<sup>st</sup> Century civil society would not solve the problem. The language of the draft currently circulating and under discussion between the Ministry of Justice and the large associations would not change the current law if the principal purpose of an association is to carry out a public benefit fee-paying activity (e.g., a museum or a private school).

Although this issue has come up in recent discussions of the definition of public benefit in both England and Canada, it has been resolved in favor of allowing organizations to be considered to be for public benefit even if their only purpose is to provide services for a fee. See, e.g., Canada Revenue Authority’s “Proposed Guidelines for Registering a Charity: Meeting the Public Benefit Test,” which contains these guidelines for when charging fees will not conflict with the determination that the organization is a public benefit organization:

### 3.2.5 Is the issue of public benefit affected by charging fees?

Many charities—for example, museums, arts organizations, and some religious institutions—charge fees for their services. Charging fees does not of itself offend the public benefit principle, although under certain circumstances it may. The concern for public benefit arises when the effect of the charge would be to exclude members of the public, in which case, the organization would ordinarily not be considered charitable.

Several factors are taken into account when determining whether the charging of fees is incompatible with public benefit:

- Charges should be reasonable; typically they should be below-market because they do not have a profit component and should aim at cost recovery at the most. Organizations that charge market rates may bring into question their charitable nature.
- Exceptionally, charges may, if appropriate to the overall purposes of the charity, be set at a rate that generates a surplus to help fund the organization’s charitable programs and activities.
- Any charge should not be set at a level that deters or excludes a substantial proportion of the beneficiary class.
- The service provided should not cater only to those who are financially well off—it should be open to all potential beneficiaries.
- It should be clear that there is a sufficient general benefit to the community, directly or indirectly, from the existence of the service.

In Germany the issue is one of form, and the decisive factor should not be whether the

organization receives fees from providing its public benefit services but rather what it does with those revenues. A not-for-profit association should be defined as one that does not distribute profits full stop.

### **Deutscher Kulturrat – latest suggestions on “public benefit law reform”**

**Berlin, den 14.12.2005.** Bereits seit einigen Jahren wird sowohl von den gemeinnützigen Organisationen selbst als auch von der Wissenschaft eine Reform des Gemeinnützigkeitsrechts angemahnt.

Zivilgesellschaftliche Organisationen übernehmen eine wichtige Rolle in der Bürgergesellschaft. Sie sind Ausdruck des Engagements für das Gemeinwohl. Sie leisten einen wesentlichen Beitrag zum Zusammenhalt der Gesellschaft. Bürgerschaftliches Engagement findet sich vor allem in zivilgesellschaftlichen Organisationen in allen gesellschaftlichen Bereichen. Speziell im Kulturbereich sind z.B. die zahlreichen Laienorganisationen der verschiedenen künstlerischen Sparten, Fördervereine von Kultureinrichtungen, Kunstvereine, Literarische Gesellschaften, Vereine der kulturellen Kinder- und Jugendbildung, soziokulturelle Zentren, Trägervereine von Kultureinrichtungen, Stiftungen sowie Einrichtungen der kulturellen Kinder- und Jugendbildung usw. zu nennen. In seiner Stellungnahme „Bürgerschaftliches Engagement in der Kultur stärken!“ aus dem Jahr 2003 hat der Deutsche Kulturrat exemplarisch die Vielfalt des Bürgerschaftlichen Engagements in der Kultur aufgezeigt. Ebenso hat der Deutsche Kulturrat deutlich gemacht, dass er für eine Stärkung des Bürgerschaftlichen Engagements die Entbürokratisierung für erforderlich hält.

Die aktuellen Debatten um den Zusammenhalt der Gesellschaft, um die Integration von Minderheiten, um die Erfordernisse im Bildungsbereich zeigen, dass gesellschaftlicher Handlungsbedarf besteht, der nicht allein vom Staat geregelt werden kann. Ebenso wenig können die Probleme allein vom Markt gelöst werden, da hier das Ziel der Gewinnoptimierung vorrangig ist. Gemeinnützigen Organisationen, die weder dem Markt noch dem Staat angehören, die keine Gewinne erwirtschaften wollen und die aus der Bürgerschaft heraus leben und legitimiert sind, kommt daher eine herausragende Funktion bei der Bewältigung der gesellschaftspolitischen Herausforderungen zu. Gemeinnützige Organisationen sind Schulen der Demokratie, der Selbstorganisation und der Solidarität.

Damit diese Organisationen ihre Aufgaben in der Zukunft noch besser erfüllen können und zugleich die ehrenamtlich Aktiven nicht durch bürokratische Hemmnisse belastet werden, hält der Deutsche Kulturrat eine umfassende Reform des seit Jahrzehnten gewachsenen und unsystematischen Gemeinnützigkeits- und Spendenrechts für dringend geboten. Dabei muss auch ein verändertes Verhalten des Staates zur Zivilgesellschaft deutlich werden.

Die Enquete-Kommission des Deutschen Bundestags „Zukunft des Bürgerschaftlichen Engagements“ hat die Reform des Gemeinnützigkeitsrechts im Jahr 2002 als wichtiges Handlungsfeld beschrieben und dem Deutschen Bundestag empfohlen, sich dieses Themas anzunehmen. Der Unterausschuss Bürgerschaftliches Engagement des Deutschen Bundestags hat in der 15. Legislaturperiode bereits Anhörungen zu dem Thema durchgeführt, konnte seine Beratungen auf Grund des vorzeitigen Endes der Wahlperiode im Jahr 2005 aber zu keinem Ende führen. Die Spitzenverbände Deutscher Sportbund, Bundesarbeitsgemeinschaft Freie Wohlfahrtspflege, Deutscher Naturschutzring, VENRO (Organisationen der Entwicklungszusammenarbeit), Bundesverband Deutscher Stiftungen und Deutscher Kulturrat erarbeiten zur Zeit zusammen mit Wissenschaftlern in einer Projektgruppe „Reform des

Gemeinnützigkeits- und Spendenrechts“ Vorschläge zur Reform des Gemeinnützigkeits- und Spendenrechts. Diese Zusammenarbeit der Spitzenverbände aus dem gemeinnützigen Bereich signalisiert, dass es sich um eine grundlegende gesellschaftspolitische Reform und keine „Schönheitsreparaturen“ am geltenden Recht handeln muss.

Mit Freude hat der Deutsche Kulturrat zur Kenntnis genommen, dass sich CDU/CSU und SPD im Koalitionsvertrag „Gemeinsam für Deutschland – Mit Mut und Menschlichkeit“ zur Stärkung des Bürgerschaftlichen Engagements und der Reform des Gemeinnützigkeitsrechts bekannt haben. Der Deutsche Kulturrat sieht dies als ein wichtiges Signal, dass in dieser Legislaturperiode eine Reform erfolgen wird.

Der Deutsche Kulturrat appelliert an die Bundesregierung und die im Deutschen Bundestag vertretenen Parteien, jetzt eine umfassende Reform des Gemeinnützigkeitsrechts vorzunehmen. Wenn zu Beginn der Legislaturperiode mit den Beratungen begonnen wird, besteht die Chance, die Reform des Gemeinnützigkeits- und Spendenrechts in dieser Legislaturperiode umzusetzen. Es kann dabei bereits auf Vorarbeiten aus der letzten Legislaturperiode, Beiträge aus der Wissenschaft sowie Positionen und Stellungnahmen der gemeinnützigen Organisationen zurückgegriffen werden. Eine Zweiteilung der Reform in kurzfristig umsetzbare und langfristig anzugehende hält der Deutsche Kulturrat nicht für zielführend. Es sollte vielmehr eine Reform aus einem Guss erfolgen.

Dabei sollte auch eine **grundsätzliche Debatte** darüber erfolgen,

- anhand welcher Kriterien die Gemeinwohlverträglichkeit festgelegt werden sollte. Es bieten sich hierfür an, das Integrationspotenzial und das Partizipationspotenzial einer Körperschaft, der Aufbau von sozialem und kulturellem Kapital und die Förderung des bürgerschaftlichen Engagements. D.h. im Mittelpunkt steht die Leistung für die Gesellschaft und nicht – wie heute vorherrschend – das subsidiäre Handeln zum Staat.
- ob weiterhin die Finanzbehörden darüber befinden soll, ob eine Körperschaft gemeinwohlorientiert ist oder dafür nicht eine andere Organisationsform geschaffen werden sollte wie es in anderen europäischen Staaten bereits üblich ist.

In Hinblick auf Änderungen im bestehenden System hält der Deutsche Kulturrat folgende Aspekte für vordringlich:

- klare auch für Laien verständliche Regelungen,
- eine verbindliche Aussage zur Gemeinnützigkeit einer Organisation nach Prüfung der Satzung durch die Finanzbehörden. Laut geltendem Recht wird ein vorläufiger Bescheid ausgestellt und die Gemeinnützigkeit im Nachhinein festgestellt. D.h. konkret eine zivilgesellschaftliche Organisation ist letztlich immer gemeinnützig gewesen und nicht aktuell gemeinnützig, dieses führt gerade bei ehrenamtlichen Funktionsträgern zu Problemen.
- eine Neuregelung der gemeinnützigen Zwecke, dabei könnten international eingeführte Klassifikationen als Orientierung herangezogen werden,
- eine Klarstellung, dass Dachverbände auch nicht gemeinnützigen Mitgliedern gegenüber Leistungen erbringen dürfen, ohne dass die eigene Gemeinnützigkeit daran Schaden nimmt,
- eine Lockerung der zeitnahen Mittelverwendungspflicht, hier wäre daran zu denken, dass

eine zeitnahe Mittelverwendung auch dann gegeben ist, wenn die Mittel im übernächsten Kalender- oder Wirtschaftsjahr verausgabt werden,

- eine verbesserte Transparenz in der Vermögensrechnung sobald die Einnahmen einen noch festzusetzenden Betrag überschreiten. Eine Neuregelung darf aber nicht dazu führen, dass ehrenamtliche Aktive in Vereinen durch zusätzlichen bürokratischen Aufwand belastet werden,
- eine Erweiterung der Abzugsfähigkeit von Zuwendungen in das Vermögen einer Stiftung. Hier geht es in erster Linie darum, Anreize zur Errichtung von Stiftungen mit einem großen Stiftungsvermögen zu schaffen,
- eine Aufhebung des Endowmentverbotes, d.h. die Schaffung der Möglichkeit, dass Stiftungen sich wiederum selbst als Stifter betätigen können,
- die Möglichkeit Lebenspartner oder Partner in einer eingetragenen Lebenspartnerschaft mit einer Stifterrente bedenken zu können wie es derzeit bei Ehepartnern bereits möglich ist,
- die Abschaffung der Pflicht zur Abgabe einer Körperschafts- und Gewerbesteuererklärung bei Körperschaften, deren Einnahmen nachweislich den Freibetrag von 3.835 € im Jahr nicht erreichen; dabei sollte die Einreichung eines Rechenschaftsberichts als Nachweis ausreichen,
- die Einführung eines einheitlichen Spendenabzugs in Höhe von mindestens 10%,
- die Vereinfachung von Zuwendungsbescheinigungen, die seit dem Inkrafttreten des „Gesetzes zur weiteren steuerlichen Förderung von Stiftungen“ am 01.07.2002 eingeführten amtlichen Vordrucke für Zuwendungsbestätigungen führen zu einem beträchtlichen Aufwand, da es eine Vielzahl unterschiedlicher Muster gibt und geringste Abweichungen von den Finanzbehörden teilweise zum Anlass genommen werden, die Spende nicht anzuerkennen,
- eine Präzisierung der Haftungsregelungen für ehrenamtliche Vereinsvorstände.

Ebenso sieht der Deutsche Kulturrat die **gemeinnützigen Organisationen selbst** gefordert, einen Beitrag zu **mehr Transparenz** zu leisten. Mögliche Optionen sind dabei:

- mehr Transparenz durch freiwillige Selbstauskunft, hier könnten gemeinnützige Organisationen sich selbst verpflichten über ihre Arbeitsschwerpunkte, ihre Einnahmen und Ausgaben sowie ihr Vermögen Auskunft zu geben, in diesem Zusammenhang könnte auch über verbindliche Vorgaben einer einheitlichen Rechnungslegung nachgedacht werden,
- als Auskunftsmöglichkeit über die Organisationen der Zivilgesellschaft eine Datenbank zu schaffen, in der gemeinnützige Organisationen mit ihren Grunddaten verzeichnet sind. Eine solche Datenbank sollte innerhalb der Zivilgesellschaft geschaffen werden und hier sollte auch die Verständigung darüber stattfinden, welche Daten veröffentlicht werden sollten.

Der Deutsche Kulturrat ist überzeugt, dass eine gründliche Debatte zum Gemeinnützigkeits- und Spendenrechts zu einer Stärkung des gemeinnützigen Bereiches beitragen wird und damit die Bürgergesellschaft als solche gestärkt wird. Die Bürgergesellschaft gewinnt gerade in Wissenschaft, Forschung und Kultur an Bedeutung. Der Staat tut angesichts seiner eigenen Einsparungen gut daran, die Bürgergesellschaft zu stärken.

## TURKEY

### RELIGIOUS COMMUNITIES NEED FUNDAMENTAL

### REFORM OF THE CONSTITUTION

BY DR. OTMAR OEHRING\*

*Long-running attempts to improve the Law on Foundations are not the way to introduce true individual and collective religious freedom in Turkey, argues Otmar Oehring of the German Catholic charity Missio <http://www.missio-aachen.de/menschen-kulturen/themen/menschenrechte>. Only some religious minorities are allowed such foundations, while foundations that do exist are subject to intrusive government interference. In this personal commentary for Forum 18 News Service <http://www.forum18.org> and reprinted here with permission, Dr Oehring maintains that Turkey needs instead to tackle the fundamental problem of the lack of religious freedom. This can best be done, he contends, by both changing the Constitution and bringing in an accompanying law to concretely introduce the full individual and collective religious freedom rights spelled out in the European Convention on Human Rights.*

Turkey's Law on Foundations plays a central role in the country's religious freedom situation, as it directly affects religious communities' ownership of property. Proposed amendments to the Law – which includes provisions governing “community foundations” for non-Muslim religious/ethnic communities – are facing a tortuous process. It is not even clear if the Ankara parliament will ever approve them. First discussed in late 2002 under the government led by Abdullah Gul in response to pressure from the European Union to bring the Turkey's legal provisions into line with European practices on human rights, discussion has continued under the government of Recep Tayyip Erdogan.

As it became increasingly clear that it would be impossible to streamline the existing Law on Foundations, a draft of a new Law was finally prepared including provisions governing “community foundations” for non-Muslim religious communities. But once again these provisions do not satisfy the concerned groups as the amendments they proposed have not been included. Meanwhile the draft was sent to the relevant commission of parliament in May 2005, which was due to decide on the draft before summer this year. This however has not happened up to now.

The changes being proposed would be important for those non-Muslim communities which have “community foundations”, such as the Armenian Catholic, Armenian Apostolic, Armenian Protestant, Bulgarian Orthodox, Chaldean Catholic, Georgian Catholic, Greek Catholic, Greek Melkite Orthodox, Jewish, Syrian Catholic, Syrian Orthodox, and Syrian Protestant communities. In theory any improvement to the Foundations Law would allow them to keep the property they currently hold (often rather precariously) and recover property taken from them over the past seventy years.

Although in the past there were several hundred such foundations for non-Muslim

---

\* Dr Otmar Oehring, head of the human rights office at Missio: <http://www.missio-aachen.de/menschen-kulturen/themen/menschenrechte>, a Catholic mission based in the German city of Aachen, contributed this comment to Forum 18 News Service. Commentaries are personal views and do not necessarily represent the views of F18News, Forum 18, or IJCSL.

communities owning thousands of properties, the government's Directorate-General for Foundations now says 160 are recognised by the state (compared to the 208 recognised by the state in 1948). The fate of the remainder and the property they administered remains unclear.

The existing Foundations Law is limited as it covers only some non-Muslim minority communities. The Roman Catholic Church, Protestant Churches (whether historical Churches or free Evangelical congregations), Jehovah's Witnesses, Baha'is and other non-Muslim groups have no such foundations – and are unlikely to be allowed to have any.

Two examples illustrate the complexity of the current situation. The Syrian Catholic Church does not have a community foundation (cemaat vakif) in Istanbul but a foundation in accordance with civil law. This had never before been seen in Turkey, because at the time it was founded, a foundation with a religious purpose could not be set up (see F18News 12 October 2005 [http://www.forum18.org/Archive.php?article\\_id=670](http://www.forum18.org/Archive.php?article_id=670)). So Syrian Catholics in Turkey now have one foundation in Istanbul founded under the Civil Code, and a number of community foundations in the south-east of Turkey.

In December 2000 the Altintepe Protestant Church in Istanbul gained foundation status, which was confirmed by the Supreme Court. However this is not to the liking of the Directorate-General for Foundations, which cannot overturn a Supreme Court decision to grant foundation status, but which has since blocked foundation applications from at least two other Protestant churches.

Yet more fundamentally than the individual cases of some communities, I believe that trying to change the Foundation Law – even by trying to include at least all non-Muslim religious communities within its scope – is not the way to go to introduce full religious freedom into Turkey. The whole legal framework governing religion has to be changed.

Most crucially, the country's Constitution needs to be changed. At present, its Article 24 covering religion is so narrowly drawn that it protects only the right to worship. It includes no guarantees about the freedom to change one's faith or to join together with others in religious communities. No guarantee is given of religious communities' rights to organise themselves freely as they choose, to own property directly, to have legal recognition or to train their own personnel.

The Constitution must include a paragraph in line with Article 9 of the European Convention on Human Rights (ECHR), which guarantees full religious freedom. As the article notes, this right includes freedom for individuals to change religion or belief “and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance”. As well as a constitutional change guaranteeing full individual and collective religious freedom rights, a law is needed explaining this in practice.

The European Commission, in its recent Proposal for the Accession Partnership 2005, specified the following measures for Turkey to take:

”Freedom of religion”

- Adopt a law comprehensively addressing all the difficulties faced by non-Muslim religious minorities and communities in line with the relevant European standards.
- Suspend all sales or confiscation of properties which belong or belonged to non-Muslim

religious community foundations by the competent authorities pending the adoption of the above law.

- Adopt and implement provisions concerning the exercise of freedom of thought, conscience and religion by all individuals and religious communities in line with the European Convention on Human Rights and taking into account the relevant recommendations of the Council of Europe's Commission against Racism and Intolerance.
- Establish conditions for the functioning of these communities, in line with the practice of Member States. This includes legal and judicial protection of the communities, their members and their assets, teaching, appointing and training of clergy, and the enjoyment of property rights in line with Protocol No 1 to the European Convention on Human Rights.” (See [http://europa.eu.int/comm/enlargement/report\\_2005/pdf/package\\_ii/com\\_559\\_final\\_en\\_tr\\_partnership.pdf](http://europa.eu.int/comm/enlargement/report_2005/pdf/package_ii/com_559_final_en_tr_partnership.pdf))

If the Constitution was changed and a law was passed that together guaranteed full individual and collective religious freedom rights, it would be very simple to grant religious communities and their entities legal status (something which does not exist at present). There would then no longer be a need for the peculiar arrangements of the Foundations Law.

The government has been reluctant to resolve existing problems caused by the regulations governing community foundations, as it fears it might have to return all the properties seized from Christian and Jewish community foundations since the 1930s. A wave of seizures occurred after 1936, when an inventory of property was drawn up, and again after a controversial 1974 Court of Appeal ruling that all property acquired by community foundations since 1936 was illegally owned. Many of these confiscated properties are now being used by the state for other purposes, but many more have been sold by the state. Some of these seized properties were places of worship, but most were community-owned schools, hospitals or land whose income supported the communities.

The government cannot kill off the proposed amendments to the Foundations Law, as it would risk killing off any chance of moving forward on EU accession. But the main problem remains that the state is unwilling to have to return all these properties and fears that, if properties in the hands of third-parties could not realistically be returned, it would have to offer perhaps substantial compensation. It fears any amended Foundations Law might force it to do so.

Although Turkish-based and international lawyers working with Turkey's non-Muslim religious communities are looking at the proposed amendments and pointing out legal problems with the current draft, they also argue strongly that this is dealing with the wrong issue. They complain that the proposed changes are still predicated on the myth that such foundations only existed because of the 1923 Treaty of Lausanne and that only those communities which had foundations then can have them now.

Because religious communities in themselves cannot get legal status (in theory the Law on Associations does allow it, though courts are unlikely to accept this in practice), they cannot own any property. Someone who does not exist cannot own property. As long as religious communities like the Alevi Muslims, Roman Catholics, Protestants, Baha'is and Jehovah's Witnesses have no legal status they cannot organise themselves administratively (they cannot even run bank accounts), and this even impacts on them spiritually. Moreover, the state can interfere at any time.

A further problem with the question of recognition of churches or religious groups as Associations – which some Protestant churches have encountered – is the attitude of the officials dealing with the application. If they are favourable, the application may be granted. If officials – and indeed judges -- are hostile, recognition may not be granted.

Many lawyers working with non-Muslim communities make a compelling case that any religious community should have rights – not only to own property but to run themselves as they choose in line with Article 9 of the ECHR.

The lawyers believe that it is time to abandon all discussion of regulations that regulate these rights and reject any suggestion that the answer is to allow other religious communities to create the same type of foundations under restrictive state controls. The argument that including the wording of Article 9 of the ECHR in the Turkish Constitution would be an excellent starting-point for solving the existing problems of religious communities – both Christian and non-Christian – is compelling.

The fundamental problem is that the existing type of foundation – which remains under the intrusive control of the Directorate-General for Foundations, which even has to approve any basic building repairs – represent in the eyes of the Turkish government ethnic-religious communities, not religious communities without strong ethnic ties. In law the foundations have nothing to do with specifically religious communities, even though they administer their places of worship and other property.

Yet a religious community is not organised as a foundation with an elected board under the control of the state. Unlike such foundations, many Christian Churches for example are led by spiritual leaders whose authority derives from their position, not from being elected. The foundation law's model is not the right one for religious communities that should have the right to determine their own governing structures themselves.

Besides, the state has frequently interfered in the election of board members, removing those it does not like – or even on occasion the whole board, saying it was not the board it expected to be elected. Armenian Apostolic and Greek Orthodox foundations have particularly suffered from this.

Another oddity is the distinction made between “community foundations” belonging to non-Muslim minorities, and those for the Muslim community, which are termed merely “foundations”. Even though they too are controlled by the Directorate-General for Foundations, they are controlled differently. Moreover, Muslim communities are not free to establish new foundations either.

Amid continuing Turkish foot-dragging on any changes to the legal framework for religious communities, the mood of outsiders has changed. At first, many in the European Union and its institutions believed that improving the Foundations Law was the closest Turkey would get to ending restrictions on Turkey's religious communities. Even Europeans from countries with full religious freedom did not believe it would be possible to persuade Turkey as well to introduce full religious freedom for all, including for religious minorities. But this has changed. I believe the European Commission is convinced of the importance of real change. It is no longer looking at the symptoms but at the core problem.

Views differ as to whether it is better to start with a revised Foundations Law and then, once that is achieved, move to a more fundamental review of the core religious freedom issue, or

whether it is better to start work now on a totally new law guaranteeing religious freedom and recognising religious communities in law.

Either way this will be difficult, given the lack of readiness in Turkey to address the unacceptable restrictions on religious communities. People feel they have already conceded too much on the road to Europe, as do the powerful military and the bureaucracy which clings to their somewhat absurd interpretation of the secularist ideas of Kemal Ataturk. Even some in the governing Justice and Development Party (AKP) would resist any changes. Real Islamists too would not understand that introducing religious freedom should also benefit Muslims. Only part of the AKP and liberal intellectual circles advocate any liberalisation.

There are indications that some parts of the AKP leadership might understand fully what religious freedom means and do indeed want controls on religious communities to be lifted, but do not dare to express their views for fear of provoking the still powerful military. Whether they understand religious freedom in the same way as the European Convention in Human Rights is another question. Some suggest that there is a hidden agenda of creating an Islamic State.

Turkey's religious minorities remain dissatisfied by the proposed changes to the Foundations Law. The proposed changes – if they are ever adopted - will not introduce true de jure and de facto religious freedom. I believe that tackling the core issue of religious freedom has to begin with changing the Constitution to guarantee full individual and collective religious freedom rights, and passing a law to put this fully into practice.

For an overview of religious freedom in Turkey, see

[http://www.forum18.org/Archive.php?article\\_id=670](http://www.forum18.org/Archive.php?article_id=670) For a personal commentary on religious freedom under Islam, see [http://www.forum18.org/Archive.php?article\\_id=227](http://www.forum18.org/Archive.php?article_id=227)