



Comments on the *Policy for regulation of International Non-governmental Organizations (INGOs) in Pakistan*

Executive Summary

These comments address the *Policy for regulation of International Non-governmental Organizations (INGOs) in Pakistan* (“INGO Policy”) issued by the Ministry of Interior (“MOI”) and adopted by the Government of Pakistan in October 2015. ICNL has reviewed this Policy in light of Pakistan’s international legal obligations and good regulatory practices.

ICNL provides an analysis of the most concerning provisions of the INGO Policy, with recommendations to improve it.¹ Key restrictions of the INGO Policy include:

- An onerous and unclear registration process with no safeguards against arbitrary denial of registration of INGOs.
- Prior government permission required to: (a) access foreign funds; (b) provide direct or indirect assistance to other NGOs; and (c) dispose of assets.
- A thirty percent cap on administrative expenses.
- Prior government permission required to hire foreign nationals, and foreign nationals may constitute only 10 percent of an INGO’s staff.
- Broad and inappropriate bans on political activity and activities inconsistent with government interests or policy.
- Restriction on INGOs from working in locations not previously authorized.
- Government’s unlimited right to information and onerous reporting requirements.
- Broad and inappropriate grounds for cancellation of registration.
- No right to judicial appeal of adverse decisions and actions taken by the government.

About ICNL

The International Center for Not-for-Profit Law (ICNL) is an international not-for-profit organization that facilitates and supports the development of an enabling environment for civil society and civic participation. ICNL provides technical assistance, research and education to support the development of appropriate laws and regulatory systems for civil society organizations around the world. For more information, please visit: <http://www.icnl.org>

¹ ICNL limited its analysis to only the most concerning provisions. ICNL is working with local and international partners to determine the need for a full legal analysis, which ICNL would make publicly available.

International Legal Framework on the Freedom of Association

Pakistan acceded to the International Covenant on Civil and Political Rights (ICCPR) on June 23, 2010. Article 22 of the ICCPR provides the overarching international standard for laws impacting non-governmental organizations (NGOs) and other associations:

Everyone shall have the right to freedom of association with others... No restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

In order to comply with its international obligations, therefore, Pakistan has the burden of demonstrating that restrictions on the freedom of association meet three requirements.²

First, restrictions must be “prescribed by law,” meaning that: (a) the restriction is introduced by a parliament or other legislative body, not an administrative order;³ and (b) the law is sufficiently precise for an individual or NGO to foresee a violation to the law.⁴ Several provisions in the INGO Policy do not meet this standard.⁵

Second, restrictions must be in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. This is a closed list, and these limited circumstances must be strictly construed.

Third, restrictions must be “necessary in a democratic society.” Necessity amounts to a proportionality test: “Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”⁶ The “democratic society” component “places the burden on States imposing restrictions to demonstrate that the limitations do not harm the principles of ‘pluralism, tolerance and broadmindedness.’”⁷

Foreign Nationals and Foreign NGOs under International Law

International norms generally require that foreign nationals and foreign NGOs be treated in the same manner as their domestic counterparts. Foreign nationals in Pakistan have the right

² “Defending Civil Society Report,” International Center for Not-for-Profit Law and World Movement for Democracy (2nd Ed., June 2012), p. 40.

³ Commentary to the Declaration on Human rights Defenders, UN Special Rapporteur on the situation of human rights defenders, July 2011, p. 44.

⁴ “Defending Civil Society Report,” International Center for Not-for-Profit Law and World Movement for Democracy (2nd Ed., June 2012), p. 31.

⁵ It is also unclear whether the INGO Policy itself meets the “prescribed by law” standard. The INGO Policy was issued by the Ministry of Interior, not a legislative body, and it is unclear if the restrictions in the INGO Policy are based on any law introduced by a legislative body in Pakistan.

⁶ ICCPR Human Rights Committee, General Comment No. 31(6), Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004.

⁷ UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (hereinafter “Maina Kiai”), para.32, U.N. Doc. A/HRC/20/27 (21 May 2012).

to freedom of association to the same extent as Pakistani citizens.⁸ Foreign or “international” NGOs, particularly associations already in the territory of Pakistan, are also protected under the ICCPR’s guarantee of the freedom of association without discrimination: “Foreign NGOs...should be subject to the same set of rules that apply to national NGOs; separate registration and operational requirements should be avoided.”⁹ Different requirements for domestic and foreign NGOs are not justified under the ICCPR.

Analysis of the INGO Policy under the ICCPR

The INGO Policy does not comply with international standards for the freedom of association in at least six major areas: registration, restrictions on resources, prohibited activities, government supervision, cancellation of registration, and lack of right to appeal.

A. REGISTRATION

The freedom of association includes the right to operate as an unregistered organization, and to easily form a legal entity if a group so desires.¹⁰ If a registration requirement exists, the registration process must meet minimum international standards and be similar to that of domestic organizations.¹¹ The registration process provided in the INGO Policy is problematic in a number of aspects.

I. No Safeguards against Arbitrary Registration Decisions

Issue: Registration decisions are made by an INGO Committee chaired by the Secretary of the MOI. (INGO Policy, Art. 4.3). The INGO Policy provides no oversight or safeguards over the INGO Committee’s decision making, such as: (1) clear grounds for denying registration, (2) a requirement to provide written justification for a denial of registration, (3) any remedy if the INGO Committee fails to respond to a registration application within the mandated sixty-day period, or (4) any right to appeal a denial of registration.

Analysis: Denying registration to an NGO is a clear infringement on the freedom of association. As for any restriction to the freedom of association, the grounds for denying registration must comport with Article 22 of the ICCPR: the restriction must be prescribed by

⁸ See, Articles 2 and 22 of the ICCPR. Article 2 specifies that the rights in the ICCPR apply to all individuals within the State’s territory and subject to its jurisdiction, without distinction based on national origin or other status. Article 22 of the ICCPR provides that “[e]veryone” has the right to the freedom of association.

⁹ Report submitted by UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, to the UN General Assembly (4 August 2009) p. 24. *See also:* Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 October 2004) p. 22: “Foreign NGOs ... must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives.”; OSCE/ODIHR, Guidelines on Freedom of Association (17 December 2014), para. 166: The same standards that apply to domestic associations “should equally be observed with respect to ... foreign associations.”

¹⁰ Maina Kiai, paras.56-57, U.N. Doc. A/HRC/20/27 (21 May 2012). The right to freedom of association “equally protects associations that are not registered. Individuals involved in unregistered associations should indeed be able to carry out any activities...This is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views and beliefs.”

¹¹ Report submitted by UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, to the UN General Assembly (4 August 2009) p. 24: “Foreign NGOs...should be subject to the same set of rules that apply to national NGOs; separate registration and operational requirements should be avoided.”

law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The INGO Policy provides no safeguards to prevent arbitrary decisions by the INGO Committee.

First, the INGO Policy provides no clear grounds for denying registration; it only states that INGOs will be registered “for specific field(s) of work and specified location(s) or areas of operation, after consultation with the relevant Federal and Provincial authorities, and in line with their needs and national priorities of Pakistan.” (INGO Policy, Art. 4.7). This suggests that registration can be denied if an INGO’s work does not align with the “national priorities of Pakistan.” However, this is not a legitimate ground to restrict an NGO’s mission or activities under Article 22. It is “vital that Government officials act in a... non-selective manner” in the registration process.¹² Legitimate grounds for denial of registration are typically limited to the organization pursuing criminal or for-profit activity, or the name of the organization being easily confused with another entity.

Second, the INGO Policy does not require the government to provide a written justification for denial of registration. Best practices dictate that a decision denying registration to an NGO must be “clearly motivated and duly communicated in writing to the applicant.”¹³

Third, the INGO Policy does not provide any remedy if the INGO Committee does not comply with the sixty-day time period to scrutinize applications. If the Committee fails to respond within the allotted timeframe, one option would be to provide for automatic registration.

Fourth, under the INGO Policy, INGOs only have the right to appeal cases of cancellation of registration, not denials of registration. (INGO Policy, Art. 7.1). Applicants should be given “the opportunity to challenge [a registration] decision before an independent and impartial court.”¹⁴

Recommendation: Delete Article 4.7 of the INGO Policy to ensure that INGOs are not registered based on the government’s determination of needs and priorities. Provide clear grounds for denial of registration that are legitimate under international law and require the government to provide written justification for denying registration based on these grounds. Provide a remedy for INGOs if the INGO Committee does not provide a timely response to an application; such remedy could be automatic registration. Explicitly permit INGOs to challenge denials of registration in court.

II. INGOs Must Register for Specific Locations of Work

Issue: The INGO Policy states that, “Approved INGOs will be registered for... specified location(s) or areas of operation, after consultation with the relevant Federal and Provincial authorities and inline with their needs and national priorities of Pakistan.” (INGO Policy, Art. 4.7). INGOs must also submit a Memorandum of Understanding (MOU) to the government (INGO Policy, Art. 5.1), specifying the authorized locations of work, among other

¹² Maina Kiai, para. 57, U.N. Doc. A/HRC/20/27 (21 May 2012).

¹³ *Id.* at 61.

¹⁴ *Id.*

requirements. The INGO Policy and MOU generally prohibit INGOs from working outside of these areas without government authorization.¹⁵

Analysis: The requirement for INGOs to operate only within specified and approved locations constitutes a restriction under Article 22 of the ICCPR on the right of NGOs to operate free from unwarranted state interference.¹⁶ Absent a clear justification that meets the standards of Article 22, NGOs should be able to freely pursue activities in the territory of Pakistan.

Recommendation: Remove Article 4.7 of the INGO Policy, particularly the “specified location(s) of operation” clause, and the accompanying provisions of the MOU.

III. Re-Registration Requirement

Issue: All INGOs are required to re-register regardless of previous registration. Further, the MOU lasts up to three years, which would seem to require re-registration every three years.

Analysis: The INGO Policy requires all INGOs to register with the MOI, regardless of whether an INGO was previously registered with the MOI or another government agency, and limits the duration of MOUs to three years (INGO Policy, Art. 5.1). According to the MOU, when an MOU is terminated, registration is cancelled (MOU, Section 5.3), which would therefore require INGOs to seek new registration at least every three years.¹⁷ MOUs should only be terminated based on objective grounds that are provided in the MOU.

Under international standards, registered organizations should not be required to re-register, as re-registration may provide periodic opportunities for arbitrary rejection of registration.¹⁸ Indeed, the government of Pakistan appears to have already exploited this opportunity; it recently issued a series of denials of registration for US- and UK-based aid groups operating in Pakistan.¹⁹

Recommendation: Provide automatic registration under the INGO Policy for INGOs previously registered with any agency of the government of Pakistan or issued a Pakistan tax number. Modify the INGO Policy to ensure that previously registered INGOs can, for example, establish offices, open bank accounts, and hire local employees, which currently can only be done if an INGO is registered under the new procedures. (INGO Policy, Art. 5.2). The three-year duration of MOUs should be eliminated (INGO Policy, Art. 5.1).

¹⁵ See MOU, Section 5.2.1 (allowing the government to terminate an MOU if the INGO has been found to be working in a geographical area other than the areas authorized); MOU, Section 2.3 (requiring approval before opening other offices); and INGO Policy, Art. 5.7 (requiring foreign employees of an INGO to obtain permission before traveling outside the INGO’s designated areas of activity).

¹⁶ “Defending Civil Society Report,” International Center for Not-for-Profit Law and World Movement for Democracy (2nd Ed., June 2012), p. 5.

¹⁷ Notably, the three-year limit is even more stringent than the five-year limit placed on NGOs and INGOs in the 2013 Policy for regulation of organizations receiving foreign contributions.

¹⁸ Maina Kiai, para. 62, U.N. Doc. A/HRC/20/27 (21 May 2012).

¹⁹ Zahid Gishkori, *Nine INGOs refused registration*, THE EXPRESS TRIBUNE (November 6, 2015), available at: <http://tribune.com.pk/story/986093/nine-ingos-refused-registration/>.

IV. Onerous Registration Documentation Requirements

Issue: Article 5.3 of the INGO Policy and the accompanying Document Checklist impose onerous documentation requirements for INGO registration. In addition, there may be other requirements for registration not captured in the INGO Policy.

Analysis: “Foreign NGOs...must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives.”²⁰ Best practices dictate that procedures for registration be “simple,” “straightforward,” “non-onerous,” and “expeditious.”²¹ The documentation requirements for INGO registration in Pakistan are numerous, unclear and, onerous, and undermine a key objective of the INGO Policy – to “facilitate and streamline the registration and functioning of INGOs.” (INGO Policy, Art. 3.1). These requirements may be especially burdensome for new, less-established or informal groups. Below are some of the most burdensome documentation requirements.

- Registration requires the submission of annual action plans, budgets, and funding guarantee letters. Registration processes generally do not require these due to funding uncertainties. Rather, it is best practice for INGOs to submit annual reports based on their actual funding and activities, which ensures a proper level of transparency.
- INGOs must submit annual reports and financial statements for the last three years. This requirement precludes registration for INGOs that do not have such documentation, either because they have been established for less than three years or were not previously required to produce annual reports.
- The INGO Policy requires proof of registration from the INGO’s country of origin and a letter from its Embassy verifying the INGO’s credentials. These requirements presume that an INGO has been registered in another country, which contradicts Article 2 of the INGO Policy. Article 2 states that unregistered groups are also governed by the INGO Policy. Some INGOs cannot register in their home countries due to laws or practices that are improper under international law. For foreign persons in Pakistan, it might not be feasible to register an organization in their countries of origin. Requiring a letter from the Embassy of the INGO’s country of origin may allow foreign governments to restrict the ability of INGOs to operate in Pakistan.
- The INGO Policy requires proof of a local residence in Pakistan. While it is common in many countries to require that organizations provide an address, requirements to secure actual office space or a residence are potentially burdensome, especially if the INGO does not have legal personality and therefore cannot sign a lease. A central office may be appropriate for well-funded INGOs, but smaller organizations or informal groups of foreign individuals may lack sufficient resources to support an office.
- There may be several other requirements for registration not captured in the INGO Policy, such as certification with the Pakistan Centre for Philanthropy and lengthy

²⁰ Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 October 2004) p. 22.

²¹ Maina Kiai, para. 57, U.N. Doc. A/HRC/20/27 (21 May 2012).

documentation required by the Intelligence Bureau.²² Ad hoc requirements added to the registration process and not provided in the INGO Policy fail to meet the “prescribed by law” standard and demonstrate that the registration process is far from straightforward.

Recommendation: Eliminate these requirements and generally only require documentation that is similar to that which is required of domestic NGOs.

B. RESTRICTIONS ON RESOURCES

The right to resources is a critical aspect of the freedom of association. The freedom of association includes the right of *any* association “to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.”²³ Access to resources is necessary for the existence and work of organizations, many of which promote economic, social, and cultural rights. Therefore, “undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.”²⁴

Furthermore, while in recent years Pakistan has sought to implement measures to prevent terrorist financing – a genuine global concern – commercial and other entities have also been implicated in terrorist financing. Sectoral equity should be exhibited in the treatment between the NGO sector and the corporate sector. States should “...avoid measures that disproportionately target or burden civil society organizations, such as imposing onerous vetting rules, procedures or other CSO-specific requirements not applied to the corporate sector writ large.”²⁵

I. Restrictions on Accessing and Utilizing Funding and Material Resources

Issue: The INGO Policy and MOU provide four main restrictions on INGOs’ ability to access and utilize funding and resources.

1. An INGO must receive prior approval before receiving additional funding or drawing from a foreign source not previously authorized. (MOU, Section 4.2).

Analysis: Requirements “to obtain authorization from the authorities to receive or use funds...constitute human rights violations.”²⁶ The MOU’s requirement is problematic for two reasons: first, it opens the door for the government to permit or prevent funding arbitrarily, and second, it provides no timeline or basis upon which the government must make a decision to authorize funding. Therefore, this requirement can result in INGOs suffering delays in accessing funding and implementing projects. Authorities should only require NGOs to notify authorities after receiving funds.²⁷

²² ICNL has received reliable reports that INGOs are being subjected to these *additional* requirements, as well as others not mentioned in the INGO Policy.

²³ Maina Kiai, para. 8, U.N. Doc. A/HRC/23/39 (24 April 2013).

²⁴ Id. at para. 9.

²⁵ Id. at para. 8.

²⁶ Maina Kiai, para. 36, U.N. Doc. A/HRC/23/39 (24 April 2013).

²⁷ Id. at para. 37.

Recommendation: Delete Section 4.2 of the MOU, or in the alternative, amend it to require INGOs to notify the government after it receives additional funds or funds from a different source not specified in the MOU.

2. INGOs must obtain prior approval to provide monetary or material assistance, either directly or indirectly, to a local or international NGO. (INGO Policy, Art. 5.4 and MOU, Section 4.24).

Analysis: As previously stated, requiring prior authorization from authorities to receive or use funds amounts to a human rights violation.²⁸ This type of prior authorization violates the right of INGOs to utilize resources to achieve their statutory objectives and to dispose of their property as they see fit. Furthermore, this requirement is overly vague as “indirect” assistance can encompass an infinite chain of resource distribution.

Recommendation: Delete Article 5.4 of the INGO Policy and Section 4.24 of the MOU. In the alternative, amend the provisions either to require INGOs to report *direct* assistance to other organizations in their annual reports, or to notify the government when direct monetary or material assistance to other organizations is provided.

3. INGOs are prohibited from transferring or leasing assets or allowing their use for purposes other than those specified in the MOU. (MOU, Section 4.25).

Analysis: Under international law, everyone has the right to own property and to be protected against the arbitrary deprivation of one’s property.²⁹ The right to property includes the right to enjoy and dispose of one’s property.³⁰

As currently drafted, Section 4.25 is ambiguous as to whether or not INGOs are prohibited from transferring and leasing their assets and possessions at all, or whether INGOs are only prohibited from transferring and leasing their assets for purposes not specified in the MOU. There is uncertainty into the intent and extent of this restriction. A blanket prohibition against the transfer or lease of any asset is, on its face, a violation of international norms. Even if the restriction is more narrowly interpreted it could nonetheless open the door for inappropriate government interference in an organization’s decision-making. The government should not be interfering on the use of assets in such broad and vague terms.

Recommendation: Clarify or eliminate this provision, or in the alternative require INGOs to notify the government of transfers, leases of assets, or uses of the property in annual financial reports.

4. Administrative expenses cannot exceed 30% of project costs. (MOU, Section 4.12).

Analysis: Caps on administrative expenses interfere with INGOs’ utilization of funds. While the intention behind such caps is generally to ensure that funding is prioritized for projects, a blanket ceiling on administrative expenses neglects the fact that administrative costs are

²⁸ Id. at para 36 (emphasis added).

²⁹ Article 17 of the Universal Declaration of Human Rights states: “(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property.”

³⁰ “Defending Civil Society Report,” International Center for Not-for-Profit Law and World Movement for Democracy (2nd Ed., June 2012), p. 50.

important for the institutional capacity, good governance and development of NGOs. Administrative expenses also vary widely among different types of organizations. For example, small organizations working directly in communities may have few administrative costs, while research and advocacy-focused organizations may have high administrative costs.³¹ In addition, administrative costs can include a wide range of expenses, from salaries, to transportation, to training. This provision is therefore too vague and too burdensome to the functioning of many organizations.³² Instead, it is best practice for governments and donors to rely on annual reports and financial statements to monitor administrative costs.

Recommendation: Delete Section 4.12 of the MOU; monitor administrative costs by reviewing annual reports and financial statements.

II. Restrictions on Human Resources

Issue: The INGO Policy and MOU provide three main restrictions to the ability of INGOs to hire foreign nationals.

1. INGOs require prior permission from the MOI before hiring a foreign national. (INGO Policy, Art. 5.5).

Analysis: This provision fails on three general principles of the freedom of association. First, NGOs have the right to operate free from undue government interference, including in their internal governance and affairs.³³ “An association is not independent if decisions concerning its activities and operations are taken by anyone other than the members of the association or a body designed by its members to do so.”³⁴ Second, the freedom of association includes the right of *any* association to seek and secure resource – foreign or domestic, and human, material, or financial.³⁵ Third, this provision discriminates against foreign individuals already in Pakistan who seek to associate with an INGO. As previously mentioned, the freedom of association applies to everyone within a country’s territory. Fourth, in accordance with the principle of sectoral equity, INGOs should be subject to the same labor rules as any other legal entity in Pakistan. Foreign individuals in Pakistan should therefore be able to freely associate with domestic and foreign NGOs.

Recommendation: Delete Article 5.5 of the INGO Policy. Alternatively, amend the provision to require INGOs to report new foreign hires in their annual reports.

2. Foreign nationals may not constitute more than 10% of total staff, and preference must be given to Pakistan nationals for key positions. (MOU, Section 4.4).

Analysis: As previously mentioned, sectoral equity calls for NGOs to be subject to the same labor regulations as other sectors, and NGOs have the right to determine their internal

³¹ Guidelines for Laws Affecting Civic Organizations (2nd Ed), Open Society Institute, at 63.

³² We note that Ethiopia implemented a similar 30 percent cap on administrative costs for charities and societies, which has caused great concern among INGOs. See *NGO Law Monitor: Ethiopia*, available at: <http://www.icnl.org/research/monitor/ethiopia.html> (accessed Dec. 9, 2015).

³³ “Defending Civil Society Report,” International Center for Not-for-Profit Law and World Movement for Democracy (2nd Ed., June 2012), p. 6.

³⁴ OSCE/ODIHR, Guidelines on Freedom of Association (17 December 2014), para. 41.

³⁵ Maina Kiai, paras. 8,10, U.N. Doc. A/HRC/23/39 (24 April 2013).

governance and affairs, as well as to access human resources. The 10% cap on foreign nationals on an INGO's staff, and the requirement to give Pakistan nationals preference for key positions – perhaps governance positions – severely undercuts the right of INGOs to determine their internal governance and access human resources.

Recommendation: Delete Section 4.4 of the MOU.

3. A foreign national must be issued a special “INGO visa,” which may last up to one year. (INGO Policy, Arts. 5.5-5.6; MOU, Section 4.5). Business and visit visas may not be issued to INGO staff. (Art. 5.8).

Analysis: The requirement of foreign hires of INGOs to obtain a special “INGO visa” suggests different treatment between INGOs and businesses, which runs afoul of the principle of sectoral equity. As an example of potential differential treatment, the “INGO visa” may last up to one year only, though business visas may last up to five years.³⁶ As a practical matter, the issuance of only a year-long visa is very likely to disrupt an INGO's activities, especially multi-year projects. The prohibition of foreign employees from obtaining a business or visit visa does not account for non-resident staff who may visit Pakistan for short periods; they should not have to go through the same requirements as foreign nationals seeking to live in Pakistan.

Recommendation: Amend the INGO Policy and MOU to subject foreign nationals seeking to work for INGOs in Pakistan to similar visa procedures as foreign nationals seeking to work for for-profit companies, including the length of time for which such visa is valid. Allow foreign non-resident staff who visit Pakistan for short periods the option of a visitor's visa.

C. PROHIBITED ACTIVITIES

The INGO Policy and MOU contain restrictions on activities that are improper due to vagueness or the absence of a legitimate aim under international law.

I. Ban on Activities Inconsistent with Government Interests

Issue: The INGO Policy and MOU contain several vague and inappropriate prohibitions related to national interest. Illustrative examples include: “anti-state activities” (INGO Policy, Art. 5.10); “breach of security or involvement in any activity inconsistent with Pakistan's national interests, or contrary to Government policy” (INGO Policy, Art. 5.11); and “non-cooperation or breach of security or participation in any activity inconsistent with Pakistan's national interests, sovereignty, territorial integrity, culture, norms, and religious sentiments of the people or contrary to Pakistan's policies” (MOU, Section 5.2.2).

Analysis: These prohibitions generally fail to meet the “prescribed by law” standard. Terms such as “breach of security” and “anti-state activities,” even if in pursuit of a legitimate aim under the ICCPR, like national security, are so broad that they empower the government to suppress activities they do not favor. Prohibitions on activities that are contrary to “government policy,” “sovereignty,” “culture,” and other similar grounds not only fail to

³⁶ Visa Categories, Directorate General of Immigration & Passports, available at: <http://www.dgip.gov.pk/Files/Visa%20Categories.aspx#L> (accessed December 10, 2015).

meet the prescribed by law standard, but do not pursue legitimate aims under the ICCPR. Rather, “[a]ssociations, whether domestic- or foreign-funded, should... be free to promote their views – even minority and dissenting views” that are contrary to government policy, since pluralism is fundamental to a democratic society.³⁷

Recommendation: Remove these provisions.

II. Ban on Political Activity and Research

Issue: The INGO Policy prohibits participation or assistance “in any kind of political activities” or conducting “research or surveys unrelated to their TORs.” (INGO Policy, Art. 5.11). Section 4.23 of the MOU further enforces these prohibitions.

Analysis: The bans in these provisions interfere with the freedom of expression.

Political activity. INGOs should not have their legal status threatened because they carry out what the authorities consider to be “political” activities. “It is a source of serious concern that the term ‘political’ has been interpreted in many countries in such a broad manner as to cover all sorts of advocacy activities; civic education; research; and more generally, activities aimed at influencing public policy or public opinion. It is clear that this interpretation is solely motivated by the need to deter any forms of criticism.”³⁸

The freedom of expression is enshrined in Article 19 of the ICCPR and restrictions to this right are lawful only when such restrictions pass a three-part, cumulative test derived from Article 19. The test is: (1) the restriction must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); (2) the restriction must pursue one of the purposes set out in article 19(3) of the ICCPR, namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and (3) the restriction must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).³⁹

A blanket requirement forcing INGOs to refrain from “political activities” fails to meet all the branches of the enumerated three-part test. First, the requirement is so vague that it fails the principle of predictability or transparency. Second, the restriction does not pursue any of the aims stated in Article 19(3). Finally, there is no indication that this restriction is necessary or the least restrictive means required to meet its purported aim. Nearly every NGO, as part of pursuing its mission, may seek to take a stand on an issue of public importance; in doing so, however, the NGO may run the risk of violating the prohibition against “political activities.” Thus, this requirement is an impermissible restriction to the freedom of expression; regardless of the regulatory intent, it will lead to the stifling of dissent and criticism and could be used to arbitrarily terminate INGOs.

Research. Similarly, the ban on conducting research or surveys unrelated to an INGO’s TOR fails to meet the three-part test. First, the government’s application of this prohibition is not sufficiently predictable. “Research” is a broad term that could encompass any kind of method

³⁷ Maina Kiai, para.32, U.N. Doc. A/HRC/20/27 (21 May 2012).

³⁸ Maina Kiai, para. 43, U.N. Doc. A/68/299 (7 August 2013).

³⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, para. 69, UN Doc. # A/HRC/17/27 (May 2011).

of gathering information, such as online research or even speaking with people in a community. Relevance to an INGO's TOR can be difficult to pinpoint and might simply amount to an arbitrary decision by the government. Second, the restriction does not clearly pursue any of the aims stated in Article 19(3); there is no clear legitimate aim for limiting the pursuit of knowledge and data. Finally, there is no indication that this restriction is necessary or the least restrictive means required to meet any purported aim. This prohibition would serve only to suppress research activities and subsequent work, including advocacy.

Recommendation: Delete Article 5.11 of the INGO Policy and Section 4.23 of the MOU.

Other Prohibitions on Activities, unless Government Permission is Obtained

The INGO Policy and MOU provide three other prohibitions on activities, unless government authorization is obtained. ICNL recommends the following prohibitions be deleted.

1. INGOs must seek permission from provincial and local government and district authorities to carry out activities. (MOU, Section 4.18).

This provision adds another layer of approval – or possibly three layers of approval from provincial, local, and district officials – before INGOs can carry out their activities. While INGOs should be encouraged to inform local authorities about their programs and activities, there is no justification for imposing another layer of approval after INGOs have had their bona fides confirmed through the registration process.

2. An INGO must seek approval from MOI (subject to the concurrence of provincial and local governments) before opening other offices in Pakistan. (MOU, Section 2.3).

Under the ICCPR, NGOs have the right to operate without unwarranted state interference, including opening additional offices. Absent a clear justification under Article 22, INGOs should be allowed to open other offices in Pakistan without obtaining permission.

3. Foreign employees of INGOs may not visit areas outside of their designated areas of activities without prior permission from the MOI. (INGO Policy, Art. 5.7).

This restriction appears to violate the freedom of movement as provided in Article 12 of the ICCPR. The restriction also discriminates against foreign employees of INGOs, in contravention of Article 26 of the ICCPR, which prohibits discrimination based on national origin and other grounds. Foreign employees of INGOs should be able to move about the country freely, except for areas generally restricted from the public.

D. GOVERNMENT SUPERVISION

Under the INGO Policy and MOU, INGOs have disclosure, audit, and reporting requirements, aspects of which do not meet international best practices.

I. No Limits on Disclosure Requirements

Issue: INGOs are required “to provide any information that the government may require from time to time.” (INGO Policy, Art. 6.1). INGOs must also report on their foreign contributions and materials, every six months “and when required by the Government.”

(MOU, Section 4.1). INGOs not fulfilling disclosure requirements related to funding “will be proceeded against, under prescribed rules and regulations.” (INGO Policy, Art. 6.2).

Analysis: NGOs and their members are protected by the right to privacy under Article 17 of the ICCPR.⁴⁰ A degree of oversight over NGOs is prudent in the interests of transparency and enforcement of laws, but governmental oversight should be reasonably restrained.

*All regulations and practices on oversight and supervision of associations should take as a starting point the principle of minimum state interference in the operations of an association....oversight and supervision must have a clear legal basis and be proportionate to the legitimate aims they pursue. Oversight and supervision of associations should not be invasive, nor should they be more exacting than those applicable to private businesses.*⁴¹

On the principle of minimum state interference, the government should not have the power to request “any information” at any time. Rather, the government should always ensure it has a clear legal basis for the desired information and that the information is proportional to the legitimate aim pursued. Disclosure requirements should be guided by rules and regulations that comport with international standards for privacy of legal entities.

Recommendation: Provide that INGOs make disclosures to the government based on prescribed rules and regulations.

II. Reporting on Activities, Staff, and Funding

Issue: The MOU requires INGOs to report several types of information to the government every six months, including: the flow of foreign contributions, materials, and services (MOU, Section 4.1); an updated list of foreign and local staff (MOU, Section 4.8); details of all payments above Rs. 20,000, or about \$190 (MOU, Section 4.9); and “written reports covering its activities and progress on the projects, funds received from abroad and their expenditure in Pakistan” (MOU, Section 4.14). In addition, the INGO Policy requires INGOs to submit an annual action plan of activities and budgets. (INGO Policy, Art. 5.3).

Analysis: “Reporting requirements, where these exist, should not be burdensome [and] should be appropriate to the size of the association and the scope of its operations...”⁴² Requirements for reporting every six months on the flow of foreign resources, staffing, payments above Rs. 20,000, and activities would be extremely burdensome to fulfill, especially for smaller organizations. In addition, annual action plans of activities and expenditures are generally not included as reporting requirements due to funding uncertainties. The standard reporting requirement with governments and donors around the world is an annual report on activities and finances.

⁴⁰ Article 17 of the ICCPR reads as follows: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.” *See also*, Maina Kiai, para. 65, U.N. Doc. A/HRC/20/27 (21 May 2012): “Authorities must ... respect the right of associations to privacy as stipulated in article 17 of the Covenant on Civil and Political Rights.”

⁴¹ OSCE/ODIHR, Guidelines on Freedom of Association (17 December 2014), para. 228.

⁴² *Id.* at. 227.

Recommendation: Amend the INGO Policy and MOU to require information on activities, finances, and staffing to be provided in annual programmatic and financial reports.

III. Mandatory Audits Conducted by INGO Committee-Approved Auditors

Issue: The INGO Policy requires INGOs to undergo financial audits conducted by auditors approved by the INGO Committee. (INGO Policy, Art. 6.3). The MOU specifies that an “independent or third party evaluation” must occur annually and assess the impact of the INGO’s work for the [national] government, provincial government, and local government. (MOU, Sections 4.15). This “performance audit” must be done from a panel of auditors approved by the INGO Committee. (MOU, Section 4.16).

Analysis: Audits can be a disproportionate verification mechanism for many smaller organizations; such organizations often do not have sufficient funds to cover an audit’s cost. Only organizations that have “significant amounts of income” should be subject to audit requirements.⁴³ Additionally, an auditor should be an independent evaluator. Mandatory approval by the INGO Committee calls into question the auditor’s independence. The INGO Policy should not require that an auditor be approved by the INGO Committee. Rather, the INGO Policy can require that an auditor is licensed and conducts financial audits in accordance with internationally accepted standards.

A “performance” audit or impact assessment ordered by an NGO regulatory body is not common practice, especially when an NGO is not receiving project funding from the government. Furthermore there is particular concern where the auditor must be approved by the government as this may lead to an arbitrary or biased assessment. Auditors also generally do not have the expertise to assess the impact of an NGO’s work.

Recommendation: Amend the INGO Policy and the MOU so that only INGOs with “significant” amounts of income must undergo *financial* audits, not impact or performance assessments. The government should determine the threshold amount. The INGO Policy and MOU should only mandate that the auditor be licensed and conduct the audit in accordance with internationally accepted accounting standards.

E. CANCELLATION OF REGISTRATION

Issue: The INGO Policy and MOU allow the government to directly cancel an INGO’s registration based on several vague and inappropriate grounds.

Analysis: The freedom of association applies for the entire life of the association. Involuntary dissolution is the most severe restriction on the freedom of association and therefore should only be applied “when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.”⁴⁴

⁴³ Guidelines for Laws Affecting Civic Organizations (2nd Ed), Open Society Institute, p. 71.

⁴⁴ Maina Kiai, para. 75, U.N. Doc. A/HRC/20/27 (21 May 2012).

The INGO Policy and MOU provide numerous broad and improper grounds for canceling registration.⁴⁵ Alongside the fact that the government determines if the basis for cancellation is satisfied, the state has near unfettered power to shut down an organization. Some of the grounds warranting cancellation include:

- Breaching “security.” (INGO Policy, Art. 5.11).
- Being involved “in any activity inconsistent with Pakistan’s national interests, or contrary to Government policy.” (INGO Policy, Art. 5.11).
- Participating or assisting “in any kind of political activities.” (INGO Policy, Art. 5.11).
- Conducting “research or surveys unrelated to [the INGO’s] TORs.” (INGO Policy, Art. 5.11).
- Not complying with any provision of the MOU. (MOU, Section 5.1).
- Working in a geographical area other than the areas authorized. (MOU, Section 5.2.1).
- “[N]on-cooperation or breach of security or participation in any activity inconsistent with Pakistan’s national interests, sovereignty, territorial integrity, culture, norms, and religious sentiments of the people or contrary to Pakistan’s policies.” (MOU, Section 5.2.2).
- Providing “[f]alse, incomplete or misleading information” to the government. (MOU, Section 5.2.4).
- Undertaking no reasonable activity for a period of one year after signing the MOU. (MOU, Section 5.2.5).

The grounds above are improper due to being overly vague, lacking a legitimate aim under the ICCPR, or constituting a disproportionate penalty to any legitimate aim. For example, shuttering an organization because it undertook “no reasonable activity” is vague and pursues no clear legitimate aim under the ICCPR. An INGO can essentially be shut down during the first year of its MOU unless it undertakes activities that the government deems “reasonable,” yet there is no concrete basis for that determination to be made.

The government can also cancel registration for minor irregularities, which is a disproportionate measure under international standards: “Actions by the Government against NGOs must be proportionate...Administrative irregularities ... should never be considered as sufficient grounds for closing down an organization.”⁴⁶ For example, cancelling registration based on non-compliance “with any provision of the MOU” is a disproportionate measure,

⁴⁵ See Section C, “Prohibited Activities,” for further analysis of several of these grounds.

⁴⁶ Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 23. *See also*: Maina Kiai, para. 38, U.N. Doc. A/HRC/23/39 (24 April 2013): Failure to provide mandatory reports is “such minor violation of the law” that it should not lead to closing an association.

especially due to the myriad administrative and reporting requirements contained in the MOU.

Drastic measures like dissolution of an association should be ordered only by independent and impartial courts, in order to ensure full protection of an association's rights.⁴⁷ The government should never have the power to dissolve an organization directly.

Recommendation: Remove all of these grounds for cancellation of registration. Provide that cancellation of registration may only be done by a court order.

F. LACK OF RIGHT TO APPEAL

Issue: Under the INGO Policy, there is no right to judicial appeal. (INGO Policy, Art. 7.3). INGOs only have the right to appeal the cancellation of registration, and such appeal may only be made to a Special Ministerial Committee. (INGO Policy, Arts. 7.1 and 7.2). All other decisions made by the INGO Committee or other government entities, such as denial of registration, undue supervision, or decisions regarding access to funding or authorized activities, are final and cannot be appealed.

Analysis: Article 26 of the ICCPR provides that all persons are entitled to the equal protection of the law. Therefore, “[a]ctions by the Government against NGOs must be...subject to appeal and judicial review.”⁴⁸ Appealable government actions should not only include the most severe measures like dissolution of an organization or denial of registration, but also invasions of privacy, interference with activities, and other decisions and actions that affect the rights and operations of INGOs and its members.

Recommendation: Amend the INGO Policy to permit INGO the right to appeal any adverse decision or action by seeking redress in a Pakistan court of law in accordance with Pakistani law or the Constitution of Pakistan.

ICNL remains available to provide technical assistance, as appropriate.

Respectfully submitted

December 22, 2015

⁴⁷ Maina Kiai, para. 76, U.N. Doc. A/HRC/20/27 (21 May 2012).

⁴⁸ Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 23.