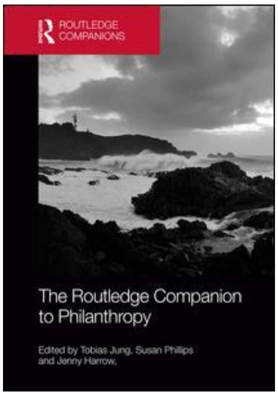

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Philanthropy in Asia

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16

Philanthropy in Asia

Evolving public policy

Mark Sidel

Philanthropy in Asia presents a rich tapestry of old and new, of tradition and innovation, at a time of rapid change in the landscape for giving throughout the region and across the broader international community. Within their extraordinary diversity, Asian societies are tapping traditional sources of charitable giving while finding new ways to access the generosity that is present in each society. As Asia is too large and too diverse to cover – even in its philanthropic activities – in any comprehensive way in a single chapter, this chapter focuses on the changing nature of philanthropy in two of the region's largest and most important countries: the People's Republic of China and India. A number of the developments within these contexts symbolize and reflect changes in other parts of the region. The chapter then discusses various challenges for the development and expansion of philanthropy across the region.

Philanthropy policy in the people-rich tapestry of China

As is the case throughout Asia, philanthropy in China presents both traditional and newer elements. It is a common misnomer to view the development of philanthropy and charitable giving in China as emerging only since the end of the Cultural Revolution in 1976 or only as a product of its more recent reform era. As Chinese and western scholars have long pointed out, charitable giving and activity have existed in China for many centuries, and in many different forms, leading to the diversity we see today (Xu, 2014). These traditional forms of charitable giving in China include: giving by citizens to each other within villages and other communities; gifts and donations of labour to temples and other religious clans or community groups; giving or the organization of labour by religious organizations, clans and community groups to poor citizens and community projects such as building schools, temples, clinics or other facilities; and other forms of philanthropy that began long ago, but have only expanded in the past 40 years.

More recently, newer philanthropic institutions and practices have joined this mix, along with a rapid expansion of direct giving and volunteering for NGOs and other civil society organizations. These include the entry of two different types of foundations (*jijinhui*) that were officially recognized in 2004 with the promulgation of new regulations on the activities of foundations: 'public fundraising' foundations (*gongmu jijinhui*) that are generally closer to the government and are allowed to raise funds from the public, and 'non-public fundraising' foundations (*feigongmu jijinhui*), akin to private foundations in other countries, that receive funds largely from major donors and generally are not permitted to raise funds from the public. In addition to these foundations, there are multiple forms of nonprofit organizations (NPOs) in China (ICNL, 2005; Council on Foundations, 2014) that include social organizations (*shehui tuanti*), civil non-enterprise institutions (*minban fei qiye danwei*), and unregistered, local organizations (including small grassroots organizations), among others. Some of these NPOs, such as the Chinese Red Cross, have a special status and exist under their own individual statutes, regulations or other forms of permission.

The foundation sector, which is the focus of this discussion, has grown quickly, particularly in the past decade. In the 1980s, China had only a few dozen foundations, all of which were government-affiliated. As of 2015, there were over 4,400 public and private foundations in China (China Foundation Center, 2015). A number of foreign foundations also work in China, such as the Ford Foundation. Ford pioneered modern foreign grantmaking in China in the early 1980s and established a regional office in Beijing in 1988. Since then, the Ford Foundation has devoted more than $300 million to grantmaking in China (Ford Foundation, ND). It has been joined by the China offices of the Bill and Melinda Gates Foundation, the Asia Foundation, and various other US and international philanthropic organizations.

Foundations in China work in different and diverse ways, but, even at this relatively early stage, some common patterns in the practices of the new philanthropic institutions are evident. Both public fundraising and non-fundraising foundations have been wary of grantmaking to Chinese NGOs and other domestic voluntary sector organizations due to concerns about the quality of services provided, professionalism of staff, financial controls, constraints imposed by local government bodies, and a host of other obstacles to the work of the local nonprofit sector. As a result, and as a consequence of the preferences of their family donors, many of the new Chinese foundations – which dominate the country's recently developed philanthropic sector – have, in effect, become operating foundations (Leat, Chapter 18), focused on running and controlling their own programs. In addition, a significant amount of the new Chinese philanthropy has arisen in response to natural disasters, such as the 2008 Sichuan earthquake and other incidents. This is highly laudable, but at the same time, it is often difficult to translate disaster philanthropy into other forms of giving in non-disaster times (Kapucu, Chapter 11).

A number of policy and regulatory constraints and obstacles are also encountered by the new Chinese philanthropic sector. China's policy and regulation has sought to keep up with, mould, and control, the development of new institutions, as well as the growth in domestic, diaspora, and foreign giving in China (Simon, 2013). In these policy and regulatory decisions, China faces the continuing tension between a framework that facilitates civic participation, giving and philanthropy, and one that controls, constrains and constricts civil society and independent giving. The ways in which this key underlying tension is balanced and resolved will play a decisive role in the development of philanthropy and civil society in China over the next several decades.

Fueled by the Chinese government's dual political aims of encouraging while also constraining and controlling the directions that philanthropy and the broader nonprofit sector will take, the legal, regulatory and fiscal framework for philanthropy has become increasingly complex in recent years. While only a brief outline can be provided within the space of this chapter, the roots of regulation lie in the Chinese Constitution of 1982. Although earlier Chinese constitutions of 1954 (Article 87), 1975 (Article 28), and 1978 also included formal rights to freedom of association, Article 35 of the 1982 Constitution states: 'Citizens of the People's Republic of China (1982) enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration'. It is not too bold a statement, however, to say that the official Chinese definition of what a right to freedom of association means is more limited than in many other countries. Nevertheless, the constitutional framework for freedom of association is how China frames its policy and legal efforts in these areas, even though the reality of policy and law does not generally live up to the freedoms promised in the Constitution.

Over the years, this basic constitutional reference has resulted in a number of regulatory efforts. These include highly restrictive provisions on philanthropy and nonprofits in the 1950s, which made it very difficult for foundations and other charitable entities to register and operate, and the gradual introduction of more facilitative documents in the 1980s and 1990s. China's current policy and legal framework for this sector is rooted in several regulatory documents issued in the 1990s, including: the *Regulations on the Registration and Administration of Social Organizations* issued by the State Council in 1998; the *Interim Regulations on the Registration and Administration of Civil Non-enterprise Institutions*, also in 1998; the *Public Welfare Donations Law*, enacted by the Standing Committee of the National People's Congress in 1999; and the *Regulations on the Management of Foundations* issued by the State Council in 2004. There are of course many other policy and legal documents governing the sector, but these are some of the key ones, along with a variety of tax laws and documents that begin the process of outlining tax exemption and deductibility issues. These basic documents, and the more specific implementing documents associated with them, have provided an initial framework for the formation, registration, governance, oversight, tax status, and other key elements of nonprofits.

The fiscal framework for this activity has rapidly become considerably more complex, yet it still mirrors the political policy of encouraging philanthropic and nonprofit activity that the government favours (particularly in service provision), while serving to discourage, control and constrain nonprofit activity that the government does not want to occur. The International Center for Not-for-Profit Law (ICNL) describes the current fiscal framework in this way:

> In practice, donations, state subsidies, and some other forms of income are tax exempt. Contributions to NPOs are deductible from income tax, with limits depending on the type of taxpayer, the type of beneficiary, and the use of the contribution.... Contributions to informal NPOs, however, are [generally] not tax deductible.... NPOs that engage in nursing, medical, educational, cultural, or religious activities or activities in which services are performed by the disabled are exempted from the Business Tax on the sale of services. However, informal NPOs that are registered as businesses are required to pay the Business Tax.
>
> *(Council on Foundations, 2014: NP)*

In the governance of philanthropy, rather than of nonprofits, the available legal documents and the overall framework are somewhat more sparse. There are, as noted, the *Regulations on the Management of Foundations* (2004) and the *Public Welfare Donations Law* (1999), as well as some more detailed implementing documents issued over the years that deal with specific foundation and other philanthropic issues. They govern the basics of the philanthropic sector, at least as envisioned in the early part of the last decade, including the two types of foundations. As ICNL notes,

> Chinese foundations, like social organizations, are regulated by both a registration and administration agency, usually the Ministry of Civil Affairs in Beijing or a provincial, municipal, or local Civil Affairs bureau or office, and by a professional agency such as the relevant government ministry or agency at the national, provincial, municipal, or local level.
>
> *(Council on Foundations, 2014: NP).*

This philanthropic regulatory framework – which is beginning to shift toward single reporting mechanisms in some parts of the country – also incorporate, particularly in the 2004

Foundation Regulations, general principles expressed in regulatory form for the governance of foundations. These cover reporting requirements, audit and the like, and provisions for government oversight. In addition, more specific implementing documents issued over the years on foundation matters include, for example, regulations on their names, information disclosure, annual inspection, and audit guidelines for them. We can find even more specific regulatory documents on particular issues in the philanthropic arena, notably documents on foreign philanthropy and donations of foreign exchange to domestic organizations.

Despite all this regulation making, virtually all observers seem to agree that the current framework for legal regulation, of both the broader nonprofit sector and the philanthropic subset of it, began as incomplete and inadequate; it was made either overly general, or – partly due to the march of time, developments around China, and an increasing tendency to explore different approaches and reforms in this sector – has quickly become dated and obsolete. The obsolescence, however, comes from some positive developments, including the growth of the sector and its increasing roles in Chinese society. At the same time, the regulatory structure and the broader legal framework outside of nonprofits have been unable to fully respond to emerging problems, such as increased instances of fraud or inappropriate practices in the sector. Many observers would also agree on another conclusion: the legal framework for the philanthropic and nonprofit sector has done a considerably better job at facilitating state control of the growth and programmatic directions of the sector than at safeguarding the rights of those who try to form and register organizations or work in them. What has emerged is what some Chinese scholars call 'differentiated management', in which the policy and legal framework enables a wide range of responses by the state to the activities of non-governmental and philanthropic organizations, depending on whether they are pursuing activities, services, policy advocacy, or other work that the state approves of or seeks to discourage.

What are the key issues for policy and regulation in Chinese philanthropy going forward? From multiple conversations, over a number of years, with government officials and nonprofit leaders in China, as well as through an extensive review of press sources which now identify these issues on a frequent and frank basis, a number of problems can be identified that Chinese policymakers and regulators are working to resolve, and will continue to work on under often complex and difficult circumstances. The first is how to move from the highly controlled 'dual management' registration and reporting system for Chinese nonprofits, which requires two different government agencies to agree to formation of an entity, toward a more streamlined system of formation, registration, and reporting for foundations and other nonprofits, an approach that has been pioneered in southern China and elsewhere. A second issue is whether to allow social organizations and other types of charitable organizations to raise funds from the public: a right generally now only available to public fundraising foundations and a few national charitable entities. Accommodating the work of foundations is a third category in need of attention. This encompasses: making more flexible – but in a prudent way – restrictions on investment of assets by foundations and other Chinese nonprofits, including whether a minimum portion of assets (say 90 percent) should be required to be held in safe instruments such as state bonds or bank accounts; whether to require minimum outlays (donations) by foundations for public benefit purposes; how to protect donor rights on restrictions and requirements placed on the use of funds; and how to strengthen foundation and nonprofit information disclosure mechanisms, transparency, and accountability through a combination of government regulation and industry self-regulation. The current dual definition of foundations – public fundraising versus non-public fundraising by which some foundations are permitted to raise funds and others are not – will itself become increasingly problematic. Fourth, tax incentives for nonprofits of various kinds, including foundations, need to be addressed: should they be enhanced through strengthened tax exemption, tax deductibility and other provisions? A related concern is how to regulate the business and investment activities of charitable organizations in general, and whether to differentiate among them in these areas. Finally, with expansion of the sector and increased hybridization that is occurring worldwide, the regulatory framework will need to deal with new forms of charitable and philanthropic organizations and new forms of giving. At present, many giving vehicles such as charitable trusts and the use of stock for charitable giving are largely unregulated by current law, at least in their early years.

In wrestling with these complex questions for the future of the philanthropic and nonprofit sector, China has had to cope with the obsolescence, generality and difficulty of enforcement of that first generation of regulation in this area. One possible resolution, which has been in draft form for many years, reworked many times, and finally introduced into the national legislature in December 2014, is an overall Charity Law (*Cishanfa*) governing the sector. This Charity Law reflects a somewhat more pragmatic approach by government to the philanthropic and nonprofit sector (China Briefing, 2015). It would require all charities to register directly with the government and allow some organizations to register without seeking government partner organizations. The Charity Law may also make it easier for a range of organizations to raise funds and may solidify some of the tax incentives that the finance authorities have grudgingly permitted in recent years. Greater transparency would allay concerns over their operations. Given its drawn out history, it is unclear when the Charity Law will be enacted: debates continue on key issues in the law, including all those discussed here, and rapidly changing circumstances are overtaking the terms of these debates amid growing demands for the Law's promulgation.

Another concern – this from the Party and government – has been the activities of foreign NGOs and foreign funders. In the years leading up to 2015, it became more difficult for Chinese organizations, universities, and other groups to receive foreign funding due to informal or formal government restrictions. In early 2015, a draft Law on the Management of Overseas NGOs emerged, proposed by the Ministry of Public Security, that would bring most issues of foreign funding within the purview of public security (police), require all foreign organizations to register after locating and signing an agreement with a designated Chinese partner organization that would be responsible for its activities in China, and restricting the fields and work that foreign organizations and funders could undertake in China. This proposed new legislation, restricting and further controlling foreign funding, prompted a major backlash from Chinese and foreign organizations alike. At the time of writing, the draft law is under consideration by the National People's Congress. If it is enacted, then its implementation rules and practice will provide a guide to how far foreign NGOs and funders will be limited in their work in China in the years ahead.

Yet another approach to these complex problems of regulation has been to supplement government regulation with various forms of self-regulation and information disclosure generated by the philanthropic sector itself. The Chinese discussion of nonprofit self-regulation has its roots in business self-regulation, with initial principles for nonprofit self-regulation advanced by the nonprofit leader Shang Yusheng and the China NPO Alliance in 2001. On the philanthropic front, the Chinese Private Foundation Forum issued self-regulatory principles for private foundations in 2009, asking the new private foundation community to abide by these (Hui, 2009; Sidel, 2014). Since 2009, discussion of the Private Foundation Forum self-regulatory principles seems to have faded somewhat. But, there remains strong interest in Chinese NPO and philanthropic circles in self-regulation, and discussion of its feasibility and potential forms can be expected to grow in the years ahead.

Organizational disclosure and transparency are closely related to self-regulation and to organizational autonomy, and thus in recent years, we have seen the emergence of several forms of disclosure requirements. For foundations, information disclosure is required and has been strengthened under the *Regulations on the Administration of Foundations* (2004) and through multiple implementing documents issued since then. Information disclosure is now also accomplished through regulatory mandates of the Ministry of Civil Affairs which oversees philanthropic and charity regulation, through the China Charity Disclosure and Information Center (CCDIC), which is a Ministry mandated mechanism, and through an initiative for philanthropic organizations that arises from the philanthropic community, the China Foundation Center.

National level tax legislation dealing with income tax status, tax deductions for charitable donations, and the possibility of an estate tax has also been gradually developing. China has a developing infrastructure that permits tax deductions for charitable donations (up to prescribed levels) and provides tax exemptions for various kinds of charitable organizations. This tax infrastructure will continue to be modified in the years ahead, likely facing considerable conflict between calls from civil society to increase the incentives for giving and misgivings on the part of tax and other officials. This is a complex area, and one that will see continuing change (Council on Foundations, 2014).

Other policy and regulatory documents affect the domestic, diaspora or international philanthropic and nonprofit sectors. Examples of these abound; one recent and important example is Notice 63 issued by the State Administration of Exchange Control that took effect in March 2010. This makes it more difficult for some, especially unregistered, social organizations to receive foreign funding. The draft law on management of overseas NGOs is a further development of these foreign currency restrictions.

In recent years, consistent with national political policy that seeks both to encourage *and* constrain the development of civil society and philanthropy, local policy and regulatory activity on philanthropy has emerged as a key area of development and experimentation. In many provinces and centrally-administered municipalities, legal and policy documents on philanthropy, charitable giving, donations, and foundations have now been issued, and in some cases, are being used to explore new and more flexible approaches to state regulation of the philanthropic sector. Some provinces and municipalities (such as Guangdong, Shenzhen, Shanghai, Jiangsu, and Beijing, among others) have become well-known for their progress in this area, including local experimentation with new forms of administration for the central authorities in Beijing. These are important experiments to watch and learn from, and at times draw upon in remaking national policy.

Local authorities, with approval from Beijing, have at times carefully expanded and made more flexible such areas as: rules on formation, registration and management of social organizations and foundations; local experiments and procedures for 'social contracting' (government contracting with nonprofits to provide social services); local initiatives in transparency and disclosure and local supervision and management of foundations; and experimentation with new rules and policies on local fundraising by local organizations that begin to weaken earlier restrictions on fundraising, among other initiatives. The willingness of central government authorities to allow provincial and subnational implementation and, in some cases, experimentation with new procedures on the registration, management and oversight of foundations, social organizations and other entities is an important set of developments in Chinese philanthropy policymaking. But, it has not yet risen to the level of provincial or other sub-national 'competition' for philanthropic resources in the way that in the past subnational regulation represented for foreign investors interested in arbitraging the differences among local incentives for foreign investment.

In short, the local developments in philanthropy policymaking and regulation represent some local specificity and, at times, local experimentation with approaches that may or may not be scaled up for other provinces or cities or as national promulgation. However, Beijing is carefully watching their progress. As ICNL (2015a: NP) has stated:

> Over the last few years, there have been important local policy experiments in the Chinese nonprofit and philanthropic sector, mostly at the provincial level. These policy experiments are important because they provide the central authorities with policy ideas and experiences that play a role in shaping national-level legislation. They therefore [may] serve as harbingers of changes in national-level legislation.

China continues to pursue a nuanced, if constrained, policy toward the development of civil society and philanthropy. The policy and legal framework encourages the growth and, in some cases, registration of social service organizations and other groups undertaking activities favoured by the state, while discouraging through a range of means the formation of groups and advocacy activities that the state disfavours. This policy of guided development is likely to continue. Organizations will, over time, probably have easier routes to formation, registration, fundraising and other operations, with organizations and foundations that provide state-favoured social services privileged over groups that engage in advocacy, which are often – though not always – a bane of the state. At the same time, the Chinese state will keep a very close watch over the entire philanthropic and nonprofit sector, allowing wide swaths of the sector to expand with increased activities and public fundraising, while keeping an even closer watch and much tighter restrictions on disfavoured advocacy groups, especially those that show any sign of fostering public discontent or that appear to be emerging as broader social movements.

Philanthropy policy in India

India, like many countries of Asia, has an extraordinarily diverse philanthropic and nonprofit sector. More traditional temple and other giving (Agarwal, 2010) mixes with newer forms of online giving, corporate philanthropy, and giving circles. As with many other countries in Asia, the level of giving in India is generous, particularly when multiple forms – money, goods, volunteering and social investing – are combined. India also has an array of philanthropic and nonprofit forms, including societies, trusts, foundations, and other kinds of civil society organizations. Government regulation is carried out through a combination of national regulation, most specifically in areas of taxation and foreign funding, and state-based regulation, which focuses on organizational form, formation, governance, reporting and related issues. Much of Indian philanthropic and nonprofit regulation is adapted from earlier British legislation of the nineteenth century, heavily amended to fit modern Indian realities. But a key feature of that colonial system – the need for regulatory approvals – remains an important and much critiqued part of modern Indian nonprofit regulation. Indeed, it is sometimes called the 'raj' system of nonprofit regulation in modern India.

Constitutional freedom of association forms the backdrop for the wide diversity of philanthropic and nonprofit forms in India. Yet, regulatory constraints and complexity are an important part of the picture as well. Other treatments of Indian philanthropic life (Cantegreil *et al.*, 2013; National Foundation for India, 2013; Handy *et al.*, forthcoming) discuss the constraints and opportunities for Indian civil society in more detail. Here the focus is on several issues that have proven of particular interest, and controversy, in India's philanthropy policy.

Set against a backdrop of complex organizational forms – societies, trusts, nonprofit companies and others – the Indian state seeks, as all governments do, to influence and shape philanthropy and civil society activity toward its desired ends, away from activities that would threaten the state or particular state policies. For example, with enactment of the *Companies Act 2013* India now requires charitable contributions by a range of Indian companies. As the prominent Indian newspaper *The Hindu* (2012) noted, 'India [has] become the first country to mandate corporate social responsibility (CSR) through a statutory provision'. These new CSR requirements require some companies to provide charitable contributions, spending two percent of average annual profits on CSR activities. This new mandated CSR spending applies to companies with a net worth of approximately $US 90 million or more, or turnover of about $180 million or more, or net profits above approximately $900,000. The baseline for calculating CSR required spending will be a company's net profit before tax, averaged over the previous three years. A committee of a company's board, including at least one independent director, must sign off on these required CSR activities. A number of provisions seek to make this required CSR spending easier for companies: for example, companies required to make such contributions may jointly pool them with other companies. In addition, the *Income Tax Act* provides incentives for corporate giving: for instance, 'shared value', in which donations that benefit a company's business, but also benefit social or related goals are permitted. Such required CSR activities and giving may also be performed directly, or through a range of other Indian nonprofits. However, CSR-related giving must be directed toward projects and activities in India, rather than overseas.

What kind of activities will count toward fulfilling the CSR requirements? The list under the legislation is broad, although it does not include a full range of advocacy activities. Available activities and goals include: eradicating extreme hunger and poverty; supporting education; promoting gender equality and empowering women; reducing child mortality and improving maternal health; combating HIV, AIDS, malaria and other diseases; ensuring environmental sustainability; strengthening employment-enhancing vocational skills; supporting social business projects; contributing to the Prime Minister's National Relief Fund or funds for the welfare of the Scheduled Castes and Tribes, minorities or women; and assisting with such other goals and activities as may later be added through legislative or regulatory provisions.

These developments have drawn wide attention in philanthropic and nonprofit communities around India, the region, and well beyond (Bapat, 2013; EY, 2013; Kordant Philanthropy Advisors, 2013). The precise number of companies subject to the required CSR spending and the amount that could be added to nonprofit giving in India each year, however, remains difficult to measure in these early stages. AccountAid (New Delhi), the well-known accounting and financial services organization working with the Indian philanthropic and nonprofit sector and the accounting firm EY (2013) estimates that the new CSR spending requirements may apply to more than 2,500 companies in India and may account for several billion dollars more in social sector spending per year.

Other developments reflect a longstanding Indian concern with certain types of foreign funding to Indian nonprofit organizations. The *Foreign Contributions (Regulation) Act* (*FCRA*), enacted during the Indian Emergency of the mid-1970s, with a range of amendments since, seeks to limit foreign funding for political, advocacy, journalism and other sensitive endeavours in India. It has long been opposed by parts of the Indian philanthropic sector that seek to raise funds abroad, both because of its policy constraints on foreign funding and its cumbersome and difficult licensing procedures. In general terms, the *FCRA* requires organizational or transaction-by-transaction permission for Indian philanthropic and nonprofit organizations to receive foreign funds (including, in many cases, Indian diaspora funds) for many charitable, cultural and other purposes. It is without doubt the most controversial and actively opposed component of the regulation of philanthropy and nonprofits in India. And, the *FCRA* is now serving as a model for restriction of foreign funding to domestic nonprofits and philanthropic organizations in Pakistan and Bangladesh, developments that have aroused the concern of non-profit advocates in each of these countries and throughout the region.

Although earlier amendments tightened the scope and enforcement of the *FCRA*, modifications in 2010 and new rules issued in 2011 expanded its scope of enforcement and its constraints on organizations that seek foreign funding for their work. For example, the *FCRA* is now applicable to individuals and some companies, as well as to NGOs. The Act requires organizational or transactional permission for donations from companies with 50 percent or more foreign equity, thus bringing donations from such well-known entities as Infosys, Cadbury and others within its regulatory scope. The Act also prohibits 'speculative activity' with foreign funds, and, as AccountAid (Agarwal, 2012) has pointed out, this conflicts with the more relaxed *Income Tax Act*'s permission for NGOs to invest in certain vehicles, such as mutual funds, which might be considered 'speculative activity' under the *FCRA*. The Act's broad discretionary grounds for the government (through the Ministry of Home Affairs) to refuse NGO applications to register under the Act in order to receive foreign funding have long been criticized, but show no signs of being moderated (Ministry of Home Affairs, ND). In 2014 and 2015, the Indian Ministry of Home Affairs took additional steps to amend and tighten the *FCRA*, to prune several thousand organizations from the list of those authorized to receive foreign funding, and to tighten funding restrictions on about 15 foreign organizations, including the Ford Foundation.

These restrictions on foreign funding for voluntary, political and other purposes in India have been strengthened over time and have, as noted above, served as a model for other governments' attempts to stifle advocacy activities by constricting the foreign foundation, development aid and other funding that helps to make advocacy possible. In Bangladesh, for example, attempts to strengthen restrictions on foreign funding for NGOs and civil society have included the proposed *Foreign Donations (Voluntary Activities) Regulation Act* which, if adopted, would require government permission for foreign donations to Bangladeshi NGOs and would strengthen other regulatory obstacles to overseas funding for advocacy and development work in Bangladesh. If adopted in its draft form, this Act would be quite sweeping as it would: prohibit individuals and organizations from receiving foreign donations or contributions for the purpose of carrying out any voluntary activity without prior government approval; require all organizations wishing to receive and use foreign donations/contributions to register with Bangladesh's NGO Affairs Bureau; require all organizations seeking to carry out activities with foreign donations to secure advance project approval; and penalize NGOs if the Director General of the NGO Affairs Bureau believes that NGOs are engaged in activities that are 'illegal or harmful for the country' (ICNL, 2015b).

These developments in Bangladesh are reflective of attempts in other parts of Asia to control and channel the nonprofit and voluntary sector. For example, information legislation is increasingly being used to target civil society activists. Bangladesh's 2006 information legislation (Art. 57(1)) states that

> if any person deliberately publishes or transmits or causes to be published or transmitted in the website or in electronic form any material which … causes to deteriorate or creates possibility to deteriorate law and order, prejudice the image of the State or … instigates against any person or organization, then this activity of his will be regarded as an offence.

Such an offence was originally punishable by ten years imprisonment, although in 2012 the penalty was increased to a maximum of 14 years imprisonment, along with heavy fines. In addition, the 2012 amendments to the information and communications legislation allowed arrest under the statute without warrant, and made alleged offences under the statute 'nonbailable', meaning that detainees could be held without the opportunity to post bail. These provisions were used against the Director of the Dhaka-based rights-based NGO, Odikhar, in the late summer of 2013 (ICNL, 2015b).

Moves to restrict foreign funding are also underway in Pakistan, again modeled after the Indian *FCRA* legislation. A draft bill introduced in 2012 targets NGOs, setting high barriers for groups to accept foreign contributions and is applicable to NGOs registered in Pakistan or abroad. The draft *Foreign Contributions Regulations Act* would allow the government to deny a group permission to receive foreign funding if the group is deemed likely to use the funding for 'undesirable purposes', as stated in the very broad language that often characterizes restrictions on civil society organizations in Asia. As in India, NGOs operating in Pakistan would be required to obtain advance governmental permission to receive foreign contributions; that permission would last for only five years before relicensing would be required; and the grounds for government review of such applications would be vague and highly discretionary. The government would be free to ban foreign funding to groups as it 'deems fit', including when it deems such funding might be used for 'undesirable purposes' or might implicate 'the security, strategic, scientific or economic interest of the State', 'the public interest', or 'friendly relations with any foreign state'. The draft legislation would allow the government to cancel a foreign funding license without judicial or other review, and with a three-year bar before reapplication is possible. Government inspection powers under the statute would be exceptionally broad, with no procedural safeguards, no judicial role, and no requirement that advance notice be given. Imprisonment and organizational liability are among the penalties drafted (ICNL, 2015c).

Conclusion: Challenges for the expansion of philanthropy in Asia

Philanthropy and the nonprofit sector in Asia have expanded rapidly in recent years. They face many obstacles and impediments to future development – some as a result of recent growth and some resulting from governmental and political constraints on philanthropic activity. In the coming years, the expansions of philanthropy will face several key challenges.

First, the emergence of new forms of giving will present different types of regulatory issues. As online, crowd sourced, and other forms of charitable giving grow throughout Asia, philanthropic organizations are faced with new competition for giving: citizens increasingly donate online and directly to organizations they wish to support, rather than through philanthropic intermediaries. Governments face the problems of tracking the diversification of giving which outstrips their ability to spot trends and identify security or other problems. Nonprofits are increasingly pressured to find ways of identifying new sources of funding at a time when traditional means of fundraising are being supplanted by new technologies and direct, internet-based appeals.

Government restrictions on foreign funding and on domestic fundraising increasingly conflict with more internationalized, transborder philanthropy. As the discussion of India, Bangladesh and Pakistan indicates, governments in these countries and throughout the region are deeply concerned about the use of foreign funds to support NGO advocacy, political and religious causes, and other activities they may perceive as threatening. Governments' responses in a number of countries around Asia have been to tighten the constraints on overseas giving, with particular emphasis on advocacy. In South Asia, and beyond, civil society organizations have tried to blunt the force of these restrictions, but often with little success. For much of elite philanthropy in these countries, restrictions on foreign funding are considered a world apart and a political issue to be avoided. In India and a few other countries, however, even local philanthropy recognizes that their freedom of movement may soon be affected and that foreign funding plays an important role in promoting participatory and sustainable development, rights-based projects, and other worthy causes. In many Asian countries domestic fundraising also faces tight restrictions (ICNL *et al.*, 2012; UNHR, 2013). Given how civil society is changing, however, these combined obstacles to the sector's development will come under significant stress in the years ahead.

Throughout Asia, tax incentives for charitable giving, and tax exemptions for philanthropic and nonprofit organizations remain relatively small. Some of this is understandable: finance ministries, for example, are inevitably focused on revenue generation rather than on the flowering of a well-funded, diverse, healthy philanthropic sector. But the years ahead will see increased pressure on governments and tax authorities to open the spigot, at least somewhat further, to incentivize both individual and corporate donations for nonprofit activity – a process that is likely to be long and for advocacy by the philanthropic sector, arduous.

In addition to addressing foreign funding and tax incentives, there is a need for more broadly enabling legal frameworks for philanthropy. In a number of Asian countries, the regulatory barriers to formation, registration, permitted activities and operations, investment of assets, restrictions on fundraising, and other key aspects of philanthropic and nonprofit activity remain remarkably high. In the years ahead, pressure will grow on governments to reduce these high barriers to growth of this sector. In many cases, governments will slowly, and in some cases grudgingly, begin to dismantle some of those impediments, but always watching the activities of nonprofits carefully and likely adopting policies that seek to channel philanthropic giving toward social services and away from advocacy.

The need for self-regulation by the philanthropic and nonprofit sectors can also be expected to increase over the next few years. Self-regulatory impulses are already strong in Asia, particularly in the business sector which in a number of countries has developed self-regulatory mechanisms, with governments being willing to devolve some regulatory mandates to these regimes. Self-regulation has been much slower to take hold in philanthropy and nonprofit activity, however. As discussed, China has very initial explorations of self-regulation underway in the philanthropic sector in the form of a kind of code of conduct. India's sector has experimented with multiple forms of self-regulation, with government encouragement, although none have taken hold on a national scale or throughout the various subsectors of the philanthropic and nonprofit arena (Sidel, 2010a). As this sector seeks to avoid stricter government regulation, self-regulation will emerge more strongly as a theme in the years ahead.

In addition, cooperation of philanthropic institutions and nonprofits with the state will expand. As governments privatize social services or undertake other measures intended to make the provision of social services more efficient, a number of countries across Asia have either adopted (e.g. India, Hong Kong) or are experimenting with (e.g. China) a variety of forms of social contracting by which national and local governments contract with nonprofits to provide social services to citizens. Some philanthropic and nonprofit organizations welcome this trend because it represents the broadest opportunity for government funding ever made available in their countries or regions. Others are more wary, seeing social contracting as a form of government co-optation of the nonprofit sector, channeling organizations from advocacy to direct provision of social services. In sum, Asia will be a landscape of considerable change – and contradictions – as policy and regulatory frameworks catch up to an expanding and diversifying philanthropy.

Notes

1 There is of course a wide array of regulatory documents on specific issues and sub-sectors, including on health that are too numerous to list here. See the International Center for Not-for-Profit Law (ICNL) Law Monitor, www.icnl.org/research/monitor/china.html and its United States International Grantmaking (USIG) Country Notes on health policies see (Sidel, 2014).

2 Similar draft legislation and a similar set of debates have been underway in Vietnam for many years on what is called the Law on Associations (*Luat ve Hoi*); see Sidel (2010b).
3 Among the best ways of tracking these regulatory developments are the materials available on the website of the International Center for Not-for-Profit Law (ICNL, www.icnl.org), and its publications, including the U.S. International Grantmaking country reports, *NGO Law Monitor*, and the *International Journal of Not-for-Profit Law*.

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