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Letter from the Editor 4

COUNTERTERRORISM AND CIVIL SOCIETY

NGO Responses to Counterterrorism Regulations After September 11th
Elizabeth A. Bloodgood and Joannie Tremblay-Boire 5

Civil Society, Aid, and Security Post-9/11
Jude Howell 20

Thirty Years of Women's Activism in Sudan
Frank van Lierde 24

ARTICLES

*Doing Good and the Law:
Questions of Control, Paternalism, and Partnership—
An Organizational Perspective*
David Z. Nowell, Ph.D. 32

*An Enabling Framework for Citizen Participation in Public Policy:
An Outline of Some of the Major Issues Involved*
Dragan Golubovic 38

*Reflections on the Legislative Environment for
Nongovernmental Organizations in Botswana*
Zein Kebonang and Kabelo Kenneth Lebotse 54

*Developing Standards and Mechanisms for
Public Financing of NGOs in Croatia*
Igor Vidačak 62

*Lottery Proceeds as a Tool for Support of
Good Causes and Civil Society Organizations:
A Fate or a Planned Concept?*
Katerina Hadzi-Miceva-Evans 71

Country Report: Moldova
Hanna Asipovich 80

Letter from the Editor

In this issue, the *International Journal of Not-for-Profit Law* focuses on counterterrorism and civil society. **Elizabeth A. Bloodgood** of Concordia University and **Joannie Tremblay-Boire** of the University of Washington, Seattle, categorize the different ways in which NGOs have responded to post-9/11 counterterrorism restrictions in the United States, Canada, the United Kingdom, Germany, and Japan. **Jude Howell** of the London School of Economics examines effects of the post-9/11 global security framework on global aid. **Frank van Lierde** of Cordaid interviews Asha El-Karib of the Gender Centre for Research and Training about counterterrorism measures and other challenges she has faced in Sudan.

In other articles, **David Z. Nowell, Ph.D.**, of Hope Unlimited for Children provides an organizational perspective on charities and their relations with governments and cultures. **Dragan Golubovic** of the European Center for Not-for-Profit Law outlines issues involved in developing an enabling framework for the participation of citizens in public policy. **Zein Kebonang** of the Botswana-UPenn Partnership and **Kabelo Kenneth Lebotse** of the University of Botswana reflect on the legislative environment in which NGOs operate in Botswana. **Igor Vidačak** of the Office for Cooperation with NGOs of the Government of the Republic of Croatia summarizes the developing standards for public financing of Croatian NGOs. **Katerina Hadzi-Miceva-Evans** of the European Center for Not-for-Profit Law examines the lottery as a means of supporting civil society organizations. Finally, **Hanna Asipovich**, also of the European Center for Not-for-Profit Law, provides a country report on Moldova.

We thank USAID for its generous support for the Moldova report, as well as our authors and their organizations for their timely and incisive articles.

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Counterterrorism and Civil Society

NGO Responses to Counterterrorism Regulations After September 11th

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We examine variations in nongovernmental organizations' (NGOs') responses to post-2001 changes in counterterrorism regulations in the United States, Canada, the United Kingdom, Germany, and Japan. We connect the presence of different ideal type responses—hiding, shirking, vocal opposition, participating, and litigating—to the extent of change in regulations, the degree of uncertainty (and risk) created by new regulations, and the availability of political institutions for NGO participation in policy-making.

Why have nongovernmental organizations (NGOs) in different national contexts taken such different approaches in responding to recent changes in counterterrorism regulations? Given that changes in regulation were inspired by a transnational threat causing a strong shock to all countries, we might expect that NGOs, particularly international NGOs (INGOs) operating in multiple countries affected by the new transnational terrorist threat, would respond similarly to protect their interests. A common response would enable coordination among international NGOs and a stronger global campaign to fight counterterrorism laws with negative consequences for civil society. The popular media and academic literature warn of potentially dire consequences if regulations continue to tighten (Howell and Lind 2009; Sidel 2004). We find that INGO responses to changes in counterterrorism regulation have ranged dramatically from hiding and shirking, to vocal opposition, to participation in policy-making and court challenges to reverse or reinterpret law.

We examine NGOs' responses to new counterterrorism regulations (post-2001) in five major OECD countries—the United Kingdom, the United States, Canada, Germany, and Japan. These are the countries with the most to fear from recent anti-Western transnational terrorism and the countries where most international NGOs operate. In each country, we examine the nature of NGO responses to counterterrorism regulation and possible explanations for the nature of those responses. We conclude that the extent of change in regulations, the amount of uncertainty created, and the availability of access to participate in policy-making have an important effect on the nature of NGO responses to government regulations.

These findings have interesting implications for the regulation of INGOs and our understanding of their likely responses in the future to changes due to transnational terrorism or other global shocks. National institutions are very important for NGOs, even international NGOs

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that cross national borders, as NGOs adapt their organization and operations in response to the institutions of the countries in which they operate. International NGOs do not operate at the international level above the nation-state, but on the ground within complex and overlapping national legal jurisdictions that complicate their operations.

NGO Responses to Changing Regulations

National regulations, including counterterrorism legislation as applied to NGOs, constrain NGO behavior by limiting their legal identities, permitted activities, and access to resources. Such regulations serve as formal institutions directing NGOs to behave in ways desirable to states by incentivizing positive behaviors (from the point of view of the state) and making illegal and punishing negative behaviors. As argued in new institutionalism and the new economics of organization, formal institutions such as regulations exert both coercive and normative pressures on NGO behavior by laying out what they can and cannot do and what is thus appropriate or inappropriate (North 1990; Ostrom 1991, 2005; Powell and DiMaggio 1991; DiMaggio and Powell 1984). Governments provide incentives to NGOs to encourage them to submit to national laws, such as tax breaks and access to grant competitions, in return for filing financial statements and adopting specific accounting and governance procedures. Governments also enforce penalties on NGOs that do not conform, including dissolution in extreme cases as well as loss of tax status, revocation of the ability to lobby, and criminal penalties for hiding assets, misallocating assets, or violating national terrorism or hate crime laws.

NGOs, however, are not passive agents forced simply to comply with the regulations or to conform to the institutions they confront. International NGOs can choose to relocate to alternative locations with different legal strictures (Keck and Sikkink 1998; Smith and Wiest 2005). Or NGOs can work to remake institutions via available political processes such as elections, participation in policy debates, and legal challenges through the courts (Prakash and Gugerty 2010; Dalton 1998; Heins 2008). We categorize NGO responses to national regulation into five ideal type actions: hiding, shirking, vocal opposition, participating, and litigating. We then look for patterns between national counterterrorism law post-2001 (and the extent and nature of changes in counterterrorism law post-2001) and NGO responses.

We define *hiding* as minimal compliance with regulations (Scott 1987). Hiding allows NGOs to avoid government attention by complying with just enough of the regulation to escape notice while also minimizing any new costs associated with complying with new regulations. For example, hiding would describe an organization that did its best to cross-check employees against available government terrorist watch lists, but did not take additional measures to certify the employees' legal identities. Minimal compliance constitutes a type of free-riding, however. NGOs that hide might want new regulations abandoned or reformed, or alternatives put into place, but they are unwilling to bear the costs of advocating for such changes (Prakash and Gugerty 2010). Advocacy requires expending money on the real costs of funding a campaign, such as hiring lobbyists, printing educational materials, or organizing rallies (Dalton 1998; Betsill and Corell 2007). But advocacy also raises the risk of punitive measures being imposed by the government on the NGO, including review of tax-exempt status and fines or penalties for inappropriate/illegal actions, as well as the costs of hiring a lawyer and the loss of public support if an NGO is seen to be out of favor with the government. The NGOs most likely to hide are those that lack political pull (or protection) in the form of a strong, active, and well-connected leadership or membership, and those for which the costs of minimal compliance are quite small,

particularly when compared to the potential costs of either not complying or speaking out aggressively against new regulations.

Alternatively, NGOs can shirk regulations by deliberately ignoring or avoiding the provisions of a law until they are caught and forced to comply by the government (Miller 2005; Johnson and Prakash 2007; Horn 1995). Shirking allows the NGO to avoid the costs of implementing changes to its behavior or organizational structure required by regulation. Shirking also constitutes a passive form of resistance to authority. The actor is less vulnerable to reprisals than if it engaged in active resistance, but nonetheless undermines government authority by not complying (Scott 1987). In principal-agent theory, shirking is argued to be a favored agent behavior in order to maximize agent interests at the expense of the principal (Miller 2005). If NGOs do not report their activities and income to the government, the government has a more difficult time monitoring their behavior. Most regulations include a penalty for shirking (or a reward for not shirking) in order to deter this undesirable behavior (Moe 1984; Haubrich 1994; Williamson 1985). Thus NGOs which are caught shirking will be required to pay a premium, often in the form of the loss of access to resources (political or economic), a fee, or possibly even dissolution (and associated costs to become reestablished). For example, new tax code provisions in the United States in 2006 provide for the automatic loss of tax-exempt status for any non-profit organization that has not filed the necessary tax forms by October 2010, thus forcing many organizations to pay back taxes and report their financial information (<http://www.irs.gov/newsroom/article/0,,id=226030,00.html>). The NGOs most likely to shirk are, first, those that have the least fear of being caught, possibly because they have few government ties, believe they are in compliance with laws, or believe their activities are unlikely to lead to violations of the law; and, second, those that face exceptionally high costs for compliance or opposition. For example, an aid organization with no government funding working in geographic areas where terrorist organizations are known to have many ties to the local populations and where foreign employees are unable or unwilling to work would likely need to defy new terrorist regulations to continue operating if it believed it could not abandon its projects in the country.

Some NGOs choose to engage in vocal opposition to government regulations via public protests and demonstrations, press releases, educational materials, newspaper editorials, and op-ed pieces. Vocal opposition is the strategy most commonly associated with NGOs, and is consistent with scholars' view of NGOs as watchdogs and human rights/civil society organizations working to prevent the encroachment of government authority (Keck and Sikkink 1998; Heins 2008; Risse, Ropp, and Sikkink 1999). The proliferation of NGO websites that clearly present their position on issues, including government regulation, demonstrates the importance of vocal opposition as a response to regulation on the part of NGOs. For example, strong statements by Human Rights Watch, the International Center for Not-for-Profit Law, and Open Democracy opposing changes to Russian NGO law in 2006 can be found on their websites (<http://www.hrw.org/en/news/2009/05/13/russia-revise-ngo-law-protect-rights>; http://www.icnl.org/knowledge/news/2006/01-19_Russia_NGO_Law_Analysis.pdf; http://www.opendemocracy.net/globalization-institutions_government/russia_ngo_3123.jsp). Vocal opposition, however, has risks as NGOs can be deemed to be disruptive, even anarchists or terrorists, depending upon the form of opposition. They may face penalties in the form of changes in tax status and even imprisonment, fines, or dissolution as punishment for illegal or inappropriate behavior. NGOs are more likely to turn to vocal opposition if their mandate or mission includes monitoring and critiquing government behavior, as is common of human rights organizations. NGOs are also more likely to engage in vocal opposition if they rarely work

collaboratively with government, if they are not dependent upon government funding, or if they feel they have exhausted other options.

Other NGOs choose to work inside political institutions to change regulations rather than challenge them from the outside. We term this participating, in that NGOs work with regulators in the form of legislators or regulatory agencies to review and revise regulations in ways that are mutually satisfactory to both the NGOs and the government. Either as interests lobbying for changes in regulations or as expert advisers testifying before government committees (Charnovitz 1997; Dalton 1998; Betsill and Corell 2007), these NGOs seek to engage and collaborate with government on improving regulations to benefit both parties. In this case, NGOs do not see regulations as only constraints, but also as legal protections that provide opportunities for NGO activities by limiting government authority, by reducing competition from other NGOs, and/or by eliminating “bad” NGOs and thereby enhancing the legitimacy and credibility of those that remain (Heins 2008; Brock and Banting 2003; Brock 2001). NGOs are more likely to turn to participating as a response if they have a history of close relations with the government and if institutional mechanisms exist that make participation possible and effective.

Lastly, NGOs may choose to challenge regulations in court, using litigation to clarify provisions in the law and the extent of government authority to enforce new regulations. Not all national political systems allow NGOs easy access to the court system. For example, in Japan, NGOs are regulated via executive departments that have bureaucratic oversight over them. Litigation is an actively confrontational response, like vocal opposition, although from within political institutions rather than outside of them. Litigation has the benefit of imposing a binding decision upon both parties, but generally results in only marginal changes to laws as court decisions are decided on a one-by-one basis as compared to the more comprehensive reform possible through participation in the policy-making process (Dotan and Hofnung 2005; Hirschl 2008). NGOs founded and/or staffed by lawyers, such as the Natural Resources Defense Council, Lawyers for Human Rights, and the American Civil Liberties Union, are the most likely to use litigation as a strategy, as these organizations are the best able to bring cases to court given their in-house expertise. NGOs are also likely to use litigation as a means of clarifying the law in situations of extreme uncertainty regarding the requirements and applicability of regulations for either NGOs or the government. Without clarification of the content or bounds of the regulation, the NGO is unable to gauge if it can and should comply, and if the government is applying and enforcing the regulation correctly. Litigation also resolves the collective action problem, as the NGO expects to receive clear, direct, and concentrated benefits for its efforts in bringing the case to trial, while free riders may or may not benefit.

We argue that the political context and the nature of changes to regulation (the extent of the increase in the severity of regulation and beliefs about government capacity and intention to enforce new rules) are the key determinants of the costs of, and potential for, passive versus active resistance. Minor changes in regulations, particularly if combined with improved monitoring and enforcement provisions, will make hiding more likely as it is cheaper to hide than resist. Major changes in regulation, especially those that create high costs or new risks for NGOs, are likely to promote more active resistance in the form of vocal opposition or participation. Changes in regulation without changes to monitoring and enforcement capabilities are likely to cause shirking, particularly if there is uncertainty about the new requirements imposed on NGOs or about government willingness or ability to enforce new regulations. Uncertainty itself is a form of risk and a source of costs for NGOs, and thus new regulations that

create a great deal of uncertainty, especially if some interpretations of the new law are potentially very restrictive, are likely to create strong incentives for active resistance by NGOs via participation or litigation. Here the nature of the political system matters. In places in which NGOs have easy access to political institutions and a sense of political efficacy (i.e., participating within the political system is possible and cost-effective), participating in policy-making is likely (Risse-Kappen 1995). In places in which NGOs have more limited access to policy-making, they may turn to litigation, particularly if there is a history of successful legal challenges and an adversarial political culture. These ideal types of NGO responses to new or changed regulations are not necessarily mutually exclusive. Participating in the political process to improve regulations might be tried prior to vocal opposition or litigation, which could be seen as a fallback option if a participatory approach fails. Similarly, NGOs might switch from shirking to hiding if they are caught shirking, or from hiding to more active opposition if new reforms impose increased constraints or costs on the NGO.

Counterterrorism Regulation Post-2001

In the five countries under study, new regulations were adopted as a result of the tragic events of 9/11. Yet, for the most part, the new regulations did not constitute a departure, but rather the logical continuation of previous legislation in light of the new international context. Almost ten years later, many new or amended provisions have rarely or never been used, but the uncertainty and potential ambiguity of their interpretation and implementation could lead to tremendous changes in the NGO landscape.

United States

Prior to the events of September 11, 2001, the Internal Revenue Service (IRS) was primarily responsible for regulating NGOs in the United States. Although the IRS retained a major role after 9/11, new laws led to more involvement by other government actors in NGO affairs. This new involvement, however, did not mark a shift in US regulation of NGOs as much as a continuation of existing laws. Executive Order 13224 of September 23, 2001, provided the first terrorist list. The assets of groups on that list and of suspected terrorists would be blocked. Helping terrorists in any way, including humanitarian assistance and the unintentional provision of expertise, was prohibited. Although it clearly went further, this provision was consistent with previous IRS regulations that prohibited charities from diverting funds to non-charitable purposes, including funding terrorism (26 U.S.C. § 501(c)(3)). The executive order also presented a definition of terrorism that NGOs and academics criticized because it allowed for acts of domestic protest and government dissension to be deemed “terrorist” acts (Odendhal 2005, 1; Guinane et al. 2008). The USA Patriot Act was less controversial among NGOs than the executive order in that it mostly amended existing legislation by increasing sentences for terrorism-related offenses, expanding the definition of material support, and officially prohibiting terrorist financing.

One of the most controversial actions taken by the US government with regard to NGOs post-9/11 was, interestingly, not a law. After Muslim charities expressed concern about how to protect themselves against terrorism, the U.S. Department of Treasury published its “Anti-Terrorist Financing Guidelines: *Voluntary* Best Practices for U.S.-Based Charities” in 2002. A revised version appeared in 2006. NGOs and academics were (and still are) concerned that the due diligence requirements detailed in the guidelines are unrealistic (see Baron (2004) for

specific issues). As a result, many NGOs are afraid that the guidelines may become de facto law (Sidel 2006, 206; Billica 2006, 17-18).

Canada

There were major changes in NGO legislation in Canada post-9/11. However, most of the debate and fear in Canada center on uncertainty – not how the new legislation has affected NGOs so far, but how it could potentially affect them if interpreted in a certain way. For instance, the 2001 Anti-Terrorism Act created the Charities Registration (Security Information) Act (Part 6). The latter makes it possible for the government to issue a security certificate against a charity based on intelligence that the charity in question has or will provide resources to a terrorist organization or is engaged in terrorist activities (section 4(1)). One of the major problems with this act is that the intelligence used to produce the security certificate does not have to be shared with the accused NGO (Bloodgood and Tremblay-Boire 2010). Yet, as of April 1, 2008, no certificate had been issued by the Canadian government (Dept. of Justice 2008). The 2001 Anti-Terrorism Act also added new provisions on terrorism to the Criminal Code, providing for the listing of organizations or individuals who take part in terrorism (83.05), and for the freezing of assets and imprisonment of individuals knowingly assisting terrorists (83.02; 83.03; 83.04; 83.08; 83.12). Some in the legal community have criticized the definition of “facilitation” employed in the Criminal Code (83.19(2)) because it implies that an NGO could be accused of helping terrorists even if it had no knowledge of terrorist activities and even if the terrorist act(s) never occurred (Carter 2004; Carter, Carter, and Claridge 2008).

Uncertainty as to how new regulations may affect charities is also prevalent in the interpretation of the amended Proceeds of Crime (Money Laundering) Act. Although the law does not explicitly require charities to report their financial transactions to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), they may be considered as belonging to the residual category of “(g) persons and entities authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments, or to provide portfolio management or investment advising services” (Proceeds of Crime Act, sec. 5). Other organizations or persons, such as financial institutions or accountants, may also be obligated to reveal financial information about NGOs (Carter 2004; Carter, Carter, and Claridge 2008).

United Kingdom

In the United Kingdom as in the United States, post-9/11 regulations did not mark a departure but rather a continuation of existing terrorism legislation. The focus was on adapting domestically oriented legislation (created to deal with incidents in Northern Ireland) to a context of international terrorism. Provisions prohibiting the funding of terrorism already existed in the UK prior to 9/11 (Terrorism Act 2000) and penalties remained the same after 9/11. One of the amendments of the Terrorism Act 2006 provided that an organization could be added to the list of terrorist entities for “glorification” of terrorism. As Dunn (2008, 15) explains, however, the term “glorification” is problematic because a person only has to consider the behavior as something that should be emulated for it to be unlawful. No emulation has to take place.

After 9/11, new legislation expanded the powers of the Charity Commission, the independent government agency responsible for regulating charities in England and Wales. The Charities Act 1993 had given the right to the Commission to remove NGOs’ trustees or employees from their position (Part IV, section 18). The Charities Act 2006 allowed the

Commission to cancel trustees and employees' membership in an organization (Part II, chapter 5, section 19). The Charities Act 1993 had given the right to the Commission to conduct inquiries and to request charities' documentation (Part II, secs. 8-9). Under the Charities Act 2006, the Commission can now, with a warrant, enter a charity's premises and seize documents (Part II, chap. 5, sec. 26).

Japan

The Japanese government, like the United Kingdom government, dealt with domestic terrorism for a number of years prior to 9/11 (e.g., Aum Shinrikyo and Japan's Red Army). The approach of the Japanese government has always been reactive more than proactive (Katzenstein 2003). Incidents such as the 1995 sarin gas attacks in the Tokyo subway did not trigger the enactment of legislation to prevent terrorism, but rather led to efforts to manage crises effectively. Terrorism was handled through police presence, not legislation (Katzenstein 2003). The events of 9/11 have resulted in the same type of "crisis management" response in Japan. The Anti-terrorist Special Measure Act immediately committed the Japanese Self-Defense Force (SDF) to provide assistance (e.g., fuel, transportation, humanitarian assistance) in the international fight against terrorism (Embassy of Japan, 2001; Katzenstein, 2003, 752). In 2003 and 2004, the Law Concerning Measures to Ensure National Independence and Security in a Situation of Armed Attack and the Law Concerning Measures for Protection of the Civilian Population in Armed Attack Situations established procedures in case of an armed attack against Japan. None of these regulations relate to NGOs.

The 2004 Action Plan for the Prevention of Terrorism was created by the Japanese government to implement the recommendations of the Financial Action Task Force (FATF). Since FATF's Special Recommendation VIII is explicitly directed toward non-profit organizations as a source of terrorist financing (FATF 2009), the Action Plan should have affected NGOs. Yet the Japanese government does not even mention NGOs in its plan. Nonetheless, NGOs could be affected indirectly, as laws implemented as part of the plan prohibit funding of terrorism and demand that financial institutions report suspicious transactions to the Japanese Financial Intelligence Office (Headquarters, 2004, 21; Kishima, 2004).

Germany

Germany, which had been the target of domestic terrorism prior to 9/11 (e.g., Red Army Faction (RAF)), focused on adapting domestically oriented legislation to the post-9/11 international terrorism context. The government shortened the discussion period for two acts, Security Packages I and II, in the immediate aftermath of 9/11. Security Package I was in preparation prior to 9/11, but Security Package II (*Terrorismusbekämpfungsgesetz*) was drafted as a direct result of the attacks. Security Package I expanded German jurisdiction to the European Union as a whole, prohibiting the formation of terrorist groups anywhere in the EU and allowing prosecution of terrorists for acts perpetrated outside the EU if the offender is German (or a German resident), is found in Germany, or if a victim is German (German Criminal Code, art. 129a, 129b). Security Package II abolished the religious privilege, which meant that religious organizations were now subject to the Act Governing Private Associations (*Vereinsgesetz*) like any other NGO. Rau (2004, 316) states that the abolition of religious privilege was under discussion for some time, but the events of 9/11 served as a catalyst in reaching approval. Security Package II also amended the provision on associations of aliens (non-EU citizens) in the Act Governing Private Associations (*Vereinsgesetz*) by including

additional reasons to prohibit them (Rau 2004). The Federal Office for the Protection of the Constitution and the Federal Intelligence Service were granted more powers, such as access to financial information and computer surveillance. In 2002, new legislation on money laundering, the Fourth Financial Market Promotion Act (*Viertes Finanzmarktförderungsgesetz*) and the Money Laundering Prevention Act (*Geldwäschebekämpfungsgesetz*), implemented a computer system capable of freezing assets and added a provision obligating bank officials, accountants, and other individuals to divulge suspicious financial transactions to the Financial Intelligence Unit (Codexter 2004, 6-7).

INGO Responses to Counterterrorism Regulations in Case Countries

Based on insights from the new economics of organization and sociological institutionalism that we used to define the ideal types presented above, we have the following expectations about NGO responses to regulatory changes in the five countries examined. First, we hypothesize that the more extensive and invasive the changes in counterterrorism regulation, and thus the greater the costs imposed by the new rules, the more likely NGOs are to take an active approach (vocal opposition, participation, or litigation) rather than a passive approach (hiding or shirking) to regulation. Second, we expect that if changes to the regulation include elements that improve the government's ability to monitor and enforce the law, NGOs will be less likely to shirk. Third, if changes to counterterrorism regulation are costly for NGOs, and if national political institutions permit participation, then we expect to see more participation. But if changes to regulation are costly for NGOs, and political participation is not possible or effective, then we expect to see litigation. Fourth, if there are major changes to counterterrorism regulation that generate uncertainty about the correct interpretation or application of the law, we expect to see litigation as a means to clarify appropriate behavior by NGOs and states, or hiding to avoid possible political targeting in an uncertain and thus risky environment.

United States

NGO responses to changes in counterterrorism regulations in the United States have run the gamut from hiding and shirking to litigation. The extent of the changes in the regulations requiring due diligence, given the lack of previous counterterrorism regulation, imposed high costs (at least if regulations are fully enforced) on many NGOs. Free-riding among NGOs, given the size and diversity of the NGO community, and the lack of means to influence counterterrorism policy given the closed nature of US policy-making on national security matters, have meant that participation is not an appealing choice for NGOs in the US. Many NGOs also feared retribution should they engage in vocal opposition to new laws. A report by OMB Watch and Grantmakers Without Borders (2008, 8) found that "Executive directors and boards fear reprisals ranging from freezing assets to seizing of equipment and materials—and all cloaked under secrecy." NGOs' concerns were reinforced by ACLU accusations of FBI spying on advocacy groups engaged in legal protest activities (*Washington Post*, 12/20/2005; Guinane 2007; Sidel 2008; Guinane et al. 2008).

Hiding and shirking are thus preferred responses for many NGOs within the US. A survey conducted by the Council on Foundations in 2005 found most large NGOs were revising their due diligence procedures and checking terrorist lists. Smaller public charities usually conducted list-checking, but with less regularity than large NGOs. Small NGOs with strong domestic mandates were the least likely to comply because their administrators believed their current policies were appropriate given their low risk of funding terrorism (Buchanan 2005).

Other large NGOs also shirked, however. A survey by the *Chronicle of Philanthropy* (8/19/2004) revealed that many major international NGOs, including Doctors Without Borders, Eagle Forum Education and Legal Defense Fund, and the United Way of America, had not verified their employees against government terrorist lists as quickly or as often as required. Many NGOs also shirked new provisions for accounting more precisely for their foreign income and expenditures within 990 tax forms by not filing promptly, thus leading to new laws making loss of tax status automatic for failure to file several years in a row.

NGOs have also used court challenges to clarify provisions for “material support,” due process, and necessary probable cause to freeze NGO assets (Humanitarian Law Project et al. v. Gonzales et al. 2005; Holder, Attorney General, et al. v. Humanitarian Law Project et al. 2010; KindHearts for Charitable Humanitarian Development, Inc. v. Geithner et al. 2009; Al-Haramain Islamic Foundation, Inc., et al. v. Obama et al. 2010). Cases have generally been brought by NGOs founded by lawyers or as the last resort of NGOs being targeted by the US government for dissolution under new counterterrorism regulations.

Canada

Although neither as formally institutionalized nor as powerful as the Charity Commission in the UK, the Voluntary Sector Initiative (VSI) in Canada created in 1995 has provided a means of participation for NGOs in policy-making and implementation via coordinated partnership opportunities with the Government of Canada (<http://www.vsi-isbc.org/eng/about/history.cfm>). The VSI also helped NGOs in Canada overcome collective action problems to work together for regulatory changes. It is thus consistent with our expectations that participation has been the dominant NGO response in Canada. Representatives from the Canadian Bar Association, Canadian Civil Liberties Association (CCLA), Amnesty International, the Canadian Red Cross, World Vision, the International Civil Liberties Monitoring Group, the Canadian Council for Refugees, the Canadian Islamic Congress, the Muslim Council of Montreal, and Imagine Canada all participated in legislative debate prior to the passage of the Anti Terrorism Act and during the 2005 review of the Act. These NGOs each submitted written and/or oral testimony to multiple Senate and Commons committees (Bloodgood and Tremblay-Boire 2010).

Uncertainty about the scope of some provisions in the new counterterrorism regulation, particularly the definition of terrorist activities and concerns that this may outlaw previously legal forms of political dissent, has sparked some litigation for clarification. In the 2006 case *R. v. Khawaja*, Justice Rutherford of the Ontario Supreme Court determined that parts of the definition violated section two of the Charter of Rights and Freedoms, however the list of offenses included in the Anti-Terrorism Act was acceptable (Carter et al. 2008, 50; Roach 2007). Given the scope of changes in counterterrorism regulation after 2001, and thus the potential risks for political targeting of NGOs via a broad application of government powers, a mix of litigation and participation is largely consistent with our expectations. It is unclear, however, if the VSI has eliminated hiding and shirking by most NGOs, given the close working relations many NGOs have with the government, or if participation simply overshadows incidents of shirking or hiding.

United Kingdom

Although civil society’s response to counterterrorism measures in the UK has been slow and relatively isolated until 2007 (CCS 2007, 5), there appears to be a movement toward more involvement by NGOs, mostly of the participatory type. Some NGO responses are more confrontational. For instance, because civil society had not been “meaningfully” consulted in the

drafting of the Home Office review on the protection of charities from terrorist abuse, the National Council for Voluntary Organisations (NCVO) produced its own report on the impact of counter-terrorism measures on civil society (Quigley and Pratten 2007). Others responses are more conciliatory. Numerous charities participated in the consultations launched by the Charity Commission (almost 200 organizations, according to the Commission's website) and by the Home Office and HM Treasury in May 2007 and July 2010 (see for example the response prepared by Liberty at <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf>). Some NGOs, like BOND (British Overseas NGOs for Development), are actively cooperating with the Charity Commission in the preparation of compliance toolkits for counter-terrorism laws. Whether confrontational or conciliatory, these responses are all participatory in nature because they seek to engage government regulators and arrive at mutually beneficial legislation.

Considering that the regulatory environment did not change drastically after 9/11 in the UK, a participatory response by NGOs mostly confirms our expectations. The increase in the severity of counter-terrorist regulations was minimal in the UK, with the addition of the "glorification" provision but unchanged penalties for acts of terrorism. Based on our hypotheses, this would potentially suggest hiding, but no evidence confirmed such a reaction. However, NGOs have easy access to political institutions and a sense of political efficacy in the UK, which enables participation. The UK government demonstrated its willingness to enforce counter-terrorist legislation by expanding the powers of the Charity Commission, but the position of the Commission as both independent enforcer and adviser to the NGO community limited active NGO resistance. By actively seeking NGO feedback, the Charity Commission ensured that NGOs had a mechanism to participate in the legislative process. Moreover, by demonstrating its independence from the American government and its impartiality, notably in the Interpal case,³ we believe that the Commission was able to establish a relationship of trust with civil society that is not as present in the other countries under study.

Japan

Japanese counterterrorism measures have traditionally and contemporarily targeted emergency response and civil defense, rather than any perceived threat from an overlap between civil society and terrorist organizations. As changes to counterterrorism regulations post-2001 have been minor and unrelated to NGOs' activities or interests, the lack of NGO response to counterterrorism regulation in Japan is unsurprising. NGOs in Japan have not needed to hide or shirk counterterrorism regulation. Their participation in policy-making is institutionally limited, given the corporatist nature of Japanese governance (Lijphart and Crepaz 1991) and NGOs' strict control by executive agencies (Pekkanen 2006). There have been no attempts at litigation on counterterrorism regulations by NGOs in Japan.

Germany

Vocal opposition has clearly been the favored resistance type in Germany. A group of German NGOs, led by *Humanistische Union* (Humanist Union), produces an annual report detailing state human rights abuses, notably through its increased surveillance powers. Amnesty

³ In 2003, the US government designated the Palestinians Relief and Development Fund (Interpal) as a terrorist group because of alleged links with Hamas. The Charity Commission immediately froze the organization's assets and started an investigation, but did not find evidence of terrorist financing or support. Consequently, it released the organization's assets and terminated the investigation (Dunn 2008, 14; Sidel 2008, 29-30).

International (AI), Privacy International (PI), and the International Helsinki Federation for Human Rights (IHF) also publicly criticize Germany for human rights violations related to the country's counter-terrorism laws. Some of the accusations include inappropriate treatment of refugees and asylum seekers, excessive use of force by police officers, unconstitutional investigations and raids against journalists, and violations of privacy (see for example AI, 2008; Banisar, 2008; IHF, 2003). The European Federation of Journalists (EFJ) opposed a counter-terrorism law that would force journalists to divulge their sources if asked. The law was passed, leading journalists, lawyers, and doctors to initiate judicial procedures, arguing that the law is unconstitutional (IFJ/IFEX, "German Parliament Defeats Anti-Terrorism Law"; IPI/IFEX, "More German Journalists Join Battle"). Other groups, such as the *Einstellung der §129(a)-Verfahren - sofort!* (Coalition for the Immediate End to the § 129(a) Proceedings), have focused on the abolition of specific terrorism provisions (in this case, § 129(a)) and on the liberation of individuals, including academics, accused under these provisions.

In Germany, more than any other case, regulatory changes directly and explicitly targeted INGOs. Although new counter-terrorist regulations were largely consistent with prior regulations, there were some significant departures, such as the suspension of the religious privilege. The German government also markedly increased surveillance powers by providing new technological tools and allowing agencies to put individuals under surveillance without informing them. Major regulatory changes and demonstrations of governmental capacity and willingness to enforce the new regulations suggest active NGO resistance, either through vocal opposition or participation. The evidence corroborates our expectations as major acts of protest, often by reputable NGOs, have taken place in Germany. Furthermore, we argued that uncertainty about regulations and the failure of other means of response should lead to resistance through litigation. The German experience supports this expectation. There were no clear boundaries to the vast expansion of surveillance powers in Germany, leading to abuse by police forces and multiple appeals to courts by NGOs and interest groups to reestablish a balance.

Conclusions and Implications for Future Change

We find that in five cases of relatively similar countries experiencing a common threat in the form of transnational terrorism, the responses of NGOs have varied substantially. In the case of Japan, where regulation changed little and did not target NGOs as a security threat, NGOs did not respond at all. In the cases of the US and Germany, where regulations changed the most, NGOs engaged in vocal opposition and litigation, the most active and confrontational responses. In the UK and Canada, where regulation changed somewhat but in ways consistent with past regulation, NGOs participated in policy-making processes to refine and reform the new rules. Our hypotheses were roughly supported—minor changes in rules (Japan) brought less active responses than major changes (US and Germany); major changes that created uncertainty produced litigation to clarify new rules (US, Germany, and Canada); increased monitoring by the government reduced shirking (US and Germany); and in cases in which governments provided institutions to enable NGOs to participate, they did so (UK and Canada). While we have focused on counterterrorism regulations, we believe that the same ideal type NGO responses—hiding, shirking, vocal opposition, participating, and litigating—would be found in response to changes in other aspects of NGOs' regulatory environment. Furthermore, the same three factors—the extent and nature of any change in regulations, the uncertainty (and risk) that changes create, and the nature of institutions for political participation—would be important for explaining why NGOs respond as they do to national changes in regulation. Efforts to clarify and specify

counterterrorism measures, and their direct impact on NGOs, would likely help to reduce vocal opposition and litigation. That said, if counterterrorism measures are highly constraining and authoritarian, NGOs are likely to continue to work to change these measures, some working collaborative with government, some shirking, and others acting openly in opposition to government. NGO hiding and shirking is likely to prove threatening for both national security and NGOs' political development in the long run. These behaviors may result in a loss of accountability and legitimacy as well as deteriorating relationships between NGOs and government. Hiding and shirking are also symptoms of collective action failure, and a coordinated global campaign may be needed by NGOs to press for more NGO-friendly and effective counterterrorism measures cross-nationally.

Country	NGO Response to National Counterterrorism Regulations				
	Hiding (Minimal Compliance)	Shirking	Vocal Opposition	Participating in Policy-making	Litigating
United States	X	X			X
Canada				X	X
United Kingdom				X	
Japan					
Germany			X		X

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Counterterrorism and Civil Society

Civil Society, Aid, and Security Post-9/11

Jude Howell¹

Following President Bush's declaration of a "war on terror" in 2001, governments around the world introduced a range of counter-terrorist legislation, policies, and practices. These included *first-order* measures aimed specifically at suspected terrorists, such as counter-terrorist and money laundering legislation, enhanced surveillance, renditions, and passenger profiling, and *second-order* measures that are built into other policies such as official aid assistance, refugee and asylum practices, education, and community-engagement initiatives. When Barack Obama became US President in early 2009, one of his first moves was to distance himself from the language of the "war on terror," a phrase that has become irrevocably associated with President Bush. In this spirit he committed his administration to closing the Guantanamo detention facility in Cuba and banning the use of torture.

This might suggest that the "war on terror" is now over; that the global security regime that evolved in the wake of the attacks on the Twin Towers could now be declared a chapter closed. Such an interpretation would, however, be overly sanguine. International troops are still in Afghanistan; there is still conflict in Iraq; Osama Bin Laden may still be alive; and the name and ideas of Al Qaeda still have currency. The "war on terror" lives on. Its institutional, policy and legal legacies remain deeply entrenched, creating challenges for international development aid and civil society actors.

The effects on aid

How then has the post-9/11 global security framework affected aid? Since 2001, aid frameworks, structures, and operations have increasingly absorbed global and national security interests. This was already evident in the 1990s in conflicts such as Bosnia and Sierra Leone, when increasing military intervention in relief work provoked sharp debate about the implications for humanitarian workers, particularly over public perceptions of their neutrality and impartiality. Since 9/11, these processes have extended beyond individual conflicts to the broad realm of aid policy and practice. This deepening convergence of security and aid can be seen at the macro, meso, and micro levels, though its particular manifestations vary according to donor, the relative security significance of any aid recipient, and the national architecture of aid and foreign policy.

First, it can be seen in the direction of aid flows. Since 2001, both military and development aid flows to front-line states in the "war on terror" – such as Afghanistan, Iraq, Pakistan, and Ethiopia – have increased. While in the 1990s "good governance" was the guiding principle for allocating aid, in the last decade bilateral donors have increasingly focused attention

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and resources on “fragile states” in order to preserve both global and national security. For example, the UK Department for International Development’s (DfID’s) 2009 White Paper committed at least half of all new aid resources to conflict-affected and fragile states.

Second, political leaders and aid ministers have increasingly linked security and aid, arguing that poverty, alienation, and terrorism are intimately connected. In his foreword to DFID’s 2005 paper *Fighting Poverty to Build a Safer World: A Strategy for Security and Development*, the then-Secretary of State for International Development Hilary Benn wrote: “In recent years DFID has begun to bring security into the heart of its thinking and practice. But we need to do more. As the Prime Minister said in his speech to the World Economic Forum this year, ‘it is absurd to choose between an agenda focusing on terrorism and one on global poverty.’”

Similarly, in February 2006, the former US Secretary of State Condoleezza Rice told the Senate Foreign Relations Committee: “It is impossible to draw neat, clear lines between our security interests, our development goals and our democratic ideals in today’s world.” The doctrinal emphasis on the “three Ds” – development, diplomacy, and defense – in the US National Security Strategy of 2002 was echoed again by Hilary Clinton, Secretary of State, in 2009 when addressing State Department employees: “There are three legs to the stool of American foreign policy: defense, diplomacy, and development ... I will do all that I can ... to make it abundantly clear that robust diplomacy and effective development are the best long-term tools for securing America’s future.” This juxtaposition of development, diplomacy, and security has been reflected in the “whole-of-government” approach to terrorism that the US and its allies have adopted increasingly since 9/11.

Third, the increasing convergence of security and aid has also permeated down to the operational level, not just in explicit counter-terrorist assistance projects such as equipping border police but also in more subtle, “softer” measures such as projects aimed at anti-radicalization. Indeed, the use of “soft” measures as part of counter-terrorism has grown in importance as political leaders have recognized the failure of “hard” military interventions to secure Western interests. Illustrative of these softer measures are US and UK aid programs designed to reform the curricula of madrassas, increased support to education sectors in Muslim majority countries, support for inter-faith dialogues, and community projects addressing issues of conflict.

Finally, increasing military intervention in relief and development has been a key tool of post-9/11 security strategy. Among the most prominent manifestations of this are the Provincial Reconstruction Teams in Afghanistan, where military personnel work alongside civilian staff to deliver “quick impact” development projects such as wells, schools, and clinics, so as to win the hearts and minds of local people. Similarly, since 2002 the Combined Joint Task Force for the Horn of Africa has worked together with USAID to coordinate development activities such as building schools and supplying textbooks.

Changing attitudes to CSOs

The post-9/11 global security regime has not only led to an increasing securitization of aid but also has affected the way governments and donors relate to civil society. First, the “war on terror” has cast a veil of suspicion over civil society in general and certain groups in particular. Charities, especially Islamic charities, international NGOs working in the Middle East and/or conflict areas, Muslim communities and their organizations, migrants, and refugees have

all come under the direct gaze of security agencies. This stands in stark contrast to the 1990s, when governments and donors embraced civil society organizations as partners in a shared agenda of democratization, participation, and service delivery. Since 9/11, charities have been seen as being at risk of terrorist abuse, whether through money laundering, diverting charitable funds to terrorist groups, or using charities as a front for terrorist activities. As Gordon Brown, then Chancellor of the Exchequer, said in a speech at Chatham House in October 2006, “We know that many charities and donors have been and are being exploited by terrorists.”

Second, aid agencies and donors have responded in varying degrees to the perceived risk that civil society organizations might be vehicles for the pursuit of terrorism. USAID has gone furthest among bilateral donors with the introduction of Anti-Terrorist Certificates, which any recipients of US funds abroad are required to sign. Since 2007 it has piloted in its Palestine program a Partner Vetting System, which requires grantees to submit personal information about key personnel and leaders that is checked against an intelligence database. The Bush administration also put pressure on foundations such as the Ford Foundation and Rockefeller Foundation to introduce similar checks into their grantee agreements.

The creation of a climate of suspicion around charities has also impinged on philanthropic donations, particularly in the Middle East. For example, since the bombings of the US embassy in Nairobi in 1998, greater restrictions on the flow of funds from the Gulf and Middle East, as well as a fear among Middle Eastern philanthropists and charities that their funding might be misconstrued as supporting terrorism, have reduced support to Muslim charities working in the Muslim-dominated North Eastern Province of Kenya.

Third, as mentioned above, the soft “hearts and minds” approach of the post-9/11 global security regime has affected the way civil society actors are conceptualized in national security strategies. Both Colin Powell and later Hillary Clinton have underlined the strategic role that NGOs play in security policy as “force multipliers” for the government (in other words, they are – albeit unintentionally – part of a general effort to neutralize hostility, armed or otherwise). In conflict situations such as Afghanistan, this has heightened debates among humanitarian workers about the dangers posed by military intervention to the principles of neutrality, impartiality, and independence. In 2008, 33 aid workers were killed in Afghanistan, the highest figure since 2001. According to an Overseas Development Institute (ODI) Policy Brief published in April 2009, the number of aid workers killed worldwide in humanitarian interventions spiraled to 122, the highest figure in 12 years tracked by ODI, most being killed in Sudan, Somalia, and Afghanistan. Humanitarian workers argue that military use of civilian vehicles and civilian dress when delivering aid has blurred the lines between “civil” and “military” and has made NGOs a legitimate target in the eyes of insurgents and political opponents.

Fourth, post-9/11 counter-terrorism measures and practices have also impinged on other parts of civil society. For example, in countries with weak policing and judicial systems, poor, marginalized, and vulnerable groups are often the first to experience the blunt edge of counter-terrorism measures. In India, a fact-finding mission in 2003 found that most of the 3,200 cases of people arrested under the Prevention of Terrorism Act, which has since been repealed, were poor, landless, tribals or Dalits. Governments have also used the language of the “war on terror” to crack down on political opponents or secessionist groups. Furthermore, the application of the arsenal of counter-terrorism has led to the “normalization of the exceptional,” whereby legitimate protesters such as anti-arms trade campaigners, animal rights activists, or environmental protestors are detained under “exceptional” counter-terrorist legislation.

How should civil society respond?

Post-9/11 global security measures have thus created challenges for international development and civil society actors. How can civil society actors best preserve the autonomous spaces and values of civil society when the balance between freedom and security tips toward the latter? How can they ensure that minority communities rendered suspect under counter-terrorist measures are able to organize and articulate their interests without fear of prosecution or persecution? How should they engage with security debates and agencies, especially when these infringe on nongovernmental spaces? How can aid agencies, foundations, and philanthropists best ensure that their partners are not linked to listed terrorist groups while also maintaining relations of mutual trust? And how can aid agencies best maintain a focus on developmental priorities when under pressure to consider national and global security issues?

While human rights activists and Muslim leaders and groups have taken the lead in challenging the post-9/11 security framework, many non-profits and voluntary sector organizations have remained remarkably silent about the effects on civil society, at least until they were themselves directly affected. As stated above, the counter-terrorist legislation, policies, and practices introduced in the wake of 9/11 remain deeply entrenched. It is time for international aid and civil society actors to seriously reflect on the lessons of the last decade and think more strategically about how best to engage with security issues.

Counterterrorism and Civil Society

Thirty Years of Women's Activism in Sudan

Frank van Lierde¹

Asha El-Karib is the former chairwoman and acting board member of the Gender Centre for Research and Training based in Khartoum. The Centre works for women's equality, peace, democracy, and a better understanding of how women's unequal status has been exacerbated by longstanding armed conflict in Sudan. Working in partnership with other women's organizations and pro-democracy groups, the Centre is committed to building a strong social movement able to influence politics and advocate for women's rights and social inclusion. Asha is also a cofounder and the director of the Sudanese Organisation for Research and Development (SORD).

Three decades of social activism have shaped and marked the life of Asha. "Things look so grim. But I refuse to fall into total despair."

When she was eleven she went along to turbulent political demonstrations, and at sixteen she gave speeches in small election halls packed with leftist activists. This was in the 1960s; the international Muslim world was in shock following Israel's Six-Day War. Likewise, this was the case in Sudan, Asha El-Karib's country of birth. "Sudan had not been independent for long at this time and Nasr, Nkruma, Nehru—the great fighters against colonialism—inspired us as leftist Muslims. As a child, I picked up a lot about the national politics. My father and uncle were members of the National Unionist Party and dreamed of a united, secular Sudanese-Egyptian state. The seventies were a tumultuous period; the first civil war lay behind us, yet there was hope and women could still take to the streets to demonstrate."

Center and periphery

For more than thirty years Asha El-Karib has fought political, social, and economic oppression in her country. "I stand up for women's rights, but that does not mean that I only work for women. Working to improve women's position in society on a political, social, and economical level is also working for a healthier, more democratic society: this is beneficial for everybody. I need to continuously find openings and use them. In my country, putting up a social fight is a matter of navigation and steering a middle course. I must look for openings in a closed state system which continuously strives to keep the power in the center, at the expense of the periphery. And women are in the margins of that periphery. No matter how complex the Sudanese political situation is with the north-south conflict, Darfur, East-Sudan, the core of the conflict is not religious and essentially has nothing to do with religious extremism or terrorism. This conflict is fundamentally due to the marginalization of Sudan outside Khartoum. Religion

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Cordaid is a Dutch development funding agency that focuses on relief aid, poverty eradication, society building, and policy influencing. Cordaid works hand in hand with organizations in the global south as well as in Europe and the United States for a more just and equitable society.

and security dominate the entire international discourse around Sudan and are also political instruments skillfully used by an elite to keep itself in place.”

Thirty years of conflict have left their mark on Asha. “I am tired, but I haven’t finished fighting yet. Sometimes it crosses my mind to redefine the concept of ‘home’ and to flee abroad. I have been offered asylum enough times. But it hurts just to think about it. Now the election did not bring the desired change we struggled for and it very likely that Sudan will never be the same after the referendum in January 2010. The outcome will definitely affect us in many ways, and I hope I still have energy to continue.”

What impact do the security and anti-terrorism measures have on social organizations and movements in the country of President Omar al-Bashir? How have they determined the work and life of Asha El-Karib? Where does she see the dividing lines between social conflict, armed resistance, and terrorism, between the monitoring of state sovereignty and state terrorism?

Legitimate violence?

“The debate on security and terrorism often concerns two questions which are not essential to me: the lack of a clear definition of what terrorism is and therefore of an international standard to determine who is and who isn’t a terrorist, and the discussion whether certain social or political grounds can justify terrorist actions. In other words, are some forms of violence legitimate to bring about change, or to counteract the undermining of the existing skewed power relations? Is there such a thing as a just war? In my own opinion that discussion quickly reaches its conclusion. Every action which sows fear and puts the lives of people at risk is a terrorist action. Without any exception. For me it is a moral case in the discussion regarding terrorism, never to emphasize the cause of violence, but the result. The end product of violence is horror, never the realization of the dream. Even if it was tempting sometimes to suggest that ‘the end justifies the means,’ the results of violence always annul the greatest political, social, or religious objectives. Whether it concerns domestic violence against women, sexual violence, political violence, terrorism, or state terrorism, the objectives do not offset the fear and destruction which are the results. To me, each one of them is a form of terrorism. That is the starting point of my work and my life as an activist, as a woman, and as a mother. I don’t mean that analysis of political and religious causes of violence should not take place; of course, you must understand violence before you can counteract it. But for me, no feasible political or religious arguments to deploy the tool of fear exist. If you use those arguments, then you are already sowing terror.”

“Armed conflicts and the violence industry and the political culture surrounding them do not limit themselves in time and space purely to the center of physical aggression. They dehumanize people, both victims and perpetrators; they create a dehumanized society, which strictly speaking is not a society but a cage, a system in which the fight against violence is considered as a subversion of the order, as an anomaly. But if you keep your eyes focused on the horrendous result of violence, then you are obliged to invest more in conflict-solving alternatives to violence. You do not even have to be a leftist moral crusader to understand that, thinking in terms of economic benefit is sufficient: nonviolent conflict solutions are more cost-effective than violent ones.”

“I was not born a pacifist. Even at an early age I thought about the legitimacy of violence and power, and as a schoolgirl and student I was convinced that you had to use violence in order to depose corrupt rulers. I have never taken up arms myself; yet I defended violence for good causes by political means. One of the experiences that made me change my ideas forever dates

back to 1971. In that year the government executed an entire swath of prominent opposition leaders from the communist and socialist side. The great shock was mainly in the fact that a couple of years earlier these leftist leaders still sang the praises of the revolution, side by side with the figures who ended up in the center of power thanks to that revolution. They were assassinated by the system which they had designed themselves. That is where the logic of terror leads to. Sooner or later, it wipes away the ground from under its own feet.”

Janus face

“In the context of international security Sudan plays a somewhat special role. Since Osama Bin Laden spent time in Sudan at the beginning of the nineties, the country has maintained an ambiguous relationship with the US. Of course, terrorists and security services operate—by definition—in the shadows, where they fight or find each other, but in Sudan the entire politics of security seem to be like a shadow-puppet show in the shade. Within the global war on terror both Sudan and the US play a double role. For some time now, my country has been on the terrorist lists of the US and the UN. It is a so-called country on the wrong side of the dividing line between good and evil, where no political compromises, let alone deals are made. But behind the scenes, American and Sudanese security services cooperate very closely. It’s a form of cooperation that serves to keep the Sudanese government within the GWOT [global war on terror] straitjacket. But there are other interests. The CIA is benefitting from it; there is a dark and fierce fight taking place over oil and raw materials. With the support of the US, Bashir reinforces its security apparatus and therefore its control of critical groups in society—and he stands stronger internationally. The Sudanese government will not breathe a word to this effect in public. That alone speaks for itself. In fact, they shout precisely the opposite from the rooftops. In the official, open discourse, Bashir shows the other side of the Janus face. He portrays the US as a state of evil, a nation of villains and all who side with him are doomed.”

“Despite the hard language of politicians, the use of the terms ‘terrorism’ and ‘fighting terrorism’ is very difficult in my country. Politicians never openly use them. In the first place this is because, as a country, we have been labeled as a terrorist state, but also because the Arab word for ‘terrorist,’ ‘erhab,’ has emotionally charged Islamic connotations. A Muslim is considered to defend his case and that of the Uma, the community of faith, and to gather power and means to do so. That is also a meaning of ‘erhab.’ When terrorism and the suppression of terrorism come up for public discussions, then they use the word ‘amn,’ ‘security.’ That word has also now become so emotionally loaded that it is used with suspicion. At one point a development organization was visited by the security service. The security services demanded total control over the food program. Why? One word in the title of the development program was slightly suspicious: ‘food security program.’ Well, security was of course their field.... It sounds like a joke, but it was a very painful joke. Eventually the government backed down, but only because it concerned an international development organization, which dared to enter the debate with the Sudanese Humanitarian Aid Commission—the HAC, a committee which serves state security more than it steers the humanitarian aid in an effective direction. Every other local organization would have been shut down. In the name of security. In fact in 2009, thirteen international NGOs were expelled from Sudan based on their alleged involvement in threatening the security of the country.”

Born with teeth

“On paper, the 2005 peace treaty between the North and the South and the constitution which originated from it offered sufficient guarantees for a healthy and meaningful independent civil sector in Sudan. Every Sudanese enjoys, on paper, the right to freedom of association, expression of opinion, and movement. But the law which manages the ins and outs of social organizations, the Voluntary Act of 2006, completely removes these rights. It is one of the strongest examples of repressive legislation that I know of. In the first place the government reduced the social sector to the NGO sector. Every social movement, network, or local voluntary organization which is not registered as an NGO is prohibited. And should you be willing and have the possibility to conform to the legal NGO straitjacket, even then the government can investigate, take over or stop any NGO program or project activity without legal procedures. NGOs are expected to provide local voluntary services and emergency aid where necessary, under supervision by and as an extension of the government. Those who find themselves in the politically sensitive areas of human rights, good governance, and democracy are seen as state enemies and face the security services. In 2007 more than forty NGOs had to close their doors for this reason. What is so painful about this is that the Voluntary Act has also been introduced thanks to massive support from the NGOs themselves, and more specifically the so-called GONGOs, the ‘governmental nongovernmental organizations.’ We also call them the NGOs which were born with teeth: they have suddenly appeared out of nowhere with money, infrastructure, and a government civil servant heading them. We have to withstand those NGOs as well. And in Darfur you are not allowed to canvass a penny in funds without these transactions running via the government. The legal, substantive, and financial monitoring of the social sector is, in other words, total and takes place under the guise of security.”

“That security control not only creates an environment of fear, it also leads to absurdities. Due to the 2006 Voluntary Act, in certain states there must be written permission in advance from the HAC for each workshop or meeting to take place. Can you imagine what that would mean for an organization such as Cordaid? You have to state all names and addresses of participants, which the HAC can cross off or add as they please. Last year I examined the impact of decentralized government policy on education, healthcare, and natural resources on women’s rights. We did that in five states, including the Red Sea State. After the investigation we wanted to share the results informally and discuss them with our partners, also in the Red Sea area. We had invited employees of the ministries. In the middle of the discussions we received a call from the HAC asking if we had authorization for the meeting. We had not asked for it, because, in our opinion, it was an informal exchange, not a formal workshop or symposium. Consequence? ACORD, the NGO of which I was the director, was denied access to all rural areas. Whereas I took part in the investigation as a researcher, not as a director of ACORD! I then had the privilege of being shadowed by the head of the Red Sea State security service, someone whom I had already met in the past several times. He waited for me at the airport. He was there, so to speak to welcome friends, but he was in the departure hall.... Our entire research was reviewed; he wanted to know everything about it and criticized our way of working. My explanation that the peace treaty guaranteed us all freedom to act as we had acted gave rise to a heated discussion. It came down to me having to do my lobbying work with a high-rank security agent who, in his turn, tried to intimidate me. I am continuously anxious about this type of ‘coincidental encounter.’ I have learned, however unwillingly, to communicate with these types of people.”

The trampling of the horde

There is a dark cloud of political terror hanging over each important period or change in the life of Asha. And at each change, she and her fellow activists have managed to transform personal fear and anger into amazing forms of resistance and social development, from the bottom up, often underground. One source of hope and resistance, which has not only played a vital role in Asha's life but has also put a stamp on the entire Sudanese society, is the Sudanese Women's Union. The story of the women's movement in Sudan reminds one of the constant bending, disappearing, and reappearing of blades of grass under the trampling of the horde.

“Even before I went to university I joined the Women's Union. It was an incredibly progressive group of women who had already been standing up for social rights and women's rights since the forties, and who had had successes. At the beginning of the sixties women here enjoyed the right to vote and to put themselves up as eligible candidates, a first in the Arab and African world! I became a member at a time when women had obtained all these important rights, including the right to equal wages, pensions, and maternity leave. But that tide turned. From the late seventies onwards the democratic achievements eroded and at the start of the dictatorship in 1989 and the reintroduction of the sharia, the union was officially dissolved, just as all forms of political and social association were too. In my time as a student I still put my name forward during union elections, but the Muslim brothers had already taken over the entire control of the union. All members, myself included, were dismissed and expelled from university. Eventually female students were allowed to go back to university, without being able to use the student accommodation, where, in fact, it all happened, and provided that we would not conduct any political activities in the slightest. At that time the Rural Development Association was also set up—an organization of students who, during their holidays, went to help en masse, in the far distant regions and in the countryside, to set up agricultural and health projects. We did this without international support or connections. The women's movement continued underground, stirred itself as little as possible in public, but continued to brim with hope and resistance.”

When Omar El-Bashir came to power in 1989, Asha was in the United Arab Emirates with her husband who was on a lecture tour. She had to stay there out of necessity, for four years. “I was wanted, risked my life if I returned. All of my brothers and sisters were dismissed at that time. The entire government apparatus—education and justice—was purged. Eighty percent of women lost their jobs and I, an activist well-known to the new rulers, could not do anything else but stay away. In my country, to give an example, not even one female judge has been appointed since 1989. I returned in 1993. In 1997, when the horror of war in the south reached a peak and the torture centers—or haunted houses—increased and talking about human rights was absolutely taboo, I set up, together with five other women, the Gender Centre for Research and Training. These were dark, grim years. We did not want to give up our fight, but the terror of the regime was so enormous. The international women's conference in Beijing in 1995 gave strength and hope. I wanted to join it but wasn't allowed. By means of international contacts we were able to make our voices heard there. Beijing was a turning point in the women's movement. In Sudan too, women have claimed a moral and operational space in the aftermath of it. There were at least ten women's organizations established during that wave of energy and hope, and all of them claimed a role in the social and civil forefront. Together with six women, who were all blacklisted, we set up the Gender Centre. Because we were listed, we were not allowed to establish an association. We got round the HAC and the Ministry of Humanitarian Affairs by

setting up a nonprofit business under the Judiciary. We managed to do that; we even had legal status. Then it was the question of how we could still do the political work that we wanted to do. We succeeded in this through looking, as much as possible, for cooperation with international donor organizations which were locally established. Now, ten years on, we are part of a powerful international network; we promote democracy and good governance throughout Sudan. We're a large player where women's rights are concerned. Without exaggerating I can say that the first peace networks originated from the women's movement and that women, including the Gender Centre, have played a central role in the peace process, in the 2005 Comprehensive Peace Agreement, and in the new constitution. That does not alter the fact that we must continuously watch our step. The Centre encounters constant opposition from the security services. Three of our projects have already been stopped through their actions. At one point the Centre was even discontinued by the authorities. That was at a time when the president was in Geneva to speak to the UN about human rights. We then raised the alarm with our Swiss contacts which was heard in UN circles and of course also by the Sudanese delegation. The president found himself in an embarrassing situation, and under international pressure the Centre was able to open its doors again, yet of course not without first having to sign a statement confirming that we would abandon political activities. But we were already used to that all our lives anyway, navigating in a treacherous reef."

"That women and women's organizations form coalitions, support each other, nationally and internationally, within a closed, totalitarian regime that places women in the margin of the margin, gives me a feeling of pride and strength. To give yet another example: in 2001 with the Women Solidarity Group, we summoned the government before the constitutional court. A law had just been promulgated which prohibited women from working after sunset, from working in hotels and the catering industry and the oil sector, and which imposed numerous, extreme freedom-restricting measures. Under pressure from popular women's movement, that law was then suspended and that has remained the case up to the present day."

Colonial control

"The question is whether our efforts make a difference in the daily lives of families, women, and young girls, in urban and in rural areas. The peace treaty and the constitution which ended the war between north and south were political successes; I would almost say paper victories. The constitution has not yet been converted into new forms of governance or legislation which changes the lives of people for the better. But against that stream of political unwillingness, we, as a social movement, together with hundreds of NGOs and civil society organizations, have been successful in relieving the daily lives of millions of people. With micro-credits we help women to achieve a better income in the informal sector of small-scale companies; with health and education projects and the construction of water wells in villages and remote locations, we give that little bit of strength and hope that for many means the difference between life and death. Something actually happens, under, alongside, or in spite of the political repression which in fact tries to freeze social progress. We continue to stay on course by working on projects, but in addition to that we want to grow institutionally to join international networks and to gain more political scope as well. We attempt to do this with SORD and with the Gender Centre. In order to be successful in this our relations with international donors are essential. Most of the support we get comes from international donors such as Oxfam, Care, DED, Inter Pares, and also from the Dutch embassy. And from Cordaid. Cordaid is one of the very few aid organizations which has given us the 'quality money' to grow as an organization, money to

invest according to our own insights and experience in growth and development. Too many donors limit themselves to project financing and refuse to invest in organizations. If that continues, it means that organizations such as the Gender Centre will cease to exist. Furthermore, the civil sector won't be able to continue its social and political resistance. With regard to the relationship with donors, our capacity to submit project proposals, to follow formats or to comply with reporting requirements, all these requirements aren't a problem. On a project level, our motor is running fine. What we are looking for, together with the international community and with international donors in the first place, are real, enriching and far-reaching exchanges. We want to discontinue the traditional project-bound and unbalanced donor-NGO relationship and to replace it with a more political coalition which can and dares to contest international power relationships. Instead of this, many donor organizations come with their own agendas to carry through reforms in the aid-receiving countries. Sometimes they justify this by the need to show measurable and visible results which dovetail with the policies and the public opinion of their own country. But in essence they practice a form of colonial pressure and control. If donor organizations feel that they need to combat crooked power relationships, they must then be brave enough to act themselves."

"It becomes even more difficult when donor organizations and the bilateral aid from separate countries are extensions of international security politics and the war against terrorism. Also, under pressure from the Global War on Terror in which their own states participated, many western donor agencies wanted to impose financial sanctions on Khartoum. But with that they also put Sudanese NGOs and CSOs under duress. They forced a complete civil sector, which already had to contend with the many forms of internal repression, into a simply servile position. The fact that the US, apart from CARE, had already withdrawn its international NGOs from Sudan, had stopped all dollar transactions and suspended all development support, was the direct consequence of the War on Terror. That also applies to the EU and to the aid from the United Kingdom, Germany, and Norway. The development tap was turned off as an important means of pressure in international security politics. The Swedes even froze all their humanitarian emergency aid. For the civil sector in Sudan it virtually meant death by suffocation. Which painfully enough played into the hands of the same regime that the international policy in fact wanted to put under pressure, simply because this lessened internal civil pressure on the regime. A part of the more politically critical CSOs started to provide more neutral emergency aid, in order to run fewer risks."

Airport

"Another consequence of the War on Terror was that all Sudanese people abroad, especially in the US, became terrorist suspects. The culture of security which has arisen in the last decade, and in many countries this culture has shaped formal security policies, has reduced 'the other,' and in particular the Islamic or Arabic 'other,' to a potential source of danger. For a period we were unable to travel abroad. We couldn't even get a visa for our neighboring country Uganda—which is, just like Sudan, a member of the Common Market for Eastern and Central Africa (COMESA). I have experienced a lot in my life in Sudan, but my most humanly degrading treatment was not by the Mukhabarat, the secret service in Sudan, or by the HAC, but by security civil servants at the airport in New York. This was in 2005. I had been invited to take part in a conference and had finally been able to get hold of a visa. I was held for nine hours, in a small room at the New York airport. I was treated like a terrorist: fingerprints, photographs from the front and in profile view, the entire visa procedure had to be repeated.... I was robbed of all

my freedoms and my dignity. Security servants followed the orders that originated from a very coherent but out of control repressive apparatus.”

You would expect that the control would be aimed at representatives of the Sudanese regime. In practice, as Asha explains, the exact opposite occurs. “The next day, during the conference, I spoke to a Sudanese lady, someone who worked for the government. She came through the security check without any problems.... In other words, freedom activists who risk their lives are considered terrorists whereas people who represent a repressive regime are received with open arms. I know the political and religious violence against women like no one else. Up to 2006 no Sudanese woman was allowed to leave the country without the formal consent of a man, whether it was her husband, her father, or even her son.... I know what I am talking about. But the security experience in New York has touched me deeper than anything else. Here you have a country that feels it has to fight against terrorism and which treats me, a guest incidentally, in a way that is a clear example of dehumanizing terror. Since then I have sworn never to go to the US again, despite the many invitations.”

“The latter unfortunately proves what I said earlier. We, social activists, fight two forms of terrorism—internally that of the regime, and externally that of countries such as the US. And the most painful thing is that those two have found an ally in each other.”

This country of fear

“The future? There are times I nearly feel like giving up, but I will not fall into total despair. Not yet. I have promised my children to continue for another two years in Sudan, until the following elections. Should the current regime remain in the driving seat, then I may have to leave this country of fear, together with my family. But as long as I live here, in my country, I have to continue my work. Staying and not fighting is impossible.”

Article

Doing Good and the Law: Questions of Control, Paternalism, and Partnership— An Organizational Perspective

David Z. Nowell, Ph.D.¹

Introduction

The story was not surprising to anyone familiar with the work of American volunteers in emerging countries. In the weeks following the devastating earthquake in Haiti last January, ten American missionaries were arrested and charged with kidnapping thirty-one Haitian children when they tried to take the children across the border into the Dominican Republic. Ostensibly, the Americans were acting in what they saw as the best interests of children who had been orphaned by the earthquake. Their actions were in clear violation of Haitian law—but the Americans claimed ignorance of the law: ““We didn't know what we were doing was illegal. We did not have any intention to violate the law. But now we understand it's a crime,’ said Paul Robert Thompson, a pastor who led the group in prayer during a break in the session. Group leader Laura Silsby told the hearing: ‘We simply wanted to help the children.’”²

For the better part of a century, charitable organizations in the United States have been major players on the world stage. The Red Cross, so evident in relief work in the U.S., began its international involvement when it provided personnel for World War I hospitals. The Rockefeller Foundation, chartered in 1913, specifically uses the term “throughout the world,” and it was this foundation’s programs that led to the worldwide eradication of yellow fever. By 2007, U.S. foundation support for international giving reached \$5.4 billion,³ climbing to 22% of all foundation grants made;⁴ that figure does not include additional billions provided in direct aid by non-foundation charitable organizations. Interestingly, well over half of the dollars targeted for cross-border work by U.S.-based foundations were given to U.S.-based organizations for their international programs.⁵

Charities have significant experience addressing the challenges of cross-border work. Some of these challenges are intrinsic to encounters between cultures: language differences, cultural mores and expectations, and conflicts of objectives are part of the “inconvenience” of working internationally. Even in these areas, however, charities often stumble despite the best intentions. As emerging countries have developed more and more comprehensive regulatory

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² “Haiti Charges U.S. Church Members with Kidnapping,” [MSNBC.Com](http://www.msnbc.msn.com/id/35235514/ns/world_news-haiti_earthquake), 2010, http://www.msnbc.msn.com/id/35235514/ns/world_news-haiti_earthquake (2 February 2010).

³ *International Grantmaking IV: An Update on U.S. Foundation Trends*, www.usig.org/updates.asp, The Foundation Center in cooperation with the Council on Foundations (2008), p.2.

⁴ *Ibid*, p. 3.

⁵ *Ibid*, p. 5.

systems in everything from accounting standards to orphan-care normatives, and as the United States tax code and Department of the Treasury regulations (especially following September 11) continue to become more and more detailed, U.S.-based charities have found that navigating a path through often conflicting standards is increasingly difficult. When conflicting and often convoluted regulations involving two or more countries are thrown into the mixture, many charities struggle to maintain equilibrium and successfully fulfill their missions. How can charities chart a course that keeps them in legal compliance, but also enhances their ability to deliver the services that are their purpose for existing?

The answer begins with a non-paternalistic respect for the culture and the laws of the recipient country⁶

Two years ago, I was called as a consultant for a group that desired to begin a shelter for biological and social orphans in the Amazon basin of Brazil. The group had been given a sizable tract of land in Amazonas. With virtually no operational monies, they planned to have the orphans create craft pieces which would be sold in the United States. The income provided would make the shelter totally self-sufficient. Unfortunately for their plans, Brazil has very strict child-labor laws, even stricter than the United States, and selling child-created crafts is absolutely in violation of the *normativos*. I asked the leader of the group if he would ever consider doing the same type of operation in Appalachia. His response was an immediate dismissal of the question, not understanding its relevance; there was never a consideration that what might be inappropriate or illegal in Appalachia would also be unacceptable in Amazonas.

The common thread in this and the opening narrative is that both groups acted in a manner which they would never condone in their home country. They also acted as if Haiti and Brazil had no legal code, or, if each did, as if the laws did not apply to Americans who truly were interested only in doing good.

Far too often, NGOs prefer not to be “distracted” from their work by bothering to become acquainted with the laws of the countries where they operate. In many cases, however, the emerging country, sensitive to past colonial abuses, codifies strict protections for children or other groups who may be the recipients of international aid. For example, Brazil’s recently enacted *Orientações Técnicas: Serviços de Acolhimento para Crianças e Adolescentes*,⁷ based on the United Nations Convention on the Rights of the Child,⁸ establishes rules governing child-care that are measurably more restrictive than corresponding laws in the United States. Brazil’s long history of “warehousing” orphans, coupled with the country’s desire to be seen as a world leader, led to the development of this very comprehensive document. Many longstanding practices of international child care providers operating in Brazil (such as long-term residential shelters) are explicitly forbidden by the new standards. Organizations that desire to continue delivering services to children there not only must become well-versed in the evolving laws, but also must be diligent in adherence to the standards of care.

⁶ The website of the U.S. International Grantmaking Project (www.usig.org) offers perspective on the legal environment for charitable work in a number of countries.

⁷ *Orientações Técnicas: Serviços de Acolhimento para Crianças e Adolescentes*, Conselho Nacional de Assistência Social, October 19, 2010, 1.

⁸ “United Nations Convention on the Rights of the Child,” UNICEF, 2010, <<http://www.unicef.org/crc/>> (21 October 2010).

In some instances, technical adherence to regulations can present challenges for organizations operating in multiple countries. For example, accounting standards can vary greatly from country to country. A unified audit report can be very difficult when the host country's standards do not distinguish between capital and operational expenditures, and the sending country requires an audit with categorical distinctions. It becomes a challenge not only for the organization to manage cash flow, but also for a governing board to understand financials when there is no apples-to-apples comparison. Hope Unlimited for Children, based in the United States but providing services in Brazil, has separate audits of its U.S.-funding organization and its Brazil-based service delivery organization, and then provides a unified financial statement for the governing board. By so doing, it meets audit standards in both countries, and provides its board with a necessary tool for effective oversight.

Proper organizational structuring can safeguard an organization operating in multiple countries

Many NGOs find that careful structuring can provide an effective means of assuring compliance with varying—and sometimes conflicting—not-for-profit regulations in more than one country. One of the simplest and cleanest ways to manage non-profits that are primarily funded in one country, but largely operate in another, is to establish separate corporations in the two countries. For example, a United States organization with a primary mission in Mexico would charter as a 501(c)(3) in the United States and then establish a second, quasi-independent not-for-profit in Mexico. The U.S. organization functions as a funding parent for the grant-receiving Mexico operation. Structurally, the U.S. organization is a non-foundation, grant-making charitable organization. All services are delivered by the Mexican corporation chartered under Mexican laws. The U.S. organization owns no property in-country, signs no contracts, and, from appearances, has very limited presence.

By hiring competent Mexican staff, familiar not only with national and local laws but also with preferred paths of navigation which are often labyrinthine in their complexity, the U.S. charity can avoid running afoul of Mexican authorities. Additionally, having native in-country staff certainly engenders the good will always necessary for building an effective organization, and allows the organization to avoid the pitfalls of apparent or actual paternalism—to which the recipient country is often very sensitive.

At this juncture, many U.S. boards face the uncomfortable issue of control. As a board member once demanded of me after we had invested over \$40 million in the course of two decades in international orphan care, “What do you mean we do not own any property down there?” The answer was very simple, we did not; all property was owned by our foreign counterpart. What that did *not* mean, however, was that we had no control. The U.S. corporation's CEO was, by charter, also the CEO of the foreign operation, and on several other levels we were able to direct operations in-country. Managers of internationally working non-profits must make developing control mechanisms (if desired) and educating their boards about those mechanisms very high priorities. Most donors as well as board members expect the recipient organization to ensure that donated funds not only end up where intended, but also that they accomplish the purpose for which they were solicited. As long as the charitable organization can report success in the deployment of funds, very few donors will raise the issue of actual in-country ownership. In this type of relationship, the U.S.-based charity becomes a grantor

organization, and the transfer of funds to the in-country organization meets the legal definition of grant-making, and can be so reflected on the organization's Form 990.⁹

Managing a board's expectations and levels of frustration is also a very important task. Many environments in which cross-border organizations work can seem almost hostile to an organization which, after all, only wants to improve the lives of others. One would think that any governmental agency, be it at local, regional, or national levels, would welcome such aid with open arms. However, implicit (and, unfortunately, often *explicitly* stated) in aid or service delivery is a critique of the government's or society's inability or unwillingness to care for its own. Even when such a message is never intended to be delivered, the dynamics of being a recipient of international aid may foster resentment. Truth be known, it is a very rare board that does not at least carry a bit of a "they should be grateful" attitude. When regulatory or structural challenges arise—as they inevitably do—it takes skillful management to help a board maintain its level of commitment and enthusiasm for working in a particular geographic region.

Conversely, there are times when an organization working internationally must deliver a very clear message to local authorities regarding the relationship. Lower-level administrators in aid-recipient countries may find a sense of empowerment by over-the-top enforcement of regulations, site inspections, or micromanagement of day-to-day operations. Tactful and intentional communications with supervisory staff reminding them of the organization's investment in the community may be necessary. This can be especially important with higher-ranking elected or politically appointed officials who can see the bigger picture. Fostering positive relationships on professional, social, and personal levels is often critical for securing a positive aid-delivery environment.

Meeting domestic control standards for international grant making and support of cross-border organized entities

The Internal Revenue Service provides reasonably clear guidelines for charitable organizations making international grants. Essentially, any funding provided to non-U.S.-based organizations must meet the U.S. organization's charitable purpose as described in the IRS-provided letter of determination. There are several tests which the IRS lists to judge whether a foreign organization is eligible to receive funding:

1. Organization receiving the grant has an IRS-issued U.S. determination letter;
2. Foreign recipient organization uses the grant for activities consistent with the grantor's exempt purpose;
3. Grantor organization is a public charity or private foundation;¹⁰ and
4. Grant is made in consideration of the Treasury's updated anti-terrorist financing guidelines.¹¹

⁹ An added benefit of such a structure is that all extra-country grants fall under the category of program funds in Form 990, providing a positive impact on program, G & A, and fundraising ratios.

¹⁰ See Rev. Rul. 68-489, and Rev. Ruls. 56-304 (grants to individuals) and 68-489 (grants to nonexempt organizations).

¹¹ "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities," U.S. Department of the Treasury (8 December 2005), p. 2.

Application of the standards is something of a challenge, however, because the rules may fall under the either/or distinction or the both/and distinction. For example, if the foreign organization has received an IRS-issued U.S. determination letter, it is presumed to be eligible to receive grants from U.S.-based grant-making organizations. This standard is, by and large, exclusive of the other three tests.

If, however, the foreign organization does not possess the IRS exemption letter, the both/and standard comes into play. That is, the grantor must be exempt, the recipient organization must utilize the grant in accordance with the grantor's exempt purpose, and the grant must be made in accordance with the anti-terrorist guidelines. This three-part test should be applied to every international transaction made by a U.S.-based charity. If all three standards are met, then the charity has achieved the threshold to qualify its exempt status.

Satisfying boards and donors on issues of control:

Many organizations find that they can employ the same mechanisms to both assure compliance with IRS regulations and their own need to direct programs in-country. They accomplish this by closely intertwining the U.S. organization with its international counterpart. In the example cited earlier, the U.S. charity founded the in-country organization and placed in its charter the requirement that its CEO would be appointed by the U.S. board. A second mechanism that may be employed is for the U.S. board to approve the operational budget of its international partner. Such steps as these two require a very close relationship between the two legally separate organizations. Indeed, the organizations must essentially function as one; the distinct identities are legal matters rather than perceived realities. So doing, however, allows the organization(s) to satisfy not only audit and regulatory requirements, but also their boards' and donors' expectations.

Our organization was approached earlier this year by another charity doing relief work in Haiti that desired to use us as a pass-through for their funding. The organization was having difficulty securing their letter of determination and wanted their donors to receive the benefit of the charitable deduction. Ultimately, our board turned down their request for a long-term relationship because of issues of oversight. I said in my letter explaining our decision:

With our work in Brazil, for example, our CEO is also CEO of the Brazilian operation, and chair of their board, as well as a voting member of our Board. I view the work in Brazil several times a year. Our Board approves the Brazilian budget, and reviews the Brazilian audit. The Board itself travels to Brazil every other year. At least once a year, our Board makes a formal note for its minutes that it is satisfied that all funds sent to Brazil are expended in accordance with our exempt purpose. The Board feels very comfortable making this certification.

With the Haitian operation, although it was consistent with our organizational charter, we could not affirm the basic requirements of oversight that the close relationship with our Brazilian organization provides. I completely supported the good work the Haitian organization was doing. Could I, however, sign and attest to our board that I knew all funds were expended in keeping with our exempt purpose? No, I could not.

A secondary benefit of such structures is that they move the American organization beyond just being a grant-maker to being personally and relationally involved in the actual aid delivery. So doing secures a much deeper level of buy-in for the organization, its board, and its

donors. Much greater levels of trust are engendered between U.S. and international counterparts. Such interaction does a great deal to insure that values and objectives are shared between the grant-making organization and the grant recipient. “Mission creep” is always a hazard for charitable organizations. The danger becomes especially pronounced when the on-the-ground component sees what they may deem to be a more tractable problem than that which the grant is intended to address. A well-conceived and defined working relationship which brings the U.S. organizational leadership and the cross-border organization into constant contact builds the relationships that provide mission security.

Conclusion

Without question, there are always significant challenges to any organization that wishes to engage responsibly in working or providing grants in cross-border environments. Indeed, it is often the very challenges—government bureaucracies that seem designed more to hinder aid to the needy than to facilitate it—that make such work necessary. However, such challenges should by no means discourage or deter non-profits from working in cross-border situations. Instead, organizations should enter such work fully aware of regulatory and work environments. Intentionality in structuring both the organization and its aid-delivery system will allow non-profits to successfully navigate the braided currents of such environments and genuinely impact the lives of those the organization has set out to help.

Article

An Enabling Framework for Citizen Participation in Public Policy: An Outline of Some of the Major Issues Involved

Dragan Golubovic¹

1. INTRODUCTION

This article examines different frameworks of citizen participation in public policy (hereinafter also referred to as public participation), with particular emphasis on participation in *legislative processes*. Citizen participation in legislative processes is an important part of an overall institutional framework of cooperation between the government and civil society organizations (CSOs), given that laws (statutes) and other general regulations are oftentimes the primary instruments of articulation and implementation of public policies.

The article discusses frameworks of citizen participation in the European countries and the European Union. Thus far, few countries have adopted comprehensive mechanism for citizen participation. Examples include Romania, Hungary, Bosnia and Herzegovina, the United Kingdom, Croatia, and Austria. In some countries, citizen participation is governed by custom law (e.g., Sweden, Denmark, and Norway), while in others this issue is addressed in a constitution, albeit in a fairly general fashion. For example, the Constitution of Switzerland imposes general obligation on the government to consult with citizens on a narrowly defined scope of issues (see also Hungary, *infra* 4).

The article seeks to expose key stakeholders (government officials, policy makers, and CSOs) to some of the critical issues pertinent to an enabling legal and institutional framework for citizen participation. It does not provide a detailed account of frameworks and practices in various countries, but rather outlines major features and challenges thereof. For clarity, references to the literature and materials used herein are omitted from the text.

2. CITIZEN PARTICIPATION: ITS RATIONALE AND THE ROLE OF CSOs

Citizen participation in shaping and implementing public policies is regarded as a critical ingredient of participatory democracy. It is noteworthy that the underlying role of participatory democracy is not to replace representative democracy, which is based on the separation of powers, multi-party system, and free elections, but rather to supplement it and make it better functioning. To that end, citizen participation serves several important functions: (1) It provides an opportunity and creates conditions necessary for citizens to engage in political life regularly—and not only during elections. (2) It creates a framework for citizens to advocate for their legitimate interests and thus contributes to the development of a vibrant democratic society. (3) It makes the work of public authorities more transparent and closer to their constituencies. (4)

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It contributes to the quality of adopted public policy and its smooth implementation. If all stakeholders participate in the process, their legitimate interests will presumably be protected and the costs of implementation of such a policy will be reduced, as they will be less inclined to resort to judiciary and other remedies to protect their interests. A study referenced in the *Public Hearings Manual*, which is published by the Organization for Security and Co-operation in Europe (OSCE), suggests that citizens are more inclined to embrace public policy if they have an opportunity to participate in the process of its shaping, even if their proposals are not favorably met. (5) It facilitates CSOs' watchdog role in the implementation of adopted policies.

As for CSOs, they play a twofold role in this process. On the one hand, CSOs are a suitable *institutional tool*, which facilitates citizen participation in public policy. They allow citizens to organize themselves and express and advocate for their legitimate interests more effectively—as well as making the entire process of participation more transparent. On the other hand, CSOs are also a *legitimate party* to this process—at least insofar as some of the human rights from which the right of citizen participation is derived are also extended to CSOs (e.g., freedom of speech, freedom of association, freedom of free access to information, *infra* 4).

The significance of citizen participation in public policy processes has been acknowledged not only at the national but also at the international level. Thus various forms of consultations involving CSOs have become a standard practice of major multilateral, intergovernmental organizations, including the United Nations, the World Bank, the Council of Europe (CoE), and the European Union (albeit with varying success). For example, the Council of Europe's *Recommendation on the Legal Status of Non-Governmental Organizations in Europe* specifically calls on member states to create an enabling institutional environment for citizen participation in public policy.

Recommendation 76: “Governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people’s opinions as to the functioning of society. This participation and co-operation should be facilitated by ensuring appropriate disclosure or access to official information.”

Recommendation 77: “NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation.”

Recommendation CM/RC(2007)14 of the Committee of Ministers to members states on the legal status of non-governmental organizations in Europe

As a follow-up step, the Conference of International NGOs, which is the “voice of civil society” with the Council of Europe, adopted the *Code of Good Practice for Civil Participation in the Decision-Making Process* (CONF/PLE(2009)CODE1), which was confirmed by the Declaration of the Council of Ministers of CoE on October 21, 2009. The Code provides an analytical framework and identifies actors and steps in the process of consultation that need to be observed in order to facilitate interaction between citizens, CSOs and public authorities.

At the European Union (EU) level, in 2001 the European Commission published the *White Paper on European Governance*, which contains recommendations put forward in order to make the functioning of EU institutions more transparent, accountable, participatory, and effective. Among others, the Commission proposed a greater involvement of CSOs in the EU

decision-making process in recognition of the important role they play in modern democracies, as well as the need to develop general principles and minimum standards for consultations with the Commission (*infra*, 4).

PROPOSALS FOR CHANGE

The Union must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments.

Better involvement and more openness

No matter how EU policy is prepared and adopted, the way this is done must be more open and easier to follow and understand. The Commission will provide:

- Up-to-date, on-line information on preparation of policy through all stages of decision-making.

There needs to be a stronger interaction with regional and local governments and civil society. Member States bear the principal responsibility for achieving this. But the Commission for its part will:

- Establish a more systematic dialogue with representatives of regional and local governments through national and European associations at an early stage in shaping policy.
- Bring greater flexibility into how Community legislation can be implemented in a way which takes account of regional and local conditions.
- Establish and publish minimum standards for consultation on EU policy.
- Establish partnership agreements going beyond the minimum standards in selected areas committing the Commission to additional consultation in return for more guarantees of the openness and representation of the organizations consulted.

European Governance: A White Paper, Commission of the European Communities (2001)

Citizen participation also features prominently in the Lisbon Treaty of the EU. Title II of the Treaty (Democratic Principles) underscores the principle of representative and participatory democracy (i.e., the role of political parties and citizens, respectively) in the function of the Union. With regard to the latter, it obliges the EU institutions to engage in consultations and maintain open and transparent dialogue with citizens. The Treaty imposes particular responsibility on the European Commission in this respect.²

² The Lisbon Treaty (which is an abbreviated version of the failed EU Constitution) was signed in Lisbon on December 3, 2007, published in the Official Journal of the EU (C306-10, of December 12, 2007), and came into force on January 1, 2010, following its ratification in all member states.

Article 10

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.
Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters

Furthermore, some international conventions specifically envisage the obligation of signatory states to create a mechanism for citizen participation with respect to the subject matter of a convention. Perhaps the most notable example in this respect is the United Nations' *Convention on Access to Information, Public Participation in Decision Making and Access to Justice Matters* (the so called *Aarhus Convention*), which has been ratified thus far by 40 countries as well as the EU.³

³ The Convention was signed on June 25, 1998, and came into force on October 30, 2001.

Article 1

Objective

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 2 (extract)

Definitions

For the purposes of this Convention,

5. “The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their *associations, organizations or groups*;
6. “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, civil society organizations promoting environmental protection and meeting requirements under national law shall be deemed to have an interest.

Aarhus Convention (1998)

Finally, citizen participation also features prominently in policy documents on civil society, which some countries have developed. For example, the *National Strategy for the Creation of an Enabling Environment for Civil Society* (2006-2011), which was adopted by the Croatia Government in 2006, states that Croatia is a vibrant, pluralistic society based on participatory democracy, which enables citizens to play an active role in social and political life. In addition, the Strategy points to the fact that a vibrant civil society needs effective instruments that will ensure citizen participation (either directly or through various forms of CSOs) in all stages of public policy processes, including the implementation thereof.

3. MODELS OF COOPERATION BETWEEN CSOs AND PUBLIC BODIES

The handbook of the Organization for Economic Cooperation and Development (OECD), *Citizens as Partners: OECD Guide to Information, Consultation and Public Participation in Policy-Making*, distinguishes three levels of cooperation between citizens and public bodies:

Information—A one-way relationship in which information flows in one direction, from the government to citizens. The government informs citizens about its decisions and initiatives as it sees fit, or citizens extract information at their own initiative. An example of this relationship is public access to documents of public significance, an official gazette, and the government’s Internet pages.

Consultation—The government seeks feedback from citizens in the process of shaping public policy. It is a two-way relationship in which the government determines participants, in order to receive sound feedback. The government ensures that citizens are provided with pertinent information in advance. An example of this type of relationship is comments to draft laws.

Active participation—A higher degree of a two-way relationship in which citizens are actively involved in shaping public policies, such as through membership in working groups commissioned to prepare a draft law. The improved collaboration with citizens and other social actors does not release the government from its ultimate responsibility to choose and implement a particular public policy.

4. THE LEGAL NATURE OF THE RIGHT TO PARTICIPATE IN PUBLIC POLICY

One of the first challenges the policy-makers need to confront in developing the mechanism for citizen participation is to make sure they understand where exactly the right to citizen participation/consultation fits into their respective legal systems. Is it a constitutional right *per se*, or a right derived from some other rights that enjoy direct constitutional protection? Is it a declaratory right that cannot be enforced, or a right whose breach is effectively sanctioned? As the tables below indicate (*infra*, Appendix I), governments provide various responses to the foregoing issues. Nevertheless, it should be noted that citizen participation is generally not regarded as a distinct constitutional right.

Hungary is among few notable exceptions in this respect. The Constitution of Hungary obliges the government to cooperate with CSOs in carrying out its duties and responsibilities. However, it also grants the government discretion to choose the model of cooperation it deems appropriate. With regard to consultations in legislative processes, the constitutional obligation for consultations is further elaborated in the *Law on Legislative Procedures* (1987). Article 20 of the Law stipulates that CSOs shall be involved in the drafting of regulations that impact social conditions and those interests they represent and protect. However, the Law does not envisage any sanctions for the violation of its provisions. In 2009, the Constitutional Court repealed some of the Law's provisions with effect *pro futuro*—31 December 2010. As a result, the Government has prepared a new law on legislative procedures, as well as a separate law on public participation in legislative procedures, which are expected to be enacted shortly.⁴ In several cases involving the Law's alleged violation, the Constitutional Court ruled that consultation provisions set forth in the Constitution and the Law were “methodological instruction” rather than enforceable right. In the Court's opinion, the exercise of legislative and executive power may not be contingent upon consultations with representatives of various private interests – unless they are granted specific power to participate (i.e., express their opinion) in a decision-making process. In another case, the Court qualified the Law as *lex imperfecta*: violation of the consultation procedure prescribed by the Law does not amount to violation of the Constitution *per se*, but

⁴ The draft Law on Legislative Procedures and the draft Law on Public Participation in Legislative Procedures (Law on Public Participation) are posted on the web site of the line ministry as of September 2010. Ironically, the ministry set a nine-day deadline to receive feedback on the drafts from interested parties. The draft Law on Legislative Procedures does not set out detailed rules with respect to public participation. Rather, it contains a general provision that the authority responsible for drafting a regulation shall ensure that the draft regulation is prepared in conformity with the provisions of the (draft) Law on Public Participation, the major features of which include the following: 1) In order to ensure transparent and participatory legislative process, the government is obliged to make the legislation plan available to the public every six months, in conformity with the schedule for Parliament's regular sessions. 2) Responsible ministers are obliged to publish on their respective web sites information concerning the title of a draft, the short summary and the impact assessment thereof, and the anticipated date of making a draft available to the public. 3) Public participation (which includes receiving comments on a draft posted on a web site, public discussion, as well as other forms) is mandatory for certain types of legislation. A ministry does have some latitude in choosing the form of participation. 4) The time frame for consultations is between 15 and 30 days, and only in exceptional cases may be shorter.

may, rather, result in political or disciplinary liability of state officials responsible for the implementation of the Law. As a general rule, the Court shall review a case on its merits only if there is reasonable doubt that provisions of the law are *per se* unconstitutional. In (rare) cases where, despite the violation of the Law, the right to consultation was nevertheless enforced, the Court in fact ruled the violation of some of the rights that are directly protected and guaranteed by the Constitution, such as the right to free access to information, the right to healthy environment, freedom of association, or the right to file a petition with the government. Following enactment of the *Law on Access to Public Information in Electronic Form* in 2005, citizens and CSOs are provided with an additional legal tool to exercise their right to consultation. In addition to obliging all bodies performing public duties to make available on their Internet sites the data of public interest, it also obliges state authorities to post draft laws and decrees on the Internet, along with explanatory notes to the draft and other necessary materials and documents.⁵

Romania has chosen to address the consultation procedure in a separate law, the Law on Transparent Decision-Making by State Bodies and Local Governments (2003), the so-called “Sunshine Law.” The Law obliges state administration and local governments to consult with “citizens and their associations” in the course of adopting general legal acts within their respective purviews. The Law defines the right to consultation as an enforceable rather than declaratory right, pursuant to the rules governing the administrative procedure. However, it appears that the scope of this protection is somewhat limited, as it is very likely that the process of consultation will be brought to a conclusion before the administrative procedure for the alleged violation of the Law is brought to a conclusion. State and municipality officials that breach provisions of the Law are subject to disciplinary liability, pursuant to the labor law and regulations governing civil servants.

In *Bosnia-Herzegovina (BiH)*, citizen participation is governed by the Rules on Consultations in Policy Making (2006). The Rules govern the enactment of general legal acts which are adopted by the BiH Council of Ministers and other institutions at the state level. The Rules prescribe the minimum level of consultations between those bodies and “the public, legal entities, and groups of citizens which do not belong to the government structure” (*infra*, table VIII). Minimum consultations include the obligation of a relevant body to post a draft of regulations on the Internet page, the possibility of providing comments to a draft by interested parties via the Internet, as well as solicitation of comments by persons who are on the consultation list of the relevant institution. Significantly, the obligation for minimum consultation is not subject to any exceptions. However, the Rules do not envisage any specific sanctions for violation of the consultation procedure. In such cases, the Council of Ministers may (but is not obliged to) refuse to put a draft on its agenda. If so, the Council’s Chief Secretary shall return a draft to a responsible body and request that it complete the process of consultation within a prescribed deadline, before the draft is reintroduced to the Council for its consideration.

In the *United Kingdom* citizen participation is governed by the *Code on Practice on Consultation* (2004). The Code is a further elaboration of one of the five compacts, the *Compact Code of Good Practice on Consultation and Policy Appraisal*, that were signed following the

⁵ Because the draft Law on Public Participation basically incorporates provisions of Articles 9 and 10 of the Law of Access to Public Information in Electronic Form, the obligation to post the draft laws and decrees on the Internet will be repealed from the Law following the enactment of the Law on Public Participation (which envisages this to be a general obligation of public authority).

adoption of the *Compact on Government's Relations with the Voluntary and Community Sector*. It proclaims six principles that the state administration bodies must observe in the process of public policy consultations. These principles apply accordingly with regard to consultations that take place before the government takes its position on the EU draft directives. As stated in the introduction of the Code, it is a document that is not legally binding and therefore may not derogate (domestic) laws and other binding legal instruments, as well as the EU *acquis communautaire*. As a result, citizens may not enforce their right to consultation. However, similar to Hungary, the right to consultation may nevertheless be enforced if the court in particular instances finds violation of some other rights that enjoy direct legal protection, such as freedom of expression, the right to free access to information, or the prohibition of discrimination. On the other hand, the Code is considered generally binding for state administration bodies. This means that the violation of the Code may result in political or disciplinary liability of the heads and employees of the state administration bodies.

The issue of citizen participation has somewhat different connotations at the *European Union* level, given the unique nature of the EU structure. Nevertheless, citizen participation is gaining in prominence with major EU political and legislative institutions, as part of comprehensive efforts to bring them closer to citizens. In 2003 the *General Principles and Minimum Standards for Consultations of Interested Parties with the European Commission* came into force. This is a comprehensive document that guides the Commission when consulting on major policy initiatives, without prejudice to more advanced practices developed by the Commission's departments – or, for that matter, any specific rules that are to be developed for certain policy areas. As a first step, the Commission is focused on applying the Principles to those initiatives that are subject to an extensive impact assessment. However, it does encourage Directorates-General to apply it to any other consultations they seek to engage in. The major objection raised against the Principles is that it is a political rather than a legally binding document (it was adopted in the form of the Commission's communication). The Commission was determined to avoid a legally binding instrument for two reasons: (1) the need to draw a clear-cut line between consultations launched by the Commission's own initiative prior to the adoption of a proposal by the Council of Ministers and the European Parliament, as part of the compulsory decision-making legislative process which is governed by the founding treaties; and (2) the risks associated with a possibility of the Principles being challenged by the European Court, which could significantly increase transactional costs of the enactment and implementation of the EU law. In addition, the Commission noted that it does have administrative and other means to ensure that all its departments duly apply the Principles.

5. KEY STATE ACTORS AND INSTRUMENTS GOVERNING PUBLIC PARTICIPATION

Regardless of the form of cooperation, any mechanism of citizen participation must identify not only key private stakeholders but also key state actors in the process along with their prerogatives and duties to that effect. Especially, it must respond to a question of whether the primary partner of citizens, CSOs, and other private actors in the process is the government (i.e., the executive branch of power) or parliament (i.e., the legislative branch of power). At least in countries with the Westminster model of governance, which is the model embraced in most European countries, it is critical to engage in participation at an early stage of preparation of laws and other instruments of public policy (the so called *ex-ante* participation). That will create a framework that will ensure that the *government*, rather than parliament, is the primary partner of

private actors in the process of participation. This is because the distinctive feature of the Westminster model is the decisive role of the government not only in preparation of laws and other instruments of public policies, but also in their enactment, for the government in regular circumstances effectively controls the majority in parliament. Therefore, models of participation in those countries that focus on collaboration with the legislative rather than the executive branch are likely to limit the leverage of citizens/CSOs in the process.

In addition, a mechanism of citizen participation needs to respond to a question of whether the framework of participation should apply to central level of governments, or whether local governments should be included in the process too. A response to that question will depend on a number of factors—including, the scope and the ambit of power of local authorities in a given country. However, as a matter of good democratic practice, a framework for citizen participation should pertain to both central and local public authorities (*infra*, Appendix I).

Finally, a framework for citizen participation also needs to identify instruments governing citizen participation. In this respect, the experience thus far seems to suggest that legally binding instruments (such as the Romanian “Sunshine Law” and to a lesser extent BiH Regulations) do not necessarily provide for a more effective framework for citizen participation as compared to codes and other legally non-binding instruments (embraced by Great Britain, Croatia, Austria, etc.), in particular if their implementation requires high transactional costs.

APPENDIX I:

COMPARATIVE TABLES ON ISSUES PERTINENT TO PUBLIC PARTICIPATION

**TABLE I: FORMS OF PUBLIC CONSULTATIONS
(ACCORDING TO THE OECD MODEL)**

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Consultation and active participation. ⁶	Consultation.	Consultation.	Consultation.	Consultation.

⁶ This does not mean that BiH is the only country which allows for active participation—i.e. participation of CSOs and the academic community in the working groups commissioned to prepare draft laws and other regulations. Quite to the contrary, it is a good European practice. However, BiH is the only country included in the survey that specifically regulates this form of participation.

TABLE II: TYPES OF LEGAL INSTRUMENTS ENCOMPASSED BY PUBLIC CONSULTATIONS

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Laws and other general regulations.	Regulations initiated by the European Commission.			

TABLE III: LEVEL OF STATE ORGANIZATION AND BODIES ENCOMPASSED BY MANDATORY PUBLIC CONSULTATIONS

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
<i>National:</i> Council of Ministers of BiH and other state institutions.	<i>National:</i> Government and governmental bodies. <i>Local:</i> Pending reforms provide for consultations at local level as well.	<i>National:</i> Government and governmental bodies; <i>Local:</i> municipality executive and representative bodies.	<i>National:</i> Government and governmental bodies; local government is encouraged (but not obliged) to adhere to the Code.	<i>European:</i> Commission.

TABLE IV: PRIVATE ACTORS THAT MAY PARTICIPATE IN PUBLIC CONSULTATIONS

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Groups of citizens, private legal entities (i.e., legal entities that are not part of the government's structure).	"Anyone": Citizens, CSOs, and other private legal entities.	Citizens and associations that have been established and operate in accordance with law.	Citizens, CSOs, and other private legal entities.	Special role of CSOs, but also citizens, companies, local and regional public bodies, etc.

**TABLE V: SCOPE OF PERSONS DIRECTLY ENCOMPASSED
IN PUBLIC CONSULTATION PROCEDURES**

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Private legal entities and groups of citizens that are on the list of line ministry or other state institution.	Customary practice: citizens, associations and other private legal entities that are on the list of line ministry.	Association of employers and other associations established and organized pursuant to law, with regard to general regulations that may influence their position and legitimate interests.	Citizens, associations and other private legal entities.	Persons whose interests may be affected by a draft regulation; persons that shall participate in the implementation of a regulation, persons whose aims correlate directly to those a regulation seeks to accomplish.

TABLE VI: PROCEDURE FOR PUBLIC CONSULTATIONS

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Consultations in any stage of drafting a law or regulation. A draft is posted on the Internet page of the ministry or other relevant institution; all persons on the consultation list are called upon to submit their comments.	Consultations in any stage of drafting a law or regulation; a draft is posted on the Internet page of the ministry or other responsible government bodies for comments.	Public announcement of preparation of a draft is made by one or more ways as prescribed by law (Internet, announcement through local or national media, etc.). A draft is submitted to all persons that expressed interest.	Consultations in early stages of development of public policy (implicitly includes preparation of draft laws); especially with persons whose interests may be affected and those who are expected to take a “proactive” stand in the process of shaping of public policy, developing draft laws, etc.	Consultations in early stages of development of public policies and regulations.

TABLE VII: DEADLINES FOR SUBMISSION OF COMMENTS

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
It appears that the deadline for submission of comments may not be shorter than 21 days (minimum consultation) or 30 days (legal provisions with a significant impact on the public).	The Law on Access to Public Information in Electronic Form requires at least 15 days for consultations, barring extraordinary circumstances.	The relevant administrative body issues an announcement on drafting at least 30 days before a draft is opened for public debate. The announcement must state a deadline for submission of comments in writing, which may not be shorter than 10 days.	At least 12 weeks, in the stage of formulating a public policy or drafting a legal instrument; an administrative body may set a longer period for consultations—e.g., during summer holidays.	Depending on circumstances. Standard period of consultations is eight weeks. In exceptional cases the deadline may be longer or shorter.

TABLE VIII: SCOPE OF CONSULTATIONS (MINIMUM AND BROADER)

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
<p><i>Minimum scope:</i> publication of a draft on the Internet page of the Council of Ministers or other relevant institution; call for submission of comments by persons/entities on the Council's list; information as to where draft may be acquired.</p> <p><i>Broader scope</i> (laws and regulation of particular significance): publication of a draft in public media, a draft directly submitted to "organizations and individuals," option for commissioning working groups including "experts and representatives of organizations" to prepare a draft law or regulation.</p>	<p>No difference in scope of consultations.</p>			

TABLE IX: EXEMPTIONS FROM MANDATORY CONSULTATIONS

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Only at instances of broader consultations: extraordinary circumstances, unforeseen international obligations or court's annulment of a law or part thereof.	For reasons of defense and national security, perceived financial interest, foreign affairs, nature conservation or inheritance protection, interests of the government, or outstanding social interest which requires immediate legislative response.	Extraordinary circumstances to which an expeditious promulgation procedure applies.	Extraordinary circumstances, which include duties arising from membership in EU and other international organizations; duties arising from obligations to enact state budget; in order to protect public health and security, etc.	No exemptions are envisaged.

TABLE X: SANCTIONS FOR BREACH OF OBLIGATIONS FOR PUBLIC CONSULTATION

BiH	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
The Council of Ministers may refuse to consider a draft if rules on consultation were not heeded.	Potential political and disciplinary sanctions for heads or employees in state administration.	Political and disciplinary sanctions for heads and employees in state administration.	Political and disciplinary sanctions for heads and employees in state administration.	No sanctions have been prescribed; implicitly, disciplinary measures for civil servants in the Commission.

APPENDIX II:

**INVENTORY OF GENERAL ISSUES THAT NEED PARTICULAR
CONSIDERATION WITH REGARD TO REGULATORY FRAMEWORK FOR
CITIZEN PARTICIPATION**

- 1) What kinds of consultations are feasible, given the circumstances (information, consultation, active participation)?
- 2) Should an instrument governing public consultations be legally binding (law or other general regulation), or would a “softer” instrument, such as a code, better serve the purpose?
- 3) Should an obligation for public consultations entail only laws, or also other general acts, or any public policy document?
- 4) Should an obligation for public consultations pertain to executive bodies (consultations during the drafting process—*ex ante* consultations), or to legislative bodies (consultations after a draft is submitted to Parliament—*ex post* consultations), or both?
- 5) Should an obligation for consultations pertain to the state bodies only, or should it also include local governments?
- 6) Who is the other party in consultations: citizens, various forms of CSOs, and corporations? Or citizens and CSOs only, including associations of employers?
- 7) Is it necessary and justified to introduce minimum and broader scope of consultations (as Bosnia Herzegovina did) with different deadlines?
- 8) Is it necessary and justified to stipulate exemptions to the public consultation obligations?
- 9) What sanctions for the breach of consultation obligations will appropriately reflect the legal nature of an instrument chosen to govern public participation?

Article

Reflections on the Legislative Environment for Nongovernmental Organizations in Botswana

Zein Kebonang and Kabelo Kenneth Lebotse*

Introduction

In 2007, the Southern African Development Community (SADC)-Council of Non-Governmental Organizations issued a communiqué on “ensuring effective civic participation in development and democratic governance.” The communiqué decried the fact that the political and policy space in which civil societies in the SADC region operated remained limited, uneven, and sometimes nonexistent. It noted that efforts taken by regional civil societies to participate and engage with regional integration initiatives were not being reciprocated by some SADC member states and the regional body. The communiqué also stated that some member states in SADC were instituting statutory regulation aimed at stifling the work of NGOs and in some instances, criminalizing their very existence and operations.

The SADC communiqué is in essence a reiteration of international law instruments such as the Universal Declaration of Human Rights of 1948 (“Universal Declaration”), the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”), and the African Charter on Human and Peoples’ Rights (“African Charter”), which seek to promote the right of association by calling for the provision of an enabling environment under which civic organizations can operate.

Against this background, this article sets out to consider the legislative and regulatory environment under which Nongovernmental Organizations (NGOs) or civil society organizations operate in Botswana. We start by giving a working definition of what constitutes an NGO or civil society. This is followed by a brief look at the state-civil society relations in Botswana. Next, we consider the legal environment under which NGOs operate and in particular the registration requirements and processes. Constraints facing NGOs are also discussed together with the impact of legislation on the operations of NGOs. The article then ends with a conclusion.

Definition

The term NGO is fairly broad and ambiguous. It covers a wide range of organizations within civil society, from political action groups to support clubs.¹ In the context of Botswana, the abbreviation NGO, as found in the Botswana National Policy on Non-Governmental Organizations, for instance, refers to a “formal organization[] falling outside the realm of government but which at the same time, is neither a formal business enterprise pursuing conventional commercial and trade interests nor a political party.”² Whatever form

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¹ Teegen, H; Doh, J and Vachani, S (2004). “The importance of non-governmental organizations (NGOs) in global governance and value creation: an international business research agenda,” *Journal of International Business Studies*, Vol. 35, pp463-483. See also Lekorwe, M and Mpabanga, D (2007). “Managing Non-Governmental Organizations in Botswana,” *The Innovation Journal*, Vol. 12.3, pp1-18

² See the 2004 National Policy on Non-Governmental Organizations p9.

they take, NGOs are important developmental partners, as they tend to “promote the material, social or political interests of their own members.”³ These interests may range from equity, educational, health, and human rights to wider socioeconomic and political interests.

The rule that civil society organizations should not have objectives that are political in nature is not unique to Botswana. It is in fact, a requirement found in a number of jurisdictions.⁴ As if to emphasize this, the National Policy on Non-Governmental Organizations states that “an NGO is understood to be an apolitical legally formed autonomous organization that possesses non-profit status, and whose primary motivations is to pursue an identifiable set of interest of public, community and/or group significance as defined in its constitution and/or Deed of Trust.”⁵

State-Civil Society Relations in Botswana

In the past two decades, Botswana has experienced a phenomenal growth in the number of civil society organizations setting up and operating in the country. For instance, the Botswana Councils of Non-Governmental Organization (BOCONGO), which is the national umbrella body for NGOs in Botswana, has more than 117 member organizations, while the Botswana National Youth Council (BNYC) has more than 16 NGO affiliates.⁶ These entities also comprise both membership and non-membership organizations. Other NGOs include the following: Emang Basadi Women’s Association; Ditswanelo- the Botswana Center for Human Rights; Kalahari Conservation Society; Kuru Family of Organizations (KFO); Gantsi Craft; Botswana Christian Council (BCC); Botswana Society; Forestry Association of Botswana (FAB); and Conservation International (CI). Although a majority of these NGOs are local or national in character, there are also a number of international NGOs operating in the country. These include Transparency International and Survival International, though the latter has no physical presence in Botswana.

While it has been argued by Lekorwe,⁷ among others, that civil society in Botswana is weak, Maudeni⁸ maintains that such a characterization is inaccurate in that it takes a Euro-centric view as a basis for measuring the strength of civil societies. According to Maudeni, the Western view measures strength in terms of the number of “violent clashes and confrontations which have led to policy reversal” between the civil society and government.⁹

The strength of civil societies lie, Maudeni argues, not in the number of confrontations they have had with government but in the political culture that prevails within the country. According to him, the political culture in Botswana promotes “mutual criticism in each other’s presence” or civility.¹⁰ It is this meeting with one’s opponent that more accurately reflects the strength of civil society than “the strong/weak civil society concept” often associated with Western societies.¹¹ While the mutual criticism may limit democracy, in terms of the restrictions it places on industrial action and street encounters, it nonetheless

³ See note 1 p 466.

⁴ See for instance *Re Hopkinson* [1949] 1 ALL ER 346 and *Re Bushnell* [1975] 1 ALL ER 721.

⁵ See note 2.

⁶ Maudeni, Z (2004). “Mutual Criticism and State/Society Interaction in Botswana,” *Journal of Modern African Studies*, Vol. 42.4 pp. 619-63.

⁷ Lekorwe, M (1999). Local government, Interest Groups and Civil Society, In *Public Administration and Policy in Botswana*, Juta Ltd Publishers, Cape Town.

⁸ Note 6 supra p. 10.

⁹ *Ibid.* p. 10.

¹⁰ *Ibid.*, p. 10.

¹¹ *Ibid.* p. 10.

promotes participatory democracy in terms of sharing views. It is within this constrained environment that civil society has contributed more to Botswana's development than is often acknowledged.¹²

That civil society organizations are considered key partners in Botswana's developmental process is not in doubt. As encapsulated in the 2004 Policy Guidelines for Financial Support to Non-Governmental Organizations:

NGOs are active players in the development and growth of the economy of Botswana alongside Government, the Private Sector and other community-based institutions. NGOs have through their activities, already demonstrated an ability to reach the vulnerable and disadvantaged groups of the society.¹³

The increasing importance of NGOs in the development process arises from the fact that they are able to promote participatory grassroots development and self-reliance, especially among marginalized segments of society such as women, children, and minority groups. In recognition of the important role they play, the government formally articulated its commitment to the development of an NGO policy in its National Development Plan-8 by undertaking that "a comprehensive policy on NGOs will be formulated during NDP 8, which will form the basis for government's relationship with NGOs and spell out how NGO activities are coordinated."¹⁴ This initiative marked an era of collaboration between the government and the NGOs as it underscored the need for a formal policy on NGOs. In 2004, the government enacted a National Policy on Non-Governmental Organizations. This policy was an outcome of intensive consultations with the NGO community, government ministries and departments, key stakeholders, and civil society in general. It provides for, among other things, the coordination of NGO activities through government line ministries, the establishment of NGO secretariats in government ministries, and the appointment/employment by government of officers to run these secretariats.

Registration of NGOs or Civil Society Organizations in Botswana

NGOs' right to exist and to enjoy the protections afforded by law is not only provided for under statute but is also constitutionally guaranteed. The Constitution of Botswana¹⁵ provides for and guarantees freedom of association for people both as individuals and as members of organizations. These rights and freedoms are enshrined in the Constitution as follows:

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinion, colour, creed

3(b) freedom of conscience, of expression and of assembly and association¹⁶

The rights outlined above are not absolute, however, as they can only be exercised to the extent that they do not run counter to any laws or infringe on other rights. In terms of the registration process, NGOs or civil society organizations can be registered either under the

¹² Ibid. p. 10.

¹³ See note 2 supra p1.

¹⁴ See the National Development Plan 8, 1997:448.

¹⁵ Cap 001, Laws of Botswana.

¹⁶ See Section 3 of the Botswana Constitution.

Societies Act¹⁷ or under the Deeds of Trust in the Deed Registry.¹⁸ Under the Societies Act, an application for registration or exemption shall be made to the Registrar of Societies, who, upon being satisfied that all prescribed formalities have been complied with, shall issue a certificate of registration or exemption.¹⁹ For an entity to register as an NGO, it must submit its written constitution within 28 days of its application for registration,²⁰ pay the prescribed application fees,²¹ provide a list of office bearers,²² and have a registered office and postal address to which communications and notices may be addressed.²³ Once these formalities have been complied with, the Registrar shall cause a certificate of registration to be issued. The certificate so issued shall become prima facie evidence of registration or exemption from registration of the society.²⁴

An NGO or civil society organization whose principal offices are outside Botswana would be deemed to be established in Botswana if any of its office-bearers or members resides or is present in Botswana or if any person in Botswana manages or assist in the management of such society or solicits or collects money or subscriptions on its behalf.²⁵ Once so deemed, the provisions of the Societies Act will apply to it as though it were a domestic NGO.

Refusal to Register

The Registrar may refuse to register or exempt a local NGO from registration where he is satisfied that (a) the NGO is a branch of or is affiliated or connected with any organization or group established outside Botswana and has not adopted its own constitution or its own rules, regulations, or bylaws; or (b) the organization or group established outside Botswana is of a political nature.²⁶ Further the Registrar can under Section 7.2 of the Societies Act refuse to register or exempt from registration a local society where—

(a) it appears to him that any of the objects of the society is, or is likely to be used for, any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare, or good order in Botswana;

(b) the society, after being required to provide information, fails to do so within 90 days;

(c) he is not satisfied that the constitution or the rules, regulations, or bylaws of the society adequately define the membership of the society and adequately provide for the termination and determination of membership and for the control and management of the financial affairs of the society and of its property;

(d) he is not satisfied that the office-bearers of the society are able to undertake the management of the society, including the keeping of proper records of meetings of the society and of its members and the control and management of the financial affairs of the society and of its property, and to perform the duties imposed on them by the Act;

¹⁷ Cap 18.01, Laws of Botswana.

¹⁸ See Cap 33.02, Deeds Registry Act.

¹⁹ Section 6.4 of note 17.

²⁰ Section 6.1 Ibid.

²¹ Section 9 Ibid.

²² Section 16 Ibid.

²³ Section 33.1 Ibid.

²⁴ Section 6.4 Ibid.

²⁵ Section 5 Ibid.

²⁶ Section 7.1 Ibid

(e) it appears to him that the constitution, rules, regulations, or bylaws of the society are in any respect repugnant to or inconsistent with any written law;

(f) he is satisfied that the application does not comply with the Act;

(g) he is satisfied that the society does not exist; or

(h) the name under which the society is to be registered or exempted—

(i) is identical to that of any other existing local society;

(ii) so nearly resembles the name of such other local society as, in the opinion of the Registrar, to be likely to deceive the public or the members of either society; or

(iii) is in the opinion of the Registrar, repugnant to or inconsistent with any written law or otherwise undesirable.

Appeal Against Refusal to Register

Where the Registrar has refused to register a society, the decision is appealable to the Minister of Labour and Home Affairs within 28 days of the Registrar's decision.²⁷ Once an appeal has been lodged with the Minister and pending the decision of the Minister, such an entity shall not be deemed to be an illegal society.²⁸ It will be allowed to operate as a lawful entity enjoying all the rights and privileges provided under the Act.

Cancellation of Registration

The Registrar may also at any time cancel the registration of a society for any of the following reasons: (a) it has become affiliated to or connected with any organization or group of a political nature;²⁹ or (b) it has changed its objectives or is pursuing objects other than its declared objects.³⁰ Any society aggrieved by the decision of the Registrar to cancel its registration is entitled appeal to the Minister within 28 days after receipt of notification of the decision.³¹ Where no appeal is made within the prescribed period, the Registrar shall proceed to effect the cancellation.³² Once cancellation is effected, the society in question will be deemed to be illegal³³ and any person soliciting, managing, or assisting in the management or solicitation or collection of money or subscriptions on its behalf shall be guilty of an offence and liable to a fine not exceeding P1000, imprisonment for a term not exceeding seven years, or both.³⁴

Constraints to NGOs or Civil Society Organization Operations in Botswana

Constraints facing NGOs or Civil Societies are fairly numerous. These range from lack of organizational capacity to lack of human capital. Many NGOs are run by volunteers and often have no functioning structures. They also face the problem of high turnover of senior staff. Over and above this, they have severe financial distress. They operate with little funding or debt to their name and compete for funding from the same donors, making it difficult to receive funds. Although civil society organizations in Botswana are free to source

²⁷ Section 8 Ibid

²⁸ Section 20 Ibid

²⁹ Section 11.a Ibid.

³⁰ Section 11.c Ibid.

³¹ Section 11.4 Ibid.

³² Section 11.5 Ibid.

³³ Section 20 Ibid.

³⁴ Section 21 Ibid.

funding anywhere, with the withdrawal of major external donor agencies from Botswana, many NGOs have had to rely for their activities and programs on government funding. This reliance has tended to undermine their autonomy by placing them directly under the influence or control of government. Under the Policy Guidelines for Financial Support to Non-Governmental Organizations,³⁵ an NGO is eligible for financial support from government only if it meets the following conditions:

- ❖ It must be registered with the Registrar of Societies or constituted under the Deeds of Trust;
- ❖ There must be proof of genuine representation in the NGO from the local community;
- ❖ There must be proof of the NGO's capability to implement the project and of the sustainability of the project after the agreed period of Government financial support;
- ❖ There must be evidence of the ability of the NGO to raise its own funds; and
- ❖ The NGO must open a bank account, which shall be accessible to relevant authorities, into which Government financial contributions will be deposited.

The purpose of the financial policy guidelines is said to be to establish and strengthen administrative mechanisms at ministerial levels in order to “enhance control, coordination, monitoring an evaluation of NGO projects/programmes that are supported by government”³⁶ and to reduce perpetual dependence on government financial support by “instituting appraisal procedures that ensure that only projects that are sustainable in the long term and benefit the target groups are supported,”³⁷ but the reality is that such support is conditional and places NGOs under the government's control.

Apart from the foregoing, the current tax legislation is limited. In terms of the Income Tax Act,³⁸ certain NGOs are exempted from tax. These include any religious, charitable, or educational institution of a public character or trust for nature conservation, scientific research, or similar public purpose.³⁹ This exemption also extends to any association of individuals formed for the purpose of promoting social or sporting amenities, not involving the acquisition of gain or the possibility of future gain by its members.⁴⁰ The form in which these organizations are constituted has a bearing on their tax liability. When constituted as an association of persons, an organization's tax liability will depend on whether it is carried on

³⁵ See the 2001 Policy Guidelines for Financial Support to Non-Governmental Organizations.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Cap 52.01 Laws of Botswana.

³⁹ See Part 1 (IV) of note 38; 2nd Schedule, Botswana Income Tax Act 1995.

⁴⁰ See Part I (X) *Ibid.*

for gain.⁴¹ On the other hand, an association that comes about by way of a deed of trust automatically becomes a taxable entity but the tax is levied on trustees.⁴²

If an association's activities are carried out for gain, it is subject under the Income Tax Act to taxation at ordinary corporate rates on the income it generates—that is, at a rate of 15 percent with an additional 10 percent withholding tax.⁴³ Additionally, that organization may find itself classified as a taxable person under the Value Added Taxation legislation, making it subject to value added tax on its taxable income if such exceeds BWP250 000 per annum.⁴⁴ While NGOs may be entitled to tax exemption under Section 38 of the Income Tax Act, for instance, donor's deductions are limited to contributions to any association, institution, college, or university for use in scientific research related to the donor's business.⁴⁵ Except for this, any amount not wholly, exclusively, and necessarily laid out or expended for purposes of producing assessable income is not tax deductible.⁴⁶

The Legislative Environment and its Impact on Civil Society Development

As noted, provided that the registration requirements are complied with, the process of registration is easy and inexpensive. However, while this process may be enabling, the law or more specifically the Societies Act does not provide for an appeal against the decision of the Minister or for a review process or an alternative dispute resolution mechanism. The effect is therefore to render an appeal or review process against the Minister's decision an expensive one, as an aggrieved party's only avenue is to petition the High Court for redress.

On the issue of funding, a majority of civil society organizations rely on government for financial support and this renders them susceptible to state capture. Further, in terms of the existing tax legislation, there is little or no incentive to make charitable donations except for contributions used in scientific research related to the donor's business. While scientific research can indeed be one of the considerations taken into account in assessing eligibility of a deduction, it should by no means be the only criterion used to determine which contributions are deductible.

The autonomy of civil society organizations has also been compromised by co-opting them through joint national councils coordinated through government departments. By institutionalizing the participation of NGOs in government's developmental process, NGOs have effectively become part of the state and have ceased to be autonomous and perform an effective moralizing role. By concentrating administrative and financial power in government-controlled secretariats, the government has unilaterally assigned to itself the role of a senior partner while NGOs have been relegated to junior partners. As these Secretariats are controlled from the Ministry headquarters and their employees hired, promoted, and trained by government, the effect is to confer government with controlling powers over the implementation of public policy.

Conclusion

As can be noted from the preceding sections, the legislative environment under which civil society organizations operate is fairly unrestrictive. The major challenge facing civil society organizations or NGOs in Botswana appears to be their lack of financial

⁴¹ See Section 37 Ibid.

⁴² Kebonang, Z (2002). "Botswana's Tax System Offer Breaks for NGOs, their Donors," *Tax Notes International*, Vol. 26.10 pp.1223-24.

⁴³ Ibid.

⁴⁴ See Section 16 Value Added Tax Act (2002).

⁴⁵ See note 42 and Section 40.1 (k) of the 1995 Income Tax Act.

⁴⁶ See note 42 and Section 49 of the Income Tax Act.

independency and resultant dependency on government and donor funding. The decline in donor funding and over-reliance on government means that civil society organizations are not adequately insulated from government influence. Their independence is greatly compromised to articulate the needs of the public and/or of specific groups, to hold the government accountable, and to provide goods and services where those are inaccessible because of government's lack of capacity or resources. NGOs often confer a public benefit which society or the community may not choose or be able to provide, or which supplements and advances the work of public institutions supported by tax revenue. Thus, to help civil society organizations become more financially independent, the tax legislation could be amended to make it easier for citizens to commit money through improved tax treatment of donations to charities. The restrictions against civic society organizations becoming "profit organizations" can also be relaxed by allowing them to trade or to compete with others in the solicitation of government and private-sector tenders for the provision of goods and services.

Article

Developing Standards and Mechanisms for Public Financing of NGOs in Croatia

Igor Vidačak¹

Introduction

There is a wide range of not-for-profit, nongovernmental associational forms that are recognized and regulated by national law in Croatia. These include associations, foundations, funds, trade unions, employers' associations, institutions (or public benefit non-profit companies) and religious organizations. The most important organizational types for the formal gathering of citizens around shared interests and the promotion of not-for-profit, public benefit activities, reflected in the sheer numbers of registrations, are those commonly referred to as NGOs (or associations under the legal terms). According to September 2010 data, there are more than 41,700 NGOs registered in Croatia.²

In general, Croatia has developed a rather supportive legal and institutional framework for the establishment and public financing of NGOs, which complies with international standards and offers some good practices that may be of interest for other countries in the region and more widely.

Changing environment for public financing of NGOs in Croatia

The system of public financing of project and programs of NGOs in the Republic of Croatia has undergone substantial changes during the last two decades. During the 1990s, the funding policy was predominantly fragmented and dispersed among various government bodies and ministries, as well as marked by lack of coordination, strategic approach, and clearcut criteria for the approval of grants to NGOs.

The first efforts towards introducing a more systematic approach to public financing of NGOs were taken in 1998 when the Parliament adopted the *Decision on criteria for the determination of NGOs whose activities are of interest to the Republic of Croatia and on the allocation of funding to NGOs from the State Budget*.³ This Decision was based on the Associations Act (from 1997) and was supposed to allow, among others, for a stronger Parliament oversight of State funding of NGOs, as well as to enable the creation of a high-level inter-ministerial committee, chaired by deputy prime minister, to develop criteria for funding NGOs of interest to the Republic of Croatia.

In the same year, the establishment of the Croatian Government's Office for Cooperation with NGOs marked the beginning of the new framework for cooperation between the Croatian Government and associations active in Croatia. This cooperation was facilitated by financing, consultations, education, and information sharing, as well as through coordinating legislative initiatives on issues affecting civil society organization. The setting up of the Office also meant the centralization of the largest portion of funds from the State Budget dedicated to NGOs that were previously secured from the budgets of individual government bodies and ministries. In addition, the Office contributed significantly to

¹ Igor Vidačak is Head of the Office for Cooperation with NGOs of the Government of the Republic of Croatia.

² See Public Registar of Associations, www.uprava.hr.

³ Official Gazette 86/98, June 1998.

introducing a transparent funding mechanism characterized by (1) the public announcement of calls for proposals and clearly stated criteria, (2) the creation of independent groups for review and assessment of projects, and (3) a well-established monitoring and evaluation process (see Bezovan, 2004). In 2001, the Government adopted the Proposal of the *Program of Cooperation between the Government of the Republic of Croatia and Non-governmental, Non-profit Sector*, which aimed to create effective mechanisms to improve relations between the Government and the nongovernmental, non-profit sector while stipulating at the same time their different roles and responsibilities in the resolution of problems and in the development of the community as a whole. That same year, after a long public consultation, the Parliament adopted the *Associations Act* by which the Government committed itself to drafting a *Code of Good Practice, Standards and Benchmarks for the Allocation of Funding for Programs and Projects of NGOs* and to proposing it to the Croatian Parliament. The *Act on Organizing Games of Chance and Prize-Winning Games*, adopted in 2002, introduced the obligation to finance eight different activity areas of work of civil society organizations, ranging from the development of sports to civil society development, to the amount of 50% of the total revenue from games of chance.

In 2002, the Government Office for NGOs initiated a decentralized model of organizational structure for the further encouragement and support of civil society. The aim was to decentralize the cooperation and state funding from one centralized office into diverse stakeholders. This resulted in various ministries, government agencies, and institutions becoming responsible for channeling state funds directly to NGOs active in the field of their jurisdiction, and they were also encouraged to designate one person or a unit responsible for cooperation with the NGOs.

The rationale behind decentralizing the cooperation and funding process was the need to renew direct communication between various ministries and NGOs and strengthen their cooperation in addressing particular needs of citizens. It also opened the possibility for diversifying the funding sources and reaching out to alternative and matching funds in the implementation of common activities between the Government and NGOs.

In addition to the direct forms of financing obtained via public calls for proposals at various levels, the changes of laws on profit and income tax in 2002 enabled the government to stimulate private citizens and enterprises to actively give to non-profit organizations. Specifically, according to the mentioned laws, donations of up to two percent of annual income are considered eligible for tax relief and exemption.

Following the start of the process of decentralization of public funding of NGOs, a Council for Development of Civil Society was set up in 2002, as a cross-sector advisory body to the Government, primarily responsible for the implementation of the Program of Cooperation, creation of the Strategy for the Development of the Civil Society, and harmonization of the state funding process. In 2003, a National Foundation for Civil Society Development was established by the Parliament with the aim of promoting and supporting the sustainability of the sector, cross-sector cooperation, civic initiatives, philanthropy, and voluntarism through education and publications, grant giving, public awareness campaigns, evaluation services, research, and regional development. By the establishment of the National Foundation, a new institutional architecture was completed in order to support creating an enabling environment for civil society development in Croatia.

Three pillar institutional framework for supporting NGOs

The three-pillar framework for supporting NGOs as autonomous, competent, and active agents of economic, social, and political development of Croatia is based on the collaboration and continuous interaction of the following institutions: Council for Civil Society Development, National Foundation for Civil Society Development, and Government

Office for Cooperation with NGOs. These institutions work closely together to promote policies and initiatives for the development, support, and sustainability of NGOs in Croatia.

The Council for Civil Society Development plays a strategic advisory role in regard to formulating policies affecting NGOs. It benefits from expert and technical support of the Government Office for Cooperation with NGOs. The Council is composed of twelve representatives of ministries and other Government bodies, twelve representatives of NGOs as well as three representatives of other forms of organized civil society (foundations, trade unions, and employer's organizations). Representatives of NGOs are elected by NGOs themselves through a transparent and democratic procedure after a public call for nominations and a public call for voting for eligible candidates, which proved to be a unique practice in this part of Europe. The participation of hundreds of NGOs in electing the Council members makes it a legitimate body in which the exchange of opinions, standpoints, know-how, and experience between the representatives of different sectors takes place. The Council members actively engage in various awareness-raising events such as public discussions, round tables, and public consultations, and seek to engage with business community representatives, universities, and journalists. At the very beginning of the Council work in 2002 and 2003, this body had a formal role of approving the decisions on the award of grants to NGOs from the State budget (based on the proposal of the Government Office for Cooperation with NGOs). Since 2004, in a decentralized environment of public financing of NGOs, the Council has retained a more strategic role as a key national cross-sector platform for dialogue on NGO-related public policies in Croatia.

As the strongest national public grant making institution in Croatia, the National Foundation for Civil Society Development provides a series of essential support services to NGOs. It is the largest donor that is oriented towards operational grants and institutional support, enabling NGOs to focus more on their "core business" rather than investing scarce human resources into continuous fundraising and working from project to project. As a public funding entity, it is unique in the region in its ability to act independently from state government, owing to the inclusion of a majority of civil society representatives on its governing body. In recent years, the Foundation has initiated the decentralization of its funding, signing agreements with four regional foundations responsible for managing community grants programs in their specific regions, which contributed to the diversification of funding and initiated a re-granting model. The Program of Decentralization of Grants for Civil Society Development in the Republic of Croatia, in partnership with four regional foundations, streamlined the process of funding short-term civic initiatives at the local level. These efforts are complemented by the activities of the National Foundation's funded network of associated NGO partners in five regions that provide various types of training, networking, technical assistance, and clearinghouse services at the local level which form an important part of infrastructure for furthering the regional development of civil society.

In a decentralized system of public funding, the Government Office for Cooperation with NGOs remained a focal policy-making point in the Government, responsible for coordinating the work of various government bodies in regard to developing cooperation with the non-profit, nongovernmental sector. This includes the following activities: designing standards and recommendations for improving the financing system of NGOs' activities from the state budget and other public sources; reporting to the Government on the overall funding of NGOs from public sources at all levels; proposing new legal initiatives for the activities of the nongovernmental and non-profit sector in Croatia; monitoring the implementation of adopted national programs and strategies influencing NGOs; developing standards of consultation for NGOs in public policy-making; and programming priorities for funding of NGO programs from the EU pre-accession and structural funds, in close collaboration with the Council for Civil Society Development.

As can be clearly seen above, the three-pillar institutional framework is a combination of centralized policy-making and decentralized support to NGOs. It is based on a wide consensus of various stakeholders that was reflected in the formulation and adoption of the National Strategy for the Creation of an Enabling Environment for Civil Society Development and the related Operational Implementation Plan,⁴ which saw the cooperation of more than 60 civil society organizations, government bodies, local authorities, universities, and businesses.

The work of the three mentioned institutions is complemented by twenty other ministries, government agencies, and institutions developing funding programs and other types of cooperation with NGOs at the national level. They also develop important activities for local and regional government bodies, which are essential for long-term sustainability of NGOs and other forms of grass-roots initiatives.

Code of Good Practice, Standards and Benchmarks

Following several years of a decentralized system of public funding of NGOs in Croatia, in February 2007 Parliament adopted the *Code of Good Practice, Standards and Benchmarks for the Allocation of Funding for the Programmes and Projects of NGOs*.⁵ The adoption of the Code was foreseen already in the Associations Act passed in 2001. The obligation of its adoption was renewed in 2006 through the National Strategy for the Creation of an Enabling Environment for Civil Society Development and the related Operational Implementation Plan. On the date of entry into force of this Code, the *Decision on criteria for the determination of NGOs whose activities are of interest to the Republic of Croatia and on the allocation of funding to NGOs from the State Budget* ceased to have effect.

The purpose of the Code is to guarantee that grant-making decisions made by public bodies at all levels are made according to established principles and standards. More particularly, the Code highlights eight principles which should guide the financing processes:

1. *Determining priorities for the funding* of programs and projects of NGOs for the budget year;
2. *Announcing public tenders*, with clear tender conditions, benchmarks for the appraisal of applications, and the procedure for awarding grants (including priority areas for applications, ways of preventing potential conflicts of interest, and the possibility of insight into the appraisal procedure). The public tender should be open for applications from NGOs for at least 30 days from the date of the announcement;
3. *Opening of received applications by a commission*;
4. *Appraisal of submitted projects and programs by expert bodies* established by grant providers and composed of representatives of state administration bodies, research and professional institutions, and non-profit legal persons (associations, foundations, and others), pursuant to the rules of procedure or some other act regulating the functioning of expert bodies;
5. *Delivering written responses to applicants* that indicate that funding was approved or give reasons for denied funding;
6. *Publication* of tender results, including information about associations, programs, and projects for which grants were awarded, and the amount of the grants;
7. *Concluding contracts* concerning the funding of programs and projects with associations that have been awarded grants within 60 days following the expiration date;

⁴ Available in both English and Croatian version at www.uzuvrh.hr.

⁵ Official Gazette no.: 16/2007, February 2007.

8. *Monitoring and evaluating the implementation of approved programs and projects*, and of the purposeful spending of the grants awarded on the basis of an obligatory descriptive and financial report submitted by NGOs to grant providers pursuant to the provisions of grant agreements.

The Code also stipulates that in case of misuse of grants by the association, the grant provider shall suspend further payment of grants and request that the grants already disbursed be refunded.

In order to be given access to public tender procedures for the approval of grants from the State Budget for programs and projects of public benefit in the Republic of Croatia, NGOs must fulfill the following three basic criteria:

1. be entered into the Register of NGOs of the Republic of Croatia,
2. promote the constitutional values of the Republic of Croatia,
3. engage in activities aimed at the needs of the community and at maintaining sustainable development.

In addition to an application for funding, NGOs are required to submit a financial report, a certificate showing that the responsible person in the association has no criminal record, and an excerpt from the Register of NGOs of the Republic of Croatia, as well as other documents pursuant to the conditions stipulated in the tender announced by the grant provider.

The Code emphasizes the specific role of the Council for the Development of Civil Society in regard to monitoring, analyzing, and evaluating funding from the State Budget approved by grant providers to programs and projects of NGOs in the Republic of Croatia through public tender procedures in accordance with the provisions of the Code. Grant providers are required to submit information about financed programs and projects to the Council for the Development of Civil Society and to the Office for Cooperation with NGOs.

On the basis of this provision, the Government Office for Cooperation with NGOs introduced a regular and thorough monitoring and analysis of public funding of NGOs, which results in detailed annual reports submitted to the Council for Civil Society Development and, finally, to the Government of the Republic of Croatia.

The positive impact of adoption of the Code on Good Practice, Standards and Benchmarks for the Allocation of Grants for Programmes and Projects of NGOs is also reflected in the almost disappearing practice of grantmaking outside public calls for proposals, using discretionary power of the minister or other heads of public body. In 2009, only 2.9 % of all state grants have been awarded in that way.

In order to allow greater openness and transparency of public funding of NGOs, the Government Office developed a public internet database of financial support to public administration bodies at national, regional, and local levels, as well as foreign donors (including EU funds) since the year 2004. The database is searchable according to the type of donor, level of government, name of organization, name of the project or program, and name of the project leader.⁶

In accordance with the measure of the Operational Plan for implementing the National Strategy for the Creation of an Enabling Environment, the Office and the National Foundation have developed a manual setting clear and detailed guidelines for all public bodies providing grants to NGOs. In addition, a series of training programs has been conducted by the Office and the National Foundation for representatives of public bodies at

⁶ The database is available at: <http://www.uzuvrh.hr/potpore.aspx?pageID=58>

the national, regional and local level. The adoption of the manual as well as the implementation of training programs on the implementation of the Code were also identified by the Croatian Government as priority measures in the field of anti-corruption and strengthening transparency of public administration.

Trends of public financing of NGOs in Croatia

During the first, centralized stage (from 1998 to 2003) of the implementation of the Programme of Allocation of Funding, the Government Office for Cooperation with NGOs financed a total of 1,997 projects and programs of associations in a total amount of HRK 105,328,942.33 (€ 14.6 million) through public tenders, and systematically monitored the implementation of these financed projects and programs. It is important to note that since 2002, the Government Office for Cooperation with NGOs has introduced a novelty into the former Program of Allocating Funding to NGOs by providing the possibility of financing multi-year programs of associations implemented in the area of social welfare, health protection, and extra-institutional education. In all, 131 programs were financed in this manner for a period of three years, whereby the provision of a part of public services in the area of social welfare, the health service, and education was systematically contracted to civil society organizations for the first time.

In the decentralized model, particularly in the period from 2004 to the present day, the amount of funds directed towards initiatives, projects, and programs of civil society organizations by state administration bodies, such as the offices of the Government of the Republic of Croatia and the National Foundation for Civil Society Development, represents more than twice the amount of the previous five-year period, achieved in not more than two years.

During the past decade (from 1999 to 2009), 27,543 projects of citizens' associations gained financial support from the State budget amounting to more than 320 million euro.

The analysis of grant making practices conducted by the Government Office for Cooperation with NGOs reflects substantial imbalances in State funding to different NGO subsectors. In 2008 and 2009 the field of sports absorbed one fourth of the total amount awarded (26%). After that follows the field of protection and promotion of culture and cultural heritage (19%). Projects supporting persons with disabilities and socially vulnerable groups were awarded some 17% of the total amount. Projects focusing on youth and children got about 12%, while war veterans amount to around 10%.

Table: *Public funding of NGOs (1999-2009)*

Financial year	Total amount of financial support to from public funds on a national level (HRK)	Number of programs and projects financed
1999	28,316,522.47	276
2000	20,545,740.86	348
2001	22,188,893.00	481
2002	17,188,893.00	450
2003	17,088,893.00	442
2004	111,096,378.86	2,733
2005	136,504,021.66	3,163
2006	321,636,823.06	2,766
2007	470,192,095.08	4,923
2008	624,170,075.33	6,350
2009	528,232,869.36	5,611
TOTAL	2,297,161,205.68 (ca. 319 million €)	27,543

Data source: Government Office for Cooperation with NGOs, www.uzuvrh.hr, April 2010

The biggest public grant making body remains the Ministry of Science, Education and Sports with 31% of the overall amount for NGOs from the State budget. It is followed by the Ministry of Culture (18.2%), Ministry of Family, War Veterans and Intergenerational Solidarity (13.2%), Ministry of Health and Social Welfare (12.1%), Council for National Minorities (8%), National Foundation for Civil Society Development (5.6%), the Ministry of Regional Development, Forestry and Water Management (3.3%), and a number of other bodies with rather small shares in the overall funding.

After almost a decade of continuous increase of public funding of NGOs from the State budget, a downward trend started in 2009 due to the impact of global recession and economic crisis. The table below shows the clear decrease of public funding of NGOs at national, regional, and local levels.

According to the research conducted among NGOs that received grants from the State budget in 2008 (National Foundation for Civil Society Development, 2010), almost 70% of NGOs rely on State budget and local/regional governments' budgets as the main source of funding. The fact that government support (both central and local) has become the major source of funding for NGOs in Croatia is an important indicator of the government's general recognition of citizen's self-organizing as value in itself, as well as beneficial to various spheres of social development.

Table: *Impact of economic crisis – downward trend of public funding of NGOs in 2009*

Level	2008. (HRK)	2009. (HRK)	Trend
National	623,783,861.59	529,596,954.21	⤵ 15.2
County level	397,884,853.34	358,625,779.62	⤵ 9.9
City level	510,456,185.13	468,245,149.10	⤵ 8.3
Municipality level	230,700,645.06	219,094,594.65	⤵ 5.0
TOTAL:	1,762,594,545.12 ca. 245 million €	1,575,562,477.58 ca. 219 million €	⤵ 10.6

Data source: Government Office for Cooperation with NGOs, www.uzuvrh.hr, April 2010

On the other hand, the same analysis showed that only one third of NGOs had self-financing activities as part of their budget. This weakness is also reflected in the USAID NGO Sustainability Index for 2009 which stresses that financial viability still remains the weakest aspect of NGO sustainability in Croatia. In view of the downward trend of public funding of NGOs, this may become a significant obstacle to the sustainability of NGOs in the forthcoming period.

Some lessons learned

Based on the experiences and lessons learned in recent years, a number of improvements in practice of public funding of NGOs in Croatia will need to be made.

One of the major concerns is related to the capacities of public bodies to monitor and evaluate NGO projects and programs financed from the public sources. The sheer number of grants approved – 6,350 grants in 2008 and 5,611 in 2009 – implies substantial challenges for civil servants working on monitoring and evaluating activities in NGO units of the ministries. Therefore, future improvements should include adjustments of the actual size of the grants to the actual costs and scope of projects or programs. Otherwise public funds, especially at the local level, tend to be dispersed without significant effect on the NGOs' capacities to deliver public goods.

Taking into account the experiences of some European countries, it will be necessary to consider the introduction of a practice by which the State concludes contracts on the performance of services of social benefit and tasks with NGOs using a procedure based on provisions regulating the procedure of public procurement, taking into account good practice of the European Union. The Ministry of Health and Social Welfare has developed standards for social service delivery which will have to be adopted by all NGOs aiming at entering the process of social contracting.⁷ This shift from grants to contracts will open a very important issue of introducing quality assurance system for nonprofit, nongovernmental organizations in Croatia. First steps in this direction have been made by the the National Foundation for Civil Society Development, which obliges all NGO beneficiaries of its operational grants to introduce a self-assessment-based quality assurance system adapted to Croatian needs on the basis of UK charity evaluation services.

In accordance with the objectives of the National Strategy for Creating an Enabling Environment for Civil Society Development, it will be necessary, apart from the already established methods and sources of financing the initiatives, projects, and programs of civil society organizations, to invest additional efforts in the identification of new innovative models—that is, into adjusting those which have proven successful in other countries.

⁷ The Decision on the adoption of Standards of Quality in Social Service Delivery and its Implementation Guidelines are available at www.mzss.hr.

Within the system of the allocation of grants, it is also necessary to earmark a part of the funds intended to provide institutional support to NGOs—that is, support for the performance of the basic activity of those organizations which have been assessed as significant contributors to civil society development or to the area in which they are active. Additional possibilities for indirect State financing of NGOs could be achieved by introducing new tax benefits for the activities undertaken for public benefit, although this measure proved to be very difficult to implement in times of economic crisis.

In view of the requirements of the EU accession process and the growing need to adjust domestic procedures of public funding to the EU standards and practices, it is to be expected that stronger emphasis will be placed on results and concrete evidence on fulfilling the beneficiaries' needs, while at the same time, the level of tolerance of any kind of irregularities in the implementation of NGO projects and programs will gradually decrease.

Given the recent withdrawal of international and bilateral donors, and the increasing prospects of EU funding for Croatian NGOs, it is important to note that EU funds are primarily available to highly professionalized NGOs with adequate organizational and human resources for the strict application process and project proposal formats.

Therefore, a diversification of public funding sources and mechanisms will need to be continuously ensured in order allow smaller NGOs equal access to State budget funding, but also to the budgets of local and regional self-government units. The variety of mechanisms should include multiyear contracts on the financing of general, public needs in society, year-long (or shorter) projects as well as small incentives to those civic initiatives that bring new ideas and new models of development or new ways of resolving existing problems.

Finally, in order to avoid overlaps and allow better complementarity of the EU and domestic funds for NGOs, stronger efforts towards coordination of all public bodies involved in using the EU structural funds after the EU accession will need to be ensured.

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Article

Lottery Proceeds as a Tool for Support of Good Causes and Civil Society Organizations: A Fate or a Planned Concept?

Katerina Hadzi-Miceva-Evans¹

Proceeds from lotteries and other games of chance provide funding to help address social needs and support the work of civil society organizations (CSOs). This article examines models for distributing lottery proceeds using examples from Europe and beyond. It discusses lottery operators, amounts distributed, the distribution process, and areas and types of organizations supported. The author selected innovative models from different parts of Europe and beyond, subject to the availability of information in English. The conclusion identifies key considerations if designing a lottery to support good causes.

To date there has been limited comparative research on the ways lotteries support societal needs.² This paper aims to enrich the existing discourse and analysis and to provide guidance to those developing regulatory opportunities for the use of lotteries to support good causes and CSOs.

THE PLACE OF LOTTERIES IN THE OVERALL CSO FUNDING SCHEME

CSOs rely on several sources to support their activities, such as donations, income generating activities, or government funding. Lottery proceeds are categorized as government funding. They offer an alternative, sometimes substantial, source of revenue for CSOs.

Lotteries and similar games of chance are a form of gambling. Their appearance is linked to the need of rulers to raise sources for financing public tasks,³ such as building China's Great Wall or rebuilding first-century Rome. By the 17th century, lotteries were organized to collect money for the poor (e.g., Netherlands).

The regulation of lotteries varies from outright prohibition, through strict regulation and state monopoly, to broad tolerance of private lotteries where proceeds are devoted to the public benefit.

SUMMARY OF MODELS USED TO DISTRIBUTE STATE LOTTERY PROCEEDS

For the purposes of this article, models for distribution of lottery proceeds for good causes have been categorized on the basis of who decides on allocation. The main distribution models are:

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²See: Kingma, S., Van Lier, T. *The Leeway of Lotteries in the European Union*, Vrije Universiteit Amsterdam, 2006; Hadzi-Miceva, K., Suplisson, F. *Overview of State Funding Schemes for Civil Society Organizations*, ECNL, 2007; Swiss Institute of Comparative Law, European Commission, *Study of Gambling Services in the Internal Market of the European Union*, 2006.

³ www.historyoflottery.com.

1. A state or government body (e.g., Croatia, Denmark, Finland, Sweden). The level and areas of support are determined by law and/or decided each year by the government.
2. Entities distinct from the government or lottery operator (e.g., Croatia, UK, South Africa, New Zealand). The areas and level of support may be decided in law or by the government, but decisions on individual grants are made by an independent body (albeit one that may include some government representation).
3. The lottery operators (e.g., Croatia, Czech Republic, Romania, Serbia, Slovenia). They decide on the level and type of support mainly as part of their corporate social responsibility programs. However, in France, the operators who obtain a license have to participate in the financing of grassroots sport through a progressive taxation on stakes.⁴
4. Distribution prescribed by law. Occasionally, as in Macedonia, the decision on who will be the beneficiary of the lottery proceeds is not made by a certain body but is prescribed by law.

Distribution by a State Body

A Finn to Win: Veikkaus Oy⁵

Veikkaus Oy is a government owned lottery established in 1940. It is managed by the Ministry of Education, with gaming rules set by the Ministry of Internal Affairs. Its profits exceed a €1.1m. on a daily basis; in 2009 out of €1, 26.5% was allocated for good causes.⁶

Under the terms of the Funds Distribution Act, the Ministry of Education prepares a proposal for distribution of funds to be approved by Government and adopted by Parliament.⁷ In 2009 the Ministry distributed €461m to 2,800 communities as follows: Finnish Arts 44.4%; Sports 27%; Science 18.9%; and Youth Work 9.7%. Supported organizations include associations, museums, libraries, sports clubs, research centers, and youth centers.

Bringing Dreams to Life: National Lottery Ireland

The Irish National Lottery has raised over €3.4bn since it was established in 1986. Its mission is to operate a world-class lottery to raise funds for good causes on behalf of the Government. Of the proceeds, 32% are allocated to good causes⁸ in the areas of Youth, Sports and Amenities; Health and Welfare; Arts, Culture and National Heritage; and the Irish Language. Projects are promoted weekly on national television in order to highlight their positive impact. In 2008 the Lottery raised €263.5 million.

The Lottery is operated by the An Post National Lottery Company under license from the Minister for Finance. Each year the surplus is attributed in its entirety to a National Lottery Fund, from which prize payments, operating costs, and capital expenditure are transferred back to An Post. The money allocated for good causes is distributed to different departments that support projects in the areas mentioned above.

⁴The European Lotteries Press Release, *European Lotteries Welcomes French Law Setting a National Framework for Online Gambling*, 13 May 2010.

⁵Information drawn from: www.veikkaus.fi.

⁶The rest is distributed as: prize payout 50.8%; lottery tax 4.7%; retail commissions 5.3%; operating costs 9.2%; undistributed prizes' fund 3.5%.

⁷Veikkaus Oy, CSR Annual Report, 2009.

⁸National Lottery, Bring Dreams to Life Annual Report, 2009.

DISTRIBUTION THROUGH SEPARATE ENTITIES

Racing for Charity: The Hong Kong Jockey Club Charities Trust (HKJC)

HKJC⁹ is a non-profit organization established in 1884 which holds a government-issued monopoly over all sports betting and the lottery. It distributes all surpluses to community and public benefit projects. It is also the largest contributor to tax revenue, the largest employer, and the biggest supporter of charitable causes in Hong Kong.¹⁰

Grants are distributed by the Hong Kong Jockey Club Charities Trust. Its trustees are the twelve stewards of the HKJC. Following an open call for applications, grants are allocated according to guidelines in the areas of Health; Community Services; Education; Training; Sport; Recreation; and Culture. The Trust allocates on average HK\$1bn a year (€102m), supporting more than a hundred CSOs and projects, providing both one-off grants and multi-year support. Beneficiaries include associations, hospitals, social institutions, and educational institutions.

Good Causes: United Kingdom Distributors of National Lottery

The UK National Lottery was set up in 1993. It is supervised by the National Lottery Commission and is currently operated by Camelot Group. Of the proceeds, 28% are distributed to good causes¹¹ in the categories of Charities, Health, Education and Environment 50%; Sports 16.67%; Arts 16.67%; and Heritage 16.67%.¹² So far £24bn has been distributed to more than 330,000 projects.

Responsibility for funding rests with the Department for Culture, Media and Sports (DCMS). It sets the policy and financial directions for the distributors (stating who can receive funding, what the funding can be used for, and the conditions the distribution body must meet)¹³ and maintains a database of grants. In addition, a National Lottery Promotions Unit raises public awareness of the good causes benefiting from lottery funding.

Under the UK system, the operator passes all proceeds to the National Lottery Distribution Fund (NLDF), which is administered by the DCMS. NLDF passes the money to fourteen lottery distributors,¹⁴ which are independent, nongovernment organizations with specialized knowledge about the particular sector. Funding is allocated through grants based on specific criteria for eligibility and funding. The distributors can delegate grant decisions to other bodies and can enter into jointly funded schemes.

The largest of the lottery distributors is the Big Lottery Fund. It was established in 2006 to distribute the 50% of money allocated for education, environment, charities, and health, and it has distributed a total of over £2.8bn. On average, 60-70% of its income is distributed to CSOs, and it has committed to giving more when it can.¹⁵ It also manages the BIG Fund for distributing non-lottery money.

⁹Information drawn from www.hkjc.com.

¹⁰*End of an Experiment*, The Economist, 15 July 2010.

¹¹The rest is distributed as follows: prizes 50%; Lottery duty 12%; retailers 5%; operating costs 4.5%; operator's profit 0.5%.

¹²About Lottery Funding; FAQ: www.lotterygoodcauses.org.uk.

¹³The directions for the distributing bodies in Wales, Scotland, and Northern Ireland are issued by their respective parliaments.

¹⁴For more see the Lottery Funders web site, www.lotteryfunding.org.uk.

¹⁵It allocated 92% of its funding in 2008/9. NCVO, *Proposed Changes to National Lottery Funding*, 2010.

It's Important to Have SUPPORT: The National Foundation for Civil Society Development Croatia

In 2003, proceeds from the Croatian lottery were used to support the creation of the National Foundation for Civil Society Development (NFCSD). Under the law, 50% of proceeds from games of chance are allocated for programs¹⁶ according to criteria set out in a decree issued each year by the Government. From that 50%, 14.10% is allocated for the development of civil society. The rest is distributed by different ministries in the areas of Sport, Needs of People with Disabilities; Combating Drug Use; Social and Humanitarian Activities; Culture; Technical Culture; and Out of Institutional Education, Upbringing of Children and Youth.

The NFCSD receives 96.55% of the funding allocated for the development of civil society. The remainder is distributed by the Ministry of Foreign Affairs and European Integration for international cooperation programs.

The founding assets of the NFCSD were HRK 2m (€275.000). By 2008 the assets increased to HRK 46m (€6.3m), out of which HRK 43m (€5.9m) came from the games of chance.¹⁷

The NFCSD both makes grants and implements activities. It also provides multi-year institutional funding. It finances associations, foundations, institutions, local government units, and others, in the areas of human rights, rule of law, non-institutional education, environmental protection, and youth. Decisions on the allocation of the funds are made by a Management Body. Its representatives are appointed by the Government and it is composed of members of the state administration, local/regional government units, and organizations and experts in civil society.¹⁸

PLAY + DONATE = 2 X WIN: International Lottery in Liechtenstein Foundation (ILLF)

ILLF¹⁹ is a private foundation which since 1995 has operated a state lottery under government license. ILLF is the only lottery operator in the country and is supervised by Government-appointed auditors which scrutinize the weekly draws. The lottery (called Golotto) is internet-based, being played through the web sites of retailers. Of each purchased Golotto ticket, 5% is donated to charities and projects in Liechtenstein and abroad. Decisions are made by a Charity Allocation Committee composed of two Government and two ILLF representatives. Proceeds are distributed for Education; Research; Libraries; Archaeology; Art; Culture; Science; Sport; Health Care; Social Welfare; Youth; the Handicapped; the Elderly; and Environment. Beneficiaries include international humanitarian organisations, universities, colleges, and libraries.

In addition, the websites which operate ILLF games also allocate a certain percentage of the revenue to fund charities. For example, 25% of all proceeds from the Plus Lotto are donated to the International Federation of Red Cross and Red Crescent Societies. ILLF also runs an online donation web site called *Liechtenstein Helps* to raise funds for the Liechtenstein Red Cross.

¹⁶Law on Income from Games of Chance, 2009.

¹⁷National Foundation for Civil Society Development, *Annual Report*, 2008.

¹⁸Hadzi-Miceva-Evans, K., *European Practices on Implementation of Policy Documents and Liaison Offices that Support Civil Society Development*, 2009.

¹⁹www.illf.com. Description developed in consultation Ms. Karin Beck, Swiss Certified Specialist for Management Assistance, ILLF.

DISTRIBUTION BY LOTTERY OPERATORS

More Than a Game: The Croatian Lottery

The Croatian Lottery has the exclusive right to organize lotteries in Croatia. Its income is passed to the state budget and distributed as described above. In addition, it runs a program of support called “*More than a Game*” to show players how their participation in the lottery also supports CSOs, institutions, and individuals in need. In 2009, HRK 2m (€275.000) financed 154 organizations in the fields of Humanitarian Activities; Health; Youth; Sport; Culture; Art; and Education.²⁰

Helping Others Win: The Czech SAZKA Lottery

In the Czech Republic 6% to 20% of the profits from a lottery must be distributed to projects that are publicly beneficial.²¹ SAZKA is the country’s largest lottery operator,²² with a mission to support good causes from the proceeds of its games. SAZKA is a joint-stock company. Its shareholders are nine associations engaged in sports and physical education. In 2008, 8% of its total turnover of CZK 1bn (€40m) was distributed for good causes: 99.4% for sports and physical education, and 0.6% for culture. In 2002, the SAZKA Foundation was established to award educational scholarships and grants in the fields of science, technology, art, culture, and support to young people.²³

DISTRIBUTION PRESCRIBED BY LAW

In Macedonia, the *Law on Lottery and Entertainment Games from 1997 (amended in 2001 and 2007)* lists the organizations entitled to receive lottery proceeds. Of proceeds, 50% are used for financing programs of associations of people with disabilities, sports associations, and the Red Cross. The law sets lower and higher caps for funding, within which the Government has discretion to decide how funds are allocated.

LOTTERIES AS A FUNDRAISING TOOL

Lotteries are used as fundraising tools by CSOs in Germany, Ireland, the Netherlands, Spain, Sweden,²⁴ the UK, Uzbekistan, and, most recently, Slovakia. They may either be used to raise funds for the CSO itself or for other causes. The lotteries may be one-off incidental events at a fundraising event, or ongoing stand-alone activities designed to raise funds over a longer period of time. These ongoing lotteries, sometimes known as “charity” or “society lotteries,” often exist parallel to state lotteries.

General characteristics of charity lotteries are:

- The main aim is fundraising for CSOs or disadvantaged groups or support of own activities;
- They donate a part of their income to the beneficiaries;
- They make no profits;
- Their funds are allocated and distributed by an independent body;

²⁰ www.lutrija.hr/Natjecaj2009.

²¹ Act no. 202/1990 of Collection on Lotteries and Similar Games of Chance.

²² ACLEU, *Charity Lotteries in EU Member States: The Czech Republic*.

²³ Sazka, *Annual Report*, 2008.

²⁴ Struving, E., Wieslander, A., *Combining the Commercial with the Charitable: Fundraising by Swedish Non-profit Lotteries*.

- They provide funds for the organizations as such (institutional support), but some also support projects or disadvantaged groups directly;
- They operate with a licence from the government; and
- They tend to supplement and not substitute for public or state support.

Charity lotteries can be organized in different ways. For example, charities in Ireland have used lotteries to raise funds since 1940. Rehab Ireland²⁵ is one of several lotteries operating today. The charity set up a fundraising company, Rehab Lotteries, to sell scratch cards through a network of 1,400 retailers, promote online games, and manage other fundraising initiatives. Proceeds are used to support Rehab activities.

The Spanish National Organisation for the Blind (ONCE)²⁶ runs the *Pro-blind Cupón Lotto scheme* to provide its members with “the means to earn a living.” The tickets are sold on the streets by 21,762 salesmen with disabilities. They provide 81% of the income of the *ONCE Foundation*, which supports social and labor integration programs for people with disabilities.

Aktion Mensch (Action Man)²⁷ Germany organizes a lottery in cooperation with the TV channel ZDF. Of its income, 30% is used to support around 10,000 projects for disabled persons and other disadvantaged groups.

The Postcode Lottery model was developed by Novamedia, a marketing agency. It currently operates the Dutch National Postcode Lottery, Sponsor BiCSO Lottery, BankGiro Lottery (all in the Netherlands), the Swedish Postcode Lottery, and the UK People’s Postcode Lottery. Novamedia receives a fixed percentage from the proceeds. The Postcode Lottery is a postcode-based subscription lottery (the ticket number is composed of the player’s postcode and a three-digit number). The ticket is sold on a subscription basis paid by direct debit so the player enters all the draws for the month; prizes are split among tickets, rather than players.²⁸

Postcode Lotteries support only a limited number of CSOs (e.g., five in Scotland, eight in England, twenty-seven in Sweden, seventy-five in the Netherlands²⁹). In the Netherlands, 50% of proceeds are given to charity. In Sweden this figure is 22.5 %, and in the UK 20%.³⁰ The sums raised can be substantial (€2.6m in the UK since 2005). These lotteries provide multi-year funding support and cultivate relationships with the media to raise awareness about the CSOs supported and the work they do, as well as promote winners.

ISSUES TO CONSIDER WHEN PLANNING A MODEL FOR USING AND DISTRIBUTING LOTTERY PROCEEDS

Lotteries are a popular source for supporting CSOs or good causes. However, the best model or mechanism for a particular country depends upon the purpose of the lottery and the context in which it will operate. This section highlights some of the issues which should be addressed and agreed on based on the local context.

²⁵www.rehab.ie/lotteries/index.aspx.

²⁶www.once.es; ACLEU, *Charity lotteries in the EU member states: Spain*.

²⁷ACLEU, *Charity lotteries in the EU member states: Germany*.

²⁸Bucci, Jo. and Hoogenboom A., *Regulatory Environment for Charity Lotteries in the UK*.

²⁹ACLEU, *Who are the lottery beneficiaries?*, www.acleu.eu/web/show/id=64123.

³⁰Novamedia, *Fact Sheet*: www.novamedia.nl/web/Who-we-are/Novamedia-factsheet.htm.

Are lotteries an ethically appropriate mechanism to raise funds for good causes?

Concerns have been raised in many countries that lotteries may create gambling addictions or other social problems, worsened by the fear that lotteries exert the strongest temptation to play on those least able to afford it (most of the state lotteries cited in this paper have increased their income in the 2009 recession). Certainly some state lottery providers have recognized the danger of addiction and have developed special initiatives to counter it. In Finland, Veikkaus's Responsibility Evaluator Tool evaluates existing or planned games from the perspective of possible gaming addiction. Based on the results, changes or restrictions to the game are proposed. The same concern has been expressed in relation to charity lotteries. Some feel they may compromise their image as it may appear that they promote a fundraising tool which creates addiction. Charity lotteries, however, tend to offer games with smaller prizes and less aggressive marketing. While this may in part be through necessity (see below), it is also the case that these games have relatively low addiction risks and may reduce the potential damage to the operator's image.

Some have asked if it is morally justifiable to use "good causes" as the flag for promoting lotteries, particularly when these good causes receive a relatively small percentage of the proceeds. If an individual wishes to support a good cause, isn't it almost always better for the cause for that individual to donate the money directly rather than purchasing a lottery ticket?

State-run lotteries are sometimes referred to as a "stealth" tax,³¹ a "tax on hope," or a "tax on the poor."³² A breakdown of the revenue distribution from each ticket shows that a significant percentage is almost always taxed by the state. After all the expenses are covered, what is left for good causes can be less than half of all revenues (e.g., Finland 26%; the UK 28%; Czech Republic 6-20%). While the total donated to good causes may be high, this is still in some cases less than the sum that is kept by the state or the operator or given away as prize money.

THE PLAYER IN THE SCHEME OF LOTTERIES AND GOOD CAUSES

Some supporters of the lottery as source for funding good causes feel that lotteries produce a win/win for the players: even if players do not always win money, they take satisfaction from the knowledge that the lost amount will be used to support a societal need. Others make a different assumption: that when the players buy tickets, "hope" to win rather than "desire to help" is the sole motivation.

Understanding the true motivations of many millions of players may not be possible. So the effect that the model of lottery support for good causes aims to have on the player and how it may impact its relationship with the community should be considered. Some questions include: Will the model aim to incite individuals to get involved in the community (e.g., HKJC has developed such scheme)? Will it want to raise awareness about the importance of supporting a certain need or CSO? How can it be ensured that the model does not act as a barrier between an individual donor and CSO, thereby hindering the establishment of a more sustainable or longer-term relationship?

³¹Brittan, S., *The overwhelming case for paying stealth taxes*, The Financial Times, 1999. Ward, L., *Lottery Attacked as Stealth Tax*, the Guardian, 15 June 2005.

³²Hansen, A., *Lotteries are another state tax — but with better marketing*, The Tax Foundation, 2005; *National Lottery is 'Tax on the Poor'*, Telegraph, 27 July 2009.

The costs of running lotteries

Start-up and running costs for a lottery can be high, potentially delaying the point at which good causes receive their due allocation. An appropriate assessment of the potential income for beneficial purposes should be made against the operational costs for particular models (the operating cost of postcode lotteries is one reason why the percentage allocated to CSOs is relatively low, especially in the beginning). Consideration of costs is particularly important for lotteries run by CSOs with modest funding opportunities. CSOs should also consider potential costs such as staff time and what is the benefit as opposed to using resources to promote and run the core activities.

(Un)Fair competition

In countries where CSOs can operate lotteries, many find that the competition against much larger state lottery operations is made more difficult by certain regulatory obstacles. These include limits on maximum payouts (as are found in the UK and Ireland), required minimum allocations for good causes, or restrictions on the games that can be offered. Some countries have recognised the harm this is doing to charity lotteries –the Irish Government set up a Charitable Lotteries Fund “to supplement the income of private charitable lotteries whose products are competing directly with the National Lottery.”³³ Elsewhere, steps have been taken to reduce the state’s competitive advantage: for example, the Netherlands reduced the minimum amount to be allocated to good causes from 60% to 50%.³⁴

What is in it for CSOs?

Many CSOs support and advocate for the introduction of state lotteries hoping that they will be able to use the proceeds to support their operations or activities. However, it is not always this straightforward.

First, not only CSOs benefit from distribution of state lottery proceeds. CSOs must often “compete” with a range of potential beneficiaries, such as individuals, public and private institutions, or even parts of government. Second, most state lotteries restrict their support to certain activities, typically education, sport, culture, and science. In fact, with the exception of Croatia, distribution of lotteries proceeds does not aim to support CSO development or give a “priority” to CSOs. Third, the amount of funding available, however large, is limited (as is the case with most other sources of state funding). These limits do not exist when fundraising from the community; here, the potential pool of resources is much larger and there are no limitations on activities or organizations. While lotteries can provide considerable income for some CSOs, they should not be seen as a key source of revenue for the sector as a whole and be introduced as a substitute for other, perhaps more productive sources.

Politicization of the process

In most systems, the state has influence or control over the policy and mechanisms for the distribution of lottery proceeds to good causes. While some countries determine the areas or the percentage of allocation in laws, others leave it to a government to decide on the distribution each year. This inevitably brings a risk of politicization; the government makes

³³Department of Finance, Ireland, *Expenditure Review of Charitable Lotteries Scheme*, 2004.

³⁴Kingma, S. and Van Lier, T, *The Leeway of Lotteries in the European Union*, Vrije Universiteit Amsterdam, 2006.

decisions based on its current policies and interests,³⁵ or subsidizes initiatives that should be funded through other revenue.

The latter has been a matter of ongoing debate in the UK. In response, the Big Lottery Fund has adopted the principle of “additionality” when assessing funding requests. This states that “lottery funding is distinct from Government funding and adds value. Although it does not substitute for Exchequer expenditure, where appropriate it complements Government and other programmes, policies and funding.”³⁶ Nevertheless, controversy remains over certain decisions, such as the use of “good cause” allocations from the lottery to fund programs related to the millennium celebrations and the 2012 Olympics.

The distribution process

The nature of lotteries combined with the emphasis on “good causes” can make the allocation and use of “good cause” funds particularly sensitive. It is therefore important that this process is transparent, that clear criteria are published in advance, and, where possible, that independent experts are involved in the funding decisions. A rigorous process of accounting and reporting is critical to ensure that the funding is used appropriately.

Similar principles apply to charity lotteries. Indeed, in many cases they are held to higher standards, and their close link to the community creates a risk that one charity lottery scandal can negatively affect the reputation of civil society as a whole.

CONCLUDING REMARKS

Various mechanisms are used to distribute lottery proceeds to CSOs or projects beneficial to the public. However lotteries, particularly state lotteries, are controversial. Some believe that neither the state nor CSOs should be promoting gambling, regardless of the benefits. Some CSOs refuse lottery money on moral or religious grounds.

Furthermore, there are risks of negative consequences for CSOs, particularly from the dominant market position that state lotteries invariably occupy. Laws should allow CSOs to operate lotteries and protect them from unfair competition.

Developing a successful lottery therefore requires careful consideration of the opportunities and risks within the local context in order to achieve the aims. Issues to consider include: What are the aims of the model—increasing income for government or maximizing funds for good causes? Which areas to support? Should CSOs have a “priority”? What is the effect on the player? How best to lower operating costs without undermining effectiveness? Which activities should be eligible to benefit? How to ensure that charity lotteries fully exploit their potential? How to ensure transparency and public support and minimize possible political interference?

This article presents some examples of lotteries which successfully provide benefits to governments, CSOs, and good causes. They demonstrate that, unlike the games themselves, the opportunities that lotteries bring do not need to be left to fate, but can be maximized based on a well-planned concept.

³⁵The new UK Secretary of State for Culture, Olympics, Media and Sport proposed increasing funding for arts, heritage and sports and decreasing money for the Big Lottery Fund. Holt, A., *Culture secretary to shake-up lottery funding*, Charity Times, 20 May 2010.

³⁶Big Lottery Fund. *Annual Report, 2009* and MacLaren, A., *NCVO Achieves Lottery Campaign 'Victory'*, Press Release, 22 March 2006. www.ncvo-vol.org.uk.

Article

Country Report: Moldova

Hanna Asipovich¹

The legal environment for civil society organizations (CSOs) and civil society in the Republic of Moldova has considerably improved in the past year. After the political change that followed the parliamentary elections of July 2009, the new government proved to be more open and consistent in carrying out a number of legal reforms contributing to an enabling environment for CSOs. At the same time the political and social events of 2008-2009 resulted in stronger voices of CSOs being heard and recognized by the Government and the Parliament. This article provides a short overview of the most significant developments in the legal field affecting nongovernmental organizations today.

As stated on the webpage of the Ministry of Justice, some 5,314 CSOs are currently included in the Ministry's online registry of nongovernmental organizations.² The actual number is higher, around 8,000 CSOs.³ Such a difference is due to fact that organizations can also be registered at the local level with municipalities and the data is not always submitted to the central registry. However, according to ADEPT think tank, only some 25% of the 8,000 CSOs are currently active.⁴

The current legal framework provides for a basic enabling environment for CSOs to freely establish and operate, as well as engage with government and other stakeholders to achieve their goals. The Civil Society Development Strategy and the National Participation Council should be mentioned among recent initiatives to support CSOs and to establish better relationships between the Government and the nongovernmental sector. In addition, several other laws affecting CSOs were adopted in Moldova in 2010: amendments to the Law on Public Associations, including amendments relating to the public benefit status; the Law on Volunteering; and the Law on Social Services. While more work is ahead in order to ensure successful implementation of the laws, these initiatives are generally supportive of CSOs and contribute to creating a better legal environment. Other initiatives are also under discussion: accounting standards for CSOs, Law on Accreditation, and possibly percentage legislation.

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² See the Ministry of Justice's Registry of Nongovernmental Organizations, accessed at: <http://rson.justice.md/organizations>

³ See USAID NGO Sustainability Index 2009, Moldova: http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2009/moldova.pdf

⁴ Good Governance and the Role of Civil Society: Moldova's case, accessed at: <http://www.development-network.eu/file/157>

Institutional Framework for Government–CSO Relationships in Moldova: Civil Society Development Strategy, National Participation Council

The grounds for legal reform were laid even before the changes of 2009 and with significant political support of members of the current democratic leadership who used to be part of the old Parliament. Back in December 2008 the Parliament passed the *Civil Society Development Strategy for 2008-2011*.⁵ This document can be considered a major breakthrough in the field of state-civil society relationships in the Republic of Moldova. The Strategy identifies a number of priorities for the government that are pivotal for the development of civil society in Moldova and establishes principles and values for cooperation and relations between public authorities and civil society. Strategic priorities include i) better institutionalization of the consultation, monitoring and evaluation of public policy processes; ii) developing an enabling legal and fiscal framework for CSOs; and iii) contributing to civic activism and volunteering. As stated in the Strategy, it is based on the principles of civil society's active involvement, public participation in policy-making, mutual respect, partnership between government and nongovernmental sector, obligation, and responsibility. It also calls for political autonomy of civic initiatives. The document promotes sustainable and balanced development of the CSO sector, both on regional and local level, and their equal treatment. Initially, the Strategy was supposed to be supported by an Action Plan as well. However, the prior vision of introducing the Action Plan within four months upon the adoption of the Strategy fell short due to the political turmoil. At present, the Action Plan exists only in a draft form that was prepared by the State Chancellery and has been circulated among the corresponding ministries. The draft Action Plan includes tangible goals and a timeline for achieving the objectives outlined in the Strategy for Civil Society Development. Despite the fact that the Action Plan has not been officially approved, its priorities and corresponding activities are part of some Ministries' internal planning and are being followed as outlined in the draft version of the Action Plan.

Another recent initiative to establish better cooperating links between the civil society sector and the Government is the National Participation Council. The Council was established in February 2010 as an advisory body and a liaison between the government, civil society, and the private sector. The Council consists of thirty members representing CSOs from various fields whose primary task is i) to participate in policy-making through providing expert opinions on draft policies and strategic documents, as well as conducting and presenting independent assessments of policies' impacts; and ii) to contribute to establishing the institutional framework for consultation that includes among others monitoring implementation of the Law on Transparency in Decision-Making and capacity-building for stakeholders. As such the objectives set up for the Council are quite ambitious.⁶

The National Participation Council recently developed and approved the strategy for its activities in 2010 - 2012 (the duration of the current mandate) and introduced some changes into the rules of operation. According to the strategy, the Council identified as its priorities i) to offer expertise in drafting, monitoring, and evaluating public policies; and ii) to facilitate involvement of private actors and civil society in decision-making process through establishing four working groups, focusing on justice and human rights; economic development; foreign policy, security, and defense; and social policy, education, and youth.

⁵ All legal documents mentioned in this country note can be found at ICNL's Online Library under heading "Moldova": <http://icnl.org/knowledge/library/index.php>

⁶ See Moldova's Government's Decision No.11 of January 2010 on Establishing the National Participation Council.

Recent Developments in the Legal Framework for CSOs: PBO Amendments, Law on Social Services, Law on Volunteering

Several laws affecting CSOs were adopted in 2010 in Moldova. While further work is needed to ensure successful implementation, these initiatives are generally supportive of CSOs and contribute to creating a more enabling environment:

- The Amendments on Public Benefit status

The amendments regarding public benefit status, which were passed among amendments to the Law on Public Associations, are an important step forward in the legal framework for CSOs in Moldova. The law aims to give practical meaning to the status of public benefit, which has already been in existence for almost ten years but recently without much significance for public benefit organizations (PBOs). According to the study carried out by the local think tank CREDO, some fifty to seventy organizations per year apply for PBO status. The number of organizations applying for the status or renewing it after three years (the status has to be reconfirmed every three years) has been steadily declining in recent years.⁷ One of the main reasons for the lack of interest in acquiring the status is lack of tangible fiscal incentives for organizations to hold PBO status, which is supposed to change with the new amendments in force.

The new law provides a definition of public benefit activities that is generally in line with other European laws; it establishes obligations concerning reporting and transparency and assigns a range of potential direct and indirect benefits to the PBOs. Both obligations and benefits are greater than the previous legislation provided for. However, the implementation of the benefits and their real scope still remains to be seen after the secondary legislation is developed. Finally, the law provides for a new composition of the Certification Commission (CC), ensuring that the majority of the CC will consist of CSO representatives.

- The Law on Volunteering

As the result of four years of active advocacy for adopting a legal framework for volunteering, the Law on Volunteering was adopted on June 18, 2010. The law regulates formal volunteering relations between host organizations (public and private entities) and volunteers. The law also introduces conceptual elements of volunteering which are in line with international and European practices: it prescribes that volunteers are individuals who undertake activities based on their own initiative and with free consent, for public benefit purposes and without remuneration. The law outlines the rights and responsibilities of the parties, addresses issues of liability, prescribes certain incentives for volunteers, and deals with international volunteering.

The Law enlists next steps needed for its successful implementation, such as preparing a standard contract for volunteers, volunteer's card, and certificate, and more generally speaks of measures to encourage volunteering and ensure minimum standards for volunteering activities.

- The Law on Social Services

This law is the first of a set of legal documents, to be followed by the Law on Accreditation as well as amendments to the Law on Public Acquisitions, which will together set the framework for public procurement of social services by non-state providers, including CSOs. These documents are tentatively to be enforced in mid-2011. The new Law on Social

⁷ CREDO's study on Legal Reform Impact Assessment on Public Benefit Organizations (under publication, 2010).

Services establishes an important milestone in that it explicitly allows for the first time to contract out social services to non-state actors, including CSOs.

The law specifically enlists the currently available legal forms of CSOs (associations, foundations, and institutions) as possible providers of social services; and it devotes a whole article to lay out the rights of such providers under this law, including their participation in determining the needs for services and access to government funding tenders. The law also sets out a new paradigm in thinking about social services by categorizing them at three levels, as basic, specialized, and highly specialized services.

Pending Legal Initiatives: Accounting Standards, Law on Accreditation, Percentage Legislation, Accounting Standards

- Accounting Standards for CSOs

To assist with reporting for CSOs and to ensure proper accountability, a working group under the aegis of the Ministry of Finance has prepared draft Methodological Recommendations for CSO accounting. The document includes suggestions for nonprofit financial reporting that can be applied by CSOs and respective authorities, as well as practical examples. The draft document is available at the Ministry of Finance webpage.⁸ It is supposed to be adopted by the end of 2010 and come into force in January 2011.

- The Law on Accreditation

According to the new Law on Social Services, all social services regardless of the actor that provides them, public or private, will need to be accredited. The Law on Accreditation will provide a more detailed definition of social services at all three levels, as basic, specialized, and highly specialized services. This arrangement gives rise to some practical questions, such as what will happen to those services that CSOs propose to start up as an innovation—that is, services that do not currently exist. Will they need to be accredited before the CSO can even run them? This and other questions will need to be discussed by the stakeholders in the development of the Law on Accreditation.

- Percentage Legislation

In Moldova where government funding to CSOs is sporadic, there have been discussions about introducing a so-called percentage law⁹ to ensure better financial viability of the non-profit sector. Several years ago a draft Law on 2%, primarily based on the Romanian example, was prepared by a group of lawyers. According to this draft Law, individual and corporate donors were allowed to designate 2% of their income tax to CSOs holding public benefit status. The draft law has been abandoned for some time and recently discussions started about possibly revisiting the idea. Local stakeholders realize that all risks and opportunities in connection to such a law need to be closely examined and calculated. Central to this assessment are estimating the amount of tax designations and the cost of introducing the system, the challenges of administration, and the running costs. Among criteria to be considered are the level of taxation, the overall number of taxpayers, the likely percentage of those who would take advantage of such a mechanism, and the number and types of CSOs likely to benefit. Recently the Ministry of Finance started an assessment of

⁸ Draft Methodological Recommendations for CSO Accounting: <http://minfin.md/ro/TranspDeciz/ProiecDeciz/19noiembrie/>.

⁹ Percentage mechanism is a form of indirect government support to CSOs, when the taxpayer decides whether to designate a portion of the annual income tax, usually 1% or 2%, to the entitled organization. The first percentage law was introduced in Hungary in 1997 and since then such laws have been enacted in a number of countries in CEE, such as Slovakia, Poland, and Romania.

taxpayers' data in the recent years to do preparatory work for the feasibility of such legislation to be applied in Moldova.

Conclusion

This article did not attempt to describe in great detail all legal initiatives that affect the CSO sector in Moldova, but sought to give an overview of a few important ones that have a direct impact on the establishment and daily operation of CSOs.

Having achieved laudable results in the area of legal reform that affects CSOs in Moldova within a short period of time, more work needs to be done to ensure successful implementation of the laws already passed; and proper policy and legal analysis needs to be conducted for upcoming legal initiatives. Further cross-sectoral dialogue between the Moldovan government and CSOs is of utmost importance to ensure proper implementation of the National Civil Society Development Strategy and to contribute to establishing an enabling legal environment for Moldovan CSOs.