

The International Journal of Not-for-Profit Law

Volume 7, Issue 2, February 2005

A Quarterly Publication of
the International Center for Not-for-Profit Law
1126 16th Street, NW, Suite 400
Washington, DC 20036
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www.icnl.org

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LETTER FROM THE EDITOR

This issue of the *International Journal of Not-for-Profit Law* opens with a special section on Latin America. We're proud to feature the reflections of former U.S. President **Jimmy Carter**, followed by on-the-ground reports from **Antonio L. Itriago and Miguel Angel Itriago, Beatriz Parodi Luna, Consuelo Castro, and Adriana Ruiz-Restrepo**, and, finally, a conference report from the **Woodrow Wilson International Center for Scholars**.

Our general articles address pertinent issues in the United States, South Asia, Turkey, and Russia, as analyzed by **Mark Sidel and Iftekhar Zaman, Robert Buchanan, Thomas Silk and Rosemary Fei, Filiz Bikmen, and Yulia Checkmaryova**.

Our book reviews range widely too, topically (from the theoretical to the pragmatic) as well as geographically (including England, India, the Balkan Peninsula, the United States). Among our reviewers are **Stephan E. Klingelhofer, Richard Fries, Bindu Sharma, Michael Bisesi, Gerald M. Easter, and Patricia Lyons**.

We gratefully acknowledge the aid of the Carter Center, the Woodrow Wilson International Center for Scholars, *SEAL Journal*, and our expert authors.

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LATIN AMERICA

The Promise and Peril of Democracy

By Jimmy Carter

The following keynote speech was delivered by former U.S. President Jimmy Carter on Jan. 25, 2005, as part of the inaugural Lecture Series of the Americas at the Organization of American States in Washington, D.C.

I am honored to address the Permanent Council of the Organization of American States. Thank you, Mr. Secretary General, Mr. President, and Ambassador Borea for the kind invitation to inaugurate this Lecture Series of the Americas.

I have long been interested in this organization. Thirty years ago, as governor of Georgia, I invited the OAS General Assembly to meet in Atlanta--the first meeting in the U.S. outside of Washington. Later, as President, I attended and addressed every General Assembly in Washington.

Back then, I realized that most of this hemisphere was ruled by military regimes or personal dictatorships. Senate hearings had just confirmed U.S. involvement in destabilizing the government of Salvador Allende in Chile, and a dirty war was being conducted in Argentina. I decided to stop embracing dictators and to make the protection of human rights a cornerstone of U.S. foreign policy, not only in this hemisphere but with all nations.

When we signed the Panama Canal treaties in this same august hall in 1977, many non-elected or military leaders were on the dais. Key Caribbean states were absent, not yet part of the inter-American system. Then in 1979, Ecuador started a pattern of returning governments to civilian rule. The inter-American convention on human rights soon came into force, and our hemisphere developed one of the strongest human rights standards in the world.

These commitments have brought tremendous progress to Latin America and the Caribbean. Citizens have become involved in every aspect of governance: more women are running for political office and being appointed to high positions; indigenous groups are forming social movements and political parties; civic organizations are demanding transparency and accountability from their governments; freedom of expression is flourishing in an independent and vibrant press; ombudsmen and human rights defenders are active; and many countries are approving and implementing legislation to guarantee that citizens have access to information.

The English-speaking Caribbean has sustained vibrant democracies. A democratic Chile is removing military prerogatives from the Pinochet-era constitution and the military has acknowledged its institutional responsibility for the torture and disappearances of the 1970s. Central America has ended its civil wars and

democracy has survived. The Guatemalan government offered public apology for the murder of Myrna Mack, and a Salvadoran responsible for the assassination of Archbishop Romero was tried and convicted last year, although in absentia.

Venezuelans have avoided civil violence while enduring a deep political rift in the last three years. Mexico developed an electoral institution that has become the envy of the world. Argentine democracy weathered the deepest financial crisis since the 1920s depression and its economy is on the rebound.

Four years ago, Canada and Peru took the lead in developing a new, more explicit commitment to democracy for the hemisphere. On the tragic day of September 11, 2001, the Inter-American Democratic Charter was signed.

I am proud to have witnessed these demonstrations of the courage, persistence, and creativity of the people of this hemisphere.

But I am also worried. I am concerned that the lofty ideas espoused in the Democratic Charter are not all being honored. I am concerned that poverty and inequality continue unabated. And I am concerned that we in this room, representing governments and, in some cases, privileged societies, are not demonstrating the political will to shore up our fragile democracies, protect and defend our human rights system, and tackle the problems of desperation and destitution.

Since our years in the White House, my wife Rosalynn and I have striven to promote peace, freedom, health, and human rights, especially in this hemisphere and in Africa. Our dedicated staff at The Carter Center have worked in 54 elections to ensure they are honest and competitive. Civil strife has become rare, and every country but Cuba has had at least one truly competitive national election.

Yet, tiny Guyana, where we have been involved for more than a decade, remains wracked with racial tension and political stalemate. Haiti, where we monitored the first free election in its history and where the world contributed many tens of millions of dollars in aid, has been unable to escape the tragedy of violence and extreme poverty. In Nicaragua, I was privileged to witness the statesmanship of Daniel Ortega transferring power to Violeta Chamorro, yet today that country continues enmeshed in political deadlock and poverty that is second only to Haiti.

Across the hemisphere, UNDP and Latin Barometer polls reveal that many citizens are dissatisfied with the performance of their elected governments. They still believe in the promise and the principles of democracy, but they do not believe their governments have delivered the promised improvements in living standards, freedom from corruption, and equal access to justice. We run the very real risk that dissatisfaction with the performance of elected governments will transform into disillusionment with democracy itself.

How can we protect the advances made and avoid the dangerous conclusion that democracy may not be worthwhile after all? The greatest challenge of our time is the growing gap between the rich and poor, both within countries and between the rich north and the poor south. About 45 percent (225 million) people of Latin America and the Caribbean live under the poverty line. The mathematical coefficient that measures income inequality reveals that Latin America has the most unequal

income distribution in the world, and the income gap has continued to increase in the past fifteen years.

When people live in grinding poverty, see no hope for improvement for their children, and are not receiving the rights and benefits of citizenship, they will eventually make their grievances known, and it may be in radical and destructive ways.

Governments and the privileged in each country must make the decision and demonstrate the will to include all citizens in the benefits of society.

Democratic elections have improved, but we have also witnessed a dangerous pattern of ruling parties naming election authorities that are partisan and biased, governments misusing state resources for campaigns, and election results that are not trusted by the populace. I include my own country in saying that we all need to create fair election procedures, to regulate campaign finance, and to ensure that every eligible citizen is properly registered and has the opportunity to cast votes that will be counted honestly.

But democracy is much more than elections. It is accountable governments; it is the end of impunity for the powerful. It is giving judiciaries independence from political pressures so they can dispense justice with impartiality. It is protecting the rights of minorities, including those who do not vote for the majority party. It is protecting the vulnerable--such as those afflicted with HIV/AIDS, street children, those with mental illnesses, women abused with domestic violence, migrants, and indigenous peoples.

Governments of this hemisphere have carried out enormous economic reform efforts in the last two decades, but these efforts have not yet brought the needed reduction in poverty and inequality. Too many governments still rely on regressive sales taxes because the privileged classes can manipulate governments and avoid paying taxes on their incomes or wealth.

Military spending has been significantly reduced, but additional reductions are advisable now that the region is democratic and most border issues have been resolved. Health and education are more important than expensive weapons systems.

Access to land, small loans, and easier permits for small businesses can harness the potential dynamism of each nation's economy. Brazil has initiated a zero hunger program to address poverty, and Venezuela is using oil wealth to bring adult education, literacy, health and dental services directly to the poor. These and other creative social programs should be studied to see which might be appropriate in other areas.

When political leaders do make the right choices to address the needs of all citizens, those citizens have a responsibility as well--to comply with the established rules of the political process. Political honeymoons are short, and sometimes a frustrated people are tempted to unseat an unsatisfactory government by violence or unconstitutional means. Elected leaders deserve a chance to make the tough decisions, or to be removed at ballot boxes.

News media play an especially important role in a free society. Press freedom is vibrant in the hemisphere, and must be kept that way. "Insult" (*desacato*) laws and harassment of journalists should be eliminated. The media also have a responsibility to investigate carefully and to corroborate their stories before publication.

Those of us in the richer nations have additional obligations. We must recognize that we live in an ever-closer hemisphere, with mutual responsibilities. Trade and tourism of the U.S. and Canada are increasingly connected with all of Latin America and the Caribbean, as the sub-regions of the hemisphere are forging closer economic ties.

We are also connected by the scourge of crime, which is a two-way street. Drug demand in the U.S. fuels drug production among our neighbors, undermining the ability of democratic institutions to enforce the rule of law, and the easy availability of small arms from the U.S. has made crime a serious problem for governments in the Caribbean and Central America.

Globally, Americans give just 15 cents per \$100 of national income in official development assistance. As a share of our economy, we rank dead last among industrialized countries. The recently announced Millennium Challenge Account is designed to provide additional help for governments pursuing transparency and accountability, but in this hemisphere only Bolivia, Honduras, and Nicaragua are being considered for this aid.

The United States has another role to play as well: of setting an example of protecting civil liberties and improving democratic practices at home, and by its unwavering support of democracy and human rights abroad.

The international lending agencies also have important roles to play: by being more flexible and responsive to political pressures and social constraints when deciding conditionality; by involving local citizens and governments in developing consensus for poverty-reduction strategies; and by helping the hemisphere carry out the mandates adopted by presidents at the periodic summits of the Americas.

Finally, I call on all governments of the hemisphere to make the Democratic Charter more than empty pieces of paper, to make it a living document. The charter commits us to help one another when our democratic institutions are threatened. The charter can be a punitive instrument, providing for sanctions when a serious challenge to the democratic order occurs, but it is also an instrument for providing technical assistance and moral encouragement to prevent democratic erosion early in the game.

Let us strengthen the charter and not be afraid to use it. Right now the charter is weak because it is vague in defining conditions that would constitute a violation of the charter--the "unconstitutional alteration or interruption" of the democratic order noted in Article 19. The charter also requires the consent of the affected government even to evaluate a threat to democracy. If the government itself is threatening the minimum conditions of democracy, the hemisphere is not prepared to act, since there would certainly not be an invitation.

Two simple actions would help to remedy this problem and allow the governments of this hemisphere to act when needed. First, a clear definition of "unconstitutional alteration or interruption" would help guide us. These conditions should include:

1. Violation of the integrity of central institutions, including constitutional checks and balances providing for the separation of powers.
2. Holding of elections that do not meet minimal international standards.
3. Failure to hold periodic elections or to respect electoral outcomes.
4. Systematic violation of basic freedoms, including freedom of expression, freedom of association, or respect for minority rights.
5. Unconstitutional termination of the tenure in office of any legally elected official.
6. Arbitrary or illegal removal or interference in the appointment or deliberations of members of the judiciary or electoral bodies.
7. Interference by non-elected officials, such as military officers, in the jurisdiction of elected officials.
8. Systematic use of public office to silence, harass, or disrupt the normal and legal activities of members of the political opposition, the press, or civil society.

We also need a set of graduated, automatic responses to help us overcome the inertia and paralysis of political will that result from uncertain standards and the need to reach a consensus *de novo* on each alleged violation. When a democratic threat is identified, the alleged offenders would be requested to explain their actions before the permanent council. A full evaluation would follow, and possible responses could be chosen from a prescribed menu of appropriate options, involving not only the OAS but incentives and disincentives from multilateral institutions and the private sector.

There is also a role for nongovernmental leaders. We at The Carter Center have convened a group of former hemispheric leaders to aid in raising the visibility of the charter, to engage the OAS, and to help it provide appropriate responses when democracy is challenged.

Let me close by congratulating the OAS, which has come a long way from my first association with it thirty years ago. As a promoter of freedom, democracy, and human rights, the OAS is one of the foremost regional organizations in the world. This hemisphere adopted the world's first anti-corruption convention and has developed a multilateral evaluation mechanism on drugs. The OAS has worked on de-mining, peacemaking, and providing scholarships to students. It exemplifies the notion that our best hope for the world is for sovereign states to work together.

The OAS is going through a difficult transition at the moment, but it will emerge even stronger. A new Secretary-General will be chosen this year, and

important discussions will be forthcoming at the General Assembly in Florida and the Fourth Summit of the Americas in Argentina.

We need each other. Let us work together to make our hemisphere the beacon of hope, human dignity, and cooperation for the 21st century.

LATIN AMERICA

Threat Resurges for Venezuelan NGOs

**By Antonio L. Itriago and
Miguel Ángel Itriago***

The threat of a new regulatory scheme to regulate contributions and donations from foreign entities to Venezuelan NGOs has resurged, only a short time after inclusion of such regulations was eliminated from the reformed Penal Code.

El Nacional reported on page A-5 of its January 11, 2005, edition that "indications of support resurfaced yesterday for approval of a new legal regulatory scheme to regulate the funds that civil associations and nongovernmental organizations receive from foreign institutions." The paper cited representative Saúl Ortega, who declared that the regulations would have as their goal that "such cooperation be governed by national legal regulatory schemes [and] would preserve the democratic institutions and the cultural wealth of the Venezuelan people." Some provisions with the same aims were recently proposed for inclusion in the reformation of the Penal Code, although ultimately they were not part of the sanctioned text.

It may be that the proposal is motivated by good intentions, as one cannot logically support foreign-financed activities that are contrary to our democratic institutions and to the domestic cultural wealth. However, it bears pointing out that laws, including criminal laws, already exist that sufficiently protect the system against acts of that kind. Obviously, those who finance such activities are the perpetrators, co-perpetrators, or accomplices of them, against whom sanctions already exist in our legislation (with penalties substantially increased in the above-mentioned reformation of the Penal Code).

We warn, nevertheless, that it would not be constitutional, appropriate, or opportune to enact a regulatory scheme to achieve the indicated objectives, because it could be used in fact to restrict the normal development of institutions, especially those that, within democratic rules, dissent from official policies and plans.

Indeed, the right of free association is acknowledged nationally and internationally as a "human right of first generation" that not only includes the right of all the citizens to create, according to the law, all kinds of associations, foundations, and other civil society organizations with lawful objectives, but also, among other things, encompasses the right to manage and administrate themselves and carry out activities, programs, and projects with absolute freedom, so long as they operate within the law and their own statutes.

For more than 120 years, Venezuela has been a very advanced country regarding the right of free association. Even now, it enjoys a privileged and enviable

position in the concert of the nations. Our legislation contains very few regulations relating to freedom of association, precisely because our constituents and legislators, respectful of the right of free association, have always understood and defended with ample reason the fact that the ideal is to establish a "general framework law" within which citizens can liberally organize and carry out activities in the public interest.

Article 52 of the new Venezuelan Constitution (1999) maintains this approach. It contributes an important element to reinforce the right of freedom of association and to determine the reach of legislative competence in these matters (and by extension the regulation of the so-called NGOs): to the traditional version of the article that consecrates the right of free association, the Constitution adds the express obligation of the State to facilitate its exercise. In other words, correlative to the fundamental *right* of the citizens, the new Constitution establishes for the State a *duty*, equally fundamental: that of facilitating freedom of association.

From a reading of article 52 of the Constitution, it can be concluded with legal clarity that the ability or competence of the State, and hence that of the Parliament in legislating on this matter, is reduced to regulations that "facilitate the exercise" of the constitutional right of free association, which without a doubt excludes the possibility of laws that hinder, limit, create obstacles, or reduce it, rather than facilitating its exercise.

The announced regulation regarding financing of national organizations would not in any form "facilitate" the right of free association, because it would restrict the right of citizens, through the organizations of civil society, to obtain from abroad the financing necessary to develop their activities for lawful purposes; and even more so when, first, one of the biggest obstacles that organizations have, given their nonprofit nature, is the difficulty in obtaining loans from national private banking, and second, when it is official policy to progressively eliminate public subsidies for NGOs.

It should be kept in mind that many programs and social works depend on foreign financing and that the simple announcement of a regulatory scheme will surely have a negative impact on budgets dedicated for the execution of important public works, with consequent harm to the public and even to the Government's image.

It would be very lamentable if, based on ignorance of the content and reach of the constitutional right of free association (which the new Constitution, as we said, has the unquestionable merit of reinforcing), the National Assembly deprived Venezuela of its position of honor won over more than a century through the acts of its most notable jurists and magistrates.

The best way to preserve the Venezuelan democratic stability is to respect and to facilitate the free exercise of the association, voting, and expression rights, among other fundamental rights of citizens.

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LATIN AMERICA

Transparency Versus Government Supervision in Peru

By Beatriz Parodi Luna*

In Peru, NGOs are not a special legal entity. Instead, they are formally constituted under the legal forms of association and foundation (regulated by the Civil Code), mostly as civil associations.

The term NGO in Peruvian legislation refers to an “administrative qualification” derived from the Register known as Non-Governmental Development Organizations Receptor of International Technical Cooperation Register (ONGD-PERU), which is under the responsibility of the Peruvian International Cooperation Agency (Agencia Peruana de Cooperación Internacional, or APCI).^[1]

The provisions of the Peruvian International Technical Cooperation Law (Legislative Decree No. 719) set forth the eligibility criteria. The organization must have a nonprofit purpose and must carry out actions of development that involve international technical cooperation in one of the ways listed in Legislative Decree No. 719. Thus, not all types of nonprofit legal entities (associations and foundations) constituted in Peru are eligible for Administrative Register status--only those that both (i) carry out programs or projects for development, and (ii) channel technical international cooperation (cooperative sources). Listing in the Register is valid for two years. Registration is renewable by presenting pertinent information on the activities that the organization has carried out. The presentation must indicate the projects or activities to which the aid from each cooperative source was devoted, as well as the same information covering the two subsequent years.

The Peruvian Government has been asked about NGO rules, particularly concerning the reception and channeling of donations. In general, the questions have addressed how donations are received from cooperative sources (especially through international technical cooperation) and how they are to be applied to social programs or development projects. Inquiries arise because transparency or clarity does not exist in applying programs to a planned social interest or a nonprofit purpose. As a product of such inquiries, there have been projects to establish diverse legal norms resulting in rules and supervisory mechanisms for NGO activities, including limitations on the compensation paid to NGO Boards. In public debate, some have said that these limitations violate the constitutional rights of freedom of association and freedom of contracting by private organizations, and that the cooperation agreements with cooperative sources have already established adequate supervisory mechanisms (periodic disbursements subject to render of account, accountable management of separate accounts, rules to ensure that funds are applied to the designated activities, and clauses of resolution and reversion of the donation, among others).

On November 13, 2004, Law No. 28386 modified the Laws of International Technical Cooperation and the APCI to establish mechanisms for the APCI to receive information and to exercise supervision over international technical cooperation. In general, the following mechanisms have been established:

- Organizations that receive international technical cooperation will annually send the APCI information on the amount and origin of the cooperation received for each plan, program, project, or specific development activity, which will be included in the transparency portal that the APCI will implement.
- The National Superintendent of Tax Administration (SUNAT), which collects taxes, will monthly give the APCI detailed information about assets that have entered Peru related to international technical cooperation.
- The control, supervision, and inspection of nonrefundable international cooperation received by development NGOs is the responsibility of the Executive Director of the APCI.
- Organizations that misuse international cooperation, or apply it to different activities from those for which it is given, may have their ONGD-PERU registration canceled.
- NGOs that are officially registered and that perform projects in areas of priority for development plans are executor units, responsible for identifying and performing actions and/or projects with the support of international technical cooperation, with the knowledge of the Central, Regional, and Local Governments, as appropriate.

As can be appreciated from the foregoing, the legal modifications are primarily directed at NGOs registered with the APCI. They do not encompass all NGOs. Some NGOs can receive donations or international technical cooperation directly through donation contracts, cooperation agreements, or other similar modes, but need not register with the APCI.

In our opinion, it should be considered that the International Technical Cooperation Law establishes the "general norms to which international technical cooperation and means coming from abroad negotiated through government organisms are subject" (Article 1 of Legislative Decree No. 719). Such an approach would impose an obligation to the extent that the international technical cooperation is channeled through the State. However, nothing prevents NGOs from proceeding directly, rather than going through the State, and entering contracts or donation agreements with cooperative sources and third parties in general. Such NGOs need not be authorized or register.

Nevertheless, listing in the ONGD-PERU Register will be necessary in order to have access to certain tax benefits granted by the Peruvian Government, such as the regime of tax refunds (mainly sales or purchase tax) paid for the acquisition of goods and services referred to in Legislative Decree No. 783.

Finally, if it is healthy that NGOs and, in general, Third Sector entities are managed under the criteria of transparency and visibility in front of society, it should not be forgotten that they are private organizations. Thus, it is necessary to obtain an adequate balance between transparency and State supervision.

We consider that because such organizations have access to resources and benefits of the State (for example, tax benefits, participation in public programs, transference of public resources), it is advisable to establish mechanisms that guarantee transparency in their activities and in the application of the resources to the designated purposes. Transparency in activities should not be construed as a violation of the right to privacy of such organizations, or an abridgment of their constitutional right of freedom of association. The same could be said of self-regulation to establish voluntarily the patterns for their actions in general and for the execution of social or development projects or programs under their charge in particular (as could be the case with contract clauses that regulate conflicts of interests, internal guidelines for the management of projects, codes of conduct enforced by voluntary adherence, and other mechanisms).

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^[11] APCI was created by Law No. 27692, published on April 12, 2002, as a decentralized public organization assigned to the Ministry of Foreign Affairs that constitutes the ruling entity of international technical cooperation.

LATIN AMERICA

Federal Law for the Promotion of Civil Society Organizations in Mexico

By Consuelo Castro*

Mexican nonprofit regulation has advanced with the launching of the Federal Law for the Promotion of the Activities Conducted by Civil Society Organizations, which was enacted and published in the Mexican Official Journal on February 9, 2004. This law is the final result of the efforts initiated in 1994 by the Centro Mexicano para la Filantropía (Mexican Center for Philanthropy), known as CEMEFI; the Convergencia de Organismos Civiles (Convergence of Civic Organizations); the Foro de Apoyo Mutuo (Mutual Support Forum); and the Fundación Miguel Alemán (Miguel Aleman Foundation). These organizations together drafted this bill and promoted it for a decade in Congress.

This new law recognizes the social interest of the activities of civil society organizations. The list of activities to be encouraged includes charitable, sports, civic education, community development, environment, human rights promotion, culture, science, and technology, among others. Organizations undertaking many of the activities on this list already have tax incentives, but others, such as organizations dedicated to human rights or sports, may not be authorized to receive tax-deductible donations.

The new law is expected to affect future federal laws in various ways, such as by granting tax incentives to such activities. This seems likely because the new regulatory framework creates an important basis for coordinating efforts of the federal government to promote nonprofit organizations and their civil society activities. An Inter-Ministry Commission has been created in order to design, implement, and follow up on the promotional actions of the federal government. The commission is being organized by the Ministry of Social Development, the Ministry of the Interior, the Finance and Public Credit Ministry, and the Ministry of Foreign Affairs. The Commission was formally created by a decree published on May 14. The Ministry of Social Development, through the Instituto Nacional de Desarrollo Social (National Institute for Social Development, known as INDESOL), will be the Secretariat. The Commission's internal operational rules were published in the Official Journal on November 23.^[1]

From the nonprofit sector, a Technical Consulting Board or council was also formed. The Board was elected on December 9, 2004. It will comprise nine representatives from civil society organizations; four from the academic, scientific, and cultural sector; and two members of the House of Representatives. This Board will provide feedback to the Inter-Ministry Commission regarding implementation of the registry and promotion activities. For the time being, members are elected to serve for staggered terms--one year, two years, or three years--so that not all

members will be up for renewal at the same time. Nine alternates to the members were also chosen in case of resignations.

A federal registry of nonprofit organizations has been created, as well as an information system. The rules for this registry were published in the Official Journal of November 23.^[21] The registry is free and voluntary, and the process of registering can be initiated online. The benefits of registering are still being created. For example, in order to apply for "federal conversion funds," which will be given next year by the Ministry of Social Development, organizations must be registered. In the future, other ministries will gradually impose the same requirement on nonprofit organizations seeking such support as subsidies, grants, tax exemptions, and funds.

It will take time for nonprofit organizations to register, because doing so will often require changing their bylaws. Many tax-exempt organizations now provide in their bylaws that, in case of dissolution, all assets will be transferred to another tax-exempt organization. In order to register under the new law, an organization's bylaws must stipulate that the recipient of assets upon dissolution will also be registered under this law. Organizations will need to document the bylaw change with a Public Notary, which will incur a cost. The Ministry of Social Development has signed an agreement with the Public Notaries Association in order to reduce the costs for organizations changing their bylaws in this fashion.

The information system implemented from this registry will give organizations visibility as well as provide transparency of the mechanisms and incentives that the federal government dedicates to nonprofit organizations. INDESOL as a matter of fact has already established its web page, <http://www.corresponsabilidad.gob.mx>.

In the long term, the registry is expected to simplify governmental procedures at different ministries. Registration may even be deemed a special kind of ID. For instance, in order to give tax-exempt status, the Ministry of Finance now requires that the nonprofit activities of the organization be certified by a public entity--depending on the subject, either the Ministry of Health or the Ministry of Culture. However, it is difficult to get this certification because the governmental entities have neither offices nor rules for certification. With the registry, the possibility exists for the federal government to establish one "window" for all governmental procedures that nonprofit organizations need. This may require great coordination as well as a genuine commitment to fostering the work of the nonprofit sector. We anticipate a long process, which has just started.

The importance of this law resides in its ability to serve as a means for enhancing philanthropy and thereby promoting civil society participation in activities that seek to develop our country.

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^[1] In Spanish, Reglamento Interno de la Comisión de Fomento de las Actividades de las Organizaciones de la Sociedad Civil.

^[2] In Spanish, Reglamento Interno del Registro Federal de las Organizaciones de la Sociedad Civil.

LATIN AMERICA

**Active Without Recognition:
Obstacles to Development of
the Colombian Third Sector**

By Adriana Ruiz-Restrepo*

Introduction

Polo, an Afro-Colombian born to a rural family of sugarcane cutters, near the city of Cali in the southwestern part of Colombia, was hit by a wayward bullet at the age of seven and permanently blinded. No longer could he help his parents with the landowner's farm animals, or fish by the river. The options for a poor, black, blind boy, as he says, were few. A human trafficker urged the family to let him have Polo as a beggar, a hideous alternative not even considered by his loving parents. An uncle gave Polo a guitar so that he might survive as a pity-evoking blind musician on Cali's buses, but the boy smashed the instrument to pieces, ending any potential it might have had for predicting his future.

Instead, Apolinar Salcedo earned a law degree and an MPA, was elected deputy to the municipal council three times, and then was elected to the position he now holds: mayor of Cali, Colombia's third-largest city, with more than two million residents. Many politicians never imagined that a handicapped person belonging to a minority race could possibly become mayor, but the people trusted Polo. The result was one of those progressive changes that reflect the kind of democracy we Colombians are proud of.

Polo defines himself as a solidarity product. Beyond his family, he credits a great deal of assistance that helped him advance: a doctor who voluntarily provided care beyond the State level; women who housed and looked after him in Cali; teachers at an NGO who taught him Braille; a not-for-profit soccer club for the blind that gave him a chance to become a star; and a privately funded scholarship that enabled him to attend law school.

Every day, such citizens supplement the efforts of the State and the market by undertaking organized activities through juridical not-for-profit persons. In this way, Polo represents the promise of the Colombian Third Sector. Yet it's only a promise. The results fall short of their potential, for two main reasons. First, organizations are atomized; they don't network or collaborate through horizontal sub-networks in ways that might allow them (a) to achieve greater impact or (b) to earn greater public trust. Second, not-for-profit law has not developed adequately to frame and rule the Third Sector's interactions with business, community, and the State.

Definitions

Co-ops, mutual benefit organizations, community organizations, foundations, not-for-profit associations and corporations (better known as NGOs), voluntary entities, neighborhood committees, and other groups together constitute what I call the **Solidarity Sector**. In order to become subjects of rights and obligations, any such organization must be recognized by law, constituted by a private agreement as a not-for-profit juridical person, and registered. This process grants the organization full legal capacity; it can undertake activities of general interest or public utility without further authorization.

By my classification, these organizations fall into two types, which reflect the activities determining their legal structures:

(a) Solidarity Economic Organizations (SEOs) primarily produce goods and services, like other units of economic exploitation, but their members do not pursue personal profit; instead, the profits are reinvested in the organization. Examples include farmer and recycler co-ops and mutual benefit organizations of employees.

(b) Solidarity Development Organizations (SDOs) primarily deliver sociopolitical opportunities and benefits to society. Examples include foundations promoting cultural heritage or entrepreneurial activities, associations for helping internally displaced persons, neighborhood committees, not-for-profit corporations for the defense of human rights, and anti-corruption watchdog organizations.

(I) The Absence of Networking

(a) Magnifying Impacts

When it exists at all, integration in the Solidarity Sector tends to be vertical, bringing together organizations of a single type, such as the Colombian Confederation of NGOs (CCONG) and the National Confederation of Cooperatives (CONFECOOP). Horizontal interaction is relatively rare. Solidarity Economic Organizations customarily identify with the capitalistic investment sector, on the ground that they share the same "enterprise" operating mode. For instance, in the current negotiations to establish an Andean Free Trade Area with the United States, Solidarity Economic Organizations have allied with small and medium-sized enterprises based on similarity of economic size. They did not ally with the Solidarity Development Organizations, which have insisted that the Free Trade Area would have noxious effects on the peasant economy and the vulnerable-population economy, types of economies that usually develop under SEOs. It is an irony that SEOs and SDOs have not teamed up, given that they share the same legal nature, the same obligations to devote resources to social ends, and the same tax benefits.

Although SEOs and SDOs sometimes attend the same forums, they almost never collaborate. This holds true even when their needs are identical. For example, when the Colombian Congress deliberated legal changes that would affect these organizations, the different types of organizations submitted separate comments despite their common concerns.

In public, Solidarity Organizations of both types have low visibility. Though this is improving, they do not frequently appear in the news. Because they are not

perceived to be a key sector in society, the media do not give their news and opinions the same attention that corporate and State voices get.

Solidarity Organizations have virtually no presence in academic life. With the exception of very few universities and schools, the perspectives of this complementary way of development are not taught or researched, even by the organizations themselves. Recently, the trend of Corporate Social Responsibility linked with these kinds of organizations has begun to attract research. Around five labs have started working on developing this market's civic initiative, but the sector as such is not particularly attractive to academia.

In addition, the SDOs devoted to generating opportunity for Colombians concentrate their efforts on two main areas: (a) grassroots and community development, such as microcredit, entrepreneurship, culture, education, and health; and (b) aspects of the Colombian situation of "conflictterrorism,"^[11] such as human rights law and international humanitarian law, emphasizing due process, victim's rights, and the crisis of the internally displaced population.

(b) Protecting Reputations

The greatest attention to organized civil society in Colombian public space has resulted from the human rights (HR) NGOs. They strongly criticized the governmental strategy of democratic security, mostly regarding the antiterrorism statute (finally declared unconstitutional) and the legal framework for the reincorporation of members of the guerrilla (left) and the paramilitary (right) outlaw groups into civil life. In response, President Uribe charged that certain NGOs were aiding the cause of Colombian terrorist groups. This accusation brought immediate and vast media attention, which suggested an intense fight between the President and Colombian NGOs. The NGOs--already little known or appreciated by Colombians--fell under suspicions of backing terrorism, whether they concentrated on human rights or on some other area.

Nineteen HR NGOs presented a writ of protection to the Colombian Constitutional Court. The Court ruled that the President had not focused his condemnation on any particular organization, but had referred ambiguously to a category; consequently, the NGOs were not harmed.^[12] Nevertheless, the Court gave the President a reminder of the limits of his constitutional right of opinion. It explained that when conveying information in a presidential address, he is subject to a strict burden of proof. When conveying his personal opinion, he is nevertheless obliged to have some level of factual justification and reasonableness, because of the potential impact his statements may have on public opinion; this responsibility increases if the address is broadcast. The Court also reminded him that any address must reflect the defense of human rights of all Colombians, and that he and other authorities must refrain from creating any additional risks to HR NGOs. These organizations are constitutionally protected, as their members already incur extraordinarily high risks through reporting individual or collective violations of human rights; they thereby occupy a fundamental role in Colombian democracy, according to the Constitutional Court.

But other scandals, such as a Venezuelan "ghost" foundation and a Danish NGO found to have made grants to armed outlaw groups, have also fueled the generalized suspicion of NGOs. In some instances, health SEOs' funds have been diverted from displaced populations to outlaw groups, and outlaw groups have used SEOs as intermediate contractors. Significant corruption was found in the late 1990s

in co-op banking and financing. Accountability and transparency usually are lacking. SDOs and SEOs alike are affected by the sector's tarnished reputation.

These factors help explain why many Colombians harbor doubts, but the doubts are misplaced. There is no justification for the perceptions of an untrustworthy Third Sector (beyond the isolated cases that should be duly prosecuted) *or* an undemocratic government (as the judicial decision attests). The civic solidarity organization is simply a neutral juridical person; such organizations should no more be the object of suspicion than for-profit corporations or any other legal institution. Indeed, both private corruption and the funding of outlaws are present in the for-profit corporate sector, but no one has ever seriously suggested that, for instance, the limited-liability company as a juridical person endangers society or democracy. At the same time, our democratic regime has constitutional provisions favorable to the existence of a Colombian Third Sector or System (under the European perspective).^[3] In addition, the current government of President Uribe has included several objectives for strengthening this domain in the National Development Plan "Towards a Community State, 2002-2006," under the chapter titled "Building Social Equity."^[4]

If Solidarity Organizations would do more to network with one another in order to form a unified sector and together fashion regular processes for interacting with business, community, and the State, they would raise their profiles, enhance their reputations, and increase their effectiveness.

(II) The Lack of Third Sector Law

But there is also another problem in the Colombian Third Sector: the lack of law, by which I mean not only law as a set of precepts but law as a dynamic discipline in which operating rules evolve.

In Colombia, almost no one cares about not-for-profit law. The Solidarity Organizations pursue their social objectives and the necessary funding, while public authorities concentrate on Colombia's abundant problems. For instance, a longstanding inspection and vigilance statute exists, which addresses both SDOs and SEOs that violate the law through their creation, grant making, or operation. But it seems to have been forgotten. There has been no in-depth study, no follow up and measurement of responsibility *vs.* autonomy, and, above all, no amendment to adjust the law to contemporary needs. In the last ten years, at least three law drafts and several congressional studies have been undertaken, but none has made it onto the Colombian agenda.

The reason is simple: as everyone says in Colombia, urgent matters precede important ones. Unfortunately, however, the failure to tackle the important matters is fueling the urgent ones. Amending the Third Sector laws would allow development and strengthening of the solidarity vehicles that create and redistribute wealth and opportunities in the country. Or, reformulated into a human security perspective, it would help to diminish the hunger, victimization, and criminal recidivism in the most vulnerable population, complementing the efforts of the State and the market.

Improved terms and enforcement of NPO law, or in a positive sense Solidarity Organizations Law, in my definition, is urgently needed to bring order to this domain. It would help the government detect illegal organizations and activities, and at the same time help legitimate organizations flourish.^[5] Creating a state liaison office for

SDOs^[6] and taking seriously the SEOs' Administrative Department and Superintendence would represent definite steps toward achieving this goal.

In addition, it is necessary to breed a new generation of lawyers, politicians, and journalists capable of understanding the importance of civic Solidarity Organizations, including their interactions with the State, the market, and the community, as well as dealing with the newly broadened public sphere in democratic regimes. Recent initiatives elsewhere demonstrate this need. The U.S. Senate Finance Committee created a Panel on the Nonprofit Sector to prepare recommendations for Congress on how to improve the oversight and governance of charitable organizations, and the UN's Secretary General assembled a Panel of Eminent Persons on United Nations-Civil Society Relations, which reflects the needs of our contemporary world. As Kofi Annan recently stated, "The United Nations once dealt with Governments. By now we know that peace and prosperity cannot be achieved without partnerships involving governments, international organizations, the business community, and civil society. In today's world we depend on each other."^[7]

Effective, efficient not-for-profit law has thus become a worldwide necessity, especially in developing countries. In a country like mine, where in addition violence menaces the society's development and the individual's security, failing to develop the law to encourage solidarity and organized citizenship is a grave mistake.

In the acceptance speech upon his election to the *Academie Française*, the respected *doyen* Georges Vedel said that after all of his years practicing law, he still couldn't rigorously define law, but he was pretty sure of what a world without law would look like. Unfortunately, Colombia's current Third Sector offers a good picture of such a world: plenty of good intentions, precepts, isolated acts, equivoques, and mistrust.

Vedel's words helped me refine my conception of law. Years of studying in Colombia and abroad, learning norms, rule, exceptions, and criteria for balancing and distinguishing tend to make you forget what law is all about. At the end of the day, just as Vedel indicated and as Colombian Justice Cepeda showed me through his work, law is about shaping and tailoring a community through a normative system of incentives and limits that, with time, will chart a path for society's advance.

Where to advance--that is an intricate political problem of law, but I believe it has been answered for a few of us. The solution, to paraphrase Civicus World Assembly, is a matter of fueling civic energy into contemporary democracy and development--or in my terms, shaping and tailoring a community that welcomes and protects all, the powerful and the powerless alike.

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UNODC Colombia. The content of the article is the sole responsibility of the author; it does not necessarily represent the opinion of the United Nations.

^[1] Unwilling to describe my country's violence exclusively as the exclusive result of internal conflict or terrorism, and believing they are not mutually exclusive, I characterize the Colombian violence as "conflictterrorism." Whatever its nature, in any event, it generates poverty and fear.

^[2] Colombian Constitutional Court, Sentence T-1191 de 2004.

^[3] Liberty of assembly (art. 37) and liberty of association (art. 38); private property (art. 58) and donations for social interest (art. 62); protection and promotion of associative and solidarity forms of property (art. 58); citizens' duty of responding with humanitarian actions to situations where life and health are in danger according to the principle of social solidarity (art. 95, #2); participating in political life as well as in the civic and community life of the country (art. 95, #5); the State shall contribute to the organization, promotion, and capacity-building of professional, civic, union, community, youth, beneficial, and nongovernmental common utility associations without affecting their autonomy, as they constitute democratic mechanisms of representation in the different established areas of participation, consultation, control, and vigilance of public administration (art. 103); public subventions to individuals or private juridical persons are forbidden but the government may enter into contracts with not-for-profit organizations known to be suitable in order to advance programs and activities of public interest according to the national and local development plans, as regulated by government (art. 355).

^[4] Among others, the creation of an institutional and legal framework with clear rules favorable to the development of the private solidarity sector; the promotion of the socioeconomic development of smaller organizations; the creation of organized forms for the inclusion of independent and informal economy workers; and the promotion of social and solidarity pacts of transparency and conviviality as a formula for achieving public trust in the sector.

^[5] The Constitution assigns to the President of the Republic the inspection, vigilance, and control of cooperative entities (art. 189, #24) and the inspection and vigilance of common utility institutions so that funds will be conserved and properly applied toward accomplishing the will of the founders (art. 189, #26).

^[6] The National Administrative Department of Solidarity Economy is responsible for directing and coordinating state policy for the promotion, planning, protection, strengthening, and entrepreneurial development of Solidarity Economy organizations.

^[7] <http://www.un.org/issues/civilsociety/>.

LATIN AMERICA

The Role of the Media in the Consolidation of Democracy in Latin America

A Conference Report*

Introduction

On November 15, 2004, the Woodrow Wilson Center's Latin American Program and the Office of the Special Rapporteur for Freedom of Expression, Organization of American States, hosted a conference on the role of the media in the consolidation of democracy. *Cynthia Arnson*, the Deputy Director of the Latin American Program, and *Eduardo Bertoni*, the Special Rapporteur for Freedom of Expression, opened the conference. Arnson shared the results of two recent studies about democracy, emphasizing that popular satisfaction with democratic governance is low in many countries and that the media can play an important role in democratic consolidation. She pointed to a United Nations Development Program study in which 43 percent of Latin Americans considered themselves to be "democrats," while 26.5 percent stated that they did not support democratic government. The remainder of the survey group was ambivalent, and Arnson pointed out that this is a group for which meaningful improvements in democratic performance were most important. Arnson also referred to a Latinobarómetro poll demonstrating that, more than a decade after the beginning of democratic transitions, most respondents in Mexico, Peru, Argentina, Brazil, Bolivia, Chile, and Venezuela said that their countries had not succeeded in consolidating democracy. Instead, she noted, the public believed that countries were governed for the good of the few and were headed in the wrong direction. Arnson noted that while over half of respondents expressed some or a lot of trust in the broadcast media, Latin American publics also tend to perceive the communications media as an important *de facto* power driving their respective economic and political systems. While the public valued the role of the media as a watchdog on government actions, respondents also stated that the media's role in forming public opinion meant that they, not the people, exercised the greatest influence on governments.

Eduardo Bertoni provided a brief overview of the Office of the Special Rapporteur for Freedom of Expression, noting that the office has functional autonomy and its own budget. He described the office as responsible for protecting, monitoring, and promoting human rights in the Inter-American system. Bertoni noted that the office attempts to carry out its functions by preparing annual reports and special thematic reports, and by organizing promotional activities such as this conference. He also noted that the office plays an instrumental role in notifying the Inter-American Commission on Human Rights about emergency situations that threaten freedom of expression, so that the Commission may recommend precautionary measures should it deem them necessary. The office also drafts

opinions and presents oral arguments before the Inter-American Court of Human Rights in San José, Costa Rica. Bertoni described some of the successes of the office in promoting democratization and the rule of law in the hemisphere, including the repeal of a number of laws restricting freedom of the press and the promulgation of a number of access-to-information laws in various OAS member states. Finally, Bertoni noted that most threats to freedom of expression can be classified into two groups. Traditional threats to journalists include judicial harassment, a lack of legal norms to implement the right of access to information, and even physical attacks and assassinations. He described nontraditional threats as including the types of issues that would be discussed at the conference.

An Overview of Key Viewpoints

Carlos Eduardo Lins da Silva, PATRI Inc.

Carlos Eduardo Lins da Silva focused on current non-traditional threats to journalism in Brazil, although he also noted at the outset that the line between journalism and entertainment was becoming increasingly blurred in Brazil and some other Latin American countries.

Lins da Silva noted that historically, Brazil has experienced two clearly defined types of journalism, starting with the first two newspapers published there in 1808. He said that one type of journalism—rooted in the tradition of the *Gazeta do Rio de Janeiro*, a state-owned newspaper—almost exclusively publicizes and praises the government, while the other—inspired by the *Correio Braziliense*, published in London and smuggled into Brazil—is strictly opposed to the government and often tied to opposition political movements. He stated that some parts of Brazil are still limited to only these two extreme forms of journalism. Lins da Silva observed that no truly economically independent media existed in Brazil until the 1930s at the earliest. He noted that the period from the 1930s through the 1950s was the first era in which media found themselves economically viable without their political sponsors' aid. He stated that media in some regions of Brazil—especially the poorer ones—have failed to achieve such autonomy even today, and many newspapers continue to be heavily financed by government support. However, the best newspapers in the country, published in cities such as São Paulo, Rio, and Porto Alegre, have been very helpful in the consolidation of democratic institutions in Brazil and have performed their watchdog role properly on many occasions.

Lins da Silva said that while journalists who work for these types of government-dependent newspapers can contribute to the defense of freedom of expression, their role in the formation of real democracy is much more circumscribed. In part for this reason, the capacity of the media to stimulate real democratic consolidation is much more limited than commonly thought. He argued that the potential role of the media in promoting democratic consolidation in Latin America is further limited by other institutions that continue to be weak. He pointed especially to judiciaries and dishonest police forces as examples. Lins da Silva concluded that the stage of perfection which media in any given country are capable of achieving will largely be determined by that of the region which they serve. The exchange between the media and other institutions cannot be denied.

In discussing the blurring distinctions between journalism and entertainment, Lins da Silva noted that newspapers are declining and new forms of providing information, such as the Internet, are growing. In his view, this has led to declining journalistic standards: diminished output of information by trained journalists is not

being adequately replaced by less responsible forms of media like Internet blogs and radio talk shows. He observed that such media too often present opinions as facts, fueling the tendency for declining public trust in journalists as a whole. He also argued that irresponsible journalism in the United States promotes distrust in Latin America. He cited two examples of activities that harm the reputations of journalists generally: coverage of the Iraq war that is perceived in the region to be biased, and the scandal involving *New York Times* reporter Jayson Blair.

Contrary to what one might expect, Lins da Silva noted that the current sales of many media conglomerates that have traditionally been owned by the so-called "media barons" may in fact be detrimental, as at least these long-term owners were largely dedicated to journalistic integrity. He noted that many recent sales of newspapers have been to groups that he considers "adventurers." He attributes such sales to a financial crisis in the media industry generally, and notes that the actions of some of these new owners may discredit journalism in a broader sense.

The Media and the Consolidation of Democracy in Chile

Pablo Halpern, Halpern y Compañía

Pablo Halpern outlined three distinct phases in the relationship between the media and democracy in Chile. From 1990 to 1994, the media played an active role in the transition. Around 1995, when the second phase set in, the media entered a new era of competition. From 2000 onward, Halpern argued, Chilean society has suffered a crisis of confidence in its public institutions.

In describing the first phase, Halpern noted that Chile had experienced a very peculiar transition to democracy, both within the Latin American context and also in comparison with other world democracies. He said that the military regime had been trapped by its own mechanism of succession, agreeing to carry out a plebiscite and proceeding to lose it. Halpern stated that the transition truly became highly successful under a center-left governing coalition because of political stability and sustained economic growth; during the early 1990s, Chile's GDP had grown about 6 to 7 percent per year.

Halpern argued that the political transition commenced with changes to the 1980 constitution that occurred in the late 1980s. Reforms to local governments and the electoral system, among others, followed. During this time, he stated, the press provided a stage for the public debate on democratizing the political system. More liberal points of view gained ground in a press that had traditionally been resistant to promoting reforms. As the transition progressed, Halpern said, institutional stability and diminishing the risk of an authoritarian reversal became distinct editorial tasks for the Chilean press. Halpern observed that the value attached to stability created an alliance among political and private sector elites and the press to "take care" of the political transition, especially with respect to frequent conflicts with the country's armed forces.

Halpern noted that throughout this initial period, as the media editorialized equally in favor of economic stability and strong social policies, social pressures were reduced and a public environment favoring tax and labor reforms was created. Additionally, new media policies were implemented, including a law regulating the National Television Network, making government media public and more autonomous. The private sector was allowed to own and operate television stations. Eventually, the former opposition press also began to disappear, as these outlets had

focused more on their political mission than on becoming financially viable. A lack of understanding of the “new Chile” and the industrial nature of the media ended most center-left media companies.

Finally, the media during this period committed itself to aiding in the process of breaking up terrorist groups. It was not until the mid-1990s that the media began to question the methods used by the new intelligence agencies that had been created under the democratic government.

During the second period of transition, which Halpern labeled the “era of competition,” the democracy of consensus that had held sway since the end of the Pinochet era gave way to more competition. President Frei’s election marked the true beginning of political competition, in Halpern’s opinion, and the figure of the president became less sacred in the media. With Frei, for the first time, the presidency became the subject of press humor.

Simultaneously, the period of competition led to the media becoming a factor in political strategies, with an attendant blurring of the line that divided facts and opinion. Mass utilization of new technologies—broadband, satellite, and the Internet—became more widespread. Systems to measure the size and the taste of audiences were put in place, and with these rapid changes, the media started competing aggressively to capture the largest audience share. Heavy competition unleashed more extreme liberal and conservative viewpoints on values, with the media playing an active role in values-related debates. As an example, Halpern pointed to the systematic resistance to government AIDS campaigns by media outlets that were conservative or very sympathetic to the Catholic Church.

During the third and current period, the media have played a crucial role in uncovering scandals that have triggered a crisis of confidence among the population. Reports of alleged pedophilia involving Catholic bishops, priests, politicians, and businessmen gained widespread attention, but also led to overly aggressive journalism. Halpern pointed to an inaccurate report stating that a legislator had been involved in such activities as one example of these excesses. Thus, Halpern concluded, in contrast to the period of the transition, strengthening democracy no longer plays as important a role in the mission or commitment of the media. Liberal elites continue to press for more true autonomy in the media, along with better quality reporting and the portrayal of a more diverse society.

Discussion

Panel moderator *Julia Preston* of *The New York Times* noted that the issues that the panel debated reminded her of the years of the Reagan administration, when many in the press considered that they were playing their constitutional role in the purest sense through their coverage of Central American warfare in the midst of intense misinformation emanating from Washington. She also observed that one of the main challenges the Latin American news media face is achieving greater independence and higher quality by building commercially successful journalism enterprises. Preston attributed the difficulty to the fact that many journalists are trained in newsgathering but not business.

Lins da Silva pointed out that Brazil has seen a number of new newspapers sprout up that qualitatively are quite good, but that only survive for a few months. He said that the same can be said about some television news programs. He sees the underlying source of this problem as the lack of economic development in Brazil

as a whole. He indicated that many areas in the south and southeast of the country have suffered from poor media quality because of several years of poor economic performance and increasing sales of media companies by “media baron” families to new, less scrupulous owners. Halpern pointed to the different example of *Televisión Nacional* in Chile. As the result of a number of reforms, the channel remains a public station but is not allowed to receive public funds. Thus, the channel has a public mission but must be sustained commercially. He noted that this arrangement has led not only to financial success, but also to real balance in the channel’s presentation. He also observed that in Chile, the media industry generally is highly concentrated; this leads not only to a high risk of political capture, but also to private sector capture. There is no high wall between the business and editorial sides of newspapers, he said. The result is that many times, those who buy significant shares of advertising can complain to editors that their company is not receiving fair coverage, and thereby affect the newspapers’ content.

Ethical Self-Control of the Media: Is it Possible?

Alejandro Junco de la Vega, Grupo Reforma

Alejandro Junco de la Vega asked the audience to contemplate whether journalistic values are being corroded by ambition. If there is a rot in the system, he asked, how far does it go? He said that he acutely appreciated what it meant to work in a country with a compromised system of journalism. He stated that a decade ago, ethics and integrity were journalistic concepts that were virtually unknown in Mexico. But, he said, there is hope, as journalism and freedom of the press have grown immensely over the course of one generation. Ethics, he stated, could not be more important to many of today’s journalists in Mexico.

Before describing the development of his newspaper company, Junco de la Vega emphasized that the story of his papers was the story of those individuals who help journalists and publishers shape journalism—people who are neither employees nor shareholders. In modern business terms they are stakeholders, members of the public who have a sense of civic duty to take up current issues. He stated that those individuals have been the company’s conscience as it seeks to transform a corrupt system into a credible one.

He stated that upon finishing his college education in the United States, he returned to his family-owned newspaper in Monterrey and sought to make significant changes. He banned the bribes and gifts that were traditionally expected and accepted by reporters and editors. With time, his readers became allies in his crusade, and his newspapers asked readers to scrutinize their editorial policies and sit on their editorial councils.

Junco de la Vega described the editorial councils, stating that they form the “compass and the conscience” of his newspapers’ editorial policies. He stated that a new set of councils is inaugurated each year. Each section of the paper has its own council of twelve unpaid citizens, only two of whom are carried over from one year to the next for the purposes of continuity. Thus, 840 community leaders act as individual ombudsmen across the country, speaking for its citizens. He stated that indirectly, these councils promote democracy, not because they tell readers what to think, but because they tell readers what they ought to think about. Junco de la Vega noted that the editorial boards both review past editions of the newspaper and suggest ideas for upcoming issues. Although the editorial boards do not directly

affect the front page of the paper, many of the issues that they suggest end up there.

He stated that he could not overemphasize the role that the editorial councils play in his newspapers' success. They weigh and balance issues that should be raised and consider what solutions should be offered. They know the needs and hopes of ordinary people and know that the newspaper can help the people make future choices. Finally, because the members are politically balanced and come from a wide variety of backgrounds, they help ensure a balanced presentation of the issues. He sees the advantages of such a system as being that the public, rather than the newspaper, sets the agenda. In this way, he argues, the power truly resides in the hands of the readers. He stated that this is an empowering process not only for the public but also for the newspaper staff. Because the editorial boards help determine best practices, they are not a mere intellectual indulgence.

Junco de la Vega concluded by observing that there have been enormous changes in a generation, but that Mexico is still making sense of its past and the persistent tangles of bureaucracy. But, he said, there is a new, optimistic spirit to be found on editorial boards. Journalists are much less likely to compromise their ethics when working for a common purpose, and editorial boards help remind reporters and editors that they are never an invisible player in the community.

The Government-Media Relationship

Peter Eisner, *The Washington Post*

Peter Eisner opened with two quotes. The first, from I.F. Stone, said, "All governments are run by liars and nothing they say should be believed." The second was from George Orwell: "Early in life I noticed that no event is ever correctly reported by a newspaper."

In relation to the first quote, Eisner said that journalism in the United States has always had a basic obligation: standing up to power and reporting to the public on the abuse of power, as a sort of ombudsman. In contrast, Eisner said, polarization and the view of journalism in the United States have reached a point in which, when *The Washington Post* or another newspaper publishes photographs of the dead in Iraq, or when a television network recites the names of U.S. soldiers killed in Iraq, the process is seen by some as a political statement and a radical act. Reflecting on Orwell's quote, he asked the audience to consider the difference between current reporting of the situation in Iraq from an eventual second draft of history. For the time being, at least, the first draft of history is limited in its ability to provide and interpret the context of news events.

Eisner said that he spends a lot of time talking with foreign journalists. He recalled recent visits by groups of journalists from Brazil, Ecuador, and Indonesia. The Brazilians arrived, he said, wanting to discuss the role of the *Post* in the prosecution of the war in Iraq. Eisner said that he had to explain the distinctions between the roles of reporters and editors versus the role of the editorial and opinion pages in the newspaper. Foreign reporters are surprised to find out that the newsroom and the editorial pages are vigorously isolated from one another. Many foreign journalists have come to meetings at the *Post* with the assumption that news reporting is a blend of journalism and opinion; and many of the foreigners said they have seen the *Post* as a monolith reflecting opinions in some way related to the U.S. government.

Eisner said the foreign journalists also wanted to know why the *Post* did not pay more attention to events in Latin America. In part, he said, the situation is particular to the *Post* at the moment, but the foreign news agenda is often controlled by the government agenda in Washington. So, when Iraq takes up most of the space dedicated to foreign news in any one edition, Latin American events often get short shrift. He also recounted conversations with an Argentine friend before the U.S. election. That friend had observed that no matter who won, neither president would pay much attention to Argentina or Latin America generally, other than the U.S. government's preoccupation with Fidel Castro and developments in Cuba. The same view was held by Brazilian journalists, he thought.

Eisner said that with the growth of politically oriented cable television outlets, newspapers have had a limited influence on public opinion and democracy. In a measure of that reality, he said that about 40 percent of the American public wrongly continues to think that weapons of mass destruction had been found in Iraq and that Saddam Hussein played a role in the September 11th attacks.

Finally, Eisner noted that the role of the media in democracy has a different tenor in the United States than in Latin America. In Venezuela, for example, there was a concerted effort by the media to promote opposition to President Hugo Chávez. Prominent in the movement that pushed for a referendum to oust Chávez were media barons who were in a very complex and intelligent way trying to influence public opinion about democracy and what the future of Venezuelan democracy should be. In the United States, by contrast, it was simply a given for many editorial boards that Chávez represented the antithesis of democracy.

Eisner identified the three most essential factors in a healthy government-media relationship: (1) a government that generally respects freedom of the press; (2) media owners who are strong enough to withstand outside pressures; and (3) an independent judiciary that does not impose or allow government to impose restrictions on the free practice of journalism. In the United States, he said, an independent judiciary seemed to be the most important, as journalists are experiencing both major and minor attacks by the government. He pointed to the naming of a special prosecutor to deal with government leaks during the run-up to the war in Iraq. Eisner said that strong and independent media owners are also an important factor, stating that this is increasingly becoming an issue that will reach paramount importance. He pointed to the *Post's* reporting on Watergate as an example of a strong, brave, and independent owner willing to take on a politically sensitive issue despite the consequences.

Eisner concluded with the observation that it is difficult to out-and-out call someone a "liar" in the press. Each country's specific experience with democracy and the media, for better or for worse, depends primarily on what the press is capable of finding out and reporting about.

Economic Independence: The Use of Government Advertisements

Darian Pavli, Open Society Justice Initiative

Darian Pavli discussed the growing web of linkages that tie the media and the government and the implications of these relationships for press freedom. He called the links "indirect interferences" with media freedom that contrast with overt forms of harassment, such as jailing or kidnapping journalists. The most interesting aspect

of these pressures, in Pavli's opinion, is that governments, as they become less repressive, shift from the traditional forms of censorship to subtler forms.

Pavli stated that around the world, not just in Latin America, one of the key forms of indirect interference is government advertising. In the United States, he observed, such advertising is not financially important for media outlets, as private advertising accounts for the bulk of advertising revenues that such outlets receive. But, he said, he had first researched this problem in his native Albania, where securing sufficient government advertising was the primary concern for newspapers across the entire political spectrum. In Albania, government advertising accounted for 30 to 60 percent of total advertising revenues.

He described the central problems as "leverage," "unfettered discretion," and "centralization." In the first instance, the sheer financial importance of government advertising to the business viability of media outlets provides the government substantial leverage over content. "Unfettered discretion" referred to the absence in many countries of a legal framework to limit the discretion that government officials enjoy in distributing these funds. The result is that such official allocations amount to favors. "Centralization" was reflected in the fact that the allocation of advertising monies is centralized, frequently with the minister of communications or information. All three of these problems meant that advertising is invariably used as a way of handing out favors to sympathetic media and punishing less sympathetic media. Further, such distribution distorts media competition in the marketplace, by acting as a subsidy.

Pavli pointed to a report published by the Office of the Special Rapporteur for Freedom of Expression in 2003 that concluded that there was scarce regulation in the area of public-sector advertising, and that those regulations that did exist were largely ignored in many countries in the Americas. This meant, Pavli said, that there were few or no criteria for allocating advertising, and that government advertising was consistently used and abused at every level of government to influence content.

Pavli then reviewed the findings of a study on government advertising in Argentina being prepared by the Open Society Justice Initiative. The study covers four provinces and the federal government in Argentina. Argentine law provides very little regulation of the distribution of government advertising funds. There is no transparency or competitive bidding for allocation. In practice, Pavli observed, a single provincial official is handed a budget and given total discretion as to where to commit government advertising funds.

Pavli noted that because of the important share of government advertising in media outlets' earnings, it is not uncommon in Argentina for journalists from a newspaper or television station to personally "make the rounds and panhandle" for advertising. Raising money is part of a reporter's, not just an advertising department's, professional responsibilities. In many cases, reporters with better skills at fundraising advance more rapidly in their careers.

Pavli stated that government money frequently comes with very specific content-related ties. For example, the money might come with a requirement that government officials be interviewed periodically. Pavli noted that in some small media markets, such as Tierra del Fuego, the government doesn't discriminate and essentially tries to buy out all of the media outlets. Moreover, some provincial governments hire media clipping agencies to analyze content and then provide the analysis to those offices that allocate the advertising funds. A good portion of the

advertising money that is spent appears not to be justified by any business or public service needs, amounting to “bogus” advertising campaigns that become, in effect, subsidies for favored media.

Pavli described a different situation at the federal level. There, the larger newspapers do not depend as heavily for their financial survival on government advertising. But, he noted, there is increasing concentration in the media sector and many companies are saddled with high debts. The owners of such outlets also depend on government for other favors, often related to their other, non media businesses. He said that at the federal level, there are also many strong pressures that are subtle or hidden.

Pavli concluded that, in the face of such financial pressures, the overall picture for media freedom and independence is fairly grim, unless both governments and the media sector agree to undertake reforms and shed light on their financial dealings.

Discussion

Joel Simon of the Committee to Protect Journalists asked Junco de la Vega how he conceived of his role in the promotion of democracy when he was developing his policy of editorial review boards. Junco de la Vega responded that as a publisher, he knows that his knowledge is limited in many areas, and so he prefers to bring in specialists in the field. After a period of time, he said, his editors began to depend on their boards. Further, Junco de la Vega said, the concept of actual participation was a driving force for him. Especially in Mexico City, with a population around 20 million people, individuals tend to feel a sense of apathy and that many issues are beyond their control. Part of his work has been to attempt to send the opposite message—that individuals can affect outcomes. He perceives this as creating a “virtuous cycle” where individuals begin to believe that they truly can make a difference. Further, he expects that the demonstrated benefits his experiment has created will motivate other forms of media to undertake similar reforms. He foresees a multiplier effect of such efforts that will contribute to resolving other long-term problems.

The Role of Schools of Journalism

Lee Bollinger, Columbia University

Following an introduction by Woodrow Wilson Center President and Director *Lee H. Hamilton*, Columbia University President *Lee Bollinger* offered a keynote address covering three main topics: (1) the evolution of freedom of the press in the United States, a history with relevance to the growth of democracy in other countries; (2) the state of university-level education in the United States; and (3) the state of journalism education, particularly in the United States. Bollinger noted that Columbia University’s School of Journalism has many ties to Latin America, including through the awarding of several prizes. He stated that one of his personal goals is to improve those ties and general knowledge about the media in Latin America.

Bollinger provided a brief overview of the development of First Amendment law in the United States. The First Amendment to the U.S. Constitution provides for freedom of speech and freedom of the press. He noted that press freedom in the United States is largely an invention of the 20th century, and especially of the last forty or so years; the decade of the 1960s crystallized the meaning of freedom of

speech. He noted that all of the Supreme Court cases dealing with freedom of speech and the press came after 1919 and that the country has experienced both ups and downs. He recounted the specifics of the Sedition Act introduced during World War I and how it made criticism of the war a criminal offense. He noted that despite our absolute rejection of such legislation today, in 1919 a unanimous Supreme Court upheld the conviction under the Sedition Act of a presidential candidate who criticized the draft.

Bollinger emphasized that it took U. S. courts decades to “get it right.” It was not until 1964 and *New York Times v. Sullivan* that the Supreme Court considered what constitutional limits should be imposed on liability for libelous statements. He argued that this history should be recalled when comparing developments in other countries to those in the United States

Bollinger underscored that a societal commitment to free speech goes far beyond preventing direct governmental censorship. Non-legal forms of suppression and censorship are as important as whether or not government officials promote free speech. Hence, he argued, the ways in which freedom of speech is created are much broader than simple constitutional guarantees.

Bollinger identified two types of freedom of the press standards in the United States. One is for print media. He called these the constitutional-type standards, covering such publications as *The New York Times* and *The Washington Post*. These standards provide, among other things, that the government cannot regulate the publications. A second set of standards applies to the airwaves and electronic media, covering media outlets such as cable television companies. These more public forms of media are considered to be publicly owned and require licenses and public access. Both systems, Bollinger concluded, have been alive and well since 1934.

In discussing the state of university-level education in the United States today, Bollinger noted that in the 25 or so years after World War II, the intellectual subjects of university study changed tremendously. During this same time, American constitutional law was in the process of redefining the American legal curriculum. The same developments occurred in other areas of university teaching, injecting new issues into academic debates. He argued that from 1975 or 1980 until the present, the situation has regressed. Instead of looking outside of university walls for issues, academics consistently looked inward. He maintained that too much academic research and theorizing has become overly abstract and inapplicable in the outside world. Very recently, he noted, it was possible to observe a shift back to the post-World War II academic tradition, focusing on the world outside the university.

Bollinger said that journalism constitutes one of the fundamental ways of bringing outside issues into an academic setting. Thus, one of his fundamental premises is that the profession of journalism is one of the most important in the world today. This is because the media has daily contact with the average person and serves as a source for vital information. He argued that journalism is crucial to how individuals perceive and shape their world.

Bollinger emphasized that universities can contribute to the quality and character of journalism in practice, just as occurs with law and medical schools. Basic journalistic skills are important, and a university can help teach those skills. Similarly, theory is also crucial and difficult to teach well. But, Bollinger warned, focusing excessively on either of these methods of teaching can easily lead schools

to “fall too deeply” into practical skills training or abstract theory and neglect teaching aspiring journalists the importance of balancing these areas.

Bollinger stated that, given the importance of their enterprise, journalism students should be given greater insights into the issues they will address in their writing. One way to do this is to take preexisting courses in the substance of controversial topics and redesign and shape them for journalism students. Thus, instead of shipping journalism students off to political science classes, the issues raised in those courses can be molded into a different format and addressed within a journalistic paradigm.

Bollinger also argued that to ensure continued quality in journalism, greater financial aid must be provided to aspiring journalists. He stated that he would like Columbia's journalism school to be a primary point of contact for issues involving freedom of the press.

During the discussion period, Bollinger addressed some of the concrete issues facing Latin American journalists. He stated that under the principles of freedom of the press as elaborated in the United States, licensing and educational requirements for journalists could not stand. Similarly, he argued that criminal libel laws should not be permitted because they restrict self-government and the notion of sovereignty residing in the people. Such restrictions, he argued, have a “chilling effect” on the freedoms of speech and the press.

APPENDIX: BIOGRAPHIES OF PARTICIPANTS

CYNTHIA J. ARNSON, Deputy Director, Latin American Program

Cynthia J. Arnsón is Deputy Director of the Latin American Program of the Woodrow Wilson International Center for Scholars. She is editor of *Comparative Peace Processes in Latin America* (Woodrow Wilson Center Press and Stanford University Press, 1999), and author of *Crossroads: Congress, the President, and Central America, 1976–1993* (Penn State Press, 1993). Dr. Arnsón is a member of the Editorial Advisory Board of *Foreign Affairs en Español*, and a member of the Advisory Board of Human Rights Watch/Americas. Prior to joining the Wilson Center, Arnsón served as a foreign policy aide in the U.S. House of Representatives, taught at The American University, and was Associate Director of Human Rights Watch/Americas, with responsibility for Colombia, El Salvador, and Nicaragua. She has a Ph.D. in international relations from the Johns Hopkins University School of Advanced International Studies.

EDUARDO A. BERTONI, Special Rapporteur for Freedom of Expression, Organization of American States

Eduardo A. Bertoni is Special Rapporteur for Freedom of Expression of the Inter-American Commission of Human Rights at the Organization of American States (OAS). Mr. Bertoni is an Argentine lawyer and a graduate of the University of Buenos Aires. He is a former Teaching Fellow of the Human Rights Institute of Columbia University School of Law. He has also been appointed Professor of Criminal Law and Criminal Procedure at the School of Law of the Universidad de Buenos Aires, where he has taught undergraduate and graduate courses on freedom of expression and criminal law. Before taking an office at the OAS, he was a legal advisor for several

nongovernmental organizations in his country, among them the Asociación PERIODISTAS. He was a member of the Centro de Estudios Legales y Sociales (CELS), Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP) and Foro para la Reconstrucción Institucional. He has also worked as an advisor to the Department of Justice and Human Rights in Argentina. Mr. Bertoni has written several publications on the right to freedom of expression and has given lectures and conferences in several countries.

LEE C. BOLLINGER, President, Columbia University

Lee C. Bollinger is President of Columbia University in New York City and a member of the faculty of the Law School. He is a graduate of the University of Oregon and Columbia Law School, where he was an Articles Editor of the Law Review. After serving as law clerk for Judge Wilfred Feinberg on the United States Court of Appeals for the Second Circuit and the Chief Justice Warren Burger on the United States Supreme Court, he joined the faculty of the University of Michigan Law School in 1973. In 1987 he was named the Dean of the University of Michigan Law School, a position he held for seven years. He became Provost of Dartmouth College and Professor of Government in July 1994 and was named the twelfth President of the University of Michigan in the November 1996. His primary teaching and scholarly interests are focused on free speech and First Amendment issues, and he has published numerous books, articles, and essays in scholarly journals on these and other subjects. Three highly acclaimed contributions to First Amendment literature include *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press, 2001); *Images of a Free Press* (University of Chicago Press, 1991); and *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, 1986). He is a fellow of the American Academy of Arts and Sciences and a member of the American Philosophical Society.

PETER EISNER, Deputy Foreign Editor, *The Washington Post*

Peter Eisner has been Deputy Foreign Editor at *The Washington Post* since 2002. The author of three books, his most recent is *The Freedom Line* (William Morrow, 2004), a non-fiction narrative about a resistance organization that led 800 Allied pilots to safety through occupied Nazi territory during World War II. His other books are, *Death Beat* (Harper Collins, 1994) written with a Colombian journalist, a personal account of the Colombian drug wars; and *America's Prisoner* (Random House, 1997), the memoirs of Manuel Antonio Noriega. Eisner is the former Foreign Editor of *Newsday*. He led the newspaper's coverage of Middle East terrorism in the 1980s. Later, as *Newsday's* Senior Foreign Correspondent, he broke exclusive stories about the drug wars in Colombia, and received the InterAmerican Press Association Award for "distinguished reporting" on drug trafficking. Eisner began his journalism career at the *Hudson (NY) Register-Star*, and later worked at the *Poughkeepsie (NY) Journal* before joining *The Associated Press*, progressing from staff reporter to bureau chief in Latin America.

PABLO HALPERN, Founder and CEO, Halpern & Co. Strategic Communication

Pablo Halpern is Founder and CEO of Halpern & Co. Strategic Communication, a communications consulting firm with clients in Chile and the rest of Latin America. Halpern is also Dean of the School of Communications at the Universidad del Desarrollo in Santiago, Chile. Previously, he was Director General of Communications for the Government of Chile and in 1993 he was Chief Communications Advisor for the Eduardo Frei Presidential Campaign Committee. From 1989–1994, he was Project

Director at the Center for Economic Research in Latin America (CIEPLAN) in Santiago, Chile and in 1992 he was a Fellow at the Woodrow Wilson International Center for Scholars in Washington, DC. Halpern is also a columnist for the newspaper *La Segunda* and the business magazine *Capital*. He is the best-selling author of *Los Nuevos Chilenos y la Batalla por sus Preferencias*. He holds a B.A. from Boston University, an M.A. from the Henry Grady School of Mass Communications at the University of Georgia- Athens, and a Ph.D. from the Kellogg School of Management at Northwestern University in Evanston, IL.

ALEJANDRO JUNCO, President and Director, Grupo Reforma

Alejandro Junco has built one of the most powerful newspaper conglomerates in Latin America, with dailies in Mexico's three largest cities: Mexico City (*Reforma*)—which today ranks number one among Mexico's elite readership—Guadalajara (*Mural*), and Monterrey (*El Norte*). Aside from his accomplishments in establishing an independent press, Alejandro Junco has also opened greater access to the electronic information industry in Mexico. In 1990, *El Norte* diversified its services to include the delivery of electronic information to computer subscribers through his company, Infotel, which also provides real-time financial information to the investment planners in Mexico and Wall Street. Grupo Reforma, as his seven daily newspaper publishing group is known, has been the most instrumental factor in the evolution of journalism in the country in the last 30 years. In recognition, Mr. Junco received an Honorary Degree of Doctor of Humanities from Michigan State University on December 2000. Born in 1948, in Monterrey, Mexico, he was educated both in Mexico and the United States, obtaining his Bachelor's Degree in Journalism from the University of Texas at Austin in 1969.

CARLOS EDUARDO LINS DA SILVA, Director of Institutional Relations, PATRI, Inc.

Carlos Eduardo Lins da Silva is Director of Institutional Relations at PATRI, Inc. He is also Coordinator of the Media and Society Studies Group at the Instituto Fernando Henrique Cardoso and Member of the Advisory Board for Brazil the Wilson Center. He has been a visiting scholar and professor at several universities and institutes including the University of Texas at Austin; the Center for Latin American Studies at Georgetown University in Washington, DC; the University of São Paulo; Michigan State University (as a Fulbright Foundation scholar); and the Woodrow Wilson International Center for Scholars. Previously he was Deputy Editor-in-Chief of the Brazilian business journal *Valor Econômico* and Senior Editor at the Brasilia Bureau of the *Folha de São Paulo*, Brazil's second largest newspaper. From 1991–1999, Lins da Silva was Senior Correspondent in Washington, DC for *Folha de São Paulo* and Washington Correspondent for the Brazilian Section of the BBC. He holds a B.A. in Journalism from Faculdade Casper Librero at São Paulo Catholic University, an M.A. in Communications from Michigan State University, and a Ph.D. in Communications from the University of São Paulo.

DARIAN PAVLI, Legal Officer, Open Society Justice Initiative

Darian Pavli is Legal Officer for Freedom of Expression and Information at the Open Society Justice Initiative where he designs, coordinates and monitors projects for the promotion and protection of freedom of expression and information in Eastern Europe, the former Soviet Union, Africa, and Latin America. Prior to joining the Open Society Institute, Pavli was a researcher at Human Rights Watch where he monitored and reported on the human rights situation in Albania, Kosovo, and Macedonia. From 1998 to 2000, he was Senior Attorney for the Organization for Security and

Cooperation in Europe and Adjunct Lecturer of Constitutional Law at the University of Tirana Law Faculty in Albania. He holds an LL.B. from University of Tirana Law Faculty, an LL.M. from Central European University, and an LL.M. from New York University School of Law.

JULIA PRESTON, Federal Court Correspondent, *The New York Times*

Julia Preston was named Federal Court Correspondent for *The New York Times*, covering the United States courthouse for the Southern District of New York, in March 2004. Previously, she had been Deputy Investigations Editor since March 2003. Before that she had been United Nations Bureau Chief since October 2002, covering the Security Council deliberations on Iraq. She was an editor on the Foreign Desk in New York from January through September 2002. She was a *New York Times* correspondent in Mexico from September 1995 until September 2001. Ms. Preston came to *The New York Times* in July 1995 after working at *The Washington Post* for nine years as a foreign correspondent. Before that Ms. Preston had worked for *The Boston Globe* and *National Public Radio*. Ms. Preston is the coauthor, with Samuel Dillon, of *Opening Mexico: The Making of a Democracy* (Farrar, Straus and Giroux, 2004), which tells the story of Mexicans' efforts over three decades to loosen the grip of an authoritarian regime and transform their country into a democracy. Born in Lake Forest, Illinois on May 29, 1951, Ms. Preston received a B.A. degree in Latin American Studies from Yale University in 1976.

JOEL SIMON, Deputy Director, Committee to Protect Journalists

Before joining the Committee to Protect Journalists (CPJ) as Americas program coordinator in May 1997, Joel Simon worked as the Mexico City-based freelance correspondent for the *San Francisco Chronicle*. He is the author of *Endangered Mexico: An Environment on the Edge*, published by Sierra Club Books. His work on Latin America has appeared in numerous publications, including *The New York Times*, *The Los Angeles Times*, and the *Columbia Journalism Review*. Simon was promoted to Deputy Director in April 1999. He is a graduate of Amherst College and Stanford University.

* **The Latin American Program of the Woodrow Wilson Center for International Scholars** serves as a bridge between the United States and Latin America, encouraging a free flow of information and dialogue between the two regions. The Program also provides a nonpartisan forum for discussing Latin American and Caribbean issues in Washington, D.C., and for bringing these issues to the attention of opinion leaders and policy makers throughout the Western hemisphere. The Program sponsors major initiatives on Decentralization, Citizen Security, Comparative Peace Processes, Creating Community in the Americas, U.S.-Brazilian relations and U.S.-Mexican relations.

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promote the observance and defense of freedom of expression in the hemisphere. For more information, please visit www.cidh.org/relatoria

This report was drafted by Eric N. Heyer, intern, Office of the Special Rapporteur for Freedom of Expression, OAS, and edited by Cynthia J. Arnson and Elizabeth Bryan of the Woodrow Wilson Center's Latin American Program. The organizers would like to thank the Swedish International Development Cooperation Agency and The Ford Foundation for their generous support of this publication and the conference on which it was based.

ARTICLE

Philanthropy and Law in South Asia: Key Themes and Key Choices

By Mark Sidel and Iftekhar Zaman*

Philanthropy and Law in South Asia – the project and the book – provides an important window into the complex relationship between philanthropy and the state in five key countries of South Asia: Bangladesh, India, Nepal, Pakistan, and Sri Lanka. In South Asia, governments seek, sometimes actively and sometimes perfunctorily, to facilitate giving and the work of the nonprofit sector, for this “third sector” does much that the state cannot or will not do. But governments also seek to control and manage philanthropy and the nonprofit sector, concerned about the sector’s rise to national influence and political authority as an increasingly important factor in development and social change, often with political implications.

Law is a crucial force for the state’s control and facilitation of nonprofit and philanthropic activity, a key crucible for the complex relationship between national governments and nonprofit work. Commentators in and beyond South Asia have often portrayed law as the mechanism for control and management of philanthropy and the nonprofit sector in the subcontinent.¹ And there is, of course, a rich literature on law in Bangladesh, India, Nepal, Pakistan, and Sri Lanka.² But among the many findings and features of our project is that law, and the legal regulation of philanthropy and the nonprofit sector in South Asia, fulfills a considerably more complex and contradictory role than perhaps earlier thought. A conflicting and fascinating picture emerges from these studies: law controls and manages; law also facilitates and encourages. Law restricts the space and autonomy of the nonprofit sector; and simultaneously law may provide legitimate means for nonprofit flexibility in organization, governance, accountability, and programmatic activities. The studies focus on the complex and even contradictory roles played by the law and the key choices that they imply for the countries of South Asia.

This overview has two primary goals. We will briefly review some of the major findings of the research and writing so ably carried out by the scholars, lawyers, and activists who gathered as the project team for Philanthropy and Law in South Asia (PALISA). This will not be a review in great detail, for the fine country chapters in the volume itself do that job in far more detail and with far more contextual sensitivity than we can muster here. Instead, we will focus on discussing and analyzing some of the complex choices, even dilemmas, that the country chapters have brought to the surface and that the societies of South Asia face as their ruling states seek to use law both to control and to facilitate the increasing activities of the philanthropic and nonprofit sectors – choices made considerably more complicated by a changing domestic and international environment.

Background and Legal Context: Paths Toward Reform in the “Complex Tapestry” of South Asian Legal Systems

The essays prepared for our volume present the true complexity of the roots of the state's regulation – through law – of philanthropy and the nonprofit sector in Bangladesh, India, Nepal, Pakistan, and Sri Lanka. The laws and regulations that govern the sector in each of these five countries come from multiple origins. They are not merely (as has sometimes been portrayed) the modern applications of colonial law in which indigenous masters replaced colonial masters in the use of legal regulation to control, restrain, and limit the growth and activities of philanthropy and the nonprofit sector. Rather, they arise out of complicated indigenous and colonial strains of control and facilitation, mixed with significant religious and cultural influences in each country.

If the history of legal regulation of philanthropy and the nonprofit sector in South Asia were merely one of state control, passed along from colonial to indigenous hands, we would be hard pressed to explain the vitality of the nonprofit sector in each of the South Asian countries today. It may be that the original balance, in colonial hands, was in the direction of control and management. But even if that were true, along the way to the early 21st century some change has occurred. Legal regulation of the nonprofit sector continues to provide, and even to emphasize, control and management. But it has adapted, as our country authors show, to facilitate growth and influence rather than merely constraining it, in the process providing an opening for diverse groups to become active and enabling a wide range of organizations to operate with reasonable autonomy under a sometimes bewildering array of legal structures and documents.

Arittha Wikramanayake puts this particularly well in the Sri Lankan context, for example:

The fabric of the law in Sri Lanka ... has a rich texture, not only incorporating principles of various customary and religious laws but also being deeply influenced by the principles of two great legal traditions – ... civil and common law.... During this process, the focus of the law has taken many forms ... influenced by various diverse factors, circumstances and events; resulting in a complex tapestry [that consists] not only of principles of different legal systems, but also of customs and religious principles originating from ... different sources....³

After independence, law adapted as state policy changed — from encouraging growth in the sector in the 1950s and 1960s, to a considerably more suspicious attitude in the 1970s and 1980s, and back to a more facilitative role in more recent years.

The situation is similar in Bangladesh, where, as Sumaiya Khair and Saira Rahman Khan confirm, philanthropy is “rooted in custom, tradition and religion ... transcend[ing] generations and span[ning] communities.”⁴ Colonial rule and colonial law played a substantial role in the early regulatory system for the Bangladeshi nonprofit sector, a structure that has been carried down to the present day with adaptation. And, as the authors point out clearly, the social organizations developed under the colonial structure of control and facilitation transformed themselves in the struggle for independence, in turn also transforming that struggle too. “Social organisations ... were galvanised into taking a political stand vis-à-vis the struggle for independence, and that struggle also resulted in the emergence of new

organisations.”⁵

The Indian system of nonprofit regulation is, as the Indian chapter authors make clear, similarly rooted in complex religious, cultural, economic, social, and political factors, including the strong influence of British colonial law. The Nepalese system of nonprofit regulation also finds its origins in religious, cultural, economic, social, and political roots, though for many years after 1960 the state played a highly restrictive role, and since 1990 nonprofits have gained some measure of rights in the changing Nepalese political system. And so too the Pakistani system, as Zafar Ismail and Qadeer Baig explain well and in detail.⁶

Several important themes emerge here. One is the constant tension between old law — often dating back to the 1850s or 1860s — and the adaptation of that law for modern contexts. This has proved difficult in each of the countries we have studied, and no South Asian country has a monopoly on effective approaches to what, in an earlier era, might have been called the “modernization” of law. When various interest groups are added to the mix, including bureaucracies that have grown dependent on a “raj” system of licenses and approvals, change is even more difficult. In recent years, indigenous actors in Pakistan have moved assertively to avoid the traditional problems of “modernizing” colonial law by proposing new legislative solutions to issues facing parts of the Pakistani nonprofit and philanthropic sector that do not rely on the piecemeal tinkering and amendment of century-old statutes (e.g., registration, status, governance, accountability, and finances). It remains unclear whether that broader approach will succeed, but it is most certainly worth careful attention.

A second major theme, often underemphasized in accounts of nonprofit regulation in South Asia, is the crucial role of religion and religious practice in the development of South Asian nonprofit legal systems. Each of the country chapters discusses the religious heritage of modern nonprofit regulation in some detail. One of the primary contributions of the country chapters, it seems to us, is that they bring religion back into the process of understanding the roots and modern legacies of nonprofit law in South Asia. The authors here are not the only ones to do that; in recent years, the religious roots of nonprofit activity in South Asia and the influences of religion on the nonprofit world have received extensive attention from Sampradaan/Indian Centre for Philanthropy and other researchers, policy-makers, and activists in South Asia.⁷

This process of change and some adaptation has implications for reform of the legal structures and mechanisms by which the state regulates philanthropy and the nonprofit sector in each of the countries we have studied. If law is more complex than originally understood, and has undergone some adaptation and change, then it may be neither feasible nor, frankly, desirable to engage in wholesale substitution of new legal arrangements, particularly from foreign models — though harmonization, simplification, and making the process of nonprofit registration and operation easier and more friendly to citizens in South Asia, while increasing accountability, is certainly desirable.

In particular, given the complexity of the roots and development of the South Asian systems governing philanthropy and law, solutions that emphasize any particular “model,” or “best practices” from abroad that seek to replace current regulatory systems, may not be the answer. That is not to deny that comparative perspectives are useful in the struggles for reform of the legal framework for

philanthropy and the nonprofit sector in the countries of South Asia – of course they are, and the country authors recognize that. But they also recognize that the very complexity of each country's cultural, political, religious, economic, and social situation must be taken fully into account in the reform process, and that any assumption that the current legal framework is merely the "hand-me-down" of colonial rule seriously oversimplifies the struggles underway in South Asia.

Several other themes emerge from the country chapters, though they may not be as explicitly stated as the process of adaptation of older law and the role of religion and religious practice. South Asian states have long been concerned about the role of powerful external donors in their countries. In the 1950s and 1960s, foreign donors focused on working with the state (especially with central government ministries) on social development, services, and policy issues. Many of these donors became frustrated with weak, technically inefficient, and sometimes corrupt government ministries and other state institutions.

As a result, in the 1970s and 1980s, foreign donors emphasized supporting and building indigenous nongovernmental organizations as service providers and, increasingly, as policy advocates and participants. In turn, governments throughout Asia have sought to restrain the influence of external donors and, where possible, to re-channel their contributions to and through state institutions – an arduous and often unsuccessful process for many Asian states. Re-channeling those funds through the state has often failed, and states in South Asia and beyond continue to rely upon controlling flows to indigenous nonprofits as a weak but still troublesome substitute for bringing those funds back "onshore" to the state while seeking to maintain the flow of much-needed donations.⁸

The Foreign Contributions (Regulation) Act (FCRA) in India is the best-known mechanism for controlling the flow of foreign funds and preventing donations to anti-government institutions. But, as the country chapters on Bangladesh and Pakistan also make clear, FCRA is not the only regulatory response to state anxiety about foreign donor influence.

Along with concern about the power of foreign donors, a new anxiety has arisen for South Asian states: the growth of large and powerful domestic nonprofit organizations. The emergence of Grameen Bank and BRAC in Bangladesh, and certain smaller but still influential organizations in India, are perhaps the most prominent examples of this trend in the region. The state's concern about the growth of such powerful indigenous nonprofits is reflected in regulatory action that seeks to limit domestic nonprofits' access not only to foreign capital, but also to commercial opportunities at home as well.

A recent example in Bangladesh illustrates these tensions: Several years ago, the attempt by BRAC, one of Bangladesh's largest and most powerful nonprofit organizations, to establish a commercial bank in competition with the traditional private banking industry proved controversial and provoked opposition by some government regulators as well as some private banks and activists concerned about the expansion of nonprofit activity into the defiantly large profit-making sphere. Eventually, after action by the Supreme Court of Bangladesh, BRAC Bank was authorized to begin business, and it has now become one of Bangladesh's most efficient and profitable commercial banks. But the controversy reflects the state, private, and nonprofit anxiety over the transformation of nonprofits into large, powerful institutions that function as important economic actors as well as fulfilling

their traditional nonprofit and charitable roles.⁹

The Status and Registration of Philanthropic and Nonprofit Organizations: Enhancing the Facilitative Role of Law

Philanthropic and nonprofit organizations are registered and regulated through multiple channels in each of the countries studied by the PALISA project team. Most of these are adapted legacies of colonial and indigenous mechanisms. In Sri Lanka, for example, nonprofit institutions can be organized as companies, trusts, societies, and cooperatives, and can be established through acts of Parliament. Similarly, in Bangladesh, nonprofits may be organized as societies, trusts, *waqf* (the Islamic analogue of trusts), social welfare associations, nonprofit companies, cooperatives, and endowments.

With some permutations, the situation is similar in Nepal, India, and Pakistan. In India, we see public, charitable, and religious trusts of various sorts, along with societies, companies, and cooperatives. In Pakistan, the chapter authors provide extensive detail on voluntary social welfare agencies, societies, trusts, companies, various forms of endowment, cooperatives, and other organizational forms. In Nepal, a similar range exists: societies, various forms of trusts (both formed and statutory), and cooperatives.

In each country, we thus see a wide diversity of nonprofit forms and multiple options for the formation and registration of nonprofit and philanthropic institutions. The formation of nonprofit organizations and their registration under these various options can be easy or cumbersome – but one key point for our discussion is that there are multiple options, and that the sheer availability of options may often be an advantage for nonprofit organizations in their relations with the state. But it is also clear in each country surveyed that every form of organization has its own vertical structure of government monitoring and regulation. This “silo” structure gives nonprofits organizational options, but it also leads to extensive regulation based on restriction rather than facilitation, significant bureaucracy, and difficulty in effecting change.

One of the authors, Arittha Wikramanayake, provides one interpretation of the results of that structure of options:

[T]here are no uniform criteria or procedures [for formation and registration]. Though the existing framework provides a wide choice, flexibility and freedom ... it also has significant drawbacks that tend to undermine the growth of the sector. These drawbacks include the multiplicity of regulators, the overlapping of laws and regulations and lack of common standards by which ... performance ... can be measured. These also lead to the creation of considerable opportunities for “regulatory arbitrage” that even extend as far as non-regulation. The end result is rather unsatisfactory, with such organizations being permitted to operate under varying degrees of regulatory conformity, and the growth of “fly-by-night” operations whose unethical activities tarnish the credibility of the entire sector.¹⁰

In his comments we have the crux of the problem: the multiple channels and options for formation and registration provide opportunities for non-profits to escape heavy-handed state control and management – but they also provide more unsavory organizations with ways to evade state management, and they make accountability

more problematic because of the “lack of common standards by which ... performance ... can be measured.”

The authors of the Bangladesh chapter make similar comments. Khair and Khan write that the lack of uniformity among organizational forms and the legislation that governs them results in a system “plagued by administrative and procedural bottlenecks” and exceptionally difficult to administer. “[T]he slackness and lethargy of implementing authorities makes processes convoluted and time consuming,” leading in turn to the “corrupt manipulations of these officials,” which in turn results, as our Bangladeshi colleagues put it dryly, in processes that are “expensive as well as tedious.”¹¹ But the organizational options for formation also provide nonprofits with “a wide choice of laws,” leading to the sort of organizational “regulatory arbitrage” of which Ariththa Wikramanayake spoke. In the Bangladeshi case, the authors note that “the current practice of incorporating under different laws albeit for similar purposes and with similar objectives actually encourages organisations to take advantage of the diverse legal arrangements available, and engage in non-transparent operations.”¹²

In the Bangladeshi case, choice and flexibility are mixed not only with bureaucracy and corruption, but also, inevitably, with significant government discretion. Security officials check for “anti-state or anti-social activities,” according to the chapter authors, but

[t]here is no indication whatsoever as to what constitutes such activities.... Instances are common where these investigative bodies willfully withhold reports and “sit on the files” until some payment, in cash or kind, is proffered... Therefore, although the text of the law is clear on ... registration, the implementing agencies manipulate the provisions by using their discretionary powers....¹³

A similar diversity of types of organization leads to a range of registration options in India, Pakistan, and Nepal, with similar “arbitrage” flexibility for the sector and similar “silo”-type discretionary regulation by the state – and difficulties in reform.

Is the solution here to “rationalize” the legal regulation of philanthropy and the nonprofit sector by integrating nonprofit regulation into a single law and a “one-window” system for formation and registration? This is the solution proposed by some, including some of the PALISA authors, who view “opportunities for regulatory arbitrage” as a negative and who reflect the frustration in the nonprofit sector at being unable to deal effectively with bureaucratic regulators. But real dangers lurk here as well: the rationalization of the legal regulation of philanthropy may not facilitate its development but merely give the state more control, unfettered by the “opportunities for regulatory arbitrage” that so benefit many nonprofits – good ones as well as the less good – in each of the countries studied in the PALISA project. Single-law rationalization – which currently has not met with approval in any of the South Asian countries surveyed – may prove a fatal pill rather than a panacea for bureaucratic procedures, legal confusion, administrative delay, and corruption.

Despite discussion in each of the five South Asian countries, there is another reason beyond the value of “regulatory arbitrage” why many countries may not move quickly in the direction of integrated legal and administrative systems for the nonprofit sector: a structure of multiple channels for formation and registration is regulated by (and benefits) multiple strands of a nation’s administrative

bureaucracy. In most of the South Asian countries, societies, trusts, companies, cooperatives, and other types of organization are regulated by different parts of the state bureaucracy – each with its own interests, each receiving administrative and other benefits usually at both central and local levels, and each having at least some interest in maintaining line control over the entities it regulates and manages. If the various organizational structures are melded through integrated legislation, then some parts of the bureaucracy will lose out in the great game of regulation and management (and in the rent-seeking that accompanies it). That alone functions as a substantial constraint on moves to “rationalize” and simplify the regulatory structure for formation and regulation of nonprofits.

This debate is clearly underway in at least several of the countries analyzed in our volume. In Bangladesh, the authors of the country chapter discuss conflicting views on the prospect for “harmonized” nonprofit legislation. On the one hand, harmonization promises to “facilitate the functions” of nonprofits, “reduce bureaucratic wrangles,” and “cut down on corrupt practices.” Opponents of harmonization contend that it would “place a constraint on non-profit formation, ... entail[ing] greater government control ... greater concentration of power and broader discretionary power.” The authors’ conclusions emphasize the need for consultation and dialogue, basing any move toward harmonization on “sound policy [that] has more likelihood of success in ... implementation.”¹⁴ Interestingly, the Bangladeshi commentators emphasize harmonizing and simplifying administration – through a “one stop service” system at the NGO Affairs Bureau – even in the absence of harmonized formation laws. Such harmonization is critical, in their view, because of “lengthy and often unnecessary scrutiny” and a “conservative approach [that] fails to acknowledge ... innovative programmes.”¹⁵

Although it provides flexibility for the nonprofit community, the diversity of registration options has its disadvantages. As Anil Kumar Sinha and Sapana Pradhan Malla point out in the Nepal context, because “statutory procedures are centralized and the formalities and requirements are neither specific nor time limited, there is extensive misuse of discretionary power and delay in administrative procedures at all stages, resulting in corrupt practices...”¹⁶ And the harmonization debate appears underway in Nepal as well. The PALISA Nepal authors stand with the harmonizers, recommending “[a] consolidated legal framework harmonizing the governance, regulation and monitoring of nonprofit organizations, with simplified and one-window procedures.” In Nepal, the authors believe, “regulatory arbitrage” imposes bureaucratic responsibilities on nonprofits rather than helping them: “Nonprofits should not be required to engage with too many regulatory bodies, leaving less time to fulfill their basic objectives.”¹⁷

Yet harmonization, even if supported, will take time to come about, as the Nepal chapter authors seem to understand. And thus the first step for them would be “a change in [the] law drafting process and introduction of a competent, efficient, effective and independent Law Drafting or Reform [Commission] that should analyze all aspects of the legal framework” and seek to improve the “self-centered” nature of many enactments presented by government ministries and agencies, which cause extensive focus on “interpretations, procedural clarification, various compliances and dispute settlements, rather than ... mission objectives.”¹⁸

A powerful effort has been made in recent years to simplify and harmonize the registration and oversight processes in Pakistan, with the strong support of prestigious domestic actors such as the Pakistan Centre for Philanthropy and the

NGO Resource Centre, and with the strong financial and political support of the Aga Khan Development Network. The Pakistan Enabling Environment Initiative envisions the establishment of a Charity Commission composed of individuals from government, nonprofit, professional, and academic origins, to manage registration and monitoring of a range of nonprofits, as well as improvements in nonprofit governance and a code of conduct. If adopted, these would be major steps in the direction of harmonization and systemic improvement that, in the words of the Pakistan chapter authors, would “mov[e] away from the current government practice of ‘registration and control.’”¹⁹

But harmonization faces substantial obstacles in Pakistan, where the initiative’s proposals would, in effect, “remove the role of the government from actively participating in the process of monitoring and facilitating the nonprofit sector.... Because this structure would in essence reduce the government’s role and make it fairly passive, the likelihood of it being accepted is tenuous.”²⁰ Harmonization and systemic improvements in Pakistan may in fact need to proceed in smaller and more gradual steps – such as evolutionary amendments to laws such as the Voluntary Social Welfare Act, and having the National Council of Social Welfare, rather than the proposed and controversial Charity Commission, assume a broader mandate over the nonprofit sector. Finding solutions to improve nonprofit and philanthropic registration, oversight, monitoring, and governance in Pakistan that “satisfy the demands of the sector at large, and also satisfy the government in ... continu[ing] to retain oversight” of the Pakistani nonprofit sector remains a complex process.²¹

Balancing “Regulatory Arbitrage” with State Control

States may, as a result of history and culture, retain a legal system in which nonprofit organizations have great flexibility to choose their preferred forms and their preferred channels for registration and regulation. Each of the South Asian countries studied by the Philanthropy and Law in South Asia project has chosen to retain that system of flexibility and choice in formation and regulation – a system that benefits nonprofits by providing multiple channels and benefits bureaucracies by creating multiple “empires.” That relatively flexible menu structure may have its disadvantages, but it is supported by a powerful alliance of the regulated and the regulators.

But this flexibility must have its counterpart in control as well, particularly in systems in which state influence and management of nongovernmental entities has always been vigorous. The counterpart to the flexibility around organizational structure is the state’s retention of control over the purposes for which a nonprofit organization may be formed and registered. The state’s power here has two forms: a broad statement of the purposes and objectives for which a nonprofit may not be formed, and a strong assertion of discretion in interpreting that standard. In India, Agarwal and Dadrawala point out that

while the legal environment for promoting “charitable purposes”... is quite enabling, one often encounters problems in convincing the registering officers whether objectives like “income generation programs for disadvantaged groups” or “empowerment of women” are charitable. Registering officers are often known to go by the “letter” and not the “spirit” of the law.²²

And they retain significant control over the interpretation of such restrictions. Some

similarities appear to exist to particular forms of organizations in Pakistan as well. In Sri Lanka, the state will not permit registration of a nonprofit if its objectives are “contrary to public policy or the public interest” or contrary to the purposes that the registering law seeks to facilitate. These broad statements of prohibited purpose enable the state to wield authority. And states do so with fairly wide discretion, perhaps formally subject in some cases to judicial review, but in reality with virtually unlimited discretion to judge the purposes of an applying organization.

This aspect of state control applies far beyond the nonprofit and philanthropic sphere: In Sri Lanka, “these restrictions and limits are based on public policy and public interest considerations that are generally applicable to all entities, whether nonprofit or otherwise.”²³ State power also rests in other areas, as we shall see: wide authority to terminate, dissolve, or take over nonprofits on the grounds of nonperformance, unlawful purpose, violation of law, or other broad reasons; and strong authority to dispose of assets when nonprofit organizations of various forms are terminated, dissolved, or taken over; receipt of foreign funds; and other arenas. But purpose control is a key element of this process, always available for use by the state even if not actually often utilized and even though its use is generally accompanied, in each of the countries studied in the PALISA process, by a formal legal right to be heard and to object to governmental action.

Some might object that we are assuming too much power for the state. In the Sri Lankan case, the chapter author argues that there is no provision “... focused on restricting the rights of philanthropic and nonprofit organizations ... by the threat of takeovers.... [And] in any event any [such] ministerial action could be challenged before the courts of law, effectively deterring arbitrary action.”²⁴ In Bangladesh, where security organizations retain a statutory right to examine registration applicants for “anti-state or anti-social” activities, “[t]here is no indication whatsoever as to what constitutes such activities.... Instances are common where these investigative bodies willfully withhold reports and ‘sit on the files’ until some payment, in cash or kind, is proffered.”²⁵ At the same time, organizations also take advantage of “loopholes” in purpose legislation. The authors’ prescription for these problems is clear and unarguable: “The language of the law should be clear,” reducing government discretion that may be politicized. At the same time, “strict conformity to the ... purposes for which an organisation may be set up should be ensured,” and sanctions imposed where needed.²⁶

In Nepal, purpose disputes seem to have focused on avoiding confusion in the minds of the public. Several types of organization prohibit political and religious activity. And, at least for societies, the government requires (though the relevant statute, the Society Registration Act, does not mandate) that organizations agree to limit activities to “the policies and directions of the government.”²⁷ These prohibited purposes appear to be enforced as much by discretion as by statute, leading to the strong possibility that such prohibitions may be differentially enforced. As the Nepalese country authors note, “[m]ost of the local authorities responsible for registration and monitoring of NGOs use their discretionary power to require applicants to refrain from political association, affiliation and activities,” subject to suspension or dissolution.²⁸

State Discretion in the Termination, Dissolution, or Government Takeover of Nonprofit Organizations

Throughout the region, governments appear to hold significant discretion in

the use or disbursal of the assets of nonprofits that are terminated, dissolved, or taken over by the government. The levels of discretion differ widely depending on how the organization was dissolved, what type of organization it was, and which country it was in; and they often differ substantially between termination, dissolution, and management takeover. The Bangladesh authors are clear on this phenomenon in their country: "Where organisations are terminated, the remaining assets are taken over by the government but there is very little evidence of how they are used or disbursed later. The decision is discretionary... and the government is not accountable...."²⁹

The situation is similar in several of the other countries in the region. In Nepal, for example, the assets of voluntarily or involuntarily dissolved organizations pass to the government after payment of certain obligations, and the government's discretion appears to be relatively broad. Judicial remedies appear to be available, but the broad government power and discretion seem to have "discourag[ed] nonprofit organizations from amassing property and discourag[ed] accountability."³⁰

In India, where termination, dissolution, and management takeover appear to be regulated in particular detail, state discretion in these processes is identified as less of an issue by the country authors.³¹ In Pakistan, the voluntary termination and dissolution processes appear reasonably well controlled, but "in the case of management takeover [by the government], ... the actions of government are arbitrary more often than not. Even though the laws provide for an opportunity to be heard against such action, in practice ... this is denied....What is left is a shell...."³² In Sri Lanka, where dissolution remains a particularly knotty issue, government discretion in the process appears to be a less serious problem overall.³³

The State and the Dilemmas of Fiscal Policy

The authors have surveyed with sophistication and in great detail the legal incentives available to philanthropic organizations and the nonprofit sector in their respective countries. These incentives fall into two general categories. The first is the tax treatment of the income and goods that nonprofit organizations receive. Generally, those incomes and goods, as well as real property holdings, are advantaged through tax exemptions as well as exemptions on customs duties and other government revenue collection. The second form of tax advantage is an incentive to donors, both individual and corporate, to contribute to the growth of a vibrant nonprofit sector through deductibility of charitable contributions.

Aspects of both structures exist in each of the five countries studied. They differ importantly in detail and degree, and the country chapters give some specifics for each country. Fiscal incentives for donors, nonprofits, and philanthropic organizations providing nonprofit capital are important throughout the world to encourage giving and nonprofit activity for the public benefit. In each country surveyed in our volume, the structure of tax exemption for nonprofit organizations is stronger and broader than the favorable tax treatment through deductions given to individual and corporate donors. It should be recognized that, in general terms, the structure and scope of nonprofit tax exemption in South Asia is fairly wide.

Yet even here, in this broader sphere of tax advantage, there are knotty issues. In some countries, exemptions are not statutorily provided but are granted solely as a matter of privilege by the taxing authorities. This is the case, for example, with respect to nonprofit exemption from value added tax and taxes on

cooperatives in Nepal, which can lead to problems of delay, favoritism, corruption, and an opaque taxation environment for the sector. In situations where tax exemption is statutorily granted, nonprofits generally must apply for the right to avail themselves of the statutory tax exemptions. Such application procedures for statutory exemptions are required, for example, in India, Pakistan, and Nepal, as well as to some degree in Bangladesh, but not, it appears, in Sri Lanka.

In those countries where application and registration procedures for tax exemptions remain a significant hurdle, the government's "retain[ing]... discretionary power," as the Nepal chapter authors put it, carries with it the danger of delay, abuse of discretion, and corruption. In Nepal, "[t]he law ... does not prescribe the extent, procedure, time and limitation of [such] investigations.... In short, tax authority discretion is too high, and uncertainty results." In sum, the Nepal country authors recommend, "procedural requirements should be reduced ... [and] government interference should be minimized."³⁴ In Pakistan, exemption procedures "suffer from discretion in interpretation":

The internal process of central, regional and local tax authority consultations on [exemption] has caused loud complaint throughout the country, with organisations noting that it takes considerable time and effort and incurs informal costs — for in the absence of a fee, "speed money" is generally expected.³⁵

This is a set of problems not yet resolved through proposed changes in legislation and definitions of organizational scope.

In some countries, such as Nepal, procedures for appeal after denials of exemption are murky. In other countries, such as Bangladesh, exemptions are granted on a case-by-case basis and may be granted or withdrawn by relevant government agencies for reasons that are not entirely transparent; and it can be difficult to challenge such decisions. Or tax can be levied by revenue agencies through notices even where the exemptions are still in place. And in India, "the trend appears to be one of a narrowing window of tax exemptions for nonprofits...." The India chapter authors argue that "this is contrary to the sector's expanding role and diversification into nontraditional methods of fundraising."³⁶

Deductibility of donations is available to donors in each of the South Asian countries in certain circumstances, but it tends to be more circumscribed than the basic organizational exemption. In certain countries, such as Bangladesh, deductions for donations are only available for donations to a very limited set of organizations, while nonprofits enjoy a wider array of tax exemptions on income and goods.³⁷ In other countries, such as Nepal, deductibility may be limited. In India, deductibility for religious donations is a particularly problematic issue. The country authors provide a cogent explanation:

Religious giving does not appear to be prompted by the motive of monetary rewards such as tax benefits. Still, denial of tax-deductible status for [religious] donations ... is a thorny issue ... [S]uch denial is contrary to current international practice, and a major disability for religious philanthropy for Indian religious sects.... This approach ... fails to recognize the philanthropic power of religious charity ... fuels public sentiment against sects which do not depend on Indian charity ... [and] creates an underground "economy" in religious charity ... result[ing] in reduced accountability....³⁸

What is overlooked in these discussions is that tax exemptions and deductions are often beside the point, particularly to donors, and particularly at lower levels of giving in most if not all of the countries of South Asia. The chapter author for Sri Lanka makes this point powerfully: "The extremely high level of tax evasion, amply evidenced by the fact that there are no more than 150,000 registered tax payers out of a total population of more than eighteen million, makes the fiscal regime practically irrelevant.... This is important to keep firmly in mind in evaluating the impact of the fiscal regime, in order to prevent a distorted perception of its role...."³⁹ And, in more detail,

it is ... doubtful whether the law provides any meaningful incentives that can motivate the public to contribute to nonprofit and charitable activities.... [T]he law limits the exemptions to a sum of 25,000 rupees or a third of a person's assessable income, whichever is less. In practice, this does not have much impact in motivating any person to factor in such contributions into tax planning. Hence, it is important that these thresholds are critically examined and revised to reflect reality. We must also question whether the tax law itself would be sufficient to make any real impact on public participation in philanthropic and nonprofit activity.... [T]he level of chronic tax evasion makes the whole system of taxes the subject of ridicule. In such an environment, it would be wishful thinking to expect any increase in public participation even if such thresholds are revised, unless tax compliance is also improved.⁴⁰

But it is important to recognize that the virtual irrelevance of taxation to charitable decision making (and regulation) goes far beyond the Sri Lankan case to encompass most of South Asia. In Pakistan, to cite just one other example, the number of taxpayers remains very limited, and most agricultural land is excluded from the tax base. In the countries where taxation retains some relevance, however marginal, and where tax filing duties may be slightly more widespread, taxation still functions largely as a method of government regulation and control rather than as a real impetus for charitable giving.

So the fiscal regime is more likely to be important not for deductibility for donors – though this may become a more important issue in the years ahead – but for the flexibility it provides for a wide range of nonprofits to operate without paying revenue to the government. That importance, outlined by the PALISA authors, is of course balanced by the state's power to give or to refuse such exemptions, another means of retaining some control over nonprofit and philanthropic institutions. That revenue authorities retain substantial discretion in these decisions is also understandable (though in some countries, Sri Lanka for example, state discretion may be subject to higher-level and judicial review).

And, of course, the continued vitality of an exemption system provides at least two other important sectors of a state's government and administrative bureaucracy — tax collectors and customs collectors — with a hand in the management and control over nonprofit organizations. To the degree that rent-seeking takes place in the process of exempting nonprofits from the formal payment of taxes, nonprofits are contributing directly (rather than indirectly and more fairly) to the maintenance of the state apparatus and its personnel, often at both local and central levels. That structure of support is enhanced by exemption or deduction procedures that are perhaps not entirely transparent, as several of the country

chapters make fully clear.

In several countries in the region, the complexity of fiscal policies toward the nonprofit sector and the difficulty of enforcing them leads PALISA authors in the direction of corporatization – the increasing tendency to seek to adopt corporate legal models for the nonprofit sector. Thus in Bangladesh, the country authors write, “[t]he ... approach towards the NGO sector needs to be consistent with reform measures chalked out and implemented by the government for the private sector,” in terms of clarity of the law and limitation of state discretion.⁴¹ In Sri Lanka, private companies have become a preferred route for working in the nonprofit sector:

Private companies offer many advantages. Firstly, like most other companies, they enjoy limited liability. Private companies also have the right to control the composition of their members [through the Board of Directors]. Additionally, the law also offers a substantial degree of confidentiality over the accounts of the company, as well as flexibility with regard to internal management procedures, disclosure requirements, as well as member meetings.⁴²

There is a similar sense in India:

In Maharashtra and Gujarat, for example, a Section 25 company [a company with limited liability which may be formed for “promoting commerce, art, science, religion, charity or any other useful object,” provided no profits (if any) or other income in promoting the objects is distributed by way of dividend, etc., to its members] enjoys certain advantages over a public charitable trust or society. Being outside the purview and jurisdiction of the charity commissioner, the company enjoys more operational freedom....⁴³

A different perspective is provided for Pakistan, emphasizing both the advantages and problems of the corporatization trend:

Charitable companies under ... the Companies Ordinance of 1984 exist in a regulatory framework primarily geared towards protection of the investment expectations of corporate shareholders. This results in a degree of regulation and compliance with regulatory procedures that is infeasible for most civil society organisations. Thus there is a need for a not-for-profit law that enables incorporation on less onerous terms, while granting the benefits of limited liability and the status of an artificial juridical person. On the other hand, the high level of regulatory control to which charitable companies are subjected can be said to enhance the credibility of such companies. This signaling effect is of value to the best organised (and funded) civil society organisations that can afford the compliance costs of the Ordinance of 1984.⁴⁴

Resource Mobilization, Capital Formation, and the Drive Toward Flexibility in Development and Investment Options for Nonprofits

In each of the countries studied here, there is a history of state controls on the permissible investments that nonprofit organizations can make with their funds. These controls have traditionally limited nonprofit investments in state bonds and securities and interest-bearing bank accounts. In some countries, however, some forms of nonprofit organization enjoy more flexibility in investment regulation,

enhancing the “regulatory arbitrage” discussed earlier.

Perhaps the key point here is to view the issue of “permissible investments” from a longer-term perspective. Over a period of several decades, it is clear that detailed state controls on nonprofit investments are gradually being reduced as nonprofits seek better returns and capital markets seek funds. In effect, of the panoply of state controls on the nonprofit sector in South Asia, permissible investments is an aspect of control that appears to be gradually lifting.

A detailed study of the reasons for this shift was not within the scope of the PALISA project and volume. The authors do an admirable job identifying the remaining restrictions on nonprofit investment and explaining the inconsistent treatment meted out to societies, trusts, nonprofit companies, and other nonprofit entities and the “regulatory arbitrage” that can result. It is appropriate, nevertheless, to mention here some of the reasons that restrictions on “permissible investments” are lifting. They include the rise of markets in each of the South Asian countries, the retreat from the state in certain areas of commerce, the growth of capital markets and their need for investments, and the rising pressures of globalization. Each of these forces and trends affects the South Asian nonprofit sector in the area of permissible investments and well beyond.

State Control and the Knotty Problem of Foreign Funding

Foreign funding is an issue to a greater or lesser degree in most of the countries of the region. In India, the national government retains control of a strict and complex regulatory process involving registration and monitoring of groups receiving foreign funding, or case-by-case approval of individual foreign funding projects. The Indian central government’s strict control of foreign funding regulation is a major arena of conflict between the state and the nonprofit sector, and perhaps the key fault line between larger progressive NGOs and the national government. That conflict is well described in the India country chapter and in other recent work on the Indian nonprofit sector.⁴⁵

In Bangladesh, “although the regulatory frameworks were ostensibly adopted to facilitate NGOs operations, in effect they...hinder activities and restrict the scope of work.” Government approvals are required to receive foreign funds, then for every project undertaken with foreign donations, and then again for the actual disbursement of funds.⁴⁶ In Nepal, foreign funding is allowed but recipient nonprofits must apply for approval from the Social Welfare Council to receive foreign funding for projects over Rs. 200,000 (about US\$2,500). The Council then coordinates with relevant government ministries on the application.

The authors from Nepal note that there are few criteria prescribed for such coordination, causing “confusion for donors, non-governmental organizations and governmental authorities alike.”⁴⁷ In Pakistan, where there has traditionally been less regulation of foreign donations, the government is now “concerned” about

the substantial unreported donations received by organisations promoting militancy, terrorism, sectarianism and creating ethnic strife.... As a consequence, the government has legislated that all *madaris* [religious schools] and other religious institutions must be registered, and that all funds received from outside Pakistan be reported.⁴⁸

In Sri Lanka, on the other hand, foreign funding is not generally subject to government approval or monitoring.

The debate over foreign funding and its regulation in India – and to a lesser degree in several of the other South Asian countries – reflects the state's continuing suspicion that NGOs may intervene in politics or be used by external forces, and the state's continuing concern for maintaining control over the NGO sector, particularly in its relations with external actors. But the debate, along with the continuing conflict over moving this debate forward toward some sort of peaceable resolution, also reflects the increasing corporatization of nonprofit affairs in South Asia.

By corporatization we mean, in part, the tendency to look toward corporate models for solutions to problems facing the South Asian nonprofit sector. In the foreign funding arena, we see this at work in the attempts by the NGO sector (and occasional allies in the Ministry of Finance and the for-profit sector) to bring the NGO foreign funding regulatory scheme within the modernized Foreign Exchange Management Act (FEMA) umbrella. FEMA is an example of India's new globalized legislation, an attempt to modernize and liberalize the legislative framework for foreign exchange transactions to suit the international environment in which India's indigenous providers of goods and services must now operate. One can call this the transition from state administration to state monitoring, from transaction-by-transaction approvals to more general licensing. It is underway in India and elsewhere in the region, though in fits and starts given the sensitivity of foreign funding and, in India, the more than 20-year-old debate over it. But that trend is a historical one, and its power can already be seen.⁴⁹

A number of other examples of corporate modeling are described in the PALISA volume. Throughout the region, the nonprofit community, the accounting community and the government look to commercial accounting standards to provide models for the modernization of nonprofit accounting. States around the region look to corporate law models to try to rationalize, make uniform, and simplify the diverse, complex, and overlapping traditional models of nonprofit formation, registration, and governance. In one sense the attraction of corporate models reflects the nonprofit community's belief that the corporate community has been more successful in persuading the government to move toward a liberalized regulatory environment. In another sense, the new successful corporations in South Asia increasingly seem to be useful institutional models for a nonprofit world that is struggling with the need to mobilize resources from private and public and local and international sources, and to work with government in an environment that is increasingly contractual rather than welfare-based.

An overabundance of government control and management is an issue in each of the South Asian countries and a source of continuing conflict between states and the nonprofit world. On the other hand, in the view of many of the PALISA authors, the state is also under-involved, under-managing and under-regulating certain aspects of the nonprofit sector. In Sri Lanka, for example, the author notes that the government imposes no regulatory or monitoring restrictions on the receipt of foreign funds for those indigenous NGOs not tied to the Tamil Tigers, nor does it effectively monitor and enforce statutory restrictions on permissible investments by nonprofits. The result is a structure of insufficient protection that provokes doubts about nonprofit integrity and weakens nonprofit accountability.

The Struggle to Transform Nonprofit Governance and Accountability

Several important aspects of nonprofit governance, accountability, and self-regulation emerge from the five country studies. The news is not particularly optimistic in any of the cases, but the developments are highly interesting in terms of comparative analysis of nonprofit regulatory systems. They are of particular interest given the recent conference on nonprofit governance, accountability, and self-regulation facilitated by the Asia Pacific Philanthropy Consortium, which produced very useful data for comparative analysis of the situation in South Asia.⁵⁰

Governance

The first theme to emerge from the PALISA studies is the lack of consistency in the statutory norms, monitoring, and enforcement of rules for the governance of nonprofit institutions. In South Asia, statutory governance requirements are generally different for each form of nonprofit organization – societies, trusts, associations, nonprofit companies, cooperatives – within each country. Some statutes mandate detailed governance procedures for specific types of nonprofit (as in the case of trusts, for example, in several countries surveyed), while other, considerably weaker statutes allow the organizations themselves to prescribe governance norms through bylaws and other internal documents. And in several countries, like Sri Lanka, some governance requirements are embedded in case law that is even more difficult for nonprofits and their members to access than the legislation itself — which is not easy to find and understand.

Regardless of whether a nonprofit begins from a base of detailed statutory governance or weak legal governance, the result seems similar: there is little effective government-based, member-based, or public monitoring or accountability for nonprofit governance. And that has key effects. In governance terms, the result is almost invariably weak boards, strong founder or successor executives, organizations dependent upon personality, and weak accountability. The weak board/strong executive dynamic is identified as a significant issue by each of the country chapter authors at different points in their analyses. The power of donors only exacerbates this problem. As Zafar Ismail and Qadeer Baig put it in the Pakistani context, “because of resource dependence, in Pakistan power lies with the donors. In reality, therefore, it is the senior management of nonprofit organisations and the donors who actually run these organisations, and the governing bodies are largely cosmetic.”⁵¹

The authors of the PALISA chapters present a number of possible solutions to this linked problem of governance and accountability. Some suggest revamping the laws, a process now underway in Pakistan. Others call for training and awareness-building well before the complex and highly difficult process of legislative revamping begins. Still others would go beyond the process of overhauling different organizational streams of legislation (covering societies, associations, trusts, etc.) and seek to move, sooner or later, toward an “umbrella” or “comprehensive” system of nonprofit regulation. But strengthened governance is higher on the agenda of both the state and at least some nonprofits than ever before in South Asia.

Accountability

The second theme that emerges in the chapters, and one that is closely linked

to the weaknesses of nonprofit governance, is the essential weakness in the accountability of nonprofits in every country surveyed. Accountability to the government exists more on paper than in any real substance, accountability to members and other specific constituencies is weak, and accountability to the public is almost nil. Accountability within the fiscal and tax realms is weak, as is audit accountability to government and organizational members.

Yet it is important to differentiate the forms and levels of accountability. A study of India, for example,

may give an impression that Indian NGOs are not very serious about accountability, [but] this is not quite correct.... [W]e need to distinguish between accountability and public disclosure. Nonprofits naturally feel accountable to their donors.... But the sense of accountability to the general public is not an automatic response.

But recent developments indicate that as donations rise within India, accountability to the Indian public may also improve.⁵² A similar point is made for Pakistan: “[T]he weakest link in the accountability chain – in essence, the missing link – is that between nonprofits and their beneficiaries....”⁵³

In Sri Lanka, few nonprofits (and few citizens) file tax returns, and the government does not enforce audit requirements effectively. In Bangladesh, where most nonprofits need not even file a tax return, audit integrity may be compromised, and public disclosure or annual report requirements are little more than ritualistic. The result is stark: “The laws ensuring accountability and transparency are not sufficient to curb corrupt practices.... [C]orruption has become the norm and honesty the exception.”⁵⁴ All of this is exacerbated in countries, like Bangladesh, where the nonprofit sector has become a “booming business” and some organizations have become political “powerhouses.”⁵⁵

This is sometimes a problem of loose and general law governing nonprofit accountability, as the Sri Lankan authors note. But even where the law governing nonprofit accountability – tax returns, nonprofit audits, annual reports, public disclosure – is reasonably strong, the provisions lack uniformity and consistency across organizational forms. The lack of uniformity and consistency enhances the “regulatory arbitrage” of which Wikramanayake writes. And even where legal provisions are strong, detailed, and clear, monitoring and enforcement is weak and inconsistent.

And, of course, legal provisions may be absent or insufficiently detailed. That, according to the country commentators, appears to be the case in Bangladesh, where accountability rules do not generally require public disclosure, and where accounting and audit standards are weak.⁵⁶ In such cases, the first step is often the elaboration of detailed, strict legal norms, well before implementation and enforcement issues can be tackled.

Where government-organized umbrella or monitoring organizations are involved, as in Nepal through the Social Welfare Council, they also seem to have substantial difficulties in enforcing sufficient accountability. The Nepal authors note that such bodies “have not been satisfactorily able to monitor organizational activities and their financial sources in a proper, systematic and coordinated manner.” And “political influences and interference” remains a substantial problem.⁵⁷

Weak accountability systems for nonprofit institutions are a particular problem because of the essential ambivalence of the nonprofit sector toward strengthening its accountability. This ambivalence may be noted in countries far removed from South Asia as well as within the region. This is not to say that all or even most nonprofits in South Asia are ambivalent about accountability norms and their enforcement. But enough are, as the PALISA authors make clear, to cause a problem.

Where the government is unable to effectively monitor and enforce accountability rules, and at least some organizations within the sector are ambivalent about either strengthened legal provisions or strengthened enforcement, accountability is perhaps destined to remain weak. This is a major ongoing dilemma for the South Asian nonprofit sector.

Self-Regulation

If governance norms are inconsistent, under-monitored, and under-enforced, and if accountability norms are inconsistent, weak, and under-enforced, then self-regulation naturally emerges as a potential solution. But it is a solution with its own deep problems. For the third theme that emerges in our book is the difficulty of formulating and enforcing self-regulatory norms within the nonprofit sector of each of the South Asian countries.

Self-regulation emerges, in South Asia and elsewhere, out of a number of different and occasionally contradictory motivations. The state is incapable; yet the state is too strong. The nonprofit sector seeks to preempt stricter government regulation; the nonprofit sector seeks to regulate itself because of the absence of any effective government hand; the nonprofit sector seeks to self-regulate to evade "rent-seeking" and other aspects of the political economy of weak but interventionist government regulation. All of these are real motivations for the increasing attention to self-regulation in the South Asian nonprofit community, despite their self-evident contradictions.⁵⁸

But self-regulation is new on the agenda, and it is slow-going in each of the South Asian countries. The experiments with self-regulation have proceeded with the most vigor and energy in India, as Sanjay Agarwal and Noshir Dadrawala point out, with a number of experiments and initiatives underway: the development of codes of conduct and monitoring or ranking or "validation" mechanisms; the formation of a "Credibility Alliance" to strengthen the sector's understanding of how to improve accountability and the public's understanding of the nonprofit sector; and other activities. Contradictions abound, and thus one of the more widespread self-regulation efforts has also been supported by the government, through the Planning Commission.

The lessons of the Indian self-regulation experience thus far appear to be twofold: experimentation with diverse and innovative approaches is useful rather than early choice of a single model for nationwide implementation (a choice that might be impossible to implement in India in any case); and the very diversity and contradictions of the Indian nonprofit sector make the spread and acceptance of self-regulation particularly difficult. It will be a long road.⁵⁹

In Pakistan, the Pakistan NGO Forum has developed a Code of Conduct aimed at “improved governance and greater accountability,” which may eventually be able to serve as an initial roadmap to self-regulation. And the recent attempts to promote an Enabling Environment Initiative and a draft law emphasize self-regulation as well, including a code of conduct to be developed by the proposed Charity Commission with the input of the nonprofit sector. But it will be a long road toward self-regulation, and a dangerous one as well. As the Pakistan authors explain, the Pakistani government cracked down on nonprofits in the late 1990s, and “[u]nless self-regulation is introduced and practised either voluntarily or in response to the enactment of the proposed Enabling Environment Initiative law, there is a strong likelihood that a [government] campaign similar” to the earlier repression will recur.⁶⁰

In Bangladesh, it will be a long road toward self-regulation as well. The Association of Development Agencies of Bangladesh (ADAB) has adopted a Code of Ethics, but institutional observance is spotty. And the politicization and factionalism of both ADAB and the Bangladeshi nonprofit sector, including formation of the Federation of NGOs in Bangladesh (FNB) as a new umbrella body rivaling ADAB, certainly do not help matters. Self-regulation will remain on the agenda in Bangladesh, at least in general terms, but it does not appear to be faring successfully yet despite the formulation of a national Code of Ethics for the nonprofit sector.⁶¹

Some activity is also underway in Nepal, where the NGO Federation has promulgated and is attempting to promote implementation of a fairly detailed Code of Conduct for the nonprofit community.⁶² And the road will be long in Sri Lanka too:

The very thought of sector-implemented “self-regulation,” even in the case of large public quoted companies, is unusual in Sri Lanka, and in any event it is viewed with widespread cynicism. It is no different within the nonprofit sector, considering that “self-regulation” generally evolves within an industry, based on its perceptions of common needs for maintaining its integrity and public confidence. This evolution has not yet taken place within the highly diverse Sri Lankan nonprofit sector. Thus there are currently no standards or codes of conduct or best practices within the sector and there appear to be few prospects for the development of such standards in the near future.⁶³

Conclusion

We have provided but a brief if intentionally provocative summary of the detailed chapters drafted by the committed and enthusiastic authors represented in our volume. Our objective has been to bring into focus a key, overarching theme: In each aspect of the regulation of nonprofit and philanthropy institutions in South Asia – organizational form, status, and registration; permitted and prohibited purposes; fiscal policy, resource mobilization, and capital formation; governance and accountability; and other issues – the state and the nonprofit sector in each country are engaged in long-term and complex battles over the very role of regulation.

A place on the spectrum between restriction and facilitation is the broad overall parameter of this struggle, and that place will be found differently in various countries and among various nonprofit organizational forms. But restriction and facilitation form the key contours of that great contention between the state and the nonprofit and philanthropic sector. The resolution may be significant for just and

sustainable economic, political, social, and cultural change in the countries of South Asia, and those struggles will bear close watching in the years ahead.

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This essay is adapted from Sidel and Zaman's introduction to *Philanthropy and Law in South Asia* (Asia Pacific Philanthropy Consortium, 2004). *IJNL* readers interested in obtaining the volume should contact Mark Sidel at mark-sidel@uiowa.edu.

¹ For other useful work on law and philanthropy and the nonprofit sector in South Asia and elsewhere in Asia, see Noshir Dadrawala, *Management of Nonprofit Organisations* (Centre for Advancement of Philanthropy [Mumbai], 1996); Noshir Dadrawala, *Country Report for NGO Laws and Regulations in India* (ICNL, 2001); Zafar Ismail, *The Legal Framework for Non-profit Institutions in Pakistan* (SPDC and Johns Hopkins Comparative Nonprofit Sector Project, 2001); Pakistan Centre for Philanthropy, *Creating an Enabling Legal Framework for Nonprofit Organisations in Pakistan* (2002); Thomas Silk, *Philanthropy and Law in Asia: A Comparative Study of the Nonprofit Legal Systems in Ten Asia-Pacific Countries* (Jossey-Bass, 1999, available at www.asianphilanthropy.org); S.S. Srivastava et al., *The Legal Framework for Nonprofit Institutions in India* (PRIA and Johns Hopkins Comparative Nonprofit Sector Project, 2001); Voluntary Action Network India, *Laws, Rules and Regulations for the Voluntary Sector: Report of the South Asian Conference* (1996); the excellent work done at Accountaid (New Delhi) (www.accountaid.net); and the papers presented to the Asia Pacific Philanthropy Consortium's conference on Governance, Organizational Effectiveness, and the Non-Profit Sector (September 2003), available at www.asianphilanthropy.com. Some of those sources and others more numerous than can be listed here are discussed at Sidel, *Recent Research on Philanthropy and the Nonprofit Sector in India and South Asia*, 12 *Voluntas* 171-180 (2001).

² The uses of law in South Asia well beyond philanthropy and the nonprofit sector have been well discussed in a range of commentaries; they include Michael Anderson and Sumit Guha (eds.), *Changing Concepts of Rights and Justice in South Asia* (Oxford, 1998); Muhammad Azam Chaudhary, *Justice in Practice: Legal Ethnography of a Pakistani Punjab Village* (Oxford, 1999); Rajeev Dhavan, *Only the Good News: On the Law of the Press in India* (Manohar, 1987); Rajeev Dhavan, R. Sudarshan, and Salman Kurshid, *Judges and the Judicial Power: Essays in Honour of Justice V.R. Krishna Iyer* (Sweet and Maxwell, 1985); Marc Galanter, *Law and Society in India* (Oxford, 1989); Marc Galanter, *Law and the Backward Classes in India* (California, 1984); Savitri Goonesekere, *Violence, Law, and Women's Rights in South Asia* (Sage, 2004); Sara Hossain, Shahdeen Malik, and Bushra Musa, *Public Interest Litigation in South Asia: Rights in Search of Remedies* (University Press

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³ Arittha Wikramanayake, *Philanthropy and Law in Sri Lanka*, pp. 333, 338.

⁴ Sumaiya Khair and Saira Rahman Khan, *Philanthropy and Law in Bangladesh*, p. 49.

⁵ *Id.*, p. 50.

⁶ Anil Kumar Sinha and Sapana Pradhan Malla, *Philanthropy and Law in Nepal*, pp. 185-187; Zafar Ismail and Qadeer Baig, *Philanthropy and Law in Pakistan*, pp. 245-249.

⁷ See Pushpa Sundar, *For God's Sake: Religious Charity and Social Development in India* (Indian Centre for Philanthropy/Sampraadaan, 2002); Rakesh Kapoor and Amit Kumar Sharma, *Religious Philanthropy and Organised Social Development Efforts in India* (2001). More generally on law and religion in South Asia, see Brenda Cossman, *Secularism's Last Sigh?: Hindutva and the (Mis)rule of Law* (Oxford, 1999); Gary Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton, 2003); Sultana Kamal, *Her Unfearing Mind: Women and Muslim Laws in Bangladesh* (Ain o Salish Kendra (Dhaka), 2001); Gerald Larson (ed.), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana, 2001); Rubya Mehdi, *The Islamization of the Law in Pakistan* (Curzon, 1994); Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford, 2003).

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⁹ Some of these issues are addressed in Mark Sidel, *States, Markets, and the Nonprofit Sector in South Asia: Judiciaries and the Struggle for Capital in Comparative Perspective*, 78 *Tulane Law Review* 1611 (2004).

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¹³ *Id.*, p. 66.

¹⁴ *Id.*, pp. 67-68.

¹⁵ *Id.*, p. 68.

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- ¹⁸ See Report of the Nepal PALISA Country Team (2002).
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- ²⁵ Sumaiya Khair and Saira Rahman Khan, *Philanthropy and Law in Bangladesh*, p. 66.
- ²⁶ *Id.*, p. 75.
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- ³² Zafar Hameed Ismail and Qadeer Baig, *Philanthropy and Law in Pakistan*, p. 322.
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- ³⁴ Anil Kumar Sinha and Sapana Pradhan Malla, *Philanthropy and Law in Nepal*, pp. 226, 228.

- ³⁵ Zafar Hameed Ismail and Qadeer Baig, *Philanthropy and Law in Pakistan*, pp. 286, 288.
- ³⁶ Sanjay Agarwal and Noshir Dadrawala, *Philanthropy and Law in India*, p. 148.
- ³⁷ Sumaiya Khair and Saira Rahman Khan, *Philanthropy and Law in Bangladesh*, p. 85-86.
- ³⁸ Sanjay Agarwal and Noshir Dadrawala, *Philanthropy and Law in India*, p. 153.
- ³⁹ Arittha Wikramanayake, *Philanthropy and Law in Sri Lanka*, p. 357.
- ⁴⁰ *Id.*, pp. 363-64.
- ⁴¹ Sumaiya Khair and Saira Rahman Khan, *Philanthropy and Law in Bangladesh*, p. 84.
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ARTICLE

The Role of a National Donor Association: A U.S. Perspective

By Robert Buchanan*

The Council on Foundations

The Council on Foundations, founded in 1949 and based in Washington, D.C., is a membership organization of more than 2,000 grantmaking foundations and giving programs. Members include private foundations (independent, family, and corporate grantmakers), community foundations, and other public charities, as well as operating foundations. While the overwhelming majority of the Council's members are U.S.-based, eligible foundations in Europe and around the world are also members. The Council provides leadership expertise, legal services, and networking opportunities, among other services, to members and to the general public through a variety of programs that range from government relations and professional development to legal services, research, conferences, affinity group support, publications, and media relations.

Government Relations Activities

The Council on Foundations works to maintain and enhance a legal system that encourages all types of formal philanthropy as well as charitable giving by individuals. The Council endeavors to educate Members of Congress about the value and importance of philanthropy and is active on issues of oversight, regulation, and tax treatment of grantmaking foundations and corporate giving programs. In order to carry out its mission, the Council works closely with the Senate Finance Committee and the House Ways and Means Committee as well as the Internal Revenue Service (IRS), the federal agency charged with regulating and overseeing charitable activities. In addition, the Council may engage with other federal agencies from time to time. Because each state also regulates charities within its jurisdiction, the Council may occasionally become involved in state issues, although this is normally left to state or regional associations of grantmakers throughout the U.S.

Every two years at the beginning of each new Congress, the Council's Committee on Legislation and Regulations develops a legislative agenda, subject to Council Board approval. The Council generally takes positions on issues that it deems will have a direct and primary effect on the health of the field of philanthropy. Guiding principles for the selection of legislative issues for Council action include sustaining and promoting a legal and regulatory system that encourages a responsible, effective, and independent philanthropic sector, as well as favorable tax treatment of private foundations and public charities that preserves and strengthens tax incentives for charitable giving.

Recent legislative issues in which the Council has been engaged include reducing the federal excise tax on private foundation investment earnings, opposing

unnecessary restrictions on donor-advised funds, and increasing appropriations for IRS enforcement of existing charity laws. The Council also maintains close contact with the IRS staff members who oversee charities, seeking clarification of ambiguous rules, commenting on proposed new rules, and advocating helpful regulatory changes. In addition, the Council is currently leading an effort by a broad group of U.S. charitable-sector organizations to develop an alternative to the U.S. Treasury Department's ill-advised voluntary guidelines for anti-terrorist financing, which are having a chilling effect on cross-border grantmaking by U.S. foundations and other charities.

While the principal contact with Members of Congress, congressional committee staffs, and key regulators in the IRS and other federal agencies is made by members of the Council's staff, the positions they articulate are based on extensive consultations with Council members through the Committee on Legislation and Regulations and other Council committees, at Council conferences and special meetings around the country, as well as through listservs, teleconferences, and other forms of communication. At the same time, the Council recognizes that its individual members have an important role to play in advancing the Council's legislative agenda through contact with their respective senators and congressional representatives, both in Washington, D.C., and through their state or district offices. *Washington Update*, the Council's newsletter on legislative and regulatory issues, is circulated to members regularly, and bulletins on urgent topics are issued through an e-mail Legislative Network as needed.

For the past eleven years the Council has collaborated with the Forum of Regional Associations of Grantmakers to organize "Foundations on the Hill," a one-day event early in the year that brings grantmakers from around the country to Washington, D.C., to meet with their congressional representatives. As part of the day's activities, training is provided on dealing with lawmakers and staff members with whom the participating grantmakers have previously arranged appointments. The event is focused on educating congressional representatives about the contributions foundations make to the public good in the legislators' districts as well as nationally and internationally. Such visits can develop strong and lasting relationships with legislators that can prove highly beneficial when the lawmakers are called upon to vote on legislation affecting foundations.

Promoting Ethics, Accountability, and Public Trust

In 2004 the Council on Foundations undertook a new, member-initiated two-year program designed to increase understanding of legal practices and to develop and encourage adherence to high ethical standards in grantmaking. Linked to this effort is a joint initiative with the European Foundation Centre to develop principles of accountability and effectiveness specifically for international grantmaking.

Following are excerpts from a speech titled "Building Strong and Ethical Foundations: Self-Regulation and Government Enforcement," by Dorothy S. Ridings, President and CEO of the Council on Foundations, delivered at the National Association of State Charity Officials Conference, on October 25, 2004:

"Some think a membership organization like the Council on Foundations has no business promulgating codes of ethics or otherwise facilitating self-regulation by philanthropic organizations. Others think that what we do is not enough. The staff of the US Senate Finance Committee does not think what we do is enough, and they drafted a 19-page discussion paper last summer that in some ways would radically

overhaul the state and federal regulatory enforcement and oversight of the non-profit sector. . . .

"Certainly, self-regulation has limits. It will not catch those who are intentionally using charities for private gain. We need you to do that. But self-regulation is not a matter of either/or. We will work hard every day to maintain an effective, transparent, and responsible philanthropic sector; at the same time, we urge you to make it a priority to investigate and punish those who willfully and flagrantly abuse their roles as stewards of private wealth dedicated to the public good.

"Transparency hasn't typically been the first word that came to people's minds when they thought of private foundations. Few foundations engaged in voluntary reporting about programmatic goals and accomplishments, and even attorneys general had difficulty getting basic information necessary to determine if fiduciary duties were being carried out. Today, more and more grantmakers are communicating to the public about what they do, and the public in turn has unprecedented access to an organization's annual information return filed with the IRS. We have reached this stage bit by bit, working together. . . .

"On the other hand, effective governance has come under increasing scrutiny and skepticism by the public in recent years. Decades of hard work and self-regulation, aided by the minimum standards set by government regulations, are being marginalized by a level of cynicism and skepticism we've not see for decades – cynicism and skepticism fueled by revelations of alleged wrongdoing we have been reading about in the press. . . . In our field, the stories have involved excessive compensation, ethical lapses, conflicts of interest and downright self-dealing. . . . And we simply, absolutely cannot ignore these stories, or wish them away. As leaders and good stewards of philanthropy we must open ourselves to discussions with each other, our grantees, Congress, and the public about these issues.

"Throughout its 55-year history, the Council has worked to improve the governance of foundations. We serve the public good by promoting and enhancing responsible and effective philanthropy. It has not always been an easy road. In 1980, the Council distributed to its members the first version of 'Principles and Practices for Effective Philanthropy.' Two years later, the Council required its members to subscribe to them. This prompted some members to quit in protest to what they believed were efforts to dictate how they carried out their missions. Generally, the principles and practices encourage foundations to make their purposes and actions widely known, improve the effectiveness of grantmaking, review grantmaking programs to changing needs, comply with the law, and avoid conflicts of interest. In 1990, the Council adopted a policy on compensation of directors and trustees. This was revised in 2002, and an additional policy was adopted on determining reasonable executive compensation. . . .

"The need for self-regulation will never be supplanted. . . . Self-regulation is what we do at the Council by providing answers to more than 4,000 requests for information we have received so far this year from our members about what grantmakers can and should do and cannot and should not do. One-fourth of these queries were answered by our legal department.

"As we have done in the past, we are also embarking on new ways to promote accountability among grantmakers. . . . As a part of that new examination we have launched a major initiative aimed at governance and stewardship. We call it

'Building Strong and Ethical Foundations: Doing It Right,' and it has a two-fold agenda:

To provide more education – through regional convenings, publications, and other means – about legal requirements and their interpretation, to board members, executives, and professional advisors, and

To discuss and develop standards that exceed legal requirements while insisting that the basic legal requirements are enforced by federal and state oversight agencies. . . .

"We'll deliberate about revamped internal enforcement mechanisms against foundations that intentionally violate the rules. We are developing compliance kits for both federal regulators – the Internal Revenue Service – and state-level charity officials, to help them better understand our field and target and penalize offenders when appropriate and merited by the facts. We hope to work hand in glove with the regional associations of grantmakers on this, since the regional associations . . . know their landscapes so much better than we ever can. . . .

"The Council's own curriculum for grantmakers and new CEOs will focus on ethics and accountability. We have begun outreach to recognized professional groups such as those serving lawyers, accountants, and financial advisors, to help improve their overall ability to advise and serve philanthropic institutions and individuals. We will reach out to new foundations entering the field, to help them get off to a good start in terms of ethics and accountability. We believe it is our job as a national membership organization to help create the curriculum, and the venues, for open discussion of the excellent governance that is such a hallmark of our field. And as long as the need exists, so will our educational efforts. . . .

"We are not alone in developing standards for effective governance. Some state and regional associations of grantmakers also have developed guiding principles and practices for grantmakers. . . . The work will go on. Self-regulation alone will not deter intentional wrongdoing, and government regulation alone cannot provide guidance to the thousands of foundations and charities that want to learn about how they can improve their effectiveness and how they can achieve the highest ethics and standards in the field of philanthropy. Self-regulation and government enforcement of the laws each has a basic role to play in ensuring that the non-profit sector and philanthropy will continue to make their unique and vital contributions to society."

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ARTICLE

California's Nonprofit Integrity Act of 2004 (SB 1262)

By Thomas Silk and Rosemary Fei*

On September 29, 2004, California Governor Arnold Schwarzenegger signed into law SB 1262, the Nonprofit Integrity Act of 2004. Sponsored by Attorney General Bill Lockyer and carried by Senator Byron Sher (D-Palo Alto), SB 1262, as it finally emerged after extensive amendments, addresses two broad areas of nonprofit activity: governance of charitable organizations and fundraising by or on behalf of charitable organizations. The Act took effect January 1, 2005.

The first part of this article explains the governance provisions of the Act: the requirements for financial audits, for audit committees, for public disclosure of audited statements, and for review and approval by the board of directors of the compensation paid to the chief executive officer and the chief financial officer of the charitable organization.

The second part considers the Act's extensive charitable fundraising provisions. The Act requires charitable organizations to enter into written contracts containing mandatory terms and conditions for every charitable fundraising event where a commercial fundraiser is used. The Act requires charitable organizations to exercise control over fundraising activities conducted for them. The Act imposes on each commercial fundraiser highly detailed requirements for prompt deposit of charitable funds in a bank account in the name of, and controlled by, the beneficiary charitable organization. The Act sets forth twelve prohibited acts in the planning and execution of fundraising by the charitable organization and others, and it gives charitable organizations extensive rights to cancel or void contracts with commercial fundraisers and fundraising counsel.

If you are a manager or director of a California charitable organization or a foreign charitable organization conducting activities or holding property in California, we urge you to give careful attention to the Act and to the significant changes it makes in governance and charitable fundraising rules, so your charitable organization can prepare to meet the challenges posed by the many new provisions of the Act.

Governance

Financial Audits

The Act requires certain charities to prepare annual financial statements audited by independent certified public accountants.

The charities subject to this new requirement are those charitable corporations, unincorporated associations, and charitable trusts required to file

reports with the Attorney General. This includes foreign corporations doing business or holding property in California for charitable purposes.^[1] On the other hand, educational institutions, hospitals, cemeteries, and religious organizations are exempt from the obligation to file reports with the Attorney General and, therefore, are not subject to either this mandatory audit requirement, or to the requirements for audit committees and for public disclosure of audited statements discussed below.^[2]

The mandatory audit requirement applies to some but not all charitable organizations subject to the Act. Only a charitable organization that receives or accrues in any fiscal year gross revenues of \$2 million or more must meet the audit requirement. Grant or contract income from the government is not included in the charitable organization's gross revenue so long as the governmental entity requires an accounting of those funds.

The financial audit must be performed by an independent certified public accountant in accordance with generally accepted accounting principles. If the audit firm also performs non-audit functions for the charity, the firm and its auditors must conform to the standards for auditor independence set forth in the Government Auditing Standards issued by the Comptroller General of the U.S. (the Yellow Book, accessible online at <http://www.gao.gov/govaud/ybk01.htm>). The Attorney General, however, may prescribe standards for auditor independence different from those in the Yellow Book.^[3]

Public Disclosure of Audited Statements

Audited statements (those required by the Act, as well as those prepared by charitable organizations required to file reports with the Attorney General, even if not required by the Act) must be made available for inspection by the Attorney General and the general public within nine months after the close of the fiscal year to which the statements relate. The Act adopts the same rules for public disclosure already applicable to IRS Form 990. Thus, audited statements must be made available to the public for a period of three years, both (1) at the charitable organization's principal and any regional or district office during regular business hours, and (2) by mailing a copy to any person who so requests in person or in writing; or, alternatively, by posting the audited statements on the charitable organization's website.^[4]

Audit Committees

With regard to those charities required by the Act to prepare annual audited financial statements as described above, the Act also provides that charities in corporate form – including charitable corporations incorporated outside California but required to register with California's Attorney General – must appoint an audit committee. The committee must be appointed by the board of directors.

The audit committee may include non-board members. While it may include members of the finance committee, the chair of the audit committee may not be a member of the finance committee, and members of the finance committee must constitute less than half of the audit committee.

The audit committee may not include any member of the staff, including top management, or any person who has a material financial interest in any entity doing business with the charitable organization.

If audit committee members are paid, they may not receive compensation in excess of the amounts received, if any, by members of the board of directors for service on the board.

Five duties of the audit committee are spelled out in the Act. Audit committees (1) shall recommend to the board of directors the retention and termination of the independent auditor, (2) may negotiate the compensation of the auditor on behalf of the board, (3) shall confer with the auditor to satisfy the committee members that the financial affairs of the charitable organization are in order, (4) shall review and determine whether to accept the audit, and (5) shall approve performance of any non-audit services to be provided by the auditing firm.^[5]

Compensation Review

The Act provides that compensation, including benefits, of two officers (the chief executive officer and the chief financial officer) must be reviewed and approved by the board of directors or an authorized committee of a charitable corporation or unincorporated association, or by the trustee or trustees of a charitable trust. The approving body must determine that the compensation is just and reasonable.^[6]

Review and approval must occur when the officer is hired, when the term of employment of the officer is renewed or extended, and when the compensation package is modified, unless the modification applies to substantially all employees.

Fundraising

Commercial Fundraiser and Fundraising Counsel: Definitions

We have included here abbreviated definitions of commercial fundraiser and fundraising counsel, even though they have been part of the law and are not newly introduced by the Act, to make more understandable our discussion of the Act below.

Commercial Fundraiser. A *commercial fundraiser* for charitable purposes is defined as any individual, corporation, or other legal entity that for compensation does any of the following^[7]:

1. Solicits funds, assets, or property in California for charitable purposes.
2. As a result of a solicitation of funds, assets, or property in California for charitable purposes, receives or controls funds, assets, or property solicited for charitable purposes.
3. Employs, procures, or engages any compensated person to solicit or control funds, assets, or property for charitable purposes.

Note that *commercial fundraiser* does not include an employee or trustee of a charitable organization, among others.^[8]

Fundraising Counsel. A *fundraising counsel* for charitable purposes is defined as any person who is described by all of the following^[9]:

1. For compensation plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in California of funds, assets, or property for charitable purposes.

2. Does not solicit funds, assets, or property for charitable purposes.
3. Does not receive or control funds, assets, or property solicited for charitable purposes in California.
4. Does not employ, procure, or engage any compensated person to solicit, receive, or control funds, assets, or property for charitable purposes.

Note that *fundraising counsel* does not include an attorney, or an employee or trustee of a charitable organization, among others.^[10]

Charitable Organizations: Control over Fundraising

The Act makes plain that charitable organizations must “establish and exercise control,” not only over their own fundraising activities, but over fundraising activities conducted by others for their benefit. That control must include approval of all written contracts, and the charitable organization must assure that fundraising activities are conducted without coercion of potential donors.^[11]

A charitable organization may not contract with any commercial fundraiser unless that fundraiser has registered as required with the Attorney General’s Registry of Charitable Trusts (“Registry”), nor may charity A raise funds for charity B unless charity B is registered as required.^[12]

Charitable Organizations: Misrepresentations

Charitable organizations (and commercial fundraisers) may not misrepresent the purpose of the charitable organization or the nature or purpose or beneficiary of a solicitation. Misrepresentation may be established by word, by conduct, or by failure to disclose a material fact.^[13]

Charitable Organizations, Commercial Fundraisers, and Fundraising Counsel: Prohibitions

The Act sets forth twelve prohibited acts and practices in the planning, conduct, or execution of any charitable solicitation or sales promotion. The prohibitions apply to, according to the Act, “regardless of injury”^[14]:

1. Operating in violation of this Act or order of the Attorney General, or after registration is no long valid.
2. Engaging in fraud or using any unfair or deceptive act or practice that creates a likelihood of confusion or misunderstanding.
3. Using any name or any other representation that misleads a reasonable person as to the identity of the charitable beneficiary.
4. Misrepresenting or misleading anyone to believe that the beneficiary of a solicitation or sales promotion is a charitable organization when it is not.
5. Misrepresenting or misleading anyone to believe that another person sponsors, endorses, or approves a charitable solicitation or sales promotion when that person has not given consent in writing to the use of the person’s name.
6. Misrepresenting or misleading anyone to believe that goods or services

have endorsement, sponsorship, approval, characteristics, ingredients, uses, qualities, or benefits that they do not have, or that any person has any endorsement, sponsorship, approval, status, or affiliation that the person does not have.

7. Exploiting registration required by law to imply endorsement or approval by the Attorney General.

8. Representing that a charitable organization will receive more than the amount reasonably estimated.

9. Distributing or offering to distribute – in connection with charitable solicitations by commercial fundraisers for police, fire, and other public safety personnel – membership cards or stickers, emblems, plates, or other items that could be used for display on a motor vehicle and that suggest affiliation with or endorsement by any public safety personnel or group.

10. Soliciting for advertising related to a charitable purpose to appear in a for-profit publication without making, at the time of solicitation, these disclosures: (a) the publication is for-profit, (b) the name of the solicitor and the fact that the solicitor is a professional solicitor, and (c) the publication is not affiliated with any charitable organization.

11. Representing that any part of contributions solicited by charity A will be given to charity B unless charity B has agreed in writing prior to the solicitation to the use of its name.

12. Representing that tickets to events will be donated for use by another unless certain requirements are met to prevent abuse.

Commercial Fundraisers: Constructive Trustee

The Act makes all commercial fundraisers constructive trustees as to all funds collected pursuant to solicitations for charitable purposes, and it requires the fundraiser to account to the Attorney General for all funds. The Act subjects the fundraiser to the Attorney General's supervision and enforcement over charitable funds to the same extent as a trustee for charitable purposes.^[15]

Commercial Fundraisers: Notice to Attorney General

Current law requires that a commercial fundraiser for charitable purposes must register with the Registry. The Act adds the requirement that before beginning any charitable solicitation, a commercial fundraiser must also file a notice with the Registry setting forth information identifying the fundraiser and the charitable organization, the fundraising methods to be used, the dates when fundraising will begin and end under the contract, and identifying information about the person responsible for directing and supervising the work of the fundraiser.

The notice must be filed not less than 10 days before the beginning of each solicitation campaign, event, or service, except for solicitations to aid victims of emergency hardship or disasters, in which case the notice must be filed not later than when the solicitation begins.^[16]

Commercial Fundraisers: Misrepresentations

Commercial fundraisers (and charitable organizations) may not misrepresent the purpose of the charitable organization or the nature, purpose, or beneficiary of a solicitation. Misrepresentation may be established by word, conduct, or failure to disclose a material fact.^[17]

Commercial Fundraisers: Deposit of Contributions

For each contribution in the control or custody of a commercial fundraiser, the Act requires the fundraiser, within five working days of receipt, (1) to deposit the contribution in an account in a bank or other federally insured financial institution solely in the name of the charitable organization and over which the beneficiary charitable organization has the sole right of withdrawal, or (2) to deliver the contribution to the charitable organization in person, by Express Mail, or by another method providing for overnight delivery.^[18]

Commercial Fundraisers: Contracts with Charitable Organizations

The Act requires that a commercial fundraiser and a charitable organization must enter into a written contract for each solicitation campaign, event, or service. The contract must be signed by an authorized contracting officer for the commercial fundraiser and by an official authorized to sign by the charitable organization's governing body. The mandatory provisions of the contract, which may be inspected by the Attorney General, include:

1. A statement of the charitable purpose of the fundraiser.
2. A statement of the "respective obligations" of the commercial fundraiser and the charitable organization.
3. If the fundraiser is to be paid a fixed fee, the contract must state the fee and provide a good faith estimate of what percentage the fee will be of total contributions, disclosing the assumptions on which the estimate is based, which must reflect all relevant facts known to the fundraiser.
4. If the fundraiser is to be paid a percentage fee, a statement of the percentage of total contributions that will be remitted to or retained by the charitable organization or, if the sale of goods is involved, the percentage of the sales price remitted to or retained by the charitable organization. In determining the percentage, the fundraiser's fee, as well as any other amounts the charitable organization is required to pay as fundraising costs, must be subtracted from contributions and sales receipts received.
5. The starting and ending dates of the contract and the date solicitation activity will begin in California.
6. The contract must require the fundraiser to handle contributions in accordance with the Act's requirements (discussed above) on the deposit or delivery of funds to the charity.
7. A statement that the charitable organization shall exercise control and approval over the content and frequency of any solicitation.
8. If the fundraiser proposes to pay any person or legal entity, in cash or in

kind, to attend, sponsor, approve, or endorse a charity event, the maximum dollar amount of those payments must be stated.

The contract must also contain three distinct provisions relating to cancellation of the contract. *First*, the contract must allow the charitable organization to cancel the contract without cost, penalty, or liability for 10 days after signing, by giving written notice in a specified manner. Any funds collected by the fundraiser after notice of cancellation shall be held in trust for the benefit of the charitable organization without deduction for costs or expenses. *Second*, the contract must permit a charitable organization to terminate the contract on 30 days' written notice to the fundraiser, effective five days after the notice is mailed. The charitable organization remains liable for the fundraiser's services during the 30-day period. *Third*, the contract must provide that, after the initial 10-day cancellation period, the charitable organization may terminate the contract at any time by giving written notice, without payment of any kind to the fundraiser, if (1) the fundraiser makes material misrepresentations in solicitations or about the charitable organization, (2) the charitable organization learns that the fundraiser or its agents have been convicted of a crime punishable as a misdemeanor or felony, arising from charitable solicitation, or (3) the fundraiser otherwise conducts fundraising activities that cause or could cause "public disparagement of the charitable organization's good name or good will."^[19]

Commercial Fundraisers: Prohibitions

A commercial fundraiser for charitable purposes may not solicit in California on behalf of a charitable organization unless the organization has registered with the Registry or is exempt from such registration.^[20]

No person may act as a commercial fundraiser if that person (or any officer or director of that person's business or any person with a controlling interest in the business or any person employed or paid to solicit funds by the fundraiser) has been convicted in state or federal court of a crime, punishable as a misdemeanor or felony, arising from the conduct of charitable solicitation.^[21]

Commercial Fundraisers: Record Retention

Commercial fundraisers must maintain, for at least 10 years, two categories of records: (1) solicitation campaign records, including donor information, revenue and expense data, the names and addresses of employees, and the name and number of each bank or other account in which funds were deposited by the fundraiser, and (2) ticket sale records for charitable events, including the number of tickets purchased and donated by each contributor and a list of all organizations receiving donated tickets for use by others.^[22]

Fundraising Counsel: Notice to Attorney General

Current law requires that fundraising counsel must register with the Registry. The Act adds a requirement that before performing any services for a charitable organization, fundraising counsel must also file a notice with the Registry, not less than 10 working days before services start. The notice must include the name and address of fundraising counsel and of the charitable organization, and the dates when the performance of services begins and ends.^[23]

Fundraising Counsel: Contracts with Charitable Organizations

The Act also makes clear that there must be a written contract between the fundraising counsel and the charitable organization for each service to be performed. The contract must be signed by the authorized contracting officer for fundraising counsel and by an official who is authorized to sign by the governing body of the charitable organization.^[24] Current law sets forth extensive provisions that must be included in the contract.^[25]

The contract must also contain two distinct provisions relating to cancellation of the contract. *First*, the contract must allow the charitable organization to cancel the contract without cost, penalty, or liability for the first 10 days after signing, by giving written notice in a specified manner. *Second*, the contract must permit the charitable organization to terminate the contract on 30 days' written notice to fundraising counsel. The notice is effective five days after the date of mailing; termination is effective 30 days after that. The charitable organization is liable for the services of fundraising counsel up to the effective date of termination.^[26]

Charitable Organizations: Right to Cancel or Void Contracts with Commercial Fundraisers or Fundraising Counsel

Contract cancellation rights of charitable organizations are addressed twice in the Act. First, they appear as mandatory provisions of contracts between charitable organizations and commercial fundraisers or fundraising counsel, as discussed earlier. Second, they appear as separate rights, entirely apart from the terms of any contract. Thus, even if contracts fail to spell out the required rights of cancellation, the Act provides that charitable organizations nevertheless have those rights by law.^[27] The Act also provides that charitable organizations may void contracts with commercial fundraisers or fundraising counsel if they are not properly registered.^[28] Finally, whenever a charitable organization cancels a contract, it must mail a duplicate copy of the notice of cancellation to the Registry.^[29]

Commercial Fundraisers and Fundraising Counsel: Registration Requirements

Similarly, the Act addresses registration with the Registry from three distinct perspectives: (1) as a requirement of commercial fundraisers and fundraising counsel,^[30] (2) as a prohibition on charitable organizations, barring them from contracting with a commercial fundraiser or fundraising counsel if not registered as required,^[31] and (3) as a remedy for charitable organizations, allowing them to void contracts with commercial fundraisers and fundraising counsel if not properly registered, as discussed above.^[32]

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Many Masters: The Challenges of Corporate Philanthropy (2003) and *The Jossey-Bass Handbook of Nonprofit Leadership and Management* (2004).

- [1] Gov. Code §12582.1.
- [2] Gov. Code §12583.
- [3] Gov. Code §12586(e)(1).
- [4] Treas. Regs. §§301.6104(d)-1(a) and (d)-2; Gov. Code §12586(e)(1).
- [5] Gov. Code §12586(e)(2).
- [6] Gov. Code §12586(g).
- [7] Gov Code. §12599.
- [8] Gov. Code §12599(a).
- [9] Gov. Code §12599.1.
- [10] Gov. Code §12599.1(b).
- [11] Gov. Code §12599.6(b).
- [12] Gov. Code §12599.6(c), (d).
- [13] Gov. Code §12599.6(a).
- [14] Gov. Code §12599.6(f).
- [15] Gov. Code §12599(g).
- [16] Gov. Code §12599(h).
- [17] Gov. Code §12599.6(a).
- [18] Gov. Code §12599.6(e).
- [19] Gov. Code §12599(i).
- [20] Gov. Code §12599(m).
- [21] Gov. Code §12599(l).
- [22] Gov. Code §12599.7(a), (b).
- [23] Gov. Code §12599.1(e).
- [24] Gov. Code §12599.1(f).
- [25] Gov. Code §12599.1(d).
- [26] Gov. Code §12599.1(f)(8), (9).
- [27] Gov. Code §12599.3(b), (c), (e), (f), (g).
- [28] Gov. Code §12599.3(a).

[\[29\]](#) Gov. Code §12599(d).

[\[30\]](#) Gov. Code §§12599(m) and 12599.1(c).

[\[31\]](#) Gov. Code §12599.6(c).

[\[32\]](#) Gov. Code §12599.3(a).

ARTICLE

Progress on Civil Society Legislation in Turkey

By Filiz Bikmen*

With the adoption in recent months of a new Law on Associations and the publication of a new draft law on foundations, Turkey is undergoing significant changes in the area of civil society legislation.

New Law on Associations

The Turkish Parliament has adopted the most progressive Law on Associations in over 20 years. This marks an important milestone for the strengthening of the legal framework for NGOs and the general advancement of civil society in Turkey. The new law significantly reduces government control over association activities while raising internal auditing standards. It also enables government funding for up to 50 percent of joint projects with associations.

The Third Sector Foundation of Turkey (TUSEV) partnered with the International Center for Not-for-Profit Law (ICNL) to provide inputs for the preparation process of this law. The cornerstone of this assistance was a "Comparative Report on Associations Law" (see appendix), which provided inputs on the intellectual framework for reform.

Almost all the provisions in the comparative report were accepted and integrated into the final draft, which was approved by review commissions and Parliament. The law was adopted in its final form by Parliament in late October 2004, and will be followed by the publication of the regulation, which is critically important for ensuring effective and even-handed implementation of the new law.

Some of the major revisions include the following:

- Associations are no longer required to obtain prior authorization for foreign funding, partnerships, or activities (although a provision in the Civil Code still requires foreign organizations to obtain prior authorization of their activities in Turkey and with Turkish partners).
- Associations are no longer required to inform local government officials of the day/time/location of general assembly meetings and no longer required to invite a government official to conduct or to supervise general assembly meetings.
- Officials conducting audits must provide 24-hour advance notice and just cause in the case of random audits.

- NGOs are permitted to open representative offices for federations and confederations internationally.
- Security forces are no longer allowed on the premises of an association without a court order.
- Specific provisions and restrictions for student associations have been entirely removed; and children from the age of 15 can form associations.
- Internal audit standards (i.e., within associations) have been increased to ensure accountability of members and management.
- Associations will be able to form temporary platforms/initiatives to pursue common objectives.
- Government agencies and departments will be able to fund up to 50 percent of joint projects with associations.
- Associations will be allowed to buy and sell necessary immovable assets without prior authorization.

Although these revisions indicate significant progress, concerns remain about sanctions, which include steep penalties and fines. It is also important to note that there are several other relevant pieces of legislation affecting civil society, such as press, assembly, and demonstration laws, which retain their restrictive nature. Thus, while the progress with the associations law is important, it is necessary to take into consideration the wide spectrum of laws and practices that require continued reform in order to fully enable civil society in Turkey.

The Department of Associations, formed in 2003 as a special unit of the Ministry of Interior, played a key role in promoting reforms and advocating for more enabling legislation. This Department provides the official registration and oversight function, with a central office in the capital Ankara and local offices in 81 provinces across the country.

Draft Law on Foundations

The draft law on foundations was published on October 28, 2004, by the General Directorate of Foundations (GDF), which is the regulatory/administrative unit responsible for oversight of foundations in Turkey. The justification for a new law on foundations is based primarily on the following mandates:

- *Need for harmonization of laws:* Current legislation governing “old” (Ottoman) and “new” (post-Republic) foundations is spread out over 40 different laws, regulations, decrees, and circulars, creating a complicated system of regulation. This law is intended to capture all of these changes and promote one harmonized law.
- *Treatment of “minority” foundations:* Non-Muslim foundations established during the Ottoman era are facing issues with legal personality and properties. This was related to other issues regarding cultural and minority rights in Turkey and was thus raised as an issue that requires resolution as part of Turkey’s EU reform process.

- *Restrictive and cumbersome regulations:* Current legal frameworks include significant limitations on foundations with regard to their governance, activities, and assets. The draft law is intended to rectify this and promote a more enabling framework for foundations to operate.

In its current form, the new draft law does address a portion of the mandates outlined above, although there is some concern regarding the harmonization of laws, given the distinctly different operational realities and needs of old and new foundations. The draft includes many positive developments for new foundations, in line with TUSEV's comments and the "Comparative Report on Foundations Law" developed with ICNL and the Law Faculty of Bilgi University. However, one of the key concerns is the increase of decision-making powers allocated to the GDF, which may be better left to the courts and justice system. The exercise of powers of the GDF has been a major issue for "old" and "new" Turkish foundations and has also been commented on by the EU in its progress reports on Turkey in 2003: "[Foundations are] subject to the interference of the Directorate General of Foundations, which considerably limits their autonomy. This includes the possibility of dismissing their trustees, and of intervening in the management of their assets and accountancy."

The draft law is currently being reviewed by several old and minority foundation specialists, as well as new foundations including TUSEV and its team of local and international (ICNL) experts. TUSEV's report is the result of extensive analysis, including comparative survey of supervisory functions of governing agencies in other European countries as well as benchmarking the Model Framework for Public Benefit Foundations developed by the EFC.

Although no official announcement has been made, It is expected that the draft will be discussed in Parliament before December 17, 2004, when the EU is expected to make a decision on a date to start accession negotiations with Turkey.

Appendix -- Reform and Implementation: Two Sides of One Coin

The much-anticipated report assessing Turkey's progress on achieving the Copenhagen Criteria for EU membership was published as planned on October 6, 2004. This report is the basis upon which the Council will make a decision on starting accession negotiations with Turkey on December 17, 2004.

The publication of this report marks the culmination of an intense year of significant reforms affecting the rule of law, the justice system, corruption, military intervention in state issues, civic and political rights (including human, cultural, and minority rights), local government, and foreign policy issues. Overall, the 2004 report concludes with the recommendation that Turkey has met a sufficient number of the political criteria required to open accession negotiations, while hinting that ongoing negotiations would likely include specific conditions to ensure strict adherence to effective implementation of reforms – especially with regard to democratization and basic rights and freedoms of Turkish citizens. As such, it is clear that these issues represent a core area by which the EU will continue to measure Turkey's progress.

Upon comparison of the respective sections on "civic reforms"¹¹ in the 2003 and 2004 progress reports, there are clear indications of improvement and shifting focus from reform to implementation. Whereas the 2003 progress report had

highlighted *specific problem areas in which reforms were still needed*, the 2004 progress report referred to specific instances in which laws *had achieved reform* but were *not showing signs of impact in implementation*. Thus it can be said that the report authors have accurately observed that Turkey has achieved measurable progress in actual reform of certain laws but less so in terms of implementation.

Concerns about implementation regarding civic reforms, however well-founded, should be carefully balanced with an understanding of the challenges in transforming a legacy of restriction and over-regulation that characterized Turkey's pre-EU reform era. This is not intended to imply that the lack of implementation should be overlooked; it only suggests that the assessment of what constitutes progress should be monitored and measured against a clear and objective set of targets, developed jointly with all stakeholders.

As such, the 2004 progress report provides an indication of the challenges in the next "phase" of the civic reform process in Turkey. Implementation will require focused strategies and should be based on the fundamental principle of cooperation between citizens and government officials in order to maximize Turkish ownership and systemic internalization of reforms.

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^[1] "Civic reform" is a term coined by the author intended to capture a wide range of reforms relating to basic rights and freedoms of citizens, including human rights, cultural rights, minority rights, and respective laws such as association and foundation law.

ARTICLE

Taxation of Grants in Russia

By Yulia Checkmaryova*

Amendments proposed this year by the Russian government to the Tax Code threaten to make matters worse for the civil society sector. In response, Russian NGOs have mobilized to bring about changes in the draft amendments.

Tax Changes of 2002

In January 2002, a new form of grant taxation took effect in Russia. Now, according to the Tax Code, a *grant* is property earmarked only for cultural, art, environmental, educational, and scientific projects. NGOs may receive tax-exempt grants from individuals or other NGOs, and from foreign or international NGOs included on a special list approved by the Russian government. Unfortunately, such a definition of *grant* infringes upon interests of NGOs implementing projects in other fields, e.g. social welfare services, health care, and protection of human rights. Russian NGOs made every effort to improve this unfair situation but in vain.

Government Amendments

In July 2004, the Russian government submitted proposed amendments to the Tax Code to the State Duma. The amendments to subsections 5 and 6 of Article 251, if enacted into law, would directly affect NGOs. On the one hand, the amendments expand the definition of the activities for which grants can be given. These include social welfare services, health care, and protection of human rights. On the other hand, the changes would place additional burdens on both foreign and domestic grantmakers. Specifically, the proposed amendments threaten to (1) prevent foreign citizens from making tax-exempt grants; (2) require Russian donors to be included on a government-approved list of grantmakers in order for their grants to be tax-exempt for the recipients; and (3) require foreign donors to satisfy stricter requirements in order for their grants to qualify as tax-exempt.

Public Outcry

Such amendments will not merely eliminate the anticipated effect of the widened scope of activities; they will make grantgiving impossible. That is why the government's proposal has triggered a public outcry. This problem has been discussed at the National Assembly (an informal grouping of NGO leaders) and at numerous meetings. A series of amendments to the government draft are being prepared now. A number of independent experts are involved in this public campaign. The main idea behind the public drive is to save the current grant taxation system by adding only three more fields. The second reading of the draft was originally scheduled for late October or early November but has been postponed. We can only hope that joint efforts will ultimately produce good results.

Tax Reform Project

CAF Russia (the branch office of Charities Aid Foundation in Russia) is also taking part in the protection of NGOs' tax interests; moreover, it is implementing the project "Civil Society Unites for a Strategic Public Policy Campaign: NGO Tax Reform in Russia," financed by USAID. Its well-known partners are the Centre for the Development of Democracy and Human Rights, the Agency for Social Information, the Institute of Urban Economics, and the U.S.-based International Center for Not-for-Profit Law (ICNL). The project's goal is to develop legislative changes that will improve the legal framework affecting civil society organizations (CSOs), to increase public support for proposed legislative changes, and to increase the capacity of CSOs to influence public policies. The partners are coordinating the current public drive against the government amendments to the Tax Code.

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BOOK REVIEW

Civil Society

By Michael Edwards. Polity Press. 168 pp. \$22.95

Reviewed by Stephan E. Klingelhofer*

Sometimes big things do come in small packages. Michael Edwards's *Civil Society* fits that description precisely. Only 112 pages, plus notes, bibliography, and index, this compact volume helps the reader understand what "civil society" is, where the concept came from, and why it is significant in today's globalized socioeconomic-political environment. Most important, Edwards raises questions about popular assumptions, even those long held and often articulated by experts on and advocates for civil society. These questions are really the heart of the book.

A renowned scholar and a well-known administrator, formerly with the World Bank and now at the Ford Foundation, Edwards is well suited to describe the civil society world and to raise questions about it. He has been a doer as well as a thinker, and this dual role qualifies him as an author whom both theoreticians and practitioners should read.

Simply put, Edwards's thesis is that no single theory can adequately explain how civil society operates and how it affects the world. He also decries the sloppy and uncritical analysis that in the end renders the phrase "civil society" as meaning everything, and therefore nothing. In fact, he suggests ("demands" would not be too strong a word) that the reader accompany him on an analytically rigorous voyage down the main tributaries that feed the dynamic social river we know as civil society.

Edwards identifies the three most significant of these tributaries in Western culture: civil society as a *part* of society, a "neo-Tocquevillian" focus on associational life; civil society as a *kind* of society, one that expresses certain values and norms and meets certain social goals; and civil society in the *public sphere*, a place of discourse that affects policy and social direction. The analysis of each of these perspectives constitutes the first part of the book.

As each theme is explicated, one can easily be drawn into that camp. But in the end, Edwards makes the compelling case that each falls short. None of the theories adequately describes what civil society is, how it operates, or – most important of all – how it *should* be understood in order that civil society might have the greatest impact.

With civil society viewed essentially as *associational life*, it embraces many groups and gatherings of folk in countries all over. These groups meet certain needs for community, for working, playing, and living together with some sense of mutual

identity. Some are registered and have legal form; others just exist, from the family level to larger amalgams. But it is often difficult to identify the line between such associational groupings and other entities – government, market-based organizations, political organizations, religious movements, and so forth. For example, village structures in the South Pacific perform some of the functions of government but have no formal political standing. Recently, certain charities affiliated with religious bodies have entered into relationships with organizations whose agendas are clearly political, which has become troubling in the context of global terror. In addition, associational life can create homogeneity and fail to promote the kinds of diversified thinking and acting that produce a living and breathing body politic. Thus, associational life alone is insufficient as a defining quality of civil society.

The next possibility, defining civil society as the *good society*, can beg more questions than it answers. As Edwards notes, the idea of *polis*, the commonwealth, can spur people to action, as it seems to have done in Eastern Europe and elsewhere. Seeking the collective good for the people as a whole is certainly a positive goal. But, as Edwards writes, achieving a “good society requires both norms of behavior that infuse institutions with value-based energy and direction, and political settlements that legitimize and sustain those values and directions in the polity.”

At least in many of its constructs, civil society can represent consensus on values and norms, and even work to achieve such a consensus. But civil society may live most powerfully in the particular, not in the general--addressing the issues that concern particular people, groups, and regions. Norms and even values differ, not to mention economic and religious goals. In any given instance, moreover, businesses, families, and the government itself can affect such norms and values as much as or more than any “civil society organization” can do.

So Edwards turns to the *public sphere* itself as a way to define civil society. He looks to Jurgen Habermas, who characterized the public sphere as that place where discursive interaction can occur. Edwards suggests that it is not unreasonable to see civil society as an almost geographic space, a space in which people talk through their differences and resolve their problems. But, as Edwards notes, people often use that space for something other than reasonable, “civil” debate. Indeed, when leaders demand civility in discourse, they are not seeking debate but demanding agreement, a kind of false consensus. The recent American role in the Middle East provides a powerful example of *non*-debate in the public sphere on matters of intense importance to every sector of the nation--economic, political, moral, and social.

When people and groups have wildly divergent interests, as Edwards observes, it takes a great deal of a kind of “moral maturity” to respect diversity and to seek the common good. Moreover, organizations established for “good” purposes often morph into “special interests,” either by devoting themselves to their own institutional perpetuation or by being perceived as untrustworthy by the political, media, and social actors that help form and reflect public opinion. At least to some degree, after all, the public sphere is a place of inequality: some voices are louder than others.

None of these worthy definitions, thus, can alone suffice to describe what civil society is and does. But *together*, they can enable us to understand better why civil society has drawn the devotion of so many people, so many resources, and so much toil, particularly during the past quarter century or so. Without a strong “associational ecosystem” (a particularly apt and interesting term, itself worth reading the book to understand), value-laden discourse cannot be undertaken. But that ecosystem cannot be strong without a level playing field, which in turn requires a public sphere that permits open discourse and adjusts the debate to assure that most voices can be heard. And that very process of “political” debate, goal-setting, and policy-making and -implementing requires the kind of participatory process that only a “civil society” can promote. Edwards depicts the three categories of definitions as standing beside one another; as suggested above, I believe they are more like tributaries merging into a river, the distinct components working together.

Civil Society is a book that should be distributed to students, practitioners, funding agencies, politicians, and everyone engaged in the promotion of “democratization.” It is a primer that we all need, one that enables us to reengage the deepest questions: how people can have a meaningful stake in the direction of their lives, why the health of society demands that they do have a stake, and who speaks for you, me, and the woman in the marketplace in Lagos.

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BOOK REVIEW

The Law of Charities

**By Peter Luxton; Judith Hill, consulting editor.
Oxford University Press, 2001. 1,088 pp. \$310**

Reviewed by Richard Fries*

At first sight, another thousand-page textbook on the law of charities in England and Wales seems hard to justify. So it was even in 2001, when Oxford University Press published *The Law of Charities*. Admittedly, 2001 was the 400th anniversary of the Statute of Elizabeth, with its Preamble that is still the fount of charity law in England and many other common law jurisdictions. But 2001 was also the year in which charity law reform really took off in England, threatening to make such a book at best of historical interest, as an exposition of pre-reform common law. Yet the progress of reform, now reaching its denouement in the Charities Bill before the House of Lords in the British Parliament, bids fair to make this book more relevant, not less – at least when a second edition appears with the updating that developments in the law itself and the changes made by the Bill will make urgently necessary.

The fact that a second edition will be eagerly awaited speaks for the excellence of the book. It also raises questions about how much more than window-dressing the reform of the law actually is. The book aims "to present a picture of charity law that gives appropriate weight to the new influences affecting it." Thus it gives a central place to legal structure and governance and "the work of the Charity Commissioners" (as it with proper legal accuracy refers to the Charity Commission, which will be set up as a legal body in its own right only under the new Bill), alongside the necessary discussion of charitable status and trust.

Peter Luxton, a distinguished academic charity lawyer, with consulting editor Judith Hill, a leading charity law practitioner, have achieved their aim brilliantly. The book is written with a clarity that illuminates the "eternal verities" of charity law (as one practitioner called them!) and makes the often arcane technicalities accessible to non-lawyers while also providing a work of reference for professionals. Because part of the case for reform has been the obscurity of the law, a treatise must be accessible to committed non-specialists, charity trustees in particular, who are the soul of charity and whom the law must serve if it is to continue to underpin philanthropic and voluntary activity in the public interest – which should be the test of the continuing relevance of charity law in the 21st century.

This book is a pleasure to consult. The opening sections on the meaning and history of charity are as good an introduction as I know for those, from whatever legal tradition and without any legal knowledge, who want to understand what charity is in English law and why practitioners' commitment to retaining the common law of charity is not mere self-interest – why and how, indeed, it is fundamentally wrong to dismiss the common law as a 400-year-old legacy overripe for

replacement. And the section of the book on the reform of charity law, tracing the decades of debate and lobbying that produced the modernization issues finally taken up by the Government, is a good test of the adequacy of the present Bill.

The heart of the book is of course a careful exposition of the law in practice, covering the scope of charity, structures and governance, the role of the Charity Commission (though perhaps having too little to say about the informal advice-giving role that is central to the reformed Commission), legal proceedings, property, investment and giving, and fundraising. The law, cases, and decisions of the "Charity Commissioners" are marshaled and presented clearly and readably. (There is plenty of entertainment to be had, too, in the byways of charity law!)

Of course, the law has already moved on in important respects since 2001. Only electronic publication with continuous editing could keep pace. For example, the book has an excellent discussion of the implications of the pathbreaking Human Rights Act 1998, incorporating the European Convention on Human Rights into British law; but it appeared too soon to reflect the adoption by the Charity Commission of "the promotion of human rights" as a charitable purpose in its own right. This is important not only in itself but as a demonstration of charity law's ability to move forward.

This ability is vital to the case for reforming charity law rather than replacing it with some more modern legal form. Over the years, critics have argued that charity law derived from the 400-year-old Preamble is out of date as well as obscure and cumbersome. (The very need for thousand-page textbooks to make up for the absence of a clear statutory statement of charity might seem to make the case for reform!) The fact that "elite" public schools such as Eton and Winchester enjoy charitable status has long been an affront to radicals, and the political controversy that the issue arouses has deterred reform. Public confidence in the integrity of registered charities has been addressed in the Charities Act 1993 and the renewal of the Charity Commission it underpinned (taken further in the new Bill). But charity itself is only now being tackled.

The reforms were triggered by the working group set up by the National Council for Voluntary Organizations (NCVO), of which Judith Hill was a member and which reported in 2001. Four years and much scrutiny later, the resulting legislative proposals aim to provide a statutory framework under which existing charity law can continue to operate. The well-known "four heads" of charity, set out in 1891 in the *Pemsel* case – wholly inadequate as a description of charity in the modern world – are to be replaced by a list of eleven substantive purposes and a catchall provision for other purposes accepted now or in the future as charitable. The professed aim is to cover the main purposes currently accepted as charitable, including the newly recognized human rights purpose (amplified by fashionable reference to equality and diversity). It does not aim to create new purposes, but to tidy up areas of difficulty or complexity under current law, such as sports and animals. Already the House of Lords has run up against the dilemma of whether to stick to this self-denying ordinance or to take the rare Parliamentary opportunity the Bill affords to make substantive changes to the scope of charity.

The case for the case law approach of common law is its flexibility. Whether a body falling within one of the accepted purposes, such as education, qualifies as a charity depends on the inherited corpus of court judgments – in particular, whether it serves the public interest. The Bill is designed to make one substantive change: to require all charities to demonstrate public benefit. Under existing law, organizations

for the relief of poverty and the advancement of education or religion (the first three *Pemsel* heads) are presumed to be for the public benefit. (Removing this presumption has been the main reform proposal from the NCVO report onwards.) But the implications of this change are not clear, and controversy has arisen, inevitably, over the impact on public schools. (Peter Luxton himself expressed doubts in evidence he submitted to the Parliamentary Scrutiny Committee, which examined the Bill in draft.) The intention, which it can confidently be said this book endorses, is to require the Charity Commission, whose "populist" approach to the determination of charitable status has stirred misgivings among some charity lawyers (reflected in this book), to be guided by the inheritance of charity law, and not to have unconstrained authority of its own to determine charitable status. How far the Charity Commission will be willing and able to apply stronger requirements for charities to show that they deliver public benefit will be a fascinating issue (if and when the Bill becomes law, with an election impending).

Perhaps the most intriguing aspect of the Bill's provisions on charitable status is the way they deal with the need to allow for new charitable purposes. This flexibility, which allows charity law to keep pace with changing conditions and needs, is met by giving a statutory basis for the approach the courts have adopted as interpreted by the Commission – namely, finding analogies to existing charitable purposes. This provision is complicated, arguably too much so. The book has some pertinent things to say about the authority to develop the law as exercised by the Commission, and about the proposal – one of the genuinely new elements in the Bill – to create a specialist Charity Appeal Tribunal.

There is of course much more worthy of note, in the book and in the Bill. For example, the Bill for the first time creates an institutional form specifically for charities, the charitable incorporated organization, to enable charities to secure the protection of incorporation without having to register also as companies. This is a significant development long sought by the sector. How it will work out must await the future, and a new edition of Luxton on charity law. At this moment of uncertainty in English charity law and regulation, it is sufficient to welcome this volume as a worthy complement to Tudor and Picarda, and to congratulate its author and consulting editor on their achievement – adding the perhaps less welcome request that they set about a new edition as soon as possible!

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BOOK REVIEW

***Does Civil Society Matter?
Governance in Contemporary India***

**Edited by Rajesh Tandon & Ranjita Mohanty.
Sage Publications. 378 pp. \$54.95**

Reviewed by Bindu Sharma*

[E]ven in modern times, communities existed before governments were here to take care of public needs. There were many groups of people with a common sense of purpose and a feeling of duty to one another before there were political institutions forcing them to perform their duties.

– Daniel Boorstin, *The Decline of Radicalism* (1969)

Clearly, civil society does matter. The free association of citizens in India (and much of the world) has a long and rich tradition that goes back to pre-colonial communal societies. An individual's responsibility to the community was well-defined within the confines of the extended family, tribe, community, or village social structure. In much of the South, modernization and colonialism undermined indigenous social relations, whereas the Soviet state did the same in the countries of Eastern Europe and Central Asia. Historically, particularly after World War II, governments increasingly assumed a wider range of responsibility in governing nation-states. However, in the last two decades, the growing disenchantment of ordinary people with the institutions of the state has resulted in the resurgence of civil society.

Rajesh Tandon and Ranjita Mohanty have summarized the current discussion on the resurgence of civil society and the myriad definitions of the term currently in use in development literature. The book is an excellent compendium of essays, with theoretical debate relating to the interface of civil society and governance mixed well with case studies that study the current actions of civil society in making its voice heard.

The essays in the book, collectively, provide perspective on the development of civil society in India from colonial to post-colonial and then to current times. The reader discerns certain features of the vast array of civil society activity from a vantage point above the fog of celebratory rhetoric that commonly obscures such activity in landscapes such as India. We see a wide variety of civil society activity, yet such activity appears not to lead to empowerment for those who need it the most. For the least empowered, a lack of education, wealth, land, and other factors continues to hinder the access to power through civil society structures.

Populism, such as “people’s power” movements and the like, frequently serve to draw attention to inequity and distortions in the power structure, and then merely empower an ancillary class of civil-society activists and their self-generated agendas acting in opposition to state structures and other traditional authority. Thus, while at first glance, civil society activity has grown greatly, and encouragingly so, in recent decades in India, and it has involved a mass of the populace, the collective message of the book’s essays is that such mass participation in itself is not proof of mass empowerment.

In the first essay, “A Critique of the Notion of Civil Society as the ‘Third Sphere,’” Neera Chandhoke explores the myriad definitions of the concept of civil society in recent theory, making the point that civil society is part of a larger canvas and therefore needs to be looked at in context of the complex interrelationships. She cautions that overuse of the concept of civil society can lead to a loss of analytical rigor and conceptual clarity in contemporary theorization: “when concepts lack these attributes, both the value and validity as politically relevant and worthy categories for action diminish considerably.”

Time and time again, the ability of civil society to coalesce against the tyrannical – whether it be the state, the elites, or the powers that be – sends an important message about the power and desirability of civil society. Despite that, we must be careful in whose hands civil society ends up, as Chandoke points out – “Eastern Europeans had exchanged the tyrannies of socialism and party apparatuses for the tyrannies of capitalism, political elites, corporate bureaucracies and ethnic majorities determined to stamp out any kind of plural life.” She rightly notes that “civil society is only ambiguously the source of democratic activism.” In her conclusion, Chandoke writes, “Civil society is not an institution; it is rather, a process whereby the inhabitants of the sphere constantly monitor both the state and the monopoly of the power within itself.”

Rajesh Tandon, in his essay on “The Civil Society-Governance Interface – An Indian Perspective,” gives a brief on the emergence of the concept of civil society in contemporary development literature. Defining civil society as “a collection of individual and collective initiatives for the ‘common public good,’” Tandon provides a simple and extremely usable definition. He also makes a much-needed differentiation between government and governance. Governance does not merely denote “government”; *rather, it is a process of looking after public resources for the common public good.* In that light, India has a perfectly legitimate, democratically elected government, but its governance of the country’s economic and social resources leaves much to be desired.

Tandon puts forth a very concise framework of civil society’s interface with governance:

Different forms of civil society contribute to different aspects of the governance agenda. Thus, as a space, civil society provides an opportunity for *voicing* issues related to the priorities and practices of governance, while as a *movement* it typically creates collective pressure for government reform. And civil society *organizations* contribute to the practical tasks associated with self-governance.

The different forms of civil society are consistent with Chandoke’s assertion that civil society is a part of a larger canvas.

In the "The Crisis of Governance," Jayaprakash Narayan provides a brief on the social stagnation of Indian society over the centuries, asserting that "the insularity of society from the state ensured that vertical fragmentation of society continued and institutions remained static and frozen," and that "Indian society even at the height of its glory did not allow the fresh breeze of new ideas and institutions to blow in." After independence in 1947, social and economic reform planning was ambitious and broad in scope, but despite the ambitious plans, the state focused most of its energy on the economic sphere, making only weak attempts to challenge the prevailing social hierarchies and failing miserably at social reform. What we have today are pockets of immense economic progress, together with economic depredation of the masses and social exploitation along age-old feudal hierarchies, as well as crumbling public order and corruption on an unprecedented scale and beyond the imagination of any at the time of the freedom struggle. Narayan believes that the misuse and disuse of the tools of government (financial, human, legislative) have resulted in a grave crisis, to the extent that the state has increasingly become an obstacle in people's march towards progress and at times even threatens people's sovereignty.

T.K. Oommen's essay moves the civil society-governance debate from the realm of confrontation and explores the cooperative interrelationship in which all three sectors – state, market, and civil society – can engage. He asserts:

First, the autonomy of the three sectors does not invest them with autarky. Second, autonomy does not necessarily erode reciprocity. Third, the boundary demarcation between these spheres does not mean that they do not overlap. Fourth, there is a division of labor between these spheres. And finally, it is a balance between the three spheres that makes for a "good society."

Harsh Mander's essay looks at the phenomenon of corruption in India by public authorities, its dynamics, impact, and causes, and the methods and dilemmas associated with its possible control. In "Corruption and the Right to Information," the focus of Mander's analysis is the poor and marginalized. In the second half of his essay, he asserts that "it is only through *an enforceable* [emphasis mine] right to information that the ordinary citizen can ensure that government actions and decisions promote public welfare and accountability." Mander cites the example of the Masdoor Kisan Shakti Sangathan (MKSS) and its struggle for the right to information in the northwestern State of Rajasthan, observing that vigilance and assertion by even the most disadvantaged can bring to book the powers that be.

The second half of *Does Civil Society Matter?* analyzes five case studies of public resistance to inappropriate government action or public policy ("Save the Chilka Movement," by Ranjita Mohanty); inaction by the government in the face of non-implementation of public policy and social reforms ("Democratic Governance, Civil Society, and Dalit Protest," by Sudha Pai and Ram Narayan, and "Land Distribution for Kol Tribals in Uttar Pradesh," by B.K. Joshi); and attempt by people seldom if ever considered worthy of recognition as citizens of India to become part of the entitlement network of the state and other public institutions ("When the Voiceless Speak: A Case Study of the Chhattisgarh Mukti Morcha," by Neera Chandoke, and "A View from the Subalterns: The Pavement Dwellers of Mumbai," by Bishnu N. Mohapatra).

Ranjita Mohanty, in "Save the Chilka Movement: Interrogating the State and the Market," talks of the Chikla Bachao Andolan, a movement by people, mostly

fishermen, who in the early 1990s successfully resisted the Integrated Shrimp Farm Project (ISFP) – a joint venture between the Tata Iron and Steel Company (TISCO, a private sector firm) and the state Government of Orissa for prawn cultivation and export. The project threatened the livelihood of the fishing communities living around the lake, people who for generations had farmed the lake with age-old knowledge of ecology and resource sustainability. Mohanty focuses on the collective resistance put up by otherwise-competing groups, disparate voices within the rural communities and student groups and other community organizations from the provincial and state capital. The movement raised important questions about government policy formulation, historical resource use and control, and issues of equity and access of the marginalized versus the local power elites.

In "When the Voiceless Speak: A Case Study of the Chhattisgarh Mukti Morcha," by Neera Chandhoke, the title itself is telling, as the essay describes the struggle of unorganized labor comprising the informal sector against extremely exploitative policies of the formal sector, in this case the Bhilai Steel Plant. Chandhoke illustrates the oppression of the local population of Chhattisgarh by the dominant groups in cahoots with the state. The essay is a classic example of the absence of governance and a deeply divided, hierarchical civil society that has denied the underprivileged and the marginalized their very rights as citizens of independent India.

In "Democratic Governance, Civil Society, and Dalit Protest," Sudha Pai and Ram Narayan examine the reluctance of the Indian state to protect the life and dignity of the poor, the oppressed, the marginalized sections of civil society, in this case the Dalits in India, historically referred to as the untouchables or harijans. After independence, the state – through the constitutionally guaranteed right to equality, abolition of untouchability, and affirmative action – sought to right the wrongs heaped on this group over centuries. However, the powerful elitist civil society fought to keep the status quo. Only since the 1980s, with the rise of the lower-caste political parties, have the Dalits mustered the strength to have their voice heard. The struggle still goes on, and this essay on the Dalit assertion in western Uttar Pradesh, especially Meerut, examines the violence and injustices heaped on this previously voiceless group and the subsequent hesitant justice meted by a highly politicized state government.

Bishnu Mohapatra, in "A View from the Subalterns: The Pavement Dwellers of Mumbai," asks the quintessentially important question: Are all groups in civil society equally capable of forming associations to ensure that their interests are regarded as legitimate? He explores the lives of the pavement dwellers of Mumbai, whom the state views as encroachers of public space and refuses to even recognize their identity as citizens. In the early 1980s, following a large-scale demolition of slums undertaken by the government of Maharashtra, social activists and concerned citizens took up their cause. The study details the context, the issues, and the modes of intervention used over the years by the community groups and organizations working with the pavement dwellers to get the state to respond compassionately to their rights and needs. The battle between the pavement dweller and the state is an unequal one, and the struggle will go on for the foreseeable future.

In "Land Distribution for the Kol Tribals in Uttar Pradesh," B.K. Joshi illustrates the non-implementation of social reform legislation enacted soon after independence. In 1950, with the abolition of the zamindari system, the government

sought to distribute to the Kol tribals titles to the very land of which they had been dispossessed by the upper- castes over the centuries. Despite such attempts at social transformation, exploitation of the Kols by the upper castes and local administration officials continues, with emancipatory policies remaining merely on paper. Only after the founding of the All India Community Help Group (Akhil Bharatiya Samaj Sewa Sansthan, or ABSSS) in 1978, and after a long hard struggle, by the end of 1997 poor Kol families started to get possession of the land that had been allotted to them in the 1960s and '70s.

As the empirical examples stand testament, it may be more appropriate in the Indian context to ask: Is civil society civil? Decades after independence, and despite the development agenda of the State, a majority of citizens have been untouched by the economic progress and social reforms boasted by State institutions. Moreover, civil society is still mired in the hierarchical feudal relationships that define the stagnation of the social arena. Modernization has been restricted to the economic arena, with socio-cultural and political reform absent. The State today is all-powerful, and civil society looks to it for guidance. Post -independence, the state appropriated many functions of civil society and it is now loath to let go for fear of diminishing its stature. Having lost its creative and associational edge, civil society must work hard to rebuild it. As Tandon puts it in his introduction:

The state is not a neutral actor that can be taken to task and brought back to play its role more efficiently without any reference to the social setting in which it operates.... Civil society is not inherently virtuous; it is also fractured from within.... Good governance thus does not only mean reforming the state; the reformation of society also needs to be simultaneously undertaken.

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BOOK REVIEW

***Governing Nonprofit Organizations:
Federal and State Law and Regulation***

**By Marion R. Fremont-Smith.
Harvard University Press. 550 pp. \$95**

Reviewed by Michael Bisesi*

"The nonprofit sector exists and thrives because the public believes in its integrity."

--Marion Fremont-Smith

The online magazine *Slate* has a wonderful feature called The Explainer, in which questions great and small (such as "Who can lie to Congress?" and "What's in Ovaltine") are answered succinctly. When it comes to nonprofit regulation, Marion Fremont-Smith may well qualify as our explainer, addressing issues as varied as the multiple meanings of "charity" and the legal definition of "UBIT." *Governing Nonprofit Organizations: Federal and State Law and Regulation* undoubtedly will be regarded as the regulatory reference of choice for years to come.

A major work on regulation may seem odd at a time when even the Geneva Convention, much less consumer and environmental protection, has been rendered "quaint." But renewed interest in issues such as tax-exemption and donor confidence, culminating in the Senate Finance Committee's far-reaching accountability hearings in fall 2004, would suggest that a serious scholarly effort actually is very timely indeed.

Fremont-Smith brings highly credible experience to her task. She currently serves as Senior Research Associate at Harvard's Hauser Center for Nonprofit Organizations. Previously, she was Assistant Attorney General and Director of Public Charities in Massachusetts. She also has been a partner in a private law firm.

This encyclopedic volume covers a comprehensive array of topics in a thoroughly researched and well-documented set of chapters. The "Brief History of the Law of Charities" alone makes the book a must-read, and the chapter on fiduciary duties is a remarkably clear exposition. Other chapters focus on the Internal Revenue Code, federal and state regulatory roles, the function of courts, and the creation, administration, and termination of charities.

Even the most casual reader will learn that the nonprofit regulatory framework is so business-oriented because the corporate form of organization is so common in the nonprofit sector. This business-model orientation is pertinent because the United States is the only industrialized nation where big business preceded the appearance of big government. The resulting reactive character of regulation also

reflects historical roots in the early colonial period ("preserving liberties, not imposing burdens") and is codified by the minimalist form of government prescribed in the Constitution.

Regulatory action also has been guided by public attitudes. Fremont-Smith contends that "the populist distrust of large amounts of property being dispensed for public purposes without public control, the fear of conservatives that charitable funds are being used to support liberal causes, the opposing fears expressed by liberals, and the concerns of business that nonprofits receive unfair business at their expense" are among the many sources of laws designed to regulate nonprofit organizations.

While some entries may strike the non-attorney reader as common sense, the book provides enough citations to satisfy even the most curmudgeonly of board members. Nonprofits must be established to fulfill a social purpose. Fiduciary responsibility requires boards and individual board members to act for public rather than personal benefit. Board members must spend enough time, attend meetings, and make reasonable inquiries if problems appear--what the Corporate Library's Nell Minow would call the "duty of curiosity."

Fremont-Smith also does a masterly job explaining other key issues. She argues that the regulatory role of the Internal Revenue Service (IRS) became so prominent because states failed to "fulfill their traditional role in regulating charities." She clarifies the "border between exempt and non-exempt activities" with detailed discussions of the Unrelated Business Income Tax (UBIT) and of limitations on lobbying activities.

Three substantive quibbles are worthy of note. First, Fremont-Smith contends that Enron and other corporate scandals have had "no direct impact" on nonprofits, but she should be given a pass on this one because that line was written before the Senate Finance committee hearings in fall 2004.

The second objection also may be time-related. She praises the work of the IRS as primary regulator because it has a record of "resisting political pressures, despite challenges to the contrary." The fall 2004 pre-election inquiry into NAACP activities may be, one hopes, a singular exception to the historic rule.

The final criticism entails two intriguing but under-developed suggestions at the conclusion of the book: "remove the almost complete protection from liability given to fiduciaries" and "provide regulatory agencies in the states and the IRS adequate funds to effectively carry out their enforcement duties." Further elaboration would have been very much appreciated.

Recent research suggests that regulation typically is more effective than voluntary control and that "the duality of deterrent fears and civic obligations" are strong motivators to avoid problems.^[1] With that framework in mind, readers will quickly discern that Fremont-Smith has produced the definitive source for those who truly want to understand nonprofit regulation.

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^[1] Peter J. May, "Regulation and Compliance Motivations: Examining Different Approaches." *Public Administration Review*, Vol. 65, No. 1 (January-February 2005) pp. 31-41.

BOOK REVIEW

Balkan Identities: Nation and Memory

**Edited by Maria Todorova.
New York University Press. 374 pp. \$40**

Reviewed by Gerald M. Easter*

There are no such things as "Balkan ghosts," so goes this new volume edited by Maria Todorova. *Balkan Identities* is a collection of essays that grew out of a conference held in June 1999, in the immediate wake of NATO's bombing campaign of Milosevic's Yugoslavia. The participants included historians, anthropologists, and literary scholars of the various nations that inhabit the Balkan Peninsula. The conference was intended to facilitate a dialogue among these experts in order to elaborate the diversity of historical understanding and collective memory in this region and to debunk the recently revived "historical legend" of a distinctive "Balkan mentality."

Maria Todorova lays out the main goals of the volume in a nicely presented introductory chapter that touches on the theoretical foundations of the study of collective memory and presents the case against a distinct Balkan memory. "There are varieties of individual and group memories in the Balkans, but no single Balkan memory," she writes. While collective memories exist among particular people in the region, any discussion a "Balkan-wide mentality should be carefully contextualised and historicised." Todorova makes a good point in this regard, but perhaps goes too far. The histories of the people of the region are so interwoven that it does not seem unreasonable to speak of a Balkan experience, granted that each national group will view that experience differently. There certainly are commonalities to a "Northern" European or "Southern" European experience shared by people who nonetheless have distinct historical memories.

But perhaps the Balkans are treated differently by scholars, such that the commonalities of the region are more apt to be reified. Todorova takes umbrage over the double standard applied by Western analysts, who believe that the instances of interethnic violence in the Balkans somehow make the people of the region more "irrational" than those engaged in warfare elsewhere. She does not trivialize the relevance of Byzantine, Ottoman, and Communist historical legacies, but insists that "legacies are not perennial, let alone primordial." She disparages the way in which popular myths intersect with scientific knowledge in the scholarly discourse on the Balkans. Todorova sees this book as an attempt "to normalise the Balkans" and to extract the region from the chauvinism and parochialism that has long plagued Balkan studies.

The book does not seek to break new theoretical ground regarding collective memory, but rather to offer examples of the rich diversity of memory among the peoples of the Balkans. The substantive chapters are organized into three broad

themes: the creation of historical memory; the manifestations of national memory; and the transmission of national identities. The impressive list of authors comprises many of the leading young scholars in their respective fields. Space prohibits mention of the all the individual chapters, so what follows is a summation of the major themes along with a few examples.

The first set of essays concern time and space in the formation of historical memory. The essays explore how perceptions of place and local identity become entwined with and manipulated to fit a more encompassing national narrative. Also, the themes of the ancient past and medieval glories long gone are incorporated into the modern national project. The cases are drawn from Kosovo, Greece, Turkey, Albania, and Bulgaria. In these cases, historical memory is articulated and passed from individual to group through various media, including personal narratives, oral history, folklore, literature, and film. The chapters attempt to explain how historical events, battles, and personalities are molded into the defining myths of a particular story of a people, a national ideology. Milaca Balic-Hayden, for example, relates the story of the epic Serbian poem, "The Finding of the Head of Prince Lazar," in which Lazar's severed noggin, submerged in a stream for forty years, miraculously rolls across a field to a nearby monastery to be rejoined with its body. The story is meant to symbolize "the rebirth of the Serbian nation." Kosovo, likewise, is more than just a physical or historical place in Serbian national identity, but a spiritual place.

The second set of essays focuses on the "masonry" of national memory--the monuments, statues, war memorials, street and place names, and the faces on banknotes that reinforce a collective national memory. These are depicted as "memory sites" that enshrine the image of the immortal heroes and antiheroes in the national saga. Dunja Rihtman-Augustin, for example, tells how the main square in Zagreb has served as a focal point in the "constructing and erasing" of Croatian national memory through the statue for Ban Jelacic, a 19th century champion of Croatian national revival, whose stone visage has undergone cycles of display and removal depending on the politics of the moment. Anastasia Karakasidou, meanwhile, uses the image of Pavlos Melas, a martyred turn-of-the-century Greek partisan, which became pervasive in the consumer culture in the early 1990s, coinciding with heightened nationalist tensions over Macedonia.

In the final set of essays, the theme shifts to the transmission of national memories in document form. These authors investigate the shaping of national historiography and the writing of school textbooks. In a smartly written chapter, Diana Mishkova compares the uses of tradition in the formation of Romanian and Serbian national identities as part of the political competition among liberals, conservatives, and radicals in the late 19th and early 20th centuries.

The different chapters hang together nicely, which is not always the case with collected books of this type. The editorial decision not to impose a rigid conceptual or theoretical scheme on the authors worked to the overall benefit of the volume. The book offers a rich store of instances of the formation of collective national memory. In so doing, the book is successful in its attempt to show the array of particularist variations in memory and identity among the inhabitants of the Balkan Peninsula. The book is most suitable for graduate students, regional specialists, and social scientists concerned with identity politics.

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BOOK REVIEW

***Something to Believe In:
Politics, Professionalism and Cause Lawyering***

**By Stuart A. Scheingold and Austin Sarat.
Stanford University Press. 182 pp. \$35**

Reviewed by Patricia Lyons*

As described by authors Stuart A. Scheingold and Austin Sarat, "cause lawyers" are those individuals who have chosen to pursue legal work aimed at fulfilling their individual visions of "the right, the good, or the just." The authors skillfully provide a broad overview of the many issues central to the development of cause lawyering and its operation in the world today. Topics are diverse, including cause lawyering and legal education, career aspects, and the challenges and role of cause lawyering in democratic advocacy. However, while the discussion is expansive and well-written, some areas leave the reader wondering if key aspects were overlooked.

The discussion of cause lawyering in legal education is a prime example of the book's shortfalls. From the beginning of their law school careers to the end, the proportion of law students interested in cause lawyering declines significantly. Much of the discussion here focuses on the intellectual shift that students experience as a result of the traditional instructional approaches in law school, and the role this shift plays in undermining interest in and perhaps respect for cause lawyering. This is an interesting point, and one that is often overlooked; however, the authors pay little attention to the economic concerns facing law students, such as skyrocketing tuition costs, and the role these concerns play in driving students away from careers in cause lawyering. In addition, it would be interesting to learn the perspectives of students graduating from institutions other than the top-tier law schools, so as to explore how the recruitment practice of large law firms varies in their experience as well as whether the pursuit of cause lawyering changes in these environments.

Another area that seems slightly off point is the chapter providing a brief history of cause lawyering. Again, the section is well-expressed and the efforts of the authors are evident; however, the history seems too general. A more developed and detailed history of specific cause lawyering endeavors, which now appear only briefly, would be preferable. Instead, the focus on demographic shifts of those involved in the law, though relevant, is applicable to any type of lawyering. More examples of cause lawyering efforts over time would have enhanced this chapter greatly.

It is important to note that the book strengthens considerably in the discussions of careers and the role of cause lawyers in democratic advocacy. In particular, the review of career avenues open to those seeking to pursue cause lawyering is both thorough and enlightening. Whether it is pro bono work, a

traditional public interest agency, or a small firm focused on a specific issue, the authors do an excellent job of presenting both the advantages and the drawbacks of each scenario.

Though some key areas seem underdeveloped, the book in general is an appealing read that provides a brief yet wide-ranging introduction to the role and development of cause lawyering in legal society.

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