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Letter from the Editor 3

COMPARATIVE APPROACHES

*The Liaison Office as a Tool for Successful NGO-Government Cooperation:
An Overview of the Central and Eastern European
and Baltic Countries' Experiences*
By Maria Gerasimova 4

*Public Benefit Status:
A Comparative Overview*
By David Moore 33

*How Freedom Is Won:
From Civic Resistance to Durable Democracy*
By Adrian Karatnycky and Peter Ackerman 47

ARTICLES

*The Potential for an Independent Regulatory Authority
for NGOs in South Africa*
By Yvonne Morgan 60

Restrictive Proposals in Kazakhstan
By Stephen Larrabee 68

Women at the Forefront of the Democracy Movement in Iran
By Nayerreh Tohidi 71

| | |
|---|-----|
| <i>Economic Constraints, Political Motives: Contemporary Russian Nonprofit Tax Law</i> By Leslie Lutz..... | 73 |
| <i>Failing to Govern? The Disconnect Between Theory and Reality in American Nonprofit Boards, and How to Fix It</i> By Michael Klausner and Jonathan Small | 93 |
| <i>Imagining Philanthropy</i> By Richard Gunderman | 101 |

CURRENT BOOKS

| | |
|---|-----|
| <i>Conversations on Philanthropy</i> Edited by Lenore Ealy Reviewed by Michael Bisesi | 110 |
| <i>Europe and Civil Society: Movement Coalitions and European Governance</i> By Carlo Ruzza Reviewed by Joseph Proietti | 114 |

Letter from the Editor

This issue of the *International Journal of Not-for-Profit Law* opens with a special section on comparative approaches to civil society. **Maria Gerasimova** examines the variety of NGO-government liaison offices in Central and Eastern Europe and the Baltic countries. **David Moore** looks at "public benefit status" in Europe, including different definitions of the status, application procedures for attaining it, and benefits that accompany it. Both of these articles will appear in books published by the International Center for Not-for-Profit Law.

The final article in our special section summarizes a major study recently released by Freedom House. **Adrian Karatnycky** and **Peter Ackerman** find that authoritarianism is more likely to give way to democracy and freedom when civil society leads the way. In the authors' words, "The stronger and more cohesive the nonviolent civic coalition operating in societies in the years immediately preceding the transition, the deeper the transformation in the direction of freedom and democracy."

Our other articles begin with a proposal by **Yvonne Morgan** for streamlining the regulation of nonprofits in South Africa. **Stephen Larrabee** warns that Kazakhstan, despite a relatively healthy economy, now threatens to clamp down on civil society. In a particularly timely article, **Nayereh Tohidi** reports on a significant step forward for Iranian civil society: a mass demonstration earlier this month in Tehran, seeking equal rights for women. Next, **Leslie Lutz** assesses the obstacles that Russian tax law places in the way of the nonprofit sector and evaluates the prospects for reform. In an article reprinted from *Stanford Social Innovation Review*, **Michael Klausner** and **Jonathan Small** propose an alteration of American law that's likely to prove controversial: releasing some board members of nonprofit organizations from the responsibility (and the liability) of active governance. Philanthropy scholar **Richard Gunderman** steps back to analyze one of those rarely considered fundamentals, the nature and meaning of the philanthropic mission. Our issue closes, finally, with incisive book reviews by **Michael Bisesi** and **Joseph Proietti**.

We gratefully acknowledge Freedom House, *Stanford Social Innovation Review*, *IJNL* student editors Sabrina Querubin and Joseph Proietti, and, of course, all of our authors.

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COMPARATIVE APPROACHES

The Liaison Office as a Tool for Successful NGO-Government Cooperation: An Overview of the Central and Eastern European and Baltic Countries' Experiences¹

By Maria Gerasimova²

Abstract

In many countries, government officials have expressed interest in establishing nongovernmental organization (“NGO”) liaison offices, and in doing so with the cooperation of the civil society sector. This article, part of a research project on NGO-government partnerships, analyzes the experiences with liaison offices in ten Central and Eastern European and Baltic countries: Poland, Czech Republic, Hungary, Slovakia, Slovenia, Croatia, Romania, Estonia, Lithuania, and Latvia. The article examines key features of the liaison offices in these countries, including the reasons for their creation, the means of establishment, the input from NGOs in the process, the structure and organization of the offices, the evolution over time of interactions between government and NGOs, and the main challenges and opportunities that the offices confront in promoting NGO-government cooperation.

¹ This article will appear in a book on partnerships between NGOs and governments, to be published by the International Center for Not-for-Profit Law.

The author would like to acknowledge the many colleagues and experts without whom this article would not have been possible. Thanks to the great International Center for Not-for-Profit Law team – Stephan Klingelhofer, Douglas Rutzen, Catherine Shea, and all colleagues from the D.C. office – who gave me the opportunity to work on the topic and provided excellent, incisive advice and encouragement throughout. Special thanks to the “NGO-Government Cooperation” team: Radost Toftisova, Nilda Bullain, and Katerina Hadzi-Miceva of the European Center for Not-for-Profit Law, who provided valuable comments and insight. To those who participated in the survey, thank you for your useful information, your thoughtful and creative suggestions, and your valuable time: Izabella Szaniawska and Malgorzata Mazur (Poland); Martin Vysin and Petr Pajas (Czech Republic); Nora Sasvari (Hungary); Tereza Horska (Slovakia); Fedor Cerne (Slovenia); Cvjetana Plavska-Matic and Matko Pajcic (Croatia); Daniela Parvulescu, Diana Nitulescu, Otilia Pop, and Gabriela Matei (Romania); Maris Puurmann and Kristina Mand (Estonia); Marius Navadunskis (Lithuania); and Inese Vaivare (Latvia).

² Maria Gerasimova is a Bulgarian lawyer with professional experience in local government and academia focused on NGO law issues. She is currently working on her Master's in Public Administration at the University of Kentucky. This article was authored during Ms. Gerasimova's term as a senior fellow at the International Center for Not-for-Profit Law. This publication was made possible through support provided by the U.S. Agency for International Development, under the terms of Award No. EDG-A-00-01-00002-00. The opinions expressed herein are those of the author and do not necessarily reflect the views of the U.S. Agency for International Development.

The article reflects findings from a survey conducted in the spring of 2004. Government officials and NGO representatives shared their experience in NGO-government cooperation and in the creation of liaison offices. The survey was supplemented with follow-up interviews and additional research.

The survey revealed the following:

- **Organization:** Liaison offices in the region fall into four distinct models:
 - In five of the ten countries examined (Poland, Croatia, Slovenia, Czech Republic, and Slovakia), the functions of the NGO liaison office are carried out by a bureaucratic unit and a broadly representative advisory body, which work in partnership as stipulated in laws, decrees, or charters. In Croatia, this model has further evolved into the so-called new model, with responsibility for NGO-government cooperation decentralized to various entities at the central and local levels, including a public, not-for-profit foundation responsible for promoting sustainability of the NGO sector.
 - The Directorate of Institutional Analysis and Relations with Associative Environment in Romania and the Directorate for Civil Relations in Hungary, both Government entities, represent a second model. These offices oversee NGO-government cooperation alone, without an advisory body.³
 - In Latvia and Estonia, existing departments handle NGO-government liaison functions in addition to their other responsibilities, which include society integration, local government, and regional administration.
 - Finally, Lithuania does not have a single, centralized NGO liaison office. Instead, various government departments are responsible for coordinating with NGOs in their areas of authority.
- **Purposes:** In all countries studied, the offices' missions include furthering democracy and strengthening relations between civil society and government. European Union accession was an additional motivating force behind the creation of the offices in Slovenia and Latvia. In Estonia and Croatia, the missions of the offices included implementing cooperation agreements between civil society and governments. Other offices were established to foster dialogue on a more favorable legal environment for NGOs and other such issues, to enhance NGO participation in public

³ In another example of this model, the Government of the Republic of Macedonia in 2004 adopted an initiative to establish a "Unit of the Government for Cooperation with the Non-Governmental Sector in the Republic of Macedonia." The Unit will be mainly responsible for establishing confidence and furthering cooperation between the Government and NGOs "as two fundamental preconditions for modernization and development of the civil society in Macedonia." Among other tasks, the Unit will be responsible for preparing a program and strategy for cooperation, facilitating legislative initiatives affecting NGOs, financing NGOs, undertaking educational programs, and coordinating cooperation among the various Ministries and NGOs. It is expected that the Unit will launch its activities in 2005.

administration, or to advance Government policy-making with respect to NGOs and NGO projects.

- **Civil sector participation in the establishment process:** In almost all cases, NGOs played some role in establishing the liaison offices. The NGO role was particularly prominent in Slovenia, Czech Republic, Estonia, and Slovakia. Even in countries where the government created the NGO liaison office on its own, it worked closely with NGOs thereafter to develop the objectives of the office.
- **Main areas of NGO-government cooperation:** The major activities of the liaison offices in all countries studied are drafting and consulting on legislation, direct/indirect financing, and exchanging information. Four countries – Slovenia, Romania, Estonia, and Hungary – emphasize education, including training NGO representatives and others active in civil society. Encouraging civic participation, open governance, and social dialogue are priorities in Slovenia, Latvia, Romania, Estonia, and Lithuania. Latvia, Poland, and Lithuania concentrate on the delegation of state functions to NGOs. Promoting NGOs, charity, and philanthropy are key concerns in Slovenia, Croatia, and Latvia. Fostering partnerships between NGOs, local authorities, and entrepreneurs is a priority in Latvia, Romania, and Czech Republic.
- **Specific fields of cooperation:** Liaison offices in some countries support NGO-government cooperation in specific fields, including Poland and Croatia (research), Estonia (statistics and support systems for civic initiatives), and Hungary (development of “information society” resources).
- **Challenges:** The obstacles to effective NGO-government cooperation are quite similar in all countries. Experts in Slovenia, Poland, Estonia, and Hungary cited as challenges building trust and overcoming misconceptions and false expectations. In Slovenia, Poland, Czech Republic, and Hungary, a difficulty has been determining who has authority to represent NGOs collectively in cooperative efforts. Procedural failures have interfered with cross-sectoral consultations in Romania. Administrative constraints (including old structures, flawed coordination, limited resources, and inefficiency) have hindered cooperation in Romania, Czech Republic, Estonia, and Hungary. Inexperience in cross-sectoral communication, on the part of both the NGO sector and the government, has stalled cooperative efforts in Poland and Romania.

Introduction

Scarcely anyone disputes the importance of the third sector for the development of democracy, especially in the post-communist countries. As NGOs proliferated throughout East and Central Europe in the 1990s, however, two key challenges emerged: (1) the nascent NGO sectors, which received substantial early support from foreign donors, needed to develop more sustainable funding sources; and (2) governments and NGO sectors, which in some cases had transcended initial hostility, needed to work together to meet growing social needs. In addition, it became increasingly apparent that

NGOs, although independent legal entities with their own unique missions, cannot achieve their objectives isolated from one another and from the government and business sectors.

Many NGOs and governments alike have begun to appreciate the advantages of cooperating more closely, both to meet the challenges described above and to enhance democratic participation. NGOs and governments have collaborated on projects to increase citizens' involvement in governance and to achieve greater accountability and transparency on the part of bureaucracy, greater access to information for both NGOs and governments, and a greater role for NGOs in policy formation. These projects have led to additional fields of cooperation, such as proactive communication, networking, joint educational ventures, consultative structures, project collaboration, and community/social capital building.

The two sectors communicate and collaborate through several different institutional mechanisms, including advisory councils, government agencies, parliamentary committees, and "QUANGOs."⁴ The institutional framework varies by country, and its attributes may depend on such factors as past experience, political influence, NGOs' viability, and international trends (*e.g.*, EU accession).⁵

One mechanism for NGO-government collaboration, the liaison office within the government, has gained respect in many countries. "Liaison office" refers to a variety of structures with two common characteristics: (1) they are institutionalized within the government and have some measure of government authority to act; and (2) they have responsibility for furthering cooperation with civil society. The impetus behind creating a liaison office sometimes stems from the NGO sector's past experiences (and failures) in communicating with authorities; in other cases, the liaison office arises through a result of a law or a government strategy.

No doubt mutual confidence is difficult to build, especially among actors with diverse structures, goals, and interests. One of the greatest conflicts stems from the discrepancy in the planning horizons. Government administrations usually have short terms of office and, recognizing their transient nature, naturally want to achieve as much as possible as soon as possible. By contrast, the third sector copes with social issues that cannot be ameliorated all at once. Accordingly, NGOs care more about sustainability – maintaining programs and activities over time to deal effectively with systemic problems. Institutionalizing the mechanisms for cooperation helps reconcile this conflict, by increasing the chances that cooperation will continue relatively independent of political influences.

Characteristics of Liaison Offices

The most common functions of liaison offices in the countries studied include the following:

⁴ This acronym stands for "quasi-nongovernmental organization" and is used to designate NGOs formed by branches of government that function as NGOs despite a lack of independence from the state.

⁵ Nilda Bullain and Radost Toftisova, "A Comparative Analysis of European Policies and Practices of NGO-Government Cooperation" (Budapest: ECNL, February 2004).

- Initiating programs to develop NGO partners and to provide for their long-term sustainability;
- Establishing and maintaining relationships with other government agencies and related entities to help them cooperate with NGOs;
- Aiding the exchange of information on topics of shared interest;
- Coordinating with NGOs on legislation affecting them;
- Making research and analysis available on topics relevant to the third sector;
- Providing counsel to NGOs;
- Developing guidance materials as well as legal and policy memoranda;
- Publicizing and promoting achievements of NGOs, including those achievements that result from successful collaboration with government institutions; and
- Distributing state funds or sharing information about funding opportunities.

In the following sections, we will discuss the establishment, functions, and activities of NGO liaison offices in the ten countries, with particular attention to the third sector's role in establishing these offices.

GOVERNMENT LIAISON OFFICES **PARTNERING WITH ADVISORY BODIES**

SLOVENIA

Background Information

Significant collaboration between government and the third sector began when Slovenia negotiated with the European Union. NGO-government collaboration focused primarily on making the accession process as open as possible, with substantial participation on the part of citizens and their organizations. A further goal was to prepare NGOs to operate in the larger arena of a united Europe after the accession. As a result, the National Coordinator for Cooperation with NGOs was organized within the Integration Unit II, Government Office for European Affairs (“GOEA”).⁶ The Coordinator works in partnership with a Center, co-financed and supported by the GOEA, that is responsible for training NGOs and providing information to them.

In Slovenia, as in all Central and Eastern European countries, the democratic changes brought about fundamental reform of NGO laws, which sought to foster the participation of civil society in all spheres of social life and decision-making. At the beginning, however, the lack of a common government policy toward NGOs impeded accomplishment of this objective. Ministries limited their relations with the third sector to the sponsorship of particular projects. Consequently, NGOs became dependent on the government and competed for budget appropriations. Little meaningful NGO-government *cooperation*, as currently understood, existed.

⁶ <http://www.gov.si/svez/>.

NGO Participation in the Establishment Process

The beginning of EU accession negotiations triggered more joint activities between the government and NGOs. In December 1998, all interested NGOs were invited to contribute to the preparation and adoption of the Slovenian government's negotiating positions with the EU. In addition to ensuring transparency and adequate input, the government and NGOs sought to open the way for Slovenian organizations to undertake European Union projects. Although approximately 160 organizations expressed their readiness to participate, only 10 percent of the organizations actually attended the public presentations of negotiating positions. The main obstacles to broader involvement of civil society organizations were said to be the impression that decisions had been already made, the complicated topics on which comments were requested, and the insufficient time for reaction. It became apparent that the government did not efficiently use NGOs' capacities in preparation for EU accession.

Slovenian NGOs concluded that their capacities could be more efficiently tapped through a new institution that would, among other things, collect and disseminate information on financial resources available from the European Union for projects, training, and potential collaborators. Moreover, the scope of NGO-government cooperation was now perceived as extending beyond the negotiations process. Both government and the third sector recognized the need for honest and continuous interaction, not only for a successful accession but also thereafter.

An outside player, the Dutch advisor Dr. Michel van Hulten, recommended the fundamental concept: a Center established by NGOs but co-financed and supported by the GOEA. Several NGOs signed a Statement of Intent on March 30, 2000. In the following month, fifteen of them created a "core working group" that framed the major principles for establishing the Center:

- Its members should be "non-profit, voluntary, independent organizations, which carry out beneficial activities";
- The Center should enhance the information flow among NGOs with similar activities;
- It should undertake training, especially in the realm of project management; and
- It should improve communication between government and NGOs.

The Slovenian Cabinet authorized the GOEA to cooperate further with the third sector in the country's accession process.

GOEA and the initiating group of NGOs signed a Statement of Intent on September 15, 2000. The group's efforts were rewarded when the Center was founded in January 2001 by 29 organizations. The Center began operations in October 2001 with the technical assistance of GOEA. All NGOs could take advantage of the Center's services and information, but only members could participate in its decision-making.

Functions of the Center

The Center has been financed not only by the government but also through projects funded by UNDP, the EU-PHARE Access programs, and the Dutch-Slovenian bilateral program MATRA. Some of the Center's most prominent projects are as follows:

- NGO cooperation with local and national government for promoting gender equality;
- NGO implementation of the *acquis* (environmental protection, sustainable development, social protection, and opposition to discrimination); and
- education for NGOs and government officials on the means of cooperation.

In addition, the GOEA works to connect Slovenia's NGOs with the European NGO network.

Other Players

The Coordinator is the only Slovenian governmental institution responsible for facilitating cooperation with NGOs. As a result of several government decisions in 2003, however, the Commission for Cooperation was established. The Commission, which comprises ten Ministers and four NGO representatives, seeks principally to develop a strategy for NGO-government cooperation, to continue the dialogue with the civil sector, and to prepare a "compact."⁷ The Commission has a mandate to negotiate with NGO representatives and to prepare a draft compact before the summer of 2004. The ultimate goal is to ensure that as many NGOs as possible will join the compact.⁸

From the third sector side, the NGO Center is only one of several actors. Another is the Forum Initiative for Development of NGOs, which unites approximately 80 percent of the non-profit umbrella organizations. The Forum has launched its own strategy for cooperation, which it discussed with government officials during twelve regional meetings before its First National Conference.

Areas of Cooperation: Opportunities and Challenges

The National Coordinator for Cooperation with NGOs outlined five priorities for the compact as critical to the evolution of NGO-government cooperation. Within each area, differences of opinion and even controversies remain; nonetheless, once agreement on the major issues is reached, compromise on the remaining issues is probably feasible.

The first priority concerns the legal framework governing NGOs. At present, the NGOs themselves have not agreed on a law reform initiative, and negotiations continue.

⁷ A compact is a policy document outlining the principles of cooperation between the public sector and organized civil society and establishing the basic structure of the future partnership. See Daimar Liiv, *Guidelines for the Preparation of Compacts*, 3 International Journal of Not-for-Profit Law (2001), <http://www.icnl.org/journal/vol3iss4/Guidelinesforcompactspprint.htm>. See also <http://www.thecompact.org.uk/>.

⁸ Based on a phone interview with Fedor Cerne, National Coordinator for Cooperation with NGOs (May 27, 2004).

The second priority is financing. A major proposal under consideration is a “1 percent” law, which would allow taxpayers to designate 1 percent of their income tax to be paid to NGOs of their choice. The enactment of this law is considered reasonably likely.

The third priority is developing support, in both government and the third sector, for open governance characterized by transparency, accountability, and trust. Indeed, the strategy deems social dialogue a government obligation. Nevertheless, achieving this goal may be difficult. Several corresponding initiatives recently have been launched, including collecting examples of good practices and gathering an informal inter-ministry group to discuss means of achieving more open governance.

Another indisputable priority, according to Coordinator, is promoting NGOs and their role in society.

Finally, “human resources” requires increased efforts, such as additional training as well as subsidies for newly created employment in the NGO sector.

Mechanisms for cooperation in specific realms – such as social, environmental, and educational affairs – will vary, depending on the experience of the relevant Ministries and on cultural factors. Overall, building trust between government and non-government actors is expected to take time, because many misconceptions and false expectations still prevail.

Furthermore, the NGOs’ own representation in the process of cooperating with government has posed challenges. The NGO Center has adopted an open procedure for electing representatives. When NGO participation is needed for a commission or working group, the relevant Ministry establishes criteria for those members. The procedure is publicly announced via the Internet, electors vote for the candidates at a special meeting, and the names of those elected are conveyed to the governmental officials.

POLAND

Background Information

Volunteerism and solidarity are often considered fundamental Polish traditions. Poland has 40,000 registered civil society organizations (including 36,000 associations), half of which use volunteers. An estimated 17.7 percent of the Polish adult population worked pro bono in 2003. Given this reality, the government strives to make the most of civil society's potential and to unite the efforts of those interested in strengthening democracy and increasing civic participation.⁹

The scheme for NGO-government cooperation in Poland combines a bureaucratic unit with a broadly representative advisory body. Poland is unique among the countries surveyed in that the forms of cooperation are stipulated by law – the *Law on Public Benefit Activity and Volunteerism* (April 2003).¹⁰ Because of its importance to strengthening NGOs’ role in Polish public life, the Law on Public Benefit Activity and Volunteerism is popular among NGOs; some call it “the constitution of the third sector.”

⁹ <http://www.mpips.gov.pl/english/index.php?dzial=52>.

¹⁰ [http://www.icnl.org/LIBRARY/cee/laws/polpubbenvolunt\[eng\].htm](http://www.icnl.org/LIBRARY/cee/laws/polpubbenvolunt[eng].htm).

NGO-government collaboration has deep and venerable roots in Polish society. The Law seeks to further this collaboration by framing the legal, financial, and institutional conditions for NGOs to operate in the public interest, as well as the duties of central and local authorities to work with NGOs. The areas of cooperation regulated by the Law include contracting public services, establishing joint task forces, consulting on draft legislation, and exchanging information on planned activities.

Functions of the Department

In accordance with the Law, the Polish government established several institutions to promote NGO-government collaboration. The Department of Public Benefit Activity, which is part of the Ministry of Economy, Labor and Social Policy, is responsible for establishing institutional and legal conditions that promote development of the Polish NGO sector. The “main task of the Department is to help NGOs and other interested parties understand the spirit and the regulations of the Law. For example, we answer questions about legal regulations connected with public benefit activity [...] throughout Poland.” The Department also provides administrative and office services to the Council for Public Benefit Activities,¹¹ a separate body intended to be a national forum for social dialogue.

NGO Participation

The Law established a Council for Public Benefit Activities, which consists of five representatives of the institutions of government administration, five representatives of local government, and ten representatives of NGOs, their alliances, unions, and certain other specified types of organizations. The Council is an advisory body that reports to the Minister responsible for social security. Its responsibilities include providing assistance and advice when public benefit organizations (PBOs) run into conflicts with government administration institutions, as well as advising on a range of issues: the application of the Law, other government legal acts affecting public benefit activities and volunteerism, public works commissioned to NGOs, and the standards for performance of such work.

The third sector contributed significantly to the development of the law and thus to the creation of the Council. A “Contact Group” of fifteen NGO leaders, based mainly in Warsaw, met regularly for several years with government representatives. It was during these discussions that the idea took shape for a body to represent NGOs in public administration.

Some controversy arose, however, over how the ten civil sector representatives on the Council would be nominated and selected. The resolution reached was that these representatives would be NGO leaders rather than experts, and that they would be proposed by NGOs. The Department of Public Benefit announces the criteria for positions and collects nominations submitted by NGOs working in designated areas, including environmental protection, poverty reduction, education, and culture. NGO

¹¹ Email from Izabella Szaniawska, Head of Legal Division, Department of Public Benefit, to Maria Gerasimova (May 14, 2004).

leaders may not nominate themselves. The responsible Minister then selects civil society sector representatives from the nominees.¹²

Areas of Cooperation: Opportunities and Challenges

The Council and the Department work together to advance NGO-government cooperation. One emphasis has been public financing of NGOs. The 2003 Law (and its implementation law) included a “1 percent” provision, permitting taxpayers to designate 1 percent of their taxes for the support of NGOs.¹³

NGOs and the government have also cooperated in developing a national strategy for the civil society sector. The strategy will likely include the establishment of an administrative body called the National Fund for Civil Initiatives, the functions of which have yet to be defined.

Research is a third area of collaboration. For example, the Department of Public Benefit is required to report to the government by June 2005 on implementation of the Law on Public Benefit Activity and Volunteerism and its results. The report will be subject to parliamentary approval. Because it will address all areas affected by the Law, the Department will draw on many sources in drafting the report, including local governments, the government administration, and social partners. Civil society organizations are expected to be a particularly useful source of information because of their knowledge of successes and problems within the sector.

Finally, the Department facilitates NGO representation on the EU committees that redistribute funds. The third sector’s insights are considered extremely important here, especially in allocating resources to address poverty and unemployment.

Challenges particularly arise at the local level. At the central level and in the bigger cities in general, NGOs enjoy relatively ready access to information, available funds, grant applications, and training, but local authorities need to improve communication and to build trust. Work needs to be done outside the capital to advance knowledge about the new legislation and to overcome civil prejudices.

CZECH REPUBLIC

Background Information

The Governmental Council for Non-State Non-Profit Organizations, an advisory body of the government, is the sole administrative body at the state level focusing on the third sector.¹⁴ The government established it as a Council for Foundations shortly after the democratic changes and assigned it primary responsibility, along with the Foundation

¹² Based on a telephone interview with Malgorzata Mazur, Department of Public Benefit (June 25, 2004).

¹³ At the same time, at the instance of the Ministry of Finance, and to the dismay of NGOs, the maximum deduction allowed under the tax laws for charitable contributions was reduced to 350 zł (approximately \$100) for individual donors and 10 percent of the donated amount for corporate donors.

¹⁴ <http://wtd.vlada.cz/eng/vybory.htm>.

Investment Fund, for distributing 1 percent of the voucher privatization portfolio¹⁵ to eligible foundations. The idea was to restore at least part of the foundation assets confiscated during the communist regime. More than 600 foundations made claims, but the first contributions were not allocated until 1999. By then, the council had a new name, the Council for Non-State Non-Profit Organizations, and new responsibilities.¹⁶

Functions of the Council

The activities of the Council gradually altered, and the third sector participated in formulating the new functions through discussions with administration representatives. Recently, the Council has served as a forum for developing a more favorable legal environment for NGOs, while continuing to distribute funds from the voucher privatization portfolio.¹⁷ In addition, administrative-territorial reform and the start of negotiations with the European Union have substantially shaped the Council's structure and activities.

Through committees and working groups, the Council currently coordinates three aspects of NGO operations: cooperation between the central government and local authorities; cooperation with relevant European institutions as a part of the Czech Republic's integration; and, together with the National Property Fund, oversight of the distributed funds. The specific tasks of the Council are as follows:

- initiating and coordinating legislative activities;
- financing NGOs;
- coordinating relations and facilitating the exchange of information between the state, regional governments, and civil society organizations; and
- ensuring equal opportunity in the use of EU structural funds.

The Council comprises 35 members, at least half of whom must be NGO representatives. Members are appointed by the Chairman, who is part of the government. Consequently, the incumbency of members coincides with the term of office of the President's Cabinet. (Actually, "the greatest advantage of the council is the fact that its Chairman is the Deputy Prime Minister who ensures a direct contact with the Cabinet. Conversely, the Council's weakness is its lack of executive powers."¹⁸) Central and regional officials and experts constitute the remaining membership of the Council.

¹⁵ In the beginning of 1992, the Czech National Council enacted an amendment to the Privatization Act allocating part of the portfolio of state industry privatized by the voucher privatization method for the needs of foundations. The State Privatization Fund established the Foundation Investment Fund as a shareholding company to administer the 1 percent voucher privatization portfolio and then to distribute the shares or dividends from it to foundations. See Petr Jan Pajas. "Endowments of Foundations Receive Contributions from the State Privatization Fund of the Czech Republic" 2 *The International Journal of Not-for-Profit Law* (August 1999), <http://www.icnl.org/journal/vol2iss2/pajasczech1.htm>.

¹⁶ Ibid.

¹⁷ Phone interview with Petr Pajas, Vice-President for Administration, The New Anglo-American College (June 4, 2004).

¹⁸ Hana Fristenska, Secretary, GCNGO, and Martin Vysin, "Non-State Non-Profit Organizations in the Czech Republic" (June 8, 2004).

Members assemble at least once every three months. They are not paid for their work. Through its composition and procedures, the Council enables the Czech NGO sector to participate effectively in the policy process. Operations of the Council are supervised by the Secretariat of the Council at the Governmental Office of the Czech Republic, which collects information, prepares expert materials, and provides administrative and organizational support.

Areas of Cooperation: Opportunities and Challenges

The method of distributing public resources to foundations resulted from close NGO-government collaboration.¹⁹ Another NGO idea that has been successfully implemented relates to appropriations for associations' support: after a survey of the Ministers on specific areas of cooperation (such as health care, social services, and education), general rules for the use of the funds were proposed. The government and civil society organizations continue to collaborate on preparing a new Civil Code and a bill on Public Benefit Status. The latter will determine which organizations operate for the public benefit and regulate their access to public funds and tax exemptions.

Based on the experiences in Hungary and Poland, a new law has been drafted to encourage donations from individuals – namely, the system of designating 1 percent of personal income tax to eligible civil organizations. Within a short time, the Council will send the draft to the other Ministries for comment. If the government rejects the draft, then it will be probably proposed to the Parliament directly by deputies of the Ministries. Because of the complicated political situation and the anticipated premature elections, however, the chances for success may improve later.²⁰

One complaint expressed is that NGO-government relations lack transparency. Further, as in most of the other countries studied, ambiguity with respect to NGO representation impedes social dialogue. It has been suggested that alliances within the third sector are needed in order to make clear who represents the sector in negotiating with the government. In the absence of umbrella organizations, government officials have been able to excuse failures to negotiate by citing uncertainty about the third sector's representatives. Still, the Council has nominated NGO representatives to serve on monitoring committees for operational programs, and the relevant Ministries have accepted the nominations and appointed the representatives. Moreover, after "intense negotiations," the Council succeeded in securing the appointment of NGO representatives to the European Economic and Social Committee.²¹

The picture at the regional level looks slightly different. As a result of administrative-territorial reform, fourteen new units were created. They possess the right of self-governance, which includes the legal powers to establish their own liaison offices and to support NGOs from municipal budgets. About ten of these units have opened discussions of their community development plans, with broad participation of NGO representatives, service providers, and trade unions. In some instances, NGO-government

¹⁹ *Supra*, Note 17.

²⁰ Letter by email from Martin Vysin, Secretariat of the Governmental Council for Non-State Non-Profit Organizations, to Maria Gerasimova (June 30, 2004).

²¹ *Supra*, Note 17.

partnerships at the municipal level are set forth in written contracts. Although comparable cooperation has not yet been achieved at the national level, encouraging trends can be built upon, including negotiations for an official governmental document stipulating the forms and rules of cooperation.

SLOVAKIA

Background Information

The Council of the Government of the Slovak Republic for Non-Governmental Non-Profit Organizations (“CG NGNPO”) was set up in 1999 as a result of collaboration between the newly elected government and civil society. A year earlier, the Program Declaration of the Government had expressed support for cooperation between the third sector and government, including joint activities to develop civil society. The government endorsed this position in its 2002 policy statement and pledged to initiate projects that would advance the collaboration. For example, the government promised the following actions to engage the third sector: (1) transforming the social services delivery system to include private providers and to set standards for financing services and ensuring their quality; (2) supporting the poor through charity and donations; (3) developing a transparent system of financing cultural activities; and (4) engaging NGOs in the development of foreign policy. NGOs expressed support for the government’s concept in the Declaration by the 6th Stupava NGO Conference. Discussions regarding a liaison body ensued among representatives of the Gremium of Third Sector, the Donors’ Forum, and umbrella and service NGOs.²²

Functions of the Office

According to its Charter, the Council is an advisory body of the government involved in all NGO-related activities. It focuses on initiating and evaluating policy proposals to support NGOs; drafting legislation concerning NGOs; and facilitating NGO-government cooperation at all levels on issues such as launching programs for cooperation, defining procedures and criteria for the distribution of public funds, and developing mechanisms for subsidies. The Council is also developing methods for disseminating information on NGOs, government programs, and its own work. The Deputy Prime Minister for Human Rights, Minorities, and Regional Development is Chairman of the Council. Council membership is honorary and unpaid. Members are selected from NGO platforms with the agreement of the Chairman.

Currently, the Council comprises 40 members. NGO representatives slightly outnumber state administrators, 22 to 18. The operations of the Council are supported by the Secretariat of CG NGNPO at the office of the Government, Human Rights and Minorities Section.

The Council meets twice a year. In order to ensure ongoing communication and continuous cooperation, it has established two working groups: (1) on legislative and economic issues, and (2) on issues concerning NGO involvement in the EU integration process.

²² Telephone interview with Tereza Horska, Senior Counselor of the Council.

NGO Participation

One of the Council's tasks is to propose appropriate NGO representation in decision-making, monitoring, and evaluation bodies. As a result, the government supports the creation of cross-sectoral advisory, consultative, and other bodies (such as committees and councils). The most vivid example is the (majority) participation of NGO platforms and similar umbrella organizations in the work of the Council.

In addition, NGOs and the government cooperate in developing and implementing projects, programs, campaigns, and conferences, and they participate jointly in public discussions and consultations. For example, the Ministry of Environment has signed an agreement of cooperation to address environmental issues of common interest with EKOFORUM, an informal forum of NGOs active in the environmental field. Another example is the Platform of Slovak NGO Development Organizations, which has partnered with the Ministry of Foreign Affairs to help develop and implement the Slovak Development Aid system.

Areas of Cooperation: Opportunities and Challenges²³

The work of the Council between 1998 and 2002 significantly contributed to the development of a "fair, reasonable and permanent" dialogue between the government and NGOs. The discussions and activities focused mainly on such issues as development of NGOs, their financial sustainability, and the legal framework in which they operate. In 2002, the newly appointed members of the Council adopted the following priorities: (1) analyzing legal and other issues relating to public funding, tax reform, public administration reform, decentralization, and Slovakia's EU integration; and (2) improving the legislative, organizational, and financial framework for NGOs to participate in the integration process and in both bilateral and multilateral collaborations, as well as preparing for use of EU structural funds.

One of the remaining challenges is how to develop financing models and further partnerships with national, regional, and local public institutions as well as the business sector.

THE "NEW MODEL"

CROATIA

Croatia presents an innovative model for institutionalized NGO-government cooperation. The government of Croatia began by establishing a centralized NGO liaison office, and then established a council that worked in partnership with the office. The government then moved toward decentralizing the cooperation and delegating some functions of the office to other bodies, under the framework of the *New Model of the Organizational Structure for Civil Society Development in Croatia* ("the new model").

²³ Information on areas of cooperation is largely based on the presentation "Overview of NGO/Government Relations in the Legal Framework of Civil Society in Slovakia after 1989," delivered at a conference on "Governments and NGOs in the Accession Countries," April 14-16, 2003, Budapest.

Background Information

The Government Office for Cooperation with Non-Governmental Organizations (“Government Office for NGOs”) was established in 1998.²⁴ It was responsible for fostering cooperation with the NGO sector through financing, consultation, education, and information sharing. The Office also coordinated legislative initiatives on issues affecting civil society. In addition, it channeled state funds to almost all fields of NGO activity through a transparent funding mechanism that had the following characteristics: public announcements of calls for proposals and clearly stated criteria; the creation of independent groups to review and assess projects; and a well-established monitoring and evaluation process. The Government Office for NGOs also led the process of preparing a *Program of Cooperation between the Government of the Republic of Croatia and the Non-governmental, Nonprofit Sector in Croatia* (“The Program of Cooperation”), which was signed in 2001. In addition, the Office published “SPONA” (Croatian for “liaison”), a periodic bulletin addressing issues of concern to Croatian NGOs, which was distributed to 16,000 recipients. Through its activities, the Government Office for NGOs helped build trust and transparent cooperation between the government and NGOs.

The cooperation between the government and civil society proved to be a vibrant process that was adjusted as needed to ensure the sustainability of civil society organizations and to define their role in spheres of collaboration. The government pledged to propose a means of financing civil society organizations to the Croatian Parliament²⁵; in response, the Government Office for NGOs developed plans for a decentralized organization. This model consists of two bodies: the Council for Development of Civil Society (“the Council”), established in 2002, and the National Foundation for Civil Society Development (“the National Foundation”),²⁶ established in 2003.²⁷ The model also envisions creation of a Strategy for the Development of the Civil Society and harmonization of the state funding process.

Functions of Key Players in the New Model

The new model resulted from a two-year process led by the Government Office for NGOs. The aim was to decentralize cooperation and state funding from one office to diverse stakeholders (government bodies, local and regional authorities, National Foundation, Government Office for NGOs, and Council). Specifically, Ministries and government offices and institutions are now responsible for channeling state funds directly to NGOs active in their fields of jurisdiction. The new model encourages Ministries to designate a person or unit responsible for cooperating with NGOs.

The decentralization stems from the need for direct communication between various Ministries and NGOs, in order to enhance their cooperation in addressing

²⁴ <http://www.uzuvrh.hr>.

²⁵ Government of Republic of Croatia, Program of Work for 2000-2004 (as cited in “From Vision to Change,” publication by the Government Office for NGOs, 2003).

²⁶ <http://zaklada.civilnodrustvo.hr/>.

²⁷ For detailed information on the new model see Cvjetana Plavska-Matic and Katerina Hadzi-Miceva, “A New Model for Civil Society Development in Croatia,” SEAL, Winter 2003/Spring 2004, p. 43, <http://www.efc.be/seal/journal.htm>.

particular social needs. It also opens the possibilities of diversifying funding sources for NGOs and of tapping alternative and matching funds for joint NGO-government activities. In addition, the Government Office for NGOs launched the drafting of a Code of Good Practice and Standards for the Financing of Programs of Civil Society Organizations out of State and Local Budgets. The Code is intended to guide bodies that channel public funds to do so in a transparent manner.

The National Foundation is established by the *Law on National Foundation for Civil Society Development* as a public, not-for-profit entity. It is responsible for promoting the sustainability of the sector, cross-sectoral cooperation, civic initiatives, philanthropy, and volunteerism, through education and publications, grant-giving, public awareness campaigns, evaluation services, research, and regional development. The Foundation is governed by a Management Board composed of three representatives from the government, one from local government, and five from NGOs. It is financed from state budget funds, Croatian lottery funds,²⁸ private donations, income from economic activities, and other sources.

The Council comprises ten government representatives, ten NGO representatives, and three experts. The members are nominated by specific Ministries, NGOs, and the Government Office for Cooperation with NGOs, and approved by the government.²⁹ The Council acts as a cross-sectoral advisory body to the government, primarily responsible for implementing the Program of Cooperation. The Council will continue monitoring implementation of the Program for Cooperation at the national and local levels, as well as creating a database of NGO programs funded by the government and proposing further changes in legislation relating to NGOs.

NGO Participation

The Government Office for NGOs initiated several cross-sectoral working groups, composed of representatives of ministries and NGOs as well as domestic and international experts. The groups were assigned to lead legislative initiatives intended to create a more supportive legal environment for NGOs (*e.g.*, the Law on Associations, Law on Income from Games of Chance and Competition, Law on Humanitarian Assistance, and draft Law on Foundations).

As noted above, NGOs are represented on the Managing Board of the National Foundation and on the Council. Significantly, the signing of the Program for

²⁸ “With the adoption of the Act on Income from Games of Chance and Competitions (2002) the material basis was formed for the foundation of the National Foundation for the Development of the Civil Society, as some of the money, as determined by Article 10 of this Act, intended for organizations which contribute to the development of the civil society, will be directed to the National Foundation. According to the Decree adopted by the Government of the Republic of Croatia in March 2003, the level of that expenditure on the activities of the National Foundation amounts to 14% of the total part of the income from games of chance which is directed towards NGOs, according to Article 10 of the Act on Income from Games of Chance and Competitions.” “From Vision to Change,” publication by the Government Office for NGOs, 2003.

²⁹ The Decision on Amendment of the Decision for Establishment of the Council for Development of Civil Society and Election of President and Members of the Council (Official Gazette of R. Croatia no. 111/2003) specifically enumerates the Ministries that can nominate representatives and the fields from which NGOs can nominate their own representatives.

Cooperation, discussed above, resulted from close cooperation between the government and NGOs. In addition, NGOs participate on almost all working groups for initiatives led by the Government Office for NGOs, National Foundation, and the Council. The most recent example is the National Committee for Development of Volunteerism, a body established by the Council to prepare a draft Law on Volunteerism and to develop a strategy for the promotion and support of volunteering in Croatia.

Areas of Cooperation: Opportunities and Challenges

The Program of Cooperation sets forth the following areas for cooperation:

- consulting with NGOs on legal initiatives and including them in working groups;
- consulting on designing the government's National Program and evaluating its strategy and priorities;
- consulting on evaluating projects in which public money is invested;
- evaluating national policy in all areas;
- decentralizing and cooperating for the development of society;
- partial or complete financing of programs and services;
- encouraging citizens to participate in decision-making and in meeting community needs;
- supporting and enhancing self-organization and volunteers' action to benefit their communities;
- developing social enterprise and social capital as important components of social development; and
- supporting a socially responsible business sector.

The Government Office for NGOs and the National Foundation have successfully advanced cooperation in these spheres so as to respond to the needs of citizens most effectively.

GOVERNMENT LIAISON OFFICES SPECIFICALLY ASSIGNED RESPONSIBILITY FOR COOPERATION – NO ADVISORY BODY

HUNGARY

Background Information³⁰

The Directorate for Civil Relations (DCR) within the Government Office for Equal Opportunities is the government body responsible for liaison with Hungarian civil society. It has existed for six years, albeit under different titles and organization structures. Institutionalized NGO-government coordination began in 1998 when Istvan Stumpf, a Minister with sound knowledge of and a positive attitude toward the third sector, promoted his idea for a specialized NGO office. The Department was established

³⁰ <http://www.nonprofit.hu>.

thereafter by government decree, without any participation of civil organizations in the process.³¹

Functions of the Office

Functions of the Directorate include initiating laws for the development of the third sector and facilitating dialogue with civil society representatives on a non-partisan basis. The Directorate works to incorporate a civil dialogue between NGOs and the government into the broader public discourse on policymaking, not only because it is a European Union requirement but because it is necessary. The Directorate also provides information about available EU funds and supervises the National Civil Fund, “the largest financial state fund for NGO support.”³²

NGO Participation

NGOs actively contributed to the preparation of the Civil Strategy of the Government and the Law on the National Civil Fund (2003). Opinions were exchanged at conferences and workshops as well as by traditional and electronic communication. Consultative civil forums with non-profit organizations and experts were organized. In the course of these discussions, the NGOs expressed the need for a more transparent support system that was tailored to the needs of the third sector.

Areas of Cooperation: Opportunities and Challenges

According to the Hungarian government’s strategy, “autonomous civil society” is considered “a partner by the State.” As in Estonia (see below), civic education is a priority of NGO-government cooperative efforts, ranging from the curricula at schools to education abroad. One reason for this emphasis is that the Hungarian civil sector is rapidly growing; more than 400,000 people volunteered in 2000, in addition to the 62,500 employees who work in the sector. Taking into account the widespread tendency toward outsourcing public services to NGOs, this employment is expected to soar. The demand for well-trained, qualified individuals will increase, with more and more positions requiring high qualifications, project management skills, and diverse abilities. In this regard, special attention is devoted to retraining public servants to work in the third sector.

The development of an information society is another field of prospective NGO-government cooperation. Civil organizations can be both consumers of information services and providers of content. “Telecottages,” along with the Civil Services Centers and other civil IT initiatives, are particularly important sources of information for local NGOs.³³ In addition to the existing nineteen county centers, the Budapest Regional Civil Service Center will soon start operating autonomously in cooperation with the Municipality of Budapest. Similar projects are expected to feature alliances between civil society organizations, government bodies, public educational institutions, and private IT companies. These initiatives provide government with a reliable flow of research with

³¹ Email from Nora Sasvari, Head of Unit, Government Office of Equal Opportunities, and Dr. Gyorgy Bodi, Director, to Maria Gerasimova (May 27, 2004), and phone interview.

³² See discussion of the Civil Fund, below.

³³ Bullain and Toftisova, *supra* Note 5.

which to assess its activities and processes, particularly those involving the effects of contracting out public services, the consequences of European Union accession, volunteerism, the democratization of society, and the roles of NGOs.

Furthermore, the third sector initiated the establishment of the National Civil Fund. The idea was to ensure, by law, state budget support for the operational costs of registered civil organizations beyond taxpayers' income tax designations. The newly adopted law stipulates that the government guarantees the National Civil Fund the amount collected by civil organizations through the 1 percent law, taking into account the taxes paid in the previous year.

This pattern of NGO-government relations arisen in other spheres, especially in the law- and decision-making processes at all levels – national, county, and local. In addition to cooperation in the legislative process (for example, recent collaboration on the Volunteer Law), we should note cross-sectoral cooperation and cooperation with respect to EU accession issues. The two sectors have also launched partnerships for providing public services (e.g., the Ministries of Health, Social Affairs and Family, Education, and Culture), and they have worked together on processes for determining direct and indirect (delegated) civil representation in EU institutions.

Despite the overall success, challenges remain. From the government perspective, NGO-government contacts are not yet as regular as they might be; the attitude of bureaucracy toward the NGO sector is not yet as professional as it could be; and administrative constraints still exist to a certain extent (for example, the State Budget Spending Transparency Program sets the maximum support for NGOs at 5 million HUF).³⁴ From the NGO point of view, the greatest obstacle is the huge number of participants – around 48,000 – and related difficulties in creating effective mechanisms for representation.

ROMANIA

Background Information

Since 2000, the law has required all central and local Romanian public authorities to have specialized units responsible for relations with civil society organizations. At the national level, this responsibility rests with the Directorate of Institutional Analysis and Relations with Associative Environment, part of the Department for Institutional Analysis, which in turn is subordinated to the Prime Minister. The Directorate's duties are to promote partnerships with NGOs, to ensure transparency of government activities, and to encourage dialogue between the Prime Minister and representatives of the third sector.

Romania has a distinctive experience in NGO-government cooperation at the local level. The Directorate assists and coordinates 84 territorial delegates working in different institutions, who have responsibility for encouraging NGO-government relations. These delegates receive monthly bulletins published by the Directorate (as well as magazines issued by NGOs). They report to the Directorate on the most active NGOs in their regions and their strategies, program data, projects, needs, and problems.

³⁴ *Supra*, Note 31.

Functions of the Directorate

The Directorate provides professional training to aid NGO-government collaboration at the local level. For example, several contracts between the Directorate and local authorities have framed the terms of partnerships under which local entities could gain access to PHARE funding programs.³⁵ In addition to offering professional development programs and information to public officers, the Directorate retrieves and analyzes data on NGO-government cooperation and undertakes the following activities:

- monitoring the implementation of norms for civil society in collaboration with central and local administrative structures;
- working on amendments to the legislative framework regulating associative life, in accordance with available information and the comments of partner associations and interested governmental entities;
- developing and coordinating programs in conjunction with associations and foundations (whether Romanian or foreign) and administrative entities; and
- publishing monthly bulletins, *Civil Society in Mass Media* and *Observer*, to inform civil society organizations about programs and financing available from the Government as well as from domestic and international partnerships.³⁶

The Directorate participated in the Tulcea meeting where the *Guide to European Union Funding for NGOs* was presented. The Directorate also co-organized sessions to publicize the Program for Civil Society Development, which was initiated by the Ministry of Finance with European Union support; it promotes NGO-government partnerships in various areas, such as counseling centers for citizens, community development, and the sustainability of the civil society sector.

NGO Participation

Romanian civil society organizations have contributed substantially to the evolving national debate on NGO legislation. They have prepared reports, conducted studies, and provided translations of foreign best practices, in addition to meeting with governmental officials. An association of NGOs has established a constructive dialogue with the Juridical Commission of the Deputies Chamber on amendments to Ordinance 26/2000 (the framework law on not-for-profit organizations in Romania), particularly those related to public benefit status. In addition, NGO proposals have helped the ministries define criteria for selecting and financing NGO projects. Furthermore, a 1 percent tax provision was included in the *Fiscal Code* of January 2004; the initiative for the provision came from the opposition political party in cooperation with more than 200 NGOs.³⁷

³⁵ Email from the Directorate of Institutional Analysis and Relations with Associative Environment to Maria Gerasimova (June 10, 2004).

³⁶ <http://ro-gateway.ro/civsoc/>.

³⁷ Mona Musca and Horia Paul Terpe, "Developing a Percentage Law: The Romanian Experience," SEAL (Summer/Autumn 2004), pp. 31, 44, <http://www.efc.be/seal/journal.htm>.

The consultation process is not always smooth, though. Sometimes NGOs are asked for comments and suggestions on very short notice, which makes it almost impossible for them to contribute. Other problems include failure to explain the purpose of a requested consultation, failure to provide necessary documents in advance, and failure to take expressed opinions into account in drafting the final law. For example, local governments' associations proposed amendments of the laws, as well as drafts of the fiscal and public services' decentralization law. Even though these associations were among the most important stakeholders with respect to these laws, their proposals were not accepted.

Another field of active NGO involvement was the debate over the European Commission's White Paper on Good Governance. NGOs organized several discussions. For example, the Regional Center for NGOs in Constanta held a debate featuring representatives of the public sector, academia, the EURISC (European Institute for Risk, Security and Communication), and the Ministry of Integration.

Generally, Romanian NGOs form issue-based coalitions, allowing more effective influence over the development and implementation of public policies. Thirty NGOs, for example, combined forces to combat violence against women. Anticorruption, health, and discrimination are also mobilizing causes; several alliances were established and broad campaigns conducted on these topics in recent years.

Areas of Cooperation: Opportunities and Challenges

NGO-Government collaboration has also produced several initiatives to ensure successful implementation of laws: a guide for applying the transparency law, legislative rules for social assistance, and models of good practice in child protection. In addition, NGOs have contributed to the Romanian Academy reports.

The Directorate was among the founders of the *eRomania Gateway Association*, which identifies, initiates, and carries out programs that promote *e*-development in Romania. The association was founded as part of the Romania Development Gateway, financed by the World Bank through the Information for Development Program. The project produced the first country-wide Internet portal for Romania: a web-based "resource center" where people in Romania and abroad can learn about *e*-business, government institutions, the business sector, civil society, and much more. The Information for Development Program seeks to use the World Wide Web for enhancing technology and information flow, thereby helping Romania (and other countries in transition) advance toward European integration.³⁸

A new trend in cooperation is contracts framing the rights and duties of the parties and their future activities toward common goals. Because the Roma population is considered one of the most vulnerable, the Directorate signed an accord with the Roma Center for Social Intervention and Studies to advance the Equal Chances for Roma Children without Identification Papers program. In addition, the Directorate endorsed a one-year collaboration protocol with the Foundation Civic Action as well as three cooperation agreements with the Peace Corps: *Development of NGOs in the Social*,

³⁸ *Supra*, Note 35.

Health and Youths Areas; Economical Development of the Communities; and The Management and Environmental Education Program.

The Directorate has international partners as well. The Francophone Intergovernmental Agency approved a project that was implemented in cooperation a French NGO, ORIFAL. At regional training seminars in three of the largest Romanian cities, public servants and NGO representatives compared Romanian and French practices in forming partnerships with public authorities.

In addition, the Directorate works to foster the development of civil society in the Republic of Moldova, Romania's neighbor to the northeast. One project, undertaken in partnership with the Moldovan Public Policies Institute, developed a weekly publication, *Democracy*, which is issued in Chisinau, Moldova's capital and largest city, and in the Northeast Region of Romania.

According to Otilia Pop and her colleagues from the Directorate, the most critical obstacles to effective NGO-government partnership are the government's wide-ranging and complex agenda and the limited resources (time, expertise, money) it can devote to the partnership.³⁹ These problems produce frustration on the part of NGOs. It is feared that bad experiences and failures of some organizations may harm the whole sector. There is also concern that the lack of sufficient capacity on the part of civil society organizations can result in the loss of valuable opportunities for the sector to influence the policy agenda.

**GOVERNMENT LIAISON FUNCTIONS
ASSIGNED TO EXISTING DEPARTMENTS**

ESTONIA

Background Information

The rise of civil society in Estonia has been attributed to two principal factors: disappointment with the existing governance system and growing confidence among citizens that they could contribute to public decision-making.⁴⁰ The third sector has assumed a role as the "natural voice of the people," providing a vehicle for them to express their opinions and to exercise their rights of assembly.

The third sector initiated a partnership agreement between the public sector and civil society organizations. The resulting agreement, known as the Estonian Civil Society Development Concept (EKAK), was approved by Parliament in 2002. The agreement was intended to provide the basis for fair interaction between the sectors in keeping with commonly accepted values, goals, and rules.⁴¹ As will be discussed below, the Ministry of Internal Affairs assumed responsibility for coordination with civil society, including issues related to implementing the agreement and establishing a committee of government and NGO representatives.

³⁹ Ibid.

⁴⁰ Kristina Mand, Director of the Network of Estonian Non-Profit Organizations, phone interview (May 24, 2004); Kristina Mand, "Implementing Partnership: Non-Profits and Public Authorities in Estonia" (May 25, 2004).

⁴¹ <http://www.emy.ee/alusdokumendid/concept.html>.

NGO Participation

The initiative for the agreement was taken in 1999. In order to ensure an open process and to collect diverse suggestions, a series of roundtables, negotiations, and seminars was organized and continued for fifteen months. Impressively, more than 2,500 NGOs worked together under the leadership of NENO (the Network of Estonian Non-Profit Organizations) with the assistance of UNDP. Finally, the initial idea – an NGO-public sector contract – was transformed into a strategic document that sets forth guiding principles for cooperation between the Government and the civil sector.

The draft of the EKAK was finalized in November 2000, after a process that sought suggestions and comments from the EKAK's Project Consulting Body, the Constitutional Committee of the Riigikogu (the Estonian parliament), central and local administrators, and regional meetings of NGOs.⁴² The EKAK was introduced to the Riigikogu by the Representative Council of the Estonian NGO Roundtable and was subsequently approved by Parliament. Despite some structural and technical changes, it retained the spirit of the draft and the priorities formulated by the NGOs.

Functions of the Department

Responsibility for implementing the Concept was assigned to the Ministry of Internal Affairs. Under its statute, the Ministry must coordinate and cooperate with the third sector and enhance community development through its Local Government and Regional Administration Department.⁴³ The Department also assists the NGO-government "joint committee" with administrative matters, analyses, and investigations that arise in the course of its work advising on implementation of the agreement.

The joint committee was established for the purposes of initiating, realizing, and evaluating action plans to implement the EKAK. The committee consists of eight representatives of the government and fourteen from the nonprofit sector, with the Minister for Regional Affairs presiding. The first assembly of the committee was held in October 2003. In accordance with the EKAK's long- and short-term priorities, three working groups were created: (1) involvement, consultation, policy appraisal, and legislation; (2) funding and statistics; and (3) awareness, civic education, media, and infrastructure.⁴⁴ Representatives of the government and NGOs share the chairmanships of the working groups. One of the committee's first tasks was to plan for implementation of the EKAK by examining the experiences of Canada and Great Britain. The EKAK Implementation Plan of 2004-2006, unanimously adopted by the Estonian government in August 2004, summarizes the work done so far by the joint committee. "The efforts of the joint committee were put in a format of a table consisting of 11 goals emphasizing issues related to legislation, civic involvement, funding, statistics, civic education and public awareness that are divided into separate activities made specific with respect to magnitude, time and responsibility."⁴⁵

⁴² <http://www.ngonet.ee/cfpbaltic/civilsociety/estonia.html>.

⁴³ Phone interview with Maris Puurmann, Estonian Ministry of Internal Affairs, Local Government and Regional Administration Department (May 25, 2004).

⁴⁴ *Supra*, Note 40.

⁴⁵ Email from Kristina Mand (August 23, 2004).

Areas of Cooperation: Opportunities and Challenges

Among the seven areas of NGO-government cooperation set forth in the EKAK, current priorities are statistics, civic education, and the support system for civic initiatives. First, compiling and updating statistics in an NGO database will be significant for both government and the NGO sector. The statistics will help identify NGO coverage and capacity as well as opportunities for collaboration, which in turn can inform development planning.

Second, education on civic rights and duties enhances citizen involvement. NGO-Ministry of Education cooperation is pursuing several objectives in the civic education area: introducing relevant courses in school curricula starting in the first grade, training teachers adequately, and establishing a mandatory state exam.

Finally, in order to avoid redundancy of administrative units, the Local Government and Regional Administration Department will develop a “one-stop office” concept at the county level. This will involve, among other things, assigning some supplementary functions to existing county development centers. These offices can coordinate regional partnerships. They can also provide services related to the accession process and EU funds, business and community development, and basic counseling. The key purpose of these supporting structures is to guarantee the competence and sustainability of citizens’ associations.

NGOs also participate in public decision-making. Third sector representatives take part in working groups and expert commissions at all ministries, particularly those making and implementing policies related to community development, education, youth, and enterprise. Unfortunately, public meetings and hearings are still not a common feature of Estonian political life.

One obstacle to effective NGO-government cooperation, from the point of view of Maris Puurmann of the Local Government and Regional Administration Department, is that the existing scheme complicates the new role of the Department in coordinating activities. Each ministry has established working partnerships with civil society organizations, so introducing a different model of collaboration is a challenge. In addition, the variety and complexity of subjects represent a challenge to the newly unified functions of the Department.

From the NGOs’ point of view, the main hindrances are “mistrust, different management and administrative structures, [and] resources.”⁴⁶ The government has failed to comprehend the ordinary NGO's problems with sustainability and its daily struggle for survival. The transformation of the Estonian third sector will probably enhance cooperation with the government: the sector will “become smaller in numbers due to improved and accurate statistics, but it will grow in quality, services provision, and financial viability.”

⁴⁶ Kristina Mand, Director of the Network of Estonian Non-Profit Organizations, phone interview (May 24, 2004).

LATVIA

Background Information

The Secretariat of the Minister for Special Assignments for Society Integration Affairs, particularly its Department of Society Integration, serves as the NGO-government liaison office in Latvia. Latvian policy places a high priority on social integration, with civic participation as one of its core values. This “bottom-up” approach seeks to generate more productive interactions between government and civil society by enhancing citizens’ interest and involvement in state governance. NGOs can play an important role here by developing methods of influencing decision-makers at all levels and by aiding the civic education of the population. The Department thus focuses its activities on improving the dialogue that citizens and their organizations conduct with the state.⁴⁷

Functions of the Office

The Department of Social Integration is the leading state governmental body in the field of NGO-government cooperation. It has the following responsibilities: to prepare legislation and other rules addressing social integration and minority rights in accordance with European Union legislation and other international treaties; to implement and coordinate two government programs, “The Integration of Society in Latvia” and “The Livs in Latvia”; and to promote the development of civil society. The Department is also responsible for coordinating state support for ethnic minorities’ cultural associations, as well as for evaluating relevant policy papers and legislative acts from other Ministries. The Department has the additional responsibility for providing civil society with relevant information and education.

NGO Participation

The Elaboration of Civil Society Development Strategy for Latvia is a project within the framework of PHARE,⁴⁸ so the rules, procedures, and Terms of Reference for PHARE projects govern the Steering Committee. The Committee includes representatives of central and local governmental institutions as well as NGOs. Although the civil society sector did not initiate the project, NGOs were invited to express opinions during development of the Terms of Reference. NGOs also took part in the debate on the draft framework document of the national program “Integration of Society in Latvia,” which was approved in 2000. The program elicited a significant response and was considered a useful step toward improving social integration.

⁴⁷ <http://www.integracija.gov.lv/?sadala=11>.

⁴⁸ Email from Inese Vaivare, Deputy Director, Department of Social Integration, to Maria Gerasimova (May 12, 2004.) PHARE is “one of the three pre-accession instruments financed by the European Union to assist the applicant countries of Central and Eastern Europe in their preparations for joining the European Union.” <http://europa.eu.int/comm/enlargement/pas/phare/>.

Areas of Cooperation: Opportunities and Challenges

NGO-government collaboration represents a major goal of “The Integration of Society in Latvia.” Under this program, the state must support the establishment and operation of NGOs. Priorities are to strengthen the links between individuals and groups in society, and those between individuals/groups in society and the state. Implementation of the framework document began in the summer of 2001, with the establishment of the Society Integration Fund.⁴⁹ Under this framework, state policy is expected to provide for intensive cooperation with and support for NGO centers, as well as promotion of NGO development. The main areas of cooperation are as follows:

- **Legislation:** The Law on Associations and Foundations developed through close cooperation between responsible ministries and the NGO community. Although current NGO legislation does not pose significant obstacles to establishing and operating an organization, it is not seen as furthering NGOs' development and financial sustainability. For that reason, a Law on Public Benefit Organizations was adopted in 2004, and related draft laws have been prepared and submitted by representatives of the Ministries of Culture, Finance, and Economy, in collaboration with NGOs. In addition, associations in certain fields are participating in working groups for revising legislation and developing new drafts and programs (*e.g.*, law on volunteerism and tax laws).
- **Charity and Philanthropy:** Charitable traditions have been promoted among entrepreneurs and individuals through debates and presentations.
- **Cooperation between the State and Local Authorities, Entrepreneurs and NGOs:** Compared to other Latvians, the residents of Riga, the capital, have considerably more opportunities to associate through formal organizations and to influence policy-making. Over 60 percent of all registered NGOs operate in Riga. It is considered crucial to enhance civic participation in the regions and rural areas, where the population has fewer resources. This program has conducted educational and informational activities and implemented grants for projects promoting NGO-local government cooperation. For example, a common information exchange system in all regions was established to facilitate NGOs' access to information. In addition to this regional cooperation, successful dialogues have been conducted at the national level concerning environmental protection, consumers' rights, and industrial development.

⁴⁹ http://www.integracija.gov.lv/doc_upl/SIP.rtf.

- **Delegation of Functions to Non-Governmental Organizations:** The government is outsourcing services under principles of equality and public competition. At present, outsourcing has been accomplished primarily through the government's contracting for social services, in addition to the Ministry of Culture's agreements with professional artist organizations and the Ministry of Education and Science's agreements with NGOs that deal with education and youth issues. Most state institutions, however, still lack experience with and knowledge of the contracting mechanism.

Most of these projects were carried out with the financial support of the Secretariat of the Special Assignments Minister for Social Integration (SMSASIA) and UNDP, as well as assistance from State Society Integration Foundation, Department for Ethnic Minority Affairs, local governments, Baltic-American Partnership Foundation, the PHARE program, and others.

One recent activity of the Department of Social Integration was an international conference, "We Go Further. National Minority Youth Activeness – An Impulse for Social Integration," organized in partnership with the Friedrich Naumann Foundation in December 2003. Participants from Latvia, Estonia, and the Russian Federation – including leading experts in sociology, political science, and cultural science, as well as national minority (youth) NGOs and media representatives – presented their countries' experiences in the integration of national minority youth, analyzed the present situation, and discussed future plans.

MULTIPLE GOVERNMENT DEPARTMENTS ASSIGNED RESPONSIBILITY FOR NGO COOPERATION

LITHUANIA

Background Information

By contrast to the other countries discussed in this article, Lithuania has no single administrative unit specializing in NGO-government coordination and cooperation. Instead, various institutions are responsible for particular aspects of cooperation with NGOs.⁵⁰ For instance, the Ministry of Social Security and Labor coordinates the provision of social services under agreements between municipalities and NGOs, a realm regulated by the Law on Social Services. The Lithuanian Council for the Affairs of the Disabled oversees NGO-government projects involving, among other things, medical and occupational rehabilitation and the social integration of disabled people. The Youth Affairs Council operates under similar conditions and facilitates state budget funding for and implementation of youth NGO initiatives.⁵¹

Areas of Cooperation: Opportunities and Challenges

Some observers advocate a single body dedicated to fostering cooperative relationships between government and the third sector. In addition, stakeholders from both sectors view the lack of an adequate legal framework as the major obstacle to

⁵⁰ Marius Navadunskis, Ministry of Social Security and Labor, "Overview of NGOs-Government Relations and the Legal Framework of Civil Society in Lithuania" (May 19, 2004).

⁵¹ <http://www.socmin.lt/?-1025581663>.

effective NGO-government cooperation. Another hindrance is financing, because the main funding sources for NGOs remain foreign donors, with the state providing few options.

Recently, an NGO Development Law has been drafted with significant contributions from NGO representatives and experts, who combined their efforts with those of the Lithuanian Parliament (Seimas) Temporary Work Group for Solving NGO Problems. Key proposals are that the law specify forms of NGO-government cooperation, and that it establish duties on the part of government to consult with NGOs, to provide access to government information, and to permit NGOs to participate in decision-making.

Another good example of a successful cooperation is an ongoing poverty reduction project that began in 2002. UNDP, the Ministry of Social Security and Labor, and the Non-governmental Information and Support Center (NISC)⁵² worked together toward several strategic objectives: establishing the basis for an NGO network against poverty and a continuous institutionalized dialogue between NGOs and the government; educating network participants; and administering pilot projects on social inclusion.

The Permanent NGO Commission and the Advisor for the Relationships with Society both work closely with the Executive Office of the Prime Minister to find ways of improving the environment for NGOs. These structures can be considered a step toward creating a governmental body for third sector liaisons. Furthermore, establishment of a liaison is consistent with the aims of the Lithuanian Government Program for 2001-2004, which proclaims support for NGOs in general and for governmental cooperation with NGOs and civil society in particular. Regional mechanisms for cooperation are likely to assume greater significance, given the growing number of NGOs focused on providing social services at the local level and their need to develop relationships with local authorities.

Without an institutionalized form of cooperation, the third sector has recognized the need for coordinated communication. In response, NISC put into practice initiatives to facilitate the exchange of information and opinions. For example, several email lists and an NGO bulletin board are available to members of the Seimas Group, the Board of the NGO Coalition of Philanthropy, and the Permanent NGO Commission, as well as legal experts, donors, think tanks, and NGOs. The result is an open and accessible forum for discussing legislation and other issues of common interest.

Another positive development is the increasing involvement of NGOs in decision-making. As specified in the Law of Public Administration, government institutions at the national and local levels are encouraged to consult with interested civil society organizations on all legislation drafts, decisions, and policies. For this provision to be fully effective, the government institutions must publish drafts in the press or on the Internet and then hold public hearings.

⁵² <http://www.nisc.lt>.

Conclusion

NGO liaison offices have provided vital mechanisms for successful NGO-government cooperation. The benefits of their activities are recognized by both bureaucrats and NGO representatives. The offices help identify, first, the problems in furthering the sustainability of the civil society sector and in building workable partnerships, and second, the most suitable solutions to the problems. The leading principles in these continuous processes are open dialogue, mutual trust and understanding, and shared goals. Adherence to these principles makes the NGO liaison offices not merely administrative structures, but meaningful “bridges” between the public and non-profit sectors.

COMPARATIVE APPROACHES

Public Benefit Status: A Comparative Overview

By David Moore¹

I. Introduction

The legal framework for nongovernmental, not-for-profit organizations (NGOs) typically permits organizations to be created in different forms and to pursue any legitimate aim, including both mutual benefit and public benefit interests. In most countries, however, the state does not want to extend benefits to all NGOs indiscriminately; instead, the state typically extends benefits to a subset of these organizations, based on their purposes and activities. By providing benefits, the state seeks to promote certain designated activities, usually related to the common good. NGOs pursuing such activities are given many different labels, including “charities” and “public benefit organizations.” Some countries, moreover, do not explicitly define this status in their laws, but certain purposes and activities are nonetheless linked to state benefits. In this article, we use the term “public benefit” to refer to this special status, and the term “public benefit organization” (or PBO) to refer to organizations legally recognized as having this status.

The practice of distinguishing PBOs and facilitating their activities is deeply rooted in European society. Codification of the common law system dates back to 1601 and the English Statute of Charitable Uses, which sought to enumerate charitable purposes and to eliminate abuse. Over time, the notion of public benefit expanded beyond the relief of poverty to include caring for the sick, training apprentices, building bridges, maintaining roads, and other, related purposes. As for the civil law tradition, foundations – which were dedicated to a public benefit purpose – existed in Europe in the fifth century B.C. Today, most civil law countries extend tax preferences to both foundations and associations, contingent on public benefit purposes.

This article seeks to present an overview of European practices for regulating organizations with public benefit status. We will focus on (1) the regulatory frameworks for public benefit status; (2) the definition of public benefit and the activities that qualify under it; (3) the appropriate decision-making authority; (4) the procedures for

¹ David Moore is Program Director for Central and Eastern Europe for the International Center for Not-for-Profit Law. This article is excerpted from the forthcoming ICNL book *Procedures for Granting Charitable, Public Benefit, or Tax-Exempt Status Around the World*, and was made possible by funding received from the Third Sector Foundation of Turkey (TUSEV), Istanbul, as well as the Institute of Urban Economics, Moscow.

certification/registration; (5) the state benefits for public benefit organizations; and (6) the accountability of public benefit organizations.

II. Regulatory Context

There is no single “right” approach to regulating public benefit. While the need for public benefit regulation is consistently recognized (at least in Europe), the regulatory frameworks vary. This section seeks to identify the primary regulatory trends.

Fundamentally, public benefit status is an issue of fiscal regulation. To promote public benefit activity, the legal framework must link public benefit status directly to preferential tax treatment or other forms of government support. In exchange for these benefits, PBOs are generally subjected to additional supervision, to ensure that they are using their assets for the public good.

Public benefit status can be conferred on NGOs either explicitly – through provisions in framework legislation or in separate public benefit legislation – or implicitly – through provisions in various laws that create the functional equivalent of operational provisions in public benefit legislation. In many countries, such as Germany and the Netherlands, tax legislation lists public benefit activities and defines fiscal privileges for NGOs pursuing those activities. The advantage of this approach is administrative simplicity; because public benefit status is an issue of fiscal regulation, it is natural to regulate public benefit issues through the tax code. The disadvantage is that, in some legal traditions, it is inappropriate to impose operational requirements (such as requirements addressing internal governance and reporting) through the tax law.

By contrast, NGO framework legislation specifically defines public benefit status in Bosnia, Bulgaria, Romania, and other countries. The primary drawback of this approach arises in countries that address different organizational forms through separate laws: a law on associations, a law on foundations, etc. Regulating issues of public benefit status in each separate law increases the likelihood of inconsistent regulatory treatment. Public benefit organizations should be subject to a number of similar requirements regardless of the underlying organizational forms. What is important is the public benefit nature of the organization, not whether it is a membership or a non-membership organization.

Where NGO framework laws address public benefit status, furthermore, reform of the relevant tax provisions often lags behind. Organizations may have no incentive to apply for public benefit status if such status does not entail any financial benefits. In Bulgaria, for example, two years elapsed between the introduction of the public benefit concept (through a new NGO law) and the provision of some benefits for PBOs (through revision of the tax law). In Bosnia, tax reform has been pending since the 2001 enactment of a new NGO law incorporating the public benefit concept.

Increasingly, therefore, countries are adopting specific “public benefit” legislation in an effort to address the full range of issues comprehensively and consistently. Hungary adopted public benefit legislation in 1997; Lithuania adopted a Law on Charity and Sponsorship in 2002; Poland enacted a Law on Public Benefit Activities and Volunteerism in 2003; and most recently, in 2004, Latvia adopted a Law on Public Benefit Organizations. These specific laws generally address the full range of regulatory

issues relating to public benefit status, including the definition of public benefit status, the criteria for obtaining it, the benefits it entails, and the obligations it imposes.

III. Definition of Public Benefit and Qualifying Activities

This section seeks to provide guidance and comparative information on the definition of public benefit and the qualifying activities. Although there is no single approach for defining public benefit, trends of international good practice are developing.

First, it is common to enumerate certain specific purposes that are deemed to serve the common good. Thus, a public benefit activity is any lawful activity that supports or promotes one or more of the purposes set forth in the law. The list below contains virtually all of the public benefit activities recognized in one or more countries in Europe:

- a) amateur athletics;
- b) arts;
- c) assistance to or protection of physically or mentally handicapped people;
- d) assistance to refugees;
- e) charity;
- f) civil or human rights;
- g) consumer protection;
- h) culture;
- i) democracy;
- j) ecology or protection of environment;
- k) education, training, and enlightenment;
- l) elimination of legally proscribed forms of discrimination, such as discrimination based on race, ethnicity, and religion;
- m) elimination of poverty;
- n) health or physical well-being;
- o) historical preservation;
- p) humanitarian or disaster relief;
- q) medical care;
- r) protection of children, youth, and disadvantaged individuals;
- s) protection or care of injured or vulnerable animals;
- t) relieving burdens of government;
- u) religion;
- v) science;
- w) social cohesion;

- x) social or economic development;
- y) social welfare; and
- z) any other activity that is deemed to support or promote public benefit.

Of course, this list may be too extensive for any one country. Countries choose public benefit purposes that reflect their needs, values, and traditions. In the Netherlands, for example, the public benefit purposes developed in fiscal jurisprudence include purposes that are ecclesiastical, based on a philosophy of life, charitable, cultural, scientific, and of public utility. German tax law includes public health care, general welfare, environmental protection, education, culture, amateur sports, science, the support of persons unable to care for themselves, and churches and religion. In France, the tax law defines public benefit to include, among others, assistance to needy people, scientific or medical research, amateur sports, the arts and artistic heritage, the defense of the natural environment, and the defense of French culture. In Hungary, separate public benefit legislation lists 22 purposes, including health preservation, scientific research, education, and culture. Similarly, Polish law lists 24 public benefit activities.

Many countries exclude certain activities or goals from qualifying as public benefit. Restrictions commonly include political and legislative activities, such as lobbying and campaigning (e.g., Hungary prohibits PBOs from undertaking direct political activities or providing financial aid to political parties). Some countries exclude purposes related to sports and religion; others do not.

Second, many countries include a “catch-all” category, which simply embraces “other activities” that are deemed to serve the common good. This is an effective way to ensure that enumerated purposes are not interpreted in an overly restrictive manner, and that the concept of public benefit remains flexible, keeping pace with changing social conditions; where public benefit definitions lack such a “catch-all” category, it may prove difficult to add new activities that serve the public benefit. The law may simply include a provision similar to the following: “Any other activity that is determined to support or promote public benefit.” As a common-law country, the U.K. relies on case precedent to define “charitable” purposes. Over time, courts in the U.K. have classified charitable purposes under four broad categories: (1) relief of poverty, (2) advancement of education, (3) advancement of religion, and (4) other purposes beneficial to the community. The courts thus recognize that the definition of “charitable purpose” must change to reflect current social conditions.²

² Recognizing the need for modernization, the British government has introduced legislation to reform charity law. The draft Bill contains no statutory definition of “public benefit,” as the Government believes the current non-statutory (common law) approach provides flexibility and the capacity to adapt to changing circumstances. Instead, the draft Bill sets a framework listing the main charitable purposes, as follows:

- prevention or relief of poverty;
- advancement of education;
- advancement of religion;
- advancement of health or the saving of lives;

Third, many countries require that the organization be created and operated principally to engage in public benefit activities, however defined. An organization is *created* principally for public benefit when its governing documents limit it principally to public benefit purposes and activities. An organization is *operated* principally for public benefit when its actual activities are principally public benefit. “Principally” may mean more than 50 percent or virtually all, depending on the country. The “principally” criterion is applied differently too – for example, by measuring the portion of expenditures, the portion of staff time, or the circle of beneficiaries.

In the Netherlands, the decisive factor is the circle of potential beneficiaries. If the activities are aimed at too restricted a group of persons – persons belonging to a family, for example – then the organization is not eligible for public benefit status. If the organization serves its members *and* engages in public benefit activities, it may qualify for public benefit status if at least 50 percent of its overall activities are public benefit activities. In order to qualify as a PBO in France, similarly, an organization must engage primarily in at least one public benefit activity, and it must serve a large, undefined group of individuals in France.³

The Charity Commission of England and Wales requires more exacting adherence to public benefit. For an organization to be treated as a charity, its aims must be exclusively charitable, and it must be set up for the benefit of the public. The Charity Commission applies three criteria:

- 1) the organization must be capable of conferring clear benefits on the public;
- 2) those eligible to receive the benefits must constitute a large enough group to be considered the public or a sufficient section of the community, and no personal or private relationships can be used to limit those who may benefit; and

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- advancement of citizenship or community development;
 - advancement of arts, culture, heritage, or science;
 - advancement of amateur sport;
 - advancement of human rights, conflict resolution, or reconciliation or the promotion of religious or racial harmony or equality or diversity;
 - advancement of environmental protection or improvement;
 - the relief of those in need by reason of youth, age, ill health, disability, financial hardship, or other disadvantage;
 - advancement of animal welfare; and
 - other currently charitable purposes together with new purposes analogous to or within the spirit of purposes now or in the future as charitable.

³ France has two forms of public benefit status: (1) general interest status and (2) public utility status. As stated in the text, an organization qualifies for general interest status when it engages primarily in a public benefit activity and it provides services to an appropriate group of beneficiaries. To qualify for public utility status, an organization must also adopt statutes in compliance with model statutes provided by the *Conseil d'Etat* (with provisions regarding internal structure, use of funds, and distribution of assets upon dissolution) and satisfy other requirements relating to financial viability and size of the organization.

- 3) any private benefits to individuals must be incidental and not outweigh the benefits to the public.⁴

In connection with the second criterion, it should be emphasized that English practice allows the beneficiaries of an organization's activities to belong *predominantly* to a particular racial, ethnic, religious, or other group, so long as the benefits are not restricted *solely* to members of that group.

Similarly, Germany requires that an organization receiving tax benefits carry out its public benefit activities exclusively, directly, and unselfishly (with disinterest). Poland likewise requires that a public benefit organization engage exclusively in public benefit activities. A Polish organization must meet the following requirements, among others:

- it conducts its statutory activities for the whole community or for a defined group of individuals whose living or financial situation is particularly difficult in relation to the rest of the society;
- the public benefit activities are the organization's only statutory activities (except that membership-based organizations can also undertake activities serving the members);
- it does not conduct economic activities, or its economic activities are limited to the fulfillment of statutory activities; and
- its entire income is allocated to its public benefit activities.⁵

IV. Decision-making Body

This section focuses on the identity of the decision-making authority – who is responsible for granting and revoking public benefit status.

Who decides which organizations qualify for public benefit status? The question has critical implications for the regulation of public benefit organizations and the entire nonprofit sector. The decision-maker has the authority to grant public benefit status; often has the additional authority to revoke public benefit status; and in some countries is also responsible for supervising and supporting the work of public benefit organizations. By granting public benefit status, the decision-maker lays the foundation for distinct regulatory treatment – treatment that entails both state benefits (usually tax exemptions) and more stringent accountability requirements.

There is no single right answer to the question of who should make the public benefit determination. In some countries, the power is vested in the tax authorities. In other countries, the courts or a governmental entity such as the Ministry of Justice confers public benefit status. Still other countries assign the authority to independent commissions. Each approach has distinct advantages and disadvantages.

⁴ See Debra Morris, "How Does the Common Law Assess Public Benefit in Order to Define a Charity?", April 1999, *International Journal for Not-for-Profit Law*, Volume 2, Issue 1, http://www.icnl.org/journal/vol2iss1/plenary_1.htm.

⁵ See Law on Public Benefit Activities and Volunteerism of Poland, Article 20.

In many countries, the public benefit determination is made by the **tax authorities**. These countries may not recognize a “public benefit” legal form or status as such; often, the fiscal authorities decide which organizations are entitled to fiscal privileges based on their purposes and activities. Countries adopting this approach for at least some categories of public benefit activity include Denmark, Finland, Germany, Greece, Ireland, the Netherlands, Portugal, and Sweden. In Denmark, for example, the tax authorities grant public benefit status through an annually published list of qualified organizations. In Finland, the status is granted for a period of five years by the National Tax Board. In Germany, the local tax authorities are responsible for granting public benefit status and for verifying that requirements for retaining this status are met every three years. In the Netherlands, official recognition as a public benefit organization is not required, but an NGO may request it. Such recognition helps organizations avoid potential disputes, which is particularly important when large donations are involved. Fiscal authorities in the Netherlands have adopted certain criteria related to the applicant's transparency and accountability.

Vesting the tax authorities with authority over the public benefit determination has the advantage of administrative convenience, in that one entity makes all such decisions. The entity's degree of expertise may depend on whether the tax department assigns the task to a specialized department within it. In addition, the tax authorities in some countries demand this authority, because the determination affects the tax base. A potential disadvantage, however, arises out of the potential conflict of interest between the duty to maximize the tax base and the responsibility for granting a status that reduces the tax base.

In Bulgaria, the Ministry of Justice – specifically, a Central Registry within the Ministry of Justice – is responsible for public benefit regulation (certification and supervision). Court-registered NGOs pursuing public benefit activities must submit applications and documentation to the Ministry. Should registration be denied, the applicant may file an appeal within 14 days in the Supreme Administrative Court. The primary advantage of placing authority within a **single ministry** is the greater likelihood of consistent decision-making. A ministry may foster the development of expertise by creating a department devoted to public benefit issues, as in Bulgaria; however, a single ministry with many duties may fail to allocate sufficient resources to public benefit issues, in which case expertise is less likely to develop. Perhaps the greatest danger in assigning public benefit issues to a single ministry is the danger of arbitrary, politically motivated decision-making. In certain countries where ministries hold authority over registration, there has been a distinct chilling effect on NGOs pursuing registration.⁶

⁶ Very few countries have placed decision-making authority within line ministries. Romania is one exception. This approach may offer an advantage, in ensuring that ministries with appropriate expertise evaluate public benefit activities (e.g., the Ministry of Health reviews the public benefit application of an NGO pursuing health-related activities), but there are far more disadvantages. The danger of political decision-making remains; consider an environmental NGO seeking to engage in environmental advocacy and litigation that must apply to the Ministry of the Environment for certification/registration. The problem of inconsistent decision-making between ministries, further, is acute. In addition, jurisdictional gaps will inevitably arise, where the applicant will not know which ministry is competent to handle its application. In Romania, furthermore, the law has left the formulation of qualifying criteria to each line ministry, which

Indeed, it is in order to avoid politicized decision-making that some countries have opted to vest **courts** with the power to certify or recognize public benefit organizations. Such is the case in Greece, Hungary, and Poland; in France, the *Conseil d'Etat* – its highest administrative court – has authority to decide whether associations and foundations qualify for “public utility” status. Court-based registration can offer the additional advantage of accessibility, in cases where courts throughout the country hold the authority. Furthermore, courts can actually speed up the process of public benefit recognition, in countries where an NGO can apply simultaneously for registration as a legal entity and for recognition as a public benefit entity. Such is the case in both Greece and Hungary. But, because courts are usually overburdened, the registration process can be slow-moving. Also, courts must deal with a wide range of issues, making it difficult for them to develop specialized expertise in public benefit issues. Decentralized decision-making, finally, is unlikely to produce wholly consistent decisions.

Perhaps the most innovative approach is the **Charity Commission** for England and Wales. While the Charity Commission is part of the government, it is independent of the political process. Its powers are conferred by an Act of Parliament. Oversight is exercised by five Commissioners, all of whom are outside both the political process and the voluntary sector. The key benefits to the commission approach are its independence from political interference, and the quality and consistency of its decisions as a result of the concentration of expertise. The key disadvantages are the cost of creating and maintaining such a commission, and the fact that it is a centralized organ.

Interestingly, the Moldovan Law on Associations created a similar body, known as the Moldovan Commission. The Moldovan Commission consists of nine persons, with three appointed by the President, three by Parliament, and three by the Government. At least one of each of the three sets of appointees must represent a public benefit organization and not be a civil servant, a government official, or a Member of Parliament. The hope is that including public benefit representatives on the Commission will protect against repressive or discriminatory decisions and increase public confidence. Developing the proper mechanism for selecting the civil society representatives, however, remains a critical challenge.

It should be emphasized that a “public benefit commission” will only be effective if it is truly free from government interference. As is the case in England, and to a lesser extent in Moldova, commission members should represent civil society and not government. Indeed, the Charity Commission in England ranks independence as one of its core principles:

We act in the public interest in carrying out our independent role. We work in partnership with charities, umbrella bodies, local and central Government bodies, and to others to whom we are accountable. Although we will be receptive and responsive to the views of these interests, we will arrive at our own decisions without fear or favour.⁷

creates uncertainty for those ministries that have issued no criteria while inviting inconsistency given the variation of criteria from ministry to ministry.

⁷ “The Charity Commission and Regulation,” as contained on the Commission’s website, <http://www.charity-commission.gov.uk/spr/regstance.asp>.

In stark contrast to the independent commission approach, a few countries grant public benefit status by governmental decree. In Belgium, for example, organizations engaged in cultural activities are granted public benefit status by royal decree. In France, associations and foundations are accredited as public benefit organizations by decree from the *Conseil d'Etat*. And in Luxembourg, public benefit status is granted by Grand-Ducal decree after application to the Ministry of Justice. These practices reflect particular historical, cultural, and legal contexts, and need not represent models for emulation.

The power to grant public benefit status generally also includes the power to evaluate and, where circumstances warrant, the power to revoke the status. Once public benefit status is obtained, however, there should be a presumption that it will endure, unless and until revocation is warranted based on monitoring/reporting requirements. Although most countries require annual reporting, some countries grant public benefit status for a longer period: three years in Belgium and Germany, for example, and five years in Finland.⁸ Should the authorities revoke public benefit status based on an adverse evaluation, the process should provide the right to appeal to an independent arbiter and other procedural safeguards.

V. Certification / Registration Procedures

This section compares European registration procedures for organizations seeking public benefit status, with particular focus on Hungary and Poland.

Whichever organ the state designates to rule on applications for public benefit status, the certification or registration process should be clear, quick, and straightforward. The specific procedures of course vary, depending on the country's regulatory scheme.

In the same way, documentation requirements can vary. Generally, however, NGOs applying for public benefit status must submit documentation indicating (1) the qualifying public benefit activities; (2) compliance with internal governance requirements, including safeguards against conflict of interest and self-dealing; and (3) compliance with activity requirements (the extent of public benefit activity) and limitations (for-profit, political, etc.). To be eligible for tax benefits under the German tax framework, for example, an organization must have a governing document specifying a public benefit purpose and stating that the public benefit activities will be carried out exclusively, directly, and unselfishly; furthermore, the organization must be governed in accordance with the rules laid down in the governing document.⁹

Where courts are responsible for public benefit registration, as in Hungary and Poland, separate public benefit legislation sets forth detailed procedures and requirements. The goal is to ensure that an organization focuses predominantly on public benefit activities, that it does not engage in other activities to the detriment of its public benefit mission, and that it maintains appropriate standards of transparency.

⁸ In European practice, organizations generally must demonstrate ongoing compliance with public benefit criteria through reporting, but they are not required to seek accreditation on a project-by-project basis. Such an approach would clearly impose administrative burdens on both NGOs and regulatory authorities.

⁹ See footnote 3, *supra*, for information on France.

Hungary's 1997 Public Benefit Act lists the specific provisions that must be included in the organization's founding instrument, including the following:

- the list of public benefit activities;
- a clause stating that the organization conducts entrepreneurial activities solely in the interest of and without jeopardizing its public benefit activities;
- a clause stating that the organization does not distribute business profits, but devotes them to its statutory activities;
- a clause stating that the organization is not involved in direct political activities and does not financially aid political parties; and
- clauses relating to internal governance, conflict of interest, and reporting requirements.¹⁰

Similarly, Poland's 2003 Law on Public Benefit Activities and Volunteerism lays down specific registration requirements for organizations pursuing public benefit status, including the following:

- the organization conducts its statutory activities for the sake of the whole community or a defined group of individuals in a particularly difficult living or financial situation;
- the public benefit activities are the only statutory activities of the organization;
- it does not conduct economic activities, or its economic activities are limited to the fulfillment of statutory activities;
- its entire income is allocated to public benefit activities;
- it has a statutory collegiate institution for monitoring or supervision that is separate from the management board; and
- its statutes prohibit certain types of self-dealing and conflicts of interest described in the law.¹¹

Procedural safeguards to protect applicants are the norm. These include time limits and a right to appeal adverse decisions to an independent arbiter. Hungarian courts must decide on public benefit applications within 30 days, extended to 45 if additional information is required; an adverse decision can be appealed to the superior courts within 15 days. Polish courts must rule on applications within three months, but in practice take about six weeks. Bulgaria has imposed even stricter limits. The Ministry of Justice must decide on public benefit applications "immediately," and the failure to grant registration within 14 days is considered a tacit denial of registration. In the case of a denial, the applicant may appeal to the Supreme Administrative Court within 14 days.

¹⁰ See Section 4 of Act CLVI of Hungary, 1997.

¹¹ See Article 20 of the Law of Poland on Public Benefit Activities.

As a procedural shortcut, countries granting separate public benefit status often allow an organization to register simultaneously as an NGO (association, foundation, or other organizational form) and as a public benefit organization. Such is the case in Greece, Hungary, and Kosovo. Bulgaria is an exception; there, courts register NGOs and, subsequently, the Ministry of Justice processes applications for public benefit status.

Facilitating the recognition of public benefit organizations is in the state's interest. Registration requirements that delay recognition will only interfere with the work of public benefit organizations. Whether contained in the law or in accompanying regulations, the legal framework must set forth clear procedural requirements that facilitate registration while imposing appropriate standards of accountability and transparency.

VI. Benefits for Public Benefit Organizations

This section underscores the importance of linking public benefit status to state benefits by providing a brief overview of typical kinds of state support.

For public benefit recognition to have any real meaning, it must provide state benefits that aid the work and sustainability of PBOs. State benefits typically come in the forms of tax exemptions on the organization's income, tax incentives for the organization's donors, and VAT relief. PBOs may also receive state subsidies or grants, and preferential treatment in procuring certain government contracts. Whatever form the benefits take, a cornerstone principle is that the benefits should be linked to the regulation of PBOs.

Most commonly, the state extends tax benefits to PBOs.¹² **Tax exemptions** may take a variety of forms and are usually available only if the income is used to support the public benefit purpose. The following categories of income may be exempt from taxation:

- income from grants, donations, and membership dues;
- income from economic activities;
- investment income;
- real property tax;
- gift and inheritance tax; and
- value added tax.

Tax incentives for individuals and corporations donating to PBOs are a crucial means of encouraging private philanthropy to support public benefit activity. Such tax incentives may take the form of tax credits or, more typically, tax deductions. Almost invariably, **donor incentives** are linked either to the public benefit status of the recipient

¹² For a comprehensive overview of tax benefits associated with NGOs and PBOs, both tax treatment of the organizations and incentives for their donors, covering 16 jurisdictions of Central and Eastern Europe, see ICNL's *Survey of Tax Laws Affecting NGOs in Central and Eastern Europe* and *Survey of Tax Laws Affecting NGOs in the Newly Independent States*, <http://www.icnl.org/programs/cee/pubs/taxsurvey/p10.pdf>

or to enumerated public benefit activities in which the recipient is engaged. For example, France and Germany allow only public benefit organizations to receive tax-deductible donations.¹³

The state may also provide **other forms of support** to public benefit organizations, including the following:

- many sources of grants, including the National Lottery, are available either exclusively or more easily to charities (UK);
- a PBO may purchase “the right of perpetual usufruct of estates that are owned by the State Treasury or local self-government units” (Poland);
- users of PBO services are entitled to a personal tax exemption for the value of the service received (Hungary); and
- a PBO is entitled to employ a person fulfilling his civil service duty (Hungary).

VII. Accountability of Public Benefit Organizations

This section outlines the common European approaches to ensuring the accountability and transparency of public benefit organizations.

Public benefit organizations – as recipients of direct and/or indirect subsidies from the government – will naturally be subject to greater government scrutiny. The purposes of this scrutiny are to protect the public from fraud and abuse by NGOs, and to ensure that public support is linked to public benefits. In positive terms, the goals of supervision are to support good management, appropriate to the size of the organization; and to ensure that the organization is accountable to its members, beneficiaries, and users, as well as the public. The degree of supervision should be proportionate to the benefits provided, and not so intrusive as to compromise the organization's independence.

Regulatory Authorities. The identity of the PBO regulator varies widely from country to country. In some cases, the registration/certification body also regulates; such is the case in England (the Charity Commission) and Bulgaria (the Central Registry of the Ministry of Justice). Elsewhere, specific government bodies play a regulatory role. In Hungary, for example, where a PBO has received funding from the state budget, the State Audit agency may monitor the use of the funds. In Romania, a special government department monitors associations and foundations with public utility status.

Reporting. To ensure that public benefit organizations are transparent and accountable, the state has legitimate interests in requiring information about how public subsidies are being spent, including both financial information (e.g., annual financial statements, or an accounting of the use of assets obtained from public sources and supposedly used for public benefit), and programmatic information (e.g., a report on activities undertaken in the public interest).

¹³ In France, only general interest associations, public utility associations, and public utility foundations (all categories of PBOs) are entitled to receive tax-deductible donations. In Germany, only certain public benefit organizations may receive tax-deductible contributions (those pursuing general public benefit purposes, benevolent or church-related purposes, or especially support-worthy general purposes).

Most commonly, a PBO files reports with the tax authorities, including annual tax returns (even if the organization is exempt) and/or applications for tax benefits (submitted voluntarily), as well as annual activity reports with the supervisory ministry or agency. Poland follows a somewhat different approach by requiring a PBO to submit annual activity reports and annual financial statements to the Ministry of Social Security. Hungary has adopted a third approach: a PBO must prepare and make available a public benefit report, which contains an accounting report, a summary of public benefit activity, and information on the organization's use of public support, its use of its own assets, the amounts of budgetary subsidies it received, and its remuneration of senior officers. Once such information is gathered, it should be made available so that the public can exercise oversight.¹⁴

In England and Wales, the accountability framework is graduated according to the size of the charity. The threshold is set at 10,000 British pounds in annual income. Those below the threshold need provide only basic details of activities, receipts, and payment accounts, so as to maintain the accuracy of the register; those above the threshold must complete a more detailed return and send in their report and accounts.

Audits and Inspections. In addition to reporting obligations, authorities often employ government audits, inspections, and other monitoring tools, though sometimes with procedural safeguards. In Germany, for example, an NGO must be given notice and an adequate time to prepare before a regular tax inspection; only VAT inspections may be conducted without notice. In Bulgaria, PBOs are subject to financial audits for the use of state or municipal subsidies or grants under European programs. The responsible auditing body must have cause to justify the audit, but prior notification is not required. Hungarian PBOs are subject to supervision by the State Audit Office for the use of budgetary subsidies. In Poland, the Ministry of Social Security has a right of access to an organization's property, documents, and other carriers of information, as well as the right to demand written and oral explanations. Such an inspection must be performed in the presence of a representative of the PBO or other witness. The inspecting officials must prepare a written report; the head of the PBO then has 14 days to submit a written explanation or objections to the content of the report.

In England, the government has no powers to investigate NGOs as such. The authorities do, of course, have a range of powers that affect NGOs – including powers related to terrorism and criminality (police), financial malpractice by companies and banking agencies, and childcare (Social Services Inspectorate) – but these are generic rather than specific to the charitable sector. Independent of government, the Charity Commission is vested with supervisory and investigatory power, through which it seeks both to encourage good practices (as a support and advisory body) and to tackle abuse (as an investigative body).

The Commission's Support Division is responsible for giving organizations advice and guidance on a range of legal, governance, management, and financial issues. To make these services more widely available, the Support Division engages in outreach, including visits to individual charities, road shows open to charities, and conferences.

¹⁴ Preferred methods of disclosure include publishing it in newspapers (Czech Republic) or on a website (Hungary), or making it publicly available at the organizational premises (Hungary).

The Commission's Investigation Division is responsible for combating abuse; it can suspend trustees, freeze bank accounts, and appoint a receiver and manager to act in place of the trustees. Although the Commission does not have the power to de-register a charity, it can act to dissolve a charity by transferring all of its assets to a comparable charity. These two Divisions, along with the Registration Division, are supported by a team of lawyers and accountants who provide professional expertise.

The key to Commission action is proportionality. Smaller charities (those with an annual income of less than 10,000 British pounds) are handled deferentially. The Commission does not use the term "audit"; instead, it has developed the practice of pre-announced visits to examine a charity's administration. The Commission more closely scrutinizes larger charities in order to promote good practice, but only with cause; initiating an investigation without cause runs against the ethos of the Commission.

State Enforcement and Sanctions. State sanctions against NGOs often include fines for violations such as the failure to file reports.¹⁵ The continued failure to file reports can lead to termination and dissolution of the organization in most countries. Termination, however, should occur only after the organization is given notice and an opportunity to remedy the deficiency. With both fines and termination orders, the NGO usually has the opportunity to file an appeal.

Additional sanctions may be available against public benefit organizations; these typically include the loss of tax benefits or the termination of PBO status. In Bulgaria, for example, no fines can be levied against PBOs; instead, systematic non-compliance with reporting requirements can lead to the PBO's termination. In Kosovo and Romania, too, PBOs that fail to file reports may lose their public benefit status. Somewhat similarly, public benefit companies in the Czech Republic may lose comprehensive tax benefits in the year of breach and other, more limited tax benefits in the following year.

Revocation of public benefit status should be an available sanction only under exceptional circumstances. If an organization in Hungary violates the law or its founding charter, for example, the court can revoke its public benefit status at the request of the public prosecutor, but only after notifying the organization and giving it the opportunity to remedy the situation. In Poland, if the PBO fails to eradicate problems identified during the inspection process within a given time period, the Minister of Social Security can file to have the organization removed from the State Court Register. Note that in both cases (1) the government must first notify the organization and give it an opportunity to eliminate the problem, and (2) the decision on revocation is made by the court.¹⁶

¹⁵ Such is the case in Bulgaria, where the state may penalize NGOs from 50-500 EUR. In Poland, an association that does not comply with requests for documentation is subject to a one-time fine not to exceed 50,000 zlotys (approximately 11,300 EUR), which may be waived if the association complies immediately after the fine is imposed. In Slovakia, a foundation failing to file a report may be fined from SKK 10,000 to 100,000 (approximately 250-2,500 EUR). In many countries (Bosnia, Croatia, Serbia, and Montenegro), fines may be levied against both the organization and its responsible representative.

¹⁶ In Bulgaria, similarly, the Minister of Justice is authorized to revoke PBO status, on the request of the public prosecutor for bodies of the State Financial Control, if the organization routinely fails to submit information required for entry into the register, or undertakes activities contrary to the provisions of law, or routinely fails to pay public amounts receivable, or has fewer members than required by law for more than six months. Revocation of PBO status can be appealed for 14 days after notification.

COMPARATIVE APPROACHES

How Freedom Is Won: From Civic Resistance to Durable Democracy¹

By Adrian Karatnycky and Peter Ackerman²

In recent months, the worldwide struggle for democracy has gained increased prominence in international affairs. In late March 2005, mass demonstrations helped topple Kyrgyzstan's authoritarian president. On March 14th, approximately one million Lebanese took to the streets in a remarkable display of nonviolent civic power to press for democracy and demand an end to Syria's military presence in their country.

In November-December 2004, the international community was surprised by the scale and perseverance of nonviolent civic resistance in Ukraine, as millions of citizens successfully pressed for free and fair elections in what became known as the Orange Revolution. But Ukraine's Orange Revolution was only the latest in a series of successful "people power" revolutions that include the Philippines in 1986; Chile and Poland in 1988; Hungary, East Germany, and Czechoslovakia in 1989; the Baltic States in 1991; South Africa in 1994; Serbia and Peru in 2000; and Georgia in 2003. The proliferation and success of such civic resistance movements in effecting political transitions is spawning increased international discussion of the mechanisms by which democracy replaces tyranny.

World leaders are taking notice. In his January 2005 inaugural address, U.S. President George W. Bush focused on global trends that are contributing to the spread of freedom and democracy. That speech and statements by other leaders, including UN Secretary General Kofi Annan and the European Union's Foreign Affairs Commissioner Javier Solana, have helped place on the front burner the question of how best to promote democratic change and to build the infrastructure of stable democratic life.

Growing international discourse about democratization is not a theoretical exercise. In the last three decades, dozens of corrupt, authoritarian, autocratic, one-party, and military regimes have fallen. As empires, multinational states, and colonial systems have receded, new states have emerged. Dictatorships collapse and new states and new democracies arise by a variety of means. **As this study shows, far more often than is**

¹ "How Freedom Is Won: From Civic Resistance to Durable Democracy" is a study based on research conducted by Freedom House. Data and findings were reviewed and evaluated by a panel of independent academic authorities. The project was also supported by the International Center on Nonviolent Conflict. Full details of the research and methodology can be found at <http://www.freedomhouse.org/research/specreports/civictans/index.htm>. Reprinted with permission. Copyright 2005 by Freedom House, Inc.

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generally understood, the change agent is broad-based, nonviolent civic resistance—which employs tactics such as boycotts, mass protests, blockades, strikes, and civil disobedience to de-legitimate authoritarian rulers and erode their sources of support, including the loyalty of their armed defenders.

In other cases, transitions are generated by a combination of domestic civic pressure and reformers within the power-holding elite. Sometimes power-holders switch sides and lend their support to an increasingly powerful civic movement. Political liberalization is also initiated from the top down, by formerly authoritarian power-holders who seek to avert a social explosion, promote growth, or avoid international sanctions. At times, political rights and civil liberties advance through the actions of outside forces, including military and peacekeeping interventions by other states, regional organizations, and the broader international community. In a world in which tyranny is facing increased resistance, these factors and the long-term outcomes they produce deserve increased analysis and understanding.

Data for this study is based in part on original research and in part on narratives and political rights and civil liberties ratings taken from *Freedom in the World*, which has been produced annually for 33 years by Freedom House. The *Freedom in the World* data set reflects numerous political transitions and dozens of new democracies and “Free” polities that have come into existence since the survey was launched. According to more than three decades of survey data, the number of Free states, which ensure a broad array of political rights and civil liberties, has expanded from 43 to 88—an average of nearly 1.5 per year—while the number of Not Free states, where repression is widespread, has declined from 69 to 49, or by nearly 2 every 3 years.

The central conclusion of this study is that how a transition from authoritarianism occurs and the types of forces that are engaged in pressing the transition have significant impact on the success or failure of democratic reform.

In addition, statistical testing of the data for the effect of time on the scores did not produce any significant improvements for freedom. This suggests that **in a preponderance of successful transitions, the most dramatic improvements in freedom tend to come quickly—in the first years of a transition, rather than slowly and incrementally over a long period of time**, underscoring the importance of the nature of the civic and political forces that emerge as important actors in the pre-transition period.

This study examines a large array of long-term data about political openings, transitions from authoritarianism, political rights, and civil liberties in order to better understand how key characteristics of the period prior to a transition correlate with the eventual outcome for freedom and democratic practice. The report looks at the pre-transition environment in 67 countries where transitions from authoritarianism occurred, and assesses and codes them according to three key characteristics: a) the sources of violence that were present prior to the political opening; b) the degree of civic (bottom-up) versus power-holder (top-down) influence on the process; and c) the strength and cohesion of a nonviolent civic coalition.

The study then correlates these three transition characteristics with the degree of freedom that exists today, some years after the transition. It does so by employing the

ratings used in the *Freedom in the World* survey according to its broad categories of Free (countries where there is compliance with a wide array of political rights and civil liberties), Partly Free (countries with some significant limitations on these rights and liberties), and Not Free (countries where basic political rights and civil liberties are widely and systematically denied). It also correlates them to the post-transition state of freedom as reflected in the survey's nuanced numerical ratings for political rights and civil liberties. The numerical ratings used in the Freedom House survey are assigned on a 1-to-7 scale, with 1 representing a high level of democratic political practices and effective adherence to fundamental civil liberties, and 7 representing the absence of all political rights and massive and systematic human rights violations. For the purposes of this study, we have taken each country's scores for political rights and civil liberties and generated a combined average, again with 1 representing best practices and 7 the worst and most repressive setting for basic rights and liberties.

Each country in which a transition has occurred over the last 33 years is evaluated in each of the three categories and accompanied by a short narrative that describes the salient events in the period leading up to the transition. A detailed methodology is included as an appendix to the report.³

Focus of the Study

This study covers transitions that have occurred over the last 33 years, as these are the years for which the annual *Freedom in the World* survey has produced comprehensive annual ratings data. Therefore, the post-war transitions to democracy in Western Europe and Japan were excluded.

We also have excluded transitions that occurred in small countries, defined as those with populations of less than one million. Excluded, too, are countries where major political transitions occurred in the last two years. We therefore do not include the recent events in Kyrgyzstan, Ukraine's transition of December 2004, or Georgia's of 2003. This is because there has not been a sufficient interval since the transition from authoritarian or pseudo-democratic rule to make firm assessments about the nature or durability of post-transition change in countries where institutional, political, legal, and human rights environments are still evolving or where reforms either have not yet been launched or fully implemented.

In the context of the above limitations, the study has applied the following definitions to the term "political transition": the establishment of a new government as a result of the fragmentation of larger state units (e.g., Czechoslovakia, Ethiopia, USSR); as a result of the end of one-person dictatorships, military dictatorships, and one-party rule; or due to the end of authoritarian dominant-party systems. This definition, therefore, excludes cases where one form of tyranny or dictatorship immediately has been replaced with another, such as a *coup d'état* that deposes one military leader only to replace him with another or the toppling of a monarchy or personalistic dictatorship and its replacement with military or junta rule. For example, we do not include Turkmenistan, where one-party Soviet rule was quickly replaced with one-man dictatorship. However, we do include Uzbekistan, because there a new state emerged in place of the Soviet one-

³ For these materials, see <http://www.freedomhouse.org/research/specreports/civictans/index.htm>.

party dictatorship and briefly permitted limited space for multiparty political activity—although the country since has banned most opposition parties and organizations and is now a Not Free polity.

Because we are measuring transitions from previously closed, authoritarian, or tyrannical systems, none of the countries in our list was rated Free in the year before the transition. In the end, our review found 67 countries that satisfy the above definitions and limitations. These “transition countries” represent over one-third of the world’s 192 countries.

Principal Findings: How Freedom Is Won

What are the study’s principal findings?

First, “people power” movements matter, because nonviolent civic forces are a major source of pressure for decisive change in most transitions. The force of civic resistance was a key factor in driving 50 of 67 transitions, or over 70 percent of countries where transitions began as dictatorial systems fell and/or new states arose from the disintegration of multinational states. Of the 50 countries where civic resistance was a key strategy (i.e., either countries in which there were transitions were driven by civic forces or countries where there were mixed transitions involving significant input from both civic forces and power-holders), none were Free countries, 25 were Partly Free countries, and 25 were Not Free countries. Today, years after the transition 32 of these countries are Free, 14 are Partly Free, and only 4 are Not Free.

Second, there is comparatively little positive effect for freedom in “top-down” transitions that were launched and led by elites. Before transition, no such countries were Free, 6 were Partly Free and 8 were Not Free, while today, post-transition, 2 are Free, 8 are Partly Free and 4 are Not Free. On a 7-point rating scale, top down transitions led to an improvement of 1.11 points in the combined average freedom score, while transitions with strong civic drivers led to an improvement of nearly 2.7 points on the same 1-to-7 scale.

Third, the presence of strong and cohesive nonviolent civic coalitions is the most important of the factors examined in contributing to freedom. In 32 of the 67 countries (nearly 48 percent) that have seen transitions, strong, broad-based nonviolent popular fronts or civic coalitions were highly active, and in many cases central to steering the process of change. In these 32 instances, prior to the transition there had been no Free countries, 17 Partly Free countries, and 15 Not Free countries. Now, years after the transition, 24 of the countries (75 percent) where a strong nonviolent civic movement was present are Free and democratic states and 8 (25 percent) are Partly Free states with some space for civic and political life, while none of the states whose transitions featured a strong civic force are Not Free.

In countries where there have been robust and cohesive coalitions employing tactics of nonviolent resistance, the mean *Freedom in the World* numerical rating improved from 5.33 pre-transition to 2.09 now, a jump of 3.23 points. This is a marked increase given that the overall scale in the survey is 1 (best) to 7 (worst), as explained above. In countries where cohesive and broadly based nonviolent civic coalitions represented a moderately strong presence, the numerical freedom score improved from a

5.11 pre-transition average to 3.39 today, an improvement of 1.72 points. In transitions where nonviolent civic forces were weak or absent, the scores moved from 5.47 in the year prior to the transition to 4.15 now, an improvement of 1.32 points: less than half the change experienced in transitions in which there was a strong and cohesive nonviolent movement. In other words, **the stronger and more cohesive the nonviolent civic coalition operating in societies in the years immediately preceding the transition, the deeper the transformation in the direction of freedom and democracy.**

Regression analysis indicates that the presence of a cohesive nonviolent civic coalition during the period of transition has a highly statistically significant effect on increasing the level of freedom.

Of the 35 Free countries post-transition, 32 (or more than 9 in 10) had a significant “bottom up” civic resistance component. Twenty-two (63 percent) of them had mixed transitions, driven by a combination of civic resistance forces and segments of the power-holders, while 10 (29 percent) had openings driven by primarily by the force of civic resistance. Only two transitions that have led to high levels of freedom today were driven from the top-down by power-holders and one by external military intervention.

Among the 23 Partly Free countries post-transition, 7 (30 percent) of transitions were civic driven, 7 (30 percent) were mixed, 8 (35 percent) were driven by power-holders, and 1 (4 percent) emerged after an external military intervention. Among the 9 Not Free countries post-transition, one transition (11 percent) was civic led, three (33 percent) were mixed, four (44 percent) were driven by power-holders, and one (11 percent) was driven by external military intervention.

Among the 35 post-transition Free countries, 24 (69 percent) had strong nonviolent civic coalitions, 8 (23 percent) had moderately strong civic coalitions, and only 3 (8 percent) had movements that were weak or absent in the two-year period leading up to the opening for the transition. By contrast, among countries that are Partly Free now, 8 (35 percent) had “strong” civic coalitions, 7 (30 percent) were “moderate,” and 8 (35 percent) were “weak or absent.” Among countries that are now Not Free, the distribution was zero “strong,” 3 (33 percent) “moderate,” and 6 (67 percent) “weak or absent.”

Fourth, the data suggests that the prospects for freedom are significantly enhanced when the opposition does not itself use violence. In all there were 47 transitions in which there was no (or almost no) opposition violence. Before the transition, none were Free, 23 were Partly Free, and 24 were Not Free. Today, years after the transition, 31 are Free, 11 are Partly Free, and 5 are Not Free. The mean freedom rating in these 47 cases was 5.34 pre-transition and 2.97 years after the political opening. Then net improvement was 2.67, a very significant gain for freedom on the 1-to-7 freedom scale.

By contrast, in countries where the opposition employed violence, pre-transition, none were Free, 8 were Partly Free, and 12 were Not Free. Today, 4 are Free, 12 are Partly Free, and 4 are Not Free. As significantly, the mean freedom score of this cohort of countries improved 1.52 points years after the transition, in contrast with the 2.67-point improvement in the freedom score in all the cases where there was no opposition violence. In all, the data showed there is more than a three (66 percent) to one chance (20 percent) chance that a country will attain high freedom post-transition where the opposition does not employ violent force.

We also wanted to test whether the results for freedom are better if the opposition does not itself use violence in cases of significant or high state violence and instead employs disciplined nonviolent civic resistance. Thus we looked at all the cases of transitions preceded by high or significant levels of violence. Of 32 countries where transitions were preceded by significant or high levels of violence, 20 cases were characterized by violent force emanating from both the state and segments of the opposition. Of these, pre-transition 8 were Partly Free and 12 were Not Free. Today, 4 (20 percent) are Free, 12 (60 percent) are Partly Free and 4 (20 percent) are Not Free. By contrast, we found 12 cases where significant or high levels of violence were mainly generated by the state (but where the opposition was nonviolent), pre-transition, 5 were Partly Free and 7 were Not Free. Years after the political opening, 7 (58 percent) are Free and 5 (42 percent) are Partly Free, while none are Not Free.

In the end, our data suggests that **recourse to violent conflict in resisting oppression is significantly less likely to produce sustainable freedom, in contrast to nonviolent opposition, which even in the face of state repression, is far more likely to yield a democratic outcome.**

A more detailed, numerical look at the data on transitions preceded by high or significant levels of violence confirms the conclusion that the opposition's resort to violence reduces the chances for high levels of freedom. In 20 transitions, both the state and parts of the opposition used violent force. The mean numerical freedom rating in these settings before the transition was 5.50. After the transition, it was 3.98, representing an improvement of 1.52 points on the 1-to-7 freedom scale. In only four (twenty percent) of these cases were strong civic coalitions influencing the direction of events as authoritarian systems fell.

By contrast, in the 12 settings with high or significant violence by the state when the opposition refrained from itself taking up violent force, the mean pre-transition freedom score was 5.25. Today, post-transition, their average freedom rating is 2.63 points, an improvement of 2.62 points.⁴ Importantly, strong nonviolent civic coalitions were present in 83 percent of these settings (in 10 of 12 cases). **Our data therefore suggests that the activity of strong nonviolent coalitions reduces the appeal of opposition violence and at the same time leads to more positive outcomes for freedom.**

⁴ The data also makes it clear that the factor of violence before the transition was less significant in determining the success or failure of a transition to freedom than was the factor of whether the opposition forces themselves engaged in significant violence.

There is also significant positive synergy from a combination of factors. There were 18 countries where a nonviolent or mostly nonviolent transition was accompanied by nonviolent resistance led by strong, cohesive civic coalitions. In the year before the transition, no countries had been rated Free, 9 were Partly Free, and 9 were Not Free. But after the transition, 17 (94 percent) of these countries were Free, 1 was Partly Free, and none were Not Free. Transition countries in which these two criteria were present in the two-year period before the political opening saw their freedom score rise from a pre-transition average of 5.47 to 1.53 today, a dramatically positive gain of 3.94 points on a 7-point scale.

This study, therefore, suggests that the choice of strategies employed by the opposition in developing resistance to oppression is of fundamental importance to the outcome for freedom. This, in turn, suggests that both the international community and the leaders of opposition movements should pay close attention to these findings.

The Need for a Paradigm Shift

Given the significance of the civic factor in dozens of recent transitions from dictatorship, it is surprising how small a proportion of international donor assistance is targeted to this sector. Americans have been leaders in providing such democracy assistance, through the United States Agency for International Development (USAID), the National Endowment for Democracy, and through major private donors such as the Open Society Institute and a small group of other private charitable foundations. Some European governments—in particular those of Great Britain, the Netherlands, the Scandinavian countries, and Germany—have furnished timely support for independent civic groups. A high proportion of this assistance is provided through such independent groups as the U.S. National Endowment for Democracy, the International Republican Institute, the National Democratic Institute, the U.K.'s Westminster Foundation for Democracy, and Germany's political party foundations, the *Stiftungen*.

However, support aimed at change that is driven by civic forces represents only a small proportion of international development aid that is directed at democracy assistance. Consider the funds allocated by USAID for democracy assistance: while a third of such assistance is formally allocated to civil society programs, most of these programs are not targeted explicitly at political-reform-oriented NGOs. Nor does such aid make a priority of assisting groups that are focused on nonviolent civic resistance or on activist youth groups that have been an important front line of civic resistance struggles.

Additionally, support for the advocacy work of NGOs has fallen somewhat out of favor among donors providing democracy assistance, and funding that encourages the building of nationwide civic coalitions to pressure for concrete change is relatively scarce. The overwhelming proportion of civil society funding supports what is called general capacity building—training and technical assistance—and is rarely matched with direct grants and the transfer of specific strategic and tactical knowledge and skills that are so essential to sustaining the infrastructure of emerging civic groups and nonviolent civic movements, especially in their early stages of development.

Moreover, most political party strengthening programs are typically carried out in complete isolation from the civil society programs. Yet, most successful civic transitions

come from the joining of forces and complementary strategies that connect democratic political groups and the broader civil society.

Once a political opening has occurred and a transition to democracy is underway, it is essential for donors to continue support for pro-democracy civic groups as a means of ensuring that there is civic pressure on the new authorities to continue down the path of liberalization and reform.

There is an urgent need for the international democratic community to understand better the importance of indigenous civic resistance directed at challenging authoritarian rule and spurring democratization and to implement a paradigm shift in its priorities in order to promote and strengthen such movements with new resources and new aid initiatives. It is also important for policymakers to recognize that in most cases, such investments in civic life are minimal—a matter of millions of dollars or less. Support for civic movements is far less expensive than major military expenditures and far less costly than the normal bill for large development programs. Yet given the correlations between open, transparent, democratic societies and peace, as well as sustainable development, there is an urgent need for greater international commitment to funding this sector, especially in closed societies and fragile new democracies.

With the promotion of freedom and democracy now a major declared objective for the U.S., Great Britain, Germany, Holland, Canada, and other democracies, there is a need for ongoing study of the phenomenon of political transitions in general and democratic transitions specifically. We hope this study is only the first step in a more comprehensive effort to address the many factors that contribute to lasting democratic change rooted in respect for human rights and the rule of law.

The world is moving toward greater respect for political rights and civil liberties. Authoritarian rule, political despotism, rampant state criminality and corruption, and the systematic abuse of minorities are under challenge. Yet while there has been momentum in favor of freedom, further such progress is far from guaranteed. If the globe's growing community of democracies does not fully understand and respond intelligently with specific initiatives that reinforce and promote change through the strategic use of nonviolent civic action, authoritarian rule will persist in many settings.

Policy Implications

This study of transitions from authoritarian rule, the factors surrounding them, and the long-term influence of these factors on outcomes for freedom is rife with specific policy implications for democratic movements and the international donor community. As can be seen from the findings, the study makes clear that how a transition from authoritarianism occurs and the forces that are engaged in pressing the transition have significant impact on the success or failure of democratic reform.

As is known, many transitions from authoritarian rule do not lead to freedom. When tyrannies or closed systems fall, democracy is far from the only outcome. Among the 67 countries we examined, pre-transition none were Free, 31 were Partly Free, and 36 were Not Free. Today 35 are Free, 23 are Partly Free, and 9 are Not Free. The opportunity for freedom after a political opening represented by the fall of an authoritarian is by itself not a guarantee of an optimal outcome for freedom in the long

term. Therefore, it is essential that indigenous democratic activists and policymakers in democratic states understand more clearly what are the most productive and cost-effective ways to increase the chances for successful democratic transitions.

Transitions are largely indigenous phenomena. But while on the surface they often appear to be entirely spontaneous, closer examination shows such transitions frequently are the consequence of the cumulative effects of nonviolent strategies and cohesive civic coalitions. This means the democratic community of nations can devise policies and take steps that promote the factors most conducive to successful transitions to freedom. We will discuss these factors and their policy implications in greater detail below.

Invest in Civic Life

According to this study, one way to increase the odds for successful transitions to freedom is to invest in the creation of dynamic civic life. Such support is most effectively rendered in the following sequence: general assistance for civil society forces; targeted assistance focused on education and training in civic nonviolent resistance; and assistance for cohesive civic coalitions through which such resistance is expressed. This means government and donor policy should direct increased resources to this important factor in effective political change and provide significant resources and knowledge to NGOs, civil society groups, and the fostering of broad-based indigenous coalitions.

To support the development of civic life, governments, regional bodies, and global institutions also should exert diplomatic and other pressures on states to create political space and toleration for the activity of civil society as a key precondition for the formation of civic movements.

Specifically, government and private support should be offered to activist student organizations, anti-corruption groups, election monitoring and voter education organizations, independent media, political party training structures, trade unions and worker organizations, women's groups, and think tanks.

Encourage the Creation of Broad-Based Coalitions

While the development of a broad array of civic, reform-oriented organizations is essential for the success of most transitions, the study shows that such developments also should be matched by efforts to establish a broad-based civic coalition focused on nonviolent resistance. There are many reasons why such umbrella civic coalitions are important in the outcomes for freedom. First, the organization, training, and operation of a diverse and voluntary civic coalition require the shaping of consensus through internal democratic practices. Second, the emergence of such coalitions boosts enthusiasm among ordinary citizens and activists by giving them a sense of momentum and consolidation. This in turn increases the number of volunteers, participants, and activists who are mobilized for nonviolent resistance efforts. Third, when such movements achieve a mass scale, they effectively prepare millions of citizens for political and civic activity, which then makes power-holders accountable after a democratic change occurs. Fourth, when coalitions are broad based and incorporate a diverse array of societal and political interests, they gain increased legitimacy enabling them to act as credible representatives of the broader interests of the society or the nation.

Internally, broad-based civic coalitions are environments for compromise, common ground, and self-discipline. As separate groupings learn to work with others who hold different political beliefs, they create a basis for the tolerant give-and-take that is a crucial component of democracy. At the same time, mass-based civic movements become an important school for the preparation of future civic leaders, politicians, opinion makers, and government leaders in the post-transition period. They become a mechanism for the emergence of a new leadership cohort, often creating a talent pool that can sustain the transition toward freedom. In short, **broad-based democracy coalitions can imbue leaders and activists with the principles and experience that make for successful democratic governance.**

Such coalitions are also more likely to result in a negotiated transition based on co-opting segments of the power-holding elite that recognize the need for reform. This is because the emergence of a cohesive and powerful opposition force capable of taking power creates rifts and divisions among authoritarian power-holders. Internal divisions among power-holders help separate the most repressive segments of the ruling elite from open-minded segments, whose withdrawal of support for the government or their unwillingness to use force against a nonviolent mass opposition are among the critical processes in many successful democratic transitions.

Internal as well as external donors should encourage the leaders of a varied array of democratic groups to find ways of coalescing into broad-based coalitions for democratic change. Official and nongovernmental outreach to democratic movements should emphasize the need for such cooperation if a peaceful transition to democracy is to be achieved. Naturally, it is up to the civic forces themselves to decide what alliances they should form, but the international democratic community should encourage opposition reformers to focus on broad-based coalition building and should encourage such steps with increased donor support and technical assistance. A component of such assistance should be programs that promote exchanges among civic activists in countries where successful transitions to freedom have occurred and their counterparts in closed societies.

As the data and narratives show, a key opportunity for broad-based umbrella coalitions to reach critical mass is provided by major national elections and referenda. This means that pressure on states to sustain electoral processes should remain a high priority of democratic governments and donors. While critics frequently point to sham elections and pseudo-democracy, it is very often precisely such seemingly illegitimate processes that spur mass-based challenges to authoritarian rule and open the door to real liberalization. Among such examples are Kyrgyzstan in early 2005, Ukraine in 2004, and Georgia in 2003 (all of which occurred too recently for their durable effects to be properly assessed and included in this survey); the 1986 presidential election in the Philippines; Chile's 1988 referendum on the presidency of Augusto Pinochet; Nicaragua's election of 1990; the 2000 presidential election in Serbia and Montenegro (formerly the Federal Republic of Yugoslavia); and Peru's tainted election of 2000. In all these cases, a vote became the catalyst for the successful application of civic mobilization and resistance strategies.

Broad-based civic movements usually fragment after a transition from authoritarianism. However, their fragmentation often results in the creation and

regeneration of a host of active civic groups, media, and other mechanisms for non-state monitoring of government activities and for public pressure in support of democracy, human rights, anti-corruption measures, educational reform, and social change. A lively civic sector in the post-transition period can become an important force for transparency and accountability among the new government power-holders. It creates pressure groups that can push the new democratically accountable leadership to hold to its pre-transition reform commitments.

Transfer Knowledge About Strategies and Tactics of Nonviolent Civic Resistance

Change and the capacity to force change in any country depends on internal factors and on internal changes in public opinion. But opposition forces can be helped in more effectively achieving their aims if they are assisted in thinking strategically about how to push change through nonviolent means. The existence of a growing civic infrastructure of well-trained activist groups and their coalescing into broad-based coalitions also needs to be coupled with knowledge on how to devise effective strategies of nonviolent resistance to authoritarian power.

This means that as indigenous civic movements are taking shape, they should be able to access expertise on a broad range of successful examples of broad-based civic resistance campaigns.

There should be a capacity to rapidly respond for requests for expertise and training when indigenous movements are ready for such assistance. A focal point of training and assistance should be how to organize and sequence nonviolent protests and mass demonstrations; strikes and other forms of industrial action; boycotts that exert domestic economic pressure on regimes and their financial backers; and nonviolent civil disobedience. They also should be given advice on more effective dissemination of information through media (including the Internet, telephone text messaging, etc.) that remain largely outside the control of authoritarian states.

Expand Space for Nonviolent Action through Targeted Sanctions

Another crucial way of assisting democratic transitions is to work to constrain insurrectionist and state violence and to expand the political space for nonviolent civic action. This means that in the cases of civil wars, governments and international organizations should seek solutions that lead to an end to hostilities and to internationally supervised or monitored elections. Democracies also should engage in preventive diplomacy to avert violence and support policies that prevent or limit the spread of violence in its earliest stages. International democratic donor support also should support nonviolent movements that can serve in repressive settings as an effective alternative to violence and to the appeal of groups that espouse violence. Besieged populations that suffer from ethnic, sectarian, or political violence are often sympathetic to the demagogic appeal of authoritarian leaders who use the danger of conflict as a justification for their own repressive rule. Efforts to restore personal security in extremely violent environments in countries that have suffered from war or civil war, therefore, can contribute in the long term to the emergence of civic coalitions for democratic change. Moreover, an environment in which civic organizing and nonviolent action are a viable option helps discredit the claims by violent extremists that they offer the only avenue for change.

A key mechanism in helping to constrain violence and create space for civic action is the willingness of the international democratic community to employ targeted sanctions against the economic interests of government officials who contemplate or use violent force to suppress nonviolent civic resistance. Such threats of sanctions can help constrain and discourage authoritarian states from resorting to the use of force by raising the costs of the use of this option. In this way, targeted sanctions and their threatened imposition can create greater space for nonviolent civic resistance movements.

As importantly, the data suggests that the interests of freedom are best furthered when the opposition resists state violence through nonviolent mass resistance. The study also indicates that the appeal of violent responses to the state is diminished when a strong and cohesive nonviolent coalition is a major presence in the period leading up to the political opening. This, in turn, reemphasizes the need to direct resources and technical assistance toward support for such civic movements.

Provide Enhanced Resources for Independent Media and Communications

Authoritarian leaders lack democratic legitimacy, and this lack of legitimacy needs to be challenged by democratic civic forces. But because repressive governments limit or control media and communications, pro-democracy activists must develop independent outlets of communication in order to stake their claim to represent the legitimate aspirations of the people. Invaluable in this effort are the Internet; independent newspapers and newsletters; unauthorized or external broadcast facilities; and cell phones, satellite phones, and text-messaging devices.

Independent communications and media are essential in mobilizing indigenous support for nonviolent resistance against a ruling elite. They also are crucial in helping opposition groups reach out to potential allies among disaffected members of the ruling elite, including segments of the defense and security services. Communications and alternative media can help civic opposition movements in making the case that they offer a viable alternative to illegitimate authoritarian rule. In this way they can erode support for authoritarians among their crucial pillars of power.

De-legitimizing an authoritarian ruler is as important to the success of a nonviolent civic movement as the movement's effort to establish itself as the legitimate voice of public aspirations. In many recent transitions, the corruption, cronyism, nepotism, and the outright criminality of authoritarian elites have been key factors in deepening public alienation and encouraging ideologically diverse groups to coalesce into a unified opposition. Independent media that report on state corruption and expose abuses of power are critical nonviolent tactics in facilitating this process.

Democracy assistance from the international community should therefore substantially increase resources for alternative media and independent communications that can carry the message of pro-democratic civil society and nonviolent resistance groups within closed and authoritarian societies.

Concluding Notes

This study is a first look at how freedom is won. It does not offer a panacea for the world's ills. Nor does it suggest a rigid formula for deposing tyrannies and replacing them with democracies. It only examines a number of factors that contribute to the

success and failure of transitions to democracy. The study does not, for example, examine all the factors that help create an environment conducive to the emergence of cooperative civic coalitions. Nor does it examine correlations of its findings with levels of income, levels of education, or levels of middle class development, all of which are understood to be important factors in contributing to the success or failure of democratic reform. This study also did not look at how authoritarian systems or totalitarian systems successfully retain their power, nor did the study examine failed efforts by opposition movements to force a transition from authoritarian rule. It is our hope that this study will also promote research into all these other dimensions of freedom and its suppression.

It is essential to the advancement of democracy that the concrete mechanisms by which freedom advances are better understood and more widely discussed by the policymaking and analytic communities. Yet while there is no fixed blueprint for the replacement of tyranny with democracy, the initial findings of this study suggest some important trends that in many cases can be applied in a range of difficult authoritarian settings.

It is with this purpose that Freedom House and the International Center on Nonviolent Conflict will work to promote and disseminate its findings.

ARTICLE

The Potential for an Independent Regulatory Authority for NGOs in South Africa

By Yvonne Morgan¹

Although we continue to hear calls for corporations and governments to increase their transparency and accountability – those two well-worn words – nonprofits are also feeling the heat. The World Bank noted in March 2005 that “as the influence of [civil society organizations] continues to grow, they are also attracting greater public scrutiny, prompting calls for greater accountability” (World Bank, 2005). This has resulted in a closer examination of how nonprofit organizations are regulated and a revival of the old debate about why such regulation is necessary.

Formal Registration of Nonprofit Organizations in South Africa

A Johns Hopkins University study found close to 99,000 nonprofit organizations in South Africa as of 1999 (Swilling and Russell, 2002). A voluntary association in South Africa need not register formally, and therefore is not necessarily subject to any reporting requirements. Reporting to one’s stakeholders, however, can enhance public trust. Consequently, South African nonprofits have generally chosen to seek formal registration of one sort or another, with the attendant reporting requirements.

A South African nonprofit that wants to be seen as credible and accountable can do one or more of the following:

- It can register with the Registrar of Companies as a Section 21 not-for-profit company under the Companies Act, comply with the terms of the Act, and annually submit audited financial statements and a report to the Registrar.
- It can register as a trust with the Master of the High Court, in compliance with the Trust Property Control Act and common law. Unless the trust deed stipulates otherwise, there are very few formal reporting requirements, and no financial statements need be submitted. Many trusts operating as nonprofit organizations choose to take the additional step of voluntarily registering under the Nonprofit Organisations Act.
- Under the Nonprofit Organisations Act (NPO Act), any organization – whether a voluntary association, a trust, or a Section 21 company – can register as a Nonprofit Organisation (NPO) with the NPO Directorate in the Department of

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Social Development. NPO status requires the organization to submit financial statements and a report each year.

- A registered NPO can take the further step of registering as a Public Benefit Organisation (PBO) with the South African Revenue Services (SARS) under the Income Tax Act. PBO status entails two tax benefits: tax-exemption for the organization, and tax relief for the organization's donors under Section 18A.

Why Nonprofits Register

Recent research has looked at why NGOs register under the NPO Act with the NPO Directorate. Most nonprofits choosing to register do so for three main reasons: registration is required in order to receive tax benefits; no unregistered nonprofit can seek government contracts or be eligible for government subsidies; and organizations hope that registration will help them get additional funding from other sources. Many funders do favor organizations with NPO status, though not all require it. Those NPOs formed as Section 21 companies tend to be the more sophisticated ones that prefer a more formal legal structure.

Compliance with Regulatory Requirements

Given all these different forms of registration, an NGO may be required to report to three separate authorities on an annual basis. A Section 21 company with tax benefits, for example, must report to the Department of Trade and Industry as a Section 21 company, the Department of Social Development as an NPO, and SARS as a PBO – in addition to reports for funders and beneficiaries. Even though the organization can generally supply the same information to each authority, the process entails considerable duplication of effort, on the part of government departments and NGOs alike.

South Africa does not have a comprehensive national database of NGOs; the database of registered NPOs, which is kept by the NPO Directorate, excludes some trusts and Section 21s. There is also no common repository of financial statements and narrative reports submitted by NGOs. The NPO Act requires the NPO Directorate to allow public access to all such information, but the result in practice is bulging filing cabinets in government offices where only the desperate or bold dare venture. South Africa does not have the equivalent of Guidestar (<http://www.guidestar.org>), the website that provides online access to publicly available tax forms of American NGOs. It would be difficult at present to introduce such a scheme in South Africa, given the lack of a standardized reporting format.

Time to Rethink

Several factors make this a good time for South African nonprofit stakeholders to consider where they stand in regard to regulation of the sector. These factors include the Department of Trade and Industry's major review of the Companies Act, with particular attention to the status of Section 21 companies; an imminent report on the impact of the NPO Act and how well it has fulfilled its objectives; and the Governance Initiative project, which is provoking discussion of nonprofit governance issues.

The Governance Initiative, which is project-managed by the Charities Aid Foundation Southern Africa (CAFSA), began at a 2004 Johannesburg conference on

governance and accountability for nonprofits. It was decided to draft a code of good governance for nonprofits and investigate ways of facilitating its implementation. Discussions led to the concept of an independent regulatory authority that could house the code and provide certification and advice on governance issues.

At present, SARS and the NPO Directorate receive thousands of registration applications each year, and neither one has the capacity to process them efficiently. The NPO Directorate, in addition, is too busy registering new organizations and enforcing reporting requirements to be able to offer advice, information, and support to nonprofit organizations. The NPO Act envisioned the Directorate as undertaking educational and supportive activities in addition to its role as regulator, but, as the NPO Act impact assessment will probably conclude, the Directorate has not been able to fulfill its complete mandate. It is unlikely that the Directorate will be given adequate resources, as the government faces many more urgent needs for funds.

The questions being asked include the following: How can publicly filed information on nonprofits be made more accessible? What can be done to lessen the duplication of reporting requirements? If nonprofits use public money to do their work, should registration and disclosure remain voluntary? How can nonprofits be encouraged to adopt good governance standards? Should a separate body promote and certify nonprofits for good governance?

All these lead to the overarching issue: Should nonprofits continue to rely on government, with its limited resources, to regulate the sector? If not, what are the alternatives?

Not a Job for Government?

Perhaps the NGO community would be better served if the tasks of regulating and supporting the nonprofit sector were reassigned. It might well be that all these roles cannot be optimally performed within a specific government department, or indeed within government at all. This is because government budgets are shaped by forces beyond an entity's actual need, such as political will, economic conditions, international pressure, and other, seemingly more pressing demands on limited government resources.

It can be argued that the existence of a positive and enabling regulatory environment, one that promotes good governance while at the same time respecting the independence of the nonprofit sector, should not be subject to government's inclinations and limitations. Salomon and Flaherty, looking at issues of nonprofit law, conclude that where regulatory authorities are uncooperative, "a separate nonprofit registration authority may therefore be the most promising and easiest for nonprofits to use" (Salamon and Flaherty, 1996).

One solution under discussion is **an independent regulatory authority**. It would register all types of nonprofit organizations and monitor their conformance with reporting requirements. Its power would be delegated by the government authorities that now exercise it, according to legislative and statutory provisions.

What might such an independent body do?

For one, it could handle the task of ensuring compliance with the various requirements imposed by the NPO Act, the Income Tax Act, and the Companies Act,

with a mandate to act on behalf of the government departments and a duty to report annually either to the Department of Trade and Industry or directly to Parliament. There is a precedent for this: the Financial Services Board has the authority to register and regulate South African financial service providers on behalf of the Department of Finance.

The body should also provide advice and guidance to NGOs on registration, tax, and other pertinent issues. Administration of the registration framework should be centralized, while educational and registration services should be available at a local, decentralized level.

Further, an independent regulatory body could collate and distribute information on the nonprofit sector, including through a common database of all registered NGOs, open to the public and available electronically. There is a dearth of current, credible information on the nonprofit sector in South Africa. The Johns Hopkins data are now over six years old, and the HIV/AIDS pandemic has led to the formation of many new NGOs.

In addition, the nonprofit sector in South Africa lacks an ombudsman. While NGOs can use the courts for any serious offenses, it may be appropriate to have some sort of procedure for the independent regulatory authority to receive and consider complaints and, where necessary, refer them to the authorities for investigation.

In the interests of accountability, an independent regulatory authority should consider implementing the sort of certification system offered by the Philippines Council for NGO Certification (PCNC), to back up a code of good governance among NGOs and to support such governance practices as board management and oversight, formal staff policies, and effective financial management. Lloyd makes the additional point that sufficient accountability will not result solely from improving reporting requirements and compliance with laws and regulations. He argues for greater emphasis on downward accountability, including the right of NGO beneficiaries to hold NGOs accountable for compliance with a code of conduct (Lloyd 2005).

Tasks for an Independent Regulatory Authority

The independent authority's tasks might include the following:

- monitor compliance with legislative requirements for
 - NGOs registering as Public Benefit Organizations (PBOs) under the Income Tax Act,
 - Organizations registering as NPOs under the NPO Act, and
 - Companies registering under Section 21 of the Companies Act;
- help all NGOs supply statutory and general information about their organizations by means of a standard information form, submitted annually;
- serve as a common repository for NGO information, such as financial statements, narrative reports, and information supplied via a standard information form, and make such information available to the public electronically;

- provide information and guidance on aspects of governance, and allow NGOs to seek voluntary accreditation that would certify their adherence to sound governance principles;
- provide information on registration and reporting requirements and procedures; and
- act as an independent ombudsman for the sector, able to hear and handle complaints and, if necessary, recommend deregistration or other appropriate measures to the appropriate regulatory authority or the courts.

What Is Being Done in Other Countries?

More than one government has found it difficult to regulate large numbers of nonprofit organizations. In a paper on trends in self-regulation and transparency in nonprofit organizations, Robert Bothwell noted several incidents over the past eight years that suggested a lack of capacity to monitor and regulate nonprofits on the part of U.S. state governments and the federal Internal Revenue Service (Bothwell 2001). Lloyd makes the point that several governments have found that they cannot adequately regulate NGOs, which is fueling the worldwide rise in NGO self-regulation (Lloyd 2005).

In the United Kingdom, charity regulation is carried out by the Charity Commission, which annually reports to the Home Secretary and Parliament. The commission's job includes gathering and distributing information about charities and evaluating and investigating complaints related to charities.

The British Government is overhauling its charity regulations following extensive research. Under the new Charities Bill, each charity with an income over a million pounds will annually have to submit a standard information return, which highlights key information such as how much the charity spent on fundraising and on public benefit aspects of its work. An independent Charities Appeal Tribunal will be created to handle appeals from decisions by the Charity Commission.

In 2002, the New Zealand government approved the establishment of a New Zealand Charities Commission, assigned to approve and register charitable organizations, receive annual returns, monitor the activities of charities, and provide advice and support to the sector and to the government. The independence of the body was secured by establishing the Commission as a Crown Agency with a separate board and the power to make its own decisions about the charitable status of organizations.

In both the Philippines and Pakistan, the government has outsourced the task of certifying and monitoring nonprofit organizations' regulatory compliance to independent regulatory authorities: the Philippine Council for NGO Certification (PNPC) and the Pakistan Center for Philanthropy (PCP). There are many similarities between the two bodies. In both countries, registration is voluntary on the part of NGOs. Those choosing to register must heed rules relating to governance, vision and goals, program operations, and monitoring and evaluation. An NGO that satisfies the requirements will receive certification and can claim tax benefits—a strong incentive to register. Information on certified NGOs is published in a directory for the public.

Speaking at a conference in 2002, Karla Simon pointed out that while some 60,000 NGOs were eligible for tax benefits in the Philippines, by April 2002 only 220 had been assessed and 135 approved for certification. In her view, the PCNC's intricate evaluation procedures were probably responsible for the long delays in certification (Simon 2002). The conference also identified the importance of having a single regulatory system for NGOs, as opposed to several different authorities that register and regulate them; and the importance of making registration a condition for receiving tax benefits.

Benefits and Challenges for a Regulatory Authority

When one considers the lack of leadership in the nonprofit sector in South Africa today, it is tempting to see this regulatory body as a sure-fire panacea. That would be a mistake. South Africa does not need an overstuffed behemoth, encumbered with too many tasks and unable to act quickly. Salamon speaks of the need to consider the "burdensomeness of the process."

What could a nonprofit regulatory body reasonably anticipate, in light of the challenges that similar bodies have faced elsewhere? For the UK Charity Commission, a problem arose over its dual roles as regulator and as "best practice" adviser. The National Council for Voluntary Organisations discerned "a very real risk that the guidance and best practice advice will become de facto regulation" (NCVO 2001). In the Philippines, as noted, the combination of hundreds of applicants and a complex registration system has led to long delays. The original New Zealand regulatory model ran out of money and time before it could be formally adopted.

Here, summarized briefly, are some of the perceived benefits and challenges for an independent regulatory authority:

| Benefits | Challenges |
|---|--|
| Promotes and rewards good governance through certification | Not all NGOs will choose to register |
| Provides mechanism for complaints and whistle-blowing | Monitoring can be time-consuming and expensive |
| Circumvents multiple reporting by NGOs | Requires consensus of sector |
| Creates common repository of NGO information available to public | Current regulatory authorities must agree to delegate authority |
| Avoids duplication of resources in different government departments | Needs to be seen as independent, but also must attract sufficient funding |
| Provision of financial information reduces risk of money-laundering | Electronic reporting requires development of standardized reporting format |

Administrative Issues

An independent regulatory authority would require excellent information technology and human resources to oversee large numbers of NGOs. It would also need a guaranteed source of funding. Within the NGO community, it would need to establish a reputation for independence from government and other bodies, and this would take time.

To avoid huge backlogs of registration applications, the independent regulatory body should aim to be "lean and mean." It should adopt a sophisticated, computerized registration framework, and make the data publicly available through an efficient information system. At the same time, it must bear in mind that most NGOs likely to seek registration work in peri-urban and rural communities without easy access to computers. Accordingly, it must develop ways to decentralize and simplify the registration process.

Difficulty in attracting funding could prove a serious handicap. However, the formation of one body to register and monitor regulatory requirements can achieve economies over the status quo, in which these duties are handled by three different government departments. In addition, SARS would benefit by freeing up resources for its other tasks, if it authorized the body to register and monitor PBOs and to award tax benefits under Section 18A.

It might be that government would provide a portion of the funding required, with additional contributions coming from other agencies with a natural interest in promoting a well-regulated and well-supported civil society, such as the National Lotteries Development Trust and the National Development Agency. This issue needs further discussion, as it may in the end prove to be a major sticking point.

Gaining the trust and support of the nonprofit sector would be an important task for the regulatory body. Therefore, the governing committee appointed must be as representative as possible of the various stakeholders in the sector, as well as of government, funders, and beneficiaries.

Conclusion

South African nonprofits would benefit from having a single authority responsible for registration and regulation of the sector. A single, comprehensive database of NGO information, available to the public, would also be useful. An independent authority could also promote good governance by disseminating a code of good governance and accrediting NGOs that voluntarily adopt its principles.

The authority would face several challenges: developing procedures for smoothly registering and regulating large numbers of nonprofit organizations, persuading the current regulatory authorities in government to delegate these tasks, and attracting sufficient funding for its operations. To ensure adequate support, it would be essential for this body to prove its independence from both government and the nonprofit sector.

Establishing such a body outside of government could do much more than merely improve registration processes. It could promote transparency and accountability – those two well-worn words again – and, as a result, foster public trust. But before the concept can become a reality, there needs to be a lot more discussion of the potential advantages and the challenges.

References

- Bothwell, R. "Trends in Self-Regulation and Transparency of Nonprofit Organizations in the US." Paper presented at The European Institute of Advanced Studies in Management Workshop: The Challenges of Managing the Third Sector in Brussels, May 2001. Reprinted in *International Journal of Not-for-Profit Law*, Vol 4 Issue 1 (2001), <http://www.icnl.org/journal/vol4iss1/bothwell1.htm#>

Lloyd, R. "The Role of NGO Self-Regulation in Increasing Stakeholder Accountability." Paper submitted to the journal *Accounting, Auditing and Accountability*, One World Trust, London, April 2005.

National Council of Voluntary Organisations. "For the Public Benefit?" (2001).

Salamon, L., & Flaherty, S. "Nonprofit Law: Ten Issues In Search of Resolution." Working Papers of the Johns Hopkins Comparative Nonprofit Sector Project, No. 20, edited by L. Salamon and H. Anheier. Johns Hopkins Institute for Policy Studies, Baltimore (1996).
<http://www.jhu.edu/~ccss/pubs/pdf/tenissue.pdf>

Simon, K. Remarks at Conference on Legal Enabling Environment for NPOs in East and Southeast Asia, Catholic University of America, 2001.

Swilling, M., & Russell, B. "The Size and Scope of the Non-profit Sector in South Africa." Graduate School of Public and Development Management, University of the Witwatersrand, Centre for Civil Society Studies; Johns Hopkins University Institute for Policy Studies (2002).

World Bank. "Issues and Options for Improving Engagement Between the World Bank and Civil Society Organizations." External Affairs, Communications and United Nations Affairs, World Bank (2005).
http://siteresources.worldbank.org/CSO/Resources/Issues_and_Options_for_Improving_Engagement_Between_the_World_Bank_and_CSOs_March_2005_Final.pdf

ARTICLE

Restrictive Proposals in Kazakhstan

By Stephen J. Larrabee¹

Who's Next?

First Turkmenistan. Then Uzbekistan. Now Kazakhstan? As improbable as it may seem to anyone who has followed the development of the five Central Asian countries since the dissolution of the Soviet Union, Kazakhstan has positioned itself to cripple the development of its civil society sector by introducing several new pieces of legislation. Clearly the most reformed and flourishing of the five countries economically, Kazakhstan had also shown a clear trend to promote a more vibrant civil society. That might be changing.

Legislative Initiatives

Three new legislative initiatives if implemented without revisions, would place major obstacles in the way of any individual, group, donor organization, or foreign government interested in promoting the development of civil society in Kazakhstan.

The first draft law, which was introduced in the Parliament in February 2005, is entitled "On Amendments to Some Legislative Acts of the Republic of Kazakhstan on National Security Issues." Though the provisions of the draft focus primarily on political and religious organizations, one provision strikes a severe blow at the third sector as a whole: the draft introduces administrative penalties on individuals who manage, participate in, or finance activities of non-registered associations, effectively banning informal associations from operating in the territory of the Republic of Kazakhstan.² This provision violates the well-recognized principle that freedom of association includes the right to associate informally. This principle is recognized throughout the world and elaborated in the Fundamental Principles on the Status of Non-Governmental Organizations in Europe: "*NGOs can either be informal bodies, or organizations which have legal personality.*"³ If enacted, this amendment will require every group to register before any activity can take place in Kazakhstan. How this provision will be enforced and who will decide what constitutes associational activity remains to be seen. It is clearly ripe for misinterpretation and selective enforcement.

The second draft law, introduced in the Parliament in April 2005, is entitled "On the Activities of Branches and Representative Offices (Separate Subdivisions) of International or Foreign Non-commercial Organizations in the Republic of Kazakhstan." This draft contains several restrictive provisions that will inhibit the operation of

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² Draft amendments to the Code of Administrative Violations, Article 374-1.

³ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Council of Europe, Para. 5.

international and foreign non-commercial organizations in the Republic. These include, but are not limited to, a two-tiered registration system for branches and representative offices of international and foreign organizations⁴; a requirement that all international and foreign organizations currently operating in Kazakhstan re-register⁵; a prohibition on foreign citizens acting as directors of branch and representative offices⁶; a requirement that any assistance provided to Kazakhstan must be carried out through a local branch or representative office⁷; and a requirement that branch and representative offices notify local executive bodies ten in days in advance of any activity.⁸ All of these requirements clearly discriminate against international or foreign non-commercial organizations and have the effect of prohibiting their operation in Kazakhstan. Such provisions do not apply to commercial organizations (both local and international) or to local non-commercial organizations. The provisions provide no justification for requiring re-registration of currently operating non-commercial organizations, or for prohibiting foreign directors. Also, many of the requirements are open ended. For instance, the draft contains a list of documents required for registration, but the Ministry of Justice can request more as it sees fit; the draft lists reasons for refusal of registration, but it can be broadly interpreted; and, finally, the draft never defines what constitutes an “event” that must be reported ten days in advance to the local executive bodies. All in all, these new requirements place an undue burden on foreign non-commercial organizations, and they leave the implementation and enforcement of these rules to an open-ended interpretation by the administrating agencies, which could easily lead to selective enforcement and corruption.

The final draft law, “On the Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan on Matters Related to Non-commercial Organizations,” was also introduced in Parliament at the same time as the prior-mentioned draft. This draft also imposes several new restrictions on non-commercial organizations operating in Kazakhstan. There are three prohibitive provisions: the imposition of repressive sanctions for a non-commercial organization that holds an event without providing timely notification to the local executive agency⁹; the prohibition of foreigners serving as managers and members of the board of trustees of non-commercial organizations¹⁰; and the requirement that any grants or contributions

⁴ Draft Law “On Activities of Branches and Representative Offices (Separate Subdivisions) of International or Foreign Non-commercial Organizations in the Republic of Kazakhstan,” Article 6.

⁵ *Id.*, Article 11, Point 2 and 3.

⁶ *Id.*, Article 6, Point 1: “Only a citizen of Kazakhstan may be deemed to be the Head of the branch and representative office of an international or foreign non-commercial organization in the Republic of Kazakhstan.”

⁷ *Id.*, Article 2, Point 1.

⁸ *Id.*, Article 5, Point 2.

⁹ Draft Law “On the Introduction of Amendments and Additions into Certain Legislative Acts of the Republic of Kazakhstan on Matters Related to Non-commercial Organizations,” Article 374-2, Point 2 of the Code of Administrative Violations: “Failure to inform or untimely notification to the proper local executive agency ... shall entail a fine at the rate of two hundred MIF [currently \$1,500] with prohibition of operation of non-commercial organization or without such.”

¹⁰ *Id.*, Article 12, Point 2-3.

provided by foreign assistance to non-commercial organizations must be pre-approved by local executive agencies.¹¹ All of these provisions create an unjustified intrusion into local and foreign international non-commercial operations, and they clearly contradict international best practices. Government officials will be able to deny funding to any non-commercial organization they wish. They will also be able to fine an organization \$1,500 and begin a liquidation process if the organization fails to notify about an "event," even though there is no clear definition of what qualifies as an "event." And foreign citizens will be banned from working in any managerial capacity in a non-commercial organization.

Recent Events and Conclusion

It doesn't take a sophisticated analysis to understand why these drafts have been introduced at this time. With three former Soviet Republics changing leadership through what can be termed "revolutions," including one in Kazakhstan's back yard, there is plenty of reason for concern. With the recent tragic events in Uzbekistan, the cause for concern has only increased.

The government's actions, however, seem misdirected. In this author's opinion, foreign non-commercial organizations and donor organizations played only a minimal role in the leadership changes in the three former Soviet Republics. Hobbling these actors and the contributions they make to the development of a vibrant civil society will do very little to prevent such changes in Kazakhstan. Indeed, thanks to the technical skills and funding that these organizations bring to Kazakhstan, individuals have been able to make a better life for themselves as well as contribute to the development of their country. In this respect, the new restrictions may end up making the government's situation more precarious, not less.

¹¹ *Id.*, Article 35, Point 2-1.

ARTICLE

Women at the Forefront of the Democracy Movement in Iran

By Nayereh Tohidi*

June 12, 2005, was a great day for the women's rights activists of Iran.

Earlier, about 90 NGOs concentrating on women and gender issues, the environment, and education joined 350 prominent female writers, academics, lawyers, artists, activists, journalists, and 130 web-loggers to call for a public protest against the breaches of women's rights in the Islamic Republic of Iran. The result was an unprecedented demonstration.

Against all the odds and intimidations, women gathered at 5 p.m. in front of the main gate of the University of Tehran – about 3,000 of them. The organizers had mobilized many male intellectuals and civil society activists too, by inviting them to sign a petition in support of the protest; some of them joined the demonstration as well.

The protesters were determined, well-organized, alert, and timely in their demands as well as in their efforts to make their voices heard, both inside and outside Iran. Their slogans and their ending statement (resolution) stressed the necessity for changing the constitution and the legal system. Many Iranian laws breach the human rights of women and justify violence against them. Activists see the present laws, based on *sharia*, as the main obstacle to achieving equality and the empowerment of women.

Though they agreed on the goals, demonstrators held various views on how best to achieve them. Some are planning to boycott the upcoming presidential elections and are calling for a national referendum for the election of a new constitutional assembly and the establishment of a secular and egalitarian constitution compatible with the universal declaration of human rights. Others plan to vote for the reformist presidential candidate, Dr. Mostafa Moin. Yet they all came together, regardless of political and ideological differences, to demand fundamental human rights.

The protesters' slogans did not mince words: “Our path to liberation – just law and women’s consciousness,” “Anti-women laws are the basis of despotism,” “We are women, we are human beings, we are citizen of this country, yet we have no rights,” “No to legal violence against women,” “Human rights are the path to democracy in Iran,” and “Oppressive laws and patriarchal traditions should be abolished.”

The security forces, of course, came in overwhelming numbers. They kicked some women (as reported by Parvin Ardalan and Fariba Davoudi-Mohajer), grabbed and

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tore many of the placards, and surrounded the demonstration with buses to prevent more women and men from joining. The women held hands and resisted the security forces by singing the “women’s freedom” song recently composed for this occasion. Overall, though, the event was relatively peaceful, with no confirmed reports of arrest or serious injury. The organizers cleverly timed the protest for the peak of the presidential election campaign, a less repressive period when security forces would be reluctant to attack women before the eyes of the public.

A few people managed to complete their speeches – including Simin Behbahani, Marziyyeh Mortazi-Langaroudi, and Shirin Ebadi (a message read aloud) – most speakers were prevented from proceeding by the security forces and the tensions they created. A group of Kurdish women, who had come all the way from Kurdistan (Marivan), managed to sing in Kurdish and deliver a speech, but the messages of women from Azerbaijan, Isfahan, Chahar-Mahal-Bakhtiyari, Khorasan, Sistan & Baluchestan, Lorestan, and Kermanshah could not be delivered. The text of many of the messages can be read (in Persian) on the web site of the *Iranian Feminist Tribune*, <http://iftribune.com/news.asp?id=19&pass=42>.

As assessed by some of the activists, including Noushin Ahmadi-Khorasani, Shadi Sadr, and Mahboobeh Abbasgholizadeh, this was a great day for the women’s movement in Iran. Women activists were able to gain more confidence, improve their organizational skills, strengthen the ties among NGOs, and articulate their demands more clearly and unanimously. Once again, women proved that they constitute the primary agents of the burgeoning civil society and pro-democracy movement in Iran. This bold yet measured and well-conceived action marks a turning point in the history of the women's movement in Iran.

Another important aspect was its global dimension. From different parts of the world, several NGOs and Internet sites for women helped generate international publicity of this important event. As organizer Noushin Ahmadi-Khorasani put it, "This action could not have succeeded without the effective international support behind it. Having five Nobel laureates, Human Rights Watch, and hundreds of academics and human rights activists from different parts of the world behind us gave us a sense of security and confidence to go ahead and overcome the fear of arrest." The international campaign and a related petition can be found at <http://www.petitiononline.com/irnwomen/petition.html>.

All who worked so hard, up front and behind the scenes, inside and outside Iran, deserve our congratulations. The successful demonstration of June 12 is likely to have major implications for the future of women’s rights, human rights, civil society, and democracy in Iran.

For additional information on the demonstration, its background, and its resolution, see the following:

<http://iftribune.com/news.asp?id=19&pass=42> (Persian)

<http://www.womeniniran.org/> (Persian and English)

<http://www.irandokht.com/news/readnews.php?newsID=11899> (English)

<http://www.iran-emrooz.net/index.php?/news/more/2076/> (Persian)

ARTICLE

Economic Constraints, Political Motives: Contemporary Russian Nonprofit Tax Law

By Leslie Lutz*

I. Introduction

In his 2004 State of the Union Address, President Vladimir Putin actively recognized the ability of nonprofit organizations to contribute to Russian society. "It is necessary," he said, "to gradually transfer functions to the nongovernmental sector which the state should not do or is unable to perform effectively."¹ At the same time, he cautioned that "not all organizations are orientated toward standing up for the real interests of the people. The priority for some is to receive financing from influential foreign organizations. Others serve dubious group and commercial interests."²

The dichotomous tone of Putin's speech represents the Russian government's broader feelings toward the nonprofit sector. While Putin expects Russian nonprofits to respond to national social and economic problems, his distrust of the sector leaves him unwilling to give these organizations the power to act efficiently. As a result, the laws governing nonprofits in Russia are confusing. Worse yet, current Russian tax law prevents nonprofits from developing financial autonomy or stability. If the government chose, it could significantly strengthen nonprofit organizations by giving them a more favorable tax status. Because the state itself fails to effectively address issues such as AIDS, poverty, and domestic violence, the very lives of citizens are at stake. Nonprofits are potentially poised to alleviate some of those problems. However, Russian tax law fails to stimulate growth in the nonprofit sector. Current laws inhibit the growth of the sector, and reforms are desperately needed for nonprofits to meet the growing demands of a society in transition.

Primary Claims

This article is built upon three primary claims. *First, not only do tax laws inhibit the nonprofit sector, they inhibit it unnecessarily.* The majority of the laws in question could be repealed without creating economic hardship for the Russian Federation or the

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¹ President Vladimir Putin, "Poslanie Federal'nomu Sobraniuu Rossiiskoi Federatsii," Moscow, Russia, 26 May 2004, <http://www.president.kremlin.ru/text/appears/2004/05/71501.shtml>, accessed 19 March 2005.

² Ibid.

government. The current laws were heavily influenced by the financial crisis of 1998, in an attempt to end noncompliance of major taxpayers and remove "unjustified tax privileges" in the form of exemptions and deductions.³ However, few Russian nonprofits are "major taxpayers." More importantly, their exemptions were not unjustified because the organizations provide valuable aid to society and should therefore be supported.

Other forms of non-tax benefits could potentially be chosen, such as financial support for advertising costs or direct government grants. I advocate specifically for benefits through the federal tax laws, because they can be administered uniformly at the federal level, do not require spending on the part of the government, and provide assistance for nonprofits on a steady rather than sporadic basis. Furthermore, as Paul Bater explains, tax relief is more flexible than other forms of aid, because it increases as an organization's income increases, and because tax benefits are not usually subjected to the same level of public comment and constraint as direct grants or other public expenditures.⁴

Second, the government allows this detrimental situation to continue, be it actively or passively, because relations between the state and nonprofits are strained. As seen in Putin's State of the Union Address in 2004, the government is distrustful of the nation's civic sector. Putin's administration has both the legal authority and the economic ability to reform nonprofit tax law. After showing that the current nonprofit tax laws are not economic necessities, I will then argue that the laws exist for political reasons.

Third, it would be to the government's advantage to have the full support of the nonprofit sector in dealing with the social and economic challenges facing Russia today. As a nation in transition, Russia faces a wide array of serious issues, such as AIDS, poverty, unemployment, and crime. The government currently treats the nonprofit sector as an enemy, not an ally. Yet the government cannot solve societal problems single-handedly, as Putin himself acknowledged in his State of the Union Address. By reforming current nonprofit tax law, the government stands to gain a powerful partner in social and economic reform: a strong and efficient civic sector, reportedly including approximately 60,000 registered charities as of 2002.⁵

II. Background

Definition of Terms

I am concerned with all civic and charitable organizations, including human rights organizations, cultural institutions, and health, housing, and welfare groups. In the United States, all such groups would be eligible for tax-exempt status and considered "nonprofit organizations." In Russia, however, these organizations are categorized at three main levels. At the simplest level, the preferred Russian term is "noncommercial," as defined

³ Raisa Fedotovna Zaharova, "Tax Law of the Russian Federation," in *Legal Foundations of Russian Economy*, ed. Juha Tolonen and Boris Topornin (Helsinki: Kikimora Publications, 2000), 134.

⁴ Paul Bater, "Tax and Other Benefits for Public Benefit Organizations," conference proceedings from European Civil Society in the 21st Century, sponsored by the International Center for Not-for-Profit Law, Budapest, 3 May – 6 May 1999.

⁵ Arthur C. Brooks, "Charitable Giving in Transition Economies: Evidence from Russia," *National Tax Journal* vol. 55, no. 4 (2002), 744.

by the Federal Law on Noncommercial Organizations, adopted by the Duma in December 1995.⁶ When the popular label of “nongovernmental organization,” or NGO, is applied, it generally refers to the largest of organizations, or to foreign nonprofits working in Russia.

Noncommercial organizations in Russia do not have profit as their primary goal and do not distribute profits among members. They can be created for "the attainment of social, charitable, cultural, educational, scientific, and administrative goals; in defense of citizens' health; for the development of physical training and sport; for the satisfaction of citizens' spiritual and other nonmaterial needs; for the defense of rights and the legal interests of citizens and organizations; the resolution of arguments and conflicts; for giving legal help; and for other goals directed toward the attainment of societal good."⁷ They can be social or religious organizations, noncommercial partnerships, institutions, autonomous noncommercial organizations, social or charitable foundations, and "other forms, as stipulated by federal law."⁸ At this broadest level of registration, organizations can pursue a wide array of interests as long as profit is not their primary goal.

A noncommercial organization gains recognition as a legal entity by registering with the local branch of the Ministry of Taxation. Tax-exempt status is not automatic. Some organizations might receive exemptions from profit taxes on certain income sources, but there are no “blanket exemptions” for any organizations.⁹

At the next level of classification, some of these noncommercial organizations are recognized as charities under the Federal Law on Charitable Activity and Charitable Organizations.¹⁰ Article 1 defines charity as the voluntary action of citizens or groups to provide money, services, or other support to those in need. The law restricts charitable goals to a narrow list, including support of impoverished citizens, response to natural disasters, and protection of the environment, culture, public health, and historical objects.¹¹ Not all noncommercial organizations are considered charities: partnerships, unions, and foundations, for example, do not qualify. Social organizations, as described above, are most likely to be considered charitable.

Certain Russian charities receive a more favorable tax status than other noncommercial organizations. They do not have to pay income tax on noncommercial revenue. In turn, they are not allowed to spend more than 20 percent of annual revenues on administrative and managerial support services.¹²

⁶ Federal'nyi zakon Rossiiskoi Federatsii No. 7-FZ, “O nekommercheskikh organizatsiakh,” reprinted in *Nekommercheskie organizatsii: Zakonodatel'nye i normativnye akty, kommentarii* (Moscow: “Rossiiskaia gazeta,” 1997), 4-20.

⁷ *Ibid.*, Article 2.1, 4.

⁸ *Ibid.*, Article 2.2-3, 4.

⁹ International Center for Not-for-Profit Law, “Survey of Tax Laws Affecting NGOs in the Newly Independent States,” <http://www.icnl.org/tools/default.htm>.

¹⁰ Federal'nyi zakon Rossiiskoi Federatsii No. 135-FZ, “O blagotvoritel'noi deiatel'nosti i blagotvoritel'nykh organizatsiakh,” reprinted in *Nekommercheskie organizatsii*, 73-83.

¹¹ *Ibid.*, Article 2(1), 74.

¹² *Ibid.*, Article 16(3), 79.

Not all charitable organizations receive equally favorable tax-exempt status under current Russian law, which creates a third and more complex level of classification. In general, charities receive the most favorable treatment of all non-commercial organizations, but not all charities can reap the full benefits. Only educational, cultural, environmental, and research organizations qualify to receive tax-exempt program-based grants from foreign or domestic foundations. Legislation under consideration by the Duma could expand this category, but the bill has not yet been adopted. Although they might be considered charities, social service organizations, healthcare institutions, and human rights groups do not receive grant exemptions at this time. As one expert from the International Center for Not-for-Profit Law explains, the concept of charitable status in Russia is not inherently linked to tax benefits.¹³ For some smaller organizations, particularly grassroots human rights groups, the complexities of the registration process can preclude receiving any level of benefits.

In this article, I will discuss a wide range of public-benefit voluntary civic groups, particularly those engaged in charitable activity. I will refer to them all as nonprofit organizations, both because profit is not their primary goal and because this terminology is familiar. It is important to remember, however, that this category includes a mixture of charities and non-charities, and that not all groups qualify for tax exemptions. Such inconsistency in current Russian tax law is one of the major problems discussed throughout this article.

Historical Framework

Although formal associations not directed by the Soviet Communist Party were forbidden, human rights activists and ecologists began to mobilize toward the end of the Soviet era. Unregistered “informal groups” spread rapidly during perestroika, and by some estimates, approximately 60,000 informal political and social organizations had sprung up across the Soviet republics by 1990.¹⁴ Russia thus has a longer experience of associational life than many people realize. However, the history of registered, institutionalized Russian nonprofits is relatively brief. While voluntary civic activity was encouraged after the dissolution of communism, laws governing nonprofit organizations did not begin to develop until 1993. The Constitution of the Russian Federation, adopted in 1993, not only gave citizens the right to form associations, but went so far as to state that “voluntary social insurance, development of additional forms of social security, and charity are encouraged.”¹⁵

Until the Civil Code became effective on 1 January 1995, the actions of nonprofits were not carefully monitored. The Yeltsin administration had given charities extensive exemptions and tax credits as early as 1991, allowing them to import and export goods duty-free to raise revenue. In the economic chaos following the collapse of

¹³ David Moore, “The Fiscal Framework for Corporate Philanthropy in CEE and NIS,” *International Journal of Not-for-Profit Law* vol. 6, no. 2 (2004), <http://www.icnl.org>.

¹⁴ Geoffrey Hosking, *The Awakening of the Soviet Union* (Cambridge: Harvard University Press, 1990), 64.

¹⁵ Article 39(3) of the Constitution of the Russian Federation, <http://www.gov.ru/main/konst/konst12.html>, accessed 22 March 2005.

the Soviet Union, this was necessary to ensure the continued provision of public goods and social services, encouraging the nonprofit sector to step in at a time of state weakness. But it was only a matter of time before the Russian Mafia became involved. A particularly high-profile case in the early 1990s involved the Russian Fund for Invalids of the Afghanistan War, which earned \$200 million by importing duty-free cigarettes and alcohol; the Mafia claimed an estimated 80 percent of that profit.¹⁶ The Civil Code set sharp limits to such business ventures, restricting nonprofits to ventures that correspond with the organizations' purposes. All other "entrepreneurial activity" became taxable.¹⁷

The Civil Code was soon followed by two more specific laws: the Federal Law on Charities and the Federal Law on Noncommercial Organizations, both adopted in late 1995. These laws established the finer points of nonprofits' obligations, particularly the registration and liquidation procedures. Under Article 3 of the Charities Law and Article 2(3) of the Noncommercial Law, organizations can take a wide variety of legal forms, as determined by the founder. All such organizations are legal entities; for official status and benefits, they must take the further step of registering with the local branch of the Russian Ministry of Taxation. Charitable organizations are required to submit an annual report of financial activity and membership details; this information is supposed to be available to the public, but bureaucratic obstacles often make it difficult to access.

Background on Tax Policy

Post-Soviet Russian tax legislation was first enacted in 1992, and the elementary version of the federal tax code was adopted in 1995. Many rounds of amendments have been adopted since then. In the earliest versions of the Tax Code of the Russian Federation, corporations received deductions for charitable gifts up to 3 percent of their taxable income, and individuals could deduct 100 percent of their charitable gifts. In-kind gifts and monetary gifts were tax-exempt for both the donor and the recipient.¹⁸ Charities, for their part, paid taxes on very few activities, leading to Mafia scandals such as that described above.

However, charities were not the only legal entities with loosely enforced tax obligations. In the early post-Soviet years, rates of tax collection were abysmal. The government could not enforce tax obligations, and many taxpayers, big and small, simply refused to pay. By August 1997, according to the International Monetary Fund, tax arrears had reached 34 percent of total collection.¹⁹ Meanwhile, much of the foreign money lent to the government was allegedly stolen or squandered.²⁰ State revenues continued to fall. On 17 August 1998, the government announced a suspension of debt

¹⁶ Carol Matlock, "Helping the Russian Mafia Help Itself," *Business Week*, 9 December 1996, 58.

¹⁷ *Grazhdanskii kodeks Rossiiskoi Federatsii* (St. Petersburg: Iuridicheskii tsentr Press, 2002), 111.

¹⁸ Milton Cerny, "Russia in Transition," *Exempt Organization Tax Review* vol. 45, no. 2 (2004), 418.

¹⁹ Dale Chua, "Tax Reform in Russia," in *Russia Rebounds*, eds. David Owen and David O. Robinson (Washington, D.C.: International Monetary Fund, 2003), 79. By contrast, Chua reports that tax arrears in the United States, Canada, and Australia averaged from 4 to 6 percent in the same year.

²⁰ "Russia Devalued," *The Economist*, 22 August 1998, 14.

payment and devaluation of the ruble. In a major economic crisis, banks closed and millions of citizens lost their jobs and their savings.²¹

The government was forced to act quickly. One of the most obvious strategies for increasing federal revenues was to strengthen the tax system, particularly its enforcement. Dialogue about reform began immediately. The first part of a two-part revised tax code was adopted in January 1999; the second part followed in January 2001. Reforms were made with four main goals in mind: (1) horizontal equity, treating all taxpayers equally; (2) simplicity, reducing the large number of small taxes that represented a bureaucratic burden; (3) stability; and (4) improvement of collection rates.²² Part I of the tax code set forth basic procedural laws and definitions of tax terms, as well as the responsibilities of tax authorities, in an attempt to curb governmental abuse of power. Part II significantly changed the main taxes imposed on all legal persons, including charitable organizations.

The second part of the Tax Code of the Russian Federation contains four major chapters, each explaining a different type of tax: the personal income tax, the value-added tax (VAT), excises, and social taxes. Most drastically, individual income tax was established at a flat rate of 13 percent, rather than the previous progressive rates of 12, 20, and 30 percent. Corporate income tax was reduced from 35 percent to 24 percent. As the tax rates were lowered, deductions and exemptions were also reduced dramatically, to ensure that overall tax revenues would not decrease too greatly. While significant changes occurred in the other forms of taxes, they had less impact on the nonprofit sector. The alterations to personal and corporate income tax calculation and the eradication of exemptions carried many negative implications for Russia's charitable organizations.²³

III. Main Impacts of the Tax Code on the Nonprofit Sector

Five main problem areas exist in Russian nonprofit tax law. I selected these issues primarily based upon two unpublished memoranda from representatives of the Institute for Urban Economics and other Russian nonprofit organizations, with further analysis provided by Milton Cerny.²⁴ Cerny's articles are an excellent English-language resource for more information on individual laws. These issues are ranked in what I believe to be an escalating order of importance.

To understand why these laws are problematic, and to show that the existence of these laws inhibits the growth of the nonprofit sector, I will compare Russian laws to a "reasonable alternative." For the standard of comparison, I chose the International Center for Not-for-Profit Law's guidelines for laws affecting civic organizations. ICNL standards are designed to benefit nonprofit organizations by strengthening their legal and

²¹ Evgenii Iasin, "Snova Avgust," *Moskovskie Vedomosti*, 17 August 1999.

²² Chua, "Tax Reform in Russia," 83.

²³ The current Russian Tax Code, in its entirety, is available through the Ministry of Taxation at www.nalog.ru.

²⁴ Liborakina and others, "Problemy nalogooblozheniia nekommercheskogo sektora i napravleniia sovershenstvovaniia zakonodatel'stava," unpublished memorandum, Institute for Urban Economics (Moscow, 2004) [Courtesy of Michael Alexeev]; M.I. Liborakina and A.K. Tolmasova, "O problemakh nalogooblozheniia nekommercheskikh organizatsii," unpublished memorandum, Institute for Urban Economics (Moscow, 2004) [Courtesy of Michael Alexeev]; Cerny, "Russia in Transition," 411-419.

financial stability. With offices in Washington, D.C., Budapest, Kiev, and five Central Asian nations, the organization has a global view of nonprofit law. A common argument against such transnational comparisons is that Russia, a country in transition, cannot be productively compared to Western nations such as the United States. The ICNL reports, however, are based on studies of more than 100 countries with varying economic and political systems, from which the common international practices are extrapolated. Because these standards were not tailored to the legal and economic conditions of wealthier Western nations, they represent an excellent standard of comparison for the Russian nonprofit sector.

Lack of Corporate Deductions

In the 2002 tax reforms, corporations lost all deductions for charitable gifts. By removing corporate deductions, the Russian government significantly decreased the likelihood of corporate giving. Many Western scholars have described the linkages between tax incentives and charitable giving. Clotfelter and Steinberg, for example, both identified tax deductions as an incentive for increased charitable giving for both American corporations and individuals.²⁵ While the exact price elasticity of charitable giving is debatable, some scholars argue that the larger deduction an individual or corporation can claim, the more likely a charitable donation will occur. Others disagree with this point. Stronger evidence shows that the larger the available deduction, the larger the donation.²⁶ In other words, tax deductions alone may not encourage new donors to give, but do seem to encourage existing donors to make larger gifts. Preliminary research has found charitable giving to be even more price elastic in Russia: the less it costs to make a charitable donation, the more likely Russians are to give, especially businesses and the upper class.²⁷

More than any of the other tax recent reforms, the eradication of corporate deductions is clearly linked to concerns over corruption in post-Soviet Russia. Both tax avoidance by major corporations and Mafia involvement with private businesses and nonprofit organizations have been key issues throughout the past decade. Such conflicts reached epic proportions in 2004, as Putin and the Ministry of Taxation accused Yukos Oil Company of illegally withholding billions of dollars in taxes. To prevent such abuses, corporate tax law has been simplified, and most deductions, including those for charitable gifts, have been removed. While some argue that this is the necessary cost of reforming corporate corruption, such changes have come at the expense of the nonprofit sector.

The ICNL guidelines recognize “reasonably generous income tax benefits” for businesses as a necessary tool to “encourage philanthropy and good citizenship.”²⁸ While

²⁵ Charles T. Clotfelter, *Federal Tax Policy and Charitable Giving* (Chicago: University of Chicago Press, 1985); Richard Steinberg, “Taxes and Giving: New Findings,” *Voluntas* vol. 1, no. 2 (1990), 61-79.

²⁶ Lise Vesterlund, “Why People Give,” in *The Nonprofit Sector: A Research Handbook*. Eds. Walter W. Powell and Richard Steinberg (New Haven: Yale University Press, forthcoming). A preliminary version of Vesterlund’s chapter was provided by Professor Kirsten Grønbjerg of Indiana University.

²⁷ Brooks, “Charitable Giving,” 750.

²⁸ International Center for Not-for-Profit Law, “Checklist for NPO Laws,” Standard 3.5, available online at <http://www.icnl.org/tools/checklist.htm>.

the definition of “generous” can be debated, it is clear that a complete lack of corporate deductions does not meet this standard. As described above, ICNL argues that “the ability to claim a tax deduction for charitable contributions plays a major role in donor decisions – at every income level – regarding how much to give.”²⁹

Surprisingly, support for corporate giving is common through the post-Soviet bloc. In Eastern Europe and the former Soviet Union, only Azerbaijan, Belarus, Georgia, and Russia lack tax incentives for corporate giving.³⁰ Deductions for donors are most common, ranging from 5 percent of pre-tax profits in Kyrgyzstan to 20 percent in Hungary.

A more innovative approach to corporate giving might sidestep concerns of corporate corruption. First introduced in Hungary in 1996, the “1% Law” allows corporations to designate one percent of their total tax liability to a nonprofit organization and one percent to a church.³¹ Corporations may choose to divide that 1 percent among several different nonprofits (or several different churches). Companies are not exempt from tax liability, but simply choose to pay 1 percent to organizations of their choice rather than to the government. This limits the risk of questionable deductions while still providing important revenue to the nonprofit sector. In 2001, the 1% Law raised \$15.76 million for Hungarian nonprofits and churches. Similar laws have been adopted in Slovakia, Lithuania, and Poland. If corruption is a major concern for the Russian government, the success of the 1% Law in Eastern Europe is an example of an alternative path to encourage corporate giving.

Low Rates of Individual Deductions

The current status of individual tax deductions is quite similar to the situation with corporate deductions. I rank this issue as more important than corporate giving, because gifts from individual donors make up a higher percentage of overall sector revenue than corporate giving in most countries. Unfortunately, this situation is also much more difficult to remedy in Russia.

A major victory of the 2002 tax reforms was the establishment of a flat tax rate of 13 percent. Earlier, perceived inequalities in the tax structure and high rates, including the social tax, were considered important factors behind the high rate of tax avoidance.³² Though the personal income tax rate was lowered for two income ranges (pre-reform tax brackets had been 12, 20, and 30 percent), the simplified system increased the overall revenue from personal income tax by 26 percent in the first year and inspired imitation in neighboring countries, leading some scholars to call this “arguably the most important tax reform of the last decade.”³³ Unfortunately, inevitable consequences have hurt the nonprofit sector.

²⁹ Moore, “Corporate Philanthropy.”

³⁰ Ibid.

³¹ Ibid.

³² Chua, “Tax Reforms in Russia,” 79.

³³ Anna Ivanova, Michael Keen, and Alexander Klemm, “The Russian Flat Tax Reform,” International Monetary Fund Working Paper 05/16 (January 2005), 4.

After the reforms of 2002, deduction rates for individuals decreased. Whereas individuals could once deduct 100 percent of their charitable gifts in any amount, they are now limited to deducting 25 percent of their taxable income. Although this change alone has lowered deduction rates, the change in personal income tax probably has had an even greater impact, because the cost of charitable giving is dependent upon such rates.³⁴ When the marginal tax rate for the Russian upper class was 30 percent, it only cost seventy cents to give the equivalent of one dollar ($\$1 - 0.30 = .70$), because the resulting deductions effectively “balanced out” a portion of the cost of the gift. With the new flat rate in effect, charitable giving has become more expensive: it now costs 87 cents to give the equivalent of a dollar ($\$1 - 0.13 = 0.87$). Other factors affect charitable giving, as well, and income is a critical factor in one’s willingness to give, among both corporations and individuals.³⁵ However, as discussed above, keeping the cost of charitable giving low is a key way to stimulate philanthropy, by encouraging donors to make larger gifts.

It is impractical to suggest an increase in the personal income tax rate. Nevertheless, philanthropy in Russia should be encouraged. Personal charitable giving rates have remained low.³⁶ The government should find ways to work around the nation’s low income tax rate, so as to produce what ICNL calls “reasonably generous income tax benefits” for both businesses and individuals.

While tax deductions encourage larger gifts from wealthy donors, ICNL suggests tax credits as a more equitable approach. Canada and Hungary are among the few nations providing tax credits for donors, instead of donations. Furthermore, tax credits can be provided independently of a state’s tax rate, thereby avoiding the impact of the lowered personal income tax rate.

It could be argued that increased tax deductions or credits for donors would diminish the revenue that the government has worked so diligently to raise. However, significant deduction rates are common in developing nations. For example, ICNL identifies India as a nation with a particularly generous policy, in which charitable donations are 50 percent tax deductible up to 10 percent of one’s gross income. It is estimated that without such incentives, contributions in India would have been 64 percent lower.³⁷

Conflicting Laws on Use of Tax-Exempt Gifts

The bureaucratic complexities of the Soviet Union were infamous during their time, and some current Russian laws seem to be holdovers from that era. In particular, the federal laws governing the use of tax-exempt gifts are uniquely contradictory. Once an organization has received a tax-exempt gift, Article 16 of the Charities Law requires that 80 percent of the gift must be spent within one year of receipt. Meanwhile, Article 251(2) of the Russian Tax Code requires the same tax-exempt gift to be spent *in its entirety*

³⁴ Vesterlund, "Why People Give," 9.

³⁵ Clotfelter, *Federal Tax Policy and Charitable Giving*, 274.

³⁶ Brooks, "Charitable Giving," 745.

³⁷ International Center for Not-for-Profit Law, "The Tax Treatment of Nongovernmental Organizations: A Survey of Best Practices from Around the World," endnote 14, <http://www.icnl.org/tools/TAXPAPER.htm>.

within the organization's current *fiscal* year. After the end of either the calendar year or the fiscal year in question, the organization must pay a profit tax of 24 percent on any remaining charitable gifts.

Either of the laws could help prevent the misuse of charitable donations. Accountability is particularly important in the Russian context, in light of the past nonprofit and Mafia scandals described above. However, the conflicts between the two laws significantly complicate the system of bureaucratic reporting and nonprofit accounting. Further, these laws undermine organizations' abilities to build financial reserves and to conduct capital campaigns. For the sake of consistency, at least one of the two laws should be repealed.

Profit Tax

As touched upon above, charitable organizations still pay the 24 percent corporate profit tax on much of their revenue. Monetary gifts are taxed when not used within the required time frame. Gifts from unapproved foreign or Russian foundations are also taxed, as described at greater length in the next section. The Charities Law requires that business ventures be limited to those required for the achievement of charitable goals; charities cannot join business associations with other organizations, be they for-profit or nonprofit.³⁸ As Cerny observes, this might potentially guard against businesses or organized crime groups disguising themselves as charities. However, "given the comparably poor health of the Russian charity sector, this provision effectively prevents small charities from pulling their profit-producing resources together without potentially losing their charitable status."³⁹ While membership dues, government grants, and other individual contributions (excluding in-kind contributions) are exempt from the profit tax, this obviously applies only to organizations that have received official status as a charity. For most cultural organizations, private schools, and smaller grassroots organizations, such donations are taxed to the full extent of corporate law. Other basic revenues, such as interest and fees for services, are taxable as well.⁴⁰

By preventing nonprofit organizations from raising their own money through economic activity, the Russian government ensures, intentionally or not, that the sector cannot develop lasting economic autonomy. Restrictions on business activities are simultaneously too narrow and too vague. They are too narrow because they prevent organizations from raising money through commercial ventures, and too vague because in many cases they blur the distinctions between charitable and commercial ventures. Healthcare organizations and cultural institutions perform work that could be considered charitable, yet because of the revenues they regularly earn, their work is considered commercial. For Russian nonprofits, the confusion and inconsistency surrounding the profit tax is sometimes as big a problem as the profit tax itself.

Tax systems generally treat net profit that a nonprofit actively earns and gift income differently. ICNL identifies four approaches to net profit, ranging along a

³⁸ Article 12(3). "O blagotvoritel'noi deiatel'nosti," *Nekommercheskie organizatsii*, 77.

³⁹ Cerny, "Russia in Transition," 417.

⁴⁰ G. Kuzmin, "Nalogooblozhenie nekommercheskikh organizatsii," *Ekonomika i zhizn'* vol. 50 (2003), 16-34.

spectrum from complete tax exemption to complete taxation. In developing nations, ICNL encourages the most lenient approach. “NGOs in such countries are often desperate for money simply to survive, and the profits from economic activities may make the difference between their continued existence and termination.” ICNL goes on to note that in many developing market economies, it is important to encourage *all* economic activity independent from the state, whether it is undertaken by a nonprofit or a for-profit organization.⁴¹

Grant Registration Restrictions

Article 251(14) of the tax code differentiates grants from all other contributions. It defines them as financing for a specified purpose, and requires a written agreement between the donor and the organization. In an unpublished memo, Liborakina and Tolmasova argue that the taxation of grants is the most critical issue facing the Russian nonprofit sector.⁴²

I too consider this to be the most important problem, because it spills over into all other areas of tax treatment. When a nonprofit is forced to pay the 24 percent profit tax on gift income, for example, the reason is often that the organization cannot register for the appropriate tax status (or, as discussed below, that the grant giver cannot register). When an individual receives no tax deduction for a charitable gift, likewise, the reason is often that the recipient organization cannot register. This complex problem thus affects nonprofit organizations and, in many cases, their donors as well.

Grants are tax-exempt only when given to a small range of approved organizations in the fields of education, culture, research, and environmental protection. In addition, each grant must be “registered” with the Ministry of Taxation, which takes at least two months.⁴³

The process of giving tax-exempt, program-based grants is even more complicated than the process of receiving them, especially for foreign donors. A grant from a foreign organization cannot qualify as tax exempt unless the organization appears on a list of approved foreign donors maintained by the government of the Russian Federation. The list is updated infrequently, and, in a Kafkaesque twist, the process of gaining admission to it has never been published. Foreign organizations that cannot successfully register with the Commission, or that choose to avoid the months of delay involved in applying for registration, must give grants that are not tax-exempt: a quarter of each grant will be spent on the recipient’s tax obligations. Liborakina reports that grant-making organizations rarely if ever include profit tax payments in their budgets, so recipient nonprofits must raise additional funds.⁴⁴

⁴¹ ICNL, “Tax Treatment,” 4.

⁴² Liborakina and Tolmasova, “O problemakh nalogooblozheniia.”

⁴³ Natalia Bourjaily, “Proposed Russian Tax Code Amendments: Benefit or Burden?”, memorandum for the International Center for Not-for-Profit Law, August 2004, <http://www.icnl.org>, accessed 23 November 2004.

⁴⁴ Liborakina and others, “Problemy...i napravleniia,” 5.

Domestic grant-making organizations, primarily community foundations, share many of the same restrictions. To be tax-exempt, their grants must also be made to educational, cultural, environmental, or research organizations. Like foreign grant-making organizations, domestic ones must register each tax exempt grant with the government. While domestic organizations are not yet required to appear on a list of authorized grant-makers, their individual grants are subjected to a similarly lengthy process of verification.

Liborakina and Tolmasova are blunt in their assessment of this legal situation: “It is impossible to discover any economic sense in this approach to taxation of grants.”⁴⁵ The government recognizes, at least theoretically, that nonprofits in certain fields of service deserve financial support that is exempt from income taxation. It should not matter, then, who gives the support. Echoing Cerny’s call for more “user-friendly” laws, Liborakina and Tolmasova character this situation as “excessive formalism.” No other country in Europe requires donors to register grants with the government or to seek inclusion on a list of approved donors. Within the former Soviet Union, only Kazakhstan requires foreign donors to register with the state.⁴⁶

As suggested by President Putin’s State of the Union remarks, quoted in the opening section, the government is suspicious of many foreign donors. A lingering Cold War mentality creates a fear that wealthy foreign donors may try to impose their Western political agendas on Russian organizations. A second large concern involves grant money for anti-war and pro-Chechnya organizations, which often comes from the Middle East and may be funding separatist movements and terrorism.

The government's paranoia may or may not be justified. What is certain, however, is that the “excessive formalism” is unnecessary. Months-long processing delays are not acceptable. If the state relies on a list of approved foreign donors, it should make public the guidelines for gaining entry and update the list regularly. The process of approving individual grants for tax-exempt status, whether from foreign or domestic donors, should be made clearer and more accessible.

The structure of the Russian law, and its vagueness in particular, allows the government to abuse its regulatory power by discriminating against organizations at will. This facet of Russian tax law serves as a powerful tool for monitoring and restricting independent civic organizations, particularly those that might not fully support the current regime.

As discussed in the previous section, ICNL’s best practices call for complete exemption from income taxation for all nonprofit receipts of grant money from donors. Distinctions are not made based on the status of the donor. More important, clear and accessible nonprofit law is considered a “fundamental freedom” by ICNL. Such laws should be “written and administered so that it is relatively quick, easy, and inexpensive for all persons to register or incorporate [a nonprofit organization] as a legal person.”⁴⁷

⁴⁵ “V takom podkhode k nalogooblozheniiu grantov nevozmozhno vyiavit’ ekonomicheskogo smysla.” Liborakina and Tolmasova, “O problemakh nalogooblozhenie.”

⁴⁶ Bourjaily, “Benefit or Burden?”

⁴⁷ ICNL, “Checklist,” standard 1.2.

By contrast, the laws governing Russian organizations today are so complex that it is virtually impossible for many nonprofits to qualify for the full extent of tax exemptions allowed by the law.

IV. Implications of the Current Russian Tax Legislation

Lack of Reliable Funding

Many sources of funding taken for granted in other nations are lacking within the Russian nonprofit sector. Government grants are extremely rare, as might be expected from the critically low levels of public revenue at the end of the 1990s. Having recently changed the law to increase tax revenue from nonprofit organizations, the state would be acting inconsistently if it proceeded to return some of the revenue to the nonprofit sector in the form of grants. In most developing nations, the state cannot afford to actively support the programs of charities, no matter how beneficial those programs might be.⁴⁸

Donations from businesses are equally rare. Even before the Tax Code completely removed deductions for corporations, corporate philanthropy was uncommon. In addition to inadequate incentives for giving, the lack of a tradition of corporate giving is viewed as an obstacle by some Russian observers.⁴⁹ Although Zelikova and Fomin's observations on the lack of corporate giving are from 1996, one must expect that giving has decreased even more sharply since the 2002 amendment of the tax code removed all corporate deductions. Lapina, meanwhile, observes that corporate philanthropy is usually a one-time, fairly random affair in Russia; businesses do not form working partnerships with nonprofits as is often seen in the United States.⁵⁰ As a result, organizations cannot plan for regular charitable gifts, and advance budgeting is a particular challenge.

Personal giving is similarly low. Again, a tradition of such charitable behavior has not been established. During the Soviet years, the state provided for citizens' needs and nonprofit service organizations did not exist, so donating to nonprofit organizations was not institutionalized as a part of Russian culture. As always, data on this topic are hard to come by. Accurate statistics on tax behavior and the amount of deductions claimed are rarely accessible, in large part because of the frequent tax avoidance that plagued Russia throughout the 1990s. However, one analysis, based on data from the World Bank, found that approximately 25 percent of Russians donate annually to charity. For comparison, the same study found that 75 percent of Americans make yearly contributions.⁵¹ While this disparity might result primarily from economic and income differences, there is a risk that the lack of tradition will continue to hold down giving even as Russian income levels increase.

Because domestic funding is hard to come by, grants from foreign organizations are all the more important. These have their drawbacks, however. Competition for a finite

⁴⁸ G. Lapina, "Sotsial'noe izmerenie 'tret'ego sektora,'" *Rossiiskii ekonomicheskii zhurnal* 7 (1999), 89.

⁴⁹ Iu. Zelikova and E. Fomin, *Blagotvoritel'nye organizatsii Sankt-Peterburga: Spravochnoe izdanie* (St. Petersburg: Sankt-Peterburgskii filial Instituta Sotsologii RAN, 1996), 97.

⁵⁰ Lapina, "Sotsial'noe izmerenie," 89.

⁵¹ Brooks, "Charitable Giving," 745.

amount of foreign funding has led to a decreased level of cooperation among Russian nonprofits. As always, groups outside of Moscow have less access to the application process for such funds, which breeds additional resentment between groups with funding and those without.⁵² In addition, foreign aid has been decreasing over the past few years, as international foundations such as the Open Society Institute reduce aid to the former Soviet Union and focus on other parts of the world.⁵³ The Russian government's suspicions of foreign foundations and NGOs exacerbate the problem. The expulsion of the Peace Corps from Russia in 2002, following allegations from Russia's Federal Security Service that Peace Corps volunteers were engaged in intelligence activities, is an excellent example of this tension.⁵⁴ While the Peace Corps is run by a U.S. government agency, and is not an independent civic group, the situation demonstrates the government's distrust of foreign activity within Russian borders.

As a result of these combined factors, the very existence of most Russian nonprofits is perilous. Lapina identified financial hardship as the single greatest weakness of the Russian nonprofit sector throughout the 1990s.⁵⁵ Some organizations have no choice but to rely on commercial activity to keep their programs running; nonprofits with property to rent out have been able to achieve greater stability than most other organizations, even when this income is taxed.⁵⁶ Still, imposition of the profit tax represents a significant burden for struggling nonprofit organizations. In the absence of other reliable funding, a supportive tax regime is critical for Russia's nonprofit sector, both to stimulate domestic and foreign philanthropy and to avoid depleting the limited resources available to nonprofits today.

Recurrent Tensions Between the Public and Nonprofit Sectors

Unfortunately, the Russian government does not seem to have the nonprofit sector's best interests in mind. Although economic necessity motivated many of the changes to the tax code, such as the reduction of the personal income tax, a large part of nonprofit tax law serves primarily to control and inhibit the nonprofit sector. There is no rational economic explanation for the conflicting requirements for spending tax-exempt donations. Restrictions on grant-giving, similarly, allow the government to monitor and hinder the nonprofit sector with little rational purpose. The government's suspicions of the independent sector are clear, both in President Putin's State of the Union Address and in daily relations between the two sectors. If it so chose, the state could easily reform tax law by expanding the benefits available to charitable organizations, or at the very least by making the law more "user friendly." However, this would empower such organizations,

⁵² V.G. Khoros and others, eds., *Grazhdanskoe obshchestvo : Mirovoi opyt i problemy Rossii* (Moscow: Editorial URSS, 1998), 190.

⁵³ Cerny, "Russia in Transition," 412.

⁵⁴ Sharon LaFraniere, "Anti-Western Sentiment Grows in Russia," *Washington Post Foreign Service*, 19 January 2003.

⁵⁵ Lapina, "Sotsial'noe izmerenie," 89.

⁵⁶ Olga Alekseeva, *Kto pomogaet detiam? O rabote blagotvoritel'nykh organizatsii* (Moscow: CAF, Rossiiskoe Predstavitel'stvo, 1994), 43.

and much evidence indicates that the current political administration feels more comfortable with a weakened nonprofit sector.

Political observers have remarked that “President Putin’s reassertion of state control over more and more of the economy combined with his radical reversal of many of the country’s political reforms is ominous.”⁵⁷ The Putin administration has clearly sought to extend its control over private businesses, local governments, and the once-independent media; it is logical that the administration would seek to extend its control over the nonprofit sector as well. One Russian activist has described this process as a “strengthening of vertical power,” which subjects the civic sector to “attacks launched by the power structures” against its autonomy.⁵⁸ Furthermore, the government has a history of interfering with the more outspoken of Russia’s nonprofit organizations, particularly human rights groups, many of which had their registration denied or delayed in 1999. Registration applications have been rejected for such trivial deficiencies as font size.⁵⁹ It is impossible to read the minds of political officials, but these factors, taken together, make a strong case for the argument that the current nonprofit tax laws are being used to inhibit the civic sector.

It is useful to evaluate the current situation in Russia through the “three lenses” paradigm described by Dennis Young.⁶⁰ Young identified three main forms of relations between the public and nonprofit sectors, based on varying approaches to economic theory. Viewed through a “supplementary” lens, nonprofits provide public goods that the government cannot or will not supply. In the “complementary” view of the nonprofit sector, a partnership exists. The government funds the nonprofit sector’s provision of public goods because this is more efficient than for the government to provide the services itself. The “adversarial” approach, finally, posits a less cooperative relationship. Nonprofit organizations play an advocacy role, pushing governments to reform, change policy, or represent minority viewpoints, whereas the government assumes a supervisory role, regulating the behavior of nonprofit organizations. These three lenses are not necessarily mutually exclusive, and all three can apply to the same nation over time.

In his State of the Union Address, Putin was calling for a supplementary approach to nonprofit-government relations, at least to the extent that it would benefit the state by relieving the burden of providing certain public goods. In reality, current relations in Russia are more adversarial. Nonprofits lobby for minority viewpoints and for policy reforms. The government, as described by Young, reacts by defending the status quo and

⁵⁷ Marshall I. Goldman, “Putin, the Oligarchs & the End of Political Liberalization,” *The Economists’ Voice* vol. 2, no. 2 (2005), <http://www.bepress.com/ev>, accessed 27 January 2005.

⁵⁸ L.M. Alekseeva, “Tret’ii sektor i vlast’,” *Obshchestvennye nauki i sovremennost’* vol. 6 (2002), 52-58.

⁵⁹ John Squier, “Civil Society and the Challenge of Russian *Gosudarstvennost’*,” *Demokratizatsiya* vol. 10, no. 2 (2002), 171.

⁶⁰ Dennis Young, “Complementary, Supplementary, or Adversarial? A Theoretical and Historical Examination of Nonprofit-Government Relations in the United States,” in *Nonprofits and Government: Collaboration and Conflict*, eds. Elizabeth Boris and C. Eugene Steuerle (DC: The Urban Institute Press, 1998), 32-67.

strictly regulating nonprofits. “In the guise of regulation, government can become the adversary of nonprofits in the policy arena.”⁶¹ This has happened in Russia today.

While Young wrote about the three lenses in reference to the United States, the analysis is applicable to Russia. The adversarial lens might even be more apt in transitional states, in which the balance of power between the public, private, and nonprofit sectors has not yet been firmly established. The state feels threatened by perceived competition from the nonprofit sector. Interestingly, Young applies the adversarial lens to the earliest years of American history, to “the early republic, when public and private spheres of autonomy were first being sorted out.”⁶² The Russian Federation is in a similar stage today. One hopes that, as occurred in the United States, relations in Russia will evolve into a more complementary balance.

Government Benefits of a Strong Nonprofit Sector

It would be to the government’s advantage to enable the nonprofit sector to work effectively and efficiently. As discussed above, few of the current problems of Russian nonprofit tax law stem from actual economic necessity. While increasing government revenues has been an important goal over the last decade, better treatment of the nonprofit sector is not a mutually exclusive action. The tax reforms were designed to end tax avoidance, particularly among wealthier individuals and legal entities, and to remove unnecessary exemptions and deductions.

From a nonprofit perspective, that statement should raise two red flags. First, the vast majority of nonprofit organizations can hardly be considered major taxpayers. The sector as a whole generates only 1 percent of the nation’s GDP, and individual organizations function in an environment of perpetual financial hardship. In fact, throughout the 1990s, a majority of Russian charities experienced such severe financial shortages that they had to suspend their program services for limited periods.⁶³ These struggling organizations were clearly not a rational target of the 2002 reforms.

Second, the government eliminated many so-called gratuitous tax exemptions and deductions in order to further increase revenues. The state must ask itself, however, whether the exemptions and deductions given to nonprofits *were* gratuitous. The exemptions given to charities and the deductions given to donors are far from unnecessary. The nonprofit sector depends on these financial benefits for survival.

By implementing more supportive nonprofit tax laws, the government would lose some small amount of tax revenue, particularly if fewer nonprofits were to pay the 24 percent profit tax on grants and other income. However, the strengthened nonprofit sector would be able to devote increased resources to the critical challenges facing Russia today – poverty, AIDS, crime, and so on – thereby lessening the state’s burden. This would make possible a more supplementary relationship between the two sectors, as described by Young and suggested in Putin’s State of the Union Address. It is logical to assume

⁶¹ Young, “Complementary, Supplementary, or Adversarial?” 40.

⁶² *Ibid.*, 60.

⁶³ K.G. Kholodkovskii, ed., *Grazhdanskoe obshchestvo v Rossii: Zapadnaia paradigma i rossiiskaia real'nost'* (Moscow: Institut Mirovoi Ekonomiki i Mezhdunarodnykh Otnoshenii, 1996), 144.

that the drop in tax revenue would be offset, if not surpassed, by the increase in social services provided. It is thus in the state's interest to support the nonprofit sector. ICNL concurs: while any government incurs a cost by giving tax benefits to nonprofit organizations, "the state is likely to recover a significant part of that tax cost to the extent that the donations are used by the PBO [public benefit organization] to deliver public benefit services."⁶⁴

The lack of supporting empirical evidence is an obvious weakness in this argument. There is simply no way to accurately estimate the potential monetary value of nonprofit output under a reformed tax code, and no way to calculate the taxes the average nonprofit organization would be paying under a uniform and consistent tax code. Because it is so difficult to penetrate the layers of Russian bureaucracy, even current figures on annual taxes paid by nonprofit organizations are elusive. In keeping with the relative youth of the Russian nonprofit sector, there has not yet been a systematic collection of data on it, such as that available in the United States through Guidestar or the Center on Philanthropy. However, it is logical that nonprofit performance would increase with nonprofit revenue, and that increased performance would in turn produce increased public benefit.

Future Legislation

This is an important time to turn public attention toward the issue, because the Russian government is considering additional reforms to Article 251 of the Tax Code.⁶⁵ The proposed amendments would broaden the organizations able to receive tax-exempt grants, extending that right to healthcare and social services organizations and human rights groups. Bill No. 58666-4 was submitted to the Duma in July 2004 and passed a second reading on 22 April 2005. (The original bill also would have further complicated the registration requirements for foreign and domestic donors.⁶⁶ With encouragement from ICNL, the Institute for Urban Economics, and USAID, the Duma removed these points in the second reading.) It is currently awaiting a third reading, which it is expected to pass without significant change, after which it would need to pass through the Federal Assembly.

If enacted, the bill would greatly expand the range of organizations eligible for grants, a definite improvement in Russian nonprofit tax law. The right to receive tax-exempt grants, however, carries little weight if tax-exempt grants are not given. While it is a step in the right direction, this bill would not remove the antiquated restrictions on tax-exempt grants from domestic and foreign donors, as described above. More organizations will qualify for grants, but grants will remain as hard to come by as ever. The government must reform this aspect of tax law as well in order to create a more economically and political viable atmosphere for Russian nonprofits.

V. Suggested Reforms and Conclusions

⁶⁴ Paul Bater, "Evaluating Tax Incentives for Donations to Public Benefit Organizations," *International Journal of Not-for-Profit Law* vol. 3, no. 2 (2000), http://www.icnl.org/JOURNAL/vol3iss2/ar_baterprint.htm, accessed 1 March 2005.

⁶⁵ "ICNL Update," 22 April 2005, <http://www.icnl.org/PRESS/Articles/2005/20050425.htm>

⁶⁶ Bourjaily, "Benefit or Burden?"

ICNL Recommended Practices

The ideal reform would create a simplified tax code, in which nonprofit organizations are clearly and consistently defined. All public benefit organizations that choose to register with the state and conform to standard reporting requirements would then receive blanket exemption from profit tax, including on income from program-based grants. This would resolve the confusion surrounding the definitions of noncommercial organizations, charities, and tax-exempt groups, and remove the resulting inconsistencies. Such broad reform is unlikely, however, because it would require many federal laws to be completely rewritten.

After examining current Russian tax law and its root causes, I believe that the most practical recommendation is a simple one: Russia should conform its laws to the previously described ICNL standards. These guidelines have been developed with a wide array of nations in mind; they are designed to transcend political and economic differences and help build a more stable nonprofit sector.

It must also be shown that any plan of reform would be economically feasible in the Russian context, such that the only real constraints are political: the government's desire not to give the sector a preferential status. Again, the dearth of economic data on the Russian nonprofit sector makes it difficult to prove that the reforms would be cost effective. But by looking at the reasons behind the existing laws, and by considering the range of other nations that have implemented ICNL's guidelines, one concludes with considerable confidence that these policies could succeed in Russia as well. A well-functioning nonprofit sector does not have to be expensive, and, in many senses, a well-functioning nonprofit sector pays for itself.

The first problem within Russian nonprofit tax law discussed here is the lack of deductions for corporate giving. Such deductions were removed in an attempt to reduce corporate corruption. Implementing a 1% Law, such as that found in Hungary, Slovakia, and Lithuania, would prevent corporations from claiming excessive deductions for their own benefit while still funneling critical support into the nonprofit sector. The success of this strategy in other post-communist nations bodes well for its potential in Russia.

The main challenge for individual giving is the significantly reduced personal income tax rate. With a flat tax rate of 13 percent, deductions for charitable gifts have less impact on one's tax returns than would be seen at higher tax rates. The nonprofit sector was not a target of this reform, which has had many positive macroeconomic results, but it has suffered as a consequence. Although the state cannot and probably should not change the personal income tax rate, it could remove the upper limit (25 percent of taxable income) on the deductibility of charitable contributions, returning to pre-reform allowances of up to 100 percent of charitable giving. For greater impact, the government could implement new tax credits, which would offer a greater reward to donors regardless of the personal income tax rate. Encouragement of charitable giving is recognized as an international norm by ICNL, with nations as diverse as India, Poland, and Australia allowing for generous deductions. While such incentives will not motivate everyone to give, they are likely to encourage current donors and wealthier individuals to give more. Incentives, particularly tax credits, might also encourage citizens to continue donating even in times of economic hardship.

This decrease in tax deductions for donors has largely resulted from helpful reforms to the tax code at large. There is no such rational explanation, however, for the conflicting calendar restrictions on the use of tax-exempt gifts. At best, the discrepancies between the tax code and the Charities Law are legislative oversight. At worst, they are an intentional obstacle to the nonprofit sector's attempts to achieve financial stability. Either way, the laws needlessly complicate reporting and accounting procedures and endanger the tax-exempt status of many grants.

It is also important for the government to decrease the level of nonprofit income subject to profit tax. To be sure, the Russian economy has struggled over the last decade; in need of revenues, the government cannot afford to gratuitously exempt all organizations from taxes. However, exemptions for the nonprofit sector are not gratuitous. Rather, as Cerny argued, the "poor health" of the sector might be relieved by an increase of untaxed, small-scale commercial activity.⁶⁷

Recognizing the financial difficulties of governments in transition, ICNL calls for partial exemption from the profit tax in developing states. Money from commercial ventures should be tax-exempt as long as it is used to support the primary goals of the organization. In Russia, this would include interest, fees, and sales of goods and services, which are currently taxed. This approach strikes a reasonable balance: nonprofits receive exemptions to support their programs and services, while governments maintain some power of taxation over the nonprofit realm. Corruption is less likely than if all nonprofit income were untaxed, regardless of how it was used.

Finally, and most important, the Russian government needs to lift its artificial restrictions upon tax exemption for grants. By requiring that grant-making organizations, both foreign and domestic, register themselves and their grants with the state, the government ensures that funding is delayed, many grants are heavily taxed, and the process of donating is overly bureaucratic and complicated. Tax exemption for such grants should depend on the grant's purpose rather than its source. No other country in Europe or Central Asia has a similarly complex legal situation. Only Kazakhstan comes close, but the Kazakh registration requirement applies only to foreign grants. The Russian government should extend tax exemptions to all grants for charitable organizations. As both ICNL and analysts from the Institute for Urban Economics have noted, the current laws make no economic sense; they seem simply to reflect a desire to inhibit the activities of Russia's charitable sector.

Advantageous reforms would be economically feasible. The real question is whether the state will allow such reforms to become politically feasible. If the Russian government continues to view nonprofits through a strictly adversarial lens, there is little hope for even the most rational of tax reforms.

Increased Accountability

In addition to the above recommendations, the government should seek to increase accountability on the part of nonprofit organizations. Many detrimental aspects of the tax code were based on a desire to reduce tax avoidance and corruption. By building a tradition of better and more public reporting, the government and media

⁶⁷ Cerny, "Russia in Transition," 417.

watchdogs could help ensure that more generous exemptions do not lead to corruption and that funds are not misused. Furthermore, charitable giving is more likely to grow if citizens trust nonprofit organizations. This is especially true in developing economies such as Russia's, where citizens are apt to be wary of a young and unfamiliar nonprofit sector. Consequently, information about revenues and expenditures, which is already collected by the Ministry of Taxation, should be made readily and clearly available to Russian citizens.

Laws must ensure that conditioned gifts are used correctly and that financial data become accessible. ICNL advises that such reporting be simple and uniform, and be made public at least on an annual basis.⁶⁸ Cerny calls for the development of a "system of applications and certifications" to ensure nonprofit transparency and penalize those who attempt to use nonprofit revenues for personal benefit.⁶⁹

Additional reporting requirements should be accompanied by simplified paperwork and a streamlined bureaucratic process. Such reforms merit further study. Ideally, the government would develop them in consultation with ICNL and an association or panel of Russian nonprofit organizations.

Conclusion

As in all developing nations, the nonprofit sector in Russia faces a wide range of challenges. The sector's tax status is not the only obstacle to its growth. Increasing public trust and public participation in civic organizations are also critical. However, improving the tax status of these organizations is a critical first step. Future growth, such as membership outreach and increased provision of social services, will require appropriate financial resources, which in turn can be achieved through more favorable tax treatment for the nonprofit sector in general and charitable organizations in particular.

While the tax reforms of 2000 and 2002 increased tax revenues, that increase must be weighed against the future costs of providing social services. These costs are bound to rise for the government if the nonprofit sector is too weak to assist in housing aid, counseling, health awareness, job training, and other endeavors. In his State of the Union Address, Putin recognized that the government cannot single-handedly help Russian citizens through the political and economic transitions at hand. However, it is clear that the Russian government still views the nonprofit sector through an adversarial lens. This is self-sabotage: the Russian government cannot hope to keep nonprofits dependent upon the state while simultaneously expecting them to solve society's problems. The government should now prove the truth of Putin's words by adopting the ICNL standards, thereby creating a legal environment in which nonprofits can effectively and stably advance the well-being of the Russian people.

⁶⁸ ICNL, "Checklist," standards 4.1 and 4.6.

⁶⁹ Milton Cerny, "Russia – A 'Virtual' Democracy?" *Exempt Organization Tax Review* vol. 45, no. 2 (2004) 234.

ARTICLE

Failing to Govern? The Disconnect Between Theory and Reality in Nonprofit Boards, and How to Fix It

By Michael Klausner and Jonathan Small*

Last September, the board of the Beard Foundation took a lashing when the *New York Times* broke the story of the foundation's inability to account for hundreds of thousands of dollars in annual revenue. The prestigious culinary institute, founded by Julia Child, had \$4.7 million in revenues in 2003, and gave out only \$29,500 in scholarships. "Whatever they [the board] did or didn't know and did or didn't do themselves," said Corby Kummer, a prominent food writer, to the *New York Times* on December 15, "it happened on their watch, and they have to offer to go." In December, after the president Leonard F. Pickell Jr. was indicted for stealing from the nonprofit to cover personal debts, the entire board tendered their resignations.

In recent years, news reports like this one increasingly suggest that too many directors of nonprofit organizations are failing to govern. And thus they are failing to fulfill the fiduciary duty of care that the law imposes on them. Commentators suggest that each and every director should work harder and more effectively at governance. Recent legislative proposals indicate that some lawmakers agree.¹

In our view, the commentators are right on the facts – many directors are not governing – but dead wrong on the solution. We believe the answer for many nonprofits is exactly the opposite: All directors *should not* be asked or expected to govern. Nonprofit organizations and their boards vary, but for many the expectation that all directors will govern – an expectation that stems from a misplaced analogy with for-profit boards – is inconsistent with the inherent nature of the nonprofit board, inconsistent with effective governance by the board as a whole, and inconsistent with the board being effective in other equally important functions.

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¹ Staff Discussion Draft of the Senate Finance Committee on proposals for reforms in the area of tax-exempt organizations (2004), proposing a maximum of 15 directors on a board.

In contrast to their counterparts on for-profit boards, directors of nonprofit organizations are called upon to perform several functions. Some directors give or raise funds; others provide special expertise; others maintain ties to an important community; others are there because their stature serves as a signal that the organization does good work. And some – perhaps just a few – govern.² All of these functions are important, and the reality is that there is typically a division of labor on a board, a division that reflects the varied interests and abilities of those who choose to join a board.

Rather than trying to fit the square peg of the for-profit board into the round hole of the nonprofit organization, nonprofits should structure their boards to reflect the reality that some board members perform governance functions, and some do not – and that that’s OK. Directors who do not govern generally perform other functions that are just as important to the organization. There is no reason to pretend that all directors actually govern, nor is there reason to ask or expect them to. And there certainly is good reason to keep them on the board so that they can contribute in these other ways.

We propose a “Bifurcated Board” structure in which organizations designate some board members as “governors,” and relieve other board members of all governance responsibilities. This specialization and clarification of roles would improve governance without sacrificing the valuable contributions that board members make to the organization they serve.

Depending on where a nonprofit organization is incorporated, this approach could be adopted by some organizations under existing law. For others, state (but not federal) nonprofit corporation laws would have to be amended in the way that we outline below.

What is Governance?

The legal source of the nonprofit board’s governance obligation lies in state nonprofit corporation statutes, which typically provide that a nonprofit corporation shall be “managed under the direction of” its board of directors.³ What this means in practice is that the board hires, fires, evaluates, and sets compensation for the executive director. The board also reviews and gives input on the organization’s strategic plan, oversees the organization’s budget and programs, and reviews the organization’s financial statements.

A typical board meets between four and twelve times a year, and, depending on the business to be conducted, diligent preparation for a meeting can require several hours of work. In addition to exercising oversight as a single body, boards often govern through committees as well. Board committees typically delve more deeply into issues than does

² Middleton, M. “Nonprofit Boards of Directors: Beyond the Governance Function,” in *The Nonprofit Sector: A Research Handbook*, ed. Walter W. Powell (New Haven, CT: Yale University Press, 1987): 160-192; Widmer, C. “Role Conflict, Role Ambiguity, and Role Overload on Boards of Directors of Nonprofit Human Service Organizations,” in *Nonprofit Boards of Directors: Analyses and Applications*, eds. Herman, R.D. and Van Til, J. (New Brunswick, NJ: Transaction, 1989): 139-151; and Miller, J. “The Board as Monitor of Organizational Activity: The Applicability of Agency Theory to Nonprofit Boards,” *Nonprofit Management and Leadership* 12, no. 4 (2002): 429-450.

³ Revised Model Nonprofit Corporation Act, Section 8.01; New York Not-for-Profit Corporation Law, Section 701 (“a corporation shall be managed by its board of directors”); California Corporations Code, Section 5210 (“the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board”).

the board as a whole, and they recommend actions to the board. The most important and most active of these committees is typically the executive committee. The executive committee may get closely involved in the organization's operation on an ongoing basis, especially if the board as a whole meets infrequently.

Nonprofit Boards Do Much More

While the board's legally mandated governance function is important, other functions have evolved for nonprofit boards that are not legally required. These functions can be at least as important as the board's governance function. Most notably, nonprofit boards commonly serve a fundraising role, a role that, for many organizations, is a *sine qua non* of their existence. Some board members make large contributions; others use their contacts to raise funds.⁴ For many organizations, this role is explicit. For example, a leading New York literacy organization asks its board members to "give and get" amounts that are "just beyond their comfort levels." Another major New York civic organization specifically asks each board member to give or get \$10,000 each year.

For some nonprofits, especially cultural organizations, funds raised by board members make up a high percentage of donated funds. For instance, a large metropolitan museum currently engaged in a major capital campaign reports that board members' gifts accounted for 68 percent of campaign donations, which now stand at over \$700 million. Of the organization's 42 board members, 37 gave over \$5 million. These figures do not include funds that board members raised from others. Other types of nonprofits also rely heavily on their boards for fundraising. For instance, a leading pro bono legal services organization in New York reported that for the fiscal year ended in 2004, its 27 board members raised about \$350,000 out of contributions totaling approximately \$1 million. Board members of this organization contributed an additional 4 percent of that total themselves. A large New York educational institution that just ended a \$1.1 billion campaign attributes approximately 37 percent of its contributions to fundraising by board members.⁵ Consistent with these examples, Francie Ostrower reports in her study of why the wealthy give that 43.4 percent of donors' largest gifts went to organizations where the donor was a board member.⁶

Board members also provide valuable services to their organizations. Often these services are administrative. Lawyers on boards commonly provide formal or informal legal advice; public relations professionals help shape the organization's message for either fundraising or mission-related purposes; real estate experts help with the acquisition or disposition of real estate; and accountants give informal advice regarding financial reporting and oversight (though they cannot replace an outside auditor). Other

⁴ Ostrander, S.A. *Women of the Upper Class* (Philadelphia: Temple University Press, 1984); Ostrower, F. *Why the Wealthy Give: The Culture of Elite Philanthropy* (Princeton, NJ: Princeton University Press, 1995); Odendahl, T. *Charity Begins at Home: Generosity and Self-Interest Among the Philanthropic Elite* (New York: Basic Books, 1990).

⁵ Organizations generally maintain the confidentiality of their donors, but we are able to provide some examples on an anonymous basis.

⁶ Ostrower, *Why the Wealthy Give*.

board members provide services more directly related to the organization's mission.⁷ An environmental scientist, for example, on the board of an environmental organization may provide scientific advice; or an education expert on the board of an educational organization may provide insight on educational matters. The Brearley School, a prominent New York City day school, for example, traditionally enhances the substantive expertise of the board by including in its membership one or more heads of comparable schools.

Board members also serve as goodwill ambassadors to the constituencies that the organization serves or the community in which the organization operates.⁸ They advise the organization on how best to deliver services to fulfill its mission, and how best to be a good member of the community. They inform the community and relevant constituencies of the services the organization can provide. The Citizens Advice Bureau, a large community-based settlement house in the Bronx, is typical. It has several board members with close ties to the community. One, for example, is a longtime Bronx resident with over 40 years of community involvement who serves on the local community board, heads a small Bronx-based social services agency, and is involved with many local organizations.

Another important nongoverning function some board members provide is simply lending their name to the cause. By virtue of their presence alone, these "big name" board members – a movie star, sports star, or former senator, for example – can attract funds, employees, volunteers, press attention, and other intangibles that can help an organization pursue its mission. Gwyneth Paltrow's presence on the board of the Robin Hood Foundation is an example of such star power, as is that of Tom Brokaw as a board member of the International Rescue Committee. This type of director can be valuable to an organization regardless of whether they attend a board meeting.⁹

A board member's service in any of these roles is not inconsistent with his or her involvement in an organization's governance as well. There are certainly many cases of board members raising a lot of money, providing important services, or lending their prominence to an organization, and governing as well. Our point is simply that this need not be the case.

Do All Directors Need to Govern?

While there may be virtues in having each director serve the board's governance function in addition to other board functions, there are tensions as well. For example, individuals who are good at fundraising may or may not be good at overseeing finances or other aspects of the organization's management. They may not have the skills, the time, or the interest. Sociologist Susan Ostrander, in her study of upper-class women, reports that "fundraising is the main task" of the women she interviewed who sat on nonprofit boards. One woman in her study told her "fundraising is absolutely at the top

⁷ Widmer, "Role Conflict, Role Ambiguity, and Role Overload on Boards of Directors of Nonprofit Human Service Organizations."

⁸ Middleton, "Nonprofit Boards of Directors."

⁹ Handy, F. "Reputation as Collateral: An Economic Analysis of the Role of Trustees of Nonprofits," *Nonprofit and Voluntary Sector Quarterly* 24, no. 4 (1995): 295-305.

[of the board's priorities]. ... [It is] the main thing that organizations want from you."¹⁰ Another confessed, "I don't bring a lot of know-how, but I'm good at fundraising and I like it." They will not discover the time, the skills, or the inclination to govern simply because they are told to. In all likelihood, they will either continue to govern poorly or not govern at all. Or perhaps worse, they will respond to the call for better governance by declining to serve on nonprofit boards. In that case, the other ways that these would-be board members contribute will be lost to the nonprofit sector.

A second problem in asking all board members to govern is that there are often too many people on the board to govern effectively. Nonprofit boards commonly include more than 30 members.¹¹ The San Francisco Symphony, for example, has an 80-member board; the Tech Museum of Innovation in San Jose, Calif., has 52; and the Legal Aid Society of New York has 51. Many nonprofits need large boards because the nongovernance functions of the board – fundraising and public relations in particular – are often enhanced by having a large board. In fundraising, more directors mean more funds, at least up to a point. If there are many constituencies with which the organization needs to work, more directors can also promote better integration with relevant communities. And attracting more "big names" may help the nonprofit attract both donors and publicity for its work.

Yet for purposes of governance, large boards often do a bad job. Among for-profit firms, the median board size is 12 to 13 members. And research has shown that boards smaller than that govern more effectively.¹² This finding is not surprising. As a group gets larger, individual members are tempted to free ride on the efforts of others. Why study the details of a proposed budget, for example, if 39 other board members, or at least some of them (hopefully), will? For many organizations, having all directors govern is unrealistic and unwise. A board may well perform its governance and nongovernance functions best if only a fraction of its members govern. Specialization of labor may be efficient on a nonprofit board, just as it often is in other contexts.

Who Said All Nonprofit Directors Must Govern?

The premise that all board members will govern is grounded in state nonprofit corporation laws, which provide that a nonprofit corporation shall be managed "by," or "under the direction of," a board of directors. The laws further provide that directors have a fiduciary duty to the organization (though enforcement is lax). Nonprofit corporation statutes evolved from for-profit corporation statutes, and the governance duty assigned to nonprofit directors is similar to that assigned to for-profit directors. This congruence is based, however, on the faulty premise that a nonprofit board is functionally similar to a for-profit board.

¹⁰ Ostrander, *Women of the Upper Class*, p. 134.

¹¹ Bowen, W.G., *Inside the Boardroom* (New York: John Wiley & Sons, 1994); Oster, S.M. *Strategic Management for Nonprofit Organizations: Theory and Cases* (New York: Oxford University Press, 1995).

¹² Yermack, D., "Higher Market Valuation of Companies with a Small Board of Directors," *Journal of Financial Economics* 40, no. 2 (February 1996): 185-212.

But the board of a for-profit corporation is quite different from a nonprofit board. The for-profit board's role is to govern the corporation in a manner that maximizes profits. While board members of some for-profits can be helpful in making introductions to potential investors, suppliers, or customers, it is clear that their primary role is governance. Consequently, board members of for-profit companies can be selected based solely on their business skills and experience, and board size can be based on efficiency in governance.¹³

The Bifurcated Board: Governing and Nongoverning Directors

Rather than mimic for-profit boards, nonprofits should structure their boards to reflect the reality that some board members govern and some do not. Of course, if all of a nonprofit's board members do govern, there is no need to do this, but especially for organizations with large boards, an explicit division of labor would not only recognize a reality that exists but also enhance governance without undermining the other functions nonprofit boards perform.

The ideal structure for a nonprofit is an explicitly Bifurcated Board: Some board members would be designated as "governing board members" and the rest as "nongoverning board members." Governing board members, who might organize themselves as the "Governors' Committee," would commit to governing. They would shoulder all the legal duties and responsibilities otherwise vested in the board, and relieve nongoverning board members of those duties and responsibilities. Although the nongoverning board members would have no governance obligations, they would continue to perform the other important functions for which they were put on the board. Any listing of the board members – on an organization's Web site, for instance – would identify those directors who are governors and state that they have taken on the legal duties and responsibilities of the board.

The objective of the Bifurcated Board structure is to make the governance role clear to the board members who assume governance responsibility and to the public, while also continuing to use the board for fundraising and other nongovernance functions. Under such a structure, everyone's role would be clear. An organization would ideally include specific obligations for governors in its articles or bylaws, such as required attendance at board meetings, committee membership obligations, and attendance at committee meetings. Governors who do not fulfill those obligations would be expected to resign as governors or have their governor status removed. They could, however, remain on the board as nongoverning members.

Aside from explicitly recognizing some board members as governors and some as nongovernors, little else would have to change. Among the governors, board committees would be unaffected. There would typically be an executive committee, and often audit, finance, compensation, and nominating committees. Nongoverning board members would also do what they currently do. They would give funds, get funds, advise the executive director and the rest of the board regarding issues on which they have expertise, and they would help the organization maintain relationships with important constituencies. Governing board members could perform those functions as well.

¹³ Bowen, *Inside the Boardroom*.

In creating this structure, a nonprofit would want to avoid making nongoverning directors feel like second-class citizens. Membership on the board should continue to be rewarding to these directors. This need not be difficult. Directors themselves could choose whether to be governing or nongoverning board members. If the number of directors who want to be governors is larger than the number that would allow for effective governance, board members could rotate in this role. They could also attend board and committee meetings at which governance matters are discussed as nonvoting participants.

The designation of directors as governing and nongoverning board members also need not be permanent. Board members could choose to govern one year and not govern another, depending on their interest and availability. Designations could be made each year at an annual meeting of the board as a whole or by the current governors according to procedures and criteria specified in the organization's articles or bylaws.

There are two alternatives to a Bifurcated Board that a nonprofit could also consider – placing all nongovernors on an advisory board, or delegating all governance to an executive committee of the board. However, neither of these structures is ideal. The advisory board option is attractive, and entails no legal complications, but for a large “giver,” a well-connected “getter,” a “big name,” or a busy community leader, a position on the advisory board may not cut it. The reality of the nonprofit sector is that a seat on “The Board” is seen as a quid pro quo for a significant contribution of cash or services.¹⁴

Delegating governance responsibility exclusively to an executive committee has some attraction because the executive committee is familiar under current board practice, but it too is problematic. In some states, the board retains substantial responsibility for matters delegated to the executive committee, and in states where a complete transfer of authority is permitted, the Bifurcated Board is more effective. If the executive committee were to assume the full role of the board, there could well be a need for a super-executive committee to assume the role of the current executive committee. In addition, many organizations would still need an audit committee, a finance committee, a compensation committee, and other committees with governance responsibilities. These could be subcommittees of the executive committee, but at that point, it would be clear that a governing board is being created within the board, and the use of the label “executive committee” could actually be confusing.

State Legislation Needed

Nonprofits could adopt a Bifurcated Board in states where the Revised Model Nonprofit Corporation Act has been enacted. All they would need to do is amend their articles of incorporation or bylaws. The act provides that an organization's “articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board,” and that to the extent this is done, the board is relieved of its legal duties and responsibilities.¹⁵ Under our proposal, the nonprofit's articles of incorporation would designate the governors – or the Governors' Committee – as the people exercising what would otherwise be the board's powers, and relieve the

¹⁴ Ostrower, *Why the Wealthy Give*.

¹⁵ Revised Model Nonprofit Corporation Act, Section 8.01(c).

nongoverning board members of those powers as well as the associated responsibilities and liability risk.

Other states currently do not allow the complete transfer of board duties that is necessary for the Bifurcated Board. They allow some delegation, but the full board retains some responsibility and potential liability. In California, for example, the board may delegate management responsibilities, but even if they do, the full board retains ultimate responsibility.”¹⁶ In our view, the laws in those states should be amended to allow for a Bifurcated Board.

In states that have not adopted the provision of the Revised Model Nonprofit Corporation Act allowing the transfer of the board’s responsibilities, legislation authorizing a Bifurcated Board should be adopted. Such legislation could follow the approach of the act – allowing a full transfer of board duties and responsibilities to any individuals – or it could be more specific in allowing an organization to bifurcate its board into governors and nongovernors and to vest governance authority in the governors. In our view, the latter is preferable.

The Bottom Line

Some nonprofit directors fail to fulfill their governance obligations. But unlike some commentators who have responded to this situation simply by exhorting board members to take their governance responsibilities more seriously, we propose a structural change. Those directors who choose not to govern should be relieved of those obligations, but so long as they perform other valuable functions that nonprofit boards traditionally perform, they should be retained as board members. The Bifurcated Board that we propose is not only consistent with the current reality of many nonprofit boards, but also provides clarity about which board members will govern and which will not. This clarity will promote effective governance. In addition, it should improve the performance of nongovernance functions, allowing nongoverning directors to focus their time and energy on these important responsibilities. States that currently do not allow organizations to adopt a Bifurcated Board should amend their nonprofit corporation statutes to do so.

¹⁶ California Corporation Code §§ 5210.

ARTICLE

Imagining Philanthropy

By Richard Gunderman*

What is our image of philanthropy? It is a question worth pondering, because our philanthropic practice is powerfully informed by our philanthropic aspirations. A rich image can open up possibilities for philanthropic excellence, enhancing the lives of both givers and recipients. By contrast, defective images tend to produce poor philanthropic strategies – strategies that, far from enriching human lives, may actually impoverish them. No one pretends that the perfect image of philanthropy ever lies ready to hand. Philanthropy must grow, develop, and adapt along with the changing human context in which it is embedded. Yet bringing it to its fullest fruition in our own place and time is an essential mission for each generation.

What kind of philanthropy can we imagine? The answer depends in part of what we understand philanthropy to be. The very meaning of the term is open to question.

- Does philanthropy refer strictly to large transfers of wealth? Or may giving take other, equally legitimate forms, such as gifts of time and talent?
- Who does it? Is philanthropy strictly the province of nonprofit foundations and their agents? Or is it also accessible to non-professionals?
- Who are its targets? Is philanthropy always directed to the public good? Or can it focus on private individuals as well?
- Does motive matter? Can we use taxes or shame to compel giving? Or must we give spontaneously of our own free will?
- Who benefits? Should philanthropic activity be devoted solely to the interests of the beneficiary? Or is there an opportunity to consider the welfare of the donor?
- How do we measure philanthropic performance? Is the ultimate criterion the monetary value of each bequest? Or do important aspects of philanthropy resist appraisal in dollars and cents?

By addressing these questions, this essay aims to challenge and stimulate the imagination of philanthropists.

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Context

How we answer such defining philanthropic questions hinges on the contexts in which we pose them. In philanthropy as in every field of life, context always exerts an immense influence on the meaning of ideas. Consider each of the following riddles.

- I live above a star, and yet never burn
I have eleven neighbors, and yet none of them turn
I am visited in sequence, first, last, or in between
PRS are my initials, now tell me what I mean.
- A beggar's brother died, but the man who died had no brother. How can this be?
- What English word is most frequently pronounced incorrectly?

Each of these verbal puzzles represents an instance of what perceptual psychologists call a figure-ground problem. Our visual assessment of a figure's size, hue, shape, and motion depends in large part on the background against which it is projected. Simply by changing the background, we can make the large appear small, the dark appear light, the straight appear curved, and the static appear moving.

Before we can solve such verbal puzzles, we need to examine carefully the mental backdrops against which we project them. Recognizing the biases and limitations of our initial assumptions is key, because they often lead us astray. To find a solution, we must try out different backgrounds or relational frameworks until we find one that puts all the pieces together in a coherent and often unexpected way. Consider these examples: The star that never burns is the asterisk on a telephone keypad. The man who died had no brother because the beggar was a woman. And the word that is most frequently pronounced incorrectly is *incorrectly*. As these solutions suggest, context may not be everything, but it counts for a great deal.

Similar psychological principles are at work in our philanthropic understanding. What are the challenges and opportunities facing philanthropy? It is natural that our perspectives vary, depending on the backdrops against which we perceive it. What works well in one context may fail in another. Systems designed to meet basic needs for food and shelter may not perform well at delivering education, and systems designed to deliver education may not perform well at meeting needs for food and shelter. No matter how badly we want to help, a failure to grasp the meaning of fundamental philanthropic concepts is likely to undermine our efforts. If, for example, we misconceive the needs and aspirations of givers and receivers, even our best philanthropic intentions will often go awry.

Consider an example, the Clinton-era federal policy that imposed lifetime limits on welfare benefits eligibility. What were we attempting to accomplish? Was our aim to promote the dignity of welfare recipients, by encouraging them to become more self-sufficient? Did we seek to discourage sloth, by preventing capable people from subsisting on the dole? Or did we simply intend to reduce the tax burden borne by working people, without reference to the welfare of recipients? In this case as in every other, our results reflect our rationale. Did we succeed at challenging dependent people to begin supporting

themselves? Did we consign mentally and physically disabled people to homelessness and perhaps even starvation? Or did we achieve both?

Resources

One of the gravest misapprehensions afoot in contemporary philanthropy, analogous to a huge optical illusion, concerns the nature of our philanthropic resources. What is the context in which we perceive the means available to philanthropists and philanthropic organizations? In many cases, we tend to construe our philanthropic endowment strictly in terms of material property. We define the poor by proprietary insufficiency, the gap that separates their financial standing from an arbitrary minimum standard. We see people as poor, in other words, simply because they lack purchasing power. They cannot purchase sufficient food, clothing, and shelter. If only they had more money, we suppose, their lives would be transformed. Yet is money the whole story? Is it the philanthropic story's most important character?

Economic accounts of philanthropy are attractive for several reasons. First, they appear to provide valid and reliable measures of philanthropic need. If we want to understand people's life circumstances, and especially their need for philanthropic intervention, we need only measure their income or material wealth. Moreover, we need not invest a great deal of time and effort acquainting ourselves with particular individuals, families, and communities. Instead, we can simply peruse their financial standing. Finally, when a deficiency is identified, the remedy is simple – we “top them up” to the critical threshold. When the problem is defined as a financial shortfall, the solution, naturally, is an infusion of money. What does philanthropy ask of us? Above all, that we write checks.

How reliable is the link between the ease with which something can be measured and its intrinsic importance? Are the things that are easiest to quantify also the ones we most need to know? We can precisely calculate a person's net worth, but to what extent can we render human needs and opportunities commensurable with wealth? If we suppose that our only dart is money, it is no surprise that our targets turn out to be commodities.

Yet what if human life offers important philanthropic targets that money cannot penetrate? Some people manage to live relatively full lives with limited resources, while some wealthy people find themselves continually wracked by want. Perhaps material sufficiency, even material prosperity, is no panacea. To be sure, few reasonable people would choose poverty over wealth. Yet an aversion to scarcity does not imply a devotion to excess. Plenty of people knowingly forgo additional wealth for the sake of other goods they esteem even more highly.

There is simply no guarantee that we can solve life's important problems by spending more money on them. Material goods are a necessary condition for crafting a full human life, but they are not sufficient. No matter how precisely we target our gifts, for example, we cannot pay someone to care – genuinely care – for someone else. The vehicle of wealth can take us only so far along the road to human enrichment. We should begin seeking other means of conveyance long before we reach that point.

It is important to distinguish between tangible resources and intangible resources. Tangible resources can be touched with the hand, such as groceries, houses, clothing, medicines, and recreational equipment. Intangible resources are untouchable, such as knowledge, skills, relationships, and dreams. Pondering this distinction, we soon realize that the value of our intangible resources vastly exceeds that of our tangible resources.

Philanthropic organizations' annual budgets and investments are measured in dollars. Yet philanthropic excellence requires other endowments, to which a dollar value is difficult to assign. The income of foundation program officers is relatively easy to determine. Yet it is considerably more difficult, perhaps even impossible, to determine the value of what those individuals know and can do. We can measure how much a foundation pays each year to provide continuing education to its employees, but it is considerably more difficult, perhaps even impossible, to place a dollar value on the quality of their learning. People who read Charles Dickens's *Hard Times* or John Steinbeck's *The Grapes of Wrath* are not in any sense materially enriched by the experience. Yet some gain invaluable insight into the human significance of poverty.

Knowledge

Our inventory of philanthropic assets cannot be restricted to funds, equipment, and the physical plant. We must expand our field of view to include other resources, such as our self-image. Our philanthropic potential cannot be fully encompassed in terms of what we have. We also need to take into account who we are, both individually and as members of organizations and communities. And who we are is constituted to a large degree by what we know.

Socrates' most famous philosophical maxim was "Know yourself." This principle applies no less urgently to philanthropy than philosophy. The first order of business in helping people is not to get them more property, but to get to know them. To this formulation of the philanthropic mission Socrates might add, "And help them get to know themselves." Ultimately, poverty is not the greatest peril. Ignorance is.

We make a mistake when we pin our aspirations on handling money more efficiently. Efficiency at allocating funds is no guarantee of generating and sharing knowledge effectively. Knowledge is the key. Without knowledge, how effectively and efficiently can we allocate money? We can be financial wizards but human dolts.

Consider the remarkable transformation that knowledge can effect in even the most tangible material resources. What we have can be completely transformed by what we learn. What happened to the value of whale oil when we discovered the energy of subterranean petroleum deposits? Who could have predicted that the bark of Pacific yew trees would turn out to play an important role in the treatment of breast cancer, or that grains of beach sand would one day provide the silicon backbone of artificial intelligence? "Raw materials" we trample underfoot may take on great value when catalyzed by human imagination.

We need to focus less on counting what we have and more on finding what we can create. Except for the very most basic necessities of life, the things we require are not simply given to us. They are the products of human creativity. Only by combining and recombining them in our imaginations can we discover what they are capable of

becoming. This principle applies to raw materials such as oil and silicon, but even more to intangible assets, such as science, language, freedom, and literature. In the realm of the intangible, calculation cannot hold a candle to imagination.

When tangible resources dominate our perspective, we tend to project philanthropy against a fixed-sum view of human affairs. In a fixed-sum system, the total extent of a desirable outcome is unalterable. A familiar analogy is that of a pie. The pie has a predetermined size, and no matter how we divide it, the total quantity of filling and crust cannot increase. To enlarge one person's slice of pie requires that we reduce someone else's.

When we see philanthropy as part of a fixed-sum system, we perceive its mission in terms of redistribution. On this account, the philanthropist is a re-distributor, transferring wealth or other goods from people who have to people who do not. The essential virtue of philanthropy becomes fairness, the pursuit of a more equitable distribution of resources. From a redistributive point of view, philanthropy cannot enrich the world. It cannot augment the total amount of goods available to us. It can, however, help to reduce the unevenness with which goods are distributed.

There are good reasons to question the adequacy of a strictly redistributive account of philanthropy. It manifests limitations even in accounting for wealth and material goods, let alone intangible resources. A gift that enables a disadvantaged person to get an education may augment that person's slice, but at the same time enlarge the pie for everyone else. The same may be said even for investments in food, housing, and healthcare. A deficiency of such goods constrains the achievement of human potential.

Generation

Redistribution has a role to play in philanthropy's mission. But it does not play the most important part. More important than redistributing wealth is creating wealth. Instead of merely topping up our tanks, temporarily relieving the burden of want, philanthropy should strive to make us more productive. Lao-Tse said: "Give a man a fish, you feed him for a day. Teach him to fish, and you feed him for a lifetime." Such productivity could manifest itself in at least two ways. In the first and most obvious sense, philanthropy could help recipients provide for themselves and their families. Creating a job enables people to satisfy their own needs, lessening their dependence on others.

Second, by helping ourselves, we become empowered to lend a hand to others. Philanthropy should not foster dependency. It should foster giving, by encouraging recipients to become philanthropists in their own right. Investing philanthropically in others engages us more deeply in our communities. It enables us to mature as both human beings and citizens. As Aristotle indicates in his *Nicomachean Ethics*, if we are to lead fully human lives, we need opportunities to activate generosity.

The distinction between distribution and generation is a telling one. *Distribution* derives from the Latin root *tribuere*, which in turn derives from the root *tribus*, the source of our word tribute. For millennia, tribute was associated with taxation, a levy paid by one nation to another, or by vassals to lords. It denoted any forced payment or contribution, including those associated with bribery and extortion. By contrast,

generation is derived from the Latin root *generare*, which means to beget or produce. The title of the Bible's Book of Genesis is derived from this source, as is our word generosity.

The distinction between distribution and generation is analogous to the distinction between payment and donation. On the one hand, we pay because we must, and on the other, we give because we can, from choice. A payment implies no concern for the welfare of the person to whom it is given. A gift implies concern for the recipient. If we did not care about the beneficiary, we would not offer the gift. Genuine generosity aims not merely to gratify recipients, but to help them become more fertile. Enlightened parents better serve their children's interests by providing them with a first-rate education than by hoarding every penny in hopes of someday leaving them the largest possible inheritance.

The most enlightened philanthropy aims at increasing non-fixed-sum relationships throughout a community. In other words, decreasing want is ultimately less important than increasing generativity, our capacity to contribute to our own flourishing. Philanthropy can still fill gaps, but it does so with the aim of helping us to develop into the fullest human beings we can become. It enhances both our capacity and our inclination to make a difference in the lives of others.

On this account, the focus of philanthropy shifts from merely filling empty bellies, covering bare heads, and mending broken limbs to building richer communities. Which is a better way to distribute food: to toss bags of it from the back of a truck, or to get us together to learn to cook one another's favorite dishes? Merely spreading food is a biologically important but humanly niggling goal. The proximate biological goal should be framed by a larger ultimate aspiration: to enhance the capacity for the food's use.

Those who receive food might be encouraged to cook for others, such as the disabled. The goal is to awaken the moral imagination – not merely to provide for basic human needs, but to help us become more responsive human beings. To live we need bread, but we also need to know that our lives amount to something. We need to know that others thrive through our existence.

Consider another example, vaccination. Communities around the world have an important interest in seeing children inoculated against a variety of infectious diseases, such as measles, diphtheria, and polio. A great philanthropic success story of the 20th century was the global conquest of smallpox through a coordinated international public health campaign. Yet the simplicity of vaccination may seduce us into a largely irrelevant image of philanthropy. Its efficiency springs from the fact that it requires but one encounter between donor and recipient, and asks nothing further of either. We simply tell patients to roll up their sleeves, make the injection, and send them away. This is not the appropriate backdrop against which to view the most important philanthropic opportunities before us.

The word *vaccination* is derived from the Latin root *vacca*, which means cow. The first immunization used a preparation from cowpox vesicles to immunize people against a much more virulent virus, smallpox. To vaccinate people, we hardly need to talk to them. We simply treat them as Petri dishes that generate antibodies. Yet human beings are not cows. In most public health situations, the active engagement of recipients

is required. In rich countries, consider the public health challenges presented by cigarette smoking, obesity, and sexually transmitted diseases. In poor countries, consider the challenges of adequate nutrition, clean drinking water, and sanitation. In these contexts, the image of passive inoculation leaves much to be desired. We need instead an image of philanthropy that stresses active cooperation and partnership.

Leadership

There is an important difference between tyranny and leadership. Tyrants command, believing that their word is law. They have little interest in the internal state of their subjects, so long as they do what they are told. Leaders, by contrast, seek not to coerce, but to inform and persuade. Their goal is not to wrest away the power of choice, but to promote better decision making. Superficially, tyranny is more efficient, because it requires less time and effort to enact a particular decision. But that efficiency is deceptive. It is grounded in a short-term perspective that does not respect the character of those being commanded. It treats people as mere instruments, means by which to achieve the tyrant's ends.

By contrast, leadership recognizes a higher form of efficiency, directed at a quite different end. Its goal is not merely to ensure that every order is carried out as quickly as possible, but to help us to develop our capacity to see for ourselves the appropriate course of action. The genuine leader takes democracy seriously, not because it always elects the best candidate, but because it provides the best environment for citizens to develop into full human beings. Why are juries an essential part of our system of justice? Less because jury verdicts are just than because they draw out essential excellences of citizenship among those who serve.

From the genuine leader's point of view, the discussion that precedes a decision is often more important than the decision itself. Mere rule is not democracy's overriding consideration. In some cases, a noble philosopher-king might make better decisions. Democracy is the best form of government because it places a premium on free and rich public discourse, which in turn cultivates the humanity of the citizenry. People do not exist to serve the government. The government exists to serve the people. In some cases, pursuing that mission entails constraining the role of government in the public sphere to avoid stunting the growth of personal and civic excellence. For our communities to flourish, we need personal and civic aspirations that extend far beyond what the law can require.

It is not enough that people merely refrain from stealing one another's property. A good community is one in which we look out for each other, coming willingly to one another's aid in times of crisis. In the appropriate setting, we naturally form cooperative relationships for our mutual benefit. The law does its part by underwriting contracts and applying legal sanctions to those who violate commitments. Yet the law cannot prescribe that we contract with one another in the first place. The law can no more tell us whom to partner with than it can tell us whom to marry, or how to raise our children. Where human excellence is concerned, it is vital that we enjoy the opportunity to develop and express our moral identity.

Even voluntary exchange relationships cannot develop character sufficiently. What are the virtues of the marketplace? They include fairness, honesty, reliability, and

ambition. Why should people trade fairly? Because an open and fair system of exchange is ultimately more productive than one that tolerates dishonesty. We reward ambition because, within the context of a truly free market, each person's ambition tends to benefit everyone else. Missing from this account, however, are vital human excellences without which human life is not complete. These include compassion and generosity.

There is a limit to what we can accomplish through financial incentives. We simply cannot pay people to be good parents, spouses, and citizens. Such vital human responsibilities require a different kind of commitment, one that involves not only calculations of advantage, but a readiness to make genuine sacrifices. Parents who based every choice about childrearing on personal advantage would be parents in name only. Good parents care first about what is good for children. If we do not love our children for who they are, we are lost, no matter what financial incentives we concoct.

Where commercial transactions are concerned, we can always substitute someone else for the buyer or seller without jeopardizing the transaction. By contrast, substituting one child for another, one spouse for another, or one friend for another presents a serious threat to a relationship grounded in love. In love, we matter for who we are, not the uses to which we can be put. In love, we are not interchangeable.

Love

The highest possibilities for the development of human character lie in love. Love evokes not profit, but human enrichment. It cultivates the highest of human excellences. It declares that we have a purpose in life higher than ourselves, that we can participate in relationships and communities whose boundaries far exceed our own. It says that our aspirations should extend beyond getting and spending to sharing, investing ourselves in one another's lives.

This kind of investment is not nearly as easy as writing a check. As Aristotle indicates, it requires not only that we share, but that we share with the right person, for the right reason, in the right way, at the right time, and for the right reason. Philanthropy stretches us as human beings, challenging us to become better than we are. It invites us to look beyond the distinctions of giver and receiver, and to see one another as sharers, parts cooperating for the benefit of a larger whole.

On this account, exchange ceases to be an end in itself and becomes a means to another end, that of integration. It provides the infrastructure of freedom and prosperity that enables us to forge deeper and more fruitful human partnerships. We are free from tyranny, but that freedom is not a mere license to indulge our every whim. It means freedom to be with and for one another. It means the freedom to complete ourselves by sharing what we are.

An old story nicely captures this image of philanthropy. In medieval Europe, a man came upon a large construction site. He saw one workman fitting two stones together. "What do you do?" he asked. "I am a stone mason," the man replied. Then he walked over to another worker, who appeared to be engaged in the same task. "What do you do?" he asked. The man replied, "We are building a cathedral." The two men operated with very different images of their mission. One focused exclusively on the task

of the moment, not looking beyond the limits of his own arm span. The other saw his immediate task in the context of a much larger calling

How do we see our philanthropic calling? Do we think primarily in terms of fundraising? Do we measure our success in terms of revenue? If so, we have fallen into a trap – the trap of pursuing what is good for us, rather than what is good for the people we serve. Wouldn't the best philanthropists and philanthropic organizations evaluate their effectiveness against a quite different backdrop? Wouldn't that backdrop reveal a much richer philanthropic potential? And what about us? What kind of philanthropy can we imagine?

BOOK REVIEW

***Conversations on Philanthropy:
An Interdisciplinary Series of Reflections and Research
Volume 1: Conceptual Foundations***

Lenore T. Ealy, Series Editor. The Project for New Philanthropy Studies at DonorsTrust. 105 pp. Free. Available online, http://www.thephilanthropicenterprise.org/uploads/PDF/Conversations_Final.pdf, and in print, http://www.thephilanthropicenterprise.org/main/cop_subscribe.php

Reviewed by Michael Bisesi*

In the 1990 film *MindWalk*, Liv Ullmann, Sam Waterston, and John Heard play, respectively, a scientist, a politician, and a poet. All three are at personal turning points when they converge on Mont St. Michel in France. As the video box explains, “A conversation begins, then the magic of interaction and the fever of ideas takes over.”

In many respects, philanthropy, the nonprofit sector, and the very notion of “the public good” likewise have reached crucial turning points. Accordingly, DonorsTrust (www.donorstrust.org) has launched the Project for New Philanthropy Studies with the first in a series of books called *Conversations on Philanthropy: An Interdisciplinary Series of Reflections and Research*. Lenore T. Ealy, a former program manager with the Heritage Foundation and the Milton and Rose Friedman Foundation, is the Series Editor. The first volume addresses *Conceptual Foundations*, and the second one, to appear shortly, will cover *New Paradigms*. Future volumes are planned on accountability, transparency, and donor intent, among other topics. (DonorsTrust describes itself as “the only community-style foundation committed to promoting a free society as instituted in America’s founding documents.”)

While this inaugural volume of *Conversations on Philanthropy* may not be optioned for a screenplay, there are enough provocative observations to ensure that the “fever of ideas” will persist long after the reader closes the book. DonorsTrust assembled an array of thinkers from economics and political philosophy to contribute to the volume. Each of the book's two “conversations” consists of an essay followed by discussant comments.

In an introduction, Lenore Ealy (another Ealy appears later in the book) says that the volume could have been named *Reclaiming the Public*. She contends that 20th-

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century public policy “crowd[ed] out any meaningful work for voluntary philanthropy to accomplish” – hence the “public” that needs reclaiming.

Without getting into the meaning of “meaningful work,” the question of what constitutes “public” merits a quick digression. Nonprofit organizations have been described variously as a “public trust in private hands” (BoardSource video) that engage in “private action for the public good” (Walter Powell, Yale). Section 501(c)(3) of the Internal Revenue Code, in its definition of “public charities,” includes this assurance regarding nonprofit organization revenue: “no part of the net earnings ... inures to the benefit of any private shareholder or individual.” The creation of the welfare state in the 20th century certainly diverted funds from charities, but there is more to “public” than money.

Lenore Ealy then argues that the changing nature of public goods, virtues, and values calls for an “inquiry into the nature of public action itself.” This inquiry unfolds in “Conversation 1” with two economists who respond to the following blunt question: “Is an Independent Nonprofit Sector Prone to Failure?” Peter Boettke and David Prychitko, from George Mason University and Northern Michigan University, respectively, provide an essay on Lester Salamon’s 1987 article “Of Market Failure, Voluntary Failure, and Third-Party Government.” They argue that Salamon views another pivotal nonprofit scholar, economist Burton Weisbrod, “through the wrong theoretical lenses.”

Boettke and Prychitko, adherents of the Austrian school (so called because they follow Ludwig von Mises and Friedrich Hayek, among others), believe that “market failure” leads to such inefficient outcomes as pollution, whereas “government failure” entails an inability “to compel its citizens to act” in a certain way.

Boettke and Prychitko acknowledge that Weisbrod at least “has the virtue of using the market failure concept correctly,” and he “also uses the concept of government failure generally correctly.” Their intellectual mentor, James Buchanan (the economist, not the U.S. president) is then cited for his commentary on the problem of “collectivization” and the difficulty of meeting “individuals’ private demands.” (Defining “private demands” leads to a second quick digression, prompted by the memory of an old sociology exam question: “Where does *society* end and *self* begin?”)

Enter Roger Lohmann and “The Commons” as an alternative to the so-called “failure project” theory. For West Virginia University’s Lohmann, “pursuit of common goods is rational behavior, albeit distinguishable from the self-interested pursuit of profit that characterizes markets.” He questions the treatment of different nonprofits as running on “unproductive” labor, and then calls for “construction of a genuine economics of common goods.”

Boettke and Prychitko, noting that they “have tried to draw their work into Austrian economic theory,” go on to say that they are “troubled by Lohmann’s appeal to Adam Smith” because of the requirements of the standard maximization model of economics. Relying on their Austrian preference, they also suggest it is pointless to search for such calculations as “social return on investment.” (Their reaction brings to mind the wonderfully surnamed British economist John Eatwell, who once noted: “If the world is not like the model, so much the worse for the world.”)

The essayists reconcile the issue by offering praxeology (the general theory of human action) as the overall organizing principle, with economics (the study of calculative action) as the primary subset. In this context, they argue that voluntary donor contributions should be the principal source of financial support, and they bemoan the reality that “many nonprofits often bypass the responsibility of persuasion and voluntary exchange and instead seek support from the state.” They believe that nonprofits act as a brake on government, and they find Salamon’s “partners in public service” notion lacking in conceptual clarity.

Brief commentary from four individuals, including the much-quoted Roger Lohmann but not the even-more-quoted Lester Salamon, rounds out the first half of the book. Lohmann regrets that social philosophers have paid too little long-term attention to nonprofit organizations and voluntary action. Zoltan Acs (Baltimore) believes that government partnerships “distort the incentives for nonprofit innovation.” Emily Chamlee-Wright (Beloit) reminds the reader that the Austrian perspectives of “non-monetary discovery” and “cultivation of local knowledge” offer important insights. And Richard Stroup (Montana State) is skeptical of partnerships because, in his view, government is not capable of achieving much.

“Conversation 2: The Necessity of Overcoming the Prejudice of Political Philosophy as a Condition for Philanthropy,” starts with an essay by Steven D. Ealy, senior fellow at the Liberty Fund, an Indianapolis-based educational foundation. He wants to know why “the political solution to social problems appear[s] to be the default position in contemporary America.”

Steven Ealy begins by turning to the work of Leo Strauss. Political philosophy, according to Strauss, is “committed to an unwavering search for the truth.” But while Strauss argues for political association, Steven Ealy examines alternatives (anarchism and polycentrism) and suggests that polycentrism is a useful approach to voluntary action. He also critiques George Will’s *Statecraft as Soulcraft* (1983), because Will sees government as playing a central role in personal matters ranging from moral education to community-building. Steven Ealy’s final argument connects Will with the William James essay on “The Moral Equivalent of War,” suggesting that deploying state power to address social problems preempts independent alternatives.

“Is there any place in [James's or Will's] society,” Steven Ealy wonders, “for an independent and vital philanthropic enterprise?” Returning to the “political association” concepts of Strauss, he introduces the insights of Michael Polyani and Michael Oakeshott. Polyani writes that science does not lend itself to central planning, thus suggesting that nonprofit organizations are best when autonomous. Oakeshott prefers law, custom, and tradition to political activity, commenting (for example) that the Bill of Rights may have been implemented by political activity, but its content evolved from a more intellectual process. Steven Ealy concludes his paper by noting that his main purpose is “to clear away one of the important intellectual roadblocks to the fostering of an independent and robust philanthropic enterprise” – namely, the notion that government is the central figure in addressing public issues.

Three discussants follow with key observations. Gus DiZerega (St. Lawrence) disputes the science analogy: “Science has it easy. There are no time constraints....”

Eugene Miller (Georgia) writes that the only (!) thing standing in the way of non-governmental action on all public issues is the cost of information and the cost of organizing. Gordon Lloyd (Pepperdine) highlights what he describes as a mistaken connection between public issues and government.

Future volumes in this series would be enhanced by more interaction among the scholars (Lenore Ealy could act as moderator of a discussion). And in the interest of fairness, balancing a long critique (such as Salamon's work in "Conversation 1") with a response from the person being critiqued seems appropriate if not obligatory. One final note: while concepts like "Pareto Optimality" undoubtedly appeal to trained economists, future volumes would not suffer from the absence of such jargon.

BOOK REVIEW

Europe and Civil Society: Movement Coalitions and European Governance

By Carlo Ruzza. Manchester University Press. \$74.95

Reviewed by Joseph Proietti¹

Europe and Civil Society provides an in-depth examination of how and why public interest associations and social movements seek to influence the policy-making process in the European Union. Carlo Ruzza, a sociologist at the University of Trento in Italy, stresses that the pro-business stance of many EU officials tends to shortchange the issues raised by public interest organizations, though a few groups have broken through to make significant impacts. The book investigates these issues by comparing how certain public interest groups in Brussels operate and how they have affected EU policy.

Ruzza examines the influence exerted by networks of activists and their allies – broadly defined as Movement Advocacy Coalitions – at the European Union in three areas of policy-making, within a framework of multi-level governance: environmentalism, anti-racism, and ethno-nationalist regionalism. He picks these movements because of their high visibility and their promotion of ideals generally shared among Western societies.

He persuasively argues that the coalitions with the most “staying power” are the ones with the ability to lobby at all stages of the policy-making process. Though he acknowledges that business can generally bring greater resources to bear in the lobbying process than under-funded public interest coalitions, he maintains that the coalitions' quiet voices are substantially amplified by their credibility and legitimacy.

Ruzza artfully and intelligently examines the roles of public interest organizations through systematic documentary analysis and an extensive series of interviews with activists and institutional actors. His analysis of the environmental movement, relying on a series of case studies, is particularly effective in portraying the interaction between these groups and the political institutions in Brussels.

Overall, *Europe and Civil Society* presents a substantial body of research that sheds new light on political legitimacy, information, and how they shape the relationship between governments and civil society in Brussels.

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