



The International Journal of Not-for-Profit Law

**Volume 8, Issue 4
August 2006**

A Quarterly Publication of
The International Center for Not-for-Profit Law
1126 16th Street, NW, Suite 400
Washington, DC 20036
(202) 452-8600

Except Where Otherwise Noted,
Copyright 2006 © by the International Center for Not-for-Profit Law.
All Rights Reserved.

ISSN 1556-5157

Publisher:

The International Center for Not-for-Profit Law
1126 16th Street, NW, Suite 400
Washington, DC 20036
(202) 452-8600
www.icnl.org

The International Journal of Not-for-Profit Law

**Volume 8, Issue 4
August 2006**

Letter from the Editor 3

SPECIAL SECTION: ACCOUNTABILITY, EFFECTIVENESS, AND INDEPENDENCE — STRIKING THE PROPER BALANCE

Where Do Your Pennies Go? Disclosing Commissions for Charitable Fundraising
Haim Sandberg 4

Government Financing of NGOs in Kazakhstan: Overview of a Controversial Experience
Vsevolod Ovcharenko 21

Tax Incentives and Transparency of NGOs in Indonesia
Pahala Nainggolan 30

Tracking the Implementation of Voluntary Sector-Government Policy Agreements: Is the Voluntary and Community Sector in the Frame?
Peter R. Elson 34

Democratization and the Dilemmas of Media Independence
Craig LaMay 50

ARTICLES

Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations
International Center for Not-for-Profit Law 76

Curbing State Interference in Workers' Freedom of Association in Nigeria
Ovunda V.C. Okene 86

Letter from the Editor

This issue of *The International Journal of Not-for-Profit Law* features a special section on not-for-profit organizations' efforts to balance accountability, effectiveness, and independence. First, **Haim Sandberg** examines the commissions that private companies, especially telemarketers, charge nonprofits for fundraising, and argues for disclosing these fees to potential donors. Next, **Vsevolod Ovcharenko** describes government financing of NGOs in Kazakhstan, detailing both its successes and its problems. **Pahala Nainggolan** investigates the opportunities and obstacles likely to confront the Indonesian Third Sector if the government's proposed tax incentive is approved. Using an innovative theoretical framework, **Peter R. Elson** dissects the differences between Canada's and England's approaches to implementing policy agreements between the voluntary sector and the government. And **Craig L. LaMay** takes a penetrating look at policies of media assistance to promote democratic consolidation, as well as the on-the-ground challenges of surviving in the marketplace while retaining a commitment to serious journalism.

Leading off our other articles, the **International Center for Not-for-Profit Law** assembles and analyzes data on recent laws and proposed laws aimed at constraining civil society organizations, describes strategies that some organizations have used to counter these measures, and suggests ways that the United States government can help. Finally, **Ovunda V.C. Okene** sketches the longstanding discord between trade unions and the Nigerian government and urges a different, mutually beneficial relationship.

We gratefully acknowledge the assistance of web masters Kareem Elbayer and Rebecca See and, especially, the generosity of our authors in sharing their experience and expertise.

Stephen Bates
Editor
International Journal of Not-for-Profit Law
sbates@icnl.org

SPECIAL SECTION: ACCOUNTABILITY, EFFECTIVENESS, AND INDEPENDENCE — STRIKING THE PROPER BALANCE

**Where Do Your Pennies Go?
Disclosing Commissions
for Charitable Fundraising**

Haim Sandberg*

Many nonprofit organizations use commercial fundraising companies for telemarketing. The cost of such services can consume a high percentage of the funds collected from the public. The U.S. Supreme Court has held that a high fundraising commission is not, per se, a fraud on the donor. Yet it seems likely that most donors would see a high fundraising commission as unreasonable and illogical irrespective of its economic rationale. If fully informed, many donors would probably refuse to contribute. This fact gives rise to what I call "the disclosure paradox." On the face of it, the charitable sector ought to benefit from public scrutiny of fundraising commissions, because it would reduce the prices charged by commercial fundraisers. However, these organizations generally oppose restrictions on their ability to hire commercial fundraisers, including restrictions that merely require fundraisers to tell potential donors about the commissions. Nonprofit organizations fear that such restrictions would diminish donations more than commissions. In my view, Supreme Court decisions reflect this fear. The late Chief Justice William Rehnquist, by contrast, believed that full disclosure would raise public confidence in the third sector and thereby strengthen its capacity to raise funds. A similar view is held by the U.K. Charities Commission. In my opinion, this is the correct view. Third sector organizations following a policy of concealment are likely to lose out in the long run.

A. Introduction

Raising funds from the public has always been an important element of financing philanthropic activities. The three monotheistic religions cherish philanthropy both as a moral virtue and as a practical mechanism for supplying the needs of society.¹ Donations are an important component of financing for organizations that seek to promote

* Senior Lecturer, The College of Management Academic Studies, School of Law, Israel, hsandbrg@netvision.net.il. LL.B. 1991; LL.M. 1995; LL.D. 1999, The Hebrew University of Jerusalem. The research was supported by a grant from the Research Foundation of the School of Law, the College of Management Academic Studies, Israel.

¹ For an historical review of the development of the institution of philanthropy in various religions and societies, see RUSS A. PRINCE & KAREN M. FILE, THE SEVEN FACES OF PHILANTHROPY - A NEW APPROACH TO CULTIVATING MAJOR DONORS 4-5, 31-42 (1994).

philanthropic goals, commonly termed the "third sector."² One characteristic of the modern third sector is fundraising among the general public,³ as opposed to depending exclusively on large one-time donations.⁴

During the final decades of the 20th century, far-reaching changes took place in the manner in which fundraising is carried out among the general public. Nonprofit organizations are no longer satisfied with charity boxes, anonymous gifts, charitable dinners, or hunting for donations door to door, but make use of all available technological innovations and modern marketing methods in order to open the wallet of the donor, including direct mailing, telemarketing, Internet marketing, collaborating with commercial companies, and advertising on mass communication media.⁵ The financial potential of these methods, in particular fundraising over the telephone, is huge. About 70% of households in the United States donate for philanthropic purposes every year.⁶ The telephone allows the fundraiser to reach nearly every potential donor.⁷

Volunteers play a relatively modest role in philanthropic fundraising today. Data published in the United States, based on reports made by nonprofit organizations to federal tax authorities, show that volunteers raised just 11% of donations in the year 2000. Most organizations do not employ full-time salaried workers for this purpose,

² For the development of the concepts of the "third sector" and "civil society," see BENJAMIN GIDRON & MICHAL BAR & HAGAI KATZ, *THE ISRAELI THIRD SECTOR: BETWEEN WELFARE STATE AND CIVIL SOCIETY* 73-115, 141-162 (2004). The adjective "third" seeks to distinguish this sector from the public and private-business sectors.

³ In a survey, conducted among a representative sample of the adult Israeli population to examine the public's philanthropic behavior, three out of every four Israeli donated money to third sector organizations in 1997. For the patterns of monetary donations among the Israeli public, see *id.* at 18-21. For the growing weight of donations from the general public in England, see MICHAEL R. CHESTERMAN, *CHARITIES, TRUSTS AND SOCIAL WELFARE* 94 (1979). For the patterns of monetary donations among the American public, see MICHAEL O'NEILL, *NONPROFIT NATION: A NEW LOOK AT THE THIRD AMERICA* 23-32 (2nd ed. 2002); CHARLES T. CLOTFELTER & THOMAS EHRLICH, *PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA* 212-217 (1999).

⁴ See *id.* *Chesterman*, at 374.

⁵ For a description of the increased use of fundraising over the Internet and the special difficulties characterizing legislation to regulate it, such as "forum convenient" from the point of view of local jurisdiction, see Melissa G. Liazos, *Can States Impose Registration Requirements on Online Charitable Solicitors?*, 67 U. CHI. L. REV. 1379, 1379-1380 (2000).

⁶ See Augusta Meacham, *To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations*, 12 COMMLAW CONSPECTUS 61, 62 n. 25 (2004).

⁷ The number of telemarketing companies in the United States was estimated to reach about 140,000 in the year 2000. Differing estimates have been given concerning the total number of telephone solicitations to every home. According to one estimate, the number of telephone solicitations carried out on average to each household in the United States (for both commercial and non-commercial purposes) is about 0.8 calls per day. There are sectors which report 3 to 5 calls per day, see Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 YALE J. ON REG. 77, 86-87 n. 25-28 (2003). According to estimates of the telemarketing companies, as of 2003 each household was exposed to 2.64 telephone solicitations per week and 137 solicitations per year, and the total number of telephone solicitations multiplied fivefold between 1991 and 2003, see 68 *Fed. Reg.* 44144, at 44152-44153, also quoted in *Mainstream Marketing Services, Inc. v. Federal Trade Commission*, 358 F.3d 1228, 1240 (2004) [hereinafter *the Mainstream case*].

either, evidently deeming it too costly.⁸ Instead, organizations frequently outsource. Philanthropic bodies obtain the assistance of commercial entities that specialize in marketing – the same sort of entities that serve companies operating for profit.⁹

Charitable fundraising, in short, has become a profession.¹⁰ The outside specialist "sells" the philanthropic organization to the consumer (*i.e.*, its aims, activities, achievements, plans for funds raised, and the like) and collects a donation, which can be viewed as the donor's "consideration" for the charity's promise to continue working for the same purposes.

There is of course a price to pay for marketing through commercial bodies. This price is both monetary and image-related.

The fact that there is a fiscal cost involved in philanthropic activity is not unusual. Philanthropic organizations generally have operating costs, which may include internal costs such as salaries, equipment, and permanent inventories, as well as external costs such as the fees of contractors and service providers. Without these expenses it probably would not be possible to perform the philanthropic body's activities. Therefore it may be said that, in general, the expenses of a philanthropic body are devoted to the general purposes that the body aims to promote. At the same time, the higher the expenses compared to income, the greater the skepticism as to whether the purposes of the nonprofit body are being well served. High expenses may suggest that someone is seeking personal gain, or simply that the organization is inefficiently run. Either way, the revenues of the philanthropic body are not advancing the organization's purposes – the purposes for which the funds were donated – as fully as they could be.

The scope of expenses and their connection to the organization's purposes must of course concern its managers, who have a *prima facie* interest in directing revenue toward the organization's objectives. Those financing the philanthropic body have equal grounds for concern; they naturally wish their money to advance the goals for which it was given. Yet these two parties to the transaction, the donor and the donee, do not always share the same interests in this realm, partly because the donee may be managed by individuals acting for personal gain,¹¹ and partly because of other factors that will be analyzed below.

⁸ Full-time salaried fundraisers were employed by 28% of organizations that raised between \$50,000 and \$250,000, and by 45% of organizations that raised between \$250,000 and \$1,000,000. See Center on Non-Profits and Philanthropy, Urban Institute Center on Philanthropy, Indiana University, *What We Know about Overhead Costs in the Nonprofit Sector*, NONPROFIT OVERHEAD COST PROJECT (Brief No. 1) 1 (2004), http://www.urban.org/UploadedPDF/310930_nonprofit_overhead1.pdf (last visited July 27, 2005) [hereinafter *the Nonprofit Overhead Cost Project*].

⁹ According to one estimate, between 60 and 70% of nonprofit organizations operating in the United States use professional fundraisers, see Meacham, *supra* note 6, at 62 n. 34.

¹⁰ In the United States these professionals are organized in the Association of Fundraising Professionals (AFP), <http://www.nsfre.org> (last visited July 27, 2005).

¹¹ For a discussion of the "Agency Costs" as a ground for public oversight of nonprofit organizations, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 409 (6th ed. 2003).

To be sure, a substantial proportion of the revenue of philanthropic bodies in some countries is derived from government budgets, either directly or through tax benefits, and the government shows particular interest in the expenses of those bodies.¹² Donations account for a relatively small proportion of the third sector's financing in those countries. Fundraising commissions are thus only a relatively small aspect of a broad issue, the connection between the expenses of nonprofit organizations and their purposes.

Nonetheless, participants in mass donation campaigns also have an interest in ensuring that their contributions are devoted to the purposes for which they were given and not to extraneous, commercial, or other purposes. This is true concerning a nonprofit organization's expenses in general and its payment of fundraising commissions in particular. Information about a philanthropic organization's expenses is important to someone deciding whether to make a donation. When two different philanthropic bodies pursue the same goals, we may assume that donors will favor the more efficient one, the one with a smaller expense-revenue ratio. When a philanthropic body's expenses are very high, and certainly when the lion's share of revenue is devoted to fundraising, people will tend to contribute their money elsewhere.

In this article, I focus solely on the special concerns raised by the cost of commercial fundraising. I ask whether commercial fundraising entailing very high costs is appropriate and whether governments should prohibit such activity, oversee it, or, at least, ensure that potential donors are fully informed.

I first describe the phenomenon of very high fundraising commissions, which has primarily been documented in the United States, though there are indications that it also exists in other countries. Thereafter I analyze whether high fundraising commissions are improper. In this context, I examine both the possibility that high fundraising commissions are inappropriate *per se* and the possibility that the impropriety ensues from nondisclosure to donors. I also outline the damage to the image of the third sector that may arise from the level of commissions as well as from the very use of commercial agents to raise the funds. In presenting these issues, I use various comparative sources, including U.S. Supreme Court cases on the constitutionality of attempts to limit fundraising commissions.

B. The Cost of Commercial Fundraising

Commercial fundraising has a monetary cost. This is generally offset by the donated funds, but not always – the cost sometimes exceeds the actual funds raised. Data on this matter are sketchy. In the United States, a field study using reports to the Internal Revenue Service found that over half of nonprofit organizations did not audit the costs of their fundraising at all.¹³ Moreover, 37% of nonprofit organizations that reported donations exceeding \$50,000 per annum (more than 74,000 associations) did not report

¹² About 64% of the financing of the third sector in Israel comes from public financing. This proportion is higher than in Holland (59%), France (57%), or the average in the European Union (55%), but lower than in Ireland (75%), Belgium (77%), and Germany (65%). *See supra* note 2, at 18; *see also* Chesterman, *supra* note 3, at 97.

¹³ The study was based on all the reports of nonprofit organizations to the U.S. Internal Revenue Service (IRS) in the year 2000 (namely, 126,956 organizations), Nonprofit Overhead Cost Project, *supra* note 8, at 1.

any costs associated with the donations.¹⁴ As the researchers note, one must question the truthfulness of the reports.¹⁵ A quarter of the organizations that did list fundraising costs reported spending \$1 per \$15 donated (*i.e.*, a fundraising cost of 6%), but a further quarter reported spending \$1 for no more than \$2 donated (*i.e.*, a fundraising cost of more than 50%). The average was \$1 per \$5.40 donated (*i.e.*, a fundraising cost of about 18.5%).¹⁶

Other evidence indicates that organizations incur especially high expenses for fundraising when they outsource it to a telemarketing company. According to a report by the Attorney General of New York, 592 telemarketing campaigns conducted during 2003 raised \$187.4 million, of which only a third – \$63 million, or 33.7% – reached charitable institutions.¹⁷ The Attorney General published almost identical findings for 2002 (31.1%),¹⁸ 2001 (31.9%),¹⁹ and 2000 (31.5%),²⁰ and similar findings for previous years going back to 1994.²¹ In California, of the \$233.17 million that the public donated through telemarketers in 2003, only \$100.02 million (42.9%) reached the bodies for which the monies were raised.²² Less than half of funds raised by commercial telemarketers reached the intended beneficiaries in Connecticut (35.2% in 2003),²³ Massachusetts (47% in 2003),²⁴ and Tennessee (45% in 2003, and only 15% in 2001).²⁵

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ New York State Department of Law, Charities Bureau, *Pennies for Charity: Where Your Money Goes: Telemarketing by Professional Fund Raisers* (December 2004), <http://www.oag.state.ny.us/charities/pennies04/penintro.html> (last visited July 27, 2005).

¹⁸ New York State Department of Law, Charities Bureau, *Pennies for Charity: Where Your Money Goes: Telemarketing by Professional Fund Raisers* (December 2003), <http://www.oag.state.ny.us/charities/pennies03/penintro.html> (last visited July 27, 2005).

¹⁹ New York State Department of Law, Charities Bureau, *Pennies for Charity: Where Your Money Goes Telemarketing by Professional Fund Raisers* (December 2002), <http://www.oag.state.ny.us/charities/pennies02/penintro.html> (last visited July 27, 2005).

²⁰ New York State Department of Law, Charities Bureau, *Pennies for Charity: Where Your Money Goes Telemarketing by Professional Fund Raisers* (December 2001), <http://www.oag.state.ny.us/charities/pennies01/penintro.html> (last visited July 27, 2005).

²¹ The proportion of funds transferred to charity ranged from between 38.1% (in 1995) and 24.7% (in 1997). *Ibid.*

²² Office of the Attorney General State of California, *Attorney General Lockyer Announces Average Charity Netted 41 Percent from Commercial Fundraising in 2003, Releases Annual Fundraising Reports, Publishes Donor Guide On Solicitation* (July 21, 2005), <http://ag.ca.gov/newsalerts/release.php?id=1190> (last visited Aug. 16, 2005).

²³ It should be noted that this was Connecticut's highest rate since recordkeeping began. See The Attorney General & Commissioner of Consumer Protection, *2003 Annual Report Professional Telephone Soliciting for Charities, Police and Firefighter Groups*, <http://www.cslib.org/attygenl/mainlinks/tabindex8.htm> (last visited Aug. 16, 2005).

²⁴ The Commonwealth of Massachusetts Office of The Attorney General, *Attorney General's Report on Telemarketing for Charity* (November 2004), <http://www.ago.state.ma.us/filelibrary/telrep03.pdf> (last visited Aug. 16, 2005).

Ohio barely exceeded one-half in 2003, with 52% of telemarketer-solicited donations reaching their intended destinations.²⁶

The World Trade Center attack of 2001 produced more positive results, according to the Attorney General of New York.²⁷ This disaster instilled a profound patriotic spirit in the hearts of Americans. This spirit was fully exploited by the fundraising industry, though not always in an honest fashion.²⁸ In New York state, more than \$2.2 billion was donated, the bulk within 60 days following the attack. The Attorney General's report concentrates on the 52 organizations that raised more than 90% of the total donations. Not one of these bodies reported fundraising costs exceeding 10% of funds raised, and most reported costs of less than 1%.²⁹ It must be noted, however, that these 52 organizations account for only a quarter of the organizations engaged in post-9/11 fundraising in the state. The situation may have differed in the other organizations, which raised only 10% of donations but made up three-quarters of the organizations raising funds.³⁰

U.S. Supreme Court cases offer additional examples of high fundraising commissions. The *Riley case*³¹ states that prominent professional fundraisers in North Carolina pocketed over 50% of the funds they raised between 1980 and 1985.³² The *Munson case*³³ cites at least ten instances in which the Secretary of State of Maryland was asked to authorize professional fundraising at a cost of between 70 and 80% of revenue.³⁴ The *Madigan case*³⁵ concerns Illinois telemarketing companies that retained 85% of the funds they raised between 1987 and 1995.³⁶

²⁵ State of Tennessee, Office of the Secretary of State, *2003 Annual Report on Charitable Fund Raising*, 358, <http://www.state.tn.us/sos/charity/annualrpt-03.pdf> (last visited Aug. 4, 2005); as well as State of Tennessee, Office of the Secretary of State, *2001 Annual Report on Charitable Fund Raising*, 243.

²⁶ State of Ohio Attorney General, *Charitable Fund Raising in Ohio by Professional Solicitors 2003 REPORT*, http://www.ag.state.oh.us/online_publications/charitable_law/2003/charitable_annual_rpt2003-72.pdf (last visited Aug. 20, 2005). See Ayres & Funk, *supra* note 7 at 121 n. 143.

²⁷ New York State Attorney General, *September 11th Charitable Relief: An Overview at One Year – Report of New York State Attorney General Eliot Spitzer* (September 2002), http://www.oag.state.ny.us/charities/september11_charitable_report/sept11_report.html (last visited July 27, 2005) [hereinafter *September 11th Charitable Relief*].

²⁸ The Federal Trade Commission, *Prepared Statement of the Federal Trade Commission on Charitable Solicitation Fraud, Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, United States House of Representatives* (Nov. 6, 2001), <http://www.ftc.gov/opa/2001/11/charitablesolicitationfraud.htm> (last visited Aug. 20, 2005).

²⁹ *September 11th Charitable Relief*, *supra* note 27.

³⁰ In this context see the general results for the year 2001, *supra* note 19.

³¹ *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) [hereinafter *Riley case*].

³² *Ibid.*, at 783.

³³ *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984) [hereinafter *Munson case*].

³⁴ *Ibid.*, at 965 n. 15.

The phenomenon of high fundraising costs has also been reported in England. In 1985 the National Council for Voluntary Organisations (NCVO) conducted a field study on fundraising. It revealed a range of problems, of which the most serious were excessive remuneration of fundraisers, transfer of too small a portion of donations to charitable purposes (10 to 20%), and fundraising in the names of trusts without the knowledge of the competent persons in the trusts.³⁷

On the basis of the data available, it seems safe to assume that many nonprofit organizations use commercial services to raise funds from the public, and that the cost sometimes consumes a high percentage of the funds collected.

C. Is Commercial Fundraising Wrong?

1. High hidden commission as fraud

Does high-cost fundraising defraud donors? The answer depends on a donor's expectations, which are influenced both by the fundraiser's declarations and by the donor's knowledge of the fundraising process in general. When the fundraiser expressly states that all funds donated or the major part of them will be used to advance the philanthropic organization's objectives, it would *prima facie* seem that directing a substantial portion of the money to the collection process amounts to a fraud. The U.S. Supreme Court reached this conclusion in the *Madigan case*, which concerned a fraud claim instituted by the Attorney General of Illinois against a telemarketing firm that raised money for a philanthropic organization in return for 85% of the funds collected.³⁸ Writing for a unanimous Court, Justice Ruth Bader Ginsburg held that there was indeed foundation for a claim for fraud. The fraud stemmed not from the high price itself but rather from the conflict between this price and the telemarketing firm's declarations that a considerable portion of donations would reach the nonprofit beneficiary.³⁹ Indeed, according to the rules established by the Federal Trade Commission ("FTC"), when a telephone solicitor misrepresents, directly or by implication, the proportion of sums donated that is expected to reach the charitable objective, this is a fraud.⁴⁰

Even in the absence of explicit or implicit representations, it may be assumed that every donor expects that the major part of his donation will reach the charitable destination and not be retained by the commercial fundraiser. If so, then failing to disclose the high level of collection costs is fraud, at least from the donor's point of view.

³⁵ Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc., 538 U.S. 600 (2003) [hereinafter *Madigan case*].

³⁶ *Ibid*, at 605.

³⁷ See Sir Ph. Woodfield et al., *Efficiency Scrutiny of the Supervision of Charities: Report to the Home Secretary and the Economic Secretary to the Treasury* 45 (1987) [hereinafter *the Woodfield Report*]; SECRETARY OF STATE, CHARITIES: A FRAMEWORK FOR THE FUTURE § 10.16 (1989) [hereinafter *the White Paper*].

³⁸ *Madigan case*, *supra* note 35.

³⁹ *Ibid*, at 619.

⁴⁰ 16 C.F.R. § 310.3(d)(4) (2003).

In keeping with this approach, various states in the United States set ceilings on the fees of commercial fundraisers. As I elaborate below, the U.S. Supreme Court invalidated these laws, holding that they abridged nonprofit organizations' freedom of speech and thereby contravened the First and Fourteenth Amendments to the Constitution.⁴¹ (Chief Justice William H. Rehnquist consistently dissented.⁴²) The *Schaumburg case*⁴³ invalidated city bylaws that denied fundraising licenses whenever the commission would exceed 25%. The *Munson case*⁴⁴ struck down Maryland legislation that similarly prohibited most fundraising commissions exceeding 25%. The *Riley case*⁴⁵ invalidated North Carolina legislation that denied licenses to commercial fundraisers if they collected unreasonable commissions, defined as commissions greater than 20% (subject to exceptions). The law also required commercial fundraisers to tell each potential donor the average proportion of donations that they transferred to charitable institutions in the year preceding the solicitation.

Dissenting in all three cases, Chief Justice Rehnquist viewed each law as permissible economic regulation and not a violation of free speech.⁴⁶ He argued, in fact, that fraud arises whenever the high cost of fundraising is not disclosed to the donor: "There is an element of 'fraud' in soliciting money 'for' a charity when in reality that charity will see only a small fraction of the funds collected."⁴⁷ "[A] high fundraising fee itself betrays the expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited."⁴⁸

To be sure, one can assume, as most justices on the U.S. Supreme Court apparently do, that reasonable donors expect high fundraising expenses. In this view, the donor knows that fundraising, like most other aspects of operating the philanthropic body, entails a cost. Thus, the average donor knows and agrees that the donated funds will also help finance the cost of collection in the absence of a contrary express promise, and even when there is a general promise to the effect that the funds will help advance the purposes of the charitable organization.⁴⁹ If the high cost of collection is publicly known, one can assume that the donor sees it as a necessary albeit unfortunate element of

⁴¹ There are three leading judgments: *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) [hereinafter *Schaumburg case*]; *Munson case*, *supra* note 33; *Riley case*, *supra* note 31.

⁴² Rehnquist wrote a dissenting opinion in the three judgments. *Schaumburg case*, *ibid*, at 639-645; *Munson case*, *supra* note 33, at 975-985; *Riley case*, *supra* note 31, at 804-812 (Justice Sandra Day O'Connor concurred with his opinion). Rehnquist was an associate justice during the *Riley case* and chief justice during the two later cases; I refer to him as chief justice throughout for simplicity's sake.

⁴³ *Schaumburg case*, *supra* note 41, at 624.

⁴⁴ *Munson case*, *supra* note 33, at 951.

⁴⁵ *Riley case*, *supra* note 31, at 785-786.

⁴⁶ *Munson case*, *supra* note 33, at 980; *Riley case*, *supra* note 31, at 807.

⁴⁷ *Munson case*, *supra* note 33, at 980.

⁴⁸ *Ibid*, n. 2.

⁴⁹ *Riley case*, *supra* note 31, at 799 n. 11 (*per* Justice William Brennan).

charitable operations.⁵⁰ A donor customarily leaves the use of his donation to the nonprofit organization's general discretion. In this view, payment of particularly high fundraising commissions does not amount to an abuse of that discretion.

There are many legitimate reasons for assuming that even high-cost fundraising faithfully serves a nonprofit organization's purposes. For example, costs might be high because they include advertising and public relations services to help make the case for the philanthropic body.⁵¹ A high cost might stem from the fact that the organization seeks to advance an unpopular cause, or that it is a small entity that most potential donors have never heard of.⁵² A high cost might well reflect the sacrifice of short-term goals (raising money) for the sake of more distant ones (raising the organization's public profile, for instance).⁵³ And a campaign might generate more funds for the nonprofit organization, even after paying high commissions, than any alternative.⁵⁴

For a combination of these reasons, the U.S. Supreme Court concludes that a high fundraising commission is not, *per se*, a fraud on the donor. This view was eloquently expressed by Justice Antonin Scalia in the *Madigan case*:

[S]ince there is such wide disparity in the legitimate expenses borne by charities, it is not possible to establish a maximum percentage that is reasonable. It also follows from that premise that there can in general be no reasonable expectation on the part of donors as to what fraction of the gross proceeds goes to expenses. When that proposition is combined with the unquestionable fact that one who is promised, without further specification, that his charitable contribution will go to a particular cause must reasonably understand that it will go there *after* the deduction of legitimate expenses, the conclusion must be that the promise is not broken (and hence fraud is not committed) by the mere fact that expenses are very high.⁵⁵

2. *Is there an unconscionable cost of fundraising?*

The different views on the U.S. Supreme Court stem, *inter alia*, from different underlying assumptions. Most justices seem to believe that a high fundraising cost generally reflects both the market price of the service and the exercise of legitimate economic discretion on the part of the nonprofit organization.⁵⁶ In Chief Justice Rehnquist's view, by contrast, the high cost may not be economically justified and may

⁵⁰ *Schaumburg case*, *supra* note 41, at 637 n. 10 (*per* Justice Byron White).

⁵¹ *Munson case*, *supra* note 33, at 961 (*per* Justice Harry Blackman); *Riley case*, *supra* note 31, at 798 (*per* Justice Brennan).

⁵² *Munson case*, *supra* note 33, at 967; *Riley case*, *supra* note 31, at 780.

⁵³ *Riley case*, *supra* note 31, at 792.

⁵⁴ *Ibid*, at 791-792.

⁵⁵ *Madigan case*, *supra* note 35, at 625.

⁵⁶ *Riley case*, *supra* note 31, at 790 (*per* Justice Brennan): "There is no reason to believe that charities have been thwarted in their attempts to speak or that they consider the contracts in which they enter to be anything less than equitable."

reflect weakness on the part of the philanthropic body.⁵⁷ Is there a conceptual or empirical basis for choosing between these positions?

Some support for the view that a philanthropic body occupies the weaker bargaining position arises from its distinctive character. Donors may believe that nonprofit organizations generally provide high-quality service at a low price, and thereby act efficiently to advance the public interest,⁵⁸ because they do not seek to profit, unlike commercial bodies. Immunity to the negative effects of profit-seeking is, in fact, a substantial portion of a nonprofit organization's reason for being.⁵⁹ At the same time, though, nonprofit organizations can be insulated from more positive effects of profit-seeking too, such as the desire to increase profits by reducing costs and thereby achieving greater efficiency. Indeed, alongside empirical studies showing that managers of nonprofit organizations generally earn less than managers of commercial bodies, it is widely assumed that nonprofit organizations are not managed in a particularly efficient manner.⁶⁰ Consequently, managers of nonprofit organizations may have less incentive and less ability to negotiate the best possible arrangements with commercial fundraisers.

Another possible explanation for why philanthropic bodies incur excessively high fundraising costs lies in the fact that these bodies constitute a relatively small proportion of the telemarketing market. Accordingly, they have less bargaining power and less influence on market prices than commercial entities do.⁶¹

In addition to the laws invalidated by the U.S. Supreme Court (discussed earlier), several voluntary and government bodies have proffered what they consider appropriate limits on fundraising costs. For example, the Better Business Bureau's Wise Giving Alliance – an umbrella organization for many nonprofit organizations⁶² that seeks to

⁵⁷ *Munson case*, *supra* note 33, at 980: "But even if a fundraiser were to fully disclose to every donor that half of the money collected would be used for 'expenses,' so that there could be no question of 'fraud' in the common-law sense of that word, the State's interest is not at an end. The statute, as the Court concedes, is also directed against the incurring of excessive costs in charitable solicitation even where the costs are fully disclosed to both potential donors and the charity. Such a law protects the charities themselves from being overcharged by unscrupulous professional fundraisers."

⁵⁸ Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

⁵⁹ *Ibid.*, at 837, 842-844.

⁶⁰ Michael Lipsky & Steven R. Smith, *Nonprofit Organization, Government and the Welfare State*, 104 POL. SCI. Q. 625, 633, 635-636 (1989-1990); Victor B. Flatt, *Notice and Comment for Nonprofit Organizations*, 55 RUTGERS L. REV. 65 (2002).

⁶¹ For the third sector's small market share in the telemarketing arena in the United States, see *Mainstream case*, *supra* note 7, at 1240. The small market share, *inter alia*, provided justification for the fact that the restrictions imposed by the FTC on telephone solicitations to persons asking to be included in the "do-not-call registry" did not apply to "solicitations to induce charitable contributions via outbound telephone calls," *ibid.*, at 1234, as well as 16 C.F.R. § 310.6(a) (2003).

⁶² See BBB Wise Giving Alliance, *About the BBB Wise Giving Alliance*, <http://www.give.org/about/index.asp> (last visited Aug. 22, 2005). In 2001 this body merged the National Charities Information Bureau and the Council of Better Business Bureaus Foundation.

establish, with the help of professionals in the field, standards for fundraising⁶³ – holds that fundraising costs should not exceed 35% of the revenue from contributions.⁶⁴ Another voluntary body, the Maryland Association of Nonprofit Organizations, states that an organization's average fundraising cost over a five-year period should not exceed 33%.⁶⁵

By contrast, the recommendations of the Charity Commission in England do not stipulate a particular limit but simply note that high commissions are likely to produce "adverse publicity."⁶⁶ This suggests that, even without an unequivocal theoretical basis for proving that nonprofit organizations pay higher-than-market prices for marketing or telemarketing services, the donating public is likely to view a high fundraising commission as unreasonable and illogical irrespective of the economic rationale. To some extent, this assumption supports Chief Justice Rehnquist's position that a very high commission always indicates an element of fraud. It also explains why the American professional organization of fundraisers recommends that members set their fees on some basis other than a percentage of contributions.⁶⁷

3. *Proper disclosure of fundraising costs: The paradox of disclosure, freedom of speech, and the image of the third sector*

The doubt that high commission costs can create in the mind of a potential donor might *prima facie* be avoided if the fundraising entity told him the commission rate before he decided to donate. But the manner in which commercial solicitations to the public are carried out, particularly telephone solicitations, does not allow in-depth explanations. Disclosing the information is likely to result in an intuitive refusal to contribute.⁶⁸ This fact gives rise to a paradox, which I term "the disclosure paradox." On the face of it, nonprofit organizations ought to benefit from any public scrutiny that lowers the price of commercial fundraising. However, the American experience shows that the organizations generally oppose mandatory disclosure of fundraising

⁶³ BBB Wise Giving Alliance, *BBB Wise Giving Alliance Standards for Charity Accountability*, <http://www.give.org/standards/newcbbbstds.asp> (last visited Aug. 4, 2005) [hereinafter *the New Standards*]. These rules, published in 2003, are an improved and more concise version of the previous rules [hereinafter *the Previous Standards*], see BBB Wise Giving Alliance, *Previous Standards: CBBB Standards for Charitable Solicitation*, <http://www.give.org/standards/cbbbstds.asp> (last visited Aug. 22, 2005).

⁶⁴ *The New Standards*, *ibid*, at Rule 9; *The Previous Standards*, *ibid*, at Rule B4.

⁶⁵ Maryland Nonprofits, *Standards for Excellence: an Ethics and Accountability Code for the Nonprofit Sector*, http://www.marylandnonprofits.org/html/standards/04_02.asp (last visited Aug. 22, 2005).

⁶⁶ Charity Commission for England and Wales, *CC20-Charities and Fund-Raising Annex B -checklists* (July 2002), www.charity-commission.gov.uk/publications/cc20.asp (last visited Aug. 22, 2005) [hereinafter *the Charity Commission*].

⁶⁷ See Association of Fundraising Professionals, *Code of Ethical Principles and Standards of Professional Practice*, Arts. 16-18, http://www.afpnet.org/ethics/guidelines_code_standards (last visited Aug. 22, 2005).

⁶⁸ *Riley case*, *supra* note 31, at 799-800 (*per* Justice Brennan).

commissions.⁶⁹ They fear that they would lose more in donations than they would gain from lower commissions. Sharing this fear, the U.S. Supreme Court struck down a law requiring fundraisers to disclose their commissions.⁷⁰ The Court said that mandatory disclosure might impair nonprofit organizations' ability to raise funds – and it was but a short step from there to the conclusion that a disclosure duty violates the constitutional right to free speech.⁷¹ (The stringent protection of these organizations' speech rights likewise led the Court to invalidate legislation setting a ceiling on fundraising commissions, even when the law permitted nonprofit organizations to exceed the ceiling if it endangered their ability to raise funds or if they provided a reasonable explanation for the high cost.⁷²)

When confronting the disclosure paradox, in my opinion, the U.S. Supreme Court sides with donees over donors. The Court favors the freedom of speech of nonprofit organizations over the consumer interests of the contributing public. The Court assumes that donors are not significantly injured in light of legitimate alternatives for protecting them⁷³ (including self-protection, by learning about commissions before donating⁷⁴). In this context, many states in the United States require telephone fundraisers to disclose whether they receive fees for their work, or how potential donors can find out about such fees.⁷⁵ Proposals have been made to amend FTC rules to this effect as well.⁷⁶ The

⁶⁹As *amici curiae*, nonprofit organizations opposed a law requiring commercial fundraisers to disclose, in each fundraising call, the average proportion of donations that they had transferred to charitable institutions in the preceding year. *Ibid.*, at 783. In fighting application of the "do-not-call" regulations to them, representatives of the third sector expressed opposition to any type of restriction on their ability to solicit donors by telephone. See FTC Telemarketing Sales Rule, 68 FED. REG. § 4637 (2003). As *amicus curiae* in the *Madigan case*, nonprofit organizations went so far as to oppose prosecuting a telemarketer for fraud, despite evidence that the company had affirmatively misled potential donors about the existence and size of its commissions: *Madigan case*, *supra* note 35, at 623. Cf. *Schaumburg case*, *supra* note 41, at 621 (nonprofit organizations urged Supreme Court to invalidate law setting ceiling on commissions charged by commercial fundraisers); *Munson case*, *supra* note 33, at 949 (same, except that law permitted exceptions); *Riley case*, *supra* note 31, at 783 (same).

⁷⁰*Riley case*, *supra* note 31, at 799. Justice Brennan: "[T]he compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent."

⁷¹*Ibid.*

⁷²The legislation that was invalidated in the *Riley case* permitted the commercial fundraiser to repudiate the presumption that a commission exceeding 35% of the donation was unreasonable if it could prove one of the following: (a) that the solicitation was not only intended to raise funds but also to transmit information; or (b) the ability of the philanthropic body to raise funds or to transmit information would be significantly impaired. *Riley case*, *supra* note 31, at 785. The *Munson case* struck down legislation that allowed organizations to exceed the 25% ceiling if they could prove that the ceiling in practice frustrated their ability to raise funds. *Munson case*, *supra* note 33, at 953.

⁷³*Schaumburg case*, *supra* note 41, at 636.

⁷⁴*Riley case*, *supra* note 31, at 799.

⁷⁵Karin Kunstler Goldman, *In the Matter of: Telemarketing Review – Comment, FTC File No. R411001 – Comments and Recommendations National Association of State Charity Officials*, Before The Federal Trade Commission Washington, D.C. 20580 (April 16, 2002) at the

Supreme Court has allowed states to require that commission costs be reported to governmental bodies, which in turn publicize the information.⁷⁷ The Court has also acknowledged the legitimacy of using state power against entities that make expressly fraudulent declarations.⁷⁸ However, these mechanisms do not reliably supply the pertinent information when a potential donor decides to open his wallet.

To be sure, free speech holds special status in American constitutional law, and it cannot generally be restricted based on the content of the speech.⁷⁹ At the same time, judgments in this area attest to the great importance that the Supreme Court places on the third sector. The Court views the transaction as the third sector addressing the public, rather than the public writing checks to the third sector; and it declines to draw a constitutional line between the two.⁸⁰ The Court also endorses the third sector's argument that mandatory disclosure would diminish its revenue stream. The result is greater constitutional protection for the third sector than for the commercial sector⁸¹ – *i.e.*, the justices apply a stricter test to laws regulating the speech of nonprofit organizations (and their commercial hirelings) than to laws regulating the speech of for-profit entities.⁸² When a telemarketer asks for a check to buy bread, for example, the level of permissible state regulation depends on whether the bread will be distributed to the homeless or shipped to the check-writer.

The German courts in recent decades have adopted a similar approach. Since 1966, various states in Germany have regulated fundraising solicitations. Regulations commonly require the fundraiser to apply for a permit beforehand, state the purposes for

FTC website, <http://www.ftc.gov/os/comments/dncpapercomments/04/nasco.pdf> (last visited Aug. 22, 2005).

⁷⁶ *Ibid.* Today these rules require telemarketers only to say that the purpose of the call is to raise funds for charity and to identify the charity, 16 C.F.R. § 310.4(e) (2003). The legality of these FTC rules, some of which were established only following the events of September 11, 2001, was confirmed in *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331 (4th Cir. 2005), a federal appellate case that the Supreme Court declined to review in May 2006, <http://www.supremecourtus.gov/orders/courtorders/051506pzor.pdf> (last visited July 30, 2006), at 2.

⁷⁷ *Riley case*, *supra* note 31, at 800.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, at 795.

⁸⁰ Justice Brennan: "Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." *Ibid.*, at 796.

⁸¹ Commercial free speech is recognized in the United States; however, it enjoys a lesser level of protection than that afforded to non-commercial free speech. *See Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) [hereinafter *the Central Hudson case*]. Chief Justice Rehnquist, in a minority opinion, opposed granting any constitutional protection to commercial speech. *Ibid.* at 583 *See also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

⁸² The oversight standard that American courts apply to economic legislation (the minimum rationality standard) is lower than the strict scrutiny exercised in the above cases. *See Munson case*, *supra* note 33, at 979; *Riley case*, *supra* note 31, at 790, 801 n.13, 808.

which the funds are being raised, and guarantee that funds will be solicited and collected properly and without disrupting the public order, that they will be transferred to the represented organization, and that they will ultimately be devoted to the purposes for which they were collected. Like the American Supreme Court, the German courts have restricted the government's oversight powers. For example, German judges have indicated that licensing authorities should not ask whether a fundraising campaign is necessary (for example, by examining the frequency of the organization's campaigns) or whether the campaign seeks to alleviate a genuine public need.⁸³ The regulations do not set a ceiling on the administrative costs of fundraising campaigns, though the government can examine them. In the Nurnberg District in 1991, it was held that a 15% fundraising campaign cost was reasonable.⁸⁴

4. *A different approach: Proper disclosure bolsters the image of the third sector*

As noted, Chief Justice Rehnquist consistently dissented from Supreme Court rulings in this area. He would have permitted the states to regulate telemarketing for nonprofit organizations. One can view the Rehnquist approach as focusing on the consumer's interests. In this view, the third sector is like any other entity asking for money, and the fundraising commissions it pays should be subject to the same level of regulation as other prices – housing prices, say, or employees' salaries.⁸⁵ Fundraising is simply a business transaction,⁸⁶ and the duty to disclose the commission rate is no different from the duty of disclosure imposed, for example, on a securities transaction.⁸⁷ In this view, the solution to the disclosure paradox is a commercial-economic approach. Full disclosure, further, will not harm the capacity of the third sector to raise funds. On the contrary, disclosure will strengthen it by bolstering potential donors' confidence: "In the process, they encourage the public to give by allowing the public to give with confidence that money designed for a charity will be spent on charitable purposes."⁸⁸

A similar view is reflected in the motto of the U.K. Charities Commission, the most efficient and powerful body in the world in this sphere: "Giving the public confidence in the integrity of charity."⁸⁹ The U.K., like Chief Justice Rehnquist, adopts a consumer-oriented solution to the disclosure paradox. The Woodfield Committee proposed a statute, with ancillary criminal sanctions, prohibiting a fundraiser from deducting any fee from donations, unless he could prove that the intention to do so was

⁸³ LESTER M. SALAMON & STEFAN TOEPLER, *THE INTERNATIONAL GUIDE TO NONPROFIT LAW* 118, 126 (1997).

⁸⁴ *Ibid.*, at 127 (citing S2223-278/St 21 from 1.8.1991 in Oberfinanzdirektion Nurnberg).

⁸⁵ *Riley case*, *supra* note 31, at 799.

⁸⁶ *Ibid.*, at 811.

⁸⁷ *Ibid.*

⁸⁸ *Munson case*, *supra* note 33, at 980.

⁸⁹ Charity Commission for England and Wales, *The Official Custodian for Charities Accounts, Annual Report 2004-05*, at the front page, <http://www.charity-commission.gov.uk/Library/spr/pdfs/annrep2005pt2.pdf> (last visited Aug. 30, 2005).

expressly stated to the donor.⁹⁰ Some of the Woodfield Committee's recommendations were eventually developed into the Charities Act 1992, which devotes an entire chapter to fundraising.⁹¹ The Act requires anyone who professionally solicits money, whether on behalf of a charitable trust (a professional fundraiser) or a commercial body (a commercial participator), not to engage in fundraising without an express written agreement with the organization that will benefit from the work. Such an agreement must contain provisions set out in the law and the regulations promulgated under it.⁹² The agreement must state, *inter alia*, the identity of the body for which funds are being raised, the purpose of the fundraising campaign, and the manner in which the funds will be transferred to the philanthropic body. It must also state that donors will be told what proportion of revenue the fundraiser will retain as a fee.⁹³ An agreement that does not meet these requirements is not enforceable, and the fundraiser cannot take a fee from the funds collected without the court's permission.⁹⁴ Under the 1992 Act, further, donors have the right to renege on donations exceeding 50 pounds sterling given as part of a telephone or broadcast fundraising campaign, and the fundraiser must explain this right explicitly at the time of solicitation.⁹⁵

Compared to the approach of the U.S. Supreme Court, this approach seems to me more beneficial to the third sector in the long run. High commercial commissions cannot be concealed from the public for long, and, because they conflict with donor expectations, they require an explanation. A donor reasonably wants to know why so much of his contribution aids a for-profit fundraising company rather than, for example, the victims of a natural disaster whom he intended to aid. If there is a satisfactory answer – *e.g.*, in particular circumstances and markets, using contractors to solicit by telephone is ultimately more efficient than relying on fundraising by employees or volunteers – the donor will understand. If the answer is unsatisfactory, then the organization ought to seek a cheaper means of fundraising. In this connection, it should be noted that only one in eight nonprofit organizations in the United States solicits funds from the general public by telephone, placing it among the less popular modes of fundraising.⁹⁶ A partial explanation for this relative rarity is no doubt the high commissions charged by commercial fundraisers.

5. *Commercialization of the fundraising process and the image of the third sector*

⁹⁰ *Woodfield Report*, *supra* note 37, at 45-46; *White Paper*, *supra* note 37, at 55, art. 10.17.

⁹¹ Charities Act 1992, www.hmso.gov.uk/acts/acts1992/Ukpga_19920041_en_1.htm (last visited Aug. 30, 2005).

⁹² *Ibid.*, § 59; and The Charitable Institutions (Fund-Raising) Regulations § 64 (1994).

⁹³ Charity Commission, *supra* note 66, at Section 39; Charities Act, 41 C. § 60 (1992).

⁹⁴ Charities Act 1992, 41 C. § 59(3)-59(5).

⁹⁵ Charity Commission, *supra* note 66, Annex B, at Sections 40-41. Charities Act 1992, 41 C. § 60-61.

⁹⁶ Only 12% of all the organizations used this means in the year 2000, whereas over half reported fundraising from foundations or from organizing charity events. See *Nonprofit Overhead Cost Project*, *supra* note 8, at 2.

The use of commercial fundraisers has negative effects apart from those created by high commissions. By hiring a commercial body to raise funds for its non-commercial purposes, a nonprofit organization may taint its image and its agenda. The commercial body does not necessarily market the nonprofit organization in the most appropriate manner. With an overzealous desire to raise funds and deduct its commission, for example, the commercial body may convey an impression of greed, thereby deterring potential donors and tarnishing the nonprofit organization's image.

Moreover, commercial bodies tend to concentrate on potential donors who will generate the greatest profit, without considering how well a fundraising campaign conveys the philanthropic body's message to the public. Telemarketing in general suffers from the familiar problem of overexploitation of a resource available to all but limited in scope (the tragedy of the commons)⁹⁷ – here, the time and attention of consumers and, in our case, potential donors.⁹⁸ This phenomenon causes the same donors to be pestered frequently ("overfishing").⁹⁹ The long-term results include more consumers hanging up on telemarketers¹⁰⁰ and more unlisted telephone numbers.¹⁰¹

Ultimately, this led to the creation of a "do-not-call list" of phone numbers that telemarketing companies are prohibited from calling; it operates at the level of the telephone companies, the state level,¹⁰² and the national level.¹⁰³ True, this restriction does not apply to most solicitations for charitable donations.¹⁰⁴ Studies indicate that consumers feel more antagonistic toward commercial calls than toward calls seeking charitable donations.¹⁰⁵ Probably more important, lawmakers, like the majority of

⁹⁷ Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L. J. 549, 551 (2001).

⁹⁸ Ayres & Funk, *supra* note 7, at 87.

⁹⁹ *Ibid*, at 120 n. 141. A similar phenomenon is the use of devices that automatically dial the customer's house and play a prerecorded message. This phenomenon was largely terminated in the United States by the Telephone Consumer Protection Act, 1991.

¹⁰⁰ Ayres & Funk, *supra* note 7, at 90.

¹⁰¹ *Ibid*, at 92.

¹⁰² For the list of states that operated a "do-not-call" list in 2001, see Janelle M. Romp, *Hello, May I Interest You in a Do Not Call List? A Comment on the Federal Trade Commission's Proposal to Amend the Telemarketing Sales Rule*, 71 U. CIN. L. REV. 639, 651 n. 106 (2003). For the current list of states with such lists, see <http://www.the-dma.org/government/donotcalllists.shtml> (last visited Aug. 22, 2005).

¹⁰³ The national list is maintained by the Federal Trade Commission and currently contains more than 85 million telephone numbers. See the list website, <http://www.ftc.gov/bcp/online/edcams/donotcall/index.html> (last visited Aug. 22, 2005), and the Federal Trade Commission for the Consumer, *FTC Announces First "Do Not Call Rule" Settlements – Timeshare Sellers and their Telemarketer Will Pay More than \$500,000 for Violating the Rule* (Feb. 16, 2005), <http://www.ftc.gov/opa/2005/02/bragliaflagship.htm> (last visited Aug. 22, 2005). The prohibition against calling telephone numbers on the list and the sanction for such calls are found in the chapter on FTC Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B) (2003).

¹⁰⁴ *Mainstream case*, *supra* note 7, at 1234, as well as 16 C.F.R. § 310.6(a) (2003).

¹⁰⁵ *Ibid*, and Ayres & Funk, *supra* note 7, at 120.

Supreme Court justices, feared that such a ban would harm the third sector.¹⁰⁶ Even so, overfishing continues to occur in solicitations for charitable donations,¹⁰⁷ and it does not bolster the image of the third sector in the eyes of potential donors. Those with caller-identification displays may stop answering calls from strangers; others may simply disconnect their telephones.¹⁰⁸

In England too, criticism has been voiced that commercial fundraisers can be "too emotive, over-aggressive, poorly controlled or badly managed, and ... give charity as a whole a bad name."¹⁰⁹ The government has so far refrained from regulating this field, preferring voluntary self-regulation alongside the legal duty to disclose commissions.¹¹⁰ The 1992 Act accorded philanthropic bodies the right to seek a court injunction, subject to giving prior notice, against a fundraiser whose methods or fitness to accomplish the task are called in question.¹¹¹ Commission guidelines emphasize the potential impact of fundraising methods: "Charities need to be alert and sensitive to public opinion and criticism. Fund-raising methods which meet with disapproval can damage the charity and reduce public confidence in the sector as a whole."¹¹²

The "commercialization effect" must therefore join the high cost of commercial fundraising as factors that harm the image of the third sector, and, certainly in the long run, diminish its revenues.

D. Conclusion

In my opinion, it is wrong for nonprofit organizations to conceal information that would influence a potential donor's decision. It is wrong to conceal the fact that a commercial body is providing the fundraising services. It is wrong to conceal the existence and size of a commission.

Third sector organizations that successfully oppose disclosure laws are likely to lose out in the end. The inevitable result will be a gradual erosion of the public's motivation to give. In the absence of full disclosure, moreover, suspicions may arise concerning exploitation of third sector organizations by the service providers; the government and the third sector together ought to expose any such abuses.

For these reasons, the government and the third sector ought to establish routine reporting mechanisms for fundraising commissions and ensure that the information reaches a potential donor *before* he decides to open his wallet. Until such mechanisms are in place, a potential donor ought to find out, on his own initiative, where every penny of a donation will go.

¹⁰⁶ Ayres & Funk, *supra* note 7, at 118-119.

¹⁰⁷ *Ibid*, at 120 (n. 141 and text).

¹⁰⁸ Or as defined by Funk & Ayres: "[T]he strategies that households adopt to avoid phone solicitations (such as taking an unlisted number) can themselves produce negative extranalties that must be weighed against the third-party benefits." *Ibid*, at 117-118.

¹⁰⁹ *White Paper*, *supra* note 37, at 57, Art. 10.22.

¹¹⁰ *Ibid*, Art. 10.23.

¹¹¹ Charities Act, 41 C. § 62 (1992)

¹¹² Charity Commission, *supra* note 66, Article 4.

SPECIAL SECTION: ACCOUNTABILITY, EFFECTIVENESS, AND INDEPENDENCE — STRIKING THE PROPER BALANCE

**Government Financing of NGOs in Kazakhstan:
Overview of a Controversial Experience**

Vsevolod Ovcharenko¹

1. Brief History of the Issue

a. NIS trends since the mid-1990s

In the mid-1990s, many governments in the newly independent states (NIS) recognized the importance of supporting not-for-profit activities in their countries. There were several reasons: the collapse of a vast Soviet system of welfare and social services; a great demand for social services among the population; the new NGOs' greater efficiency compared with the old Soviet social institutions; and an opportunity to attract additional resources, primarily from foreign donors, for social services performed by NGOs. There was also the opportunity to use NGOs for misappropriating government funds – with no liability for anyone in the case of their liquidation.

At the beginning, the governments faced some confusion over priorities: to support NGOs or to emphasize high-quality services. The latter would require participation of all competent service providers, not just NGOs, in the competition for government funds. In the absence of an established and well-functioning system of state procurement, in most cases it was decided to use grant mechanisms called *zakaz*, which can be translated as "order" or "contract." This Soviet-era term was adopted because the term "grant" was largely associated with foreign assistance to governments and local NGOs.

Unfortunately, the terminology, and in particular the term *zakaz*, which was never defined clearly in the legislation, resulted in controversial practices and widespread confusion. In some instances, state grants and state procurement both were labeled *zakaz*.

b. Kazakhstan's approach – local particularities

In the beginning of 21st century, the idea of governmental support of social NGOs also became widespread in Kazakhstan. Several NGOs – including the most active, the Confederation of NGOs of Kazakhstan – conducted a long-term campaign advocating a special law on state social contracts (state social *zakaz*). The idea finally was accepted by the government, and it started the drafting process. The International Center for Not-for-Profit Law (ICNL) provided technical assistance to both the NGOs involved and the governmental drafting group. During the drafting process, participants addressed the

¹ Vsevolod Ovcharenko is Regional Legal Consultant for Central Asia, International Center for Not-for-Profit Law.

problem of determining the mechanism of the social contracts. The following are some of the issues that arose during this process:

i. Constitutional prohibition

Kazakhstan's Constitution, in Section 5.2, prohibits state financing of public (citizens') associations. The extent of the constitutional prohibition was unclear in terms both of what qualifies as "state financing" and what qualifies as a "public association." In the Kazakh Civil Code, "public associations" are listed as one of sixteen legal forms of non-commercial organizations. In common usage, though, the term "public associations" often referred to unregistered groups as well.

So, in the absence of a clear understanding of what the Kazakh Constitution prohibits, participants decided to use a mechanism of state procurement to govern state social contracts.

ii. Local Procurement Law – no room for social services

State procurement is very technical and expensive. The problem was complicated by the fact that the Kazakh Law on State Procurement did not provide an adequate mechanism for procurement of services. The law omitted both qualification requirements for bidders and mechanisms for procuring the services. The Kazakh Procurement Law was based on the UNCITRAL Model Law on State Procurement, but without its Chapter 4, which is devoted to procedures for procurement of services. Officials of the special governmental Agency for State Procurement, which administers the Law on State Procurement, were, and remain, reluctant to develop procedures where the law is silent. Indeed, they have refused to discuss the issue for the last ten years.

iii. "State Grants" in the form of "Procurement Contracts"

The Law on State Social Contracts that finally emerged represented a compromise. NGOs undertook a very active advocacy campaign. Further, the responsible governmental agency, the Ministry of Culture, Information and Public Accord, was reluctant to submit state social contracts to the authority of the Agency for State Procurement. The result is an odd hybrid: state social contracts in Kazakhstan are doled out through a sort of state grant-giving system, yet the agreements between the state and the NGOs take the form of state procurement contracts! Despite the peculiarities of this mechanism, it distributed the equivalent of some \$3.5 million during 2005.

c. ICNL's role in the process

Throughout the process of drafting the law and evaluating it, ICNL provided technical assistance to all interested persons. The deficiencies of the designed mechanism were clearly explained, and it was suggested that this system would not work efficiently and would create broad opportunities for corruption and abuse of governmental funds unless a number of critical amendments were introduced into tax, state budget, and state procurement legislation. Without the critical amendments, the system has indeed proved inefficient.

During the drafting process, some governmental officials tried to use the Law on State Social Contracts to impose additional limitations on NGOs in Kazakhstan. ICNL

provided assistance to a group of local NGOs, and, thanks to their active efforts, no such provisions appear in the final text of the Law adopted on April 12, 2005.

2. Current Status of the Issue

Now that more than a year has passed since the law was adopted, we can begin to assess the law and its consequences. It should be noted that pilot state social contract tenders were started two years before the law's adoption, so we have three years in which the government has financed some Kazakhstan NGOs.

a. Money allocated by the Government

The program began with the equivalent of \$400,000 in 2003 and finished 2005 with \$3.5 million. The President, speaking at the Second Civic Forum in September 2005, said that by 2010, this figure should reach \$8 million.

b. Government's vision of the process

The government's main incentive for increasing its funding is to "outbid" local NGOs and end their reliance on foreign funding. Kazakh officials believe that donors determine the policy of organizations they finance. The government thus wants to supplant foreign donors and set the policy of local NGOs.

c. Legislative "coincidences"

This widespread view of financing as a rivalry between foreign donors and the state can be illustrated by a "coincidence." One week after the Law on State Social Contracts was signed by the President and came into force, a group of patriotic deputies initiated two extremely repressive laws in draft form – (1) on activity of foreign and international NGOs in Kazakhstan, and (2) on amendments of some other laws designed to limit NGOs' foreign financing. Fortunately, the draft laws were of such poor quality that some of their provisions were declared unconstitutional by the Constitutional Council, and the laws were not put into effect. Restrictions on foreign donors, such as those in the two draft laws, became possible only after the law legalizing government financing of NGOs came into effect. One might conclude, as a result, that the main reason for the Law on State Social Contract was political: to keep local NGOs from fighting the repressive provisions on foreign financing by promising them state financing instead.

3. Problems Revealed Before and During the Process

Three years after the practical launch of State Social Contracts (SSCs), most of ICNL's predictions have come true.

a. Legislative inconsistencies

First of all, even government officials involved in the SSC process now agree that proper administration of funds is impossible without changing other laws.

i. Constitution

As noted above, the Constitution prohibits state financing of public associations but does not define the boundaries of "state financing." The situation has been complicated by the recently adopted Budget Code, which indicates that state contracts for

services constitute "state financing." Interpreted literally, this means that public associations, which constitute at least 40% of all NGO in Kazakhstan, are ineligible for SSCs. Modifying the Budget Code could resolve this problem, but the government has not moved to do so.

ii. Budget Regulations

Funds allocated for SSCs do not have one unified respective budget code. Only local divisions of the Ministry of Culture and Information are bound by the Ministry's rules. Local governments and other ministries make their own decisions about how to allocate funds, and face serious technical problems in doing so.

iii. Procurement Regulations

Procurement methods (open one-round tenders) and qualification requirements (minimum price principle) applied to SSCs are not consistent with the nature of social service procurement. The problem is unlikely to be resolved, because the responsible Agency for State Procurement refuses even to discuss it. An open tender is the most expensive method of procurement, and the least effective one for procuring social services. As a result, local administrators often have only one entity in their region that is qualified to deliver a particular social service – or none at all. Also, administering the procurement often costs as much as the contract granted. As result, officials have favored larger and larger lots for SSC tenders. Starting from \$5,000 to \$15,000 in 2003, some in 2005 reached \$150,000.

iv. Tax Regulations

The most serious and distressing problems for NGOs are associated with the taxation of SSCs. According to tax laws, an SSC is for-fee income and not subject to any exemptions. Most local NGOs have no experience in for-fee activities and the accounting and tax management/planning that they entail. Further, the tax rules require calculating corporate income tax at the beginning of the year, in advance, and paying it in four installments during the year. The penalty for failing to declare or underestimating the coming year's income tax due is 70% of the omitted amount.

No NGO engaged in an SSC declared its income, because they had never done so before. The result was not as drastic as it could have been. Penalties were often waived (a lot of government-operated NGOs (GONGOs) faced this problem, along with conventional NGOs). Even if applied, the penalties were generally small.

The government has recognized this problem and made a practical effort to resolve it now. ICNL's view is that if procurement is simply state grants given through an SSC mechanism, the tax regime should treat them as it treats ordinary grants for SSC funds – with full exemption from corporate income tax and VAT. The Government agreed with this approach. The respective amendments were introduced to the Parliament in May 2006, adopted in June, and signed into law by the President on July 7. They will take effect on January 1, 2007.

b. Government officials' violations

In addition to obvious legislative inconsistencies, many reports indicate that administrators have violated the SSC tender rules.

i. Corruption complaints

Several applicants reported that officials requested kickbacks, ranging from 10% to 30% of the contracted amount.

ii. No competition

The tenders are often an empty exercise, because some regions have no alternative vendors of social services. Because the rules require more than one bidder in order to conduct an open tender, a friendly NGO may agree to be listed as an alternative bidder at the request of a state funds administrator, even though the NGO has not in fact bid on the project.

iii. No consultations on topics of bids

The biggest criticism surrounds the topics of the bids, the content of the lots: what particular social services a state funds administrator will seek. No criteria or mechanisms prescribe how the administrator should decide what shall be procured. In practice, administrators often define the services to be procured with a particular NGO or (more often) GONGO in mind.

iv. Rapid creation of GONGOs in the absence of NGOs

Sometimes no NGOs in the region offer the services to be sought. In several such instances, we understand that local authorities responsible for procurement have quickly established and registered NGOs, consisting of their relatives or friends, solely for SSC purposes.

v. Violation of payment terms by administrators

Many reports indicate that state administrators are violating payment terms, most commonly by refusing to pay the final installment – often 70% of the cost of the contract – to a conventional NGO (there are no such complaints involving GONGOs). NGOs are afraid to sue the government for violating the contract, and in any event the contract terms often give the administrators discretion to refuse to pay the final installment.

vi. Broad use of NGOs to channel the money

According to some reports, the government has used an SSC to support a governmentally controlled company, such as a TV channel, by requiring the NGO to use that company as a vendor.

vii. Legalized support of GONGOs and quasi-NGOs

In 2004 and 2005, the majority of SSC tenders went to GONGOs – meaning that the government is using state money to finance not-for-profit organizations established or controlled by the government.

c. Omissions and shortcomings from NGOs

For the sake of a comprehensive account, we must note that conventional NGOs themselves bear a measure of the blame for their problems here.

i. Poor legal knowledge

A significant factor is the low level of legal knowledge, especially on tax matters, among NGO leaders and managers. Most of them make decisions with possible financial implications without consulting anyone on the attendant legal issues.

ii. Ignorance of tax regulations and respective implications

Likewise, most NGOs engaged in SSCs believe that they applying for state grants; the tax implications come as a surprise. We see that once they learn about their tax liability, often the hard way, they are reluctant to engage into the SSC process again.

d. Potential implications for NGOs

There are several current and potential implications for NGOs involved in the SSC process. Unfortunately, many of them are negative.

i. Current implications:

Current implications proceed from the fact that an SSC is deemed an entrepreneurial activity for tax purposes. Implications include the following:

(1) NGOs must declare their business income and pay corporate income tax in advance. If they fail to do it properly, they are subject to strict penalties.

(2) To avoid penalties, NGOs must improve their financial management and accounting. In the long run, this improvement can increase an NGO's capacity as well as its proficiency – a long-term positive result that comes at a cost.

(3) With both taxes and professional accounting eating into the budget, the cost of social services is increasing for NGOs. As a result, they become less competitive with governmental institutions providing comparable services. NGOs may function as "gap fillers," with their services merely supplementing those provided by the government. It is difficult to tell whether this is a positive or negative outcome, but it is the reality.

ii. Potential implications:

(1) The first problem proceeds from the constitutional prohibition against state financing of public associations, and the Budget Code's broad definition of "state financing." As a result, every public association engaged in an SSC must recognize the state procurement contract could be declared illegal, and the government could demand the return of its funds.

(2) The second problem grows out of the fact that many NGOs engaged in SSCs did not declare their corporate income tax yet were not punished. The tax authorities have discretion on whether to impose penalties. Avoiding a penalty may sound like a positive outcome, but the tax authorities could impose it sometime in the future. With this threat of punishment, thus, the government, through its tax authorities, can influence and even control NGOs that received SSC funds.

e. Implications for foreign funding

The government's original hope – that SSCs would lure NGOs away from foreign financing – did not come true, and will not, for a good reason: the creation of GONGOs. With most SSC funds going to government-organized or -controlled entities, authentically independent NGOs still depend on foreign financing. The SSC program will

have scarcely any impact here, because NGOs know they are doomed to lose SSC tenders to GONGOs, which have better relations with the government officials overseeing the process.

So, contrary to the government's hopes, the SSC program has not significantly reduced the foreign funding of NGOs in Kazakhstan. But that does not mean that the government is going to give up. It may pursue other means of creating unfavorable conditions for foreign funding of NGOs in Kazakhstan.

4. Future Plans and Expectations

a. Constant increase of government funds allocated for SSC

The government is going to double the amount of funds allocated to SSC, from \$4 million planned in 2006 to \$8 million by 2010.

b. Tax authorities to make SSCs more attractive for NGOs in 2006

As noted above, tax authorities have recognized the problem with corporate income taxation of SSC funding and the financial hardships associated with properly declaring and paying this tax in advance. Discussions with the Tax Committee and the Ministry of Budget Planning (responsible for tax reform plans) started in January 2006, producing three amendments that were adopted in July and will come into force on January 1, 2007. The amendments will finally place SSC funds within the same tax regime as ordinary grants. It will eliminate the most complicated and technical problem that NGOs confront with regard to SSCs.

c. External and internal political environment

The contours of the SSC system have been influenced by events both in neighboring countries and inside Kazakhstan.

i. "Colored revolutions"

It is no secret that the changes of governments in Georgia, Ukraine, and Kyrgyzstan came about with the active participation of some local and foreign NGOs. This fact has caused the governments of neighboring countries, including Kazakhstan, to see NGOs as a potential threat to the stability of their regimes.

ii. New enemies – exporters of democracy

Many NGOs whose activities relate to citizens' political rights have been declared "exporters of democracy" and public enemies in Kazakhstan. In some NIS countries, witch-hunting has started against the leaders of such NGOs.

iii. Audits by government agencies

Kazakhstan has also reacted by undertaking unprecedented audits of foreign NGOs and those local NGOs receiving foreign financing. In January and February 2005, foreign NGOs were subjected to in-depth tax audits. Then in March and April, they were audited further by the prosecutors and the Financial Police. In April and May, a lot of foreign NGOs in Kazakhstan were harassed by Immigration Police. So far as one can tell, none of these organizations cut back on its anti-governmental activities as a result. Nevertheless, both the government and the majority of the Parliament members still favor

limiting the activities of foreign NGOs and their donors as much as possible. New initiatives are likely, and soon.

iv. Government Legislative Initiatives

In January 2006, the government started drafting the Law on Charitable Activities, using a similar Russian law as the model. Such a law would overturn the existing system of basic tax preferences for NGOs (all gratuitous donations to NGOs are exempt from corporate income tax and VAT), which is functioning very well.

d. NGOs face a challenging time

The Kazakh government's attitude toward NGOs and their activities is quite common now in the NIS and other parts of the world. To some extent it is a predictable consequence of NGOs' more prominent role, which many governments have proved unready to confront in a friendly, constructive fashion.

As for NGOs in Kazakhstan, it is time for them to choose their future: continue their operations using government funds and facing increased government control; or avoid governmental financing and depend instead on foreign donors (though they are gradually leaving Kazakhstan); or engage in for-fee activities to fund their operations. Each NGO will have to make its own decision. One thing is clear: the government's attitude toward NGOs is no longer favorable but suspicious. NGO leaders must adjust to this new reality.

5. Conclusions – Positives and Negatives

a. Positive points and areas of potential improvement

The general process of governmental financing has had several positive aspects.

(1) The government has recognized the private sector for social services and decided to support such services. This marks a first step toward establishing a competitive environment for social services, which in theory will improve the quality of the services without increasing the price.

(2) The government is going to continue this practice of funding until at least 2010, according to the President.

(3) The government has recognized the problems associated with taxing SSCs and made energetic steps to remedy this problem.

(4) Social sphere NGOs have an alternative source of financial support, which gives them a better chance to survive and preserve their professional capacity during the current freeze in relations between the state and civil society.

b. Negative points and obstacles to their amelioration

The status quo also features many negative points, most of them addressed above. Here is a summary of the shortcomings of the SSC process that need to be addressed.

(1) The constitutional prohibition against state financing of public associations prevents the development of a straightforward, effective grant mechanism. With the government's current distrust of NGOs, the situation is unlikely to change soon.

(2) The system of distributing state funds to NGOs through the procurement mechanism has proved inefficient and controversial. To summarize the problems, inconsistencies, gaps, and omissions in laws and regulations prevent the system from effective operation. Reforms, based on international best practices, would ameliorate or eliminate most of the technical problems.

(3) Limiting potential vendors to NGOs, though reasonable in a grant-giving mechanism, is inconsistent with a procurement mechanism, given the fair-competition foundation of state procurement as well as WTO standards (which allow preferences for state procurement only in the form of quotas for local suppliers). Kazakhstan's desire to enter the WTO may force a reconsideration of the current practice.

c. Summary of what should be done to improve SSC process

There are several obvious steps to improve the SSC process:

(1) Incorporate the proper criteria into the state procurement law, so that service procurement can be assessed based on effective price rather than, as now, minimum price;

(2) Add specific procedures for service procurement to the state procurement law;

(3) Resolve the budget codification problem to clarify and unify treatment of SSC funds by state funds administrators;

(4) Change the Budget Code's definition of "state financing" to exclude all state procurement contracts, including SSCs; and

(5) Establish advisory councils to help to decide which social services the state administrators ought to procure, in order to use tax funds more efficiently in the SSC process.

d. Overall assessment of the future

Though it is difficult to predict anything in this part of the world, several possibilities could easily develop in the next two years:

(1) The government will continue to finance social NGO activities, and the amount of the funds allocated will gradually increase.

(2) The funds will continue to be used inefficiently, due to the many problems in the process. Efficiency in fact is likely to *decrease*, given that the stakeholders responsible for the process are not inclined to change anything. The corporate income tax exemption would help NGOs but not affect the SSC process itself.

(3) The government will continue its attempt to limit and harass NGOs that receive foreign financing, as well as try to prevent foreign and international NGOs from effectively operating in the country.

As for ICNL, it will continue to provide technical, legal assistance to all interested stakeholders working to improve the legal environment for governmental financing of NGO activities in Kazakhstan.

SPECIAL SECTION: ACCOUNTABILITY, EFFECTIVENESS, AND INDEPENDENCE — STRIKING THE PROPER BALANCE

**Tax Incentives and Transparency
of NGOs in Indonesia**

Pahala Nainggolan¹

The Indonesian government's draft tax law, now pending before parliament, includes a provision long sought by Indonesian nonprofit organizations: a tax incentive for donors. If the provision is approved, the impact on the Indonesian non-profit sector could be enormous – or it could be minimal. Which proves to be the case depends on whether nonprofit organizations adopt high standards of transparency and accountability.

This article provides a snapshot of the Indonesian Third Sector and some of the problems that bedevil it, examines current rules requiring transparency and accountability, summarizes the potential tax deduction, and finally explains what nonprofit organizations must do – and who must help them – if they are to enjoy the fruits of the possible change in law.

The Third Sector in Indonesia

At present, corporations cannot treat donations as expenses in calculating their tax. Under the Income Tax Law number 17/2000, the only expenditures treated as deductible are those directly related to the company's efforts to gain, collect, and maintain its taxable revenue (article 9). Consequently, a company's donations result in a taxable income that exceeds accounting income. Some companies, however, have gotten around this limitation by treating their grants as marketing expenses – specifically, investments to improve their images in the communities they serve. (For recipients, donations are nontaxable under article 4:3 so long as no business relationship or common ownership exists between donor and donee.)

Citizens make few donations in Indonesia, mostly for religious purposes or to alleviate the suffering caused by natural disasters.² Why are individual donations so rare? For one thing, people in developing countries with more income feel obliged, first and foremost, to assist their relatives. For another thing, people are uncertain about the future, so they tend to save any surplus. In addition, individuals are allowed to deduct very few donations from their taxable income. Many observers believe that the potential of individual donations in Indonesia is huge; it is a matter of changing the behavior.

¹ Pahala Nainggolan is a Doctoral student of Management Science at the Graduate School of Economics-University of Indonesia, the former Finance Director of the grantmaking Tifa Foundation, still active in capacity-building programs for NGOs run by Tifa, and the author of several books and many articles. He gratefully acknowledges Ari and Basil at Tifa Foundation for sharing lessons learned, data, and ideas during the preparation of this article.

² Leon, Patricia, *Four Pillars of Financial Sustainability*, The Nature Conservancy, 2001.

To date, most nonprofit funding has come from donor agencies, mostly international ones. In Indonesia, as in some other countries, many nonprofit development and advocacy organizations have sprung into being based on the availability of funding rather than on the needs of the community. Existing organizations have similarly adjusted their missions to suit donors and, in some instances, undertaken operations without the needed skills or community support. One must question the sustainability and impact of such work.

Against this backdrop, financial sustainability remains a major problem. Legal Aid Offices (YLBHI) provide a case in point. In 2001, after decades of successfully helping marginalized people gain access to justice, the organization faced a major shortfall. Their longtime donors decided to discontinue funding, and YLBHI could not continue operating its 23 offices across Indonesia.

Thousands of NGOs may find themselves in the same situation. Programmatic sustainability depends on financial sustainability.

Transparency and Accountability Requirements

Indonesian law requires significant transparency and accountability. Foundation Law No. 16/2001, and its amendment, Law No. 28/2004, state that a foundation must make its annual report available for public access. The report should disclose what the organization does and how it manages its resources as reflected in its finance report. The finance report must meet what is known as Standard of Financial Accounting No. 45, the Indonesian Accounting Standard Reporting for Non-Profit Organizations. Those organizations whose annual income, from government or any other sources, exceeds Rp. 500,000,000 (five hundred million rupiah) must publish their audited financial reports in local newspapers. Finally, Article 78 requires foundations that receive public funds to provide public access to their annual reports covering the past ten years.

In practice, unfortunately, few nonprofit organizations heed these rules, and enforcement is exceedingly weak. Results from the ongoing TANGO³ (Transparency and Accountability of NGO) program confirm the situation. It finds the three major problems confronting Indonesian nonprofit organizations to be financial, programmatic, and legitimacy. The financial element consists of generating, auditing, and publishing a financial report that meets the applicable accounting standard, as well as measuring the effectiveness of fundraising efforts. Programmatic elements include applying a logical, impact-focused approach to designing, managing, and evaluating programs. Legitimacy, finally, concerns the organization's stakeholders, their access to its programs, and their assessment of them.

All of these problems are interrelated. What they have in common is transparency and accountability. The TANGO program's tentative conclusion is that many

³ The TANGO program, run by the Tifa Foundation, aims to strengthen NGOs through capacity-building activities. At the beginning, participants undertake a self-assessment with the help of independent facilitators. The assessment measures six elements. The program then helps the organization strengthen the weakest of these elements through training, mentoring, and field visits. This has been applied to 190 NGOs in eight provinces, and the results show that financial, programmatic, and legitimacy problems tend to be the most serious. For details of the TANGO program, contact ari@tifafoundation.org or basil@tifafoundation.org.

organizations are willing to be more transparent and accountable but lack the technical knowledge to do so.

The Proposed Tax Deduction

The government recently presented the revised draft Tax Law to parliament. Parliament is expected to act on the proposal later in 2006, and the law will take effect in early 2007. In its current form, the bill would make corporate donations to nonprofit organizations for "social development" deductible. By treating the donations as deductible expenses, corporate taxpayers will no longer have to pay the current 30 percent income tax on those amounts. Although the law does not define "social development," the phrase refers to development of the social infrastructure in the taxpayer's community, complementary to the work of the government. If the law is adopted, regulations would clarify such details as mechanisms and procedures, the parameters of the beneficiary sector, and the category of eligible organizations.

An Opportunity and a Challenge

The tax proposal represents an important opportunity for Indonesian nonprofit organizations, but a significant challenge as well. The opportunity – new sources of funding that will help promote sustainability – hinges on the two factors noted earlier, transparency and accountability.

From the government's point of view, tax-deductible donations are in part government funds. The deductibility provision would diminish overall tax revenues. If it is enacted, the government, reasonably, will want to ensure that the social benefit outweighs the cost.

If nonprofit organizations cannot responsibly and accountably handle tax-deductible donations, they will lose this source of funding – or, indeed, never enjoy it at all. The draft law leaves a great deal of room for interpretation through regulation. Authorities could create a government institution and make it the sole repository of deductible donations. The problems of today's nonprofit organizations in Indonesia would remain unchanged.

What can be done to help foster accountability and transparency, in a gradual and realistic fashion – not only to receive the benefits of the tax deduction, but to expand nonprofit activities and increase their effectiveness overall? Three steps would help significantly.

First, nonprofit organizations need technical tools. One such tool is accounting software that is easy to use, low-priced, and complies with Standard of Financial Accounting No. 45. Most accounting software now available is designed for corporations and their needs, so it is ill-suited to nonprofit organizations.

Second, nonprofit organizations need to use accountability as a selling point. A 2002 study found that one reason that people do not donate to NGOs is uncertainty about what the organizations do with the money.⁴ To address this problem, an organization should generate a financial report (perhaps with the new software); get it audited, ideally

⁴ Saidi, Zaim, *Sumbangan Sosial Perusahaan*, Piramedia, 2003.

by an accounting firm working pro bono; and then assure potential donors that it will use their funds capably and effectively. This will expand the Third Sector's access both to individual donations and to public funds, including the proposed tax incentive.

Third, nonprofit organizations must address their programmatic shortcomings. They should learn the needs of the community and then target those needs. Doing so will require information as well as money. NGOs must master the issues, the experiences of other organizations in addressing similar problems, the best practices in the field, and the pertinent scholarship. Advocacy NGOs need to understand the rudiments of marketing management and persuasion as well.

Who should lead the way? As the major funders at present, donor agencies are the logical actors. Grants must foster capacity building on the part of nonprofit organizations, including purchasing software, hiring auditors if necessary, training managers and others, and acquiring deeper technical knowledge of the social problems they address.

Results will not come overnight. They will require donor agencies to adopt integrated, well-planned, long-term programs. But the results – an expanded, vibrant, sustainable Third Sector – will be well worth the wait.

**SPECIAL SECTION: ACCOUNTABILITY, EFFECTIVENESS, AND
INDEPENDENCE — STRIKING THE PROPER BALANCE**

**Tracking the Implementation of
Voluntary Sector-Government Policy Agreements:
Is the Voluntary and Community Sector
in the Frame?**

Peter R. Elson¹

Central governments have repeatedly entered into bilateral policy agreements (as distinct from regulatory or legislative measures) with a collective of voluntary sector representatives. This practice started with the signing of a Compact in England and the rest of the UK in 1998, and has continued with the signing of the Voluntary Sector Accord in Canada in 2001, and similar agreements in Eastern Europe.

There has been particular interest in tracking the implementation of bilateral policy agreements between the voluntary sector and the government, especially within and between Canada and the UK. To date, much of this analysis has been process-oriented, profiling trends and highlighting issues facing key stakeholders. By contrast, this article analyzes these policy agreements in the context of a broader Policy Implementation Framework (PIF), initially developed by Paul Sabatier and Daniel Mazmanian in the early 1980s. The application of the PIF to the policy agreements between the voluntary sector and the government reveals significant differences in how these policy agreements are being implemented in Canada and England. The article assesses the impact of material, structural and contextual variables on policy implementation, and examines the viability of using this model to assess similar agreements.

Introduction

Both Canada, in 2001, and England, in 1998, have entered into bilateral policy agreements at the national level between the voluntary sector and the government (Government of Canada, 2001; Straw & Stowe, 1998). The Canadian Accord, like the UK Compact, is a framework agreement that outlines a shared vision, values, general principles, and a mutual commitment to building a positive relationship and pursuing common purposes. The Accord is designed to strengthen the relationship between the two

¹ Peter Elson is a Ph.D. Candidate in the Department of Adult Education and Community Development at OISE/University of Toronto, specializing in the study of voluntary sector-government relations. He can be reached at 167 Garden Avenue; Toronto, Ontario M6R 1H8; peter.elson@utoronto.ca. Earlier versions of this article were presented at the 12th Biennial Social Welfare Policy Conference in Fredericton, Canada, in 2005, and at the 2006 Canadian Political Science Association Conference in Toronto. The author would like to acknowledge comments and suggestions on earlier drafts of this paper which were provided by Susan Phillips, Kathy Brock, Gary Craig, and Jack Quarter.

sectors by (1) encouraging better partnering practices; (2) fostering consistent treatment of voluntary organizations across government; and (3) promoting a better understanding within each sector of the constraints, operations, and practices of the other. The policy agreements in both countries are seen as "intention setters" that define the intended state of relations between the two sectors (K. L. Brock, 2004; Morison, 2000).

A number of policy researchers have analyzed Accord/Compact developments in Canada and England (K.L. Brock, 2004; Carrington, 2002; Craig, Taylor, Carleton, & Garbutt, 2005; Good, 2003; Morison, 2000; S. D. Phillips, 2004b). Much of this analysis has been process-focused, drawing on the seminal work of John Kingdon. It has been insightful in drawing out the dynamics of issues, policies, and politics of voluntary sector relations with the respective national governments (Kingdon, 1995).

This paper takes a different tack. I utilize a Policy Implementation Framework (PIF), which takes account not of process but of material, structural, and contextual variables (Sabatier, 1986).

Why This Framework?

Policy implementation has been viewed as a "top down" process, driven by policy implementers; a "bottom-up" process, which positions street level bureaucrats as key policy implementers; and an advocacy coalition process, which captures the dynamics of competing interests (Mazmanian & Sabatier, 1989a). Each of these models, however, is predicated on a number of conditions. The optimal model thus depends on the particular conditions.

The PIF model has been shown to be superior to a more "bottom-up" or "advocacy coalition" approach under the following circumstances: (1) when there is a dominant piece of legislation or policy structuring the situation to be analyzed; (2) when research funds are limited; (3) when the focus is on the extent of structure or constraint in the overall policy system, and mean responses are desired; and (4) when the policy process operates with at least moderate clarity and consistency (Mazmanian & Sabatier, 1989b). All of these conditions are exemplified by the Accord/Compact agreements.

Paul Sabatier and Daniel Mazmanian developed their "top-down" theoretical framework for analyzing policy implementation in the early 1980s. The framework applies a number of statutory and non-statutory variables to five identified stages in the policy implementation process (see Figure 1) (Sabatier & Mazmanian, 1980). This approach to analyzing policy implementation is grounded in policy theory, such as veto points and causal theory (Mazmanian & Sabatier, 1989b; Pressman & Wildavsky, 1973).

The PIF addresses particular policy implementation issues: (1) the extent to which implementing officials and target groups act consistently with the objectives and procedures outlined in the policy decision; (2) the extent to which policy objectives are attained; (3) the principal factors affecting policy outcomes and impacts; and (4) the policy's reformulation, if any. In addition, the PIF conceptual framework provides a broader socioeconomic context in which policy implementation issues can be addressed.

The timeframe for appropriately applying the PIF has been set at between twenty and thirty-five years, to allow for slow starts and the reemergence of issues after a hiatus. Because the voluntary sector-government agreements in Canada and England have been

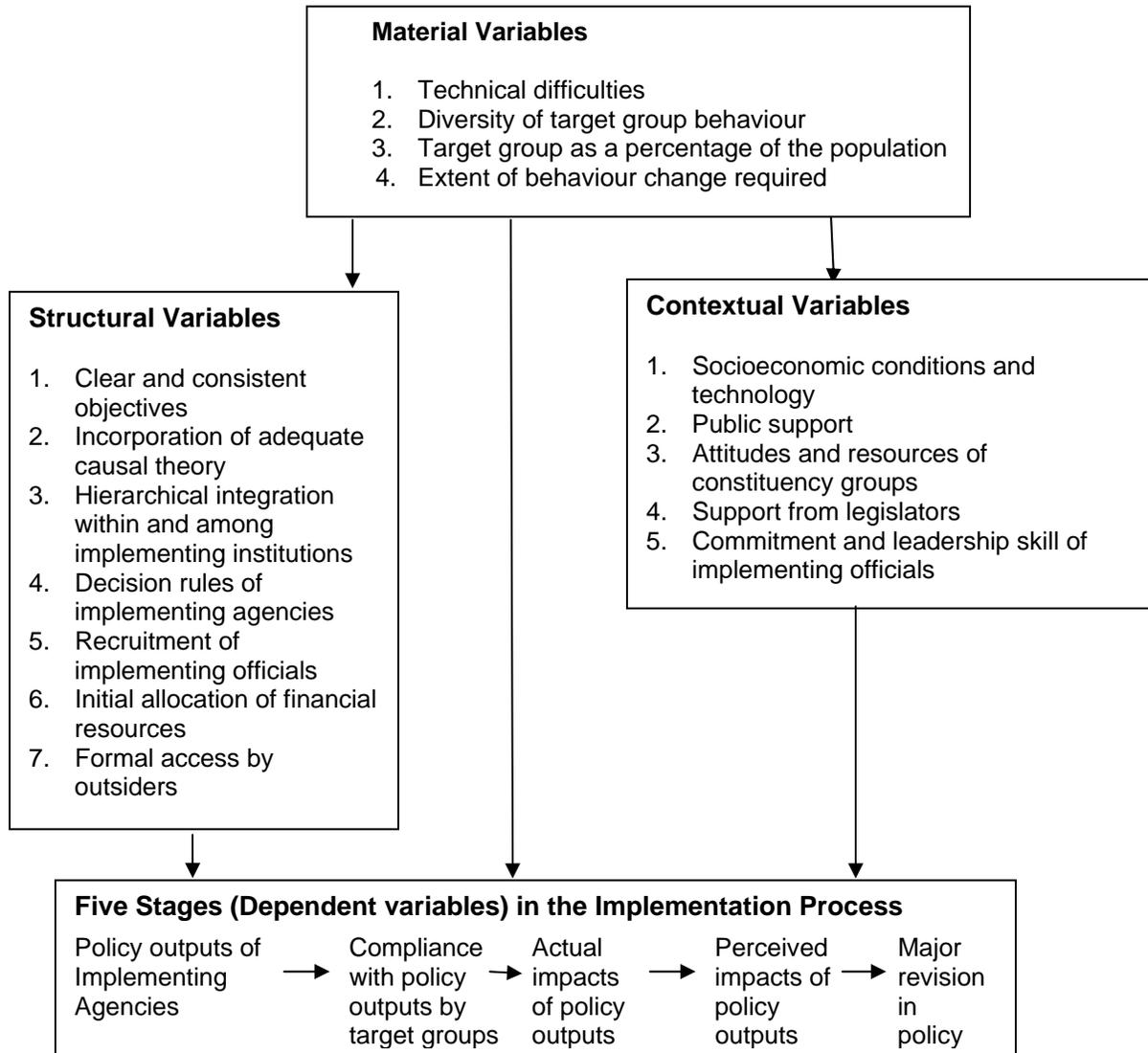
in place for only five and eight years, respectively, this paper addresses the suitability of the framework for long-term analysis, rather than offering any definitive answer as to the success of policy implementation in the two countries. However, the context in which such a policy is launched establishes some implementation success factors, and these will be identified.

The Policy Implementation Framework (PIF)

According to Mazmanian and Sabatier, the crucial role of implementation analysis is to identify the variables that affect the achievement of the policy objectives throughout the process. These variables can be divided into three broad categories: (1) the *material* variables associated with the problem(s) being addressed, (2) the *structural* dimensions that influence the implementation process, and (3) the net effect of a variety of *contextual* variables to support the policy. Mazmanian and Sabatier in turn apply these three independent variables to five stages of policy implementation.

Figure 1

Policy Implementation Framework (PIF)



Modified from Mazmanian and Sabatier (1983). *Implementation and Public Policy*. Used with permission of the author.

Material Variables

Material variables reflect the core intent of the policy. On the one hand, small and well-defined policy changes are easier to support, politically, and have a greater chance of success (Mazmanian & Sabatier, 1983). On the other hand, significant and complex changes require less-focused regulations and allow implementing officials much greater discretion.

Policy implementation is influenced by the need for hierarchical integration and the variations in bureaucratic commitment to policy objectives (Mazmanian & Sabatier, 1983). The diverse behavior in hierarchical organizations poses considerable challenges (Mazmanian & Sabatier, 1983), all the more so when combined with two additional factors, the horizontal governance across multiple government departments, and the inherent diversity of the voluntary sector (S. D. Phillips, 2004b).

Structural Variables

Seven structural variables influence policy implementation: (1) clear and consistent objectives, (2) incorporation of an adequate causal theory, (3) hierarchical integration within and among implementing institutions, (4) decision rules of implementing agencies, (5) recruitment of implementing agencies, (6) access by outsiders, and (7) the initial allocation of financial resources (Mazmanian & Sabatier, 1983).

Hierarchical integration within and among implementing institutions (e.g., federal or central government departments or agencies) is determined by two factors: the number of veto/clearance points involved in implementing the policy objectives, and the extent to which those who support the policy objectives have both incentives and sanctions to advance compliance. Veto/clearance points are defined as occasions when an intermediary has the capacity (though not necessarily the authority) to impede progress (Mazmanian & Sabatier, 1981, , 1983). This is a critical variable, as it reflects both institutional support and the commitment and leadership of implementing officials. The effects of horizontal governance, and those of conflicting priorities with existing or emerging mandates across multiple government departments, have been addressed by several researchers on both on both sides of the Atlantic (K.L. Brock, 2004; Craig et al., 2005; S. D. Phillips, 2004b).

Successfully implementing the policy also requires that external stakeholders have formal opportunities to influence implementation, and that independent entities undertake evaluation studies. If the policy is formalized in statute, then legal challenges are available. Otherwise, much depends on the commitment and skill of implementing officials, and the organized support of external stakeholders and legislators to keep the implementation process moving forward (Mazmanian & Sabatier, 1989a).

Contextual Variables

Legislators support policy implementation by controlling the nature and extent of oversight, the availability of financial resources, and the introduction of new and possibly conflicting policies (Mazmanian & Sabatier, 1983).

Another key variable is leaders recruited for the implementing agencies. These leaders must possess substantial managerial and political skill and must be committed to the policy goals. As policy "fixers," they must ensure that the policy is implemented to the fullest extent possible – a responsibility beyond what we might normally expect in light of their positions and resources.

Beyond the material and structural aspect of policy implementation, a policy needs a periodic political boost to maintain its visibility and relevance in a changing socioeconomic climate. Policy objectives should not be undermined by the emergence of conflicting public policies (Mazmanian & Sabatier, 1983). Further, a decline in the resources or the commitment of external stakeholders can enfeeble implementation (Mazmanian & Sabatier, 1983). Intermediary organizations need the membership, resources, and expertise to position themselves as strong, legitimate, essential, and continuing participants in the policy implementation process.

Five Stages of Policy Implementation

Sabatier and Mazmanian list five stages of policy implementation: (1) the policy outputs, or decisions, of departments; (2) the compliance of internal and external target groups with those decisions; (3) the actual impact of the decisions; (4) the perceived impact of the decisions and (5) the political system's revision of the original policy (Mazmanian & Sabatier, 1983). (See Figure 1.) The first three steps address policy output, and the last two address the political system's relationship to the policy. Although policy implementation is much more complex than this model depicts, these stages do reflect general tendencies in "top down" policy implementation.

Application of the PIF to the Accord with Comparisons to the Compact

Accord/Compact-like agreements have been signed by national governments in a number of countries, and by regional and local jurisdictions within countries (Bullain & Toftisova, 2005; S. D. Phillips, 2005a; Toftisova, 2005). All of these agreements have been based, to a significant degree, on the original UK Compact (S.D. Phillips, 2001). Such an agreement makes a government responsible for developing better practices in its dealings with the voluntary sector. The agreement embodies shared visions and principles, along with a commitment on the part of each side to fulfill particular responsibilities (S. D. Phillips, 2002). Both the Accord and the Compact acknowledge the independence and diversity of the voluntary and community sector. In addition, these agreements typically embody themes of accountability, governance, and representation, which can provide the foundation for more detailed codes of good practice (Elson, 2004).

Material Variables in the Accord

Target group

In the case of the Canadian Accord, the target group can be defined as relevant bureaucrats in the federal/national bureaucracy and their affiliated agencies, plus – at least potentially – all registered charities and nonprofits. In Canada, about 80,000 charities fall under federal jurisdiction (M.H. Hall, de Witt, Lasby, & McIver, 2004). To

put this number in perspective, small organizations with revenues less than \$250,000 a year make up 80 per cent of voluntary sector organizations in Canada.

Diversity of target group behavior

Before the launch of the Accord, relationships between the federal government and voluntary organizations varied widely. This framework suggests that these initial trajectories have often continued. Although systematic implementation data are sketchy, there is reason to believe that the departments that have been most successful in initial policy implementation are the ones that already had constructive working relationships with voluntary organizations. In the 2003 voluntary sector report on the implementation of the Canadian Accord, the majority of respondents reported a good relationship with the federal government, yet over half reported little or no change in that relationship (K.L. Brock, 2004). In addition, an internal government survey reveals that more socially oriented departments (e.g., Heritage Canada, Social Development Canada, and Health Canada) were ahead of others in implementing the Accord.²

Structural Variables in the Accord/Compact

Clear and consistent objectives?

The Accord in Canada is very general and lacks any specific departmental commitments. Trade-offs between policy options were not confronted during negotiations, and the parties did not develop an operational framework for choosing among alternative program initiatives before signing the Accord (Good, 2003).

Two Codes of Good Practice (Funding and Policy Dialogue) were developed subsequent to the Accord to put some of the Accord principles into practice in both government and voluntary sector organizations. The Canadian Code of Good Practice on Funding, for example, specifies that the government will "use multi-year funding agreements and develop and implement mechanisms to facilitate their use" and "manage funds effectively to eliminate problems caused by the distribution of a concentrated amount of funding to organizations at the end of the fiscal year" (VSI, 2002, 13). Yet even the Codes of Good Practice often leave considerable room for interpretation.

Valid causal theory?

How well understood are the policy statements outlined in the Accord? The Accord itself grew out of broad-based but disconnected voluntary sector representation and a short-lived "feel-good" political agenda on the part of the Liberal government (Johnston, 2000, , 2005; S. Phillips, 2003). In particular, the government wanted to avoid contentious areas (e.g., advocacy, financing) and achieve a concrete "deliverable" – the Accord – by the end of the International Year of Volunteers in 2001 (K. L. Brock, 2004; S. Phillips, 2003; S. D. Phillips, 2004a).

A valid causal theory also requires that officials responsible for implementing the program have the authority necessary to succeed – or, put differently, that they have jurisdiction over a sufficient number of the critical linkages needed to achieve the policy objectives (Mazmanian & Sabatier, 1983). In Canada, three of the most significant

² The author had direct access to an internal government survey on implementation of the Accord.

voluntary sector initiatives are divided between different departments, and six different layers of responsibility lie between the lead ministers and the horizontal requirements directed to deputy ministers (K.L. Brock, 2004). Without a central coordinating body with authority to direct other departments, the result is myriad veto/clearance points.

Hierarchical integration in departments?

The degree of hierarchical integration depends on, first, the number of veto/clearance points in the attainment of policy objectives; and, second, the extent to which supporters of those objectives can forestall potential vetoes through inducements and sanctions.

One positive example has been the Canadian Revenue Agency, responsible for charity registration and regulation. The Canada Revenue Agency has enhanced its transparency; increased its consultations with the sector; clarified its advocacy regulations; and initiated a Charities Advisory Committee, although the latter has recently been suspended by the recently elected minority Conservative government (Carter, 2006; CCRA, 2005; Johnston, 2005).

However, consistent vertical and horizontal implementation remains an ongoing challenge for both the sector and the government (Compact, 2005a ; Eakin, 2005; Voluntary Sector Forum, 2005). For example, only in March 2006, following a very public clash, did the federal government post the position of a "fairness advisor" to intervene in contract disputes (Service Canada, 2006). By contrast, the English Compact strategically provided for a mediation process to resolve differences, a mechanism that has been exercised on a number of occasions (Straw & Stowe, 1998).

Decision rules of implementing agencies?

In Canada, a series of Auditor General's reports highlighted weaknesses in federal funding of the private sector, which in turn cast a shadow over *all* agreements, including those with voluntary sector organizations. The result has been significant increases in accountability and reporting requirements, greater micromanagement, and a general reluctance of government departments to take any risks (Eakin, 2005; S. D. Phillips & Levasseur, 2005; Scott, 2003). These practices violate the spirit of the Accord and the terms outlined in the Codes of Good Practice for Funding, which together explicitly acknowledge the independence of the voluntary sector and call for multiyear and flexible funding agreements (Government of Canada, 2001 ; VSI, 2002).

Officials' commitment to policy objectives?

No matter how well a policy structures the formal decision-making process, the objectives cannot be attained without the support of officials in the implementing agencies (Mazmanian & Sabatier, 1983). Any new program requires implementers who can and will develop necessary regulations and enforce them in the face of resistance from bureaucrats or others.

The Accord fundamentally addresses horizontal governance, so "champions" have been appointed or designated to assume the lead for implementing the Accord in different departments. These champions' status and authority, and thus their impact, vary considerably. Often an assistant deputy minister, a champion liaises with the lead department, Social Development Canada, and "spreads the word" at the departmental

level (K.L. Brock, 2004). Though it is still early in the implementation process, champions thus far appear to have produced more promotional sizzle than regulatory substance.

Phillips points out that an issue remains politically salient when ministers and deputy ministers are involved in the decision-making process. Without such decision points, they are likely to disengage, leaving middle managers with few incentives to stay atop issues that are not central to their mandate (S. D. Phillips, 2004b). At the same time, the voluntary sector needs to do much within its own ranks to raise importance of this policy, by collectively taking steps to address implementation issues (Johnston, 2005).

Formal access by outsiders and independent evaluation?

Policy implementation will be affected by the extent to which target group representatives are able to participate through formal decision-making forums and independent evaluation studies (Mazmanian & Sabatier, 1983).

In Canada, most individual organizations must struggle on their own to address or absorb any policy discrepancies, while in the UK a dispute resolution process was built in to the Compact agreement (Eakin, 2005; Goar, 2005; S. D. Phillips, 2003; Scott, 2003; Service Canada, 2006). The Accord as well as the Compact's policy status (as distinct from having formal legal status) limits the availability of any legal venues. So developing and maintaining a mutually beneficial relationship assumes particular importance for both parties, politically as well as practically.

Formal evaluation studies by relatively independent observers can help to achieve policy objectives (Mazmanian & Sabatier, 1983). In Canada, there has been no call to date for a systematic or independent implementation data-collection process (Government of Canada, 2003; Government of Canada, 2004; Voluntary Sector Forum, 2003; Voluntary Sector Forum, 2004).

Adequate financial resources to achieve launch?

Money is critical. Without it, staff can't be hired, regulations remain undeveloped, programs are not administered, and compliance goes unmonitored. In general, a threshold of funding is required in order to launch the program; funds allocated above this threshold can be proportionally related to the ultimate achievement of policy objectives (Mazmanian & Sabatier, 1983). Inadequate funding can doom a policy program before it gets started. Because funding must be reviewed periodically by the legislature, funding represents an important indicator of legislative and executive support for the program. In Canada, though an initial \$95 million was allocated to voluntary sector initiatives over a five-year period, far less than \$1 million was allocated to support implementation of the Accord within the sector, and no new funds were announced in the 2005 budget (Christie, 2005).

In England, new investments in voluntary sector capacity are an ongoing part of a ten-year strategic plan, including the most recent £70 million addition to an initial £80 million allocated to build sectoral capacity at a national and local level (HomeOffice, 2005). These investments are also leveraged by the mainstream role of voluntary organizations as exemplified by their growing role in service delivery, the 2002 cross-

cutting review, and the active and rigorous scrutiny the Compact has received from academic researchers and dedicated media.

Comparative Policy Implementation Status

To answer the question of where the Compact and the Accord are in the context of this framework, published research and implementation reports were analyzed and two senior representatives of the voluntary sector in Canada and England with an intimate knowledge of the Accord/Compact were interviewed. Notwithstanding the variance in time-frames between the two agreements, the following factors were assessed: clarity and consistency of policy objectives; the adequacy and validity of causal theory and jurisdiction; a supportive implementation process (assignment to sympathetic agencies, adequate hierarchical integration, supportive decision rules, and sufficient financial resources); commitment and skill of implementing officials; continuing backing from supporters and legislators; and changes in supportive conditions.

For the majority of variables (seven of ten) profiled in Table I (see below), Canada's policy implementation status was rated low-moderate (notable obstacles to effective implementation, though with some factors conducive to implementation). Of the remaining three variables, supportive decision rules and formal access by supporters were rated low; and clear and consistent objectives was given a moderate rating.

In England (national level only), eight of ten variables were given a moderate or a moderate to high (strong asset in effective implementation of policy objectives); and the remaining two, assignment to sympathetic agencies and supportive conditions not undermined, received a high rating.

Table I

	<u>Canada</u> (yrs 1-2)	<u>England</u> (yrs 1-5)
1. Clear and consistent objectives	moderate	moderate
2. Adequate causal theory	low - moderate	moderate- high
3. Implementation process enhances compliance		
a) assignment to sympathetic agencies	low-moderate	high
b) adequate hierarchical integration	low	moderate
c) supportive decision rules	low-moderate	moderate
d) sufficient financial resources	low-moderate	moderate – high
e) formal access by supporters	low	moderate - high
4. Committed and skilful implementing officials	low – moderate	moderate
5. Support of interest groups and legislators	low – moderate	moderate - high
6. Supportive conditions not undermined	low – moderate	high
Overall Rating of Implementing Effectiveness (to date)	minimal	adequate/ substantial

HIGH = A strong asset in effective implementation of policy objectives
MODERATE = Conducive to effective implementation, although some problems
LOW = Notable obstacle to effective implementation
NEUTRAL = Factor played little or no role implementation effort

At this point Canada's trajectory reflects a modest initial effort with a less than medium degree of policy conformity. Only time will tell if the current support will

gradually erode, improve, or undergo a hiatus and be resurrected later if conditions change. The actual policies outlined in the Accord and the Codes are conducive to their implementation, but a lack of authority, direction, and priority in relation to existing policies has clearly slowed policy implementation.

In England, the political and policy dynamics combined to provide a strong initial launch of the Compact. It has subsequently received a number of "boosts" to keep the Compact timely, relevant and on the forefront of the governments' political and policy agenda. The voluntary sector has risen to the occasion through the work of the NCVO as a voice for the sector; policy researchers have scrutinized developments on an on-going basis; and substantive support has been received from the media.

Comparative Political Contexts

A policy may establish the basic structure under which the politics of implementation take place, but it is also driven by (a) the need for constant or periodic infusion of political support to override competing agendas, and (b) the constituencies on whose support the policy depends (Mazmanian & Sabatier, 1983).

Attitudes and Resources of Constituency Groups

Changes in the resources and attitudes of constituency groups also play a role in the achievement of policy objectives. In Canada, the voluntary sector fell over the Accord finish line operationally exhausted and politically impoverished, resulting in a significant turnover of leadership within the voluntary sector, a situation from which it is just now starting to emerge (S. D. Phillips, 2004b).³

In addition, the federal system of government in Canada means that the operations of many voluntary organizations are not touched by the federal government in any meaningful way beyond the requirements for charitable registration. Such organizations see the Accord as peripheral to their core interests, which are more likely to be funded by provincial or territorial governments.

In England, the NCVO clearly has held, and continues to hold, the voice for the voluntary sector, and has been a lead participant in many sectoral policy issues (NCVO, 2004). The NCVO is well resourced by the government and its members to provide both technical support to organizations and a strong policy and research voice for the sector (NCVO, 2005a). The NCVO has played a leading role in supporting the implementation of the Compact, educating the sector, and advocating for its implementation both nationally and locally (NCVO, 2004).

The issue of sectoral representation is one of the dividing lines in the policy landscape in Canada and England. In England representatives of umbrella organizations are viewed as holding the collective voice for the whole sector, providing legitimacy and responsibility to their deliberations, and they are recognized as such by the central government. In Canada, by contrast, the federal government officially recognized

³ A planned reconfiguration of the Voluntary Sector Forum is much more inclusive than was previously the case, and the recent emergence of Imagine Canada has established a policy presence in Ottawa. However, chronic under-funding of many voluntary organizations continues to undermine their capacity to participate in, or pro-actively lead, collective sector-centered policy discussions.

individuals as being merely "representative" of the voluntary sector, without the legitimacy to speak for or represent a broader constituency (S. Phillips, 2003). This lack of voice and legitimacy, in Phillips's view, is a major weakness in voluntary sector-government relations (S. D. Phillips, 2005b). In addition, the federal government has allocated no sustainable resource base for the sector to organize and represent itself.

Support from Legislators

There is also a significant difference in the policy context in which the voluntary sectors operate in Canada and England. A series of dedicated and enthusiastic ministers for the voluntary sector in England have served to maintain a strong political profile for the sector (Etherington, 2005). NCVO's Parliamentary Team coordinates on-going relations with, and deputations to, both houses of parliament. In addition, a "secondment" scheme provides the opportunity for an MP to be "seconded" or temporarily transferred to a voluntary organization for a limited time. This secondment, which provides the MP with an intimate and inside view of the voluntary organization, is followed by appropriate recognition from the program patron, the Speaker of the House (NCVO, 2005b).

A line department of the federal government in Canada, Social Development Canada, has been given the lead for horizontal implementation, which itself has major policy priorities unrelated to, and disconnected from, the voluntary sector; and no hierarchical relationship to other departments with leading roles with respect to the voluntary sector (SDC, 2005a).

The concerns of the voluntary sector at large are largely invisible to federal MPs, and rarely are deputations or targeted events orchestrated outside standing committee hearings. In spite of the fact that Canada's voluntary sector, as a percentage of its active work force, is the second largest in the world (after the Netherlands), the federal government has no minister dedicated to the voluntary sector (M.H. Hall, Barr, Easwaramoorthy, Sokolowski, & Salamon, 2005). A further challenge facing the status of the Accord is that though former liberal Prime Minister Jean Chrétien signed the Accord, it neither had all party support nor was introduced in the House of Commons, and thus subsequent governments – even Liberal ones – may wish to distance themselves from it (K. L. Brock, 2004). According to Phillips, the fact that the Accord does not need to be tabled with a committee or Parliament was a fundamental mistake that greatly weakens its implementation (S. D. Phillips, 2005b)

In England, the Home Office's Active Community Directorate, under the auspices of the Home Secretary, coordinates Government departments' work on the Compact and promotes its scope across Government, including Government Offices for the Regions, Executive Agencies, and non-departmental public bodies (NDPBs). The Compact Advocacy Program and direct reporting to Parliament provide England with two important indicators of transparency and compliance. In addition, the NCVO and others on the Compact Working Group play a key watchdog role and monitor Compact compliance.

Policy Outputs

Policies will go a long way toward implementation under the following conditions: the Codes, in this context, are consistent with the policy agreement; the target

groups comply with the codes; there is no serious "subversion" of the policy outputs; and there is a clear causal link between the desired changes and the policy objectives.

One of the most visible byproducts of these agreements to date, from a policy perspective, is the development of a number of agreed-upon codes of good practice. Two such codes have been developed in Canada, one pertaining to Policy Dialogue, the other to Funding (Voluntary Sector Initiative: VSI, 2005). In England, five codes of good practice have been developed, addressing issues related to Black and Minority Ethnic Groups, Community Groups, Consultation and Policy Appraisal, Funding & Procurement, and Volunteering (Compact Working Group, 2005).

The Funding/Policy-related Codes are clearly consistent with the spirit and intent of the Accord/Compact agreements, and there also is a clear link between the Codes and the desired changes and policy objectives. While there appears to be no serious "subversion" of policy outputs, the challenge of horizontal policy implementation and competing policy demands cannot be underestimated, particularly when a relationship with the voluntary sector is critically important to some departments and virtually nonexistent in others (S. D. Phillips, 2004b).

Actual Impact?

Because the Accord/Compact is a policy framework, and not a statutory piece of legislation that would get translated into numerous regulations, conformity of decisions with policy objectives depends on the ability of constituency groups (e.g., Voluntary Sector Forum/NCVO) and legislators/senior managers who support the policy to actively intervene in the implementation process.

The degree of professional collegiality that dominates government-social sector relations in Canada tends to slow down implementation, as incremental consensus takes over deliberations (K.L. Brock, 2004; S. D. Phillips, 2004b; Tuohy, 1999). For example a two-year task force has been created with government and sector representatives to bring federal policies and practices in line with the Code of Good Practice on Funding (SDC, 2005b). There are specific cases where improvements have taken place, and there is now a growing abundance of resource information for voluntary sector organizations, but only selected anecdotal evidence indicates any institutional shift (Government of Canada, 2003; Government of Canada, 2004; Voluntary Sector Forum, 2003; Voluntary Sector Forum, 2004; Patten & Sarkar, 2003; Patten & Scotti, 2004). Further movement will depend as much on the desire of the federal government to sustain the terms of their relationship with the voluntary sector, as it will on the capacity of the voluntary sector to clearly and consistently hold the federal government accountable (Johnston, 2005).

The mainstreaming of the voluntary sector in England was a key means for Blair to deliver on his "Third Way" themes of liberalized public service delivery and civil renewal (Elson, 2004; Giddens, 1998; Kendall, 2000; S. D. Phillips, 2002). This close relationship between the voluntary sector and core government policies has been a critical factor in the development and maintenance of a strong policy and political relationship. Reflecting the degree of support for the Compact and voluntary sector; a cross-cutting review took place in 2002; a number of progressive policy documents have been generated by the Active Communities Unit; and after four years, almost 98 percent of the

388 local authorities either have or are negotiating local compacts (Compact, 2005b; HM Treasury, 2005).

Politicians may be more interested in the perceived impact on the government at large, individual departments, and key constituency groups. In this context, Blair's "Third Way" agenda is continuing to push the voluntary sector role in public service delivery while NCVO and others are also working to revive the civil renewal agenda (Etherington, 2005). The Accord, by contrast, has had little political visibility in Canada since its signing in 2001.

The impact on individual voluntary organizations is likely to vary as widely as the capacity of the organizations themselves and the commitment of their corresponding government departments. In this context, intermediary organizations, such as NCVO in England, and the Voluntary Sector Forum and Imagine Canada - come to the fore as voices for the sector and as means to systematically monitor practices (K. L. Brock, 2004; S. D. Phillips, 2004b).

Conclusion

This PIF model focuses on the "top-down" dimension of policy implementation, providing a framework to examine in considerable detail the material variables that contextualize the key policy parameters; the structural variables that influence its launch and adoption; and the contextual variables that provide, sustain, or diminish its implementation. Future use of this model will need to consider the impact of horizontality and bilateral obligations in this type of policy implementation. Regardless, the Policy Implementation Framework serves a number of purposes. It provides a means to clearly identify and analyze the leading independent variables and their impact on both the formation and implementation of policy, particularly where the focus is on the implementation of the policy rather than on policy processes. It also provides, in this particular case, a means to compare the policy implementation trajectories of two policies which, though similar in philosophy, operate in two different political contexts, and which may be extended to other contexts.

This research introduces an opportunity to start exploring the implementation of bilateral government-voluntary sector agreements in the full light of day. Without making direct causal claims, the PIF does add to our understanding of the implementation of Accord/Compact agreements and provides a new means to systematically monitor their progress over time.

References

- Brock, K. L. (2004). *A Comprehensive Canadian Policy Toward the Third Sector? Defacto or Default?* Paper presented at the 33rd ARNOVA Annual Meeting, Los Angeles, CA.
- Brock, K. L. (2004). The Devil's in the Detail: The Chrétien Legacy for the Third Sector. *Review of Constitutional Studies*, 9(1&2), 263-282.
- Bullain, N., & Toftisova, R. (2005). A Comparative Analysis of European Policies and Practices on NGO-Government Cooperation. *International Journal of Not-for-Profit Law*, 7(4), 64-115.
- Canada, G. o. (2001). *An Accord between the Government of Canada and the Voluntary Sector*. Ottawa.

- Canada, G. o. (2003). *Taking the Accord Forward: The First Report to Canadians on Implementing An Accord Between the Government of Canada and the Voluntary Sector - Background Paper: Government of Canada Implementation*. Ottawa: Government of Canada.
- Canada, G. o. (2004). *The Journey Continues: The Second Report to Canadians on Implementing An Accord Between the Government of Canada and the Voluntary Sector- Background paper / Government of Canada Implementation*. Ottawa: Government of Canada.
- Carrington, D. (2002). *The Compact - the Challenge of Implementation*. London: The Active Community Unit.
- Carter, T. S. (2006). CRA Suspends Advisory Committee. *Charity Law Update* (May-June).
- CCRA. (2005). Future Directions and the Charities Directorate. Retrieved May 25, 2005, from www.cra-arc.gc.ca/agency/directions/charities-e.html
- Christie, J. (2005). Personal Correspondence (Voluntary Sector Forum). Ottawa.
- Compact, W. G. (2005a). The Compact: Working Together / Better Together. Retrieved May 5, 2005, from www.thecompact.org.uk/.
- Compact, W. G. (2005b). Local Compact Progress by Area list. Retrieved May 30, 2005, from www.thecompact.org.uk/C2B/document_tree/ViewACategory.asp?CategoryID=116
- Craig, G., Taylor, M., Carleton, N., & Garbutt, R. (2005). *The Paradox of Compacts: Monitoring the Impact of Compacts*. London: Home Office Research, Development and Statistics Directorate.
- Eakin, L. (2005). *The Policy and Practice Gap: Federal Government Practices Regarding Administrative Costs When Funding Voluntary Sector Organizations*. Ottawa: Voluntary Sector Forum.
- Elson, P. (2004). Advocacy and Third Way Politics: Canada and the United Kingdom. *The Philanthropist*, 18(No. 3), 215-224.
- Etherington, S. (2005). Personal communication [interview notes]. May 27, 2005.
- Forum, V. S. (2003). *Taking the Accord Forward: The First Report to Canadians on Implementing An Accord Between the Government of Canada and the Voluntary Sector - Background Report: Voluntary Sector Implementation*. Ottawa: The Voluntary Sector Forum.
- Forum, V. S. (2004). *The Journey Continues: The Second Report to Canadians on Implementing An Accord Between the Government of Canada and the Voluntary Sector - Background paper: Voluntary Sector Implementation*. Ottawa: Voluntary Sector Forum.
- Forum, V. S. (2005). The Accord and Codes of Good Practice. Retrieved May 5, 2005, from www.voluntary-sector.ca/eng/accord_and_codes/index.cfm
- Giddens, A. (1998). *The Third Way: The Renewal of Social Democracy*. Cambridge, UK: Polity Press.
- Goar, C. (2005). Red tape throttles charities. Retrieved August 5, 2005, from <http://www.thestar.com>
- Good, D. A. (2003). Promises and Pitfalls: Experience in Collaboration between the Canadian Federal Government and the Voluntary Sector. *Journal of Policy Analysis and Management*, 22(1), 122-127.
- Group, C. W. (2005). The Compact: Working Together / Better Together. Retrieved May 5, 2005, from <http://www.thecompact.org.uk/>.
- Hall, M. H., Barr, C. W., Easwaramoorthy, M., Sokolowski, S. W., & Salamon, L. M. (2005). *The Canadian Nonprofit and Voluntary Sector in Comparative Perspective*. Toronto: Imagine Canada.
- Hall, M. H., de Witt, M. L., Lasby, D., & McIver, D. (2004). *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations*. Ottawa: Statistics Canada.
- HomeOffice. (2005). *Developing Capacity: Next Steps for Change Up - Developing Excellence in the Voluntary and Community Sector*. London: Active Communities Unit: Home Office.
- Johnston, P. (2000). *Lessons Learned*. Paper presented at the Independent Sector 2000 Annual Conference Pre-Session - Building Global Democracy & Civil Society, Washington, DC.

- Johnston, P. (2005). Personal Communication. May 26, 2005. Toronto.
- Kendall, J. (2000). *The mainstreaming of the third sector into public policy in England in the late 1900s: Whys and wherefores: Civil Society Working Paper 2*. London: London School of Economics: Centre for Civil Society.
- Kingdon, J. W. (1995). *Agendas, Alternatives, and Public Policies* (2 ed.): Harper Collins College Publishers.
- Mazmanian, D. A., & Sabatier, P. A. (1981). *Effective Policy Implementation*. Lexington, MA: Lexington Books.
- Mazmanian, D. A., & Sabatier, P. A. (1983). *Implementation and Public Policy*. Dallas: Scott, Foresman & Co.
- Mazmanian, D. A., & Sabatier, P. A. (1989a). *Implementation and Public Policy with a New Postscript*. Lanham, MD: University Press of America.
- Mazmanian, D. A., & Sabatier, P. A. (1989b). Top-down and bottom-up approaches to implementation research: a critical analysis and suggested synthesis. In *Implementation and Public Policy with a New Postscript*. Lanham, MD: University of America Press.
- Morison, J. (2000). The Government-Voluntary Sector Compacts: Governance, Governmentality, and Civil Society. *Journal of Law and Society*, 27(1), 98-132.
- NCVO. (2004). *Annual Review & Impact Report 2003-2004*. London: National Council of Voluntary Organisations.
- NCVO. (2005a). About NCVO. Retrieved July 28, 2005, from www.ncvo-vol.org.uk/asp/search/ncvo/main.aspx?siteID=1&slID=2
- NCVO. (2005b). Campaigns. Retrieved May 18, 2005, from www.ncvo-vol.org.uk/render.aspx?siteID=1&slID=2&subSID=293&documentID=274&pageID=238
- Patten, M., & Sarkar, E. (2003). *Taking the Accord Forward: The First Report to Canadians on Implementing An Accord Between the Government of Canada and the Voluntary Sector*. Ottawa: Voluntary Sector Initiative (Canada).
- Patten, M., & Scotti, S. (2004). *The Journey Continues: the Second Report to Canadians on Implementing An Accord Between the Government of Canada and the Voluntary Sector*. Ottawa: Voluntary Sector Initiative (Canada).
- Phillips, S. (2003). In Accordance: Canada's Voluntary Sector Accord from Idea to Implementation. In K. L. Brock (Ed.), *Delicate Dances: Public Policy and the Nonprofit Sector*. Montreal & Kingston: McGill - Queen's University Press.
- Phillips, S. D. (2001). A Federal Government - Voluntary Sector Accord: Implications for Canada's Voluntary Sector. Retrieved August 3, 2005, from www.vsi-isbc.ca/eng/joint_tables/accord/pdf/phillips.pdf.
- Phillips, S. D. (2002). Voluntary Sector - Government Relationships in Transition: Learning from International Experience for the Canadian Context. In K. Brock & K. G. Banting (Eds.), *The Nonprofit Sector in Interesting Times: Case Studies in a Changing Sector* (Vol. 2). Montreal & Kingston: McGill-Queen's University Press.
- Phillips, S. D. (2003). Voluntary Sector-Government Relationships in Transition: Learning from International Experience for the Canadian Context. In K. L. Brock (Ed.), *Delicate Dances: Public Policy and The Nonprofit Sector* (pp. 17-70). Montreal & Kingston: McGill-Queen's University Press.
- Phillips, S. D. (2004a). The Limits of Horizontal Governance: Voluntary Sector - Government Collaboration in Canada. *Society and Economy*, 26(2-3), 393-415.
- Phillips, S. D. (2004b). *Testing the Limits of Horizontal Governance: Voluntary Sector - Government Collaboration in Canada*. Paper presented at the International Research Symposium on Public Management, Budapest, Hungary.

- Phillips, S. D. (2005a). *Civil Society Excellence: comparative overview of the joint strategies / agreements [unpublished]*. Paper presented at the Civil Society Excellence: An International Seminar on Strategies and Agreements between the Public Sector and the Nonprofit Sector, May 3-5, 2005, Tallinn, Estonia.
- Phillips, S. D. (2005b). Personal communication, received June 18, 2005. Ottawa.
- Phillips, S. D., & Levasseur, K. (2005). The Snakes and Ladders of Accountability: Contradictions between contracting and collaboration for Canada's voluntary sector. *Canadian Public Administration*, 47(4), 451-474.
- Pressman, J., & Wildavsky, A. (1973). *Implementation*. Berkley: University of California Press.
- Sabatier, P. A. (1986). Top-Down and Bottom-Up Approaches to Implementation Research: A Critical Analysis and Suggested Synthesis. *Journal of Public Policy*, 6(1), 21 - 48.
- Sabatier, P. A., & Mazmanian, D. A. (1980). The Implementation of Public Policy: A Framework of Analysis. *Policy Studies Journal*, 8(4), 538 - 560.
- Scott, K. (2003). *Funding Matters: The Impact of Canada's New Funding Regime on Nonprofit and Voluntary Organizations*. Ottawa: Canadian Council on Social Development.
- SDC. (2005a). Social Development Canada (services). Retrieved August 3, 2005, from <http://www.sdc.gc.ca/en/home.shtml>
- SDC. (2005b). Task Force on Community Investments. Retrieved July 28, 2005, from www.vsi-isbc.ca/eng/funding/task_force.cfm
- Service Canada. (2006). Service Canada / Voluntary Sector Joint Working Group Memorandum - March 2006. [electronic source] accessed May 1, 2006, from <http://www1.servicecanada.gc.ca/en/epb/sid/cia/CCSB/memorandum0306.shtml>
- Straw, J., & Stowe, K. (1998). *Compact: Getting it Right Together – Compact on Relations Between Government and the Voluntary Sector in England*. London: Secretary of State for the Home Department.
- Toftisova, R. (2005). Implementation of NGO-Government Cooperation Policy Documents: Lessons Learned. *International Journal of Not-For-Profit Law*, 8(1), 11-41.
- Treasury, H. (2005). The role of the Voluntary Sector in Public Service Delivery. Retrieved July 28, 2005, from www.hm-treasury.gov.uk/spending_review/spend_ccr/spend_ccr_voluntary/spend_ccr_voluntary.cfm
- Tuohy, C. H. (1999). *Accidental Logistics: The Dynamics of Change in the Health Care Arena in the United States, Britain and Canada*. Oxford: Oxford University Press.
- VSI. (2002). *A Code of Good Practice on Funding: Building on An Accord Between the Government of Canada and the Voluntary Sector*. Ottawa: Voluntary Sector Initiative (Canada).
- VSI. (2005). Government - Voluntary Sector Relationship / Voluntary Sector Initiative. Retrieved May 25, 2005, from www.vsi-isbc.ca/eng/relationship/index.cfm
- Voluntary Sector Forum (2003). *Taking the Accord Forward: The First Report to Canadians on Implementing a Accord Between the Government of Canada and the Voluntary Sector – Background Report: Voluntary Sector Implementation*, Ottawa.
- Voluntary Sector Forum. (2004). *The Journey Continues: The Second Report to Canadians on Implementing An Accord Between the Government of Canada and the Voluntary Sector - Background paper: Voluntary Sector Implementation*, Ottawa.
- Voluntary Sector Forum. (2005). *The Accord and Codes of Good Practice*. Retrieved May 5, 2005, from www.voluntary-sector.ca/eng/accord_and_codes/index.cfm

**SPECIAL SECTION: ACCOUNTABILITY, EFFECTIVENESS, AND
INDEPENDENCE — STRIKING THE PROPER BALANCE**

**Democratization and the Dilemmas
of Media Independence**

Craig LaMay¹

No one can be good for long if goodness is not in demand.

– Bertolt Brecht

Since about the mid-1970s, democratic transitions in Latin America, Africa, Asia, and Europe have occurred with important contributions from the civil society sector, including a broad array of media, not just news organizations but also entertainment and public relations media. The questions still confronting many of these countries is whether their transitions are permanent or passing, and if the former, what obstacles lie in the way of democratic consolidation. Perhaps the largest obstacle, writes Samuel Huntington, is the recognition that "democracy is a solution to the problem of tyranny, but not necessarily to anything else."² Poverty, ethnic and racial conflict, inadequate economic development, chronic inflation with substantial external debt, and political leaders – many of them former dissidents – who are not fully committed to the democratic ideal of lawful and peaceful transitions of power, all militate against successful consolidation. In transition countries as varied in their political, economic, and cultural experience as Russia, Indonesia, and Guatemala, democracy's hold has been irresolute.

Media assistance is intended in some way to address these problems. For journalists, the idea behind media aid is both obvious and uncontroversial – if a people are to be sovereign, they must be able to receive a wide variety of ideas, to criticize the government and, more generally, to circulate information related to public affairs. "Free elections" do not mean much if the government's opponents have been gagged and their platform banned from public discussion. News media make sovereignty meaningful by acting literally as the medium through which actions taken in civil society find their expression in political and economic society and, eventually, their manifestation in public policy. Official assistance providers – such as, in the case of the United States, the Agency for International Development (USAID) – also endorse the idea that press

¹ Craig L. LaMay, an assistant professor at Northwestern University's Medill School of Journalism, is the editor most recently of *Journalism and the Debate Over Privacy* (Erlbaum, 2003). His book *Exporting Press Freedom: Economic and Editorial Dilemmas in International Media Assistance*, from which this article is adapted, is forthcoming from Transaction Books. Copyright 2006 by Craig L. LaMay.

² Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1992), 263.

freedom is a "fundamental" democratic goal,³ but in practice view media assistance as a more instrumental good. Historically it has been associated with efforts to organize and hold free elections, in which the role of media is to provide voters with information about parties, candidates, polling places and times, and so on. More broadly, the purpose of media assistance (and other forms of democracy assistance) is to ensure that other, more traditional forms of development aid are used productively and not siphoned off by corrupt or incompetent governments. Official democracy aid, in other words, is supposed to provide at least some measure of transparency and accountability in international economic development. Private providers of media assistance – for example, non-governmental organizations such as the Open Society Institute (OSI) and the International Center for Journalists (ICFJ) – will often work to advance these goals as contractors with government aid agencies, but they will also emphasize goals of their own, such as promoting civil society, advancing women's rights, and securing the rights of free expression and a free press.

The recipients of media assistance – journalists in developing and democratizing countries – will typically describe "democratic" media as serving two broad goals. The first is "building a culture of free expression," to which end journalists will talk about a range of issues associated with the "watchdog" role of the press and the need to provide citizens with access to news and information. This conception will often compete with another, quite different one that emphasizes providing citizens access to the instruments of communication, perhaps even against the prerogatives of those who own them, and especially where ownership is concentrated in the state or in private centers of economic power. This conception links media firmly to civil society promotion – "enhancing the bonds of community, building citizenship, and promoting individuality," as one Filipino journalist and educator explained it to me.⁴ These conceptions are not mutually exclusive, and they are joined in a common inquiry: How does a society create and sustain media that engage the public in democratically centered discourse? From this follows several related questions: What is the role of the state in creating and sustaining an independent and diverse press? What about the seemingly intractable problem of inhospitable environments – from coercive governments, antiquated press laws, and marginalized populations, on the one hand, to public apathy and unfavorable markets, on the other? What strategies can journalists in developing societies realistically employ to circumvent, if not overcome, these obstacles free press development?

Unfortunately for the would-be media system architect, there are no good answers to these questions. There exists great disagreement even in established Western democracies about what "free" and "independent" media look like, what purposes they

³ See Lorne W. Cramer, "Promoting Free and Responsible Media: An Integral Part of America's Foreign Policy," U.S. Department of State, 2003, at <http://uninfo.state.gov/journals/itgic/0203/ijge/gj01.htm> (accessed June 15, 2004). Cramer was Assistant Secretary of State for Democracy, Human Rights and Labor in the first George W. Bush term. He is currently president of the International Republican Institute.

⁴ Melinda Quintos de Jesus, executive director, Center for Media Freedom and Responsibility, Manila, Philippines, author interview, Denpasar, Indonesia, September 10, 2002.

serve, and to whom and how they are held accountable.⁵ Despite this, it is easy to find, in even the academic literature, breezy proclamations about the global "triumph" of "Western" journalistic standards.⁶ This makes no more sense than it does to talk about "Western-style" democracy. The United States and the United Kingdom, for example, have both very different media systems and quite different ideas of what makes a democracy work. Thomas Carothers has written that "the principles of democracy are quite clear,"⁷ but the principles of democracy are also breathtakingly few. "Democracy has no theory to export," Jacques Barzun wrote in 1989, in advance of the democracy aid soon to flow to Central and Eastern Europe, "because it is not an ideology but a wayward historical development."⁸ At best, he said, democracy has a theorem: that for people to be free they must also be sovereign, and the necessary conditions for sovereignty are political and social equality. How they exercise that sovereignty, what mechanisms they use to ensure equality and to distribute freedoms, is left to them to decide. As a result, institutional forms of democracy vary significantly. Americans, for instance, would find the social regulatory regimes in Switzerland or Sweden oppressive, the coalition governments of Germany, France or Italy a hindrance to effective decision-making, and Holland's non-majoritarian, proportional system of party representation incomprehensible. One might seek to copy any of these as a device for the expression of popular will, or invent something completely different.

So, though it is fine to talk in broad terms about rule of law, respect for human rights (including free expression), and civil society formation, "democracy" is not a theory but merely how the wheels turn. And at the level of machinery, theories about democracy can obscure more than they reveal. Consider the idea that cultural or religious values are the main impediments to democratization in Asia and the Islamic world.⁹ Maybe the problem stems from the way scholarly work gets reduced to television sound-bites by journalists and aid providers, but the effect is the same: to make simplistic what are complex challenges. For example, in Indonesia – an Asian country and the world's largest Muslim nation – the values that pose critical problem for democratization are not Asian "culture" or Islamic "culture" but the many juxtaposed and overlapping "cultures" that coexist within the same political boundaries: tribal communities in Kalimantan and New Guinea; agrarian, semi-feudal communities in the provinces; a growing middle class; and the technology-adept capitalist elite in Jakarta. Add to this the fact that Indonesia stretches across one-eighth of the world's circumference, in an archipelago of 17,000 islands containing more than 300 ethnic groups that speak as many or more

⁵ See Denis McQuail, *Media Performance: Mass Communication and the Public Interest* (Newbury Park, CA: Sage Publications, 1992); see also Daniel Halin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (New York: Cambridge University Press, 2004).

⁶ See, for example, William A. Hachten and James F. Scotton, *The World News Prism: Global Media in an Era of Terrorism*, 6th ed. (Ames, Iowa: Blackwell Publishing, 2002), 168.

⁷ Thomas Carothers, *Critical Mission: Essays in Democracy Promotion* (Washington, D.C.: Carnegie Endowment for International Peace, 2004), 262.

⁸ Jacques Barzun, "Is Democratic Theory for Export?" *Society* (March/April 1989): 16-23, 23.

⁹ Any number of journalism commentators have discussed the idea that Asia and the Muslim world are for cultural reasons poorly suited for democracy. For an academic discussion of the subject, see Huntington, *The Third Wave*.

different languages, and democracy promotion starts to look tricky. If a goal of a public-service media system is, at least in part, to link these many pieces into a coherent whole, how best to do that?

For our would-be architect of free and independent media, there is the additional challenge that media, unlike most other democratic institutions, are rooted not in political or civil society, but in economic society. As an industry, democracy promotion has tended (and still tends) to see media primarily as a component of civil society promotion, which is understandable and fine until aid is exhausted or withdrawn. Then it comes time to pay the bills – for salaries, newsprint, ink, transmitters, videotape, delivery trucks, telephones, software, presses, and all the rest. Other institutions of governance also have to pay their costs, of course, but many of those hold the power of taxation. It is certainly not unheard of for media to rely on tax support – the license fee that sustains many European public broadcasters is exactly that – but as a revenue source it is always troublesome, and in editorial terms its effects can be restrictive rather than liberating. Absent multiple layers of statutory and bureaucratic insulation, media that rely on government support will always be susceptible to government meddling, or worse. Rarely can even the most benign governments be expected to favor any interests but their own. More generally, the idea of government support for media, and thus entanglement with them, can be offensive to the idea of a speech market in which individual actors (and their ideas) are supposed to compete without unfair advantage. In real life, of course, some members of the speech market are hugely advantaged, usually by their economic power. Whether such a system is just or not, it is a principled question to ask whether that power should derive from the government purse. As a practical matter, too, the concept of government media is anathema to people in many democratizing countries, where past experience suggests a bad result, and by no means a "democratic" one.

The business of media assistance, now at least twenty years old, has thus come to recognize the central dilemma: how to find adequate and diverse sources of revenue while also providing a high-quality editorial product, one that contributes to democratic consolidation and maturity. This is at heart an economic dilemma, for the problems typically identified in virtually all democratic media systems – the lack of professionalism and even corruption among journalists, the tendency to favor sex, scandal, and trivia in print and broadcast – are best understood as economic problems. Public affairs media are, or at least have many of the characteristics of, public goods. Media are also experience goods. The cost of preparing a television news program, for instance, is the same whether it is broadcast to one person or one million, and no rational person will produce such a program if he cannot recover his average cost of production. (The irrational or altruistic person may do this, but not for long.) Recouping those costs becomes more difficult because consumers cannot evaluate a media product – in general, say, which of two newspapers is the higher-quality one, or in particular which newscast on a specific event is the more informative – without first consuming it. Consequently their decisions about what media to consume are likely to be poorly informed.

An additional economic problem for our architect is that the production of this consumption good is an inherently inefficient activity: News is not like automobiles, computers, blue jeans, or other products that fewer workers can now produce in less time than they could ten, twenty, or a hundred years ago. Put another way, good journalism is

like good music, and inefficient in the same way. Two hundred years ago, for example, it took four musicians to play Beethoven's Opus 18, No. 4, and it took them about twenty minutes to play it. Today the piece still requires four people and twenty minutes. With some products, productivity remains flat (or nearly so) even when you add new technologies and other innovations to the production line.¹⁰ High-quality journalism – the kind that involves reporters who investigate and report, editors who edit and rewrite – works very much the same way. Whether it reaches the public on paper, on air or on line, good journalism is a hand-made product, and the only way to wring efficiencies out of it is, unfortunately, to eliminate reporters or avoid serious newsgathering, neither of which is apt to improve democracy's chances.

Yet another problem for our architect is that the *consumption* of public affairs media is also inherently inefficient. As Anthony Downs posited long ago, the theory of "rational ignorance" suggests that for most people, time and money is more productively spent doing something other than becoming well-informed citizens.¹¹ For this reason, economist James Hamilton has written, most media engage in "rational omission" with respect to public affairs and investigative journalism, which, in addition to being unappealing to audiences, is much more costly to produce than sex, scandal, and trivia, and brings lower returns.¹²

It is for these reasons that high-quality public-affairs media everywhere find it difficult to support themselves financially. In developing democracies, consequently, training programs for reporters and editors, funding to support particular types of coverage, and other well-intended and potentially valuable assistance activities are apt to have little or no enduring value in and of themselves. Someone must pay a news organization's operating costs. Government or private subsidy is one solution. Another is the market, where media can compete for audiences and revenues. Neither solution is perfect; under either scenario, media can be excellent, or they can lose their public good character altogether and even hinder the democratic project. As an economic proposition, all that can safely be said is that the availability or unavailability of *any* revenue source will have implications for editorial mission. And editorial mission matters. As a larger popular and academic literature argues, both developing and developed countries contain many media that are not only financially self-supporting but hugely profitable, but they add little or nothing to democratic decision-making and in some cases even undermine it.¹³

¹⁰ The problem of productivity lag in inherently inefficient enterprises is known as "Baumol's cost disease," after William J. Baumol, the economist who first identified it using the analogy of a string quartet and the performance of a musical work. See William J. Baumol and William G. Bowen, *Performing Arts: The Economic Dilemma – A Study of Problems Common to Theater, Opera, Music and Dance* (New York: Twentieth Century Fund, 1966).

¹¹ See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper Books, 1957).

¹² See James T. Hamilton, *All the News That's Fit to Sell: How the Market Transforms Information Into News* (Princeton, N.J.: Princeton University Press, 2004).

¹³ See, for example, Herbert J. Gans, "Journalism, Journalism Education, and Democracy," *Journalism and Mass Communication Educator* (Spring 2004), 10-16; Gilbert Cranberg, Randall Bezanson, and John Soloski, *Taking Stock: Journalism and the Publicly Traded Newspaper Company* (Ames, Iowa: Iowa State University Press, 2001); James Fallows, *Breaking the News: How the Media*

The problem for media assistance, then, is to identify worthy editorial missions and then to figure out how to build self-sustaining businesses around them. Unfortunately, this kind of long-term approach is not the norm in democracy assistance, which is often criticized for the attention-deficit disorder of donors. Here also lies another dilemma for our democracy architect. What is a "worthy" editorial mission? Again, economic theory about the impossibility of defining the "public interest" suggests that any meaningful answer will be freighted with political assumptions and preferences shared by some members of society but not others. The plausibility of a one-size-fits-all editorial mission shrinks further when we consider the rights of the press and of free expression generally, the mechanisms for enforcing those rights, and the proper role of the government in producing, packaging, and disseminating information. One can dodge these problems entirely, as some media training organizations attempt to do; characterize the goal in broad normative terms, as some media NGOs do; or, regardless of local conditions, try to impose one particular Western approach, as some international organizations (including the UN and the OSCE) have been charged with doing in post-conflict regions such as Bosnia and Kosovo. The solution in any case will always be in some way flawed. As with the problem of financing, there is no straightforward answer to the problem of editorial mission.

A final challenge facing the would-be democracy promoter, beyond the ambition of this article, is that the very nature of democracy is changing. Even as democracy has become the only normatively acceptable choice at the level of the nation-state, it has arguably been cheapened by its ubiquity. The relationship between decisions that average citizens take at the ballot box and the circumstances of their daily lives grows ever more tenuous in a global economy. For journalists and those who wish to assist them, this paradox represents both an editorial challenge and a financial one. On the one hand, it prompts the question of how journalists are to understand and explain the challenges facing their countries and communities within the larger framework of global governance. On the other, it exposes news organizations everywhere, but particularly in developing societies, to additional competition in the markets for content, production, and distribution, and of course for audiences, too.

There is little discussion about the so-called "democratic deficit" in the democratization industry, and to be fair, the deficit is not its concern. Overwhelmingly the industry's practitioners work in and care about places where, against the experience of political repression, ethnic conflict, and war, people are trying to reassert control over the conditions of their own lives, and in many cases to reclaim their dignity as human beings. And at its best, the industry is not much interested in the institutions and processes of formal democracy unless they make participatory democracy real – that is to say, they give citizens a voice in government decision-making and provide some measure of social and economic equality. Where the democratization industry focuses on these kinds of places, people, and problems, it is hard not to be impatient both with realists who argue that it cannot be done and with moralists who underestimate how long and hard the work will be. Though the industry, in its thinking and behavior, is frequently paternalistic, anti-

intellectual, and even faddish, it deserves credit for its emphasis on public participation of a kind which has largely disappeared from advanced representative democracies (what Robert Dahl, in fact, calls polyarchies¹⁴), and which is increasingly difficult to resuscitate anywhere, never mind in states struggling to escape authoritarian or violent pasts. At least some of the uncertainties that bedevil media assistance thus derive from those that bedevil democracy generally.

A Guatemalan Apologue

In late 2004, I was doing field research when a colleague's email referred me to a trade magazine article about the Media Management Center, a journalism research and training organization whose home offices in Evanston, Illinois, are upstairs from my own at Northwestern University. The Center is the gold standard in media industry executive training programs, affiliated with both the Medill School of Journalism and Northwestern's Kellogg Graduate School of Management. Its research is widely praised and its recommendations carefully noted in the media industries it serves, not only in the United States but around the world. In visits to news organizations in developing countries, I have frequently referred editors and publishers to the Center's web pages, where it generously makes its research findings freely available.¹⁵ The article in *Editor & Publisher* was another in a series of accolades. The success story in this case was a Guatemalan newspaper, *Nuestro Diario*, which since its founding in 1999 has enjoyed singular commercial success in a market where it competes with five other dailies. *Nuestro Diario* is especially popular among younger and less-educated readers, and the article quoted several 14-year-olds in the tourist haven of Antigua, about 40 kilometers out of the capital city, who claimed to read it "cada dia," every day. "I like the sports, the stories about soccer, the crime stories, but the main thing is, it's entertaining, a way to pass the time," said one young man.¹⁶

"*Nuestro Diario*," the article went on to conclude, "is an ironic instance of the student turning teacher, the hottest case study on the international newspaper circuit."¹⁷ For the paper's rapid growth in the six years since it opened, the publisher credited marketing and editorial strategies he had learned at Media Management Center seminars.¹⁸ According to *Editor & Publisher*, *Nuestro Diario* had applied a "rigorous readership formula with steely discipline,"¹⁹ and it quoted Mike Smith, a principal in the Center, to the effect that U.S. publishers were already seeking to replicate *Nuestro Diario's* success with young readers in such products as the Chicago Tribune Company's *Red Eye*. And for good reason: *Nuestro Diario*, with a circulation of about 300,000, has nearly doubled the number of Guatemalans who read a daily paper. It is the largest-circulation newspaper in Central America, distributed almost entirely through street and

¹⁴ Robert Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989).

¹⁵ Readership Institute research and publications are available at <http://www.readership.org/>.

¹⁶ Mark Fitzgerald, "Born in the USA," *Editor & Publisher* (December 2004): 48-51.

¹⁷ *Ibid.*, 48, 49.

¹⁸ *Ibid.*, 49.

¹⁹ *Ibid.*

newsstand sales. Compared to its competitors it has relatively few advertisements (with only 8 percent of the national advertising market), but its circulation is more than twice that of its closest competitor, *Prensa Libre*.

What appeals to *Nuestro Diario's* readers, said *Editor & Publisher*, is the paper's "predictability."²⁰ Part of that predictability is the number of pages, which on most days is 32, making it easy for readers to find favorite features while also making limited advertising space more valuable. The paper employs numerous elements of design and presentation – such as leaving the first six pages of the newspaper ad-free – that MMC research has shown are reader-friendly and thus promote sales. The reporting style of the paper, said *Editor & Publisher*,

is to tell stories with a mix of text, photos and graphics. There are lots of short captions, giving information that is not repeated anywhere else. The main story, always short, almost never quotes anyone. Instead, there are snippets under headshots of the sources, who may be witnesses to a crime or giving an opinion about what happened.... In a package of text and graphics occupying just a third of a page, there might be more than a half-dozen ways to enter the story. On the big story that stretches across pages 2 and 3, there might be 25.... Every page is produced separately and reporting teams compete just to get on it.... *Nuestro Diario* is also filled with pictures of ordinary people – exactly what readership studies say readers and non-readers want to see.²¹

The article then quoted Smith: "The first challenge you hear to this is that it's 'dumbing down journalism.' I often say to people, well, you try to get that much information in a half-page of text. I don't think that's dumbing down – I think it's smartening up the presentation."²² Perhaps so. I have worked with and written for the Media Management Center on occasion, enough to know that it mixes scholarly expertise with industry needs in a way that its clients value highly. It has made a science out of the news business.

But of course the news media are more than a business. Their products affect how people perceive their choices in a democratic society, and the quality of those products is critical if those choices are to be meaningful. Few would dispute this proposition, even those who honor it in the breach. Beyond that, the implications of the proposition are not clear. Quality is a subjective measure, though presumably it has something to do with the balance of public-affairs information and entertainment available in any one medium. If so, there is the added difficulty that is very nearly impossible to disentangle the "entertainment" aspects of media goods from purely "informational" ones. A soap opera, for example, can be more effective in educating people about a public health issue than years of news articles or a barrage of government public-service announcements.

Viewed as an economic proposition, the problem of quality is that the overall character of any good, and particularly media goods, will be dependent on, if not inseparable from, the business constraints put upon it. One such constraint is revenue

²⁰ Ibid., 50.

²¹ Ibid., 51.

²² Ibid.

source, but here, too, evidence about outcomes is mixed. Advertiser support, for instance, is often assumed to be inimical to public service, but with the exception of public broadcasting, the world's exemplary public-service media earn the majority of their revenues from advertisers, not readers or viewers.²³

The problem of media goods and business constraints has been a matter of debate in developed democracies for a long time, and has been resolved in a variety of imperfect ways. But in developing democracies the problem is new. And where democracies are immature, or where political, social, and economic reforms co-vary in potentially destabilizing ways, the problem is especially significant. It is arguably the case, for example, that in a country such as Guatemala, *Nuestro Diario* makes few or no contributions to public discourse and democratic transition. Put another way, democracy may continue to mature in Guatemala, but the success or failure of *Nuestro Diario* will have little effect on its chances. The paper's business success is remarkable, and that success may be a sign of social stability in a country where the national psyche is scarred by 40 years of military dictatorship, civil war, and genocide. But *Nuestro Diario* is by any reasonable editorial standard a bad newspaper. It is engaging in its way, but to call it a work of reporting is charitable. It is a collection of "captions" and "snippets" and "headshots" that substitute full-color, garish graphics for narrative context and editorial explanation. Its "predictable" editorial features include cartoon-style reenactments of gang killings and political executions (sans the blood and corpses), and lots of sex. Perhaps its most distinctive predictable feature is a daily pin-up girl, printed as a centerfold.

Nuestro Diario is one of five independently published tabloids that constitute the newspaper market in Guatemala. (There is also a government newspaper that publishes official bulletins and announcements, *Diario de Centroamerica*.) *Prese Libre*, at more than 50 years old, is the politically conservative dean of the group and controls 45 percent of the newspaper advertising market. *Nuestro Diario* is of course the readership leader, with total sales nearly 12 times that of *El Periodico*, an erudite and aggressive investigative paper, and also of *Siglo Veintiuno*, the other elite paper in Guatemala. The fifth paper in the market, *Al Dia*, is aimed at the same poor and mostly young demographic as *Nuestro Diario*, but has not enjoyed nearly the same success, with daily sales of fewer than 45,000 copies. All the papers distribute nationwide, but distribution is spotty, and readership is concentrated in and around Guatemala City, where all the papers publish.

In 2004, I visited *El Periodico* because of its reputation as the country's most vigorous investigative paper, the winner, along with its publisher, of numerous honors from international press freedom groups. It has also survived repeated rhetorical, legal,

²³ See Leo Bogart, *Commercial Culture: The Media System and the Public Interest* (New York: Oxford, 1995). See also John C. Merrill, "International Media Systems: An Overview," in *Global Journalism: Topical Issues and Media Systems*, eds. Merrill and Arnold S. de Beer (Boston: Pearson, 2004), 32-33. Merrill identifies the "great" "quality" newspapers of the world as *Asahi* (Japan), *El Pais* (Spain), *Frankfurter Allgemeine* (Germany), *The Independent* (U.K.), *Le Monde* (France), *Los Angeles Times*, *Neue Zuercher Zeitung* (Switzerland), *The New York Times*, *Sueddeutsche Zeitung* (Germany), and *The Washington Post*. Whatever the merits of the list, one thing can be said of it: all of the papers earn most of their revenues from advertising.

and physical attacks on its reporters as well as assassination attempts on its publisher, José Ruben Zamora.

El Periodico's newsroom and business offices are in a renovated home in a middle- to upper-class residential neighborhood in Zone 13, near the airport. No sign identifies the place as a newspaper office, but there are always a few motorcycles and several conspicuously armed men standing at the front entrance. One wears the uniform of a private security service; the others do not. The entrance doors they guard are heavy steel, with a magnetic lock. Like every other building on the block, *El Periodico's* offices lie behind an 8-foot concrete wall topped with coils of razor wire. Exterior windows are covered with iron bars. Here and there, other buildings on the street have signs on their doors announcing themselves as private residences. *El Periodico* draws the attention not only of the authorities but of thugs with the potential to harm both people and property. Neighbors want to be sure that anyone looking for *El Periodico* does not get the wrong building.

As a business, *El Periodico* struggles. It has tried in various ways to appeal to younger readers, so far without much success. Its staff, ironically, is on the whole young, in their twenties and thirties, about 70 percent of them women. Some of the more senior editors, and José Ruben himself, are in their late thirties or forties, and all began their journalism careers at other papers. Zamora, 48 when I met him, is a civil engineer by training. He was a founder of *Siglo Veintiuno* in 1991, but left that paper with his investigative editor, Sylvia Gereda, to launch *El Periodico* in November 1996, shortly after civilian rule returned to the country. The editors and reporters I met at *El Periodico* work there because the paper does what editor-in-chief Anna Carolina Alpirez characterizes as "journalism that matters."²⁴ Alpirez, like many others on the editorial staff, came to *El Periodico* after having established a reporting career elsewhere. For some on the staff, it is a last stop; if *El Periodico* fails, they say, they will leave journalism and do something else. Several of the reporters said they would not work at any other paper, even as they acknowledged that *El Periodico's* editorial policies and some of its more pointed editorial features cost the paper both readers and revenues.

On the editorial side, *El Periodico* is two papers in one. The majority of staff work on producing the daily product, and a much smaller group is devoted, full-time, to doing long investigative pieces. In its daily reporting, *El Periodico* covers national and local news, including the country's growing importance as a conduit for illegal drugs and immigrants into Mexico and the United States, and the consequent rise of Guatemala's political and drug assassinations. It also covers sport and entertainment, but neither at length, and it does some business reporting. *El Periodico's* cultural reporting includes reviews of pop music, movies, and nightlife – but also reviews of high-brow entertainments, including books, a rarity anywhere. And like *Nuestra Diario*, *El Periodico* has a daily "girl photo," though usually a modest one (that is to say, fully dressed) that takes up a half page or less. The girl photo is a fixture in Latin American newspapers, even this one. José Ruben believes the feature helps to sell the paper. The women on the editorial side see it as incongruous with *El Periodico's* style of journalism.

²⁴ Anna Carolina Alpirez, executive editor, *El Periodico*, author interview, Guatemala City, October 14, 2004.

Marketing Director Carolina Marquez thinks it hurts the paper's brand identity. José Ruben also elects to publish regularly a columnist whom the entire staff considers politically and socially regressive, a throwback to the country's militarist past. José Ruben publishes him for reasons that no one could fully explain or which, if they did, I could not understand. The idea seems to be that the columnist represents a social and a journalistic value the paper wishes to promote, opinion diversity.

El Periodico competes for readers in a small market – the 20 percent of Guatemalans who do not live in poverty. These are educated, middle- to high-income readers who work in government, business, and education. The paper's signature work is investigating corruption in the national civil service and federal government, stories that are accompanied by a strong and reported editorial page. Special sections, done several times a year, examine the history of political violence in the country and its continuing legacy. José Ruben writes most of the lead editorials, and his voice stands out as the editorial identity of the paper. In 2003, when former Army General Efraín Ríos Montt ran for president as candidate of the Frente Republicano Guatemalteco (FRG) party, despite a constitutional provision barring former military officers from holding that office, *El Periodico* was the paper that most vigorously reported about and editorialized against his candidacy and the court that authorized it. The law notwithstanding, Ríos Montt was hardly the ideal chief executive for a country on the mend. A former Army chief of staff, he had seized the presidency in a 1982 coup and ruled Guatemala for a little more than a year until he was himself deposed in August 1983. In his short tenure in office, Ríos Montt had implemented a counter-insurgency plan modeled on the French experiences in Algeria and Vietnam, destroying hundreds of rural villages and often slaughtering their civilian inhabitants. By the end of 1982, the policy had driven approximately a half million refugees either into Mexico or into Guatemala's slums.²⁵ More than 200,000 had died or disappeared.²⁶

In 2003, Ríos Montt was serving as president of Congress, a position that provided immunity from prosecution. In 1990 and 1995 he had sought to run for president, but both times his candidacy had been barred by the Constitutional Court. In July 2003, however, a Constitutional Court packed with FRG judges approved his candidacy, a decision that a *lower* court stayed days later as an affront to rule of law. When it did, Ríos Montt gave a radio address urging his followers into the streets. By then the campaign had already turned violent, with 22 people connected to political parties having been assassinated. It would soon get worse. Several hundred FRG supporters, many recruited from rural departments, came to Guatemala City wielding guns, machetes, and clubs. On July 24 and 25, approximately five months before the election, the capital city was the scene of violent riots in which masked and armed men sacked office buildings, fired machine guns from roaming trucks, burned piles of tires in the streets, took hostages, and attacked journalists covering the melee, killing one. Both

²⁵ For a brief history of Guatemala's experience between the U.S.-backed 1954 coup and restoration of civilian rule in December 1995, see Andrew Reding, "Democracy and Human Rights in Guatemala," World Policy Institute, April 1997, <http://www.ciaonet.org/wps/rea01/index.html>.

²⁶ Official, unofficial, and academic sources report the number of dead and disappeared under Ríos Montt's rule between 19,000 to 200,000. The 200,000 figure comes from the U.S. State Department. See <http://www.state.gov/r/pa/ei/bgn/2045.htm>.

the U.S. Embassy and the UN mission in the city were forced to close. The Guatemalan government, led by President and FRG party leader Alfonso Portillo, took no action to quell the riots, and indeed members of the Army and the police participated in them.²⁷

Mayan peasants in the highlands, fearing the return of a military regime, began streaming toward the Mexico border, where they were either turned away or herded into refugee camps.

A month before the riots, on the morning of June 24, a dozen armed men had gone to *El Periodico* publisher José Ruben Zamora's house posing as investigators from the public prosecutor's office. They forced their way in, then stripped, tied up, and blindfolded José Ruben, made him kneel with a pistol to his head, and beat his children in his presence. Throughout the attack, the men took orders from someone by phone. According to Zamora, one of his attackers told him, "If you value your children stop bothering the people above. I don't know who you've annoyed high up the ladder, but we have orders that someone up high despises you. Whatever you do, do not report this."²⁸

The attackers left after three hours. They demanded money and promised to return if it was not paid. Zamora sent his wife and children out of the country for the rest of the campaign and continued with his work. "We are all vulnerable to delinquency in this country," he said, "and I have a duty to carry on."²⁹ International human rights and press groups rallied to *El Periodico's* cause, and the World Association of Newspapers and the U.S.-based Media Development Loan Fund urged the State Department to lodge a protest over the attack with the Guatemalan government. It did so, with the result that police security around the newspaper's offices increased. Three months later, in December 2003, General Rios Montt was eliminated from the ballot in the first round of voting after polling only 19 percent. He lost his congressional leadership position too, exposing him to prosecution both in Guatemala and in Spain. By contrast to *El Periodico*, *Nuestro Diario* remained steadfastly silent on the critical constitutional questions surrounding the general's attempt to recapture the presidency, though it ran photographs of the riots and their aftermath, along with plenty of "snippets."

To be sure, *El Periodico* was not the only news organization to suffer violence during the run-up to the 2003 elections. Other journalists covering the riots, particularly television reporters, were attacked, and one suffered a fatal heart attack while being chased. Journalism is a dangerous enterprise in Guatemala, and the more dangerous for those who take it seriously.

If *El Periodico* is on the hard road to independence, it has chosen to be there. The paper was at one time in a business partnership with *Preense Libre*, and together the two created *Nuestro Diario*. As part of the deal, *Preense Libre* held 60 percent ownership of *El Periodico*. Eventually the joint venture fell apart because *El Periodico* could not meet its financial responsibilities, leading *Preense Libre* to take *El Periodico's* shares in *Nuestro*

²⁷ An August 30, 2003, report by Guatemala's Human Rights Ombudsman (Procuraduria de Derechos Humanos, or PHD) determined that public officials had planned and executed the riots.

²⁸ David Brewer, "Guatemala press freedom alarm," *BBC News World Edition*, June 28, 2003, <http://news.bbc.co.uk/2/hi/americas/3028928.stm> (accessed June 2, 2004).

²⁹ *Ibid.*

Diario as payment. In the deal, *El Periodico* also lost access to its printing press. Zamora and his partners could have solved their financial problems by selling *El Periodico* outright to *Prese Libre*, thus becoming the "high end" product in a group that would have served virtually the entire Guatemalan newspaper market. (*Al Dia*, for example, was created for this purpose, a joint venture of *Siglo Veintiuno* and Costa Rica's *La Nacion*.) But had it done so, the thinking went, *El Periodico* might have had to abandon its commitment to investigative reporting; at any rate, a sale would have turned José Ruben and the rest of the staff into someone else's employees. So instead they negotiated a loan from the Media Development Loan Fund and bought back their shares from *Prese Libre*. Though the three papers are no longer legally or financially linked, *El Periodico* and *Nuestro Diario* still occupy adjoining buildings. From the outdoor patio that separates *El Periodico*'s cramped newsroom from its business offices, one can look through several windows into *Nuestro Diario*'s spacious and well-appointed newsroom.

Somewhere in the wide editorial space that separates the two newspapers lies the dilemma that faces journalism everywhere, but that is especially acute in developing democracies: the more closely a media product takes on the social and economic characteristics of a public good, as *El Periodico*'s investigative reporting does, the less support it will find in the market; as a media product loses its character as a public good – as with *Nuestro Diario*'s murder-as-entertainment features and pin-ups – the more likely it is to be financially sustainable, but the less its sustainability affects the outcome of democratic transition.

Admittedly, this formulation of the dilemma is overdrawn. *Nuestro Diario*'s ability to engage young people, especially the many who are poorly educated and employed, can hardly be a bad thing – even if the content falls short of some desirable level of public affairs reporting. This is especially true in a country where genocidal wars have left a population that is overwhelmingly young. Moreover, one sign that a country has begun the process of democratic consolidation is that its media cease to be predominantly oppositional and begin to feature a broader array of choices, including lighter and more entertaining fare for more diverse audiences. Viewed in that light, *Nuestro Diario* may be more important for what it represents than for what it produces.

El Periodico, by contrast, is important for what it produces. Investigative reporting is what press freedom is *for*. It gives that freedom its *raison d'etre*, and it requires skill and tenacity. Done well it also requires money and time, sometimes a lot of both. That is why so few of the world's news organizations do investigative work. It is cheaper and less risky to cover official statements, news conferences, and other events specifically designed for news coverage – Daniel Boorstin's "pseudoevents."³⁰ Anywhere it is done, investigative reporting is based on the premise that real news does not happen on TV talk shows or in press conferences, but in places that are often mean and grubby, and sometimes dangerous. Reporting real news also invites recrimination and even

³⁰ Boorstin coined the term "pseudo-event" to refer to events that were prepared and staged for news coverage. He first developed the idea in a 1960 article, the same year as the first televised presidential debates between John Kennedy and Richard Nixon. See Daniel Boorstin, *The Image: A Guide to Pseudo-Events in America* (New York: Vintage, 1961).

revenge. In such a country as Guatemala, where rule of law and civil society support are still weak, doing investigative journalism requires extraordinary courage and ingenuity.

Of course, none of that matters a whit if one cannot keep the lights on. To survive or, better, to become profitable, *El Periodico* needs to be a well-managed business, one that where possible learns from its competitors. Juan Luis Font, the young managing editor of the paper, spends a great deal of time thinking about new editorial features or promotions that might attract readers or advertisers, all while protecting the core investigative and editorial functions of the paper. So does the paper's sales manager, Juan Carlos Velazquez, an old university friend of José Ruben and with him a founder of *Siglo Veintiuno*. Like their colleagues at *Nuestro Diario*, Font and Velazquez have studied the findings from the Media Management Center's "Readership Institute" study, and both believe that *El Periodico* could and should follow many of the study's recommendations.³¹ But not all of them. One Readership Institute paper specifically questions whether investigative reporting is "relevant" to young adult readers, an empirical challenge that strikes at the heart of *El Periodico*'s editorial mission.³² Other Readership Institute reports say that stories that are "too long" or "cover too much" are "inhibitors" to readership.³³ Obviously individual news organizations will decide for themselves what these findings imply for their business, but it is certainly possible to conclude that the kind of reporting that is central to *El Periodico*'s social mission is, simply, a poor business choice. Former *Chicago Tribune* foreign correspondent and Chicago Council on Foreign Relations Executive Richard Longworth reports anecdotally that newspapers across the American Midwest construe the Readership Institute findings to preclude *any* international news or even national news; these papers instead focus on the sort of quick-hit local features than have made *Nuestro Diario* so successful.³⁴

In 2004, according to Juan Carlos, *El Periodico* was in the red, though both he and the paper's general manager, Carlos Gonzales Campo, expected the paper to become profitable soon. Another problem was cash flow. About 10 percent of the paper's revenues in 2004 came from advertisements paid a year in advance, and though the paper grew in circulation in 2004, the growth was not that significant. In any case, Juan Carlos was tied to advertising rates he had negotiated months earlier. He believes *El Periodico* must grow its subscription to 50,000, almost double the current figure. When I ask how he would do that, he smiles and says, "I suppose we have to change the product."³⁵ Juan Carlos believes the paper needs more entertainment features – specifically, advice columnists and comics. In 2005, led by Juan Luis and investigative editor Sylvia Gereda, the paper launched a weekly supplement for kids. The paper's young marketing manager,

³¹ Readership Institute, <http://www.readership.org/>.

³² "Auditing Your Newspaper's 'Experiences,'" Readership Institute, July 2004, 3, http://www.readership.org/new_readers/data/auditing_experiences.pdf.

³³ See, for example, "Key Newspaper Experiences," Readership Institute, July 2004, 3, http://www.readership.org/new_readers/data/key_experiences.pdf.

³⁴ Richard Longworth, executive director, Global Chicago Center, Chicago Council on Foreign Relations, author interview, Evanston, Illinois, April 16, 2005.

³⁵ Juan Carlos Velazquez, sales manager, *El Periodico*, author interview, Guatemala City, September 16, 2004.

Carolina Marquez, is even more frustrated. She believes she can offer valuable guidance on what features readers want – and, as important, what they do not – but is rarely consulted. *El Periodico's* mostly male and mostly middle- and high-income readers, she says, are insufficient to sustain the paper over the long term. Carlos Gonzales, a retired banker and an old friend of José Ruben, agrees. "Our 'elite' is not economical," he says, "but it is an elite that likes to read. The biggest challenge is to increase readership, but we're not getting anywhere. We're stuck."³⁶

There is a third way to sustainability, but *El Periodico* has chosen not to take it: The paper could survive on grants from regional and international media and human rights organizations, official aid organizations, and other donors. In effect, *El Periodico* would then operate as a not-for-profit firm, on the implicit presumption (if not the explicit legal requirement) that its core activity is neither profitable nor self-sustaining. Given its reputation, the newspaper would not have a hard time attracting grants, at least in the short term. From the beginning, indeed, *El Periodico* has benefited from outside donations of money and technical expertise, and at crucial times it would have gone out of business without them. Such revenue sources, however, are unreliable, and they often come with donor expectations that the paper's management believes could compromise – or could appear to compromise – its independence. And as a matter of principle, Zamora and his colleagues believe that if they can make the paper a market success, they will also make a statement about Guatemala's progress toward democracy.

It is easy to find media in the developing and democratizing world that are supported by grants from nongovernmental or international governmental organizations (NGOs and IGOs), as well as media that are staffed and operated by NGO or IGO personnel for the express purpose of pursuing some other democracy-enhancing goal, such as developing civil society, promoting public health, or supporting national and local elections. Often, however, donor-supported media wither and die when aid is withdrawn, redirected, or exhausted – as eventually it always is. Some of these media firms are supposed to die: at least in the judgment of their funders, they have served their purpose. Other media firms have survived by becoming so aid-dependent as to have forfeited any meaningful claim to editorial independence. They constantly retool their editorial mission to appeal to donors. In the process, these media frequently lose public credibility, thus undermining the case for their continued existence, and they fail to develop the managerial capacity to survive on their own. In the meantime, their presence can have the unintended and undesirable effect of competing in the market for audiences and advertisers against other media that are trying to provide independent voices in a changed political, social, and economic landscape.

Of course, donor-supported media do not have to collapse into editorial irrelevance. Some are excellent, far superior in quality to anything else available, especially in societies where legal protections for the press are weak or nonexistent. In Cambodia, for example, where hopes for democracy collapsed after the 1997 coup, the not-for-profit *Cambodian Daily* has emerged as one of two papers of record (the *Phnom*

³⁶ Carlos Gonzales Campo, general manager, *El Periodico*, author interview, Guatemala City, September 15, 2004.

Penh Post is the other); it survives on donations. Such a paper is sustainable until the donors' money runs out, and then the calculus changes.

The dilemma of sustainability was first summed up for me in 1999, in a conversation with Sheila Coronel, a distinguished investigative reporter in the Philippines who is now the executive director of the Philippine Center for Investigative Journalism in Manila. Good journalism that survives the worst political and social conditions, Coronel said, may have trouble when it faces competition from a variety of other outlets, including many that trade in entertainment and sensationalism, and others that are subsidized by governments. Reflecting on her time working as a journalist during the Ferdinand Marcos era, she said, "Tyranny of the state may be better than tyranny of the market. As journalists we knew what to do with the state – you topple it. But what do you do with the market?"³⁷

The same problem exists in other democratizing regions. A 2005 article in *deScripto*, the professional journal of the Southeast Europe Media Organization, notes that

since the media requires two markets to survive economically (audience and advertising), it has to be interested in financially successful management, but at the same time it must irritate the economic status quo because of its duty to research such themes as part of investigative journalism. So it may and often does happen that journalists are challenged to research subjects that may not be in the best interests of people or organizations which are stake or shareholders in the media. Economically speaking, media ownership is not an easy position. On one hand, media entrepreneurship is encouraged in a very difficult and complex market, and on the other hand, it is the source of independence problems, often negatively impacting freedom, the open media market, and above all, media culture. Ownership is the position at which economy, quality, money, and public communication values meet and where all those factors come into a difficult crux in a democratic culture.³⁸

This "crux" is of course not unique to developing and democratizing states. Western journalists confront it daily, if in a different context. In a 1997 speech to a roomful of Russian journalists (then still enjoying freedoms that have largely eroded under President Vladimir Putin), *Washington Post* columnist Jim Hoagland talked about the erosion of Western journalism standards under the onslaught of financial pressures that he said were "redefining the market – downward."³⁹ In the United States, "our lowering of standards and refocusing of reporting is being subliminally, subtly dictated by market concerns in a rapidly and at times violently changing global economy."⁴⁰

³⁷ Sheila Coronel, executive director, Philippine Center for Investigative Journalism, author interview, Queenstown, Md., May 31, 2000.

³⁸ Thomas A. Bauer, "Two Schools of Thought," *deScripto: A Journal of Media in South Eastern Europe*, No. 2 (Winter 2005): 4.

³⁹ Jim Hoagland, "Media: Democracy in Jeopardy?" in *Freedom and Responsibility Yearbook, 1998/99* (Vienna, Austria: Organization for Security and Cooperation in Europe, Representative of the Media, 1999), 109-112.

⁴⁰ *Ibid.*

Exempting only the Public Broadcasting Service – a not-for-profit – Hoagland charged that the financial markets' demand for steadily increasing quarterly profits had gutted news organizations of their core purpose and most editorially important features, and in the process posed a "threat to democracy."⁴¹ And then he corrected himself: "I realize to my Russian colleagues I must sound something like a cry-baby. Here I am, complaining of the problem of too much money while they strive to find enough resources and moral support within their own society to establish and pursue independent reporting and editing. If they are successful, perhaps years from now they will get to the point of having the problems I have complained about today."⁴²

In fact, they already do. Though a host of factors affect the sustainability of a news organization, the economic dilemma in news production is much the same in both developed and developing states: The character of some information goods is such that few if any for-profit firms will choose to produce them, with the result that they may not be produced at all. Put another way, media independence in an open and free society is largely a function of revenue sources, and revenue invariably colors one's definition of "independence." And where markets have greatly liberalized but press freedom is still restricted, as in Guatemala, the twin goals of financial and editorial independence can be especially elusive. *Nuestro Diario* is a market success largely because it avoids the high expenses and low returns of serious news production. *El Periodico* has won international editorial acclaim, but struggles for audiences and revenues in its own market.

What is Press Independence For?

Framed as a question, the dilemma faced by *El Periodico* – and for that matter by *Nuestro Diario* – is this: *How are professional news media supposed to sustain themselves financially without giving up or deeply compromising their editorial independence?* Again, the dilemma is not unique to developing states; the economics of high-quality journalism currently receives much professional and academic commentary in the United States and Western Europe. What that discussion suggests for developing democracies will depend in the first instance on how one characterizes media "freedom" or "independence." But the social consequences of the dilemma may be particularly worrisome in states where civil society is weak or impaired, where economic stability and security are fragile, and where rule of law is a work in progress – in short, where democratic consolidation is incomplete and large segments of the population have yet to see their lives significantly improved by political transition.

For these reasons, official and private sources of financial aid to media development often link their support, rhetorically if not also programmatically, to civil society development. The assumptions behind that linkage are interesting for what they imply about editorial mission and the meaning of editorial "independence." Another such linkage exists as well: the aftereffects of political transition on the media sector mirror those in civil society generally. For the media, the most important effect is a shift in purpose. Media that once existed as sources of political opposition must now contend

⁴¹ Ibid.

⁴² Ibid., at 110.

with the practical challenges of democratic governance, as well as the immediate challenge of running a business. The news product may in turn change substantially. Speaking in Chicago in early 2005, South African journalist Mathatha Tsedu said that since 1994 the news media in his country

have gone for well-off blacks and forgotten the poor. They no longer serve as watchdogs for the weak and the poor. The poor are not a market, but a liability. Nobody covers them. It is the same in the United States, but here the poor are a minority and the middle class is the majority. In South Africa, the poor are the majority. If no one is interested in them, how do we represent them? How are they part of our democracy? It is the dilemma of existence versus the need of the media to survive.... At the same time we have had an exodus of skilled journalists who have left to join government and business. The result is less coverage of our country's democratic story even as it gets more difficult to tell.⁴³

Tsedu was one of South Africa's leading opposition journalists during the apartheid era, a role that is evident today in the physical scars he carries from detentions and beatings. For fourteen months in 2002 and 2003, Tsedu served as editor of the *Sunday Times*, South Africa's largest paper (with a Sunday circulation of 3.5 million) and not one known for being the voice of the powerless. He was eventually fired by the paper's owner, Johnnic Communications (Johncom), which claimed his performance was unsatisfactory, and specifically that he failed to produce an "independent quality newspaper that sustains our democracy, is trusted by its readers and advertisers, is targeted at those people in Living Standards Measures categories 6-10 in South Africa and Southern Africa, and is profitable."⁴⁴ But as one South African commentator noted, the question is not why Tsedu was fired, but why he was ever hired:

They knew he came from a deeply embedded tradition of Black Consciousness activism. They knew that Africanisation was important to him. They knew that he had a strong change agenda, including getting rid of the popular and lucrative – but controversial – "extra" editions.... They knew that the slogan he often announced was: "Journalism must serve the poor and the powerless." But having selected him, Johncom management must have known that this would mean a disruption in staff, readership, sales, advertising and revenue. Why did they appoint him if they did not want to go down this road?⁴⁵

What makes Tsedu's firing particularly notable is that Johnnic Communications is itself one of South Africa's most visible democratization projects. Formerly known as Times Media Limited, Johnnic is a publicly traded firm, owned by a coalition of black business groups and trade unions known as the National Empowerment Consortium. Johnnic's executive staff and board of directors are composed predominately of blacks

⁴³ Mathatha Tsedu, remarks at the Medill School of Journalism, Northwestern University, Evanston, Illinois, March 7, 2005.

⁴⁴ "Media statement by Johnnic Communications Chief Executive Officer, Mr. Connie Molusi," November 10, 2003, <http://www.prnewswire.co.uk/cgi/news/release?id=111560>.

⁴⁵ Anton Harber, "The hiring and firing of Mathatha Tsedu," *Business Day* (November 14, 2003), <http://www.journalism.co.za/modules.php?op=modload&name=News&file=article&sid=884> (accessed January 26, 2006).

and representatives of other "previously disadvantaged communities." Johnnie owns several publishing and entertainment properties, but the *Sunday Times* is the money-making machine at the heart of the enterprise. And because the controlling Consortium is itself deeply in debt, it is highly sensitive to changes in share prices and profit levels. According to the commentator quoted above:

Tsedu's dismissal is not about media freedom, for no one is suggesting it was an attempt to stifle his views. It is not about race, much as this provides the cover for those who want simple and crude explanations. It is about the complexities, contradictions, limitations and difficulties of transformation in an empowerment media company. It raises questions about what transformation is intended to achieve. Is the goal to maximize the profitability of empowerment shareholders? Does it mean closing a New York bureau and opening one in Lagos? Does it mean getting rid of the "ethnic" editions, which were conceived in the sin of apartheid but are popular and lucrative? Does it mean hiring political editors who have no experience? How does one weigh the demands for change against shareholders' demands for growth? Which takes priority?

One thing is clear: there is no point to transformation if the end-product is not a healthy and profitable newspaper. There is little value to empowerment if you have been empowered to control a shell. All of this takes place in an increasingly competitive market. The *Sunday Times* used to be the undisputed king of the English-language weekend, but now it has to fight off the *City Press*, *Sunday World*, *Sunday Sun* and *Sunday Independent*, some of whom are eating away at the top of the market, others at the bottom.⁴⁶

The sustainability dilemma is thus important not only for what it suggests about financial viability, but also for providing a perspective for thinking about a more fundamental question: *What is media independence and what is it for?* Media assistance programs, whatever their purpose, rarely address this question head on. When they do, the answer tends to be understandably short and abstract. The sum of it is usually that journalism is a means to an end: to promote fair elections and universal suffrage; to develop political parties; to guide legal, judicial, and administrative reform; to strengthen civil society; to support public education and social services; and perhaps most often, to promote free-market economies. Media assistance programs focus on the relationship between journalism and civil society mostly because donors believe the two are symbiotically joined. It is not uncommon to hear that free and independent media are a necessary, even sufficient, condition for sustaining civil society, and it is nearly impossible to find literature on media development that does not include (mostly vague) assertions about its importance to civil society development.

Even assistance organizations that are founded, funded, and run by journalists and journalism organizations tend to shy away from any but the most general statements about the goals of press freedom and independence. American journalists are particularly wary of this discussion. Media assistance, after all, is an undeniably political activity, but because their professional norms frown on anything that might be characterized as advocacy, journalists tend to characterize what they do as training, largely neutral as to

⁴⁶ Ibid.

matters of content or editorial mission. One common refrain, for instance, holds that Western media trainers show aid beneficiaries "how" to cover the news but never "what" to cover. One commentator calls this an "occupational ideology of professionalism"⁴⁷ that in itself is assumed to enhance democracy.

Other media assistance providers are more bold stating their objectives. USAID's published materials are notable and praiseworthy in this regard; they are far more explicit about basic questions of journalistic purpose and media system architecture than anything in American press law. Some private sources of media assistance also advocate particular ideas about press freedom and its purposes, which should not be surprising. In most places that receive media assistance, the assistance is intended to help publicize and perhaps remedy gross social inequities and injustices, up to and including the legacies of political torture and mass murder. Professional norms notwithstanding, "neutrality" concerning the violations of fundamental human rights is immoral. In any case, media assistance providers can hardly ignore the reasons for their own existence. To do so makes any discussion about the field incoherent. And where political violence is not a factor, the market will ultimately determine how the media system operates, which media it sustains, and what they produce. For some, that will be enough. Depending on how one defines "independence" (or for that matter "democracy"), perhaps it should be.

Definitions: What Does a "Free" Press Look Like?

Freedom of expression is a critical component of democratic norms. Robert Dahl long ago listed freedom of expression and freedom of information as two of seven criteria most useful for evaluating any state wanting to call itself a democracy.⁴⁸ In its most tangible form, Dahl said, the two criteria require a "free and responsible" press system.

What does a free and responsible press system look like? Especially since the end of the Cold War, developing and developed nations alike, prodded by changes in communications technology, have considered this question in both normative and legal terms. And countries emerging from various forms of authoritarian rule face the additional question of what news media practices promote democratization. As with the post-World War II period, some media restructuring over the last decade has been the result of international military intervention, as in Bosnia, Kosovo, and Iraq. Most media restructuring since the mid-1980s, though, has resulted from a significant effort by the democratic West to export ideas about press freedom to Central and Eastern Europe, Latin America, Southeast Asia, and to a lesser extent Africa. That effort has generated either bilateral or multilateral financial and material assistance from donor countries, such as the United States, Britain, Germany, and Sweden; IGOs such as the Organization for Security and Cooperation in Europe (OSCE), the European Union (EU), and the African

⁴⁷ James Miller, "Democratization and 'Fact-Based' Journalism: Donor Politics in East Central Europe," paper presented at an International Conference of the Association for Education in Journalism and Mass Communication, London, January 5, 2002.

⁴⁸ Robert A. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989).

Union (AU); and international and regional NGOs, dozens of which concern themselves almost exclusively with media and free expression issues.⁴⁹

Both donors and recipients of media aid use such terms as "independence," "freedom," "responsibility," "professionalism," "diversity," and "sustainability" to mean a great variety of things, depending on their historical experience and social norms and practices. Media scholarship also uses these terms casually, and sometimes nonsensically. One widely used academic text in international journalism studies, for example, defines "independent" journalism as anything that is not government funded.⁵⁰ This will surely come as a disappointment to the British Broadcasting Corporation (BBC) even as it confirms the deeply held convictions of FOX News viewers in the United States. In the business of media assistance, donors and recipients alike tend to define independence by what it is not – it is *not* monopolistic control over the instruments of mass communication. Beyond that, it is not clear what independence means, never mind "free," though presumably both terms somehow relate to the source and predictability of a media organization's revenues and the autonomy from government control of its editorial decisions.

Often these terms are defined by ideological or strategic objectives. In the 1970s, a body set up under the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the MacBride Commission, defined media freedom as communication in the service of economic development. The Commission recommended citizen rights of access to the media, the development of locally managed alternative channels of communication, and the participation of non-professionals in media production. Western countries, and the United States in particular, rejected the report as an attack on editorial judgment and thus on free expression. By 1991 UNESCO appeared to have changed its views, explaining in the Declaration of Windhoek:

We mean by an independent press, a press independent from governmental, political or economic control.... By pluralism, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.⁵¹

This is language that most journalists would agree with, but it is not very useful to a discussion of sustainability: a press independent of governmental, political, and economic control does not exist. The press must depend on *something* for its viability; in this sense, the press can never be wholly free simply because it is locked into a cycle of

⁴⁹ For excellent overviews of the universe of media assistance, see Monroe E. Price, Bethany Davis Noll, and Daniel De Luce, *Mapping Media Assistance* (Oxford: The Programme in Comparative Media Law & Policy, 2002); Ellen Hume, *The Media Missionaries: American Support for International Journalism* (Miami, Florida: John S. and James L. Knight Foundation, May 2002), http://www.ellenhume.com/articles/missionaries1_contents.html; and James Miller, *Democratization and Fact-Based Journalism: Donor Politics in East Central Europe* (New York: Council for European Studies, 2001), http://www.europenet.org/conference2002/abstracts/j1_miller.htm.

⁵⁰ Hatchen and Scotton, *The World News Prism*, 32.

⁵¹ UNESCO, *Declaration of Windhoek*, Windhoek, Namibia, May 3, 1991, http://www.unesco.org/webworld/com_media/communication_democracy/windhoek.htm.

interdependence. In authoritarian societies the interdependence is easy to understand: governments employ strict censorship to control the flow of information to the general public, and journalists exist as mouthpieces for the government. In democratic societies the interrelationship is much more variable, in part because theory is less important to democracy than how freedom is lived and perpetuated.⁵² Ideally, the role of the media in a democracy is to ensure the existence of a broadly and equitably informed citizenry, which in turn can hold elites accountable and maintain popular control of government through free and competitive elections. For the press to fill that role, at least two conditions must obtain: citizens have some sort of constitutional or statutory right to political information, and media are protected from the arbitrary exercise of government power. Most democracy scholars also argue for a third condition: legal means, such as restrictions on ownership, that safeguard media pluralism – by which they mean a broad array of media forms and outlets offering a variety of political viewpoints.

These descriptions are to some degree caricatures. Totalitarian regimes never succeed in suppressing *all* speech, nor is their control over information complete and omniscient. Democratic societies almost all have some measure of government control over, or at least government involvement in, their media systems. At one level, this theoretical dichotomy is a relic of a Cold War framework in which democratic media systems are clearly different from and freer than authoritarian ones. That framework is long overdue for reassessment, and the current emphasis on "sustainability" in media aid – to the extent it concerns itself with other goals conterminous with or dependent on sustainability – can be read as the beginning of such a process. The process has been helped along by growing criticism in developed democracies that the media in general and broadcasting in particular are undermining representative democracy rather than enhancing it.

I understand sustainability to mean *financial sustainability joined with a public-service editorial mission*. Financial sustainability means the ability of a media firm to be economically viable in a country where the enabling conditions for sustainability – above all the rule of law – are in more or less in place. Unfortunately, transition states often lack enabling conditions. At a 2000 meeting convened by the Ford Foundation and the Aspen Institute, journalists from more than two dozen transition states identified the principal enabling conditions for a healthy media sector as follows:

- Peace, stability, and tolerance
- Pluralistic society
- Basic conditions for survival
- Favorable economic conditions for the media
- Sufficient resources/equipment & infrastructure
- Physical safety of journalists
- Constitutional reform

⁵² For a wonderful explanation of democracy and its conflicting theories, see Barzun, "Is Democratic Theory for Export?."

- Independent judiciary
- Access to information
- Access to media
- Diversity of media outlets
- Independent journalism associations
- Self-regulation / ombudsmen / critical culture in journalism
- Courage

Participants in the meeting also listed the major obstacles to a healthy media sector, obstacles that most knew from personal experience:

- Government repression / archaic laws / emergency regulations
- Religious suppression
- Non-state repression / gangs and paramilitary
- Partisan political corruption of journalists
- Self-censorship
- Lack of journalism training / unprofessionalism
- Imbalance of media in urban and rural areas
- Unsupportive culture / lack of public support
- Unsupportive market / market fragmentation
- Inadequate investment in public and journalism education
- Dangerous work environment / conflict and war
- Media concentration / opacity of corporate ownership
- Privatization of public service media
- Commercialism in media

Journalists themselves thus identify as critical enabling conditions for media development and sustainability many of the factors that scholars and donors identify as important for democratic transition generally: the rule of law, a healthy civil society, and favorable economic conditions.⁵³ With respect to media development, at least, these things are not mutually exclusive. Criminal libel laws, licensing schemes, and value-added taxes, for example, function as both legal and economic restraints on the press. Religious repression, ethnic conflict, paramilitary threats, and rural poverty function as both civil society and economic barriers to media sustainability. Official corruption and organized crime inhibit civil society, economic development, and the rule of law.

⁵³ See Monroe Price and Peter Krug, *The Enabling Environment for a Free and Independent Media*. (Washington, D.C.: United States Agency for International Development, 2002), <http://pcmlp.socleg.ox.ac.uk/enablingenvironment.pdf>.

Without conditions favorable to press freedom, it makes little or no sense to talk about sustainability in terms of market viability. In Zimbabwe under Robert Mugabe, currently, money alone cannot generate media sustainability. There and elsewhere, sustainability has to be understood in terms appropriate to the functions of media in the particular society. Monroe Price and Bethany Davis Noll have argued that in many states those functions are not so different from what they were a decade or more ago,⁵⁴ and that the nature of sustainability depends on the goals of assistance. Potential goals include the following:

- **Crisis sustainability** seeks to keep media financially afloat during periods of violent conflict and post-conflict, or in the aftermath of natural disasters. Here sustainability almost certainly depends on outside donors.
- **Incubator sustainability** seeks to nourish a variety of new media with the expectation that some will survive and some will not. Most common in post-conflict or transition societies where the enabling environment is still a work in progress, incubator sustainability also pursues supplemental goals, such as promoting professionalism among journalists and developing a legal framework that promotes free and responsible expression.
- **Strategic sustainability** seeks to further some political and economic goal, much in the way public diplomacy does. In November 2001, for example, the United States created Radio Free Afghanistan to promote democratic values in that country. Such media may not – and are not intended to – outlive their strategic purpose.
- **Election sustainability** seeks to enable citizens to make an informed choice about candidates, as in the post-conflict elections in Cambodia, Bosnia-Herzegovina, and East Timor.

At least three of these forms of sustainability – crisis, strategic, and election – rely on the rule of law. Without it, any discussion of financial sustainability will be highly conditional if not nearly pointless; profits provide little protection against police raids and mobs. By rule of law, I mean that the government abides by its legal obligations under the constitution; that the police and military are accountable to civilian authorities; that the work of both legislative and administrative procedures are transparent and public; and that an independent judiciary provides an effective way for the public to protect its civil rights against encroachment by the government or concentrations of private power. The value of the rule of law, in short, is predictability and fairness. Without it, journalism lives under constant threat of arbitrary state action. At a minimum, the law has to guarantee journalists the freedom to gather and disseminate news without fear of criminal prosecution or violent attack.

Ideally, a host of ancillary rights flows from that basic freedom. Most important, perhaps, is a right of access to public places and proceedings and to government information. The rule of law also requires a regulatory framework that imposes as few

⁵⁴ Monroe E. Price and Bethany Davis Noll, *Media Sustainability: Democracy and Development* (Washington, D.C.: Aspen Institute, 2002), http://www.aspeninst.org/c&s/nonpub/20020909/price_noll.pdf.

burdens on speech as possible, so that media firms can serve their audiences, develop their markets, and ensure their financial independence. Where regulations are necessary – in determining how political candidates may acquire and use broadcast time during elections, for example – they must be clearly written, process-based, and narrowly drawn. And the state should eschew non-media regulations that have the effect of skewing the speech market – tax laws and licensing schemes are notorious in this regard.

Of course no bright line separates "stable" or "mature" legal systems and transition states from backsliders. Thomas Carothers, among others, has argued that a great many so-called transition states are not transitioning to anything, but instead are stuck in a vast "gray area" between authoritarianism and democracy.⁵⁵ At any given time, it can be difficult to tell where on the continuum one of these gray-area states lies, partly because the judgment can depend on the measures one uses. Democratic progress comprises several independent variables, though none may be susceptible to easy measurement. For official purposes, and sometimes as well for journalistic ones, the most popular indicator of democratic momentum is a successful election (and ideally more than one) that is free and fair, and in which a majority of eligible voters participate. Elections have tangible qualities: they are usually bound by rules and fixed by time, and they can be observed, with votes counted and observations about process compared to electoral outcomes. Elections, in other words, can be evaluated more or less objectively. But of course an election by itself is no guarantee of democracy. Iraq, Ukraine, and Indonesia all held national elections in 2004 and 2005, and the eventual outcomes were generally judged fair, though perhaps in some other way seriously flawed. Each country still suffers from other critical problems, however, ranging from official corruption to criminal violence – in short, inadequate rule of law development.

In sum, then, it is one thing to identify clear threats to the press, and quite another to identify the essential contours of press independence. In 1985, researcher David Weaver and his colleagues argued against trying to apply the same model of press freedom to many countries, especially a model that seeks to compare industrialized countries with developing ones.⁵⁶ All of the major press freedom and sustainability indices rely on values that are, if not subjective, at least not universal. And the measure most amenable to quantification, financial sustainability, is often subject to constraints that have less to do with economics than with near-ideological faith in the market. The market may well be a better devil to deal with than the government, and when they work properly, markets are at least predictable in their ruthlessness. Moreover, journalists in developing democracies typically have little or no experience of benign government involvement in the media sector, so for them market independence is the only option. But the judgments of the market may be no kinder to high-quality "independent" journalism than was the old authoritarian state.

In Guatemala, *El Periodico* continues to find its way, with some success. Last year it developed several editorial products designed to attract not just new readers but

⁵⁵ Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* (January 2002): 5-21.

⁵⁶ David H. Weaver, J.M. Buddenbaum, and J.E. Fair, "Press Freedom, Media, and Development, 1950-1979: A Study of 134 Nations," *Journal of Communication*, Vol. 35, No. 2 (1985): 104-117.

new kinds of readers. The goal is to become "essential" reading (the specific objective of Readership Institute recommendations) for a much larger and more diverse audience, and to compete more vigorously with *Prese Libre*, Guatemala's longstanding paper of record. *El Periodico* has launched a weekly supplement for kids and, to a great extent, *by* kids. The supplement, created by investigative editor Sylvia Gereda, has an advisory board made up entirely of teenagers, who drive the editorial content. A second new offering is *El Periodico in Five Minutes*, a daily news digest distributed as part of the main paper. The four-page digest summarizes the day's major stories and features several of the paper's best photographs. The supplement has proved enormously successful with women, especially housewives – a readership that *El Periodico* has heretofore been unable to reach. Managing editor Juan Luis Font is now making plans to distribute the supplement as a stand-alone publication on college campuses.

Finally, led by publisher José Ruben Zamora, *El Periodico* has developed a special weekly section on business and economics that focuses on economic policies and trends in Central America and the world, as well as on management issues. The supplement is more esoteric, even academic, than the usual newspaper business section or business magazine, and is intended to provide unique, added value to the economic elites who constitute most of *El Periodico's* traditional readership. In addition to boosting subscription revenue, all of these supplements provide additional opportunities for advertising revenues.

In the newsroom next door, *Nuestro Diario* also continues to grow, providing its colorful snippets of sex and sensationalism to its audience of young, poor, and often poorly educated readers. Somewhere in between the editorial missions of these very different business enterprises lies a vision of Guatemala's political future.

ARTICLE

Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations

International Center for Not-for-Profit Law

The 2005 Forum for the Future, hosted by President Bush, brought together leaders from dozens of nations, including 22 Arab countries and members of the G-8 industrialized countries, with the aim of fostering nongovernmental organizations and civil society. Although many of the other nations present at the Forum supported fostering civil society, the forum ended without a formal declaration. The Egyptian government demanded inclusion of language that would have given to Arab governments significant control over which pro-democracy groups would receive aid, scuttling any possibility of agreement.

Just days earlier, the Russian Duma passed on first reading a law that would have barred the participation of foreigners in Russian civil society organizations, prohibited foreign organizations from operating branches in Russia, and given the government unchecked powers to intrude in the affairs of civil society organizations, including a requirement that it be notified of the existence of informal groups such as neighborhood associations. Efforts by Russian civil society leaders, with support from international organizations, coupled with diplomatic approaches from the United States, European Commission, and others, led to the elimination of some of the more restrictive features of the draft. Nonetheless, the law ultimately adopted on January 17, 2006, gave the Russian government significantly greater control over NGO activity.

These are not isolated events. Over the past year, nineteen countries have introduced restrictive legislation aimed at weakening civil society. These countries join the more than 30 with existing laws, policies, and practices that stifle the work of civil society organizations (CSOs).

The International Center for Not-for-Profit Law (ICNL), an organization dedicated to the promotion of the freedom of association, civil society, and citizen participation worldwide, presents this study of recent laws and proposed laws aimed at restricting the operations of civil society organizations. The study identifies both recent and existing restrictive laws and proposed laws. It offers a typology of the legal barriers used by governments to constrain civil society and describes the challenges that these pose to civil society organizations. Lastly, it describes strategies that civil society organizations in various countries have used to counter restrictive measures and how the United States government can provide support.

I. Recent Laws and Proposals to Restrict Civil Society

The study reveals that nineteen countries have enacted or proposed laws that would in some way restrict the activities of civil society over the past five years.

Although these types of laws can be found in almost any region of the world, they tend to be concentrated in Africa, the Middle East, and the Newly Independent States of the former Soviet Union. Countries with restrictive laws generally exhibit the following characteristics:

- 1 The country is either governed through a dictatorship or, if elections are held, they are deemed not to be free and fair (e.g., Egypt, Azerbaijan, Eritrea)
- 2 The country is a theocracy or has a strong politico-religious contingent (e.g., either where a particular religion's tenets/values are perceived as inconsistent with or threatened by the human rights agenda, or where a particular religious group seeks to use such legislation to suppress another group) (e.g., Nepal)
- 3 The country operates in a "closed" or command economy (e.g., China, Cuba)
- 4 There is political unrest in the country or neighboring country threatening the current government regime or incumbent party (e.g., Zambia, Sudan, Ethiopia, Russia)
- 5 Similar legislation or practices have been enacted or introduced in sister regimes (e.g., Belarus, Russia, Middle East)
- 6 The country controls, restricts, or monitors media (e.g., Cuba)
- 7 The country has a history of human rights abuses (e.g., Belarus, Zimbabwe)

The reasons given for the proposal and enactment of these laws vary depending on the situation. Oftentimes, the government will provide an "official" rationalization for a proposed law that does not match the reasons perceived by the international community and local NGOs. For example, in Russia, the government has described the law described above as necessary to counter terrorism and money laundering. Similarly, both the governments of Kazakhstan and India claimed that their recent attempts to enact laws restricting NGO financing were necessary security measures for their countries. Other governments insist that the laws are needed to encourage greater transparency and accountability among CSOs.

In some cases, the restrictive legislation may in fact simply be a misguided attempt to achieve the stated goal. However, in virtually all of the cases cited, the means deployed are far more harsh and restrictive than necessary to fight abusive CSO practices, and often are contrary to obligations to protect the right to free association imposed either by the country's constitution or by international conventions to which it is a party. In some countries, the restrictive laws are a continuation of longstanding patterns of repressive government tactics (e.g., Belarus). In others, the recent initiatives appear to be motivated by a desire to forestall political opposition. In the Newly Independent States, for example, it has been postulated that governments are wary of civil society in the wake of the Rose Revolution in Georgia and the Orange Revolution in Ukraine in which CSOs played prominent roles in elections that swept authoritarian leaders from power.

II. Common Legal Barrier Constraining Civil Society and the Challenges They Pose to Democracy Assistance Groups

The use of restrictions by foreign governments on NGO formation, operation, and financing is increasing. Several trends have emerged with respect to authoritarian

governments' use of such restrictions. We summarize below some of the more common legal barriers included in restrictive legislation.

These restrictions have posed obstacles to the ability of both foreign and domestic civil society groups to form, operate, and sustain themselves. Examples of the challenges faced by domestic groups are included in the summaries below.

A. Limited Rights to Associate and Form NGOs

In the most restrictive environments, governments do not grant the right to associate or form organizations.

- In Saudi Arabia, there is no law governing CSOs, and as a result only a few organizations established by royal decree or under government control exist.
- In Libya, there is no right to associate recognized by law.
- Cuba strictly controls CSOs, even going so far as to form its own organizations.
- China provides no legally guaranteed "right" for a CSO to exist. However, civil society in China has been able to exist somewhat under harsh circumstances through the ingenuity of its CSOs, which, for example, often register as another form of organization.

1 Inability to register and secure the benefits of legal personality

Repressive governments often closely guard the process by which an organization can register, i.e., become a legal person with all of the rights attending that status. On one hand, governments may insist that all groups, however small or informal (a neighborhood association, a babysitting coop, a poker club), must register, thus ensuring that they can keep watch on the groups' activities. On the other, governments may make registration difficult, limiting the ability of civil society groups, and particularly advocacy groups, to exist. Tactics include retaining excessive government discretion over the registration process, making registration expensive, inconvenient, or burdensome in terms of the type or amount of information required; excessive delays in making registration decisions, and requiring re-registration every few years, thus giving government the right to periodically revisit the issue of whether an organization should be allowed to exist.

Illustrations of restrictive registration practices and their consequences for civil society include the following.

- The initial draft of the Russian law threatened to restrict the activities of foreign persons on the territory of Russia. Foreign citizens and persons without citizenship, if not permanently residing on the territory of the Russian Federation, would have been prohibited from establishing a public association or non-commercial organization, or from becoming a member or participant in such an organization. The provisions that appeared in the law ultimately enacted and signed into law are not as sweeping; they require only that a foreign national or person without citizenship be physically present in the Russian Federation in order to found an organization. The law does, however, give the registration authorities broad and discretionary grounds for refusing to register branches of foreign organizations.

- In Azerbaijan, Ethiopia, and Algeria, regulations governing the registration process are vague and leave great discretion to the registration officials. As a result, CSOs have difficulty registering – they are sometimes denied registration and other times experience long delays or repeated requests for information. In Azerbaijan, for example, it is reported that registrations have been "de facto suspended" as a result of poor and overly discretionary implementation of the registration laws.
- In Belarus, the government has adopted a series of laws restricting both public gatherings and CSO activity in recent years. Among other powers, the laws give the government substantial discretion over the registration process, vesting authority in a National Commission on Registration of Public Associations to advise the Ministry of Justice on which organizations to register, a process that is not transparent. Applicants have waited for more than a year for a response on applications to register (the law provides for one month) only to be denied registration without explanation.

B. Inability To Obtain Foreign Funding or To Raise Domestic Funding

Perhaps the most common tactic used by governments to restrain civil society is to restrict the access of CSOs to foreign funding, apparently as a means to reduce foreign influence. Legislative provisions used to restrict foreign funding have included requirements that

- 1 CSOs re-register or receive a special license to receive foreign funding;
- 2 all CSOs be granted prior government permission to receive foreign funding (on a donation-by-donation basis);
- 3 all foreign funding be channeled via government or designated, monitored bank accounts;
- 4 foreign aid be subject to tax;
- 5 a CSO's total funding from foreign sources be limited to a stated percentage; and
- 6 foreigners' participation in domestic associations be limited, or that a person be a citizen in order to be a member of an association.

Examples of recent attempts to restrict foreign financing of domestic organizations include the following:

- On March 7, 2006, the president of the separatist government in the Transnistria region of Moldova signed a decree prohibiting foreign funding of NGOs registered in Transnistria. Under the decree, NGOs are prohibited from receiving funding directly or indirectly from any international or foreign organization, foreign government, Transnistrian organization with a foreign capital share in excess of 20 percent, foreign citizen or stateless person, or any anonymous source. The same persons cannot found or join Transnistrian NGOs.
- Zimbabwe in 2004 enacted a "CSO Bill" that prohibits local CSOs engaged in "issues of governance" from accessing foreign funds and foreign CSOs involved in these activities from registering. The bill was decried as a direct attack on

human rights groups and attempts to scrutinize Zimbabwe's human rights record. Indeed, upon introducing the bill, Zimbabwe's President Mugabe declared that "[w]e cannot allow [CSOs] to be conduits or instruments of foreign interference in our national affairs." Mugabe ultimately declined to sign the controversial bill, citing "one or two issues he wanted to be addressed," but there is concern that the bill will be revived.

- In Eritrea, the government introduced CSO Administration Proclamation No.145/2005 that prohibited the UN and other similar organizations from funding CSOs, prohibited international agencies from directly funding local CSOs under most circumstances, and required all donor funds to flow through government ministries. The proclamation also imposed taxes on food aid and other donations, outlawed CSO work in fields other than relief and rehabilitation, and increased reporting requirements.
- In Uzbekistan in 2004, the government took greater control of foreign funding of CSOs by requiring them to deposit funds in one of two government-controlled banks, thereby allowing monitoring and control of all money transfers. Within a short time following enactment of these provisions, the government had obstructed the transfer of over 80 percent of foreign grants to CSOs. Worse still, the system is administered according to unwritten policies and oral instructions, making it difficult for CSOs to follow the rules or appeal adverse decisions. More recently, the government has suspended the operations of some foreign democracy and governance organizations that have partnered with and funded local groups, and has refused to register others.
- Regulations adopted in 2004 in Belarus impose among other things reporting and approval mechanisms that give the government control over donor funds and projects. In addition, these rules force many CSOs to pay up to 30 percent tax on foreign aid, "causing some donors to reconsider their support."

C. Arbitrary or Discretionary Termination and Dissolution

Some countries retain substantial discretion to shut down CSOs and use that discretion to quash opposition groups.

- Belarus, for example, in 2004 enacted a law providing the government with the authority to close a CSO for violating laws restricting the use of foreign funds or for demonstrating in violation of the Law on Mass Meetings. It has for some time used its powers to dissolve CSOs as a weapon against the sector. In 2003, government officials dissolved 51 leading NGOs, and in 2004 the government dissolved more than twenty organizations. Also in 2004, the government denied renewal of registration permits for two U.S. organizations implementing programs funded by the U.S. government.
- Egypt's Law 84/2002 permits the supervising Ministry to shut down an organization at any time on the grounds that it is "threatening national unity" or "violating public order or morals," broad and ambiguous terms that afford the government substantial discretion to terminate CSOs.

D. Inability To Advocate for Particular Causes or Get Its Message Out to Constituents

- In Nepal, a proposed CSO Code of Conduct would have outlawed "attempts of political influence" on others, as well as preaching religious conversion or speaking for or against religions.

E. Arbitrary and Stringent Oversight and Control

Once a NGO has been formed and registered with the proper authorities, governments may continue to restrict its activities through unchecked oversight authority and interfering in the activities. An organization's failure to comply with government demands may lead to daunting sanctions and penalties.

- The recently adopted amendments to Russian law strengthen the government's control over the activities of organizations by authorizing registration authorities to audit their activities and finances. The authorities may also request any financial, operational, or other internal documents from an organization at any time and without any limitation, and even send government representatives to the organization's events. These provisions are overbroad, lack protections for organizations, and could well have a chilling effect on an organization's activities.

F. Harassment from Government Officials

- In Belarus in 2003, 78 CSOs ceased operations due to harassment from government officials. In 2004, the government thoroughly inspected and issued warnings to 800 others. The national security agencies and the Office of Public Associations questioned and searched some NGOs, and in some instances, confiscated publications and print materials. These inspections made it nearly impossible for organizations to concentrate on their primary activities, and have proved to be a successful instrument for the government to control the activities of the majority of NGOs.
- In Cuba, officials have used the provisions of the Law for the Protection of National Independence and the Economy of Cuba, which outlaws "counterrevolutionary" or "subversive" activities, to harass dissidents, human rights activists, and others.

G. Establishment of "Parallel" Organizations

Restrictive governments have sometimes sought to undermine the CSO sector by establishing captive CSOs, or GONGOs. Governments can use these organizations to channel government funding to preferred causes and away from opposition groups, to discredit opposition groups by claiming that its captive organizations are the only "legitimate" civil society, or to appear supportive of at least some portion of civil society.

- In Slovakia under Meciar, for example, the government sponsored and funded a group of "parallel" organizations to compete with opposition CSOs. These organizations enjoyed the financial support of the state and frequently implemented state social policies.
- In Tunisia, the government has established GONGOs with the aim of monitoring the activities of independent CSOs; representatives of the GONGOs reportedly

attend conferences and other events and transmit intelligence to the government regarding other CSOs.

H. Criminal Penalties Against Individuals Associated with an Organization

Individuals who are found responsible for certain NGO activities can be held criminally liable and fined or imprisoned. This has an obvious chilling effect on individuals seeking to exercise their right to associate, and discourages active participation in NGOs.

- In Egypt, Law 84 / 2002 imposes severe individual penalties for non-compliance with its provisions. These penalties include up to one year in prison and a fine of up to 10,000 Egyptian pounds for establishing an association that threatens "national unity" or violates "public order or morals"; up to six months in prison and a fine of up to £E 2,000 for conducting NGO activity "without following the provisions prescribed" by the law, conducting activity despite a court ruling dissolving or suspending an association, or collecting or sending funds abroad without MOSA permission; and up to three months in prison and a fine of up to £E 1,000 for conducting NGO activity without a license from MOSA, affiliating with a foreign NGO network or association without MOSA permission, or merging with another association without MOSA approval.
- Yemen's Law No. 1 of 2001 Concerning Associations and Foundations (which also contains a number of progressive provisions) includes a handful of draconian individual punishments, which seem out of place given the law's overall liberal thrust. For example, individuals who are not members of an NGO but participate in the management or discussions of an NGO's General Assembly without express approval of the NGO's Board of Directors are subject to up to six months in prison and a fine of 50,000 Yemeni rials. Further, any violation of Law 1 / 2001, no matter how small, can be punished by three months in prison and a fine of YR 30,000.
- In Belarus, a law signed by the president in December 2005 provides for prison sentences for those who train others to take part in street protests, engage them to act against Belarus' sovereignty, or tell lies about Belarus.
- In Uzbekistan, several U.S. organizations are currently under criminal investigation for alleged "violations" of law such as having an unregistered logo and failing to register specific activities (as opposed to organizations) with the government. These investigations have in some cases involved questioning of individual staff members for up to twelve hours at a time. Prosecution of individuals remains a threat.

III. The United States' Response

There can be little question that the repressive tactics outlined above have hindered the development of civil society and thwarted the ability of individuals to associate. Nonetheless, civil society organizations have devised a number of strategies to counter these tactics. While not every strategy is effective in every country or circumstance, in combination they constitute a useful array of tools to protect basic rights against government incursion.

The United States can highlight and address harassment and constraints on civil society by its support for a number of these strategies. Some – such as diplomacy – our government can undertake directly. Others will require financial or other support for the initiatives of civil society groups and others.

Another potentially effective response is sponsorship of research, toolkits, sourcebooks, trainings, and other tools to raise the awareness of civil society about options for dealing with repressive CSO laws and policies.

The following are among the strategies that have proved effective in addressing government constraints on CSOs.

A. Domestic Litigation

In some countries, NGOs have resorted to domestic litigation challenging provisions of law that have been used, e.g., to deny them registration or terminate their registrations. In some instances, where the courts are reasonably independent and fair, domestic litigation has proved effective in securing a just resolution for the affected civil society organization. In Egypt, for example, the NGO laws are vague, arbitrary, and unnecessarily severe, and the Ministry of Social Affairs uses them selectively to dissolve NGOs that are "threatening national unity" or "violating public order or morals." However, the laws permit appeal to the administrative courts. In one prominent example, the Egyptian Organization for Human Rights fought a ministry in court for more than ten years and ultimately prevailed. On the one hand, this example demonstrates that the right of appeal to domestic courts can provide relief. On the other hand, the litigation consumed more than ten years in Egypt's backlogged court system, draining the time and resources of the well-respected human rights group in its fight for legal recognition.

Direct challenges under a country's constitution have succeeded in blocking restrictive provisions, at least temporarily. Again, in the Kazakhstan example cited above, consideration by the Constitutional Council resulted in a finding that restrictive laws were not constitutional. In Egypt, a challenge in the constitutional court led to the invalidation on procedural grounds of Law 153, the precursor to the 2002 NGO Law discussed above.

In other circumstances, resort to domestic courts is simply a means of exhausting domestic avenues of relief, which is frequently a prerequisite for petitioning an international tribunal. In Venezuela, for example, the judiciary is not considered to be independent of the Chavez regime, and CSOs do not believe they are likely to prevail in court on any challenge to a government action. Nonetheless, they bring domestic suits as a means of exhausting their remedies, as required in order to reach international tribunals such as the Inter-American Court of Human Rights.

B. Litigation Before International Tribunals

There are a number of international tribunals whose mandate is to protect basic human rights guaranteed by international conventions by adjudicating claims of affected groups and individuals against member states. Perhaps the best known of these tribunals, at least with respect to the protection of the right of free association, is the European Court of Human Rights. In a series of cases before the Court, Greek and Turkish association members, political parties, and others managed not only to obtain judgments against their governments requiring the registration of their organizations, but also to set

important precedents interpreting the right of free association granted by the European Convention on Human Rights.

C. Legal Triage

One strategy that has provided much-needed legal resources to civil society organizations under legal threat is "legal triage" or providing legal defense. In one program, ICNL makes available legal consultants through resource centers in five Central Asian countries to assist organizations in registering and in addressing other legal requirements applicable to them. In many instances this program has proved very effective. It was successful in assisting in the registration of the only public association to become registered. However, one downside should be noted as well. This type of assistance can draw the ire of a repressive government, which may target the legal assistance providers in a further attempt to discourage CSO activities. In Uzbekistan, for example, programs and individuals responsible for providing legal assistance to NGOs are currently the subject of a criminal investigation (see above.)

D. Law Reform Campaigns

CSOs and their partners can work to sponsor progressive legislation governing their formation, operation, and sustainability. Experience has shown that law reform initiatives can be effective in securing basic rights to form and operate a organization if they are championed by those governed and inclusive of the government and civil society. However, a state that is actively oppressing civil society is not likely to countenance a progressive law reform initiative. This strategy is perhaps best employed in countries that have shown a trend towards liberalization. For example, in Jordan, the government responded to complaints that a repressive draft law on social development had been drafted by a Ministry without consultation with affected civil society groups by sending the law back to the Ministry for revision after solicitation of public comment. It is hoped that the ongoing public participation campaign will lead to a draft law that enables civil society.

E. Awareness Raising

Civil society and its partners can work to raise international awareness of threats to the right to association and harassment of civil society groups. Awareness-raising mechanisms can assist civil society groups isolated in a restrictive country in garnering support, and can lead to effective international pressure on states that harass or constrain civil society. One such program is Civil Society Watch, operated by CIVICUS, an international organization dedicated to citizen participation. Civil Society Watch "aims to mobilise quick, principled and effective responses to those events that threaten civil society's fundamental rights to collectively express, associate and organise throughout the world."

F. Diplomacy

Diplomacy is an effective tool in some situations. Leaders of other nations and international institutions can open discussions with a government to dissuade it from pursuing repressive legislation, and offer political room for maneuver to allow a government the ability to change course publicly. Secretary of State Rice urged Russia to revise its restrictive draft legislation, saying that democracy is "built on the ability of

citizens to associate themselves freely and to work to bring their government into a particular direction," and that nongovernmental organizations in Russia are "simply trying to help citizens to organize themselves better, to petition their government to make changes in the policies that affect their very lives. That's the essence of democracy." The Secretary's public statements supplemented weeks of diplomatic approaches to the Russians by the Department of State as well as by representatives of the European Commission. As discussed, while the law ultimately passed remains problematic, a number of the more restrictive provisions that appeared in the initial draft were eliminated.

G. Public Action

Public action – citizens organizing against repressive measures – can take a wide variety of forms, including demonstrations, letter-writing campaigns, public comment, and media campaigns. It can be initiated domestically, or, where domestic CSOs and citizens are too severely constrained or isolated to take effective action, internationally.

1. Domestic action

CSOs have organized against draft laws with restrictive provisions, rallying expert and international support, distributing analyses of the provisions among a wide range of stakeholders, holding meetings, and generating media attention. In Kazakhstan, these types of activities were successful in convincing the government to withdraw some of the offending provisions of a recent restrictive draft law even before the drafts were submitted to the Constitutional Council. In Slovakia, CSO leaders – many of them veterans of a campaign to defeat an undesirable Law on Foundations – initiated a campaign to spur public participation and voter turnout that ultimately led, in the 1998 elections, to the downfall of the authoritarian Meciar regime.

2. International pressure

The international community can publicly apply pressure to repressive regimes in an attempt to reverse obnoxious behavior toward civil society groups. International pressure can also give hope to threatened groups, which may feel abandoned in their struggle. On December 10, 2004, United Nations Human Rights Day, Amnesty International organized demonstrations against widespread human rights abuses by Zimbabwe at the border crossings from South Africa, Mozambique, Botswana, and Zambia. According to Amnesty officials, the concept was "to march to the borders and register our concern about the situation in Zimbabwe and the plight of Zimbabweans in the diaspora" and ultimately to pressure the neighboring countries to take greater action to stem the crisis in Zimbabwe and the flow of refugees across the border. Amnesty and other groups have continued to target their public grassroots campaign at the leaders of other African countries in hopes that they will exert influence over Zimbabwe to change its policies.

ARTICLE

Curbing State Interference in Workers' Freedom of Association in Nigeria

Ovunda V.C. Okene¹

From the time that trade unions first emerged in Nigeria, they have suffered crude treatment and abuse from the government. The abuses were particularly grave during several years of military rule. Although Nigeria has returned to democratic governance, the abridgment of trade union rights continues. This article argues that through such behavior, the government of Nigeria infringes workers' freedom of association under international law – which does not augur well for the nation's future as a liberal democracy.

"Without freedom of mind and of association a man has no means to self-protection in our social order." – Harold Laski²

1. INTRODUCTION

Freedom of association is generally regarded as safeguarding individual civil liberties. Following the principle that people may do whatever they wish as long as they do not harm others, an individual should be free to join an organization and to act in association with others as long as no harm is caused. The right to freedom of association is promoted throughout the world. "Freedom of association," said Sir Abubakar Tafawa Balewa, then Prime Minister of Nigeria, at the opening of the first International Labour Organization African Regional Conference, in Lagos, Nigeria, in 1960, "is one of the foundations on which we build our free nations."³

The concept of freedom of association in labor relations means that workers can form, join, or belong to a trade union and engage in collective bargaining. It also implies

¹ Ovunda V.C. Okene, LL.B. (Hons.), LL.M., is a Senior Lecturer in Law, Faculty of Law, Rivers State University of Science and Technology, Port Harcourt, Nigeria. From 2001 to 2004 he was the Head of the Department of Business Law of the same university. He is also a Solicitor and Advocate of the Supreme Court of Nigeria and Senior Partner in the law firm of Okene & Okene, Port Harcourt, Nigeria. Mr. Okene is currently working toward his doctorate degree in law at the University of Essex, Colchester, United Kingdom. His research interests include human rights, labor law and labor rights, conflict studies, international and comparative studies, and interdisciplinary and socio-legal studies. He can be reached at ovcokene@essex.ac.uk or ovcokene@yahoo.com.

² *Liberty in the Modern State* (London: George Allen & Unwin Ltd, 1948), p. 195.

³ Johnston, G.A., *The International Labour Organisation* (London: Europa Publications, 1970), p. 150.

that the workers are entitled to go on strike whenever necessary. Members thus enjoy the right to associate for union purposes and the right to participate in all union activities. These rights are recognized both in international law and in all civilized countries of the world. If, without justification, the public authorities threaten the life and limb of the unionist to prevent him or her from taking part in union activities, freedom of association is violated.

Nigerian trade unions have long suffered mistreatment by the government – indeed, it dates back to the unions' founding. The abuses and violations of rights were particularly severe during the years of military rule, from 1984 to 1999. Though Nigeria has returned to democratic governance and joined the comity of civilized nations, the rights of trade unions are still being violated.

This article examines the government's disturbing pattern of behavior. We argue that the public authorities infringe the right to associate under international law by denying, limiting, or violating workers' freedom to associate for their collective interests. The scope of the article is limited to *state* interference with workers' freedom of association. Other limitations, such as those imposed by employers, are not discussed in detail.

2. FREEDOM OF ASSOCIATION IN INTERNATIONAL LAW

The concept of freedom of association is widely acknowledged as a fundamental right in international law. There are several sources. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, proclaims that "Everyone has the right of freedom of peaceful assembly and association." Article 23, paragraph 4, also states that "Everyone has the right to form and to join trade unions for the protection of his interests." The same principle is echoed in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴ and the International Covenant on Civil and Political Rights (ICCPR)⁵ both of 1966. The International Labour Organization (ILO) likewise recognizes freedom of association as a fundamental principle in several major documents, the most important ones being the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)⁶ and the Right to Organise and Collective Bargaining Convention 1949 (No. 98).⁷ Further, the right to freely associate is guaranteed in the European Convention on Human Rights (ECHR) 1950,⁸ the European Social Charter (ESC) 1996,⁹ the American Convention on Human Rights (ACHR) 1969,¹⁰ the Community Charter of Fundamental Social Rights of Worker (CCFSRW) 1989,¹¹ the EU Charter of Fundamental Rights (EUCFR) 2000,¹²

⁴ Article 8 (1) (a)-(c).

⁵ Article 22(1).

⁶ See Articles 2-7.

⁷ See Articles 1-6.

⁸ Article 11.

⁹ Part 1, paragraph 5, and Article 5.

¹⁰ Article 16.

¹¹ Article 11.

and the African Charter on Human and Peoples' Rights (ACHPR) 1981.¹³ In sum, there can be no doubt that international law recognizes the right to freedom of association and the right to organize.¹⁴

3. SOURCES OF THE RIGHT TO ASSOCIATE IN NIGERIAN LAW

Nigeria is a member of the Governing Body of the ILO and has ratified ILO Conventions 87 and 98. Nigeria has also ratified both ICESCR and the International Covenant on Civil and Political Rights. Accordingly, Nigeria is bound by these instruments. This means that workers and trade union organizations in Nigeria, like those in most other countries, have the right to lodge complaints with the ILO Committee on Freedom of Association concerning any abridgments of workers' freedoms.

Besides these instruments, constitutional and legislative provisions protect the exercise of freedom of association by workers and employers.

3.1 Constitutional Basis for Workers Freedom of Association

The freedom to associate has a constitutional basis in Nigeria. Section 40 of the Constitution of the Federal Republic of Nigeria 1999 provides as follows:

Every person shall be entitled to assembly freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any association for the protection of his interests.

Section 40 holds great significance, for it gives the labor movement a *constitutional* right to associate. The Constitution further protects the worker's right not only to belong to but also to form a trade union. Thus the Constitution bars a "closed shop"¹⁵ agreement, "yellow dog" contract, or any other arrangement that compels a worker to join a particular union or that excludes the worker from union membership. This covers both

¹² Article 12(1).

¹³ Article 10.

¹⁴ For more detailed discussion of these instruments, see Swepston, L., "Human Rights and Freedom of Association: Development through ILO Supervision," 137:2 *International Labour Review* 169-194 (1998); Gillian Morris, "Freedom of Association and the Interests of the State," in Ewing, K.D., Gearty, C.A., and Hepple, B.A. (eds.), *Human Rights and Labour Law: Essays for Paul O'Higgins* (London and New York: Mansell Publishing Limited, 1994), p. 2; Leader, S., *Freedom of Association: A Study in Labor Law and Political Theory* (New Haven and London: Yale University Press, 1992), pp. 123-265; Valticos, N., "International Labour Law," in Blanpain, R. (ed.), *International Encyclopaedia for Labour Law and Industrial Relations* (Deventer: Kluwer, 1984), pp. 79-92, 239-53; Creighton, W.B., "Freedom of Association," in Blanpain, R. (ed.), *Comparative Labour Law and Industrial Relations* (Deventer: Kluwer, 1990), Chapter 17; Ben-Israel, R., *International Labour Standards: The Case of the Freedom to Strike* (Deventer: Kluwer, 1988); Hodges-Aeberhard, J., and Odero de Dios, A., "Principles of the Committee on Freedom of Association Concerning Strikes," 126 *International Labour Review* 543 (1988); Jenks, C.W., *The International Protection of Trade Union Freedom* (London: Stevens and Sons, 1957), pp. 181-183; Jenks, C.W., "International Protection of Freedom of Association for Trade Union Purposes," 87:1 *International Labour Review* 1-115 (1955).

¹⁵ A closed shop is an agreement, usually between a trade union or unions on the one hand and the employer on the other, that makes union membership a condition of employment or continued employment. A closed shop seriously limits a worker's freedom to belong to a union of his choice.

private employers and the government itself when acting as employer. This means that a worker can decline to join union X and instead form or join union Y.¹⁶ Finally, the Constitution provides for access to court to remediate any breach of the right to associate. Section 46 of the Constitution states as follows:

Any person who alleges that his right to form, join or belong to a trade union of his choice has been, is being or is likely to be infringed may apply to a High Court in the State in which the infringement is threatened or has occurred for redress.

3.2 The African Charter on Human and Peoples Rights

Another source of freedom of association of workers in Nigeria can be found in the African [Banjul] Charter of Human and Peoples Rights 1981. Article 10 of the Charter provides that "Every individual shall have a right to free association provided that he abides by the law." Nigeria has ratified this Charter and made it a part of national law.¹⁷ In *Abacha v Fawehinmi*,¹⁸ the Supreme Court held that since the African Charter has been incorporated into Nigerian law, it enjoys a status higher than a mere international convention; it is part of Nigerian *corpus juris*.

3.3 Other Sources of Protection

Other sources of the protection of the right to associate in Nigeria can be found under Section 9(6) of the Labour Act 1990¹⁹ and Section 12 of the Trade Unions Act 1990.²⁰ These sections show that the right to associate and belong to trade unions is open to all, regardless of ethnicity, religion, or political affiliation. They also forbid discriminating against workers based on union membership or non-membership.

4. STATE INTERFERENCE WITH WORKERS FREEDOM OF ASSOCIATION

The right of all members to participate in trade union activities flows from the right of workers to associate for trade union purposes. Any unlawful and unjustified action by the public authorities that impairs the right of the unionist to actively participate in union activities will violate the right to free association. In the *travaux preparatoires* leading to the adoption of ILO Convention 87, it was noted that

Freedom of industrial association is but one aspect of freedom of association in general, which must itself form part of the whole range of fundamental liberties of man, all interdependent and complementary one to another, including freedom of assembly

¹⁶ See *Basorun v Industrial Arbitration Tribunal*, Unreported Suit No. LD/105/71, High Court of Lagos State, cited in Uvieghara, E.E., *Labour Law in Nigeria* (Lagos and Oxford, 2001), p. 319.

¹⁷ See African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Chapter 10, Laws of the Federal Republic of Nigeria 1990.

¹⁸ (2000) 6 NWLR (Part 660) 228(SC).

¹⁹ Chapter 198, Laws of the Federation of Nigeria 1990.

²⁰ Chapter 437, Laws of the Federation of Nigeria 1990.

and of meeting, freedom of speech and opinion, freedom of expression and of the press and so forth.²¹

Article 8 of Convention 87 specifically provides that "The law of the land shall not be such as to impair, nor shall it be so applied as to impair the guarantees provided for in the convention."

The ILO has identified certain civil liberties as essential for the exercise of trade union rights. In Nigeria, unfortunately, the state has continued to deny trade unions the free exercise of these liberties.

4.1 The Right to Personal Dignity and Safety

Freedom of association extends to the personal dignity and safety of workers; they must be free to associate and organize without fear or molestation. This is a significant aspect of trade union rights. However, it is not uncommon to hear of violence, injuries, loss of life, cruelty, torture and other forms of ill treatment, forced exile, and disappearances of workers all over the world.²² Many workers who try to form trade unions are spied on, harassed, pressured, threatened, suspended, fired, deported, or otherwise victimized in reprisal for exercising their right to freedom of association.²³ The state must ensure that the lives of workers and especially their leadership are protected from both the state itself and others.²⁴

In Nigeria, workers' right to personal dignity and safety is very precarious. Violence against trade unionists is endemic, including murder, disappearance, intimidation, torture, harassment, and detention. In 2002, shortly after the Nigerian Labour Congress (NLC) declared a nationwide strike over the increase of petroleum prices, security agents rounded up Adams Oshiomhole, the NLC president, and several other labor leaders, including Dr. Dipo Fashina, president of the Academic Staff Union of Universities (ASUU). Sixteen other union leaders were arrested in Port Harcourt, Rivers State, while twenty-five persons, including the state secretary of NLC, Wale Olaniyan, were locked up in Ogun State by the police. In the course of the Abuja arrests, the police exhibited excessive brutality. They seized the NLC president's car and savagely beat up Dare Agbaje, the driver. ASUU president Fashina had his shirt torn and one of his fingers broken. Throughout a twenty-four hour stint in detention, they were not allowed to receive any medical attention.²⁵ Much earlier, Milton Dabibi, general secretary of the Petroleum and Natural Gas Workers Union (PENGASSAN), and Frank Kokori, general secretary of National Union of Petroleum and Natural Gas Workers (NUPENG), were

²¹ ILO: Freedom of Association and Industrial Relations, Report VII, IL Conference, 30th Session, 1947, p. 11.

²² This is clearly the terrible situation that Nigerian trade unionists increasingly face.

²³ Compa, L., "Workers' Freedom of Association in the United States: The Gap between Ideals and Practice," in Gross, J.A. (ed.), *Workers' Rights as Human Rights* (New York: Cornell University Press, 2003), p. 32.

²⁴ See ILO: Committee on Freedom of Association, 217th Report, Para. 493.

²⁵ See *2002 Annual Report on the Human Rights Situation in Nigeria* (Nigeria: Committee for the Defence of Human Rights [CDHR], 2002), p. 131.

detained in 1994 and 1996, respectively, for more than two years without charge or trial. When they fell into poor health, access to medical care was denied them.

With the use of the police and other law enforcement agencies to harass and assault trade unions in Nigeria, the state cannot deny responsibility. A government spokesman recently warned labor against what he described as "unnecessary confrontation," and added that the government would not tolerate "any excessive militancy" from them.²⁶ This sort of statement suggests that the government tacitly supports the attacks against unions. Even where unions and workers are harassed by people outside the government, responsibility still rests on the government, for it turns a blind eye to the atrocities. Nigerian trade unions were in the vanguard of the nationalist movement, which eventually led to Nigerian independence and freedom for all citizens. It is disturbing that they are now treated as enemies by the government. The secretary general of the Organisation of African Trade Union Unity (OATUU) has expressed a similar view:

As a trade unionist, the question that worries me most is why trade unions which fought side by side with political parties to dislodge colonialists ...are not now accepted by African Governments.... [T]rade unionists are in jail or in detention ... some under investigation, splits are being encouraged to weaken trade union leadership ... some unions are facing threats of dissolution. There are trade unionists living in exile because they have displeased home governments.²⁷

In sum, the abuses of trade union rights remain a sore point in Nigeria.

4.2 Freedom of Assembly

It is very important that trade union organizations be able to organize meetings and other activities without having to seek permission from the authorities. ILO Convention 87 recognizes this fact by providing that "the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."²⁸

Yet that has not consistently been the case in Nigeria. Organizations frequently must seek official authorization before holding a public meeting or gathering. Such a requirement can greatly diminish the exercise of free association, especially when workers seek to engage in activities that the authorities may consider a challenge against their own policies and programs. The Nigerian Public Order Act is a radical example here: it empowers the authorities to prohibit gatherings or mass meetings generally.²⁹

²⁶ *Ibid.*

²⁷ Wogu Ananaba, *The Trade Union Movement in Africa* (London: C. Hurst & Company, 1979), p. 175.

²⁸ See Article 3(2).

²⁹ Public Order Act, Chapter 382, Laws of the Federation of Nigeria 1990, especially sections 1-4.

Unionists could be prevented from gathering to discuss a contemplated strike, for example, or to conduct an election.

Giving such wide discretionary powers to a functionary of a state that is openly hostile to trade unions is bound to lead to abuse of power. In August 2002, for example, the Federal government without reasonable cause dissolved the executive committee of the Maritime Workers Union of Nigeria (MWUN). Without an executive council or committee, a union cannot assemble to discuss and further the interests of members.

4.3 Freedom of Opinion and Expression

The right of trade unions to function freely and properly can be affected by state or other form of censorship. Unionists need to be able to express their views openly, without fear of reprisals from the state or others. The presence of police or other security at trade union meetings could chill the freedom of expression of trade unionists and their participation in trade union activities.

Even though the Nigerian Constitution guarantees freedom of expression for every citizen, authorities take brutal measures against those trade unions perceived to be working against their interests. The Nigerian Union of Journalists has persistently complained of violations of its members' rights. On January 4, 2002, for example, an anonymous caller who claimed to be working in tandem with the State Security Services (SSS) in Ibadan, the Oyo State capital, in a telephone conversation with Bayo Oladeji of the *Nigerian Tribune*, said in a muffled voice, "your [telephone] number is under surveillance and we know what you have been doing with it, especially Bayo Oladeji. This call is from the SSS and we are going to sweep that house very soon."³⁰ The reason for this threat was plainly articles considered unfavourable to those in power.

The Committee on Freedom of Association believes that a union's Convention 87 rights preclude any requirement that it submit all communications and publications for approval before distributing them.³¹ Any such requirement could both invade privacy and erode the autonomy and independence of trade unions and their members. The Committee on Freedom of Association also considers that the full exercise of trade union rights calls for a free flow of information, opinions, and ideas, and that workers, employers, and their organizations should enjoy freedom of opinion and expression at meetings, in publications, and in the course of other activities.³²

4.4 Protection of Trade Union Property

Government and its functionaries should treat trade union property like any other private property: as inviolable without reasonable justification. Searches of trade union offices and the dwellings of trade union members should be carried out only with proper warrant and in strict compliance with the purpose of the warrant. Trade union property should also be safeguarded from unwarranted destruction.

³⁰ See *2002 Annual Report*, n. 25 above.

³¹ See General Survey, 1983, Para 68.

³² General Survey, 1994, Para. 38.

In Nigeria, government disrespect for trade union property is commonplace. The Nigerian Labour Congress and its affiliate trade unions (more than 50) have been raided by the authorities without legitimate cause. In the recent *ILO Case No. 2267/Nigeria (2004) Complaint Against the Government of Nigeria on Freedom of Association*, the Academic Staff Union of Universities (ASUU) brought a complaint to the ILO concerning violations of freedom of association and gross infringement of trade union rights, including summary dismissal of academic staff because they had taken strike action, and harassment and victimization of trade union members. Following strike actions by ASUU in 2001, 2002, and 2003, forty-nine lecturers of the University of Illorin were dismissed, union property vandalized and removed, and premises were sealed. Staffs purportedly dismissed were also brutally evicted from their living quarters.

These actions were stoutly condemned by the ILO Committee on Freedom of Association, and the Nigerian Court ordered the government to reinstate the dismissed lecturers and restore trade union property. Even so, the government has done nothing by way of taking remedial steps.

4.5 International Affiliation.

International affiliation is certainly one of the basic trade union rights enshrined in Convention 87 of the ILO. Article 5 provides that

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisations, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

However, the Nigerian state has continued to deny trade unions the full opportunity to exercise their right to freedom of association in this regard. The successive military regimes between 1985 and 1999 completely banned international affiliation by trade unions. The present civilian administration is similarly hostile. Large international affiliates have helped trade unions grow in many developing countries. By affiliating with other organizations, a trade union can gain access to financial assistance, training, and other benefits. It is ironic that the same government that goes about the world seeking aid and debt forgiveness will not let its trade unions freely seek international affiliation so as to benefit from potential assistance.

International affiliation would bring Nigerian trade unions into contact with their counterparts in both industrialized and Third World countries of Asia, the Caribbean, Latin America, and the Pacific, thereby providing a useful forum for the exchange of views and ideas, mutual cooperation and assistance, alliance on international industrial action, and other ways to find solutions to workers' problems. When it bars such affiliations, the government of Nigeria violates freedom of association.

5. TOWARD PROTECTING TRADE UNION RIGHTS IN NIGERIA: PRESCRIPTIONS

As we have seen, the rights of trade unions in Nigeria are routinely violated. The ILO has repeatedly voiced outrage over Nigeria's continued flouting of labor rights. The

government's actions arise out of arrogance and show contempt for the people. What can be done to solve these problems?

5.1 Absolute respect for the Rule of Law

Beyond doubt, the history of military domination of politics and governance largely accounts for the authoritarianism of the Nigerian state today. But those times are past. Democracy extols the rule of law. The rule of law seeks to ensure that a government acts within the constraints of its constitution. It also provides for equality before the law and due process of law. Now that Nigeria has returned to full-fledged democratic governance, the government must respect the rule of law and the human rights of the citizens, including the rights of trade unionists. The government should be bound by its constitutional provisions. As a constitutional government, it should not take any arbitrary action to violate trade union rights. To do otherwise is to foster an environment where authoritarianism flourishes, the rule of law is negated, and neither officials nor private entities respect trade union rights and dignity. Of particular importance here is the *ILO Case Against the Government of Nigeria*, brought by the ASUU. The government should recall the forty-nine dismissed lecturers of the University of Illorin and restore the destroyed and confiscated trade union property.

5.2 Judicial Role

The judiciary plays a very prominent role in a society governed by the rule of law. The judiciary has the important tasks of interpreting the constitution and defining the scope and limits of the powers of both the executive and the legislature. Court represents the last hope of the common man against the powers of government, which makes it essential for the judiciary to exhibit a high sense of duty and commitment to the cause of justice. The judiciary must annul and invalidate any governmental or other action that violates trade union rights in Nigeria. It must fearlessly ensure that the constitution and laws of the land are fully complied with. If the courts will intervene in such matters, then we can begin to see a ray of hope for protecting trade union rights in Nigeria. As the American Supreme Court Justice Hugo Black pointed out in *Chambers v. Florida*,

Courts stand as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or victims of prejudice or public excitement.³³

Trade union rights must not be allowed to suffer at the hands of the Nigerian state. The time is thus ripe for the Nigerian judiciary to embrace the legitimate authorities of judges and invalidate all acts that violate trade union rights. The Nigerian Constitution makes the executive and legislative powers subject to the provisions of the constitution³⁴ and to the courts.³⁵ These provisions authorize the judiciary to play an active role.³⁶ It should do so.

³³ 309 U.S. 227, 241 (1940).

³⁴ Sections 6 and 4 of the 1999 Constitution of the Federal Republic of Nigeria, respectively.

³⁵ Section 4(8), *Ibid.*,

³⁶ See Eso, K., *Thoughts on Law and Jurisprudence* (Lagos: MIJ Professional Publishers Ltd., 1990), pp. 170-171.

5.3 Compliance with International Labor Standards

There is the urgent need for Nigeria to comply with all the ILO Conventions to protect trade union rights. At a time when most countries are fighting to protect the human and trade union rights of citizens, Nigeria must not take a retrograde step, one that will deprive it of full standing in the international milieu of states that comply with international labor standards.

The time is ripe for legislative intervention. In line with the ILO's principles and standards, all draconian decrees and laws that have infringed upon workers' and unionists' rights in Nigeria should be removed from our statute books immediately. Compliance with international labor standards will do much to ensure the protection of trade union rights in Nigeria.

6. CONCLUSION

Nigeria continues to violate trade union rights, contrary to both its own constitution and international standards. A few of the violations have been discussed here, but we must stress that this account is far from exhaustive, for violations of workers and trade union rights are usually unreported.

The Nigerian authorities must provide an enabling environment for freedom of association, in which trade unions can flourish. The status quo, with union leaders and other unionists hounded and arrested with no regard for due process, is unacceptable. Like other liberal democracies, the government of Nigeria must respect the rights that trade unions derive from the freedom of association.³⁷ Indeed, it should encourage and empower unions to help with the task of economic development.

We agree with Harold Laski that "Without freedom of mind and of association a man has no means to self-protection in our social order."³⁸ One must hope that Nigeria will unleash its trade unions and restore its posture as a liberal democratic nation that respects the rule of law.

REFERENCES

- Ananaba, W. 1979. *The Trade Union Movement in Africa*, p. 175. London: C. Hurst & Company.
- Ben-Israel, R. 1988. *International Labour Standards: The Case of the Freedom to Strike*, pp. 25- 29. Deventer: Kluwer.
- Compa, L. 2003. "Workers' Freedom of Association in the United States: The Gap between Ideals and Practice." In *Workers' Rights as Human Rights*, J. Gross (ed.), p. 32. New York: Cornell University Press.
- Creighton, W.B. 1990. "Freedom of Association." In Blanpain, R. (ed.), *Comparative Labour Law and Industrial Relations*. Deventer: Kluwer.

³⁷ See Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (Yale University Press, 1992), p. 269.

³⁸ *Liberty in the Modern State*, n. 2, above, p. 195. See also Morse, D., *The Origin and Evolution of the ILO and its Role in the World Community* (1969), p. 58, cited in David L. Gregory "The Right to Unionise as a Fundamental Human and Civil Right," 9 *Mississippi College Law Review* 35-54 (1988).

- Hodges-Aeberhard, J., and Odero de Dios, A. 1988. "Principles of the Committee on Freedom of Association Concerning Strikes." *International Labour Review* 126: 543.
- Jenks, C.W. 1955. "International Protection of Freedom of Association for Trade Union Purposes." *International Labour Review* 87 (1): 1-115
- Jenks, C.W. 1957. *The International Protection of Trade Union Freedom*, pp. 181-183 London: Stevens and Sons.
- Johnston, G.A. 1970. *The International Labour Organisation*, p. 150. London: Europa Publications.
- Laski, H. 1948. *Liberty in the Modern State*, p. 195. London: George Allen & Unwin Ltd.
- Leader, S. 1992. *Freedom of Association: A Study in Labor Law and Political Theory*, pp. 123-265. New Haven and London: Yale University Press.
- Morris, G. 1994. "Freedom of Association and the Interests of the State." In *Human Rights and Labour Law: Essays for Paul O'Higgins*, Ewing, K.D., Gearty, C.A., and Hepple, B.A., (eds.), p. 2. London and New York: Mansell Publishing Limited.
- Sweepston, L. 1998. "Human Rights and Freedom of Association: Development through ILO Supervision." *International Labour Review* 137(2): 169-194.
- Valticos, N. 1984. "International Labour Law." In *International Encyclopaedia for Labour Law and Industrial Relations*, Blanpain, R. (ed.), pp. 79-92, 239-53. Deventer: Kluwer.