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PUBLIC POLICY ACTIVITIES OF NOT-FOR-PROFIT ORGANIZATIONS

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- . **Introduction**

This study presents a theoretical and practical overview, from a comparative perspective, of the regulation of public policy activities undertaken by not-for-profit organizations (NPOs) in both common law and civil law jurisdictions. In the broadest sense, most activities of NPOs have implications for or are the result of existing policy. Moreover, the decision to grant benefits of any sort to NPOs is public policy related as it involves a use of state resources. For purposes of this discussion, however, public policy activities will be defined as supporting or opposing candidates for public office, supporting particular political parties, lobbying for or against specific laws, engaging in public advocacy, or pursuing issue-oriented litigation. NPOs will be deemed to include charitable institutions in their widest sense under the common law, as well as foundations and associations not organized for private benefit under the civil law, or what are generically referred to in popular parlance as non-governmental organizations (NGOs). The study is divided into two parts. The first section surveys the relevant laws in a number of significant jurisdictions, generally distinguishing between civil law and common law. The second section analyzes the differences identified, and looks at the theoretical basis therefor, in an effort to provide general guidance for legislators, government officials, legal practitioners, and members of the NGO sector.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize that all individuals possess the rights to freedom of opinion and expression, and freedom of peaceful assembly and association. 1 According to these widely respected international pronouncements, both rights may be limited in conformance with the "interests of national security or public safety, public order, the protection of public health or morals or the protection and the rights and freedoms of others" in a democratic society. 2 While there is consensus that individuals have these rights, there is some debate, at least in the United States, concerning the extent to which they apply to *organizations* of individuals united for charitable purposes or public benefit, particularly when they act in the public policy realm. 3 At any rate, as a matter of fundamental human and civil rights, NPOs should be able to participate to some degree in the process of public policy.

Naturally, restrictions upon the public policy activities of NPOs depend to a certain extent upon the *system* of law in each country. As a general proposition, restrictions are most thoroughly articulated and strictly enforced in countries applying the concept of "charity", as defined under the common law. In these jurisdictions, there is greater emphasis upon the purposes of NPOs, and their conformity to historically derived (but

often differently defined) notions of acceptable charitable purposes. Civil law jurisdictions generally lack specific provisions restricting the public policy activity of NPOs. Political parties are usually governed by distinct legislation, separate from that covering foundations and associations, and/or handled separately in the Civil Code. (However, certain countries, particularly the Newly Independent States of the former Soviet Union or NIS, permit political parties to be formed pursuant to the general law on Public Associations). Generally speaking, the civil law emphasizes classification of organizational forms, which must be strictly followed in order to obtain legal personality. This justifies differentiation between political parties and other collective entities.

In fact, the primary basis for this divergent treatment of the public policy activities of NPOs appears to be classification in common law countries on the basis of *charitable*, or *public benefit* purposes, in contrast with civil law classification focusing upon the nature of *legal personality*. 4 When an organization is classified as charitable, common law countries are inclined to restrict public policy activities because many such activities are perceived to be inherently partisan, and thus in actual or potential conflict with the public benefit purposes of the organization. Further, public policy activities should not be improperly subsidized so that they undermine the justification for tax or other related benefits. Where public benefit is not the primary purpose of the NPO, common law countries tend to be less restrictive.

Civil law countries generally treat the issue as a threshold, organizational matter, which is governed by the range of permissible activities for the particular form of organization. In contrast to common law jurisdictions, there are two preferred forms for NPOs. Associations are primarily membership organizations. Foundations are non-membership organizations, with a patrimony or endowment devoted to a particular cause (although "operating" foundations are more prevalent than traditional "grant-making" foundations in some countries with limited philanthropic resources). There is no justification for distinguishing between associations and foundations with respect to regulating their public policy activities.

The legal systems of Central and Eastern Europe (CEE) are based in the civil law tradition. Nonetheless, there is a trend towards recognizing different organizational forms in the region. For example, Hungary and the Czech Republic have Public Benefit Companies, Hungary has Public Chambers, Lithuania has Community Organizations, and

several countries allow or plan to allow Public Foundations. In any event, the principle concern is that NPOs not circumvent the legislation or civil code provisions governing political parties.

In spite of these different approaches, even civil law jurisdictions may consider the extent to which an NPO engages in public policy activities when public benefit status is at issue. Therefore, it is possible to identify an element of convergence between the two legal systems. Tax status still depends to a large degree upon the organizational form in civil law countries (for example, successful registration as a foundation in Belgium automatically results in tax preferences, subject to periodic review). However, there is

also a tendency towards having this issue reviewed separately, subsequent to registration, by specialized tax authorities or an appropriate ministry (particularly in the CEE countries). In this case, tax preferences may be contingent upon an analysis of the public benefit derived from the activities of the organization, not unlike the process utilized in common law countries.

The threshold question for emerging democracies such as the countries of Central and Eastern Europe (CEE) or the Newly Independent States (NIS) is whether it is necessary to impose restrictions upon the public policy activities of NPOs at all. They need to consider what dangers might result from NPOs entering the public policy arena and whether this would constitute an evasion of the requirements for establishing political parties. They also need to consider whether there might be problems for the not-for-profit sector as a result of public policy activities conducted by some of its members. Analysis of the practices and experience of the various civil law countries is a beneficial first step. To the extent that some form of restrictions or scrutiny is warranted, and only in this case, serious study of the practices in common law jurisdictions may be interesting and instructive. In any event, it is appropriate to take a look at the different legal regimes covering the political activities of NPOs in both civil law and common law countries.

II. **Comparative Survey**

A. **Civil Law Countries**

It has been said that in civil law countries the "rule of law is conceived as a rule of conduct intimately linked to ideas of justice and morality", in which the development of doctrine plays a prominent part. 5 As a general proposition, there are no specific provisions regarding the public policy activities of NPOs in the civil codes. Instead, their activities are limited by the prohibition against contravening the public order or morals, as defined by the socio-cultural and/or religious norms of each jurisdiction. For example, France, Belgium, Holland, Finland, Italy, Spain, Germany, Switzerland, and Denmark do not place any restraints whatsoever upon the public policy activities of NPOs. This is consistent with the practice in Latin America, the other region of the world adhering almost exclusively to the civil law.

As a matter of fact, some civil law countries go so far as to encourage public policy activities by NPOs. In Belgium, there is an explicit right entitled the "droit de critique" (right to criticize) which permits associations to use all legal means to defend the interests and ideas which are identified in their organizational objectives. In Bolivia, the Constitution enables civic associations that represent a collective interest and have legal personality, such as syndicates, trade associations, and grass-roots organizations, to present candidates for national public office, provided that they ally themselves with a political party. 6 Further, political parties in both Bolivia and Germany set up foundations specifically for the purpose of channeling resources into partisan activities. And in Switzerland, associations play an important role in fostering participatory democracy, by mobilizing and representing citizens in the political decision-making process.

Similarly, Public Associations in Russia can engage in lobbying and take part in electoral campaigns, provided that they are authorized to do so in their founding documents. Chapter Three, Article 27 of the Federal Law on Public Associations grants such entities the following rights:

- "to participate in the generation of decisions of organs of state authority and local self-governing bodies according to procedures and within the scope [of federal law]; to set up mass information media and to conduct publishing operations; to represent and defend their own rights and the legal interests of their members and participants and of other citizens before the organs of state authority, local self-governing bodies and public associations; to present initiatives in regard to various issues of public life and to submit proposals to the organs of state authority; to participate in election campaigns (in the event of the state registration of the public association and with the presence of a provision concerning participation in elections in the charter of the public association in question)."

However, both the Federal Charity Law and the Moscow Charity Law prohibit using funds to support political parties or conduct electoral campaigns. Religious organizations in both Russia (under the Law on Freedom of Conscience) and the Central Asian Republics are precluded from engaging in politics. Interestingly, in all of these countries political parties fall under the jurisdiction of the laws governing other associations. This may at least in part explain not only the lack of restrictions on political activities, but also a certain degree of hostility on the part of governments to NPOs and the not-for-profit sector as a whole.

In line with the general practice in civil law jurisdictions, many of the CEE countries do not regulate public policy activities undertaken by NPOs. In Poland, Croatia, and Estonia, for example, the laws impose no limitations whatsoever. In Hungary, the only limitations pertain to foundations which receive state support or money from abroad. In practice, however, they are quite easily circumvented by establishment of an "intermediary" NPO. 7 In both Poland and Hungary, NPOs are widely seen to play a dynamic role in public life.

On the other hand, some CEE countries do regulate the public policy activities of NPOs. In Bulgaria, Article 12 of the Constitution prohibits associations from "having political purposes and engaging in political activities, typical only for political parties". 8 However, according to Stephan Kyutchukov, an attorney and expert on non-profit legal issues, this prohibition is construed narrowly in practice merely to ban associations from sponsoring candidates for public office. NPOs have been allowed to finance and endorse candidates, lobby for and against legislation, engage in public advocacy, and undertake issue-oriented litigation. 9 In Lithuania, the Law on Foundations contains a provision prohibiting political activity, which is not defined in this legislation. In Romania, according to Lucian Mihai, another authority on non-profit legal issues, "NPOs are prohibited from engaging in political activities, but no legal definition of ëpoliticalí exists. Several NPOs have taken advantage of this ambiguity and have conducted various

types of political activities." 10 In the Czech Republic, associations (but not foundations) can not be "established to conduct political activities". 11 In practice, however, NPOs in both Romania and the Czech Republic engage in all of the activities undertaken by Bulgarian NPOs listed above.

While these examples appear to suggest a dichotomy concerning the regulation of public policy activities of NPOs in CEE countries, it is important to note that in practice the public policy realm is quite accessible to NPOs, especially in comparison with common law countries. In other words, actual practice is close to the norm in civil law jurisdictions, even if it does not go as far as Bolivia and Germany. One explanation for this situation is competition between two contradictory goals: the desire to open up the political process, and the desire to set limits upon political opposition (which in certain CEE countries finds a home in the not-for-profit sector). Another factor tending to keep the public policy process open in practice may be the fact that regulation and enforcement often lag behind reality when countries are in a state of transition. In any event, current practice regarding regulation of public policy activities by NPOs places the CEE countries and the NIS within the civil law tradition.

B. **Common Law Countries**

The common law legal system developed incrementally over a number of centuries, greatly influenced (if not actually determined) by the decisions of judges resolving individual disputes, applying the rationales enunciated in previous cases (precedent) and principles of equity. Both the concept of "charity" and its application cannot be separated from this socio-legal context, particularly in the Anglo-American experience. Over the centuries since the Preamble to the Statute of Charitable Uses in 1601, the courts of England and all other common law countries have interpreted charitable activity to encompass service for the public benefit or good. 12 Thus, in most common law countries NPOs are classified by virtue of their charitable purposes, and not their specific organizational form or type of legal personality. Accordingly, the categories of activities which qualify as public benefit are often codified and/or delineated in court decisions. Both tax authorities and judges interpret these categories more broadly than under the traditional civil law practice. The general premise which underlies the historical concepts, the codifications, and the decisions which interpret and apply them, is that *much public policy activity is outside the realm of charity*, particularly when it takes the form of partisan politics, explicitly or implicitly.

1. **England**

The charitable sector in England has long-standing roots going back to the middle ages, but developed extremely rapidly in the nineteenth century. Traditionally, the concept of charity has been more broadly construed than in the civil law (although there are exceptions now). This is in great measure due to the role of the courts in delineating the boundaries of the concept: "it is not for the government to precisely define the activities that a charity may pursue, only that it legally exclude those activities which a charity

should not pursue." 13 The primary responsibility of the government is to assure that charities are trustworthy, and what they claim to be.

Accordingly, the government has transferred much of its responsibility for regulation and oversight of NPOs to the Charity Commission for England and Wales. The goal of the Charity Commission is to promote the effective use of resources for charitable purposes, by registering charities, providing information concerning their activities, and investigating and controlling abuse. While the Charity Commission is ultimately accountable to the Home Ministry, it has a large degree of autonomy, and practically speaking extends to the sector many characteristics of self-regulation. Indeed, one of the main functions of the Charity Commission is to ensure that the law is obeyed by Trustees, who are actually responsible for the administration of charities.

For many years, the courts struggled with definitions and principles concerning the public policy activities of charities. For example, the 1981 case of McGovern and others v. A.G. involved the right of charities to lobby for changes in the law. The following conclusion was reached:

"...the court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the U.K. for one or both of two reasons. First, the court will ordinarily have no sufficient means of judging, as a matter of evidence, whether the proposed change will or will not be for the public benefit. Second, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must decide the case on the principle that the law is right as it stands, since to do otherwise would be to usurp the function of the legislature." 14

However, application of the latter principle results in a tautology, since if the law is presumed to be right as it stands, no efforts to lobby for a change could fall within the concept of charity or public benefit!

In response to these difficulties, and also a growing scandal over the electoral campaign activities of charities (such as Oxfam) during the late 1980ís, the Charity Commission issued Revised Guidelines on public policy activities in 1994. The Guidelines were finalized in 1995, following extensive consultations. Based upon general principles enunciated by the courts, the Guidelines distinguish between public policy *objects* (purposes) and public policy *activities*. They state that although charities cannot have public policy *purposes*, they may nevertheless engage in *activities* which are directed at securing, or opposing, changes in the law or in government policy. In order to do so, the trustees of the charity must show that there is "a reasonable expectation that the activities will further the purposes of the charity effectively and so benefit the beneficiaries" (charitable objects). Similarly, campaign activities are permissible, as long as they promote the purposes of the charity, and provided that they are based upon reliable data and a well-founded case. These activities must also be independent of the positions taken by political parties, since purely partisan activity is circumscribed.

Most examples of permissible public policy activity given by the Charity Commissioners are similar to those allowed in the United States under the Internal Revenue Code. The major potential exception concerns grass-roots lobbying, which the Charity Commission prohibits completely. However, sometimes the examples are problematic, since it is difficult to draw a precise line separating the promotion of charitable purposes via public policy activities, and undertaking activities with public policy purposes. For example, charities are supposedly allowed to spend funds for the promotion of legislation, provided that they are authorized by their statutes to do so, and reasonably believe that this would further legitimate charitable purposes. But promoting or opposing legislation can also be interpreted to have partisan political motives, particularly during electoral periods.

2. **Canada**

Canadian law distinguishes between charities and other NPOs. Jurisdiction over charities in Canada has generally been seen as a provincial matter, with the subject of public policy activities covered by common law rather than statute or fiscal regulation, although Revenue Canada has overall supervision. 15 In order to qualify as a charity, enabling its donors to enjoy tax privileges in the form of deductions from gross income, an organization must be devoted exclusively to purposes defined as charitable by the Canadian courts, refrain from distributing profits or engaging in self-help, and limit its involvement in public policy. Acceptable charitable purposes include the relief of poverty, the advancement of education, the advancement of religion, and activities which benefit the community.

If an organization does not qualify as a charity under the Canadian Income Tax Act, it can still obtain not-for-profit status if it is organized and operated exclusively for social welfare, civic improvement, or recreation, does not actually make a profit, and does not distribute benefits to insiders. In this case, however, it would not be subject to the regulations governing charities, and donations would not have any special tax status. NPOs in Canada are extended a great deal of autonomy, including the ability to influence their tax status, and, if unincorporated, may not even be required to file a tax return.

Regulations covering charitable organizations in Canada are not dissimilar to those in England and the United States. Revenue Canada has issued guidelines which define impermissible public policy activities to include:

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  - 1) supporting a particular party or candidate for political office;

    2) promoting a general political ideology

    3) supporting or opposing changes in the law or in governmental policy;

    4) advocating that the public adopt a particular attitude toward a divisive social issue.

The only public policy activities which do not contravene charitable status are those which serve educational purposes. They must further the goals of the charity by providing factual information and expert opinions in a sincere effort to enable the public or government officials to fully and reasonably consider an issue. As in the both England and the United States, it is necessary to present a full and fair exposition of the facts. Other activities which are prohibited in Canada (and the United States as well) include directly or indirectly supporting or opposing political parties, politicians, or candidates for public office, purchasing tickets to fund-raising events which benefit political parties or candidates, and using the property or personnel of the charity to benefit political parties or candidates.

In Canada, not only are such public policy activities limited to furtherance of the goals of the charity, and required to be non-partisan in nature, but they must also be minor in relation to overall activities. The Canadian Income Tax Act requires that *substantially all* resources be devoted to charitable purposes or activities, and that any public policy activities be ancillary and incidental thereto. In the opinion of Revenue Canada, *substantially all* means ninety per-cent, although this interpretation should not be considered universally binding throughout the provinces.

One area where Canadian and American law diverge concerns sanctions. Whereas the Internal Revenue Service can impose a tax on funds devoted to public policy activities which are considered improper, the only sanction in Canada is the loss of registered status. This may result in a slightly higher level of tolerance, until circumstances actually warrant such a harsh measure.

3. **The United States**

In the United States, NPOs must be legally constituted under the laws of a particular state, which will exercise jurisdiction over many of their activities, and collect local taxes. State laws concerning public policy activities by NPOs, and the tax consequences thereof, can diverge markedly from federal practice, and in many instances are closer to the common law model. However, federal taxes are applied uniformly, by the Internal Revenue Service, in accordance with the provisions of the Internal Revenue Code. As a general proposition, it is not the organizational form of the NPO which controls federal tax issues, but the category of the Code into which its activities and purposes fit.

Political speech has long been placed at the core of the constitutional right to freedom of speech in the United States. Although this right has generally been regarded as belonging to the individual, the constitutional analysis may also be applied to individuals acting collectively. 16 Generally speaking, any law or regulation which burdens an organizationís right to engage in political speech must be narrowly tailored to serve a compelling state interest.

Since 1934, charitable organizations in the United States have been prohibited from lobbying the government. And since 1954, they have been prohibited from participating in political campaigns for public office. Provisions in the Internal Revenue Code amply

demonstrate that Congress has intended to clearly separate partisan politics from charitable activities. 17 Two justifications for this policy have been advanced by scholars and judges. First, the principles of "non-subvention" and "neutrality" posit that the cost of public policy activities by NPOs should not be borne by the taxpayer through a government subsidy, albeit indirect in the form of tax benefits. This is considered to be particularly inappropriate when other individuals or groups may not be afforded the same benefit, or may not agree with the ideas being espoused. This view was first expressed in the American courts by Judge Learned Hand in 1930. Denying a charitable deduction for contributions to an organization that lobbied for birth control legislation, he wrote: "Political agitation...however innocent the aim...must be conducted without public subvention; the Treasury stands aside from them." 18

The principles of "non-subvention" and "neutrality" have been criticized for several reasons. First, it has been suggested that the principles fail to take into account the fact that "almost every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object." 19 That NPOs which take diametrically opposed positions concerning controversial issues can receive tax benefits is demonstrative of this fact. Additionally, the Government undermines non-neutrality in the tax laws by distinguishing between different types of NPOs, and by applying different rules concerning lobbying activities to them. 20 However, there is general consensus in favor of these two principles with respect to partisan political activity, such as participation in electoral campaigns, and the deductibility of expenditures related thereto. This may be seen at least in part as a result of traditional American antipathy to public financing of political campaigns.

The second argument advanced in support of the proposition that politics and charity should be separated is that politics is "by definition inconsistent with charity." 21 Political interests, by their very nature, are competitive and divergent. The public benefit should be, at least in theory, general and not partisan. While specific examples of activities which are accepted as public interest are often rather specialized, the idea remains that there is some definite benefit to the general public, or that at a minimum there are no competing interests which are harmed by the activity.

In a certain sense, a contradiction arises since many organizations may be able to best serve their charitable purposes by supporting a friendly candidate, or opposing legislation which might harm their constituents. However, such activities would necessarily be controversial, and the organization may find itself promoting ideas or taking actions which are not generally accepted as charitable by the public or even by individual members of the organization. The defining issues, then, are whether an organizationís right to political expression should be limited 1) by virtue of the benefits or subsidies conferred by the government for its charitable operation, or 2) because public policy activity would be tantamount to using benefits from authorities to influence those very same authorities, or 3) because the promotion of charitable purposes necessarily excludes activity in the political arena.

An organization or corporation in the United States is eligible for exemption from federal taxation if it qualifies under Section 501 or Section 521 of the Internal Revenue Code. Distinguishing between different kinds of organizations, each provision codifies both acceptable purposes and permissible activities. For example, most charitable organizations falling under Section 501(c)(3) can not dedicate a substantial part of their activities to carrying on propaganda or otherwise attempting to influence legislation, and are prohibited from becoming involved in political campaigns for public office. 22 They are nonetheless allowed to spend a limited amount of money to influence legislation, and can always publicize the results of nonpartisan research or provide technical assistance to legislative bodies. However, civic leagues and business leagues regulated in other subsections face no such limitations. Political parties, which receive an exemption for contributions, membership dues, and fundraising events (when used for exempt functions), are covered under Section 521. Thus, the scope of permissible public policy activities for NPOs is directly related to their stated purposes (organizational test) and actual activities (operational test), and the section under which they fall. As a general proposition, the distinctions between organizations under these various provisions and the public policy activities which they may undertake without losing their tax-exempt status are extremely complicated, beyond the scope of this paper, and of limited relevance to other jurisdictions.

- . **Theoretical Analysis**

The rights extended to NPOs to engage in public policy activities depend upon both the legal system and the specific laws which are in effect in each country. The survey of national practices above indicates that the system of law plays a significant role in the approach to public policy activities of NPOs, with divergence between civil law and common law jurisdictions. However, while the system of law establishes the framework for handling this issue, and sets the historical precedent, it is by no means determinative. Thus, there are exceptions. For example, Quebec, despite its firm civil law traditions, imposes controls on the public policy activity of NPOs which are comparable to its common law neighbors. And several CEE countries, while following the civil law approach in practice, have a number of significant restrictions in the law, the meaning of which remains to be fully developed. Thus, while the analysis necessarily begins with the system of law, it can not stop there. Other socio-political and legal factors must be considered.

First, the analysis should distinguish between direct involvement in electoral activities and general involvement in public policy decision making. With respect to electoral activities, it is up to the individual nation to determine the access of NPOs to the electoral process. In some countries, such access is completely open to NPOs while in others, there are restrictions. A common restriction is the requirement that NPOs either register as a political party or seek affiliation with a registered party. This decision is a matter of

constitutional and electoral law and should be left to the discretion of a nationís legislature. However, whatever restrictions are incorporated into the law should not unduly hinder the democratic process.

With respect to NPO involvement in public policy decision making, there is a distinction between informing and advising members of Parliament and involvement in decisions of the executive branch, either at the local or national level. There should be no objection to NPOs making contact with parliamentarians. This is part of the democratic process. Providing information to the parliament is a valuable service that will usually be appreciated by its members.

There are valid arguments for NPO involvement in decision and policy making by the executive branch. There are risks as well, including corruption, conflict of interest, manipulation, and misuse in general. These risks, however, are not specific to NPOs. The law should provide for a controlling mechanism, but it also should not be specific to NPOs. For example, gross corruption is a matter of criminal law. Several controlling mechanisms are available, including general legal provisions, self regulation, governmental supervision, and judicial supervision.

Another important factor is the approach towards the NPO sector in general, and the concept of charity in particular. The traditional concept of charity in the common law countries, despite the broad interpretation given to enumerated categories, is not amenable to public policy activity. This is particularly the case when such activity is partisan in nature, and/or involves electoral processes. Therefore, charitable organizations are directed towards the provision of information relevant to their statutory purposes, and involvement in the legislative process. Further, strict attention must be paid to the amount of such activity, and the interests of members and beneficiaries. Charities in common law jurisdictions can face the loss of their tax benefits if they venture too far.

This treatment of charities under the common law finds theoretical justification in the belief that they are supposed to serve the public benefit, while politics is competitive, and a clash between often conflicting interests. Tax concessions for NPOs engaging in public policy activity are seen as an improper form of subsidy. NPOs which are not deemed charitable are essentially free to engage in public policy activities, presumably because they do not receive the same level of tax benefits, and because the members share the political views of the organization and are willing to pay to disseminate those views. Under this approach, it is not the organizational form which is determinative, but the actual goals and activities of the NPO, and whether they fit into the concept of charity.

In the majority of civil law countries, there are few restrictions upon the public policy activities which may be undertaken by NPOs. Often, obtaining legal personality is the threshold issue, with the types of permissible activities and the tax consequences determined by the form of organization. While the civil law approach to the concept of charity has traditionally been more limited, most European countries now recognize and list as public benefit many of the same activities as the common law countries. The different attitude towards public policy activities may be due in part to a more organic

perspective of society. Political life may be viewed more as an expression of the society itself, and less as a clash of interest groups. Also, historically speaking, philanthropic organizations have played a more limited social role in the civil law countries. Finally, it is possible that under a civil law framework, regulation of the legal forms for organizations is considered to constitute sufficient control over the not-for-profit sector.

One aspect of the common law approach to charity that bears emphasis is its historical role and development. The common law concept of charity is intimately intertwined with British constitutional and parliamentary practice. Going back to Queen Elizabeth and the Statute of Uses, and traditional efforts by the monarchy to limit ecclesiastical privilege, the common law has sought to permit charities a defined range of social functions outside of the political sphere. Judges have played a prominent role in determining the boundaries of charitable activity. And the practices and principles of "equity" have left their imprint. In contrast, the civil law countries, looking to the order which the civil code supplies, within a society not defined by diverse interest groups, may be satisfied with employing legal personality as the mechanism which structures NPO participation in the political process. In short, charities may not be seen to occupy a defined sphere in the same sense that they do under the common law.

One interesting result of this dichotomy is revealed by transplantation of the concept of charity. It is possible that to the extent that the concept of charity is adopted, even in civil law jurisdictions, restrictions upon public policy activity undertaken by NPOs follow. This seems to be the case with the laws in Moscow and Russia. Further development of the legal systems in the CEE countries and the NIS will give a better indication if this is indeed the case.

With regard to politics, some of the same distinctions identified above apply. What constitutes the "rough and tumble" of politics under the common law, where government subsidies must be carefully scrutinized, may under the civil law be seen more as an extension of the rights of juridical persons. Thus, the public policy activities of NPOs may be viewed as a legitimate form of participation in public life, and useful for the political development of the country. Additionally, the tendency to focus upon individual rights in common law countries may lead to a concern that public policy activities on the part of NPOs, as collectives, may not fully represent or actually even contravene the wishes of certain members. The representative nature of associations, from the perspective of the civil law, may render such concerns unnecessary.

Furthermore, attitudes towards the political process itself play a significant role. For example, certain countries make a deliberate choice to encourage the political participation of individuals *and* organizations which seek to represent dissident voices in the population, or interests which have been historically marginalized from the political process. This seems to be the case in Bolivia, which enables indigenous grass-roots organizations to present candidates for public office, and Switzerland, which has a long tradition of mobilizing the electorate. It is little surprise that in Poland, the home of Solidarity, NPOs may nominate candidates for political office.

The issue of public confidence in NPOs must also be considered. NPO involvement in public policy activities, particularly policy making, might confuse the public which could lose confidence in the sector. This result would be to a great extent related to the statutory purpose or goal of a particular NPO. If its statutory objectives are to be actively involved in public policy making (e.g. trade unions or special interest organizations such as environmental groups), there should be little reason for the public to be confused. The risk with regard to public confidence in NPOs should not be a reason to limit their role in the policy making process. The controlling mechanisms such as legal provisions, self regulation, and judicial oversight can be implemented. Moreover, as NPOs become more active they will learn from their mistakes.

Of course the specific nature of the public policy activities must be taken into consideration. If there is one definite lesson to be learned from the common law approach, it is that truly educational activities undertaken by NPOs should be permitted, even if they have consequences for public policy. The standard applied, that the evidence must be fully and fairly presented, and factual in nature, seems not only appropriate but enforceable as well. When direct involvement in electoral activities is in question, then potential evasion of the requirements for political parties must be more seriously evaluated.

One final issue concerns the tax treatment of NPOs. Different nations treat NPOs active in public policy differently with respect to tax benefits. The question is more important in common law countries where the tax benefit status is linked to a certain public benefit status. It may be less important in systems where the tax benefits are governed in separate tax laws, where the nature or source of the income generating activity determines the tax treatment. It is up to the national legislature to decide whether or not to grant tax benefits to NPOs active in public policy or their donors. Given each nationís tradition and legal system there are good arguments for either choice. NPOs should expect restrictions on public policy activities in exchange for tax benefits. When restrictions are placed on public policy activities, it is important to define clearly what activities are considered related to public policy and what are not. For example, electoral activities are clearly public policy related while educational activities are less easy to qualify.

A proviso to this analysis must be added, with reference to the former socialist states in Europe. Neither NPOs nor public policy activities as defined herein existed in these states during the last four decades. Therefore, it may be too early to draw firm conclusions. In a very short period of time, the CEE countries, and some of the NIS, have made incredible progress towards re-creating civil society, and also towards democratizing/opening the political process. But the relationship between these two trends has not been definitively established. Since the right to lobby in a formal sense is relatively new, and not yet widely practiced, the rights of NPOs to engage in this process have not been fully addressed. On the other hand, the (perhaps more perceived than actual) use of NPOs in certain countries as a vehicle for political forces which are out of power has led to politicization of the sector, and a backlash against NPOs in general.

- . **Conclusion**

As these trends take shape in the former socialist states, over time it is possible that more limitations will be placed upon the public policy activities of NPOs. The regulation of economic activities on the part of NPOs may offer an example. After an initial period of relatively little control, following the fall of the Soviet Union, well publicized cases of abuse have led to the imposition of more restrictions on the range of permissible economic activities in a number of countries. It would be inappropriate to assume that the same process will apply to public policy activities. The point here is that practices in this regard are still fluid and developing, and definitive conclusions are premature.

Nonetheless, it is hoped that the new democracies in Europe will benefit from the experiences of other countries. The civil law approach to public policy activities on the part of NPOs should be carefully studied, since this is where comparable legal principles are most likely to be found. To the extent that limitations are deemed necessary, it is the common law which offers the most experience and concrete examples. Additionally, it is necessary to analyze the historical and socio-political factors which temper these systemic differences. In this fashion, it will be possible to determine the best approach in particular countries.

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1. Universal Declaration of Human Rights, G.A. RES. 217 (III 1948), Art. 19, 20; International Covenant on Civil and Political Rights, 999 U.N. T.S. 171, 6 I.L.M. 368, Art. 21, 22.
2. International Covenant on Civil and Political Rights, Art. 22 (2).
3. For further analysis concerning the role of NPOs in public debate, and guidelines concerning the legal regulation of NPOs in general, please see the Open Society Institute Handbook on Laws for Civic Organizations, prepared for the Open Society Institute by ICNL, in particular Section 22.
4. For a more complete discussion of the meaning and significance of "public benefit", please see the ICNL Issue Paper devoted to this topic.
5. David and Brierly, Major Legal Systems in the World Today, Second Edition, The Free Press, 1978, p. 21.
6. Baptista, Rosario, Legislación Vigente para el Sector Privado y sin Fines de Lucro en Bolivia, p. 5.
7. Ibid. Hungary Country Report, Page 11, prepared by Gabor Gyorffy.
8. *Select Legislative Texts and Commentaries on Central and East European Law*, edited by Douglas Rutzen, published by ICNL, the European Foundation Centre Orpheus Programme, and the Union of Bulgarian Foundations, Bulgaria Country Report, Page 2, prepared by Stephan Kyutchukov.
9. Ibid. Bulgaria Country Report, Pages 2 and 9.
10. Ibid. Romania Country Report, Page 7, prepared by Lucian Mihai.
11. Ibid. Czech Republic Country Report, Page 8, prepared by Petr Pajas.
12. "The essence of charity...is that charities exist for the public benefit." Richard Fries, Commissioner, Charity Commission for England and Wales.
13. Kevin Bales, *A Brief Guide to British Charity Law*, Ethics Development Initiative, p. 3-4.
14. [1981] 3 All E.R. 493 at 506 (Ch.D.)
15. See Re Public Trustee and Toronto Humane Society et al. (1987) 60 O.R. (2d) 236 and Section 92 (7) of the 1982 Constitution Act, 1985 R.S.C., Appendix II.
16. See First National Bank of Boston v. Belotti, 98 S.Ct. 1407; see also, Austin v. Michigan Chamber of Commerce , 494 S.Ct. 652, 657 ("The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.")

17. See, in general, Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 Geo. Wash. L. Rev. 308; Galston, *Lobbying and the Public Interest Rethinking The Internal Revenue Codeís Treatment of Legislative Activities*, 71 Tex. L. Rev. 1269.
18. Slee v. Commissioner, 42 F2d 184, 185 (2d Circ. 1930)
19. Buckely v. Valeo, 424 U.S. 1, 91-92 (1976)
20. See 26 I.R.C. 162 (e)(2); see also Regan v. Taxation With Representation (461 U.S. 540).
21. Chisolm, *supra*, at 337.
22. *Provisions of the United States Tax Laws Affecting Not-for-Profit Organizations*, Published by ICNL.

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