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Letter from the Editor

The *International Journal of Not-for-Profit Law* marks the beginning of a new American presidential administration with a symposium on Reformist Leaders and Civil Society. We asked civil society leaders from around the world to address four questions on the impact of reformist leaders plus one on the current economic crisis. We are delighted to present their thought-provoking responses: **Ingrid Srinath**, Secretary General of CIVICUS: World Alliance for Citizen Participation; **Francis N. Pangilinan**, a Senator of the Republic of the Philippines; **Liz Atkins,** Director of Public Policy for the National Council for Voluntary Organisations in London; **Boris Strečanský**, Executive Director of the Center for Philanthropy in Slovakia; **David Robinson,** Director of the New Zealand Social and Civic Policy Institute; **Arthur Larok,** Director of Programmes, Uganda National NGO Forum; and **Dragan Golubovic**, Senior Legal Advisor of the European Center for Not-for-Profit Law in Budapest.

We also feature an overview of the legal framework for not-for-profit organizations in Central and Eastern Europe, by **Douglas Rutzen**, President of the International Center for Not-for-Profit Law; **David Moore**, Program Director for the European Center for Not-for-Profit Law; and **Michael Durham**, a former ICNL intern who is now an associate at Caplin and Drysdale. **Benedict C. Iheme**, a lawyer and development consultant from Nigeria, outlines the laws and regulations under which Namibian civic organizations operate. And the **Foundation Center**, in cooperation with the **Council on Foundations**, provides a snapshot of today's international grantmaking.

As always, we gratefully acknowledge our authors for their incisive and informative articles.

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Reformist Leaders and Civil Society

Increase Engagement with the New Government

Ingrid Srinath[1]

What innovations have worked, and what lessons have been learned, for civil society to enhance its engagement with the government when a reformist leader takes office?

The election of a reformist leader opens up precious space and opportunity for more meaningful citizen/civil society engagement. In order to take advantage of that space/opportunity, civil society needs to be able to (i) mobilize and organize those groups traditionally marginalized from political processes (e.g., women, youth, people living in poverty); and (ii) draw on the growing number of participatory governance strategies and tools that promote not just consultation but a wide range of more meaningful forms of dialogue, negotiation, and joint deliberation and decision-making. These include, for example, strategies/tools like participatory planning, citizen juries, deliberative polling, participatory budgeting, citizen boards/advisory committees, etc.

In the run-up to the election of a reformist leader, there is often an increase in civic mobilization. What are some innovations and lessons learned about sustaining civic participation over time?

There are a couple of tensions in the question:

How do you define reformist? Most leaders of different parties are reformers against the last regime, in that they have a different take on a policy, direction, etc. However we (society and/or media) only apply this label (1) to persons who challenge the status quo to such a degree that they are considered reformers, and (2) when the person leaving power is so rejected by society that anyone with a new idea to change things is seen as a reformer.

The second tension in the question is between reformist leaders creating a stir within the public (i.e., civic mobilization) and sustaining this civic engagement through participation. The reason that persons mobilize behind a reformist leader is because he/she is attempting to alter the status quo—with the presumption that the status quo is found lacking or detrimental to a large enough part of society. The most obvious answer thus is that all leaders should be reformist against the last.

However, most policy shifts on which leaders get elected are not cataclysmically different enough to sway people to huge mobilization. Take the two leading parties in the UK, Labour and Conservative. Although the Conservatives are steadfast in rolling back some of the policies of the Labour government, they are not in reality vastly different from Labour, and the Labour policies are not so bad that the population is disgruntled enough against them. This is in part (but not wholly) why there is such political apathy in the citizenry in the UK. The problem thus is that there are comparatively very few instances where citizens are dejected enough about something to cause this stir. The issues that rile up society to mobilize

[1] Ingrid Srinath is the Secretary General of CIVICUS: World Alliance for Citizen Participation. She also serves on the board of the IANGO Accountability Charter and the World Economic Forum NGO Advisory Group.

completely are generally of profound or cataclysmic shifts—e.g., apartheid here in SA, the end of the Soharto dictatorship in Indonesia, antiwar rallies in America (and the ascent of Obama?) and the rest of the globe, and marches against nuclear weapons testing in the last couple of decades.

The challenge thus is how you convert this to long-term participation. After most reformist leaders comes sustained political mobilization for a period because people are politically aware and have a taste for it. However, look at many countries that have gone through political reformists. In UK in 1997, Labour took power by a huge voter turnout, but now, voting has sunk back to low levels (voting is possibly the minimalist form of civic participation—it happens every four years or more, and that is it until the next election). After the end of the Vietnam War, there was a marked decline in voter turnout in the US. There are cases like this everywhere in the world, in every country. Part of this problem may well be mental positivity toward the leader: "You were good/moral/supportive about this matter so we trusted you then, and we trust you to make our next decisions for us." I don't know if it is a good idea or in good taste to draw a parallel to Mugabe, but he came to power with a huge mobilization of the populace, and over time and through their unchallenging confidence in his policies he was able to erode the system until it was too late—until we are in our present position.

The interesting question is how to entrench civic participation at a high level. The reality is that most people are moved enough to become vocal and mobile (e.g., join committees, votes, marches, etc.) only about cataclysmic events/shifts.

I would like to draw attention to one detrimental approach that guaranteed civic participation. Under Mao's regime, China enacted community communist groups. By law everybody had to be a part of them. This is how doctrine was pushed downwards and people took part in voicing the greatness of communism and Mao and China. At one point these groups' members were forced to apologize for mythical civic disobedience in front of the rest of the community, resulting in punishment, etc. It was a way of controlling the population. We all are well aware of the controlling structure this created in China, resulting in tens of millions of deaths if not more. But the reality is that you can force, through the law, people to participate; however, unless you have a morally steadfast regime or a strong ethos, the potential for this to be effective is limited. Is it true participation if it is forced? Probably not.

One of the ideas that political governance and general civic engagement literature is built upon is that people are motivated to participate when they see their ideas and wants being enacted in a real way. Obama allowed his supporters to take the reins on activities and thus they owned them and felt like they were part of the end product. We can quote countless examples where these principles have encouraged sustained civic participation in governance, many beginning with health reform, road works, trade unions, and public discussions. In South Africa, for example, these principles have turned a mobilized population into a sustained, politically engaged one since the end of apartheid.

The end result is this: a reformist leader prompts civic mobilization through satisfying the needs of the disgruntled society by taking up a cause. People are empowered because the subject matter will affect their lives, either physically (e.g., a third runway at Heathrow destroying people's homes and neighborhoods) or mentally (nuclear disarmament, antiwar, Obama/anti-Bush). The trick then is to create the sustained civic participation after the original issues are resolved or the people are in place to resolve them. If you can make sure people stay

engaged by making that they have a real say in their own existence, they are more likely to participate. Civic mobilization is good because it helps to kick-start this process. There is no blueprint to this and people are trying every which way to make it work in their own society and culture.

What are some of the challenges that civil society organizations face when a reformist leader is elected?

One thing that civil society can do is to increase engagement with the new government and frame responses in relation to the election manifesto. For instance, when the Manmohan Singh government came to power in India in 2002, one of the election promises was to legislate freedom-of-information legislation. CSOs had already been working on this draft and fortunately because the government had the numbers in Parliament, it was able to push through the Right to Information Act.

One lesson, again from India, was the willingness of the Manmohan Singh government to engage with civil society. A National Advisory Council was established to advise on key issues and on ways to help the government fulfill its election promises. Nevertheless, this process got bogged down in politics and also led to a certain amount of disillusionment on the part of civil society members in the Council.

What are some lessons learned relating to the management of high (and sometimes unrealistic) expectations that can accompany the election of a reformist government, and how can civil society help hold governments accountable for pre-election promises?

The last decade has seen much innovation in methods of "social accountability"—ways in which citizens and civil society can hold government accountable. Methods such as social contracts, integrity pacts, participatory expenditure tracking, social audits, citizen report cards, community scorecards, and other mechanisms of participatory monitoring and evaluation have proved effective in many different contexts around the world. They now need to be disseminated more broadly, brought to scale, and, where appropriate, institutionalized.

In Jammu and Kashmir, in India, a speech made by the chief minister about "zero tolerance for human rights violations" was used by NGOs for engagement with the government to put in place institutional mechanisms to reduce violations. It is important for civil society to minutely study election promises and draw up a blueprint for their implementation, with civil society's assistance in both operations as well as monitoring.

The current financial crisis has created challenges for governments, governance, and civil society actors. What advice would you like to convey to civil society actors in light of the financial crisis?

Situations of crisis are also situations of enormous opportunity and change. It sometimes takes a crisis to realize that business as usual is not working and that things have to change. Despite the pain and challenges of a crisis situation, it can be the ideal time to mobilize people to a cause, change attitudes and behaviors, and propose alternative solutions.

In the current financial scenario, my advice to civil society actors would focus on the need to look for funding beyond the large donor organizations, as they are all likely to be affected by the meltdown. For instance, groups might consider enhancing the individual membership base (who pay fees), or looking for ways of income generation through sale of publications, or seeking contributions from rich individuals like movie stars and famous writers.

Reformist Leaders and Civil Society

A Confidence Gap Needs To Be Bridged

Francis N. Pangilinan[1]

What innovations have worked, and what lessons have been learned, for civil society to enhance its engagement with the government when a reformist leader takes office?

For civil society to enhance its engagement with government, especially with the entry of a reformist leader, there must first be a clear appreciation of the crucial nature of strong private sector-public sector partnerships. There must be a healthy respect for the distinct roles each plays in governance. There should be a clear understanding and acceptance on both sides that conceptually, government and private sector partnerships can in fact improve governance and ensure greater impact in a given community, and that such partnerships have in fact led to concrete gains and results.

There must be a meeting of the minds as to the necessity of synergy, the need and the importance of the sharing of resources as well as expertise and a clear understanding of the goals and the end results of such a partnership between the reformist leader and civil society.

In addition, there must be a clear recognition at the outset of the limits that the reformist leader, operating within the parameters of government, faces when engaging with civil society and the private sector. There must be a leveling off of expectations between the reformist leader and civil society. All too often unrealistic expectations lead to disappointment and disillusionment.

Upon my election in 2001 and my stint as Chairperson of the Senate Committee on Urban Planning, Housing and Resettlement the same year, the challenge of reforming the housing sector immediately came to the fore. With a housing backlog of some four million homes nationwide, the challenges were formidable. We knew that government could not hope to address the huge backlog without private sector participation. At that point, the performance of government agencies tasked with overseeing the nation's housing programs left much to be desired. Reforms were urgently needed. Consistent with my election campaign commitment of strengthening citizens' involvement in helping shape the community and enhancing civil society's involvement in governance, we immediately engaged the private sector.

We sat down with a Catholic Church-based national organization called GAWAD KALINGA (GK) committed to providing decent housing for the poorest and most marginalized sectors of society. These were poor families living in shantytowns located in urban centers throughout the country. We immediately pushed for greater government funding to social housing in partnership with GK—funding that would be disbursed to GK directly and not through the traditional government disbursement process. This innovation turned out to be crucial in getting support.

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[1] Francis N. Pangilinan is a senator of the Republic of the Philippines and a former Senate Majority Leader of the Philippine Senate. A former youth leader and student activist who advocates for justice, independence, and integrity in governance, he was elected for a second six-year term in May 2007. Senator Pangilinan is the first incumbent Senator in the history of the Philippines to run as an independent candidate and win.

In 2001, GK had 20 housing sites outside of Metro Manila, the nation's capital. By the end of my first six-year term, the committee was able to allocate the largest amount of government resources to socialized housing in a decade with GK as a partner. More than 200 local governments throughout the country likewise partnered with GK by providing land for socialized housing. Organized nationwide at the grassroots level, GK provided the human resources to build the homes and to organize the communities. Because of the strong commitment of its leaders, GK was able to attract support not only from government but from the private sector as well; private donations were tax deductible. All told, by the end of six years, GK sites rose from 20 to 1,200. Today, there are over 1,300 GK communities nationwide.

The GK experience is by far the largest, most significant development in the socialized housing sector in the country in last ten years. Without housing champions in government and in the private sector working closely, the GK experience would not have been possible.

Another major ally in civil society's partnerships with a reformist leader is the media. The media play a very crucial role in helping frame the issues and presenting them to the public. For any reform effort to succeed, it must be able to build a critical mass of supporters, and the critical mass can best be reached through the media.

In the run-up to the election of a reformist leader, there is often an increase in civic mobilization. What are some innovations and lessons learned about sustaining civic participation over time?

The key components of sustaining civic participation are ensuring that participation bears fruit and that stakeholders' interests are addressed, whether in the short, medium, or long term. There is nothing more persuasive than success in the partnership.

Issue-based advocacy groups, such as those committed to shelter, quality education, and access to justice, have successfully maintained healthy and effective partnerships with reformist leaders by identifying objectives and roles before the election and continuing to pursue them with clarity after the election.

The independence of these organizations and the maturity with which they are able to partner with government and still achieve the desired results are necessary elements of strong, long-term, and sustainable civic participation. The thin line that separates the governors from the governed, the citizens from their elected leaders, must always remain clear and sharp. It is when the line becomes blurred that a sustainable partnership is undermined. Sustaining civic participation rests on the assurances that these advocacy-based organizations do not lose their identities and that they remain focused on their missions even after the election is over and the business of governance begins. It is one thing to get elected; it is another thing altogether to govern and to ensure that the advocacy groups remain committed to their missions while partnering with reformist leaders in the pursuit of their objectives.

Sustaining support and mobilization over time depends as well to a great extent on the campaign promises made and the fulfillment of these promises. A reformist leader must walk the talk if he or she is to remain effective as a mobilizer. The fuel of civil society groups is their zeal to achieve their noble goals. Nothing can be more discouraging to civil society groups than seeing the transformation of a leader from being noble to being ignoble. Integrity, consistency, and clarity are all necessary if strong partnerships between civil society and a reformist leader are to be sustained.

What are some of the challenges that civil society organizations face when a reformist leader is elected?

The challenge is for both government and civil society organizations to accept and firmly remain committed to the concept of strong government-private sector partnerships with the clear understanding that while pursuing their respective missions, there must be mutual respect for the independence, the limitations, and the opportunities that come with such engagements. To lose the independence and the initiative of either one would weaken the partnership.

It has also been my experience that by and large, the public has grown cynical of quite a number of government initiatives and promises made by government officials. This cynicism affects the ability of the reformist leader to immediately engage civil society and vice versa. A confidence gap needs to be bridged. There is a great degree of distrust, perhaps because of years of broken promises from public leaders. The initial hesitance to engage can be attributed to this experience. There must be efforts to reach out, to persuade, to convince, to inspire, and of course to get concrete results. On the part of civil society, the challenges are to learn to distinguish leaders who walk the talk and to immediately engage them.

There is, consequently, the challenge to rouse stakeholders to action and get them to directly help shape the reform effort.

What are some lessons learned relating to the management of high (and sometimes unrealistic) expectations that can accompany the election of a reformist government, and how can civil society help hold governments accountable for pre-election promises?

Expectations can be managed most effectively with strong and sustained engagement in pursuit of a clear set of goals and based on mutual respect coupled with a great degree of candor. When the reformist leader is seen up close and on a regular basis, trust and confidence are built and strengthened. It is also in these engagements that the reformist leader is able to get firsthand feedback on the issues and concerns of civil society and stakeholders. Pressing the flesh and getting down and dirty are necessary to build confidence.

As Chairperson of the Committee on Justice and Human Rights in 2001, I took up the cudgels for the judiciary and the reforms that were urgently needed at that time. Upon my assumption of the chairmanship of the committee, the situation facing the justice system was alarming. A third of the nation's courts had no judges. The compensation package was so low that lawyers opted to stay in the private sector because earnings there were five to ten to even 20 times higher. The situation was worse in the first-level courts or the municipal trial courts where the vacancy rate nationwide was 44 percent. Nearly half of the first-level courts nationwide had no judges. In the National Prosecution Service, the vacancy rate was also even more alarming. Nearly half of the available government positions of public prosecutors were empty. The net effect of the glaring lack of judges and prosecutors was a serious delay in the dispensation of justice and the disposal of and resolution of cases. The whole system of justice was under severe constraints and needless to say the faith and the trust of the public in the system of justice had been adversely affected. The main culprit was the unattractive compensation package for government lawyers. The private sector just paid so much more.

The immediate solution was to introduce legislation that would raise the pay of government lawyers/judges and bring it to the levels comparable to the private sector. After eighteen months of legislative work with an unprecedented mobilization of the legal community,

two pieces of legislation doubled the pay of judges and justices nationwide and increased the pay of public prosecutors. Involved directly in the efforts to pass the measures were the stakeholders themselves through their respective organizations, including the Philippine Judges Association, the Integrated Bar of the Philippines, Philippine Bar Association, Association of Law Schools of the Philippines, Volunteers Against Crime and Corruption, and Crusade Against Violence.

The immediate effect of the increase in salaries and compensation was the rise in applications for judgeship positions nationwide. By 2007, or four years after the laws were passed, the vacancy rate in the courts nationwide had dropped to sixteen (from a high of 30) percent and the increase in applications to vacant courts jumped as much as 1,000 to 1,500 percent in certain areas. More lawyers were applying for these positions. This meant that there was a larger and deeper bench from which to choose the best and the brightest.

This effort was not without serious challenges. For one, the pay of judges and prosecutors involved some 4,000 positions. Excluded from the measure were more than 17,000 court employees who also wanted increases in their pay. These positions in the judiciary had not experienced huge vacancies because their pay was comparable to that in the private sector. The association of court personnel threatened to strike. The matter was addressed by a combination of persuasion and accommodation, but the bottom line was that a painful decision to exclude them had to be made, otherwise there would be no law. In such an instance, the strong partnership between civil society and the reformist leader made it possible. In addition to the court personnel, the Department of Budget and Management opposed raising the compensation package on two grounds: the country was experiencing huge budget deficits at the time and funds were not available, and raising the pay of one set of public officials and employees would cause demoralization in the bureaucracy where other agencies too were clamoring for better pay. In sum, the package had legal, administrative, and financial stumbling blocks. All the ingredients of failure were present.

In the constant dialogues and meetings with the various stakeholders spanning eighteen months, the common goal of improving the compensation package was decided upon, reiterated, and constantly reviewed and updated so that all the stumbling blocks would be hurdled. Without the strong day-to-day engagement with civil society and the various stakeholders, it is difficult to see how such a controversial measure would have reached first base.

The current financial crisis has created challenges for governments, governance, and civil society actors. What advice would you like to convey to civil society actors in light of the financial crisis?

The financial crisis was brought about to a large extent by the weakness of the regulatory framework resulting from the all-too-familiar paradigm that the markets left to themselves will be self-correcting. The deregulated financial sector brought the mess that the world economy now faces. The strategic role civil society can play is to create the pressure for greater regulation and transparency in the financial sector. It is to provide a counterbalance, with outside-the-box thinking that can help chart a new course and lead to an irreversible process of reforms in financial sector. It is to move toward greater openness and greater access to information necessary for stakeholders to make wise decisions.

Civil society actors, relative to government, have greater dynamism and greater flexibility. This ability to be flexible will help them push for greater transparency and accountability. In my own experience, government resources and personnel are used more

effectively when in partnership with private sector and civil society organizations with known track records. This can be attributed in part to the greater transparency in these transactions that result from the presence of these civil society actors.

Clearly, left to address the matter themselves, the financial sector and the government agencies tasked to regulate them have failed and failed miserably. It is time to shake things up and infuse new ideas and new approaches that can only come from outside. The bailout plans are stopgap and short term. The long-term reforms that must take place will require an entire community of stakeholders participating zealously and relentlessly in the process.

Reformist Leaders and Civil Society

There Is a Danger That the Government Starts to Think It Owns the Sector

Liz Atkins[1]

What innovations have worked, and what lessons have been learned, for civil society to enhance its engagement with the government when a reformist leader takes office?

Don't rely on past favors being returned. Remember that you must understand what problems the government faces and help come up with answers. Unless the issue is already on the government's agenda, it will be difficult (though not impossible) to put it there without firm evidence, realistic, workable solutions, and trust.

Build the capacity of civil society organizations (CSOs) to campaign and influence through building their knowledge, skills, campaign planning, and confidence. Ensure that they understand that campaigning is not just a legitimate but a necessary activity to meet the needs of their beneficiaries.

Ensure that government officials and elected representatives are open to influence and prepared to do things differently. Government must be willing to balance representative and participatory democracy – both are necessary – as well as value the contribution of CSOs and be open to facilitating engagement from the bottom up. People must be convinced that through involvement, they can influence things and make a difference to their own or others' lives.

In 1997, when the Labour Government under Tony Blair was first elected, social media and even email were not widely used, but now, such sites as YouTube, MySpace, Flickr, Twitter, and Facebook have of course taken off as campaign tools. They allow grassroots supporters to have a voice. They have enabled millions of people to organize their local communities (at least in the States) – no longer as passive consumers of the Internet or as supporters of a specific campaign with a uniform message but as active participants with their voices heard. This approach could help build long-term support.

In the run-up to the election of a reformist leader, there is often an increase in civic mobilization. What are some innovations and lessons learned about sustaining civic participation over time?

In the years running up to the Labour Party's election victory in 1997, many civil society organizations, particularly those focusing on poverty, civil liberties, and homelessness, worked with Labour to help develop its policies. That insider influencing was important in at least two respects: it meant the incoming government had policies that appealed to a very wide civil society agenda, and that agenda created a groundswell of support for the incoming government and huge expectations that key policies would be implemented.

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[1] Liz Atkins is the Director of Public Policy for the National Council for Voluntary Organisations in London.

What was important in the run-up to the election and immediately after it was maintaining lines of communication with key players on what should and could be achieved.

Many of the Labour Members of Parliament who were elected and secured ministerial office had close personal and policy links with CSOs, which then helped government implement key policies such as a national minimum wage, equalizing the age of homosexual consent with that of heterosexuals, and child protection legislation.

What are some of the challenges that civil society organizations face when a reformist leader is elected?

In the case of the 1997 Labour Government, there were many challenges. As mentioned above, many civil society activists did move into Parliament and government as ministers, MPs, and advisers.

This made it especially difficult for CSOs accustomed to developing policies with senior Labour Party figures and getting most of their demands accepted as part of the party's agenda. Government was a culture shock – in particular, recognizing that government is about deciding priorities and that therefore they might have to settle for less than they demanded in their lobbying; and that government ministers, even if they had worked with them in the past, might make decisions that they fundamentally disagreed with. Learning to compromise and to accept that their advice would not always be taken was difficult.

It was and remains difficult for CSOs to decide how to use their influence – as insiders or outsiders or a mixture of both. CSOs rightly value their independence and the right to work with government on some aspects of policy and work against it on others, using their supporters to publicly criticize the government's position and its ministers' records. Government ministers have on occasion found it difficult to accept that independence of action, operating on the assumption that a CSO that supports government on one thing will support it on others.

There is a real danger of mission drift and of incorporation by the state – a CSO being seduced by a sympathetic government into doing things that are not central to its mission or central to the needs of its beneficiaries, by chasing grants or contracts and acting like an arm of the state. There is also a danger that the government starts to think it owns the sector or, worse, that the sector is in fact part of government, rather than having an existence and purpose beyond the needs of government.

What are some lessons learned relating to the management of high (and sometimes unrealistic) expectations that can accompany the election of a reformist government, and how can civil society help hold governments accountable for pre-election promises?

CSOs need to understand the fundamental difference between being lobbyists who further a cause to meet specific needs and being in government. Through their activities, CSOs create a more deliberative as well as a more participative democracy – enabling policy-makers to reach a much wider range of interests than would otherwise be possible, and, through increased participation, better holding government and other public institutions to account. But they can never and should never assume the role of representative democracy. Only elected bodies have the legitimacy to make decisions in the public interest.

Mechanisms for holding governments to account are of course various: outsider approaches, including mass campaigns with high-profile advertising and media and celebrity support; blogging and local campaigns focused on individual MPs; and insider influencing –

working with government officials, ministers, and MPs, and using the party's policy-making processes to set the agenda internally in its various forums and conferences.

The current financial crisis has created challenges for governments, governance, and civil society actors. What advice would you like to convey to civil society actors in light of the financial crisis?

My advice is to ensure that any demand is based on solid evidence of the impact of the financial crisis on CSOs and their beneficiaries and is proportionate – and to use outsider and insider strategies to make a strong case even stronger. Explain and demonstrate the value that CSOs can bring to alleviate the impact of the crisis on the most vulnerable – e.g., help with homelessness or provide advice to the most financially excluded. Ensure that the case is well documented and communicated in the media, so that government trusts and supports CSOs to deliver elements of its economic recovery strategy.

Make the most of online opportunities – go directly to people you want to reach; don't wait for them to come to you. Ensure that you have the skills and resources in your CSO to understand and exploit low-cost social networking tools – and synchronize such networking with your current supporter database.

Reformist Leaders and Civil Society

Getting Too Close to New Leadership Can Be Blinding

Boris Strečanský[1]

What innovations have worked, and what lessons have been learned, for civil society to enhance its engagement with the government when a reformist leader takes office?

Based on my experience from Central Europe, mostly from Slovakia, I find it hard to formulate lessons, as I think that there is no guarantee that they would be applicable in other contexts. There is also a range of opinion on the period in Slovakia when a reformist leader took office. My view is that the expectations of civil society are high during such a period, and the excitement lasts for a while. Sooner or later, though, the problems that the preceding leadership has left for the new leader require setting up priorities. Some issues will be pushed to the background, some to the forefront. This will create some discomfort in the civil society, which has many different, often competing expectations for the new leadership.

There is one more thing that the civil society ought to be aware of in these situations: getting too close to new leadership can be blinding. Civil society ought to maintain a healthy distance between itself and the government.

In the run-up to the election of a reformist leader, there is often an increase in civic mobilization. What are some innovations and lessons learned about sustaining civic participation over time?

Civic participation over time is a function of deeper qualities than of the pre-election hype. Sustaining it on a higher level is, I think, not realistic, but one can hope to maintain its sensitivity at a level that it responds in case of need. Several elements, in my view, are critical for supporting (I do not dare to say sustaining) civic participation over the long term. These include the following:

a) Family influence (bringing up children with civic virtues; seeing parents as engaged citizens);

b) Civic education in schools;

c) Personal examples by public figures (politicians, intellectuals, artists, scientists, celebrities)—the existence of civic leadership role models gives other people inspiration for emulating such behavior; and

d) Civil society-friendly laws and legal frameworks that stimulate and encourage civic participation by imposing minimal barriers and simple procedures.

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[1] Boris Strečanský is Executive Director of Center for Philanthropy in Slovakia. He is a philosophy and history graduate and since the early 1990s has been active in the non-profit sector, philanthropy, and civil society development in the CEE region.

What are some of the challenges that civil society organizations face when a reformist leader is elected?

Supporting a reformer is very tempting and very understandable for civil society to do. On the other hand, the magnitude of issues that need to be dealt with inevitably creates tensions with the civil society agenda. I find it more effective to focus on using the window of opportunity when the new government is willing to listen to civil society to push for changes that will improve the conditions for civic engagement, whatever they might be in a given context. The civil society will then deal in its own way with its various agendas.

The loss of civil society leaders as they move to governmental positions is a natural process and cannot be avoided. In the short term, it creates a negative balance, but it also represents an opportunity for renewal of leadership, which is a healthy thing.

What are some lessons learned relating to the management of high (and sometimes unrealistic) expectations that can accompany the election of a reformist government, and how can civil society help hold governments accountable for pre-election promises?

These situations are often unique and therefore it is hard to follow set rules. Energetic, impassioned people want to express themselves. Managing that process is hard, almost impossible. I think that while passion (like compassion) is a key element of civil society leadership, it is good to be reminded that good management follows certain rules and principles. We must be clear on priorities (assuming we have agreed on them, which is the most difficult thing to do), consistently pursue them, and remember that "one eats an elephant piece by piece."

How can civil society help hold governments accountable for pre-election promises? I believe it can help foster the society's memory and raise interest in comparing pre-election promises with the post-election state of affairs. Holding governments accountable for campaign promises requires that there are constituencies sensitive to discrepancies. This is not automatic in some countries. Accordingly, it is not always enough to ensure that watchdog groups monitor the government and raise their voices. A society also needs citizens and media that are interested in their findings and in their conversation with the government over disputed matters.

The current financial crisis has created challenges for governments, governance, and civil society actors. What advice would you like to convey to civil society actors in light of the financial crisis?

I do not feel I can give much advice—civil society leaders have personal compasses that they follow. A time of crisis is a test of civil society. The qualities of solidarity, sharing, support, and belongingness become more essential than ever. If the civil society is strong, it can endure the crisis. It depends on all of us.

Reformist Leaders and Civil Society

Be Prepared to Get Your Hands Dirty

David Robinson[1]

In considering ways in which civil society could enhance its engagement with the government when a reformist leader takes office, it is important to reflect on the fact that all new governments are "reformers" in that they have an inherent need to change the current status quo.

Recently we have seen a change of government in Australia and New Zealand as well as in the USA. In the UK, the signs are that the current Labour Government is likely to be replaced by the Conservatives at the forthcoming election. In both New Zealand and the UK the "conservative" parties have positioned themselves as "reformers" in relation to the perceived paternalism and narrow ideology of the current (UK) and former (NZ) "progressive" administrations. As with the Democrats in the USA and the Australian Labour Party, they have looked to exploit dissatisfaction with governments that have been perceived as being increasingly rigid and incapable of responding effectively to new challenges. So, I would suggest that the project for civil society is not the election per se but also the practices and programs needed after an election in order to implement new, progressive policies.

The key point about any effective engagement with government is to start this process well before the election and, at an early stage, to see this process as a continuum that will carry on throughout the term of office of the new administration—that is, to engage with policy-makers in developing progressive programs that reflect the experiences and aspirations of those represented by community activists, and not simply endorse a party political platform.

However, after the election it is critical to be strategic in considering what can be achieved. Focus on what is practical and realistic. Build your case through a series of "can-do" options that open a space for future dialogue and ongoing change.

Above all, don't count on government officials to deliver even when new, progressive policies are introduced. Government's practices and programs must change, not just its policies. Therefore, be prepared to get your hands dirty and engage with the practical delivery of policies and practices—and not just be content with writing "position statements."

"Leaders" and "governments," reformist and progressive or otherwise, are not all-powerful. In his memoirs, Aneurin Bevan commented that when the postwar British Labour Government took office, they were ready to "seize the levers of power"; unfortunately he discovered these levers were "not attached to anything."

It is essential that community activists keep at it for the long haul—there are no quick and easy victories to be won.

The election of a "reformist" leader or government provides a space, an opportunity for change. In itself it is not that change. **It is critical to sustain civic participation—the key message is that selecting a charismatic candidate and voting are not sufficient. Voting needs**

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to grow from the experiences of people campaigning together and then lead on to working together. That means presenting policy options to the new administration but also being ready and able to help turn these options into reality.

A current example in New Zealand is the proposal to develop community-run housing for newly settled refugees where the housing is allocated and managed by the refugee community itself. This clearly cannot be achieved simply by gaining support from the minister of housing and his ministry. It requires the ongoing, active participation of community activists and organizations.

It is critical not to allow yourself to be turned into a sideline critic of government policy, but rather to remain an active participant in the development and implementation of real-life programs.

As noted in my comments of the community housing proposal, it is important to be strategic and inclusive, to involve those who will be affected by policies and practices in the ongoing work of monitoring, lobbying, and ensuring the implementation of policies.

Our process for working with a newly elected conservative National Party government in New Zealand is no different than what it would have been had the Labour-led coalition government been returned:

1. Work together to develop practical proposals – suggesting what the government can do rather than just criticizing them for what they are not doing. This helps fill the practical policy gaps that exist in any new government.
2. Ensure ongoing interaction with government officials and the monitoring of government's actions. This requires effective coordinating bodies in specific policy areas such as international aid and disability policy as well as a generalist civil society organization (CSO) umbrella body.
3. Although they may have limitations, practical proposals should not be seen as all that can be achieved. Rather, they should lay the foundations for future changes and developments.

And above all "keep on keeping on." Be clear about what you want to see happen in practice and not just what words should be adopted in policy statements. This means keeping focused on your principles and making them practical by spelling out clearly how they be put into practice.

In this overall process, building and maintaining strong networks ensures that contact with civil society leaders is not lost if they move into government but that they remain allies. When colleagues make such a move, ensure that they are constantly reminded of where their real mandate comes from – keep them on mailing lists, and continue to invite them to participate in community actions and social functions. Citizens don't lose their citizenship when they go to work for government, although sometimes they may need to be reminded of this!

In the case of the new US administration, it is critical to identify where the critical tipping points are. At present, the key may be to focus on an end to the "culture wars," and to aggressively push for an end to the appointment of conservative, like-minded officials to boards, academic institutions, courts, etc. This is a key change/reform that is urgently required in order to prepare the ground for many other substantive reforms. More than anything else, this would clear

the decks and create a space for the potential development of real reform in policies, practices, and programs. It is essential to remove the blinkers from advisors, consultants, academics, and government officials in environmental policy, international policy (especially in the Middle East), and domestic affairs such as housing and employment. But it is important to be vigilant and ensure that one set of prejudices is not simply replaced with another set.

Clearing away prejudice and privilege should open the way for new thinking and new ideas. Not the imposition of a new "orthodoxy" that in its turn will need to be overthrown in the future.

A key strategy is to build relationships with government officials before, during, and after an election to ensure that civil society has a role to play in the development of policies and programs—that CSOs are clearly recognized as being more than service-delivery agents.

Although it may appear to be an overly restrictive factor, the current economic situation provides opportunities to lobby for the reallocation of resources. There is an opportunity to work with reformist governments in changing policies and practices to ensure that there is real community involvement. This means that governments will need to reach out and develop real community partnerships.

At the same time this may even result in some modest savings of government funds while providing services that are more clearly responsive to community needs and more inclusive of community input in their delivery.

In the above example of the potential to reorganize the provision of publicly funded housing in New Zealand, the aim is not to reduce government expenditure in housing but to begin a move from state housing to community housing. This would mark a move from a welfare to a community-development approach, from paternalism to cooperation.

To some degree this had already been taking place under the previous Labour government, but the full potential of community input was held back by an ideological emphasis on the dominant role of the state in providing and managing public rental housing.

The key to progressive reform is opening spaces to enable community initiatives and encourage people's self-determination, not simply changing the management of those spaces sitting between the state and commerce from one set of politicians to another.

Reformist Leaders and Civil Society

Bind Reformist Leaders to Campaign Commitments

Arthur Larok[1]

What innovations have worked, and what lessons have been learned, for civil society to enhance its engagement with the government when a reformist leader takes office?

I think civil society should not be distracted from their core mandate and competences with or without a reformist leader in government. Usually there is a lot of optimism and enthusiasm, to the extent that some level of disappointment is inevitable. Civil society should keep a noticeable distance to remain independent and focused even in the event of a reformist leader being elected. All they should take advantage of is the political will that comes with a reformist leader. They should stick to the issues for which they demand action and not abdicate their professed constituency—citizens—because when all is done and dusted, it is citizens who will have the power to keep in or vote out a reformist leader.

In the run-up to the election of a reformist leader, there is often an increase in civic mobilization. What are some innovations and lessons learned about sustaining civic participation over time?

It is inevitable that civic mobilization will diminish following an election. However, this doesn't mean that civic engagement cannot be sustained over time. The challenge usually is finding durable reasons and new ways of engagement in an undoubtedly changed socio-political terrain following an election. The type of issues that have heightened civic mobilization in the run-up to an election will largely define the nature and extent of mobilization thereafter.

One way of sustaining civic engagement in the post-election epoch is to develop "citizen-leadership contracts" that bind reformist leaders to campaign commitments. It is important to impress upon such leaders the need for regular interface and conversations around these contracts. Innovations such as subjecting leaders or designates to questions from citizens on the progress, stagnation, or regression of commitments in the citizen-leadership contracts would sustain the much-needed civic mobilization and engagement beyond an election. It is important that a progress report is produced by citizens and a direct interface with a reformist leader is guaranteed at least once a year.

What are some of the challenges that civil society organizations face when a reformist leader is elected?

Challenges include threats of cooptation—i.e., supporting a reformer while maintaining independence from the government—as well as the loss of civil society leaders as they move into government. In addition, civil society faces the challenge of maintaining access to the new leader. Very often reformist leaders are surrounded by so much official protocol that access becomes a nightmare. Another challenge is that some of the ideals civil society shares with reformist leaders before elections can remain unimplemented. To make such ideals a reality

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through the more robust government, it may be worthwhile to push legislation that institutionalizes them.

What are some lessons learned relating to the management of high (and sometimes unrealistic) expectations that can accompany the election of a reformist government, and how can civil society help hold governments accountable for pre-election promises?

My response to the question about maintaining civic mobilization applies here as well. Citizen-leadership contracts can help define the sustained conversations between civil society and reformist leaders. Through these regular conversations, citizens and leaders can realistically manage their expectations and promises.

The current financial crisis has created challenges for governments, governance, and civil society actors. What advice would you like to convey to civil society actors in light of the financial crisis?

Civil society is diverse and the financial crisis will impact different segments differently. But civil society need to keep the discussion focused on the issues and conditions that led to the financial crisis. The financial crisis is a culmination of many years of questionable global economic policies shaped in large part by a dominant neo-liberal, unbridled capitalist school. This must be challenged and innovative ways of working between the state and market need to be found.

Further, civil society needs to critically engage with developed countries' governments on how they have responded to the credit crunch and financial downturn. There have been important bailouts of private companies. If the work of civil society is indeed appreciated, why can't developing countries consider development bailouts through civil society? It is an issue of bailing out private companies versus bailing out anti-poverty initiatives of civil society.

Finally, civil society, especially in the South, needs to start thinking very seriously about alternative sources of revenue, not merely funding from the North.

Reformist Leaders and Civil Society

A Reformist Leader Is No Guarantee

Dragan Golubovic[1]

What innovations have worked, and what lessons have been learned, for civil society to enhance its engagement with the government when a reformist leader takes office?

Civil society needs to make a case that it has the capacity to contribute meaningfully to setting priorities in a reformist leader's agenda and addressing those priorities—rather than focusing on having a government commit to pay attention to civil society. In the context of the Balkan region, this particularly refers to the capacity to work with governments in the areas of social reforms and European integrations. Civil society has demonstrated that capacity in various fashions. The first step in the process is usually establishing "credentials" with a government by proving to be a reliable source of pertinent information and a constructive contributor (or instigator, for that matter) of various legislative and other policy-related initiatives. Once the trust is established, the possibilities of collaboration are likely to expand.

Having a reformist leader in the office is no guarantee of a more productive relationship between the government and civil society, though. For example, the current President of the Czech Republic (and a former Prime Minister), Vaclav Klaus, is certainly a reformist, but at the same token not a great proponent of civil society, to say the least.

In the run-up to the election of a reformist leader, there is often an increase in civic mobilization. What are some innovations and lessons learned about sustaining civic participation over time?

Generally, chances of sustained citizen participation in public policy seem greater if there is an institutional mechanism that supports and encourages this process, as with a number of initiatives at the national and international level. For example, the Lisbon Treaty of the European Union (EU) proclaims representative democracy (i.e., the role of political institutions) and participatory democracy (i.e., the role of citizen participation) as fundamental values of the EU. Similarly, the Conference of International NGOs, which operates under the auspices of the Council of Europe, has taken on drafting a code of good practice in citizen participation. Various forms of networking and social mobilization that are emerging on the Internet, as well as efforts in many countries to create an "e-government," are likely to significantly shape this process in the future.

What are some of the challenges that civil society organizations face when a reformist leader is elected?

One of the most formidable challenges is the drain of human resources, as personnel take on governmental and private business positions. This process is compounded by the fact that most prominent NGOs in nascent democracies are leader-driven, with poor corporate governance and weak institutional memory. Another common challenge is an inability to respond to new realities and social priorities, which oftentimes requires a significant shift in institutional policy

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and goals of an organization—or even a recognition that an organization has fulfilled its mission and perhaps should cease to operate or merge with another organization.

What are some lessons learned relating to the management of high (and sometimes unrealistic) expectations that can accompany the election of a reformist government, and how can civil society help hold governments accountable for pre-election promises?

This is what civil society (media included) should excel in doing by default. Civil society is meant to work with citizens and for citizens, and in this respect being vocal in public and keeping social networks is instrumental to keep the government in check. Clearly, new forms of networking on the Internet are going to play a key role and significantly facilitate this process in the future.

The current financial crisis has created challenges for governments, governance, and civil society actors. What advice would you like to convey to civil society actors in light of the financial crisis?

The current financial crisis is both a challenge and an opportunity in that it gives civil society a chance to contribute to the debate. Indeed, in many ways civil society is ideally positioned to lead this debate, since by default it operates with fewer political and institutional constraints than governments and other public actors. This will also require that a civil society take a hard look at itself and think of the transformative role it can play in ever-evolving modern societies.

Article

The Legal Framework for Not-for-Profit Organizations in Central and Eastern Europe

Douglas Rutzen, David Moore, and Michael Durham[1]

Introduction

The legal framework for not-for-profit organizations (NPOs) in Central and Eastern Europe (CEE)[2] has undergone dramatic reform since 1989. Upon transition, the NPO legal framework was either incomplete or out of date. For example, Bulgaria relied on a 1949 law, while Romania awoke "Sleeping Beauty" – a 1924 law that the communists had neglected to repeal.

Others countries swiftly enacted new NPO legislation. Then-Czechoslovakia enacted a new associations law just four months after the Velvet Revolution. Macedonia enacted a new law on "social organizations and associations" even before holding multi-party elections.

By the mid-1990s, the region had witnessed a renewed effort to reform NPO legislation. Countries found that existing legislation failed to support the "renaissance of civil society"[3] arising in the region. In some cases, countries found that the swiftly enacted legal framework was incomplete. For example, the Albanian Civil Code contained just ten general provisions on foundations. Pyramid schemes exploited the vagaries of the law, contributing to civil chaos that plagued Albania in the mid-1990s.

In contrast, the laws in other countries were overly burdensome. Romanian law required 20 founders for an association, while legislation in the Federation of Bosnia-Herzegovina (BiH) required 30 founders. Moreover, the Federation required that founders be "citizens," which disenfranchised refugees and internally displaced persons seeking to exercise their associational rights.

Tax and fiscal frameworks were similarly constraining. In some countries, NPOs were taxed as businesses, and there were few incentives for philanthropy. At the same time, some countries restricted the ability of NPOs to engage in income-generating activities, and government funding was often based more on patronage than public service. Without tax

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[2] For purposes of this paper, CEE encompasses Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Kosovo, Latvia, Lithuania, Macedonia, Montenegro, Poland, Slovakia, Slovenia, and Serbia.

[3] Douglas Rutzen, "The Renaissance of Civil Society," *Select Legislative Texts and Commentaries on Central and East European Not-for-Profit Law (ICNL and EFC, 1994),* p. vii.

benefits, incentives for philanthropy, opportunities for income-generation, or government funding, prospects for NPO financial sustainability were limited.

But soon, in country after country, working groups formed to revise laws, policies, and practices. With the benefit of remarkable leaders and fresh perspectives, the NPO legal environment improved and achieved global acclaim. As Lester Salamon and Helmut Anheier wrote in 1999, "in many ways, the new legal frameworks emerging in the region appear to be superior to those in the West, which developed in a far more haphazard fashion."[4]

This survey is dedicated to those remarkable women and men who have done so much to improve the legal environment for civil society in the region. Their dedication, skills, and integrity are an inspiration as we continue to address challenges confronting civil society in the region and around the world.

I. Provisions of General Laws

A. Consistency and Clarity of the Laws

The regulatory framework for NPOs consists not of a single "NPO law," but of a series of different laws and regulations, including framework legislation, tax legislation, procurement laws, legislation governing social service delivery, and the legal framework for public participation, among others.[5]

The clarity and consistency of the regulatory framework varies widely from country to country. Registration procedures may consist of a simple, one-step process (Kosovo); a two-step approval process (Romania); or a quagmire of overlapping laws (Serbia). In some countries, tax laws may provide appropriate exemptions to NPOs and incentives to donors, but in others, NPOs are taxed like businesses. Government financing of NPOs may be reasonably transparent (Hungary) or remain a largely non-transparent process.

Thus, despite the tremendous law reform efforts since 1989, gaps, contradictions, and burdensome provisions remain in the laws of the region. Efforts are ongoing in most countries to continue to improve the legal framework and the implementation of laws affecting NPOs.

B. General Constitutional and Legal Framework

Every country in Central and Eastern Europe guarantees the freedom of association. In most countries, the constitution explicitly permits the formation of organizations such as clubs, societies, associations, and, as in Poland, foundations. Some countries also explicitly recognize the right to join an organization (Czech Republic, Hungary, Kosovo, Macedonia), as well as the right not to be a member of an association (Czech Republic, Macedonia, and Montenegro). Interestingly, Montenegro's 2007 Constitution guarantees "national and ethnic groups the right to establish educational, cultural and religious associations, *with the financial support of the State*" (emphasis added) (Article 79, Constitution of Montenegro, 2007). In some countries, the freedom of association extends solely to citizens (Article 20, Constitution of Macedonia; Article 40, Constitution of Romania), but in others this right is explicitly granted to "all persons"

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[4] Lester Salamon, Helmut Anheier and Assoc., "Civil Society in Comparative Perspective," in *Global Civil Society: Dimensions of the Nonprofit Sector* (Baltimore, MD: The Johns Hopkins Center for Civil Society Studies, 1999), p. 34.

[5] This paper does not address the legal framework for trade unions, political parties, or other similar organizational forms.

(Article 2(3)(g), Constitution of Bosnia and Herzegovina; Article 43, Constitution of Croatia; Article 48, Constitution of Estonia; Article 63, Constitution of Hungary; Article 58, Constitution of Poland; Article 29, Constitution of Slovakia). Constitutional frameworks often draw a distinction between the right to form associations (available to everyone) and the right to form political parties (extended to citizens only).

At the same time, every constitution articulates specific limitations on the freedom of association. These limitations include the following:

- Limitations justified by the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others (Bosnia, Czech Republic, Kosovo, Montenegro, Poland, Serbia, and Slovakia);
- Prohibitions of associations that aim to undermine a country's sovereignty, national integrity, constitutional order, or national unity (Bulgaria, Croatia, Estonia, Macedonia, Montenegro, Poland, Romania, and Serbia);
- Prohibitions against incitement of racial, national, ethnic, or religious enmity (Bulgaria, Czech Republic, Macedonia, Montenegro, Poland, Serbia, and Slovakia);
- Prohibitions against propagating Nazism, fascism, or communism (Poland);
- Prohibitions of associational goals and activities aimed against political pluralism or the principles of a state governed by the rule of law (Romania);
- Prohibitions against armed organizations with political objectives (Hungary) or paramilitary structures seeking to attain aims through violence (Bulgaria);
- Prohibitions of associations that seek to engage in political activity that is in the domain of political parties (Bulgaria); and
- Prohibition of associations pursuing the goals of political parties, churches, and religious congregations, or being operated as such (Czech Republic, Slovakia).

In CEE, these constitutional rights and limitations must be applied against the background of international law, specifically Article 11 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) (1953), a convention that has been adopted by 47 members of the Council of Europe[6] and by all of the countries of the region. The ECHR provides, in relevant part, that:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not

[6] See http://conventions.coe.int/. The ECHR was ratified by the U.K. in 1953 and by Montenegro in 2007.

> prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The ECHR established an elaborate dispute resolution mechanism, including the European Court of Human Rights, the first international court dealing solely with human rights matters. Groundbreaking decisions of the European Court have now firmly established that there is a right under international law to form legally registered associations and that, once formed, these organizations are entitled to broad legal protections.[7]

C. Types of Organizations

In CEE, the two fundamental NPO legal forms are associations (*universitas personarum*) and foundations (*universitas rerum)*. Associations are membership-based organizations whose members, or their elected representatives, constitute the highest governing body of the organization. They can be formed to serve the public benefit or the mutual interest of members. Foundations traditionally require property dedicated to a specific purpose and are governed by a self-perpetuating board of directors (e.g., the board itself nominates successive members). In some countries, they may serve private purposes, although in many they must serve the public benefit.

Both associations and foundations are implicitly or explicitly bound by the "non-distribution constraint." In some jurisdictions, a "positive formulation" is used: in Albania, for example, the law states that NPOs must use their income and property for the purposes specified in the organization's charter. In others, a "negative formulation" is employed: in Kosovo, an NPO "shall not distribute any net earnings or profits as such to any person." Regardless of the precise formulation, the non-distribution constraint is the common attribute that distinguishes NPOs (sometimes more precisely called "not-for-profit organizations") from commercial companies.

1. *Associations*

All countries in the region recognize associations, although the rules and procedures governing associations differ from country to country. For example, as the attached charts reveal, there is considerable diversity as to who may found an association: Hungary and Slovenia require ten founders, and Poland requires fifteen[8]; Estonia and Latvia require only two. In Bulgaria and Romania, legal entities may found an association; in Macedonia and Slovenia, they may not. In Albania, the Czech Republic, and Hungary, foreigners can be founders of an association; but in Bosnia and Herzegovina, except for the Republic of Srpska, foreigners can

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[7] See, e.g., *United Communist Party of Turkey and Others v. Turkey*, European Court of Human Rights, (133/1996/752/951) (Grand Chamber decision, January 30, 1998); *Sidiropoulos and Others v. Greece*, European Court of Human Rights (57/1997/841/1047) (Chamber decision, July 10, 1998); *Freedom and Democracy Party (ÖZDEP) v. Turkey*, European Court of Human Rights, (93 1998/22/95/784) (Grand Chamber decision, December 8, 1999). For more on this topic, see Zvonimir Mataga, *Handbook on Freedom of Association under the European Convention for Human Rights and Fundamental Freedoms* (2007, on file with ICNL).

[8] Poland also provides an alternate membership structure, the "Simple Association," which only requires 2 members. Lithuania also had two membership forms until 2004, when it chose to simplify and consolidate the two forms into a single flexible association form.

only act as founders if they are residents of or are registered in Bosnia.[9] Poland provides a second association form, the "simple association"

Most countries allow foreigners to form associations. In Slovakia, foreigners may not be the founders of an association. Some countries, such as Macedonia and Serbia, allow special "associations of foreigners" but limit the purposes they can pursue.[10]

Associations do not generally require capitalization. Romania is the one exception to this rule; the Law on Associations and Foundations requires associations to state the "initial endowment" of the association.

2. *Foundations*

Virtually all countries in the region have organizational forms called "foundations." In several countries, the foundation form is fairly new. For example, Macedonia recognized the foundation form only in 1998. Others have recognized foundations for quite some time. For instance, in Bulgaria, the Communist Law on Persons and Family of 1949 permitted foundations, and the Polish Law on Foundations was adopted in 1984.

Countries generally take one of two approaches to the definition of a "foundation." Some, such as the Czech Republic and Slovakia, require significant endowments, conceptualizing foundations as essentially endowed grant-making organizations (although they may also carry out other activities). These countries generally provide other forms to accommodate non-endowed, non-membership NPOs. Similarly, some countries specify that a foundation must serve its purposes in perpetuity, preserving its assets in order to do so. Other countries, such as Bulgaria and Estonia, define foundations more broadly, encompassing operating and grant-making foundations, whether temporary or permanent. In these countries, associations are essentially membership NPOs and foundations are non-membership NPOs, and there is little need for additional organizational forms.

There is considerable variation on the substantive and procedural requirements for creating a foundation. In some countries, such as the Czech Republic and Slovakia, foundations must serve the public benefit. In other countries, such as Estonia, foundations may serve private purposes.[11] In nearly all countries, foundations may be established by a single natural or legal person.

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[9] The reader should note that there are three governmental entities within the constitutional framework of Bosnia and Herzegovina: the state and two distinct "entities." The State of Bosnia and Herzegovina enacted a state-level Law on Associations and Foundations in 2001, regulating non-profits throughout Bosnia. Republika Srpska, a distinct entity within Bosnia, enacted a Law on Associations and Foundations in October 2001. The Federation of Bosnia and Herzegovina enacted a Law on Associations and Foundations in 2002. The three laws largely comply with regional best practices and international standards.

[10] In May 2006, Montenegro held a referendum on independence. Following the referendum, the Union of Serbia and Montenegro has given way to two fully independent states. The 1990 Federal Law on Associations (Federal law) is still applicable in Serbia. Indeed, most associations have chosen to register under the Federal law rather than the Serbian Law on Social Organizations and Citizens' Associations of 1982 (Serbian law) because of less stringent registration requirements and practice.

[11] In other words, in Estonia a group of friends could organize a hiking club as a foundation. However, in the Czech Republic they could not. Of course, in neither case could the foundation distribute profits or net earnings as such to any person.

In addition, some countries specify the minimum endowment required to register a foundation. For example, the Czech Republic requires that a foundation have a minimum endowment of 500,000 CZ, and Slovakia requires that a foundation have a minimum endowment of 200,000 SK. Other countries have adopted a more flexible approach. For example, the laws in Slovenia, Croatia, and Serbia do not state minimum capitalization requirements.[12] Rather, they state that a foundation's assets must be sufficient to carry out the purposes of the organization. Similarly, Hungarian law merely requires that capitalization be sufficient to initiate the operations of the foundation.

There is also variation in the required duration of a foundation. In some countries, such as the Czech Republic, Slovakia, and Slovenia, the presumption is that a foundation will carry out its activities on a permanent basis. Others, like Estonia and Albania, allow foundations to be established for a limited duration.

3. *Additional Organizational Forms*

Approximately half the countries in the region have also added at least one new form in addition to associations and foundations. Three specific forms merit special mention.

First, some countries have distinguished between grant-making and service-providing organizations. They define foundations as primarily grant-making organizations, and create a separate form for non-membership NPOs that are predominantly dependent on grants or income from economic activities to carry out their mission. Often these NPOs are service-providing organizations, such as private hospitals, institutes, and training centers. This organizational form has a variety of names, ranging from "public benefit companies" in the Czech Republic to "centers" in Albania.

Second, several countries (including all countries that require that certain foundation assets be preserved to serve the foundation's purposes in perpetuity) have provided for a second grant-making organizational form, namely the "fund." Croatia, for example, defines a fund exactly as it defines a foundation, except that a fund must pursue its purposes on a temporary basis (i.e., for less than five years). Similarly, the Czech Republic recognizes "funds" and Slovakia recognizes "investment funds" that (unlike foundations) do not require an endowment. However, these forms are given fewer fiscal and tax benefits than foundations, in exchange for fewer limitations on the use of assets.

Third, a few countries have created "open foundations," which are organizations that have characteristics of both associations and foundations. Such organizations are like foundations in that they involve dedicating property to a particular (usually public-benefit) purpose. However, they share some important traits of membership organizations (although they are not always considered to be such organizations). The key trait is that later contributors may "join" an open foundation, becoming co-founders with the original founders. The organization may also be able to "expel" other founders who do not perform their duties. Lithuanian charity and sponsorship funds fall into this general category of organization. The founders of open foundations usually have substantial ongoing power in determining the organization's activities; in Lithuania, for example, they constitute its highest governing body. This type of hybrid

[12] A new draft Law on Endowments and Foundations in Serbia requires the minimum endowment of €50,000 for an organization that pursues public benefit purposes, and €100,000 for an organization that pursues mutual benefit purposes.

organization is fairly uncommon in the region, particularly where the association and foundation organizational forms are broadly defined under national legislation.[13]

4. *"Public Benefit Status"*[14]

In many countries, various organizational forms are eligible to receive the functional equivalent of public benefit status.

In some countries, certain organizational forms (such as foundations in the Czech Republic) must, by definition, serve the public benefit and are entitled to comprehensive tax/fiscal benefits. In other situations, benefits do not derive from a distinct "organizational form," but rather a distinct "status" available to multiple organizational forms. For example, in Bulgaria, both associations and foundations—the two underlying NPO forms—may be registered separately as public benefit organizations, assuming they meet qualifying criteria. In Poland both NPOs and private companies founded under the Commercial Law Code can qualify for public benefit status.

In some countries, specific provisions defining public benefit status are contained in the NPO framework legislation; such is the case in Bosnia, Bulgaria, and Romania. Other countries have adopted specific "public benefit" legislation. Hungary adopted public benefit legislation in 1997, and Poland enacted a Law on Public Benefit Activities and Volunteerism in 2003.[15]

D. Purposes

As described above, associations can generally pursue activities directed to the public benefit or to the mutual interest of members. In most countries in the region, foundations must be dedicated to the public benefit; in a minority of CEE countries, however, foundations may serve private purposes as well. Other organizational forms usually have a more narrow range of permissible purposes. For example, public benefit companies in the Czech Republic must "provide to the general public commonly beneficial services under objective and equal conditions."

To qualify as a "public benefit status" organization, an association or foundation (or other NPO legal form) must be principally dedicated to public benefit purposes and activities. The list of public benefit purposes will necessarily vary from country to country to reflect the needs, values, and traditions of the particular country. The following list contains many of the public benefit activities recognized in one or more countries in Europe:

A. Amateur athletics;

B. Arts;

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[13] Some countries also recognize public law foundations, which are beyond the scope of this article (which is limited to private law entities).

[14] For an in-depth examination of the regulatory treatment of public benefit status organizations, see ICNL's *Model Provisions for Laws Affecting Public Benefit Organizations* (2002), ICNL's White Paper on Public Benefit Organizations (July 2004), and an issue of the *International Journal for Not-for-Profit Law* dedicated to this topic: http://www.icnl.org/knowledge/ijnl/vol8iss2/.

[15] This law also defines the terms "non-governmental organization," which includes corporate and non-corporate entities outside the public finance sector as described in the Public Finances Act, not operating for profit, and formed under relevant legislative provisions.

C. Assistance to, or protection of, physically or mentally handicapped people;

D. Assistance to refugees;

E. Charity;

F. Civil or human rights;

G. Consumer protection;

H. Culture;

I. Democracy;

J. Ecology or the protection of environment;

K. Education, training and enlightenment;

L. Elimination of discrimination based on race, ethnicity, religion, or any other legally proscribed form of discrimination;

M. Elimination of poverty;

N. Health or physical well-being;

O. Historical preservation;

P. Humanitarian or disaster relief;

Q. Medical care;

R. Protection of children, youth, and disadvantaged individuals;

S. Protection or care of injured or vulnerable animals;

T. Relieving burdens of government;

U. Religion;

V. Science;

W. Social cohesion;

X. Social or economic development;

Y. Social welfare;

Z. Any other activity that is designed to support or promote a public benefit.

E. Registration or Incorporation Requirements

All of the countries in Central and Eastern Europe require NPOs to register before they can become legal persons. The following subsections discuss various issues arising in the registration process.

1. *Responsible State Organ*

A key issue was whether to entrust registration to the judiciary, to a ministry, or to another administrative body. About half of CEE countries vest registration authority in a ministry or other administrative body. The concern with this approach is that these entities are often subject to political influences. In addition, in certain countries—for example, Macedonia prior to

1998—registration was conducted by the Ministry of Interior, which because of its prior association with the security apparatus had a chilling effect on associational activity.

A general, albeit not universal, trend is to transfer registration authority away from ministries. In some countries there is also a movement to develop specialized, apolitical bodies to register organizations. For example, in early 2007 the Macedonian Government amended the law to transfer the registration of associations and foundations from the courts to the Central Register.

The second issue is whether registration should take place at the local or national level. Local-level registration eases registration burdens for community-based groups seeking to register an NPO. Accordingly, a number of countries, including Bulgaria, the Czech Republic, and Estonia, allow at least some types of organizations to register with district courts. Of course, the advantages of decentralized registration can be had without resort to the courts; Slovenian and Croatian associations can register with regional administrative bodies. The disadvantage of decentralized registration is that it makes it more difficult to have consistent decision-making.

Interestingly, Albania transferred registration authority from various local district courts to the single district court for Tirana in May 2001. This has proved burdensome, however, for NPOs outside of the capital city.

Most countries place a single body in charge of registering all NPOs of a particular form, whatever their purposes. Some, however, have separate registration processes for different NPO organizational forms. For example, in the Czech Republic, associations are registered by the Ministry of Internal Affairs, but courts register foundations, funds, and public benefit companies. A few countries—especially in the case of foundations—involve the ministry working in the NPO's area of activity in the registration process. Slovenia, for example, vests registration authority in the ministry with subject-matter competence over the activity of the foundation, while in Croatia the Central Administrative Office is in charge of registering foundations but requires the consent of the activity-area ministry. Not only does this division of registration authority create confusion and delays when an organization does not fall neatly under one ministry's supervision, but local experts also state that this approach increases the risk that the government will exercise inappropriate direct or indirect control over NPOs.

2. *Registration Procedures*

Registration procedures vary widely, depending on the country and the organizational form. Typically, however, NPOs applying for registration must submit the following documents to the registration authority: the act of establishment, the governing statutes, and the registration application. The documentation must of course contain the basic information (name, address, goals and activities, founders, internal governance procedures, etc.) required by law. In some countries, further documentation is required for at least some organizational forms. For example, in Romania, both associations and foundations must also secure and submit the approval of the ministry or of the specialized central administrative body with competence over the activity of the association. In Hungary, courts required public benefit companies (a specialized NPO form[16]) to submit a public benefit contract with a government agency. In Poland, separate procedures are

[16] The legal form of the public benefit company was discontinued after July 1, 2007, and is replaced with the "nonprofit company," which may also apply for the public benefit status. It is likely that to apply, the nonprofit company will also have to include a contract with a government agency.

in place for registration, permission to perform economic activities, and conferral of public benefit status.

Registration fees, if required at all, are generally nominal and are not set to discourage or prevent NPOs from seeking registration. For example, in Croatia both associations and foundations must pay registration fees of approximately €10. In Serbia, registration costs approximately €8**.** Hungary requires no registration fee at all for foundations or associations, but requires the equivalent of €100 for registration of nonprofit companies.

3. *Grounds for Refusal*

In many countries, the registration organ may refuse to register an NPO only if the registration documents are materially incomplete, basic requirements of the law are not satisfied, or the purpose is illegal. However, a few still require a deeper inquiry into the desirability or feasibility of the potential NPO. For instance, some countries' legislation prohibits an NPO from registering if its activities are "immoral" (see, for example, the Croatian Law on Foundations and Funds). Little guidance is provided as to what counts as immoral, and as a result, registration officials have broad discretion to determine what purposes are immoral in their view. Croatian law adds to this another ground for refusal: officials have authority to deny registration "if there is no serious reason for the establishment of a foundation, particularly if the purpose of the foundation is obviously lacking seriousness."[17] Similarly, in Serbia officials may deny registration if they do not find the establishment of a foundation "opportune."[18] These sorts of subjective provisions have proven to be problematic, and law reform initiatives are underway in these countries to define more narrowly the grounds upon which registration can be denied.

4. *Procedural Safeguards*

Most countries in the region have taken steps (at least on paper) to ensure that registration decisions are quick and in harmony with the law. Generally, registration bodies are required to decide on an NPO's registration within a fixed time period, varying from ten days to three months.[19] To enforce these deadlines, some countries have further specified that after a certain time period expires, the organization be considered registered by default.[20] In addition, as noted on the attached charts, many countries allow founders to appeal adverse decisions in court or through an administrative proceeding.

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[17] Article 6 of the Croatian Act on Foundations and Funds (1995).

[18] Article 24 of the Serbian Act on Endowments, Funds and Foundations (1989).

[19] If an NPO fails to gain approval because of some technical flaw in its registration request or statute, several countries explicitly stipulate that the registering body must make the NPO aware of the problem and allow it to resubmit documents within a fixed time period (typically a month).

[20] It should also be noted that the implications of default registration are unclear. Unless the registration authority is required to issue a certificate of registration, then an organization registered by default may still have difficulties opening a bank account, obtaining a seal, or proving its legal entity status. Moreover, it may not be possible for an organization to seek redress for the registration organ's failure to register since it is technically (though perhaps not practically) registered. Interestingly, Serbia takes the opposite approach: if no registration decision has been given within 30 days of application, Serbian law considers the registration application *rejected*. At first glance this approach seems more draconian, but in practical terms it makes it easier for an NPO to appeal the failure to register since there is now an adverse decision to appeal.

5. *Registration of Public Benefit Organizations*

In determining the registration (or certification) procedures for a public benefit status organization, countries have adopted a variety of approaches. In some countries, this authority is vested in the tax authorities. In other countries, the courts or a governmental entity such as the Ministry of Justice confers public benefit status.

Generally, NPOs applying for public benefit status must submit documentation indicating (1) the qualifying public benefit activities; (2) compliance with internal governance requirements, including safeguards against conflict of interest and self-dealing; and (3) compliance with activity requirements (extent of public benefit activity) and limitations on activity (for-profit, political, etc.). For example, Hungary and Poland both list the specific provisions that must be included in the organization's founding instrument to attain public benefit status. In addition, as with initial registration as an NPO, PBO registration/certification procedures typically include procedural safeguards to protect applicants, such as time limits for the registration decision and the right to appeal an adverse decision to an independent arbiter.

F. Public Registries

Many countries are now creating public registries, containing basic information on all registered NPOs. This helps third parties seeking to contract with NPOs, promotes organizational transparency, and provides valuable information to potential donors and other interested parties.

In several countries, the public registry is housed at the national level. For example, the Albanian registry is located at the District Court of Tirana, and the Croatian registry of foundations is found at the Central Administrative Office. The Bosnian state-level registry of associations and foundations is located at the Ministry of Justice, as is the Montenegrin registry of associations and foundations. Romania has established a national registry of not-for-profit entities in Bucharest. In Slovakia, foundations and non-profit organizations providing public benefit services are included in a Central Register maintained at the Ministry of Interior. In the Czech Republic, the central register of foundations and funds as well as the register of public benefit companies is maintained by the Ministry of Justice and available on Internet (additionally, the Ministry of Interior maintains a list of associations, but it is rarely updated).

In other countries, the public registry is housed at the local level. The Croatian registry of associations is housed at the local level. Estonia maintains registries at county and city courts. Romania, in addition to having a national registry, also has special local registries housed at the clerks' office of the court in whose jurisdiction an NPO is operating. Macedonia also has public registries at both the national level and the local level.

Among those countries recognizing public benefit status organizations, some have created a separate registry of public benefit organizations at the state level (Bosnia and Herzegovina—Ministry of Justice; Bulgaria—Central Registry at the Ministry of Justice; Poland—State Court Register). Hungary, lacking a public registry for NPOs generally and PBOs specifically, is an exception to this trend, although an initiative is under way to introduce an Internet-based public registry in 2009.

Wherever the public registry is housed, it is critical that it be publicly accessible and easily searchable. In Albania, for example, while the registry must be accessible by law, in practice it is only accessible at the discretion of the court clerk; moreover, the information is filed chronologically, making it difficult to locate a file by name. One innovative way to ensure

accessibility is via the Internet; several countries, including Bulgaria, Croatia, the Czech Republic, and Estonia, have made their registries available online in this way.

G. General Powers

Registered NPOs (including public benefit organizations) generally have full rights and powers to act as other legal entities, including the right and power to rent, lease, and buy real property and to conclude contracts. Depending on the organizational form, the law may limit NPOs from engaging in political activities, for example, and limitations are likely to be broader in the case of public benefit organizations. Furthermore, NPOs must confine their activities to those listed in their governing documents and may be required to obtain licenses to carry out certain activities (such as running a daycare center for young children).

Failures to comply with such limitations may be challenged by two categories of complainants: persons with a legal interest or the regulatory authority. First, persons with a legal interest may file a petition to the court (Albania, Bulgaria, Czech Republic) or file a complaint with the public prosecutor. If an NPO engages in unlawful action, a member of the governing body (or of the association) has the right to petition the court to seek action against the NPO (Hungary, Slovakia) or to annul the NPO decision (Romania); any interested person may request that the court dissolve the organization (Romania) or notify the public attorney about the illegal activities (Bosnia, Croatia, Montenegro, and Serbia). Moreover, Czech citizens are obligated to inform police of any observed crime against the Constitution, the security or welfare of the state, or property.

Second, the regulatory authority—whether ministry, court, or public prosecutor—usually has express authority to address compliance with the law. Similarly, the regulatory body for associations, once it has concluded that an association is violating the law or its statutes, may demand a correction, give a warning, or file a suit. In Bosnia and Croatia, the public attorney can exercise his *ex officio* duty to commence such proceedings.

Potential or intended beneficiaries of the NPO may sue an organization if their rights are violated or they suffer harm (Hungary) or if they can prove their legal interest in the proceedings (Bosnia, Bulgaria, Croatia, Czech Republic, Montenegro, and Serbia). According to the Estonian Law on Foundations, "A beneficiary or other person with a legitimate interest" can demand information from a foundation about the fulfillment of its objectives, and may examine the annual accounts and activity report, the conclusion of the auditor, accounting documents, the foundation resolution, and the articles of association. If the foundation fails to comply with a demand, then the entitled person may demand exercise of his or her rights by a court proceeding.

II. Governance

The laws in Central and Eastern Europe vary greatly in the amount of detail with which they address NPO internal governance issues. Some simply require that the organization's statute outline the structure of the organization. Others spend pages of legislative text laying out voting procedures and quorum requirements, providing for management failures of various kinds, etc. In some cases, these detailed rules can be modified by an organization's statute or bylaws; in others, not.

A. Structures

1. *Associations*

An association's highest governing body is the general assembly of its members (or for certain large associations, their duly elected representatives). Several countries envision a management body in addition to the general assembly to deal with the day-to-day affairs of the association. In addition, many countries require the association to designate a person to have the general power to represent the organization in dealing with third parties (Bosnia, Croatia, Hungary, and Serbia). Most countries guarantee the right to withdraw from an association, and several allow members to contest association decisions contrary to law or statute. Countries may also specify (or require the organization's statute to specify) a variety of other features of associations, such as the criteria for accepting/expelling members, members' rights and duties, authority to represent the NPO, and other issues of internal governance.

It is common for legislation in the region to reserve decisions of particular importance to the general assembly. Acts commonly reserved to the general assembly include termination of the association; its transformation, division, or merger with another association; amendments to the association's statutory purpose; the election or recall of officers; and setting the amount of membership dues. Often the decisions to do these things require more than a standard majority vote. Estonia requires two-thirds of all members to approve changes in the statute and allows changes in the association's purpose only with the consent of nine-tenths of the members. Several other countries have similar "super-majority" voting requirements for key organizational decisions.

Countries differ on the procedure to call a meeting of the general assembly of members. Many allow the procedure to be governed by the organization's statutes. Some also regulate additional issues, for example, the fraction of the members (ranging from one-tenth in Estonia to one-third in Hungary) required to call a special meeting of the general assembly. A few also require that notice be given about what will be decided at the meeting; in Estonia, for example, departures from the announced agenda are legally binding on the association only if all members are present. Laws that address the procedure to convene the general assembly usually also determine how many members must be present to constitute a quorum. Some also determine a procedure by which members can obtain redress if the association operates improperly. In Albania, Hungary, Romania, Bulgaria, and Estonia, laws give members the explicit right to go before a court to contest decisions they take to be contrary to law or to an association's statute. Such an objection must be filed within a fixed time period (typically, 10 days to three months).

2. *Foundations and Other Non-Membership Organizations*

In general, non-membership organizations are governed by a board of directors. They may also have separate management to conduct routine business of the organization and a separate supervisory board (or at least an auditor) to oversee the operation of the organization (making sure it does not act illegally or misuse its funds, etc.). A few organizations do allow founders to play a continuing role in the governance of the organization.

As the attached charts illustrate, there is varied practice among countries. In Slovenia, there is a single management body. In contrast, Romanian foundations and Hungarian and Slovak public benefit companies are required to have a supervisory board. Others require supervisory boards only in certain cases. For example, Hungarian organizations wishing to attain

public benefit status must have a supervisory board if their annual income is larger than HUF 5,000,000; the Czech Republic uses a similar size distinction to determine whether a foundation must have a full supervisory board or just an auditor. A Czech public benefit company must have a supervisory board if it performs supplemental economic activities, if it receives certain kinds of contributions from the state, or if it received more than three million Czech crowns in income the past year. Slovak foundations must have a Supervisory Board if their property exceeds 5,000,000 SK; otherwise they must have an "inspector."

In short, the trend is to provide a few basic provisions dealing with NPO internal governance structures. Typically, these provisions identify the highest governing body (or bodies in the case of some foundations) and their respective responsibilities. At the same time, legislation typically gives the founders or the highest governing body broad discretion to set and change the governance structures of the organization within the limits set forth by law.

B. Accountability

1. *Duties and Responsibilities of Governing Bodies*

As a general rule, the highest governing body has the authority and duty to review and approve the annual budget, the annual financial report, and the annual activity report (if applicable). In addition, the highest governing body is empowered to set policy; to elect or appoint officers; to decide on transformation, termination and dissolution; and to decide on changes to the organization's governing documents. While the highest governing body may delegate certain powers to management—including, for example, signing powers (Hungary)—there are usually limitations on what powers may be delegated, such as the power to amend the statute or approve the budget (Bulgaria).

Members of governing bodies may be personally liable for harm to the NPO or to third parties. In many countries (Bosnia, Croatia, Montenegro, and Serbia), any person with a legal interest may sue for damages incurred as a result of the board member's breach of duties. In some countries, such as the Czech Republic, the liability to third parties lies with the organization and not with the individual members of the board. However, the organization may recover damages from a responsible member of the board before a civil court. In other countries, such as Albania and Macedonia, the responsible board members may be held directly responsible for injuries to third parties where the responsible member acted in the exercise of duty, willfully, or with serious negligence. Estonia imposes joint liability on board members for damages wrongfully caused to the NPO or to creditors of the NPO for failures to perform their duties in the manner required.

Legal rules designed to prevent conflict of interest and self-dealing are increasingly common. In Albania, conflicts of interest are addressed through (1) required disclosure of the conflict of interest between the individual and organization, (2) recusal of that individual from the decision-making process, (3) mandatory approval of any associated transaction by the highest decision-making body of the organization, and (4) a requirement that the transaction be at fair market value or on terms more favorable to the organization. Countries with conflict of interest rules generally extend their application to all organizational forms. In Hungary, however, such rules apply to foundations and to PBOs, but not to other organizational forms.

Enforcement of conflict of interest rules may be based on a declaration of compliance with these rules submitted by the organization at the time of registration and subsequent changes

in membership of the governing body (Hungary). In Romania, if a member of an association violates the conflict of interest rule—and the required majority approval could not have been obtained without the member's vote—he or she is responsible for the damages caused to the association.

In practice, few countries evidence a history of governing body members being held liable for violations of duties, such as the duty of care, duty of loyalty, the duty of good faith, etc. For those found liable of improper conduct, there is generally a right to appeal, according to general civil procedure rules.

III. Dissolution, Winding Up, and Liquidation of Assets

NPOs can usually be dissolved voluntarily or involuntarily. In many cases, the highest governing body has broad discretion in determining when to dissolve an organization voluntarily. The one notable exception is for service-providing public benefit organizations, on which some countries impose restrictions in order to avoid the immediate cessation of services which might adversely affect beneficiaries. As for involuntary termination, the trend has been to decrease discretion, bringing these provisions more in line with Article 11 of the European Convention on the Protection of Human Rights and Freedoms (1953).[21]

It should also be noted that in many countries, specific events trigger termination as a matter of course, for instance if the time period for which a foundation or fund was established ends. The relevant governing organ of an NPO should move to dissolve the organization in such cases. In many countries, if the organization does not dissolve itself when one of these "automatic" conditions for termination arises, the registration authority may dissolve it involuntarily.

A. Voluntary Termination

As a general rule, associations and their equivalents can choose to dissolve at any time by a resolution of the general assembly (this resolution may require more than a simple majority to pass). Whenever an organization dissolves voluntarily, it generally must inform the registration body of the decision to dissolve. Some countries, for example Macedonia and Serbia (Federal Law), require a particular officer to inform the registration body of such decisions within a fixed time period (between three and fifteen days). They allow the imposition of significant penalties on the officer who does not report such decisions promptly.

Some countries allow founders to dissolve a foundation if certain conditions described in the organization's statute are met (Estonia and Macedonia). Interestingly, the founder of a Czech public benefit company actually has the right to veto the organization's voluntary termination, on condition that the founder provides additional resources for the organization's continued operation.

[21] The European Court on Human Rights explicitly extended Article 11 protections to the termination of an organization in the *ÖZDEP* case.

In some countries, such as the Czech Republic, some organizations with public benefit status may be terminated only upon the condition that their remaining property is transferred to another organization of the same legal form. More specifically, termination of a foundation is possible only when its endowment and other remaining property are transferred to another foundation with a similar purpose. If no such foundation exists or is willing to take over the property, it must be transferred to the community where the foundation had its registered headquarters and must be used for a public benefit purpose.

B. Involuntary Termination

Almost all laws allow involuntary termination if an organization has violated the law or its statute (although some require the violation to be egregious or give the organization a warning before dissolving it). Estonia also allows termination if the purpose becomes impossible, illegal, or contrary to the constitutional order or to public policy. Slovenia allows the responsible ministry to dissolve a foundation if, in its judgment, changed circumstances make the continuation of the foundation unnecessary. This provision has been criticized, however, as it gives registration officials a great deal of discretion as to whether to dissolve an organization.

Organizations might also be dissolved if they fail to serve their statutory purposes or engage in excessive economic activities. Czech public benefit companies can be dissolved after six months not only if they have not fulfilled their public service, but also if they have seriously compromised the service's quality or interrupted it because of the organization's supplemental economic activities. Estonia also provides explicitly for termination in case the organization's main activity becomes economic activity.

Many countries also cause an organization to be dissolved if it stops functioning, although they use differing criteria to determine when an organization is defunct. Slovenia and Serbia have no other criterion; they leave it to the registration body to determine if a given association has "ceased to operate." Hungary uses a more objective criterion, setting a fixed time period (five years) that an association must be dormant before it can be dissolved; this approach is also reflected in the Federal Law that is still operational in Serbia.[22] Slovakia takes a different approach, dissolving organizations whose management boards fail to meet or have unfilled vacancies for a fixed period of time, while the Czech Republic requires a community self-government to fill a vacancy in the board, if the founders or other relevant body of the organization fail to do so within 60 days.

In most CEE countries, a court must decide whether to dissolve an NPO involuntarily. Typically the public prosecutor or administrative body responsible for supervising NPOs requests the termination. In several countries, other interested parties (notably founders and organization officers) can seek to have an NPO dissolved. Usually termination decisions can be appealed according to normal administrative or judicial procedure.

[22] Article 47 of a Serbian draft Law on Associations, which has recently been reintroduced to Parliament, also stipulates that an association shall be deemed dormant if it does not engage in any statutory activities for two successive years, or if the general assembly does not convene during a period which is twice as long as the one prescribed by the statute for the general assembly to convene.

C. Liquidation

Upon termination, an NPO goes into liquidation. A few countries (Croatia and Estonia, for example) have legislated relatively well-defined liquidation procedures for NPOs, while others specify that NPOs follow the same liquidation procedures as commercial enterprises.[23] In some countries, the liquidation procedures for NPOs remain ambiguous, and the resulting legal uncertainty makes it much harder for NPOs to enter into business relationships with third parties.[24] Generally, upon liquidation the powers of the normal governing bodies to represent the NPO cease, and a liquidator is appointed to exercise these powers. (In cases of voluntary termination, the NPO can select a liquidator itself, while in other cases the court or administrative body typically appoints the liquidator.) The liquidator is responsible to find and satisfy the claims of any creditors, and to disburse any remaining assets in accordance with law. After liquidation is complete, the liquidator reports to the registration body, which deletes the organization from the register. A few countries have legal requirements that the records of the dissolved organization be archived, or at least kept available for a few years after the termination.

Assets remaining after liquidation are generally disbursed according to an organization's statute, subject to certain important caveats. Assets of a public benefit foundation must generally remain dedicated to their public benefit goals and may not be distributed to founders after termination. Czech and Lithuanian laws explicitly require that assets of foundations/funds be transferred to other such organizations. Slovak law requires that the assets be distributed to another foundation or to the municipality; however, the endowment property may only be transferred to another foundation registered under the law. Latvian organizations that qualify for public benefit status are subject to a similar rule. Hungary, however, allows the founder to dissolve the foundation and repossess the assets (or in an open foundation, his/her contribution) if certain conditions specified in the founding act are realized. In practice, however, public benefit status will not be granted to a foundation unless it is specified in its founding document that any remaining assets will be given to a foundation with a similar purpose.

Associations generally have fewer restrictions placed on the distribution of remaining property; they may well be able to distribute it to their members. This is the default rule for Lithuanian associations (although Lithuanian associations qualifying to receive donative sponsorship could not apply this rule). In Estonia, distribution to members is explicitly allowed if the association was founded essentially as a mutual benefit organization, presumably on the assumption that such organizations receive no tax benefits or public contributions. In contrast, Slovenia and Latvia prohibit all associations—whether mutual benefit or public benefit—from distributing remaining assets to members, requiring instead that they be distributed to another association or public organization. Latvian Non-Profit Organizations are subject to an intermediate rule: they can return their participants' capital contributions, but not any profits.

Several countries distribute assets of an NPO differently if termination is involuntary, giving the government more control over the liquidation process than in cases of voluntary dissolution. Estonian law, for example, provides that if an organization is dissolved for violating

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[23] A Serbian draft Law on Associations also contains detailed provisions on liquidation procedures.

[24] Hungary reportedly has had this problem. See *Select Legislative Texts and Commentaries* (on file with ICNL).

the law, the constitutional order, or good morals, its property passes to the state, regardless of any provisions to the contrary in the organization's statute. Latvia has a similar provision, which also applies if the organization's primary purpose becomes economic activity. However, the clear trend in the region is away from this kind of direct state appropriation of NPO assets.

In short, the trend in the region is to allow the highest governing body of an NPO (particularly associations) broad discretion to terminate the existence of the organization. While many countries provide broad, discretionary grounds for the involuntary termination of an NPO, a number of countries are more strictly limiting these grounds to comply with the requirements of international law. Virtually all countries require that the assets of a public benefit organization (or other organization receiving substantial tax/fiscal benefits or public donations) be transferred to another public benefit organization. Some also allow mutual benefit organizations to distribute at least a portion of remaining assets to members.

IV. Regulation

A. Regulatory Authorities

The principal regulatory authority over NPOs varies widely from country to country in the CEE region. For example, in Bulgaria and Hungary, the responsible authority is the public prosecutor of the district where the NPO is registered. In Estonia and Slovakia, the Ministry of the Interior regulates the activities of associations and foundations; in the Czech Republic, the Ministry of the Interior oversees associations, and the court of registry oversees the activities of foundations, funds, and public benefit companies.

In addition, the tax authorities typically ensure compliance with tax regulations. Other regulatory bodies may focus on compliance with labor law regulations and money laundering provisions. For example, in Bulgaria, the State Agency 'National Security' is tasked with monitoring money laundering and the financing of terrorism, and the National Revenue Agency ensures the payment of social security under labor contracts and the payment of taxes (e.g., income tax, tax on profits from economic activity, etc.), while the local authorities are responsible for collecting local taxes and fees (e.g., tax on real estate, tax on some property transactions, etc.).

Governments exercise broader control over PBOs. In Bulgaria, the Central Registry within the Ministry of Justice has the right to inspect and monitor the activity of PBOs. In Hungary, where a PBO has received funding from the state budget, the State Audit agency may monitor the use of these funds. In Romania, a special governmental department monitors the activity of associations and foundations with public utility status.

B. Licensing and Governmental Approvals

In most CEE countries, government licenses are generally required for NPOs pursuing certain designated activities. In Hungary, for example, associations and foundations must be licensed to provide food services, home care, family care, and special basic social services, as well as day care and residential services. In Bulgaria, to provide social services, an organization need not be licensed, but it must be registered in a special registry; only services to children require a special license. The trend in the region is to provide the same treatment to NPOs

engaged in special services as to other entities (from private businesses to public institutions) engaged in special services.

Where special licenses are required, the licensing organ may require special reports about the activity. The extent of the reporting will vary depending on the nature of the activities, their duration, and their impact on the public.

C. Reporting

Many NPOs, like other organizations, must produce annual reports of their finances (for tax purposes, if nothing else, assuming they meet the threshold amount for filing). Some are required to submit more detailed information about their activities to a body (or multiple bodies) other than the tax authority, often the body responsible for registering NPOs or the ministry with responsibility over the area of the organization's activities. However, associations in several countries are exempt from these reporting requirements. For example, Czech and Slovak associations do not have to produce any reports so long as their income is below a certain level. However, they may be audited and therefore need to keep records. In these countries, reporting is also tied to having the status of a public benefit organization, which demands a higher level of accountability from both foundations and associations.

Some countries require certain NPO organizational forms to file more substantive reports about their activities. Slovakia, for example, requires summaries of activities and an explanation of how they relate to the organization's purpose and a separate accounting for expenses related to business activity; for foundations, it also requires a division of expenses into administrative and purpose-related expenses. Public benefit organizations in Hungary and Poland are required to produce fairly detailed programmatic reports. Foundations are also often required to report specifically on their management of their endowments, as in Slovenia and Croatia. Moreover, independent audits are required in certain cases, such as for foundations in Estonia and Slovakia.

In addition to reporting obligations, authorities often employ other monitoring tools, such as government audits and inspections, especially to monitor PBOs. In Bulgaria, PBOs are subject to financial audits for the use of state or municipal subsidies or grants under European programs. The responsible auditing body must have cause to justify the audit, but there is no requirement of prior notification. Hungarian PBOs are also subject to supervision by the State Audit Office for the use of budgetary subsidies. In Poland, the Minister responsible for social security issues has the right to access an organization's property, documents and other carriers of information, as well as to demand written and oral explanations. Such an inspection must be performed in the presence of a representative of the PBO, and in Poland members of the Public Benefit Work Council have the right to participate in control activities. The inspecting officials must prepare a written report; the head of the PBO then has the opportunity to submit a written explanation or objections to the content of the report within fourteen days.

In short, the challenge is to ensure that reporting requirements are narrowly tailored to meet legitimate interests and are not unduly burdensome or intrusive. NPOs are typically required to file tax reports under the terms and conditions of the tax laws. Sometimes these reports must be audited, but small organizations are often exempted from this requirement, which is consistent with regional good practice. As for programmatic reporting, the trend is to require public benefit organizations receiving tax/fiscal benefits to submit reports, although small organizations are sometimes exempt from these requirements or required to submit simplified

reports. It should also be noted that NPOs are often subject to a variety of other reporting requirements, including reports to management bodies, reports to licensing authorities if the NPO engages in an activity subject to licensing, reports to state funding bodies, and reports to private donors.

D. State Enforcement and Sanctions

Fines are often imposed in the case of the failure to file reports. Such is the case in Bulgaria, where the state may penalize NPOs from €50 to €500. In Poland, an association that does not comply with requests for documentation is subject to a one-time fine not to exceed 5,000 zlotys, which may be waived if the association complies immediately after the fine is imposed. In Slovakia, a foundation failing to file a report may be fined from SKK 10,000 to SKK 100,000. In many countries (Bosnia, Croatia, Montenegro, and Serbia), fines may be levied against both the organization and against the responsible representative of the organization.

Continued failure to file reports can lead to termination and dissolution in most countries. Termination should only follow, however, after notice to the organization and an opportunity to remedy the deficiency. Where fines are imposed or termination is ordered, the NPO usually has the opportunity to file an appeal.

Sanctions against public benefit organizations may include the loss of tax benefits or the termination of PBO status. In Bulgaria, for example, a PBO can be terminated in case of systematic noncompliance with reporting requirements. In Kosovo and Romania, PBOs that fail to file reports may also lose their public benefit status. Somewhat similarly, public benefit companies in the Czech Republic may lose comprehensive tax benefits in the year of breach and other more limited tax benefits in the following year.

V. Foreign Organizations

The trend in Central and Eastern Europe is to provide a level playing field for both foreign and domestic organizations. With this in mind, laws in most countries specifically address the registration of a branch office of a foreign organization. To register a branch office, foreign organizations are generally required to submit the following documents:

1. Proof that the organization is registered in another country;
2. Governing documents showing the goals and activities of the foreign organization and its branch office;
3. An official decision to establish a branch office in a given country; and,
4. The address of the branch office and name of representative.

Some countries place additional requirements on foreign organizations. For example, in Romania, foreign organizations may only be recognized on the condition of reciprocity and on the basis of prior approval from the Government. This, however, has proved to be a problematic provision in other countries in the region.

Interestingly, in Hungary, there is no legal basis for a foreign organization to register a branch office. In practice, however, foreign organizations are permitted to register as the branch

office of a commercial company. The situation is similar in Serbia, where foreign organizations' branch offices operate based on a certificate issued by the Ministry of Foreign Affairs—although such a practice does not have support in currently governing legislation.[25]

VI. Miscellaneous

A. Transformation

The merger and split-up of NPOs is often regarded as an internal issue and dealt with in the governing documents of the organization. In recognition of this principle, some countries, such as Bosnia, prescribe that the issue must be addressed in the statute of the organization. Confirmation of the transformation is subject to the approval of the regulatory body, be it the court or ministry (or administrative body).

Laws in many countries, however, provide limitations on transformation. For example, while associations may be free to split into either associations or foundations, foundations may merge with or split into only other foundations (due to concern over protecting the foundation's property and the concern that in some countries foundations are, by definition, PBOs, while associations may be organized for either mutual-benefit or public-benefit purposes). Albania, the Czech Republic, Estonia, and Slovakia forbid the transformation and merger of foundations (as well as centers and public benefit companies) into associations and vice-versa. More importantly, public benefit organizations are generally restricted from transforming into mutual benefit organizations or for-profit organizations, for public benefit organizations must use their assets (including public support) to address public benefit goals.

Following transformation, the newly formed NPOs are usually jointly liable for the obligations undertaken prior to their transformation.

B. Endowments / Investments

In most countries in the CEE region, there are no special rules relating to endowments or investing, including investments abroad. As legal entities, NPOs are subject to the general regulatory framework for investments in the given country. In Hungary, for example, any investment is permitted, but only investments in government bonds may be tax exempt.

Exceptions to the rule include the Czech Republic and Slovakia. In these countries there are specific limitations on the investment of the endowment by a foundation. In Slovakia, the Law on Foundations also sets specific limitations on investments to protect against the diminishment of a foundation's endowment. The endowment of a foundation may not be donated, invested as a deposit into a commercial company, pledged, or otherwise used to secure any obligations of the foundation or of third parties. The foundation must keep all of the monetary assets forming part of the endowment at a local bank or foreign branch bank. These monetary assets may only be used to purchase public securities and governmental treasury vouchers; securities accepted on the market of listed securities and shares of open investment funds; mortgage bonds; bank deposits, savings certificates and deposit certificates; and real estate.

[25] A draft Law on Associations, however, governs the registration of foreign organizations in some detail.

C. Public Policy Activities

NPOs are allowed to engage in a variety of public policy activities, including a broad range of advocacy efforts. At the same time, with a few notable exceptions, countries generally prohibit NPOs from nominating candidates for political office. Some, like Macedonia and Bosnia, also prohibit NPOs from direct participation in a campaign and from financing candidates or parties. Hungary places few limits on NPOs' ability to engage in political activity, but makes tax benefits contingent on their refraining from nominating candidates in national elections. Some laws are less clear, either because they do not explicitly mention political activities or because they do not explain which political activities are illegal. This is the case for the Lithuanian law on charity and sponsorship funds. These prohibitions have generally been construed narrowly, so that, in practice, Lithuanian NPOs can conduct (and have conducted) a variety of public policy activities. Most liberally, Poland places almost no restrictions on associations' political activities—even allowing associations to take part in elections through special elective committees. That said, Polish NPOs active in the legislative process risk being treated as lobbyists and fined as a result of the broad definition of lobbying in the law. Lithuania explicitly excludes associations' uncompensated legislative advocacy on behalf of their members from the application of its lobbying laws.

In Hungary, the restriction on political activities is tied to the public benefit status. Hungarian law generally allows foundations and associations to finance political parties but denies a PBO status to all NPOs that fund political parties, that are not independent of those parties, or that nominate candidates for national elections (nominations for local elections are allowed). Hungary also adopted a law on political party foundations—similar to the German model—whereby separate budget support is given to party foundations, which are also allowed to fundraise for and finance the party with which they are affiliated.

In short, legislation in the region generally recognizes that NPOs are key participants in framing and debating issues of public policy, and just like individuals, they should have the right to speak freely on all matters of public significance, including existing or proposed legislation, state actions, and policies. Likewise, consistent with international good practice, NPOs generally have the right to criticize or endorse state officials and candidates for political office. They also generally have the right to carry out public policy activities, such as education, research, advocacy, and the publication of position papers. At the same time, they are generally prohibited from engaging in "party political" activities, such as nominating candidates for office, campaigning, or funding parties or political candidates.

VII. Tax Laws

In the transition from socialism, the first step toward developing a viable NGO sector for many countries in Central and Eastern Europe was to modify, supplement, and clarify the basic framework legislation establishing NPOs and setting forth their essential characteristics. As more and more charitable organizations have formed under those laws, the need to help those organizations (and their charitable activities) become sustainable has brought the issue of tax benefits to the forefront of discussions. But in many countries, this second stage of reform has not progressed as far as the first. Thus, it must be noted that for several countries in the region, the current tax regime is only the latest step in an ongoing process of reform and adjustment.

A. Tax Advantages for Charitable Institutions

1. *National Income/Profits Tax*

All of the countries in the region provide some relief from the profits/income tax for public benefit organizations.[26] In some cases, this is because the profits tax leaves NPOs as a whole outside its scope. More commonly, however, tax laws apply to NPOs, but provide more or less nuanced exemptions based on an organization's type, purposes, and source of income.

The most common exemption is for membership dues and other donations. It appears that all countries in the region exempt such funds from the income of charitable organizations (in fact, many of them exempt all NPOs from taxation on these sources). A few countries consider not only whether the recipient organization is charitable in nature, but also whether the donated funds will be used for charitable purposes, even if the recipient is not inherently a charitable organization. For instance, the Czech Republic exempts all donations to foundations, funds, and public benefit companies, which are, by their very nature, publicly beneficial. It also exempts donations to other legal persons if they are used for certain designated public benefit purposes. Poland and Albania have similar systems. In Lithuania, an organization must qualify as eligible to receive sponsorship in order to avoid taxation on its donations (which requires it to spend those donations on public benefit activities). However, Lithuanian NGOs do not pay profits tax unless their annual profit exceeds one million Lithuanian litas (approximately 300,000 euros).[27]

There is more variety in the treatment of income from business activities and passive income earned on investments such as stock dividends, bond interest, rent, or royalties. These are discussed below.

The qualification requirements for exemption depend in large part on the scope of the exemption. In some countries, registration as a particular NPO form is itself sufficient to qualify the organization for tax benefits. Thus, the registering authority's decision is the source of both legal entity status and tax benefits.

Estonia, Bulgaria, Hungary, Latvia, and Poland have developed a more elaborate system, under which a charitable organization seeking certain tax benefits must specifically apply for exempt status. Only once its application is approved, and its name added to a list of exempt organizations, does the organization become eligible for those tax benefits.

In jurisdictions requiring separate application for tax benefits, there is some variation in who has responsibility for the master list of exempt organizations. In Bulgaria, the list is kept by the Minister of Justice; in Kosovo, by the NPO Registration Office. In Latvia there is not a separate list of tax-exempt organizations; rather, a public benefit commission determines which organizations are accorded public benefit status in the register of legal entities, and the tax authorities must provide tax benefits to the organizations receiving that status.

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[26] In Estonia, there is no tax on legal entities profits *per se*. Rather, the tax applies only to certain distributions made by those entities. Distributions made to charitable organizations recognized as eligible for tax benefits are not subject to the tax. This applies to some distributions (like dividends) that would normally be taxed.

[27] Martinas Zaltauskas & Viktorija Daujotyte, European Foundation Center, *Country Profile December 2008: Lithuania* (updated by Vaidotas Ilgius), at 7, *available at* http://www.efc.be/ftp/public/eu/CountryProfiles/lithuania.pdf .

2. *VAT*

There are several ways in which VAT may be applied to public benefit organizations. One option is simply to exempt them from the VAT system. This means that they do not charge VAT on goods and services that they provide, but it does not allow them to recover VAT paid on purchased goods and services. A more favorable option is to "zero-rate" their goods and services, allowing charitable organizations to avoid collecting VAT and also seek rebates for amounts paid. The European Union imposes a different system which has now been introduced in all of the new member states. Under this system, the VAT treatment does not depend on the status of the organization, but the type of goods or services provided. Within the limitations provided by the 6th Directive,[28] member states may choose to exempt certain types of goods or services or lower the rates charged on them.

A few countries have had across-the-board exemptions for NPOs in general or charitable organizations specifically (Montenegro). These exemptions frequently do not apply when the goods or services are part of an organization's economic activities (Romania), or when a tax preference would distort market competition (Montenegro). Macedonia has a narrower exemption that applies to cultural institutions, botanical gardens, zoos, parks, archives, and documentation centers. Several countries also have created incentives for foreign aid by providing special VAT exemptions for international organizations, internationally donated supplies, or local NPOs funded by international donors. However, such exemptions are being discontinued in the EU accession process, as under EU rules, the VAT treatment may not consider the source of the income.

Even in countries without an explicit exemption for charitable organizations, many charitable organizations are exempt under general rules limiting VAT collections to taxpayers with more than a certain amount of turnover. Although the threshold for VAT registration varies from country to country, most of the countries in the region set the threshold somewhere between €10,000 and €30,000, although Romania has a higher threshold of approximately €50,000. In Kosovo, an organization must register for VAT if it has imports from or exports to other parts of the Former Republic of Yugoslavia (FRY), or if its turnover is above €100,000 annually. Organizations with public benefit status are entitled to a rebate of VAT attributable to intra-FRY imports/exports.

In addition to any exemptions granted to charitable organizations in general, and in line with the EU regulations, many countries either exempt certain goods or services entirely or tax them at preferential rates. Many of these goods and services are of a sort typically provided by charitable organizations. Examples of such zero-rated or preferentially rated goods and services include educational and scientific publications and materials, health care, religious items and services, cultural events, care for the elderly, and social welfare services. Interestingly, Albania exempts many such goods and services, but only if NPOs provide them at a price clearly below the price at which they would be supplied on a for-profit basis.

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[28] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0388:EN:HTML

B. Donor Benefits

Virtually all of the countries in the region grant at least some benefits to donors for contributions that they make to certain NPOs. An exception is Slovakia.

At the same time, several countries (Hungary, Lithuania, Poland, Romania, and Slovakia) have enacted innovative laws that allow taxpayers to designate 1-2% of their paid taxes to be distributed to qualifying NPOs of their choice. One advantage of these laws is that they provide a source of funding for NPOs not controlled directly by the government or foreign donors, helping to sustain the independence of the nonprofit sector. Furthermore, this regime allows charitable organizations to compete for these designated funds, presumably giving organizations an incentive to manage their funds efficiently, provide appropriate public disclosures about their management and activities, and choose activities that meet pressing needs in the eyes of the public.

1. *Benefits for Business Donors*

Businesses in every CEE jurisdiction, except Slovakia, receive some tax benefits for charitable giving. In jurisdictions where organizations can obtain a special public benefit status, generally the recipient of a donation must have public benefit status; in other countries, the donations must generally be for one of a number of listed charitable purposes.

Generally, the benefit is in the form of a deduction, which decreases the tax base (i.e., the amount of taxable income upon which the tax is computed) in the amount of the contribution. However, a few countries have departed from this practice. Lithuania allows businesses to deduct double the amount of their contribution, for a deduction of up to 40% of their profit; Hungary allows a deduction of 150% of contributions made to organizations that have been accorded the status of a "prominently public organization," but only up to 20% of taxable income. Latvia allows a tax credit (decreasing the amount of the tax, not the tax base) in the amount of 85% of the contribution (up to 20% of the company's tax liability) to most organizations on the government's list, and 90% of the contribution to certain specially favored organizations (such as the Latvian Olympic Committee, the Children's Fund, and the Culture Fund).

All of the countries limit the amount of deduction or credit that a company may claim. A few set the limit as a percentage of gross income or revenue. They are: Bosnia (0.5%), Macedonia (5%), Serbia (3.5%, or 1.5% for donations for cultural purposes), and Slovenia (3%). Estonia allows up to 3% of the base for the social tax (employee compensation) as a deduction. The more common approach, however, is to limit the deduction to a percentage of taxable income/profit, for example: 1% (Albania[29]), 5% (Czech Republic, Kosovo, and Romania) or 10% (Bulgaria, Poland, and Slovakia).

Some countries have higher allowances for particularly favored activities. For instance, Albania generally allows only 4% of taxable income to be deducted, but allows up to 10% for publication activities; Poland has a list of purposes, including scientific research, for which a 15% cap applies. Croatia allows the applicable ministry to increase the generally applicable 2% cap for particular projects it approves.

[29] Albania has a 1% limit applicable to entities that pay small business taxes. Entities paying regular profits tax may deduct up to 4% of otherwise taxable profits.

2. *Benefits for Individual Donors*

Seven jurisdictions in the region do not generally permit individuals to deduct their charitable contributions: Albania,[30] Bosnia and Herzegovina, Kosovo, Lithuania, Romania, and Serbia. The remaining countries generally give individual contributions the same sort of preferences that they give business contributions, except that the limits on contributing may be different (and usually larger). For instance, the Czech Republic allows businesses to deduct up to 5% of their income, but allows individuals to deduct up to 10%. Hungary gives individuals a tax credit for charitable contributions, which cannot exceed 30% of the tax liability up to HUF 50,000 (approximately €200), or up to HUF 100,000 for "prominently" public organizations. However, higher income individuals (those in the highest bracket) may not take advantage of this possibility, as they are denied tax benefits altogether.

In Macedonia, individuals are entitled to a personal income tax reduction amounting to 20% of the total amount of the annual tax liability of the provider, but not exceeding 24,000 MKD (€390), if the donation is given to citizens' associations and foundations of public interest, public institutions, local self-government units, and other legal entities enumerated in the law. In Poland, individuals can deduct 6% of their donation when they donate to an "ordinary NGO" and 100% of their contribution when they donate to a religious organization.

C. Endowment Issues

The term "endowment" may refer to a specially designated portion of the assets of an NPO (usually, a foundation) that are to be maintained permanently and used to support the organization's purposes on an ongoing basis. In this narrow sense, only a few countries in the region have special regulations treating endowments. However, many NPOs derive some part of their income from the investment or other use of their property. Such property can be loosely termed part of an organization's "endowment," and so, in a broad sense, all of an organization's passive investment can be categorized as an investment of the organization's endowment.

1. *Taxability of Investments*

Generally, NPOs in the CEE region are allowed to hold a variety of income-generating investments, including bonds, deposit accounts, securities, intellectual property, and real estate. The precise tax rate that applies to such investments varies from country to country and across types of investment. In a few countries (including Bosnia and Herzegovina, Croatia, and Romania), such investments are not considered taxable income for legal persons in general. In these jurisdictions, charitable organizations' investment income is exempt from tax. Other rules nonspecific to NPOs may impact whether particular investments are taxable.

Some jurisdictions provide special exemptions for passive income earned by charitable organizations. Examples of this approach include Kosovo and Poland.[31] The Czech Republic and

[30] Albania allows its deduction for "traders," whether they are legal or physical persons. Thus, some individuals are eligible to deduct contributions on the same basis as businesses do.

[31] In Estonia, there is no corporate income tax, but only a tax on distributions. However, dividends paid to an organization on the government's list of public-benefit organizations are not subject to the normal tax on distributions. Other forms of passive income are, of course, not taxable as income *per se*, but expenses incurred in generating those forms of income may be considered taxable distributions if the income-generating activity is not related to the organization's purposes.

Serbia provide that the yield from a foundation's endowment is not taxable; since foundations in these jurisdictions must have a public benefit purpose, they effectively also limit the tax deduction for passive income to public benefit organizations.

Other countries provide more limited tax benefits for passive income. In Montenegro, for example, passive investment income up to €4,000 is exempt. In Hungary, investment income is generally taxable, but if some portion of their total income is produced by their targeted activities, they may exempt a proportional amount of their investment income. In addition, public benefit organizations not conducting economic activities may exclude all of the yields from deposits or credit-type securities related to their public benefit purposes.

Finally, four countries—Albania, Bulgaria,[32] Slovakia, and Slovenia— generally provide no exemption for passive income, or for charitable organizations' passive income in particular. Failing to exempt investment income in this way can lead to incongruous results. Since many of these countries would allow a third party to make the same investment and contribute the resulting income to charity without taxing either the donor or the recipient, it is not clear why the investment should be less favored just because the invested property belongs to the charity, not the third party.

2. *Restrictions on Investing*

Countries in the region have imposed relatively few restrictions on how property may generally be invested. As noted above, foundations are sometimes required to maintain a minimum amount of assets, where the minimum is either a fixed amount or an amount sufficient for accomplishing the foundation's purposes. These restrictions may require foundations to invest conservatively to avoid falling below the relevant threshold. Hungarian law specifically states that economic activities (including passive investment) must not jeopardize a foundation's purposes. Further, Hungary requires public benefit organizations to adopt an investment policy. Slovakia and the Czech Republic have imposed more specific limits on the investment of a foundation's endowment (in the narrow, technical sense), restricting investment to certain relatively safe investments. In Slovakia, the endowment may be invested only in state bonds and obligations, securities traded on main markets, mortgage bonds, deposit receipts, deposit certificates, participation certificates, and real estate. The Czech Republic allows investment in bank deposit accounts, state-issued or guaranteed securities, real estate, income-producing art, certain intellectual property, and certain investment instruments from OECD countries. In addition, Czech foundations cannot put more than 20% of their assets into publicly traded stocks, and cannot own more than 20% of the stock of a stock-holding company. Lithuania requires charity and sponsorship funds to hold their funds in banking institutions.

D. **Commercial/Business/Economic Activities**

Given the scarcity of large endowments and the lack of longstanding traditions of private philanthropy, the reality is that many organizations in the CEE region can survive only by conducting some economic activities to supplement income from donations and investment. Rules regarding the permissibility and taxation of such activities therefore have a significant impact on the growth and sustainability of the sector. Nevertheless, regimes in the region have

[32] Bulgaria does not tax income from interest on bank deposits for funds that have been received as part of the non-profit activity of the NPO. In addition, there are certain general exemptions for income from investments in publicly traded shares on the Bulgarian stock market.

taken various approaches to ensuring that NGOs conducting economic activities are not merely for-profit entities in disguise. The principal safeguard against this, of course, is the non-distribution constraint, which prevents any NGO from distributing profits as such to owners, members, or other insiders in the organization. However, CEE jurisdictions have supplemented this basic requirement with a variety of other restrictions on economic activities' permissibility or eligibility for tax benefits.

Part of the difficulty with economic activities is crafting a definition that captures potentially problematic activities without sweeping a large amount of innocent activity within its scope. For instance, certain traditional fundraising activities, such as benefit concerts or fundraising raffles, could conceivably fall within an undifferentiating definition of economic activity. As a general rule, economic activities can be defined as "regularly pursued trade or business involving the sale of goods or services and not involving activities excluded under some distinct tradition."[33] Generally, this definition should be understood to exclude the receipt of gifts and donations (see above), certain passive investment income, occasional activities such as fundraising events, activities carried out using volunteer labor, and fees that are "intrinsically connected to the public benefit purposes of the organization" (for example, tuition for an educational organization). [34] Several countries—for instance, the Czech Republic—explicitly provide that certain cultural events, fundraising lotteries, etc., fall outside the scope of any restrictions on economic activity.

1. *Permissibility of Economic Activities*

Virtually all countries in the region allow at least some forms of NGOs to engage in economic activities directly; that is, without creating a separate for-profit company to do so. In addition to imposing the non-distribution constraint on any income earned from these activities, many countries impose a requirement that the income be used to support the organization's statutory purposes. Some countries impose additional requirements. For instance, they may require any economic activities to be explicitly listed in the organization's governing documents (Albania and Croatia) so that registering authorities can consider their legitimacy in advance. Or they may impose a purpose test, under which an organization's primary purpose cannot be to conduct economic activity (Albania, Hungary, Latvia, and Slovenia). Some require that economic activity be incidental and not comprise a regular part of the organization's activities (Romania), or that it be carried out only to the extent necessary to support the organization's purposes (Croatia, Hungary, Lithuania, and Slovenia).

There is a particularly broad consensus that NGOs should be permitted to engage in economic activities that support the organization's statutory purposes. Otherwise, for instance, sale of clothing to the poor at or below cost might be considered impermissible economic activity. Whether NGOs should be allowed to engage in completely unrelated moneymaking ventures is less established. Bosnia, Bulgaria, Latvia Romania, and Slovenia all have laws that explicitly allow NGOs to engage in *related* economic activity, which leaves their ability to engage in unrelated activity more questionable. Latvia allows other economic activity only so

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[33] International Center for Not-for-Profit Law, "Economic Activities of Not-for-Profit Organizations," in *Regulating Civil Society*, conference report, (Budapest: May 1996), pp. 6-7 (available online at http://www.icnl.org); ("Economic Activities"); Lee Davis and Nicole Etchart, *Profits for Nonprofits: An Assessment of the Challenges in NGO Self-financing*, (Santiago, Chile: NESsT 1999), pp. 72-73.

[34] Ibid.

long as it is "complementary" and "pertains to the maintenance and utilization" of the NGO's own property—suggesting that such activities should remain an incidental accessory to the NGO's other activities. Similarly, in Albania, the Law on Non-Profit Organizations provides that a not-for-profit organization may conduct economic activities in order to realize its purposes. The economic activity must "conform" to the purposes of the organization, which may allow activities that are consistent with, although not related to, the statutory purposes. Poland permits economic activities by NGOs only to the extent necessary for fulfillment of the NPOs' statutory tasks, and only under certain specific conditions. Poland also recognizes a category "paid public benefit activities" subject to special conditions and regulation. Montenegro takes a different approach; instead of differentiating between related and unrelated economic activities, it establishes a percentage/monetary threshold for income generated from those activities, beyond which an organization must engage in economic activities only through an independent commercial entity.

Some countries distinguish between foundations and other types of NGOs with respect to the permissibility of business activities. In the Czech Republic, foundations and funds are generally prohibited from engaging in business activities,[35] but such activities are allowed for all other types of NGOs. Similarly, in Slovakia, foundations and non-investment funds are prohibited from engaging in business activities.

There are limited exceptions to the general trend in favor of permitting NGOs to engage directly in economic activities. In Macedonia, foundations and associations generally may not engage in economic activities directly. In order to engage in income-generating activities to support their not-for-profit purposes, they must found separate joint stock or limited liability companies. These separate subsidiaries are subject to the same tax rules as other commercial enterprises.

2. *Tax Treatment of Economic Activities*

As with other types of income, charitable organizations in Lithuania and the Federation of Bosnia and Herzegovina are not taxed on economic activities because they are not subject to the profits tax at all.[36] At the other extreme, Albania, Bulgaria, Slovenia, Romania, and Republika Srpska all tax income from any economic activities, related or unrelated—which is a restrictive approach inconsistent with regional good practice and currently the subject of revision in many of these countries. Between these two poles, other countries have adopted various intermediate approaches. One intermediate approach, employed by Estonia, is to tax income from economic activities only when it is unrelated to an organization's statutory purposes.[37]

Another approach, used by Poland and Kosovo, is to apply a destination-of-funds test, exempting any income from economic activities that is used to further the organization's

[35] There is a limited exception for investments in joint stock companies. In addition, foundations may organize cultural, social, sporting and educational events, as well as lotteries and public collections to raise funds.

[36] In 2003, there were legislative proposals in Lithuania to subject NGOs' economic activities to the profit tax.

[37] In Estonia, business income is not directly subject to tax. Instead, expenses connected with the production of unrelated business income are treated as taxable distributions from the NGO. Thus, Estonia exempts related (but not unrelated) expenditures.

purposes (perhaps requiring proof that the funds have been so used within a certain amount of time after they are received).

Another option is to employ a mechanical test, exempting income from economic activities below a set threshold, and taxing the rest. In Hungary, the amount of tax-free economic activity that an organization can carry out depends on its public benefit status. Non-public benefit organizations are entitled to exemption for business income that does not exceed 10% of total income or HUF 10 million; the threshold for public benefit organizations is HUF 20 million. "Prominent" public benefit organizations can have tax-free business income up to 15% of total income.

A few countries have also added the stipulation that business income will not be exempt if giving a preference to the business activity in question would allow unfair market competition against for-profit companies. For example, Croatia's law does not allow exemption when doing so would give the NGO an "unjustified privileged position in the market."

E. Miscellaneous

1. *Administrative Expenses*

Generally, countries in Central and Eastern Europe place no legal limits on administrative expenses or salaries.

Slovakia offers one of the few exceptions to this rule. The administrative expenses of non-investment funds, one of Slovakia's specialized NPO forms, may not exceed 15% of the fund's total expenditures, not including expenses for registration, fundraising, auditing, and verification of the proper use of grants. This has proven to be an extremely problematic provision and is inconsistent with regional good practices. Lithuanian sponsorship funds were subject to a similarly burdensome 20%-of-income restriction, which has since been abolished.[38]

Also, according to the Czech Law on Foundations and Funds, the organization's governing documents must prescribe self-selected limits to the administrative and operational expenditures of a foundation or a fund, and the limitation may not be changed for at least five years. In the case of a foundation, this rule may be expressed as a percentage of the yield from the endowment, a percentage of the registered endowment's total value, or a percentage of the total yearly value of the grants made by the foundation to third persons. In the case of a fund, this rule may be expressed as a percentage of the yield from the property of the fund, a percentage of the total assets of the fund at the end of the year, or a percentage of the total yearly value of the grants made by the fund to third persons.

2. *Accounting*

In most countries throughout the CEE region, there are special accounting rules for NPOs. For example, NPOs typically must account separately for their statutory not-for-profit activities and for their economic activities (Bulgaria, Hungary, Poland). They must indicate

[38] Zaltauskas & Daujotyte, *supra* note 27, at 6.

support received from the state budget (Hungary) and comply with accounting rules prescribed for budgetary spending (Croatia).

In addition, accounting requirements often vary depending on the size of the organization. Romania allows NPOs to be subject to simplified accounting rules if they are not public benefit organizations, have the assent of public finance authorities, and their annual revenue does not exceed €30,000.

IX. Government Funding

In most countries, NPOs are permitted to compete for government funds. Often, this is made explicit. In Bulgaria and Estonia, the Law on Procurement specifically allows all legal persons to compete for government funds in tenders. The Slovak Public Procurement Act runs counter to this trend by expressly excluding NPOs from public service tenders. However, upon EU accession, all new member states adopted some form of regulation that enables NPOs to apply for the Structural Funds of the EU that are channeled through the national governments (and may include grants as well as public service tenders).

Where NPO participation in public procurement is permitted, the rules on bidding vary dramatically. In Bosnia and Serbia, for example, the ministries have great discretion in determining the rules for government funding, but these rules are far from clear and transparent.[39] In the Czech Republic, however, there are clear, published grant application rules in the fields of science, research and development, education, and care for children, and ecology. Similarly, in Hungary, several laws govern various government funds that support NGOs through free and open competitions with set bidding rules; moreover, in certain cases NPOs can gain access to government funds through unsolicited proposals for grants and contracts.[40] Romania adopted a Law on Grants, which provides for the application of the same basic rules for grant competitions across national and local government agencies. In Croatia, a code of good practices has been adopted, which is designed to ensure transparency of government grant-making through open competitions and objective criteria. Finally, in Montenegro, a cross-sectoral commission is empowered to distribute public grants.[41]

X. Privatization

Several countries have created special legal forms to permit or facilitate the privatization of state assets to the not-for-profit sector. Indeed, in the Czech Republic, public benefit companies were originally designed to be vehicles through which the government could privatize services currently funded through state-run institutions, including hospitals, schools, and museums; but because of insufficient incentives to assume state responsibilities, privatization through public benefit companies has had only modest success. In Hungary, the public benefit company was also created to facilitate privatization. In practice, state agencies, ministries, and

[39] However, Serbia draft Law on Associations and draft Law on Endowments and Foundations provide for transparent rules on public funding and significantly limit the government's discretion in this respect.

[40] E.g., in some of the ministries, the Minister has a discretionary amount of funds that s/he may use to support NGOs.

[41] For more information on NPO-Government partnerships, please visit the European Center for Not-for-Profit Law at http://www.ecnl.org.

local governments in Hungary established public benefit companies staffed with former public administration staff and concluded contracts with these companies to provide public services formerly provided by the state. This mechanism is of course distinct from outsourcing service delivery to independent NPOs. It has been discontinued as of 2007 and the more general "nonprofit company" form has been introduced in its stead, which is less prone to such abuse.

At the same time, some types of social services (e.g., homeless shelters, disability homes, home care networks) are effectively provided by NGOs that receive payments covering a certain part of their costs from the state through a so-called normative support system (provided on a per capita basis). Foundation schools have also been successful, if not numerous, in Hungary.

In Bulgaria, legal changes permit NPOs to compete for contracts with local governments to deliver social services, but the implementation of this procedure has been slow to take root.

In some countries, especially in Southeastern Europe, the privatization of the public sector has barely begun, so there are no effective mechanisms yet in place to include NPOs in the process. In other countries, such as Hungary, NPOs may be permitted to bid to become recipients of certain assets (museums or health clinics), but in practice are rarely awarded such assets. More commonly, government assets and funding are distributed to quasi-NPOs or government organized NPOs.

XI. Conclusions

NPO legislation in CEE is quickly evolving. Trends include the following:

- *Organizational Forms.* Most countries now recognize both associations and foundations. The trend is to define these forms flexibly, which limits the need for additional organizational forms. Countries also recognize the right to organize unregistered associations.
- *Founders*. Most countries require two to five founders for an association, and one or more founders for a foundation. Most countries also allow legal entities and foreigners to found NPOs.
- *Capitalization*. Associations do not require capitalization. Foundations do typically require initial property, but the trend is to make this a nominal amount or to require that the assets merely be sufficient to accomplish organizational purposes.
- *Registration Authority.* The trend is to divest line ministries and the Ministry of Interior of registration authority for NPOs. Countries are transferring this authority to courts or to other ostensibly less political bodies. The trend is also to allow registration at the local level.
- *Grounds for Refusal.* The trend is to define more precisely and narrowly the bases upon which registration may be refused. At least for associations, these tend to be based on Article 11 of the European Convention.
- *Procedural Safeguards*. Most countries provide time limits for the registration process and allow redress (at least for the founders) for adverse decisions.

- *Public Registries.* Countries are increasingly creating public registries of NPOs to promote transparency. Some countries, like the Czech Republic, and Croatia, have also placed these registries on the Internet.
- *Governance Structures.* Associations are typically governed by a General Assembly of Members. Foundations are typically governed by a Board of Directors; some also have Supervisory Boards and other structures. Additional structures, such as an Audit Committee, may also be required for organizations receiving tax/fiscal benefits. Laws typically identify these structures and their responsibilities, but otherwise grant the founders broad discretion to determine internal governance issues.
- *Economic Activities.* The trend is to allow NPOs to engage in a broad range of income-generating activities, treating economic activities as a tax issue and not as an NPO status issue.
- *Political Activities.* Most countries prohibit NPOs from engaging in "party political" activities, such as nominating candidates for elective office and fundraising for parties or candidates. NPOs are, however, allowed to engage in a broad range of public policy and advocacy activities.
- *Reporting.* NPOs are generally required to file tax reports in accordance with the tax laws. Organizations receiving tax/fiscal benefits or significant public donations are typically required to prepare programmatic reports. The trend is to narrowly tailor reporting requirements to meet legitimate interests while not unduly burdening NPOs. Toward that end, small NPOs are sometimes exempt from reporting requirements or required to submit simplified reports.
- *Taxation.* In all countries, NPOs receive some degree of exemption from taxation; in nearly all countries, there are incentives in place to encourage giving by individuals and corporations. The trend is to link tax treatment to the activities of the NPO and the challenge to ensure proper implementation.
- *Government Funding.* Increasingly, governments are providing direct funding to NPOs and seeking to facilitate privatization of state resources to private actors, including NPOs. The trend is to facilitate this process and ensure that the shift of government resources to the NPO sector is performed in a transparent manner.
- *Termination.* The trend is to grant the highest governing body of an organization (particularly an association) broad discretion to terminate the NPO and to precisely and narrowly define the bases upon which an NPO may be involuntarily terminated.
- *Liquidation.* The trend is to require an NPO receiving substantial tax/fiscal benefits or public contributions to transfer its assets remaining upon dissolution to another organization pursuing the same or similar purposes. Other organizations, particularly mutual benefit associations, are often allowed to distribute remaining assets to members and, if applicable, founders.

Law reform challenges continue to face the NPO sector in Central and Eastern Europe. Primary among them are (1) revising the basic framework legislation to ensure more streamlined

registration and higher standards of accountability; (2) improving the regulatory framework for public benefit organizations to encourage their activities; (3) improving the tax treatment of NPOs and donors to support the sustainability of NPOs; and (4) improving the system of government funding to provide more effective delivery of public services.

This concludes the survey of CEE legislation governing general framework laws, including organizational forms, registration procedures, governance and accountability, termination and liquidation, supervisory regulation, taxation, and other regulatory practices affecting NPOs. Additional information is available at http://www.icnl.org.

Common NPO Organizational Forms				
Country	**Association**	**Foundation**	**Public Benefit Company**	**Other**
Albania	Association	Foundation	Center[42]	
Bosnia and Herzegovina (State level)	Association	Foundation		
Bosnia and Herzegovina (Federation)	Association	Foundation		
Bosnia and Herzegovina (RS)	Association	Foundation		
Bulgaria	Association	Foundation		Chitalishta[43]
Croatia	Association	Foundation Fund		Private Institutions
Czech Republic	Civil Association, Interest Association of Legal Entities	Foundation Fund	Public Benefit Company	Public Institution,[44] Charitable Estab-lishment[45]
Estonia	Non-Profit Association	Foundation		Non-Profit Partnership

[42] Albanian centers are much like foundations, except that they are intended to operate with grants from other sources, not to provide grants themselves.

[43] Traditional Bulgarian community centers.

[44] A form used for semi-autonomous state-funded institutions like universities.

[45] Used by the Catholic Church, this form gives the founder more control over the organization's governance, but makes the founder liable for the organization's activities as well.

Common NPO Organizational Forms				
Country	**Association**	**Foundation**	**Public Benefit Company**	**Other**
Hungary	Association/ Social organization	Foundation Open Foundation[46]	Nonprofit Company	Public Foundation, Public Society
Kosovo	Association	Foundation		
Latvia	Association	Foundation	Non-Profit Organ-ization	
Lithuania	Association	Charity and Sponsorship Fund, Foundation, Public Institution	Public Institution	
Macedonia	Citizens Association, Association of Foreigners	Foundation		
Montenegro	Association	Foundation		
Poland	Association, Simple Association	Foundation	Public benefit company	
Romania	Association	Foundation		
Slovakia	Civil Association	Foundation Non-Investment Fund	Non-Profit Organization that Provides Public Services, Non-Investment Fund	
Slovenia	Association	Foundation		
Serbia	Association[47]	Foundation		

[46] Although a special legal type, this is the most common foundation form.

[47] Under the Serbian law, associations are divided into social organizations or citizens' associations, and associations of foreigners.

Founding Requirements for Membership Organizations						
Country	**Minimum Members**	PERMITTED TO FOUND AND JOIN?				**Special umbrella organization form? If so, how many organizations needed to found?**
		Citi-zens	**For-eigners**	**Legal persons**	**Minors**	
Albania	2/5[48]	Yes	Yes	Yes		No
Bosnia and Herzegovina (State level)	3	Yes	Yes, if resident or registered in BiH	Yes	Yes	Not addressed
BiH (Federation)	3	Yes	Yes	Yes	Yes	Not addressed
BiH (RS)	3	Yes	Yes	Yes	Yes[49]	Not addressed
Bulgaria	3[50]	Yes	Yes	Yes		No
Croatia	3	Yes	Yes	Yes[51]	No	Yes; 2 or more associations
Czech Republic	3	Yes[52]	Join Only[53]	Join Only	Yes[54]	Yes; 2 or more associations
Estonia	2	Yes	Yes	Yes	Yes	
Hungary	10	Yes	Yes	Yes	Yes	Yes, federation: 10 associations needed

[48] At least two juridical persons or five natural persons must be members of the association.

[49] Although the three laws in Bosnia and Herzegovina (the state level, the Federation, and the RS law) do not specifically address the issue of minors as founders of an association, under general rules of civil law, a minor at the age of 14 may be a founder of an association with the consent of his parents or legal trustee. In addition, minors may participate as members in the association's activities in a manner prescribed by the statute.

[50] Public benefit associations must have at least 7 natural persons or 3 legal persons as members.

[51] Local legal persons can found associations, as can foreign legal persons. Foreign legal persons can join associations whose statutes so specify.

[52] Citizens of any member state of the European Union have equal rights when residing in the Czech Republic.

[53] Sometimes contested by the Ministry of Interior, but supported by a ruling of the Constitutional Court.

[54] At least one founder must be 18 years old.

Founding Requirements for Membership Organizations						
Country	**Minimum Members**	PERMITTED TO FOUND AND JOIN?				**Special umbrella organization form? If so, how many organizations needed to found?**
		Citi-zens	**For-eigners**	**Legal persons**	**Minors**	
Kosovo[55]	3	Yes	Yes	Yes		Current law does not prohibit them
Latvia	2	Yes	Yes	Yes		Yes; 2 or more associations
Lithuania	3	Yes	Yes	Yes	Join Only[56]	Not addressed
Macedonia	5	Yes	Join Only[57]	No	No	Yes; associations and foundations
Montenegro	5	Yes	Yes[58]	Yes	Yes[59]	Yes; 2 or more juridical persons
Poland *Associations*	15	Yes	Join Only[60]	Yes as Sup-porting Mem-ber[61]	Join Only (16+)	Yes; 3 or more
Poland *Simple Associations*	3	Yes	Yes	No	Join Only (16+)	No

[55] At least one founder must have residence or seat in Kosovo.

[56] Children under 18 may be members of an organization active in the field of children's or youth activities.

[57] An association's statute must explicitly state that foreigners are allowed to join; otherwise, they are prohibited. However, foreigners can form special "associations of foreigners."

[58] Must have a residence or place of business in Montenegro.

[59] This issue is not specifically addressed in the law, however, it appears that under general rules of civil law a minor at the age of 14 may be a founder of an association with consent of his parents or legal trustee.

[60] Foreigners who are not permanent residents may join a Polish association if the association's statute explicitly so provides.

[61] Legal persons can join Polish associations as "supporting members."

Founding Requirements for Membership Organizations						
Country	**Minimum Members**	PERMITTED TO FOUND AND JOIN?				**Special umbrella organization form? If so, how many organizations needed to found?**
		Citi-zens	**For-eigners**	**Legal persons**	**Minors**	
Romania	3	Yes	Yes	Yes		Yes; 2 or more associations or foundations
Slovakia	3	Yes	Yes[62]	Join Only	Yes[54]	Yes; 2 or more associations
Slovenia	10	Yes	Join Only[63]	No		
Serbia	10	Yes	No[64]	No	No[65]	

Capitalization Requirements for Foundations and Funds		
Country	**Organization Form**	**Minimum Initial Capital**
Albania	Foundation	Appropriate for purposes[66]
Bosnia and Herzegovina (State level)	Foundation	Assets required, but no minimum amount specified
BiH (Federation)	Foundation	2,000 KM ($1,800)
BiH (RS)	Foundation	Assets required, but no minimum amount specified

[62] In practice, however, it is recommended that foreigners found associations with local citizens.

[63] Permanent residents and foreigners may join if the statute explicitly so specifies.

[64] Foreigners (including, presumably, permanent residents) may establish special "associations of foreigners" in Serbia.

[65] As a general rule, a minor is anyone who cannot vote, which in Serbia means anyone under 18.

[66] The law does not explicitly state this, but foundations in Albania are required to list in their founding document the property that is sufficient for the foundation's purposes.

Capitalization Requirements for Foundations and Funds		
Country	**Organization Form**	**Minimum Initial Capital**
Bulgaria	Foundation	While there must be some initial capital, no specific minimum amount is required. At least in theory, therefore, 1 Bulgarian lev would be sufficient to satisfy the requirement.
Croatia	Foundation	Enough to serve purposes permanently; income must exceed amount necessary to maintain property
	Fund	Appropriate for purposes
Czech Republic	Foundation	500,000 CZK
	Fund	None specified
Estonia	Foundation	Can be dissolved if assets are clearly insufficient and no acquisition is likely in the immediate future
Hungary	Closed Foundation	Appropriate for purposes
	Open Foundation[67]	Enough to begin serving its purposes
Kosovo	Foundation	None
Latvia	Foundation	None
Lithuania	Charity and Sponsorship Fund/Foundation	None
Macedonia	Foundation	5,000 Euro
Montenegro	Foundation	None
Poland	Foundation	Must have 1000 PZL set aside if conducting business activities
Romania	Foundation	At least 100 times minimum gross salary (or 20 times, if the foundation's exclusive goal is fundraising for other associations or foundations)
Slovakia	Foundation	SK 200,000
	Non-Investment Fund	SK 2,000
Slovenia	Foundation	Appropriate for purposes
Serbia	Foundation	Appropriate for purposes

[67] 95% of Foundations in Hungary are "open foundations."

NPO Registration Procedures				
Country	**Entity Type**	**Body**	**Time**	**Special Refusal**
Albania	Association, Foundation, Center	District Court of Tirana	15 days	
Bosnia and Herzegovina (State level)	Association	Ministry of Justice of Bosnia and Herzegovina	30 days	If organization program or activities contravene the constitutional order of BiH; or are directed at its violent destruction, stirring of ethnic, racial or religious hatred, or any discrimination prohibited by law
	Foundation			
BiH (Federation)	Association	Single Canton: Cantonal Ministry; otherwise Ministry of Justice	30 days	Same as BiH State level, and/or if they engage in electioneering, fundraising for candidates, or financing of candidates or political parties
	Foundation	Ministry of Justice and government		
BiH (RS)	Association	District Court	15 days	Same as BiH Federation, and/or if generating profit is the primary purpose of the organization program
	Foundation	District Court		
Bulgaria	Association	Local District Court; public benefit organiza-tions must also register with the Ministry of Justice	14 days for Ministry of Justice	
	Foundation			
Croatia	Association	County offices	30 days	If organization program or activities contravene the Constitution or law
	Foundation	Central Administrative Office (with required permission from activity-area ministry)	30 days for area ministry; 60 total	If purpose is not feasible or immoral, or if there is "no serious reason" or purpose is "obviously lacking in seriousness"
	Fund			
Czech Republic	Association	Ministry of Interior		

NPO Registration Procedures				
Country	**Entity Type**	**Body**	**Time**	**Special Refusal**
	Foundation	Register Court		Military organizations must have prior government approval
	Fund	Register Court		
Hungary	Association, Foundation	District Courts	Expe-dited proce-dure	
	Nonprofit Company	District Commercial Court	Expe-dited Proce-dure	
Kosovo	Association, Foundation, Public Benefit Organization	NGO Registration and Liaison Department, Ministry of Public Administration	60 business days	Denial if (a) registration documents do not comply with requirements of regulation; (b) statutes would violate provisions of UNSC Resolution 1244 or any UNMIK regulation; (c) organization has same name as registered organization or one so similar confusion will result.
Latvia	Non-Profit Organization	Register Authority	30 days	
	Association		7 days	
	Foundation		7 days	
Lithuania	Association	Register of Enterprises		
	Public Institution			
	Fund			
Macedonia	Association	Primary court of the territory in which NPO is seated	30 days	If statute, program or activities of NPO are directed towards violent overthrow of constitutional system, instigate military aggression or national, religious, or racial hatred and intolerance, or violate the prohibition on political activities
	Foundation	Central Registry	5 days	
Montenegro	Association	Ministry of Justice	10 days	

NPO Registration Procedures				
Country	**Entity Type**	**Body**	**Time**	**Special Refusal**
Poland	Association	Local branch of National Registry Court	3 months	Administrative authorities informed, and can object
	Foundation	Local branch of National Registry Court	14 days	
	Simple Association	Local *starost* office	30 days	
Romania	Association Foundation	Primary court	3 days	
Slovakia	Association	Ministry of Interior	10 days	If NPO's goals are incompatible with being non-compulsory, or if it's a church, party, or firm
	Foundation	Ministry of Interior		If it is not a gathering of property or not publicly beneficial (advisory ministry's re-port is used to determine this)
	Non-Profit Organization	Regional office		If it is not really an NPO, or not providing generally beneficial services
	Non-Investment Fund	Regional office	Date set in proposal, or by decree	
Slovenia	Association	Local state administrative bodies		
	Foundation	Ministry over the foundation's area of activity		
Serbia	Association	Ministry of State Administration and Local Self Government, municipal administrative organ over internal affairs	Union: 15 days; Serbia: 30 days	Union: If program or activities are directed at violent destruction of the constitutional order, territorial integrity, or independence of the country; or violation of rights and freedoms protected by the Constitution; or stirring of ethnic, racial or religious hatred

NPO Registration Procedures				
Country	**Entity Type**	**Body**	**Time**	**Special Refusal**
	Foundation	Ministry of Culture		If foundation is judged unnecessary; no redress procedure

Mandatory Governing Organs of Common NPO Forms					
Country	**Entity Type**	**General Assembly**	**Board**	**Management**	**Other Required Body**
Albania	Association	Yes		Single person or committee	
	Foundation		At least 3 members		
Bosnia and Herzegovina (State level)	Association	Yes		Board or person representing the association appointed by the assembly	
	Foundation		Founder or authorized person appoints management board of at least 3 members		
BiH (Federation)	Association	Yes		Board or person representing the association appointed by the assembly	
	Foundation		Founder or authorized person appoints management board of at least 3 members		
BiH (RS)	Foundation		Founder or authorized person appoints management board of at least 3 members		
	Association	Yes	Board or person representing the association appointed by the assembly		
Bulgaria	Foundation		Self-perpetuating	Elected by board	Public benefit organizations must have two bodies: one collective supreme body and one
	Association	Yes		At least 3, though the General Assembly may agree on a 1-person management	

Mandatory Governing Organs of Common NPO Forms					
Country	**Entity Type**	**General Assembly**	**Board**	**Management**	**Other Required Body**
				board (or manager)	management body.
Croatia	Association	Yes			
	Foundation		General provision for "foundation bodies," which are representative and managing. Chosen for the first time by a ministry; nominated by director.[68]		
	Fund				
Czech Republic	Association	Yes			
	Foundation		At least 3 members		Auditor or 3-member Supervisory Board[69]
	Fund				
Estonia	Public Benefit Company		3, 6, 9, 12, or 15 members[70]	Managing Director	3-7 member Supervisory Board
	Association	Yes		1- or several-member	
	Foundation		Yes		Auditor
Hungary	Association	Yes		Yes	Public benefit status requires a supervisory body if annual income exceeds five million HUF.
	Foundation		Yes		
	Nonprofit Company	Yes		Yes, as in the limited liability company or other comparable company legal form	Supervisory Board and Auditor or as required by the comparable legal form
Kosovo	Association	Yes			
	Foundation		At least 3 members		
Latvia	Non-profit Organization	Investors in a nonprofit organization have the right to manage it.			

[68] In Croatia, a "director" is a special temporary officer, nominated by the founder, who starts the organization.

[69] Organizations with less than CZK 5,000,000 can have only a single auditor.

[70] Czech public benefit company boards are generally not self-perpetuating unless the founder becomes unable to appoint them. The founder may specify that a certain number of directorships are controlled by a particular constituency.

Mandatory Governing Organs of Common NPO Forms					
Country	**Entity Type**	**General Assembly**	**Board**	**Management**	**Other Required Body**
	Association	Yes		1- or several-member	
	Foundation			At least 3 persons, unless a separate 3-person supervisory board exists	Yes
Lithuania	Association	Yes		Either one person, collegial body, or both	
	Charity and Sponsorship Fund	Founders' Meeting	Yes	A head and a chief finance officer	Auditor
	Public Institution	Founders' Meeting		1-person director	
Macedonia	Association	Yes		Yes	
	Foundation			Yes	
Montenegro	Association	Yes[71]		Unless less than 10 members	
	Foundation		Yes[72]	Yes	
Poland	Association	Yes	Yes		Internal auditing organ
	Foundation			Yes	If foundation has PBO status, must have internal auditing organ
Romania	Association	Yes	Yes		Auditor or committee of auditors[73]
	Foundation		At least 3		Odd number of

[71] However, if there are more than 10 members, it appears that not all of them would have to be members of the General Assembly.

[72] The Montenegrin law provides that a foundation shall have the management board and the supervisory board.

[73] A committee of auditors is required for associations with over 100 members.

Mandatory Governing Organs of Common NPO Forms					
Country	**Entity Type**	**General Assembly**	**Board**	**Management**	**Other Required Body**
			members		auditors[74]
Slovakia	Association	Yes			
	Foundation		At least 3 members	Single administrator; appointed by board of directors	Supervisory Board (property above 5,000,000 SK) or a single auditor
	Nonprofit Organization		At least 3 members	Executive manager	Supervisory Board (property above 5,000,000 SK) or a single auditor. At least 3 members[75]
	Non-Investment Fund		As set forth in statutes	Administrator, appointed by Board of Directors	By statute
Slovenia	Association	(Must have some supreme body)			
	Foundation	(Optional body of founders)	At least 3 members		
Serbia	Association	Yes			
	Foundation			Yes	

[74] The statute states that the same provisions governing associations apply here. This is confusing, as literal application would mean that multiple auditors are required only if the foundation has over 100 members, and that a majority of auditors must be members of the foundation. However, foundations do not have members.

[75] Although not clearly stated, the statute also appears to allow for substituting this committee with a single auditor.

Restrictions on NPO Governing-Organ Membership		
Country	**Organization Type**	**Leadership Restrictions**
Bosnia and Herzegovina (Federation)	Foundation	Minors, employees, members of other organs, and supervisors may not be members of the management board
BiH (RS)	Foundation	Employees, members of other organs, and supervisors may not be members of the management board
Croatia	Foundation	Leaders must be trustworthy and capable, not ministry officials or members of Foundation Council (a national body)
	Fund	
Czech Republic	Foundation	Board of Directors and Supervisory Board members must not be convicted of a willful crime; must not be an employee or close relative of one; must not be members of both boards
Hungary	Association	Management must be Hungarian nationals or settled non-nationals with a residence permit[76]
Macedonia	Association	Majority of management must be Macedonian citizens
	Foundation	
Slovakia	Foundation	Administrator and directors must be only natural persons of irreproachable character (must not have been convicted of a criminal offense). A person may not hold position in the two bodies. The administrator may also be a permanent or long-term resident.
	Nonprofit Organization	
	Non-Investment Fund	Administrator and directors must be only natural persons capable of legal acts and of irreproachable character (must not have been convicted of a criminal offense). A person receiving benefits from the fund may not be a member of the Board of Directors. The Administrator can be a member of the Board of Directors only if so provided in the statutes.
Slovenia	Foundation	Board cannot contain persons who are underage or without legal capacity, employees, or those supervising the foundation.

[76] This restriction does not apply to organizations of an "international character." In such organizations, the only restriction is that the officers have not lost their civil rights (by being convicted or being judged incompetent). This further requirement also applies to other categories of associations.

Founders' Ongoing Powers over NPOs		
Country	**Organization Type**	**Founders' Special Powers**[77]
Bulgaria	Foundation	Rights may be reserved to founders; they pass to the foundation after the founders die or otherwise become incapable of acting.
Croatia	Foundation	Statute can't contradict the founding act without founder consent (if living); founder can contest initial selection of officers.
Czech Republic	Foundation	Founders can request termination or dissolution under certain conditions (as can other interested parties)
	Fund	
	Public Benefit Company	Founders can request termination under certain conditions (as can other interested parties). Founders can veto decision of the Board for Directors on termination or dissolution if they are willing to take over responsibility for continuing certain the activities of the public benefit company
Estonia	Foundation	Founders can dissolve foundation if articles allow; they may modify articles in changed circumstances.
Hungary	Foundation	Only founders can replace board members if they endanger the foundation's aim, and can amend the deed of foundation (but not name, purpose, or assets).[78]
Latvia	Foundation	Founders have power to appoint initial management and to annul a foundation until it is registered; all donors have power to review Foundation's affairs.
Macedonia	Foundation	Statute can allow founders to dissolve foundation in certain circumstances.
Slovakia	Foundation	Charter can specify parts of the bylaws changeable only by founder; founders can decide to dissolve.
		Founders can dissolve/merge; board of directors appointed/dismissed by founders unless statute determines otherwise.
	Nonprofit Organization	Founders can reserve rights to make certain changes in by-laws.

[77] This chart summarizes a few countries' laws that reserve special powers for founders even when primary of control of the organization has passed to separate governing organs. It does not include membership or quasi-membership organizations in which founders actually act as a governing body of the organization.

[78] Subject to the same approval procedures as the initial foundation registration.

Founders' Ongoing Powers over NPOs		
Country	**Organiza-tion Type**	**Founders' Special Powers**[77]
	Non-Investment Fund	Founder retains the right to appoint and dismiss directors, unless otherwise provided by statute, and to appoint and dismiss the Board Chair. Founder further may issue decisions to abolish the fund, or to merge or fuse the fund.
Slovenia	Foundation	Founders and donors can request removal from office for failure to fulfill obligations or acts contrary to interests of foundation.

Limitations on NPO Involvement in Political Activities		
Country	**Organization Type**	**Restrictions**
Albania	Association, Center, Foundation	Political parties are not subject to the Law on Non-Profit Organizations.
Bosnia and Herzegovina (State and Federation)	Association, Foundation	The goals and activities of a registered association or foundation shall not include electioneering, fundraising for candidates, or financing of candidates or political parties.
Bosnia and Herzegovina (RS)	Foundation, Association	Goals and activities shall not include engagement in political campaigns and fundraising for political parties and political candidates, or financing of political parties and political candidates.
Bulgaria	Association, Foundation	Organizations pursuing political activities are governed by a separate act.
Croatia	Association, Foundation, Fund	Political parties are governed by separate act.
Czech Republic	Association	Cannot be founded if explicitly engaged in political activities (association law does not apply to political parties or movements, which are governed by separate laws) but can lobby, endorse candidates, provide information, and advocate.
	Foundation, Fund	Cannot provide financial support to political parties or political movements but can lobby, endorse candidates, provide information, and advocate.

Limitations on NPO Involvement in Political Activities		
Country	**Organization Type**	**Restrictions**
	Public Benefit Company	Can lobby, endorse candidates, provide information, and advocate.
Estonia	Association, Foundation	Only political parties can run candidates for election, but NPOs are free to lobby. Some general restrictions on funding political parties may apply.
Hungary	Association, Foundation (except party foundations), Nonprofit Company	Hungarian organizations with public benefit status cannot engage in direct political activity (political party activity and nomination of candidates for national elections) or fund political parties; they must also be independent of political parties. Anyone with state funds cannot use them for political activities without express permission. If financed with state funds, a foundation may not fund political parties.
Kosovo	Association, Foundation	NGOs may not engage in fundraising or campaigning to support political parties or candidates for political office, nor may they propose, register or in any way endorse candidates for public office.
Latvia	Non-Profit Organization	
	Association, Foundation	Political parties are regulated by other laws; associations and foundations are allowed to engage in public activities such as disseminating information in the media, picketing, and holding public meetings.
Lithuania	Association, Charity and Sponsorship Fund, Public Institution	Lithuanian NPOs may not participate in election campaigns or sponsor political parties or organizations, but all other political, legislative and lobbying activities are permitted.
Macedonia	Association, Foundation	Can't perform political activities (direct participation in campaign or financing parties).
Montenegro	Association, Foundation	Not specifically addressed; in practice, almost unrestricted. Political parties are governed by separate law.
Poland	Association	Polish law explicitly gives associations the right to public expression; they can engage in almost any political activity, even participation in electoral campaigns.

Limitations on NPO Involvement in Political Activities		
Country	**Organization Type**	**Restrictions**
	Foundation	Depends on purposes of foundation; political purposes may not qualify as public benefit.
Romania	Association	Political parties are not governed by the law on associations and foundations. In general, at least previous to the new law, lobbying and endorsing candidates were permitted.
	Foundation	
Slovakia	Association	Political parties and political movements are governed by separate law. Apparently NPOs can endorse candidates, lobby, and even contribute to campaigns.
	Foundation	Cannot finance activities of political parties/movements or benefit candidates for elected posts.
	Non-Profit Organization	Cannot finance activities of political parties/movements or contribute to a candidate.
Slovenia	Association	Groups founded exclusively for political aims are governed by special law on political parties.
	Foundation	Law doesn't explicitly prohibit foundations with political aims.
Serbia	Association, Foundation	Not specifically addressed; in practice, almost unrestricted. Political parties are governed by separate law.

Article

The Legal and Regulatory Framework for Civic Organizations in Namibia

Benedict C. Iheme*

1. INTRODUCTION

Since the introduction of the Government of the Republic of Namibia Civic Organizations Partnership Policy (GRN-COPP)[1] in 2005, the vogue is to refer to civil society organizations in Namibia simply as "civic organizations." The GRN-COPP uses that term to encompass all organizations "found at all levels of civil society between the individual or family and the state," including non-governmental organizations (NGOs), community-based organizations (CBOs), clubs, and groups such as foundations, women's groups, trade unions, chambers of commerce, and faith-based organizations.

The GRN-COPP goes on to identify the following as the common characteristics of civic organizations (COs):

- They are non-profit distributing.
- They operate in the public interest or in the interest of their members and/or sponsors.
- They adhere to democratic structures.
- Involvement is voluntary.
- They feature high levels of participation.
- They emphasize empowerment of beneficiaries.
- They operate independently (both financially and administratively) from the state and donors.[2]

Under the current law, the legal status of a CO may take one of the following forms:

- Voluntary Association – regulated under the common law;
- Trust – regulated under the Trust Moneys Protection Act 1934;
- Section 21 Company (or "company not for gain") – regulated under the Companies Act 2004;
- Incorporation under special statutes, such as Cooperatives Act (for the registration and incorporation of cooperative societies) and Trade Unions Act (for the registration and incorporation of trade unions).[3]

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[1] The policy was introduced through a Cabinet decision in December 2005. The primary purpose of the policy is to encourage development partnerships between the Government and civic organizations.

[2] Para 3.1.3, GRN-COPP.

Accordingly, individuals who wish to establish a CO have the option of giving it a legal status in any of the first three forms. The group may only establish a CO in the fourth form if a special statute exists for the incorporation of the particular type of CO (e.g., a cooperative society).

This article seeks to examine the legal and regulatory framework for COs in Namibia in the light of the provisions of relevant international law instruments and other principles making up the *international best practices* that have been developed over time. The provisions, or *contents*, of the Namibian laws relating to civic organizations as well as the system of *administration* of those laws shall be examined. This approach is taken with a view to ascertaining not only the letter of the laws but also the practical effect of the laws on the operation of civic organizations. Although attention will be placed primarily on the laws under which civic organizations may be established, other laws that affect civic organizations as such will also be examined.

The article begins with an overview of the existing legal and regulatory framework for civic organizations. The overview is followed by a restatement of the international best practices, and an analysis of the existing framework in the light of the international best practices. Existing statutory provisions for direct and indirect fiscal support for civic organizations are then noted and assessed. Finally, recommendations for the improvement of the framework are made.

2. OVERVIEW OF THE LEGAL AND REGULATORY FRAMEWORK FOR CIVIC ORGANIZATIONS

As already noted, the legal status of a CO may be in one of the following forms: voluntary association, trust, or section 21 company ("company not for gain"). Each of these three forms will now be examined. While there are COs – notably, cooperative societies and trade unions – that are required to be incorporated under special statutes, the incorporation and regulation of COs under special statutes will not be examined as it constitutes a special or exceptional category.

2.1 Voluntary Associations

Under the rules of common law, all that it takes to establish a voluntary association is for a few people to come together to agree orally or in writing to set up the association to pursue any lawful object other than making a profit. Although no one can even estimate the number of these organizations operating in the country, it is generally believed that by far the largest number of civic organizations in Namibia belong to this category. These associations are essentially membership-based. The organization does not have a legal personality of its own. Subject to a few common law rules, it is very much up to the members to make the provisions to guide the conduct of the affairs of the association. Among the common law rules are a duty on the part of the members to act in good faith towards each other, and a duty – in case of possible conflict between the interest of a member and that of the association – to ensure that the interest of the

[3] Para 2.2, GRN-COPP. In this paragraph, the GRN-COPP goes on to speak of "Registration and/or incorporation within the framework of Acts of Parliament, official Government policy or Cabinet decision." This is probably not entirely correct. While a CO, such as a trade union or cooperative society, may be incorporated under a special statute (Act of Parliament), it does not seem that under Namibian law an official Government policy or Cabinet decision can – by itself alone – confer corporate status on a CO. In any case, none of several respondents could give a single instance of a Namibian CO with a corporate status conferred on it by a Government policy or Cabinet decision.

association is protected.[4] Due to the absence of adequate legally prescribed minimum standards for the governance of these organizations, third parties who consider working in collaboration with any of these associations may have reason to worry about the transparency and accountability of the conduct of the affairs of the associations. Yet the existence of these associations, as structured, finds an important legal justification in the need to protect the fundamental right to freedom of association.

2.2 Trusts

The established practice is that trusts are regulated by the Trust Moneys Protection Act 1934. Under the Act, every trustee appointed by a written instrument is required to lodge the instrument, or any written variations of it, with the Master of the High Court. Before the trustee begins to administer the trust, he shall furnish to the Master such security for the due and faithful administration of the trust money as the Master finds satisfactory unless the trust instrument directs the Master to dispense with such security *and* the Master is satisfied that such security should be dispensed with or the court directs otherwise. Section 1 of the Act defines "trustee" as "a person appointed by written instrument operating either *inter vivos* or by way of testamentary disposition whereby moneys are settled upon him to be administered by him for the benefit, whether in whole or in part, of any other person." A far-reaching implication of this clear definition will be discussed later in this article.

2.2.1 Lodgment/registration procedure: The procedure is as follows. When a trust is set up, the trustees approach the office of the Master with the trust deed. The office of the Master decides whether the trustees should furnish security. To reach this decision, the Master is expected to consider such facts as the names and ages of the beneficiaries, their relationship with the trustees, the written views of the beneficiaries as to whether the trustees should be exempted from furnishing security, acceptance of trust by trustees, confirmation that all the trustees are majors, the profession or occupation of the trustees, and any previous experience that a trustee has had in the administration of trusts.

Upon deciding that the trustees should not furnish security, or upon being satisfied that the trustees have furnished any security he requests from them, the Master issues a certificate to the trustees. The certificate, which evidences the "registration" or lodgment of the trust deed with the Master *and* the authority of the trustees to manage the trust money, states either that the Master has not called upon the trustees to furnish security or that the trustees have furnished security to the satisfaction of the Master, in terms of section 3 (1) of the Act. The official registration fee is N$20.00 in "uncalled Namibian revenue stamps." Professional fees would usually be paid to a lawyer/notary public. The trustees are expected to administer the trust in accordance with the terms of the trust deed, and the provisions of the Act.

It is important to emphasize that the effect of the "registration" by the Master is not to confer legal personality on the trust. Nothing in the Act changes the common law position that a trust is not a legal personality but that the trust property is held in the name of the trustees for the benefit of the beneficiaries. A trust is therefore only registered and not incorporated.

[4] See "Laws and Regulations Governing Non-Profit Organizations in South Africa," a presentation made at the International Charity Law Comparative Seminar, Beijing, China, October 12-14, 2004, available at www.icnl.org

(Conversely, as the registration of a section 21 company results in the creation of the company as a legal person, incorporation takes place.)

2.2.2 The Master's Powers and Measures to Protect Trust Moneys: The express purpose of the Act is to "provide for the protection of trust moneys." Thus, section 4 of the Act gives the Master wide powers to require a trustee at any time to provide a satisfactory account of the administration of the trust money and accrued income, and the power to require a trustee to deliver to him any books or documents relating to the trust money, to answer any inquiry relating to such money, and the power to appoint any fit and proper person to conduct an independent investigation into the administration of the trust money.

By way of an established practice, the Master requires the trustees to appoint auditors who shall be auditing the trust's accounts annually, and submit to the Master the name and address of the auditor. The auditor is not required to submit the audited accounts of the trust to the Master annually, but only when the Master requests the accounts – and such requests are typically made when a beneficiary complains to the Master about the management of the trust funds. An auditor is required to give an undertaking to the Master to notify the Master upon the occurrence of any of the following events:

- if there is any substantial addition to the capital of the trust and the value thereof;
- if the trust is not be administered in accordance with the trust deed or the Act;
- if he finds out that the funds of the trust are not being administered in line with the terms of the trust or the provisions of the Act; and
- if he ceases to act in that capacity, he must provide the reason why, and the name of the new auditor, if he is aware.

If an auditor resigns, he is required to report to the Master on the state of affairs of the trust before he vacates office.

2.2.3 Kinds of Trusts: In practice, three kinds of trusts are lodged with the office of the Master and regulated under the Act – Family trusts (under which the beneficiaries, and often some or all the trustees, are members of a family), Business or Investment trusts (under which a person gives funds to trustees for the purpose of more specialized management/investment on behalf of specified beneficiaries), and the Charitable organizations' trusts. The total number of trusts that have so far been registered or are currently operational is not available. In 1990, 36 trusts were registered. The figures for the following years are as follows: 2000 (442), 2001 (387), 2002 (484), 2003 (451), 2004 (423), 2005 (437), and 2006 (472).[5]

2.2.4 The Keeping and Analyzing of Records: The records in the office of the Master are kept manually; they are not computerized. As a result, it is often arduous to retrieve documents, especially from the older files. Again, some documents in the older files are becoming fragile and could well fall apart. In the absence of computerization, it is also difficult to disaggregate and analyze the existing data. Probably due to short staffing or inadequate staff training, the documents received in the office (especially audited accounts) are simply accepted and placed in files without being critically examined, as the duty of ensuring the protection of trust moneys would seem to require.

[5] For 2007, 305 trusts had been registered as of September 4.

2.2.5 Public access to records: Interested members of the public are free to go to the office of the Master to confirm the existence of a trust or to examine the deed, as these are seen as public documents. No search fee is charged, but the person conducting a search will have to pay for photocopies, if needed.

2.3 Section 21 Companies (Companies not for gain)

This kind of company may be incorporated by a group of individuals who come together under an association with a lawful main object which must not be the making or division of profit. The company must be registered by the Companies Registration Office, pursuant to the Companies Act 2004.[6] It is incorporated as a company limited by guarantee and must have at least seven members and two directors. A foreigner may be a member or director. There are no available figures on the number of section 21 companies in existence in Namibia, but it is believed that there are not many of them. Most of the formal civic organizations are registered as trusts, a far easier and cheaper window for registration.

2.3.1 Procedure: The registration procedure is that the promoters of the company begin by reserving the proposed name and stating the main object of the company. Once the name is approved,[7] the remaining incorporation documents are prepared and filed. The documents are the memorandum and articles of association and the statutory forms.[8] Nominal official fees are paid for filing these registration documents; promoters of a section 21 company would usually spend much more in paying professional fee to a lawyer/notary public. Hitherto, from the time an application including the complete set of documents is filed, it takes about fourteen days to register a section 21 company.

2.3.2 Effects of Registration: Upon incorporation, the company acquires legal personality. It is obliged to file annual returns (including audited accounts). A section 21 company would usually be able to enjoy tax exemption under section 16 of the Income Tax Act 1981.

2.3.3 Ongoing Changes in Administration: A system of electronic registration is currently being tested, and when it is fully operational it will take five days to complete the registration process. As part of an ongoing automation process in the Companies Registration Office, an electronic database has been put in place and electronic versions of the existing documents (i.e., the records of existing companies kept in hard copies) are being prepared and entered in the

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[6] This is the provision in the Companies Act 2004, which replaced the Companies Act 1973. The Companies and Patents Registration Office, a Directorate within the Ministry of Trade and Industry, had responsibility for registering and regulating companies under the 1973 Act. This arrangement continues, as the system transits into the full implementation of the Act of 2004, the intention of which seems to be to give greater autonomy to the companies' registry. There has been no change in respect of Section 21 companies, and the same statutory forms continue to be used in the registration process.

[7] The Registrar has the wide power to refuse a proposed name if he considers it "undesirable." While this is not supportable, as the discretion granted is too wide and may be exercised quite subjectively, respondents reported that the practice is to withhold approval for a name only where it is likely to confuse people – for instance, by being so close to another registered name or by falsely suggesting a link to the Government.

[8] Para 2.2, GRN-COPP states as follows: "In the case of Section 21 Companies, hardly any of them follow the prescribed Memorandum of Association. Instead they attach their own individual constitutions in place of such Memoranda often in contradiction with the Act." A Registrar in the Companies Registration Office insists that this is incorrect, adding that such a company would not be registered if its promoters submit an invalid or improperly prepared Memorandum of Association.

database. Unfortunately, due to inadequate manpower and funding, this process is proceeding very slowly and may take a long time to complete.

3. INTERNATIONAL BEST PRACTICES

Prominent among the relevant international law instruments are the Universal Declaration of Human Rights of 1948 ("Universal Declaration"), the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), and the African Charter on Human and Peoples' Rights ("African Charter").[9] The international best practices, largely shaped by these provisions, seek to maintain a balance between, on the one hand, ensuring for civic organizations an enabling environment in which to operate, and, on the other hand, ensuring that (for their own credibility and for the protection of various stakeholders) the organizations operate in line with the principles of accountability.[10] It is useful, at this point, to restate and – where necessary – briefly explain the best practices on laws guiding civic organizations.[11]

3.1 Establishment of Civic Organizations and the Protection of Fundamental Freedoms

3.1.1 Creation:

In order to protect the fundamental freedoms of expression, association, and peaceful assembly, civic organizations should be allowed to freely come into existence. This means that they should not be required to register with a state agency or obtain legal personality in order to operate lawfully. However, the state may, by law, prescribe that certain privileges (such as the access to tax preferences and state funding or contracts) may be restricted to formal (i.e., registered) civic organizations.

Explanation: This principles flow from the clear provisions of such international law instruments as the International Covenant on Civic and Political Rights (ICCPR) and the decisions of international courts. Thus, in the case of *Sidiropoulos and Others v. Greece,*[12] where the Greek authorities refused to allow the establishment of a Macedonian cultural association, the European Court of Human Rights held that "the right to form an association is an inherent part" of the right to freedom of association. The Court went on to state as follows: that "citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which the right would be deprived of any meaning."

The instruments provide that the freedom of association can be restricted only in a few carefully defined situations: i) in the interest of national security or public safety, ii) for the

[9] Although the Universal Declaration did not have binding effect when it was adopted by the United Nations General Assembly, its provisions have since been accorded normative effect in international law. The other instruments mentioned here create obligations binding on the countries that are parties to them. Indeed, in the case of ICCPR, for instance, under the First Optional Protocol which came into force in 1966, a Human Rights Committee has been established to which individual citizens of a state party who allege that their rights have been violated, and who have exhausted local remedies, may lodge their complaints against the state.

[10] These principles have been collated and discussed in a useful publication, *Guidelines for Laws Affecting Civic Organizations* (New York: Open Society Institute, 2004). The publication is hereinafter referred to as the *Guidelines*.

[11] For detailed discussions, see the *Guidelines.*

[12] 4 Eur. Ct. H.R. 500 (1998); also available at www.icnl.org

prevention of disorder or crime, iii) for the protection of public health or morals, and iv) for the protection of the rights and freedoms of others. The Court in the *Sidiropoulos* case emphasized that exceptions must be "construed strictly," that "clear and compelling reasons" would be needed to justify restrictions, that any restrictions must be "proportional to the legitimate aim pursued," and that there must be "relevant and sufficient" evidence for "decisions based on an acceptable assessment of the relevant facts" before a restriction can be deemed justifiable.

3.1.2 Registration/Incorporation:

Laws governing civic organizations should be written and administered so that it is relatively quick, easy, and inexpensive for all persons (including natural and legal persons) to register or incorporate a civic organization. Such laws may require that certain formal acts must occur to create a formal civic organization.

3.1.3 Registration/Incorporation Agency:

The agency of the state that is vested with the responsibility for giving legal existence to civic organizations should be adequately staffed with competent professionals. It should be even-handed in fulfilling its role, and the registration/ incorporation of a civic organization should involve relatively little bureaucratic judgment or discretion as to the permitted purposes of the organization and the means by which it intends to pursue those purposes. Its decision not to register a civic organization should be appealable to an independent court.

3.1.4 Permitted Purposes and Activities:

(a) A civic organization should be permitted to engage in activities for the benefit of its members (mutual benefit) or for the benefit of the public at large (public benefit).

(b) A civic organization should have the right to speak freely about all matters of public significance, including debate about and criticism of existing or proposed state policies and actions.

(c) Any civic organization engaging in an activity (e.g., health care, education, social services to persons living with HIV/AIDS, etc.) that is subject to licensing or regulation by a stage organ should be subject to the same generally applicable licensing or regulatory requirements and procedures that apply to activities of individuals, business organizations, or public organs.

3.1.5 Termination, Dissolution and Liquidation:

The highest governing body of a civic organization should be permitted to voluntarily terminate its activities, dissolve it as a legal person, and liquidate its assets pursuant to the decision of a court and upon application by the organization. The registration or supervisory organ or court should be allowed to involuntarily terminate the organization's existence only for the most flagrant of violations, and then only after a requested correction of a legal or ethical violation has not occurred. To ensure that fundamental rights are not violated, all involuntary terminations should be subject to judicial supervision.

3.2 Integrity and Good Governance

3.2.1 Mandatory Provisions for Governing Documents:

The laws governing CSOs should require that certain minimum provisions necessary to the operation and governance of the organization be stated in the governing documents of a civic

organization. The requirements may be different for membership and non-membership organizations, with the latter possibly being required to have additional governing bodies (e.g., supervisory boards, audit commissions, etc.) because they do not have members.

3.2.2 Optional Provisions for Governing Documents:

Laws governing civic organizations should give an organization (through its highest governing body) broad discretion to set and change the governance structure and operations of the organization within the limits provided by the law.

3.2.3 Internal Reporting and Supervision: Duties and Liabilities of Governing Bodies and Their Members:

The highest governing body of a civic organization (or its delegate) should be required by law to receive and approve reports on the finances and operations of the organization. The law should provide that the organization's officers and board members have a duty to exercise loyalty to the organization, to execute their responsibilities to the organization with care and diligence, and to avoid any actual or potential conflict between their personal or business interests and the interests of the organization.

3.2.4 Prohibition on the Distribution of Profits and Other Private Benefits:

(a) Laws governing civic organizations should provide that no earnings or profits of an organization may be distributed as such to founders, members, officers, board members, or employees.

(b) Laws governing civic organizations should provide that no organization should be permitted to distribute assets to its founders, members, officers, board members, or employees upon the dissolution of the organization.

(c) Laws governing civic organizations should provide that the assets, earnings, and profits of an organization may not be used to provide special personal benefits, directly or indirectly, (e.g., scholarships for relatives) to any founders, members, officers, board members, employees, or donors connected with the organization.

3.2.5 Methods and Subjects of Voluntary Self-Regulation:

Although basic standards of conduct and requirements for governance of all civic organizations should be enacted as published laws, organizations should be permitted and encouraged to set higher standards of conduct and performance through self-regulation and codes of ethics.

3.2.6 Umbrella Organizations:

The laws should permit and the society should encourage the formation of umbrella organizations to adopt and enforce principles of voluntary self-regulation.

3.3 Financial Sustainability

3.3.1 Fundraising Activities – General Rule:

Civic organizations should be permitted to engage in all legally acceptable and culturally appropriate fundraising activities, including door-to-door, telephone, direct mail, television, etc., campaigns, lotteries, raffles, and other fundraising events. Lotteries, charity balls, auctions, and

other occasional activities conducted primarily to raise funds for an organization are a form of fundraising and should not be regarded as economic or commercial activities.

3.3.2 Fundraising Activities – Limitations, Standards, and Remedies:

Fundraising through a public solicitation method should require registration with a state organ or an independent supervisory organ, which will issue permits, badges, and other identification materials to the fund raisers, set standards for public solicitation activities, provide information to the public, and sanction inappropriate conduct.

3.3.3 Economic Activities:

A civic organization should be permitted to engage in lawful economic, business, or commercial activities, provided that (i) the organization is established and operated principally for the purpose of conducting appropriate not-for-profit activities (e.g., culture, education, health, etc.), and (ii) that no profits or earnings are distributed as such to founders, members, officers, board members, or employees. The organization may engage in such activities provided that the appropriate requirements for licensing and permits are met.

3.3.4 Income or Profits Tax Exemption for CSOs:

Every civic organization, whether established for mutual benefit or for public benefit, and whether a membership or non-membership organization, should be exempt from income taxation on moneys or other items of value received from donors or governmental organs (by grant or contract) and regular membership dues, if any. A variety of approaches may be taken with respect to exemption for interest, dividends, or capital gains earned on assets or the sale of assets, with greater preferences on such items generally being made available to public benefit organizations.

3.3.5 Income Tax Benefits for Donations:

To encourage philanthropy and good citizenship, donations of individuals and business entities to public benefit organizations should be entitled to reasonably generous income tax benefits (such as deductions or credits).

3.3.6 Taxation of Economic Activities:

Civic organizations should be allowed to engage in economic activities as long as those activities do not constitute the principal purpose or activity of the organization. Any net profit earned by the organization from the active conduct of a trade or business could be –

(a) exempted from income taxation,

(b) subjected to income taxation,

(c) subjected to income taxation only if the trade or business is not related to and in furtherance of the not-for-profit purposes of the organization, or

(d) subjected to income taxation under a mechanical test that allows a modest amount of profits from economic activities to escape taxation but imposes tax on amounts in excess of the limit.

3.3.7 VAT, other taxes, and customs duties:

Public benefit CSOs and their activities should be given preferential treatment under a value added tax (VAT), other taxes (e.g., property taxes), and customs duties provided that appropriate limitations are in place to guard against fraud and abuse.

3.3.8 Support for Endowments:

The laws should contain provisions that support the formation and maintenance of endowments. These include special tax incentives for donations to form endowments, prudent investment policies, etc.

3.3.9 Foreign Funding:

A civic organization that is properly registered or incorporated should generally be allowed to receive cash or in-kind donations or transfers from aid agencies of another country, a multilateral agency, or an institutional or individual donor located in another country, as long as all generally applicable foreign exchange and customs laws are satisfied.

3.3.10 Government-Civic Organizations partnerships:

The laws, including the procurement legislation where appropriate, should contain provisions that encourage partnership between government and civic organizations, providing for government financing of projects carried out by civic organizations, through grants and contracts.

3.4 Accountability and Transparency

3.4.1 Reporting Generally:

To the maximum feasible extent, all reports required of CSOs should be as simple to complete and as uniform among state organs as is possible.

3.4.2 Reporting to Supervisory Organ:

(a) Any civic organization with significant public benefit activities or with substantial public support should be required to file appropriate reports at least annually on its finances and operations with the appropriate organ or agency of government that is responsible for general supervision of civic organizations. Other civic organizations (i.e., those without significant public benefit activities or without substantial public support or those with gross income below a certain threshold) should be allowed to file simplified reports or none at all.

(b) All reporting requirements should contain appropriate provisions to protect the legitimate privacy interests of donors and recipients of benefits as well as the protection of confidential or proprietary information.

3.4.3 Audit by Supervisory Organ:

(a) Consistent with the normal state powers of inspection for all legal entities, the supervisory organ should have the right to examine the books, records, and activities of a civic organization during ordinary business hours, with adequate advance notice. This audit power should not be used to inhibit the freedom of association of the individuals connected with the organization or to harass the organization.

(b) To ensure compliance with the laws, all reporting civic organizations should be subject to random and selective audit by the supervisory organ, but such audits should not be used to harass organizations or individuals connected with them.

3.4.4 Reporting to and Audit by Tax Authorities:

It is appropriate for separate reports to be filed with the tax authorities. Different kinds of reports may be required for different kinds of taxes (e.g., income taxes, VAT).

3.4.5 Reporting to and Audit by Licensing Organs:

Any CSO engaged in an activity subject to licensing by a state organ should be required to file the same reports with that organ as individuals or business organizations are required to file.

3.4.6 Disclosure or Availability of Information to the Public:

Any civic organization with significant activities or assets or with substantial public support should be required to publish or make available to the public a report of its general finances and operations. This report may be less detailed than the reports filed with the general supervisory organ, the tax authorities, or any licensing organ, and should permit anonymity for donors and recipients of benefits in addition to protecting confidential or proprietary information.

3.4.7 Special Sanctions:

In addition to the general sanctions to which an organization is subject equally with other legal persons (e.g., contract or tort law), it is appropriate to have special sanctions (e.g., fines or penalty taxes, or the possibility of involuntary termination) for violations peculiar to civic organization (e.g., self-dealing, improper public fundraising practices, special rules contained in tax legislation).

General explanation: In the better-developed national legal systems, these principles have been accepted and specific statutory provisions made to give effect to them. Thus, the objects of South Africa's Nonprofit Organizations Act 1997, as defined in section 2 of the Act, closely reflects these principles. The objects, which the various provisions of the Act are aimed at achieving, are as follows:

> The objects of this Act are to encourage and support nonprofit organizations in their contribution to meeting the diverse needs of the population of the Republic by –
>
> (a) creating an environment in which nonprofit organizations can flourish;
>
> (b) establishing an administrative and regulatory framework within which nonprofit organizations can conduct their affairs;
>
> (c) encouraging nonprofit organizations to maintain adequate standards of governance, transparency, and accountability and to improve those standards;
>
> (d) creating an environment within which the public may have access to information concerning registered nonprofit organizations; and
>
> (e) promoting a spirit of cooperation and shared responsibility within government, donors, and among other persons in their dealings with nonprofit organizations.

4. ANALYSIS OF THE LEGAL AND REGULATORY FRAMEWORK FOR CIVIC ORGANIZATIONS IN THE LIGHT OF INTERNATIONAL BEST PRACTICES

4.1 Fundamental freedoms are protected by a liberal regime: Namibia has domesticated the provisions of the relevant international law instruments. Thus, these freedoms are recognized in the Constitution of Namibia and only subject to similar restrictions as contained in the international instruments.[13]

By permitting civic organizations to operate legally – mainly as voluntary associations under the common law – without being formally registered or incorporated, Namibian law accords with the country's Constitution and its obligations under international law by providing significant and commendable protection for the fundamental freedoms of expression, association, and peaceful assembly. In this regard, Namibian law closely resembles the law of South Africa, a country with which it has close historic ties. This is unlike the position in other countries such as Tanzania, Zambia, Kenya, and Uganda, where a civic organization generally cannot exist lawfully if it is not registered.

It is true that a voluntary association is a loose arrangement, and there are not enough generally applicable rules to ensure accountability and transparency in such organizations.[14] Yet it is important to remember that citizens cease to be free if they cannot come together to pursue a common lawful interest without being formally authorized by a state agency. (As a necessary exception to this, any civic organization in Namibia that wishes to engage in an *activity* – such as running an orphanage or medical clinic – that requires licensing by a state agency cannot lawfully engage in that activity without obtaining the prescribed license.[15]) Again, it is typical

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[13] Article 21 (1) recognizes the fundamental freedoms, including "freedom of association, which shall include the freedom to form and join associations or unions, including trade unions and political parties." The restrictions are contained in Article 21 (2) as follows:

> The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Apparently in an effort to ensure that the fundamental freedoms are not whittled away by laws that may restrict them, Article 22 goes on to provide as follows:

> Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorized, any law providing for such limitation shall:
>
> (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
>
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest."

[14] Para 2.2.

[15] This is the clear intendment of the National Welfare Act No 79 of 1965 as amended by the National Welfare Amendment Act No 12 of 1979 and the National Welfare Amendment Act No. 9 of 1993, as the Act defines a "welfare organization" as meaning "any association of persons, corporate or unincorporated, or institution, the objects of which include one or more of" a number of specified activities. It is submitted that a voluntary association – one not registered as a trust or incorporated as a section 21 company – which nonetheless establishes or plans to establish an "institution" whose object is one of those specified in the definition, qualifies to apply for registration as a welfare organization. The established practice, however, is that the Ministry of Health and Social

that when an association begins to rise above the very small scale of operation by embarking on more substantial activities, it inevitably takes the formal steps (such as adopting a written constitution and keeping written records) that help streamline its operations and prepare it for registration or incorporation.

There are good reasons why individuals who have formed or plan to form a civic organization will desire to formally register or incorporate it. Some of these reasons are as follows:

(1) To become eligible to receive grants from donor agencies, most of which make grants only to organizations that are formally registered or incorporated;

(2) To become eligible for tax or other state benefits that are available only to legally established organizations;

(3) To establish clear and easily enforceable rules for the internal governance of the organization, including rules for the election of officers;

(4) To give the organization the capacity to act in its own name (e.g., open its own bank account, rent its own office space, hire its own employees);

(5) To provide for the perpetual existence of the organization;

(6) To limit the liability of individuals involved with the organization.[16]

Aside from the interest of the organization and its members, it is also in the interest of the public that civic organizations register with a government agency, where information about them may be accessed by any interested person, so that the government and citizens will be able to reach them to and interact with them in any of several capacities – as donors, volunteers, collaborating partners, or beneficiaries. Accordingly, it is a good practice to have a single national registry of all formal civic organizations that is accessible to the public. A good example of this national registry is that kept by the South Africa's Directorate for Nonprofit Organizations pursuant to a mandate given under the Nonprofit Organizations Act 1997.

4.2 To what extent can a trust establishing a civic organization be validly "registered" under the Trust Moneys Protection Act 1934? As already noted, it is the established practice that a trust deed that sets up a civic organization and gives money to trustees to administer for the promotion of the objects of the organization may be lodged with and "registered" by the Master of the High Court pursuant to the Act of 1934. The extent to which this practice is actually authorized by the Act (and, therefore, lawful) will depend on the interpretation of the provisions of the Act.

To recapitulate, the Act provides that every trustee appointed by a written instrument is required to lodge the instrument, or any written variations of it, with the Master of the High Court. Before the trustee begins to administer the trust, he shall furnish to the Master such security for the due and faithful administration of the trust money as the Master finds satisfactory unless the trust instrument directs the Master to dispense with such security *and* the Master is satisfied that such security should be dispensed with or the court directs otherwise. Section 1 of

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Welfare requires that an applicant for registration as a welfare organization must be registered as a trust or section 21 company.

[16] See the *Guidelines.*

the Act defines "trustee" as "a person appointed by written instrument operating either *inter vivos* or by way of testamentary disposition whereby moneys are settled upon him to be administered by him for the benefit, whether in whole or in part, of any other person."

The implication is that only a person who falls within the meaning of "trustee," as defined in the Act, can lodge with the Master the instrument under which he is appointed. The definition of "trustee" deserves to be carefully examined. For anyone appointed trustee to come within the scope of the Act, the beneficiary "in whole or in part," must be a "person." A "person," in law, is either a natural person (i.e., a human being) or a legal person (i.e., a corporate body treated in law as having rights and obligations, such as a company incorporated under the Companies Act). The question is: Can a trustee appointed under a deed giving him a sum of money to administer, not in whole or in part for the benefit of any natural or legal *person*, but *wholly* for the promotion of a *cause* (such as gender equality or rural development) lodge the instrument of appointment with the Master? That would be valid only if the cause could be interpreted to be a "person"; and this does not seem possible by any stretch of the imagination.

Where, however, there is more than one beneficiary under a trust deed, and the beneficiaries include at least one person and one or more causes, the situation falls within the scope of the 1934 Act. The Act is thus intended to protect moneys given to trustees under the old and familiar practice whereby a person of means creates a trust for the benefit of particular family members and friends *and* also for the advancement of a charitable cause dear to his heart, whether or not he thereby creates an institution for the advancement of that cause. It is submitted that it is only to this limited extent that the 1934 Act could provide a valid basis for the registration of a trust setting up a civic organization.

By contrast, in South Africa, any trust deed that sets up a civic organization may validly be registered by the Master under the Trust Property Control Act 1988, the statute that replaced the 1934 Act. The 1988 Act requires a trustee to lodge with the Master "the trust instrument in terms of which the trust property is to be administered or disposed of by the trustee." It seeks to protect "trust property" – not only money but all movable and immovable property held in trust. It defines "trust" as follows:

> "trust" means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –
>
> (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
>
> (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.

These provisions are wide enough to cover any trust establishing a civic organization, whether or not a "person" is one of the other beneficiaries. All that is required is for the trust deed to make clear provisions as to what it seeks to achieve.

4.3 Does the Trust Moneys Protection Act 1934 contain enough provisions for adequately regulating a civic organization set up as a trust? Assuming that the 1934 Act actually gives the Master the authority to "register" these organizations, it is important to note that the Act only seeks to achieve the narrow purpose of protecting trust money. Thus, for the civic organizations registered as trusts, there should be statutory provisions covering the essential issues that ought to be provided for in order to achieve the overall aim of providing an enabling environment for the organizations to operate freely while also ensuring that they operate in line with the requirements of accountability and good governance. (These essential issues are spelled out above as part of the international best practices, especially in the section on Integrity and Good Governance.)

In the absence of statutory provisions indicating mandatory provisions to be included in the organization's governing documents (as required by international best practices), the current practice is that those who set up civic organizations as trusts feel free to prescribe in the trust deed the rules for governing the organization. The rules so prescribed may not meet required minimum standards. On the whole, the current statute does not contain provisions for adequately regulating a civic organization.

In South Africa, even the Trust Property Control Act 1988, the provisions of which cover a wider scope, does not contain enough provisions. However, the gap is filled by the provisions of the Nonprofit Organizations Act 1997, especially the mandatory as well as the recommended (but not mandatory) list of matters to be provided for in an organization's constitution, the minimum standards for accounting records and reports, the requirement for the filing of annual reports, and sanctions for noncompliance with these requirements.

4.4 Does the Companies Act 2004 contain enough provisions for adequately regulating a civic organization set up as a section 21 company? Yes, to a great extent. The provisions of the Companies Act (notably, section 21(2)) and the matters required to be provided for in the company's memorandum and articles of association go far in satisfying the requirements. Under section 21 (2) of the Companies Act, the memorandum of association of the association – i.e., a company not for gain – must comply with the requirements of the Act and must, in addition, contain the following provisions:

> (a) the income and property of the association however derived must be applied solely towards the promotion of its object, and no portion must be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise, to the members of the association or to its holding company or subsidiary, but nothing contained in the memorandum prevents the payment in good faith of reasonable remuneration to any officer or employee of the association or to any member in return for any services actually rendered to the association;
>
> (b) on its winding-up, deregistration or dissolution the assets of the association remaining after the satisfaction of all its liabilities must be given or transferred to some other association or institution having objects similar to its object, to be determined by the members of the association at or before the time of its dissolution or, failing that determination, by the Court.

Nonetheless, one way of further ensuring that the required standards are met by section 21 companies could be to develop for them a model memorandum and articles of association which

would contain provisions aimed at bringing their internal governance arrangements in line with the requirements of best practices.

4.5 How can the administration of Namibia's existing civic organizations' registration/incorporation laws be improved? The Companies Registration Office has been administering the Companies Act, under which section 21 companies are registered, in a reasonably efficient manner. Although the registration requirements (especially the memorandum and articles of association) are technical in nature, the process is reasonably quick and not very expensive. Thanks to ongoing improvements, the Office seems poised to perform even more efficiently. With more funds to complete the ongoing computerization process, and more and better-trained staff to run the new system efficiently, the work of the Office would be improved. Yet it should be borne in mind that most civic organizations prefer to register not as section 21 companies but as trusts.

Under the Trust Moneys Protection Act, the office of the Master of the High Court handles the registration of most of the formal civic organizations and other kinds of trusts. To improve the administration of the Act, the office needs more and better-trained staff to reduce delays in the registration process (although it is reported that this is often the fault of trustees who do not meet the registration requirements in time) and to ensure that records submitted to the office (especially accounting records) are properly examined and needful action taken to protect trust moneys. The records should also be kept in electronic format to make it easier to preserve, retrieve, and analyze them as needed.

5. OTHER RELEVANT LAWS: STATUTORY PROVISIONS FOR INDIRECT FISCAL SUPPORT FOR CIVIC ORGANIZATIONS

By the very mechanism of making and implementing certain provisions in revenue laws, the state indirectly gives some financial assistance to civic organizations. While these provisions do not regulate civic organizations, they affect the fortunes of the organizations. If an organization is exempt from paying a tax, this means that it can retain (and presumably apply towards the attainment of its objects) the amount it would have paid as tax. If a person is entitled to a tax deduction in respect of money he donates to an organization, this could encourage him to donate more.

5.1 Tax Exemptions: Section 16 of the Income Tax Act No. 24 of 1981, Namibia's basic income tax statute which has been amended fifteen times since independence in 1990, provides for exemptions from income tax. Of particular relevance to civic organizations are section 16 (1) (e), (f), (g), and (i). Each of these paragraphs mentions, and exempts from tax, the income of a specific type of civic organization. For instance, paragraph (j) exempts "the receipts or accruals of all ecclesiastical, charitable and educational institutions of a public character, whether or not supported wholly or partly from the public revenue." Most civic organizations, whether or not they are registered under any law, will probably come within the provisions of section 16 and can claim tax exemption.

5.2 Tax Benefit for Donations: The Income Tax Amendment Act No. 22 of 1995 provides for tax deductions in respect of "any amount donated by the taxpayer during the year of assessment" to either "(i) a welfare organization registered or deemed to be registered under the National Welfare Act 1965 (Act 79 of 1965), and which is approved by the Minister [of Finance] after consultation with the Minister of Health and Social Service; or (ii) an educational institution approved by the Minister [of Finance] after consultation with the Minister of Higher Education,

Vocational Training, Science and Technology or with the Minister of Basic Education and Culture, as the case may be." This means that the benefit is available, not to all civic organizations, but to the ones that are welfare organizations registered or deemed to be registered under the Welfare Act.[17] Also, a donation is deductible if made to an educational institution belonging to a civic organization if the approval of the Minister of Finance is obtained after consultation with the appropriate Minister of Education.

5.3 Value Added Tax: The Value Added Tax Act No. 10 of 2000 is the basic statute in this respect, and to date it has been amended thrice. The relevant provisions here are section 9 (and Schedule III paragraph 2 (t)) as well as section 10 (and Schedule IV) of the original Act. Under section 9 and Schedule III, the "supply of goods or services by any charitable organization, children's home, old age home or orphanage" shall be charged with VAT at the rate of zero percent (i.e., zero-rated). Similarly, under section 10 and Schedule IV, educational services in schools and medical or paramedical services by medical professionals or in hospitals and other medical facilities are among the supplies that are exempt from payment of VAT.

Again, this means that a civic organization that can persuade the tax authorities that it comes within the category of "charitable organization" will, in effect, not pay VAT. "Charitable organization" is not defined in the Act but is arguably wide enough to cover most civic organizations. Although the supply of goods or services by a "children's home, old age home or orphanage" is also zero-rated, this will, in practice, hardly benefit another set or type of civic organizations, as any organization that owns or operates such welfare institution will almost certainly come within the category of "charitable organization." Yet, an organization that is somehow held not to be a "charitable organization" will nonetheless not be obliged to pay VAT in respect of any supply of educational services in schools or medical services in a hospital or other medical facility.

5.4 Custom Duties: Under section 84 and Schedule No.4 Part 1 of the Customs and Excise Act No. 20 of 1998, provisions are made for specific rebates of custom duties on particular types of goods imported into Namibia by particular organizations or institutions and under particular conditions. In respect of "Goods for Cultural, Educational, Charitable, Welfare or Youth Organizations or Purposes" imported by "approved institutions or bodies," the Schedule grants full rebate for some itemized types of goods imported under specified conditions.

The listed types of goods includes "Goods (excluding clothing) forwarded unsolicited and free to any organization registered in terms of the National Welfare Act, 1965 …, entered in terms of a specific permit issued by the Permanent Secretary, [Ministry of] Trade and Industry, for the official use by such organization." Another type is "Goods (excluding motor vehicles) specially designed for use by persons with mental defects, subject to the production of a certificate from the Permanent Secretary, [Ministry of] Health and Social Services, that such goods are for use exclusively by such handicapped persons, such certificate being endorsed by the Permanent Secretary, [Ministry of] Trade and Industry that such or similar goods are not ordinarily or satisfactorily made in Namibia."

[17] Registration under the Welfare Act is not for the purpose of obtaining a legal status but only for the purpose of being allowed to establish and operate a social welfare institution, such as a children's home. The practice (which does not seem to be consistent with the law) is that to be registered under the Act, a civic organization must be first registered as a trust or a section 21 company. In addition, it must fulfill other conditions.

While, in principle, most civic organizations will probably qualify to benefit from the rebates, an organization must be approved by the Ministry of Finance before it can claim the rebate. Also, in each case, several other conditions must be satisfied, as spelled out in the examples given above. Probably one of the most onerous combinations is that some of the goods must be forwarded "unsolicited" *and* also require a special permit from the Permanent Secretary. It is no surprise that civic organizations, in fact, rarely obtain these rebates.

Looking at indirect support as a whole, it is commendable that probably all civic organizations can qualify for income tax exemption and exemption from VAT. The law provides for generous custom duty rebates, but some of the conditions for obtaining them are quite stringent, and need to be made more liberal. While it is commendable that there is no limit to the amount of donation to a civic organization that is tax deductible, the category of civic organizations that could receive a tax deductible donation needs to be widened.

Yet, as things stand, funds retained by Namibian civic organizations through these indirect types of support are not large enough to significantly contribute to sustaining the organizations. Namibia's private sector and the resources at its disposal are small relative to the funding needs of the civic organizations, and much of the population is poor; therefore, not much accrues from donations. The anecdotal evidence shows that most people who make charitable donations give to their local community-based organizations or church-affiliated groups, and hardly ever to other nongovernmental organizations. The fact that they do not generate high incomes (outside of funding from donors) means that income tax and VAT exemptions do not enable the civic organizations to retain significant amounts of money.

6. OTHER RELEVANT LAWS: STATUTORY PROVISIONS FOR DIRECT FISCAL SUPPORT FOR CIVIC ORGANIZATIONS

Through statutory provisions and official practices, civic organizations may receive direct fiscal support from the government. This support may come in form of payment for the execution of a government contract or a grant or subsidy.

6.1 Government procurement in Namibia is regulated by the Tender Board of Namibia Act No. 16 of 1996, under which two important pieces of subsidiary legislation have been made: the Tender Board Regulations (1996) and the Tender Board of Namibia Code of Procedure (1997). Nothing in the statute or statutory instruments precludes a civic organization from tendering for the supply of goods or services to the Government. In practice, however, these organizations have generally not been active in supplying goods and services to the Government. A notable exception to this is the supply of consultancy services to Government ministries and other departments.

There is nothing wrong in restricting the participation of civic organizations in government procurement to certain types of services for which they may be deemed to be suited, and keeping for-profit companies away from those areas. It is submitted that where civic organizations become active in government procurement and begin to effectively compete with for-profit organizations, it becomes imperative to protect for-profit organizations from unfair competition by drastically reducing or eliminating the indirect fiscal benefits extended to the civic organizations.

6.2 In some sectors, particularly social welfare and education, the Government also provides subsidies to civic organizations. A welfare organization registered by the Ministry of

Health and Social Welfare under the National Welfare Act, as amended, may request a subsidy from the Ministry in any financial year. Along with its application for subsidy, the organization is required to submit a business plan which must clearly address a welfare need. The Ministry will study the plan and, if satisfied, will identify one or more specific items it will support with a subsidy. It will inform the organization accordingly. At the end of the year, the organization will be obliged to submit to the Ministry an audited report which must show that the subsidy was applied for the approved purpose. The Ministry has the discretion to determine whether to give a subsidy to an organization or institution and the amount of subsidy – the official explanation for this is that what the Ministry can do depends on the budgetary allocation it receives in any given year.

Under the Education Act 2001, a "person" (and this may be "a natural person, a body corporate, a trust, a church, or a registered welfare organization") may at his own expense establish a private school but is required to register it with the Ministry of Education before education is provided to any person in the school. The Act empowers the Minister for Education to grant aid to private schools "out of money appropriated for this purpose by Parliament…on the prescribed conditions and such other conditions as the Minister may impose." The Act empowers the Minister to determine the form that the aid may take, and this may include subsidy, the provision of materials, and the provision of teachers who are staff members of the Ministry of Education. Currently, the practice is that the Ministry provides subsidy to private schools that apply and are considered needy. Depending on the observed needs of the school, the subsidy could be provided to support the salaries of enough teachers to enable the school meet the prescribed teacher-student ratio,[18] to support teachers' salaries and assist the school to procure "learning materials," or even to cover those two items and further pay for the cost of boarding facilities for the students.

6.3 The Lotteries Act 2002 authorizes the organizing of National Lotteries in Namibia. Under the Act, fifty per cent of the net proceeds of the lotteries shall be paid into a special fund styled the "Social Upliftment Fund" and a committee is set up to make allocations from the Fund to "any authority, institution, body or association of persons as the committee may determine for any purpose which the committee determines will support and enhance the social upliftment of the Namibian people." While it is really up to the committee to determine who qualifies to receive an allocation from this Fund, civic organizations that deliver social welfare services would probably be considered. Support from this is expected to become available when the organizing of the lotteries commence.

Among Namibian civic organizations, there is a general lack of significant internally generated income as well as a lack of donor funding for institutional support (as distinct from program support). The lack of adequate core funding that enables a civic organization to pay salaries and other operational expenses is one of the twin threats to the viability of Namibian civic organizations.[19] It is important to work out ways by which the Government could do more

[18] The ratio is 1 teacher to 35 students in the primary schools and 1 teacher to 30 students in the secondary schools.

[19] The other threat is the lack of formal structures and clear, written internal procedures for governance. These often result from, and reinforce, leaderships that are built around a charismatic person or persons (often the founder or founders). It puts other stakeholders in an inferior and insecure position and limits the ability of the organization to go beyond the shadow of the founder(s) and actually transform into an institution.

to provide direct core funding for the sustenance of civic organizations, particularly the well-regulated and transparently run organizations that are delivering services to the populace.

7. RECOMMENDATIONS

It is hereby recommended that a process leading to the reform of the existing laws, especially the laws on the registration or incorporation of civic organizations, should be embarked upon to deal with existing shortcomings and to align the laws more closely with international best practices.[20] This article has pointed to specific shortcomings in the existing laws. A reform of the laws should be accompanied by improvements in the administration of the laws. Towards these overall goals, the following specific recommendations are made: Firstly, the reform *process* should be carefully designed. Civic organizations should participate fully in it. In the light of experience elsewhere, the process should begin with expert-facilitated dialogue between Government and representatives of civic organizations on best practices in the regulation of civic organizations, and should include short-term training and long-term mentoring for lawyers drawn from both Government and civic organizations who are engaged in the process. Secondly, the new laws should contain provisions either validating the earlier registrations of trusts that may be discovered to have been made by the Master of the High Court in error or enabling the regularizing of such registrations; if this is not done, there could be a crisis of legitimacy in the system. Thirdly, pending the making of new laws (a process that could take some years to complete), *steps could be taken to improve the administration of the existing laws* along the lines indicated in this article.

[20] In Paragraph 2.2, the GRN-COPP states as follows:

> The need to improve upon the current legislative and institutional framework within which Civic Organizations operate is recognized in NDP2. Consequently, this policy calls for the formulation of a New Bill, to establish a transparent, voluntary, parallel registration process in order to complement existing provisions and to nurture the principles of partnership.

It is hereby submitted that this stipulation in the GRN-COPP confuses the proposed new law on Government-civic organizations' partnerships with other laws that will need to be enacted to reform the existing laws that lay down the legal and institutional framework for civic organizations in Namibia. This is erroneous. The law on partnerships may be parallel to or complement the existing laws but it will not address the deficiencies in the existing laws that regulate the civic organizations, whether or not they choose to partner with the Government.

Article

International Grantmaking

Foundation Center
in Cooperation with
Council on Foundations[21]

U.S. foundation giving for international purposes reached a record level in 2007, and when 2008 giving has been fully tallied, another new high is likely to be recorded. Moreover, despite the current economic crisis, prospects for international giving in the near term are less pessimistic than current market conditions might suggest.

International Grantmaking IV: An Update on U.S. Foundation Trends examines the current state of giving for overseas recipients and U.S.–based international programs and its outlook for the future. Prepared in cooperation with the Council on Foundations, this latest update of the Foundation Center's benchmark series on international funding examines changes in grantmakers' strategies and practices and the outlook for giving based on a 2008 survey and interviews with leading funders. It also documents trends in giving through 2006 based on actual grants awarded by over 1,000 of the largest U.S. foundations.

THE OUTLOOK FOR INTERNATIONAL GIVING

International giving grew faster than overall giving between 2002 and 2007.

The nation's over 72,000 grantmaking foundations gave an estimated $5.4 billion in 2007 for international causes, including both direct giving to overseas recipients and funding for U.S.–based international programs. This record amount represented a more than 70 percent gain over the $3.2 billion estimated for 2002. Adjusted for inflation, international giving climbed nearly 50 percent during this period, far surpassing the 22.3 percent rise in overall giving.

Numerous factors boosted international funding following the early 2000s downturn.

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[21] Excerpted from *International Grantmaking IV*, by the Foundation Center in cooperation with the Council on Foundations. Used with permission.

Established in 1956, and today supported by close to 600 foundations, the Foundation Center is the nation's leading authority on philanthropy, connecting nonprofits and the grantmakers supporting them to tools they can use and information they can trust. The Center maintains the most comprehensive database on U.S. grantmakers and their grants — a robust, accessible knowledge bank for the sector. It also operates research, education, and training programs designed to advance philanthropy at every level. The Center's web site receives more than 57,000 visits each day, and thousands of people gain access to free resources in its five regional offices and a network of close to 400 funding information centers located in public libraries, community foundations, and educational institutions in every U.S. state and beyond. For more information, visit foundationcenter.org.

The Council on Foundations, formed in 1949, is a nonprofit membership association of grantmaking foundations and corporations. Members of the Council include more than 2,100 independent, operating, community, public, and company-sponsored foundations, and corporate giving programs in the United States and abroad. The assets of Council members total more than $307 billion. The Council's mission is to provide the opportunity, leadership, and tools needed by philanthropic organizations to expand, enhance, and sustain their ability to advance the common good. For more information, visit www.cof.org.

In the wake of the 2000 technology sector meltdown and subsequent stock market decline, September 11, 2001, terrorist attacks, and a brief recession, international giving by foundations declined in 2002 and remained basically unchanged in 2003. Funding rebounded the following year and continued to grow at a double-digit pace for the next two years. Foundation giving for international purposes rose an additional 8 percent in 2007. Among the factors contributing to this resurgence were the ramping up of giving for global health by the Bill & Melinda Gates Foundation and its more recent expansion into international development; increased giving by new and newly large foundations, such as the Gordon and Betty Moore Foundation and the Susan Thompson Buffett Foundation; higher levels of funding by well-established international funders whose endowments had grown substantially; and the response to natural and humanitarian disasters around the world—such as the Indian Ocean tsunami, Pakistani earthquake, and crisis in the Darfur region of Sudan—especially by corporate and community foundations.

International grantmaking in 2008 is expected to exceed 2007 giving.

Although the economic downturn that began in the latter half of 2007 and deepened in 2008 has raised concerns about possible cutbacks in foundation giving, the Foundation Center still expects overall giving to grow ahead of inflation in 2008. To gauge the impact of the economic downturn on international grantmaking, the Foundation Center's April 2008 survey of leading international funders asked about the prospects for their international giving. Of the 78 survey respondents—including many of the nation's largest international givers—only 7 percent expected that they would reduce their international support in 2008, while close to half expected to increase giving. The balance reported that their international funding would remain about the same. The largest funders tended to be more optimistic about increasing their international giving, while corporate grantmakers tended to be less optimistic.

The impact of the U.S. financial crisis remains uncertain, but most leading international funders are likely to remain committed.

Over half of the survey respondents indicated that they expect international funding by U.S. foundations to grow during the next two to three years, while just 5 percent anticipate a reduction in the overall amount of international giving provided by the nation's foundations. At the same time, over two-fifths of survey respondents agreed with the statement that the current economic climate is likely to cause foundations in general to focus more on domestic rather than international issues, while one-third disagreed and nearly one-fourth said they didn't know.

Despite this heightened level of uncertainty, and the expansion of the financial crisis in late 2008, international funders are likely to remain committed to their grantmaking priorities. Among the 20 leading grantmakers interviewed by the Foundation Center in July 2008, most indicated that they would maintain their international focus whether or not there was a prolonged downturn in the U.S. economy. International grantmaking represents a long-term commitment and an integral strategy for these funders. As one interviewee remarked, "We may change the amount but not the proportion of our international grantmaking."

INTERNATIONAL GRANTMAKING TRENDS THROUGH 2006

(*The following analysis examines funding trends between 2002 and 2006 based on all of the grants of $10,000 or more reported by a sample of 1,005 of the largest U.S. foundations in 2002 and 1,263 for the latest year. Grants included in the samples represented approximately*

half of giving by all U.S. foundations in each year and well over two-thirds of total estimated international giving.)

Record 22 percent of grant dollars supported international activities in 2006.

Private and community foundations included in the Foundation Center's grants sample gave a record $4.2 billion for international programs in 2006, up 92.2 percent from $2.2 billion in 2002. This growth, fueled mainly by exceptionally large grants, far exceeded the 20.5 percent rise in overall giving reported by sampled funders. As a result, international support jumped from 13.8 percent to a record 22 percent of grant dollars. The share of number of grants, which is not affected by especially large awards, held steady at approximately 9 percent during this period. Nonetheless, sampled foundations awarded 13,112 international grants in 2006, up by 16 percent from 2002.

Gates Foundation accounted for more than half of the increase in funding.

Dramatic growth in international funding by the Bill & Melinda Gates Foundation fueled most of the gain in international grant dollars between 2002 and 2006. Overall, the foundation raised its international giving from $525.8 million to $2 billion. Since the late 1990s, the foundation has benefited from record gifts from its founders, and in 2006 it received an additional multi-year, multi-billion dollar commitment from the investor Warren Buffett. Nonetheless, excluding the Gates Foundation from the sample, international support would have grown faster than overall giving during this period (34.4 percent versus 11.7 percent), and the share of foundation grant dollars providing international support would have risen from 11 percent to 13 percent.

International giving grew faster than overall giving, regardless of foundation type.

Between 2002 and 2006, international support by community foundations included in the sample more than doubled—from $29 million to $81 million—surpassing the 38.7 percent growth in their giving overall. Similarly, corporate foundations more than doubled their international grant dollars—from $115.3 million to $261.8 million—while their overall giving rose a modest 12 percent. A key factor contributing to the rise in international giving by community and corporate foundations was increased support for relief efforts in the wake of several major natural and humanitarian disasters. Despite this strong growth, community and corporate foundations continued to account for modest shares of international giving in 2006 (1.9 percent and 6.2 percent, respectively).

Newer foundations increased their share of international giving.

Foundations established since 1995 (a year after the Gates Foundation was created) accounted for 7.4 percent of total international grant dollars awarded by all sampled funders in 2006, up from 3.7 percent in 2002. Among these newer funders, 39 gave at least $1 million for international programs in 2006. The largest of these grantmakers by far was the Gordon and Betty Moore Foundation, formed in 2000. Other examples of large, newer international funders include the Skoll Foundation (2002) and the Omidyar Network Fund (2004).

Overseas funding represented a larger share of international grant dollars but a smaller share of grants.

Between 2002 and 2006, foundation giving to overseas recipients more than doubled to $1.9 billion, while support for U.S.–based international programs increased 72 percent to $2.3

billion. As a result, the share of international dollars targeting overseas recipients increased from 38.5 percent to 45 percent. This larger share is attributable to a higher level of overseas giving by the Bill & Melinda Gates Foundation. Excluding Gates, the share of overall international grant dollars directed overseas would have declined from 39.7 percent in 2002 to 36.4 percent in 2006. Even with the Gates Foundation in the sample, the share of the number of international grants going directly overseas dipped from nearly 40 percent to roughly 36 percent.

These findings suggest that some funders may remain hesitant to support overseas grantees in the post-9/11 regulatory environment. Indeed, nearly three-fifths of respondents to the Foundation Center's 2008 survey agreed that "The more demanding post-9/11 regulatory environment discourages giving to non- U.S.–based organizations." Nonetheless, this figure was down dramatically from the nearly 80 percent of respondents who agreed with a similar statement in a 2004 Foundation Center survey.

Overseas giving primarily benefited global programs and Sub-Saharan Africa.

Despite the challenges in grantmaking abroad, well over one-third (36.8 percent) of international funders in the 2006 sample made grants directly to overseas recipients. Global programs of organizations based in Western Europe—such as the Switzerland-based Global Fund to Fight AIDS, Tuberculosis, and Malaria and the World Health Organization—ranked first by share of dollars received (37.1 percent), followed by grantees in Sub-Saharan Africa (18.1 percent) and Asia and the Pacific (11.5 percent). Between 2002 and 2006, grant dollars awarded to Western European recipients jumped nearly sixfold, while giving to those in Sub-Saharan Africa more than doubled. Consequently, the share of overseas giving going to Western Europe climbed from 21.5 percent in 2002 to 55.2 percent, while Sub-Saharan Africa's share rose from 17.6 percent to 18.1 percent. These gains were largely attributable to a dramatic increase in the Gates Foundation's support for global health and, in the case of Sub-Saharan Africa, by the Gates and Rockefeller foundations' funding for international development—specifically for programs to introduce the Green Revolution to Africa.

Grants to U.S.–based recipients mainly targeted Sub-Saharan Africa.

Over half of the funding for U.S.–based international programs targeted specific countries or regions, led by Sub-Saharan Africa. Support for this region through grants to U.S.–based programs climbed from $94.8 million in 2002 to $518.7 million in 2006, largely due to several multi-million-dollar health-related grants from the Gates Foundation. Programs benefiting the Arctic/Antarctic posted the second-largest percentage gain in funding, although the region ranked last by share of grant dollars in the latest sample. Following Sub-Saharan Africa at the top of the list were "Developing Countries" (broadly defined), Asia and the Pacific, North Africa and the Middle East, Latin America, Eastern Europe, Russia and the Independent States, Western Europe, Canada, and the Caribbean. Additionally, $1 billion of the $2.3 billion provided to U.S.–based international programs in 2006 supported global programs.

International development benefited from the fastest growth in grant dollars; health captured the largest share.

Among major program areas, international development/relief posted the largest percentage gain in foundation support between 2002 and 2006. Funding for this field more than tripled to $884.3 million, boosting its share of international support from 12.6 percent to a record 21 percent. This increase reflected higher levels of funding for international agricultural

development by the Gates and Rockefeller foundations, among others, as well as giving by numerous foundations in response to natural and humanitarian disasters.

Support for health more than doubled during this period to $1.8 billion, and the share of international grant dollars targeting the field climbed from less than 32 percent to close to 43 percent. While the Gates Foundation accounted for the vast majority of the growth in international health giving between 2002 and 2006, funding for health would still have increased at an above-average pace even if the Gates Foundation were excluded from the sample.

Excluding Gates, international development would rank first by grant dollars, followed by the environment and health.

If the Gates Foundation were excluded from the sample in 2002 and 2006, both the four-year change in international giving and the distribution of grant dollars across subject areas would look substantially different. For example, while giving for international development still more than doubled between 2002 and 2006 without Gates—surpassing all other fields—support for the environment and education would also have grown at an above-average pace. Moreover, international development and relief would rank as the top international funding area with 25.7 percent of grant dollars, followed by the environment (12.5 percent), health (11.6 percent), and international affairs (10.6 percent).

Foundations awarded $123 million for global climate change.

Grantmakers included in the Foundation Center's 2006 grants sample provided an estimated $123 million for international and domestic-focused projects dealing with global climate change, such as conferences designed to raise awareness about the issue, climate change studies that document the extent of the possible impact, efforts that directly address the problem through new technologies, and developing constituencies for climate protection. Leading funders included the William and Flora Hewlett Foundation and the Energy Foundation, which was founded in 1991 by a consortium of grantmakers (and is currently in the process of changing status to a public charity).

Close to half of international giving was consistent with U.N. Millennium Development Goals.

Approximately 46 percent of the $4.2 billion in international grants awarded by funders included in the 2006 grants sample supported activities consistent with one or more of the eight goals adopted at the United Nations' (U.N.) 2000 Millennium Summit. Among the "Millennium Development Goals," programs related to eradicate extreme poverty and hunger ("Goal 1") and combating HIV/AIDS and other infectious diseases ("Goal 6") accounted for the largest shares of foundation grant dollars.