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June 2011

Letter from the Editor 4

DEMOCRACY AND CIVIL SOCIETY

Civil Society and the Duty to Dissent
Helen James 5

The Abandonment of Democracy Promotion
Tara McKelvey 12

*“When We Raise the Issue of the Corruption
of Local Authorities, It’s the Rebels Who Descend on Us”*
Frank van Lierde 18

*Interview: Civil Society Organizations Respond
to Government Regulations in Ecuador*
Susan Appe 27

ARTICLES

*The Financial Crisis and the Nonprofit Sector:
Can Philanthropic Foundations Support the Creation
of a Civic Watchdog of International Finance?*
Lorenzo Fioramonti and Ekkehard Thümler 33

The NGO Law: Azerbaijan Loses Another Case in the European Court
Mahammad Guluzade and Natalia Bourjaily 43

A Reflection on the Legal Framework for Civil Society in Nepal
Uttam Uprety 50

Letter from the Editor

This issue of the *International Journal of Not-for-Profit Law* focuses on democracy and civil society, with four articles addressing the topic from varying perspectives. First, **Helen James** of the Australian National University asks whether responsible membership in civil society sometimes requires citizens to dissent from the actions of their governments or from the dominant opinion of the moment. **Tara McKelvey**, a journalist, author, and Guggenheim fellow, then considers a different sort of duty, one at the national level: the obligation to promote democracy around the world. Next, we present two features focusing on activists who work on the relationship between democracy and civil society: **Frank van Lierde** of Cordaid profiles Babloo Loitongbam of India, the founder and director of Human Rights Alert; and **Susan Appe** of Andean University Simón Bolívar interviews Orazio Bellettini Cadeño of Ecuador, the Executive Director of Grupo FARO.

We also feature three additional articles. **Lorenzo Fioramonti** and **Ekkehard Thümler** of the University of Heidelberg's Centre for Social Investment consider the potential role of philanthropic foundations in backing the creation of a watchdog organization covering international finance. **Mahammad Guluzade** and **Natalia Bourjaily** of the International Center for Not-for-Profit Law assess a European Court of Human Rights case that ruled against Azerbaijan. Finally, **Uttam Uprety**, an active member of the Nepal Participatory Action Network (NEPAN) and a former research fellow at the International Center for Not-for-Profit Law, provides a comprehensive evaluation of the legal framework for civil society in Nepal.

We are grateful to USAID for supporting the Nepal study and to all of our authors for their timely and important articles.

Stephen Bates
Editor
International Journal of Not-for-Profit Law

Democracy and Civil Society

Civil Society and the Duty to Dissent

Helen James¹

Introduction

The renowned American lawyer Cass Sunstein, in his splendid book *Why Societies Need Dissent*,² explicated the view long held amongst exponents of theoretical democracy that dissent is the leaven which propels societies to be productive, innovative, creative, attractive to human beings from diverse cultural backgrounds; that dissent unleashes the regenerative capacities which enable societies to thrive and not atrophy. In fact dissent, defined as the public expression of disagreement with majority-held views, is the essential component of open democratic politics, as it underpins the operations of the various “freedoms” – the freedoms of association, media, religion, speech – to protect which we have been repeatedly told by leaders of the world’s major democracies since 1939 that we must go to war. This imperative itself has produced major eruptions of dissent from those disagreeing with the prescription. Dissent in all organizations, minor and major, whether the local book club or the highest organs of government, is a forum for proposing alternate views, for bringing additional information to bear on decision-making processes which could have far-reaching consequences for those responsible for the administration of government. For example, had the late President John F. Kennedy not listened to dissenting voices, the unimaginable catastrophe of nuclear war with the former Soviet Union could have occurred in 1962 at the time of the Cuban missile crisis.

Sunstein rightly considers that dissent is, however, a much undervalued quality in democratic polities, and of course one that is repressed in non-democratic polities. We are only too well aware of the fate of political dissenters from present-day Syria, Yemen, and Libya to Myanmar, China, Russia, and South America. But we like to fondly believe that dissent is welcomed in democratic societies as an expression of the validating principles of oppositional politics. Outside formal institutional fora, sadly, this is rarely the case. While many democratically elected politicians claim they uphold the fundamental freedoms enshrined in the American Constitution and similar documents or legal frameworks operating in other major Western democracies, in practice those who publicly dissent from majority views or challenge perceived politically correct norms are frequently ostracized, expelled from their places of work, careers destroyed, imprisoned, or even killed. Being a dissenter is not a comfortable career, even in established Western democracies. Despite the much-vaunted freedom of the press, during the widely unpopular Iraq War of 2003 which saw thousands of demonstrators (dissenters) pour onto the streets of major Western capitals, some journalists who challenged the government line of the day, both in the United States and in Australia, were persecuted, threatened with imprisonment and loss of their livelihoods. And not just during the 2003 Iraq War, but also the earlier Vietnam War era (1965-1975, the epitome of dissent being marked by Daniel Ellsberg’s unauthorized leaking of the Pentagon Papers in 1971 and their publication in *The New York Times* and *The*

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² (Harvard University Press, 2005).

Washington Post. Pursued by the administration of the day, Ellsberg has now found his place as a hero of the history of dissent who exposed to the public and the Congress the culture of mendacity within the U.S. Administration.

Yet freedom of the press, that bulwark of democracy as it has been instilled in millions of school children, is a major public institution by which dissenting views are conveyed to the population at large. When the press/media is co-opted by government, that government resiles from the high standards of accountability and transparency which we consider paramount in consolidated and established democracies; and conversely, the lack of “freedom of the press” and associated freedoms are critical measures of dictatorship. Dissent thus has a checkered history both in democratic and non-democratic societies, a principle frequently more recognized in theory than in practice. Indeed, the worldwide decline in freedom of the press and its associated culture of political dissent in recent years has been the subject of the latest survey and freedom index by Freedom House, which notes that 2010 was the fifth consecutive year in which this negative finding has been observed.

The Duty to Dissent

America was born in dissent. Those who sailed on *The Mayflower* in 1620 and their descendants who fought the War of Independence in 1776 not only sought to establish the primacy of dissent in a modern democratic polity, but also gave credibility to the notion that the principled individual has a duty to dissent in pursuit of a civil society. Their voyage across the ocean, establishment of the “Commonwealth” of Massachusetts, and later repudiation of the authority of the Crown of England, were part of the fabric of dissent in which modern journalism was born. In that era, politics and religion walked the same path, as Anne Hutchinson found out when, in 1636, her dissenting religious views caused the political leaders to expel her from their community. She sought refuge in Rhode Island. Governmental and religious authorities worked closely together, considering that each had the power to dictate the parameters of an individual’s faith, a system of governance which had given rise to the major religious wars of Western Europe, and the relentless persecution from which the Pilgrim Fathers had initially fled.

Whilst in modern times it is generally acknowledged in most Western democracies that a person’s religious views are a private matter, not the purview of the state, this development in public policy has been a hard-won perspective over which much blood has been spilt. Resistance to religious persecution has been the crucible for the public expression of dissent across numerous societies, leading to concomitant political activism, either through pursuit of arms or through the medium of print, as may be seen in the journalistic forays of a kindred spirit, the English Presbyterian dissenter Daniel De Foe. He published the 1703 satiric pamphlet, *The Shortest Way with the Dissenters*, which pilloried the established Church of England. It earned him some time in the stocks and set him on the path to being acknowledged as the father of modern journalism. The less fortunate English bookseller John Smith in 1791 published a similar pamphlet, “A Summary of the Duties of Citizenship,”³ an attack on the abuses of the Church of England, for which he was put on trial in 1796. His wife had, unknown to him, sold a single copy of the pamphlet. He earned a harsher punishment, being sentenced to having his hand struck off and to serving time in prison, which so impacted his health that he died. The fury of the English Establishment may be gauged by the introduction to his indictment, which reads:

³ Rare Book Room, Cambridge University Library.

Indictment [for libel and sedition, inciting disaffection towards King, Clergy, and Government]: That John Smith, being a wicked, malicious and ill-disposed person and greatly disaffected to our Lord the King and the Government of this kingdom, and wickedly, seditiously, and maliciously contriving and intending to scandalize and deface, and bring into hatred and contempt, our said Lord the King, and the established Government, Religion, and Law of this Kingdom, and the Clergy of the Church of England as by law established, and the Army of our said Lord the King: and to insinuate and cause it to be believed that the Government of this kingdom as by law established is an usurped, unjust and tyrannical government, and that the Army of our said Lord the King is used and employed by the Government of this Kingdom as an instrument of tyranny and oppression over the people thereof, and thereby to raise and excite sedition, discontent, and irreligion in the minds of the liege subjects of our said Lord the King, on the 17th day of 1795, in the county of Middleses, that is to say, in the parish of St Giles's in the Fields and St. George's, Bloomsbury, wickedly, seditiously, and maliciously did publish, and cause and procure to be published, a certain Libel, containing therein, amongst other things, divers wicked, scandalous, and seditious matters and things of and concerning of our said Lord the King and the established Government, Religion, and Laws of this kingdom, and of and concerning the Clergy of the Church of England as by law established, and the Army of our said Lord the King.⁴

If one detects something of the fury of Shakespeare's King Lear when Cordelia refuses to state publicly how much she loves him, and thereby declines to acknowledge his authority by playing the game, then perhaps one is simply recognizing the Rumpelstiltskin type of fury which seems to characterize authoritarian presumptions of compliance. This has nothing to do with the theory of consent or its withdrawal, but everything to do with the capacity or otherwise of governmental authority to accept criticism in an appropriate manner. While John Stuart Mill in his 1859 essay, *On Liberty*, took the stance that the time had passed when it would be thought necessary to defend the principle of 'liberty of the press' as what he identifies as 'one of the securities against corrupt or tyrannical government,'⁵ sadly this is not the case. The politico-religious reverberations of the 'War on Terror' have produced governmental authorities which only too readily revert to the coercive practices of earlier historical eras. The problem of suppression of dissenting opinion lies with us today as much as it did in John Smith's or Daniel De Foe's time, for how frequently do we hear legitimately elected governments not only indignantly refuting even mild criticism and relentlessly pursuing the criticizer, but then also putting in place expensive bureaucracies to deflect and criminalize any future criticism?

Critiques of elected government and exposure of the self-interested fallacies at its very heart inform that most famous of political essays, Henry David Thoreau's 1849 work, "Civil Disobedience: or Resistance to Civil Government." Where, in contemporary times, we hear democratic governments effusing about the obligations and duty of citizens to protect the security of the state, Thoreau would have countered with his views on the obligations of citizens to resist the tyranny of the majority and the duty of citizens to obey their conscience. One of Thoreau's many contributions to social and political theory and what constitutes a "civil society" was his capacity to fuse rights and obligations, not to place them in dichotomous categories but to see them as twin entities. Thus, in pursuit of individual rights such as those set out in the U.S.

⁴ John Smith, "A Summary of the Duties of Citizenship" (London: 1791), pp. i-viii.

⁵ John Stuart Mill (1859), *On Liberty*, chapter 2.

Constitution, and subsequent manifestations in the 1948 U.N. Declaration of Human Rights and related 1966 Covenants on Economic and Social Rights and on Civil and Political Rights, Thoreau argued that the individual has *both* a right and an obligation to follow his or her conscience in resistance to (un)civil government and the tyranny of the majority. His profound influence is attested to not only in the writings of J. S. Mill,⁶ but also in those of M. K. Gandhi and Martin Luther King Jr., who openly acknowledged their debt to Thoreau.

Journalists, writers, and intellectuals are of course the backbone of a culture of dissent, the parameters of which have evolved from at least the time of the 15th-century printing press. Many have given their lives for their profession and their principles. In the major Western democracies, journalists, writers, and intellectuals are a reasonably protected species, safeguarded, at least in theory, by the framework of the First Amendment in the United States and similar legal entities in other Western democracies. How then should one regard the current vehement pursuit of Julian Assange by the U.S. administration for publishing on his website, Wikileaks, sensitive, hitherto classified material relating to U.S. government diplomatic cables and state secrets? Assange, no matter what his personal attributes, is after all clearly a member of the Fourth Estate, a journalist whose right to publish material can hardly be questioned. That he publishes electronically rather than in conventional hard copy should be irrelevant. One should note also that similar vehement pursuit does not apply to the other media outlets, newspapers, to which Assange forwarded copies of the material he had published on his website. This set of activities should be disaggregated from that of the person or persons who provided him with the classified material, and there is clearly no doubt that the act of providing him with the material infringed the law which applies to governmental employees not to divulge classified documents. However, it is highly doubtful that Assange, by publishing, has infringed any law. What he has done is the Rumpelstiltskin type of action which has tweaked the nose of the sleeping giant of the U.S. administration. But this, whilst understandably infuriating for the administration, is not illegal, unless causing embarrassment to government has suddenly become a crime. Nor was publishing the Pentagon Papers by the *New York Times* and *The Washington Post*. Assange's opposite number is not Daniel Ellsberg who provided the material to those newspapers. The U.S. administration believes that it has in custody the person who provided the classified materials to Assange, and, given the reports of the conditions in which the accused person, Private Bradley Manning, is held, one can only sympathize with the young man. Perhaps he will become the object of an Amnesty International investigation. Daniel Ellsberg's opposite number is Bradley Manning; Assange's is *The New York Times* and other newspapers.

Has Assange followed Thoreau's dictum, the obligation to follow his conscience? Undoubtedly so. From time to time he has made clear that he sought to erase the identities of those mentioned in some of the documents; he sought to protect their identities, especially where those persons had worked closely with U.S. forces in theatres of war. Assange is clearly persona non grata in several Western democracies, but it is highly doubtful that he has done anything other than what any other journalist would have done if those documents had come into his or her possession. Would the reaction from governmental circles have been different had Bradley Manning or others provided the secret materials directly to the mainstream media?

Assange, whilst exercising dissent in the service of what he perceives as a civil society, has observed Thoreau's dictum to follow his conscience by making information on governmental

⁶ *On Liberty*, 1859.

activities available to the public. He has also provoked considerable dissent on his behalf. In Australia, the Prime Minister, Julia Gillard, adopted a conservative, pro-U.S. administration line. She stated that whilst some agreed with Assange's action, she did not. Initially, her government had raised the specter of prosecuting Assange, an Australian citizen. Her stance provoked howls of outrage not only from her own backbench but amongst civil libertarians in Australia generally. Dissent was clearly on the march. Amidst loud cries that Assange had not broken any Australian law, the government backbenchers succeeded in embarrassing their Prime Minister considerably. The Australian Federal Police, pursuant to an official directive, confirmed on December 17, 2010, that their inquiries had "not established the existence of any criminal offences where Australia would have jurisdiction."⁷ The wider populace adopted its typically cynical, skeptical stance towards anything that politicians initiate and openly scoffed at the inept attempt to discredit Assange through means of the Swedish allegations of sexual assault. The Sydney Peace Institute awarded him the Sydney Peace Prize for his endeavors to bring to public attention materials which he believes it is the public's right to know. The Australian National University convened open forums on Assange and Wikileaks, a measure of the interest in the affair from the perspective of upholding the principles of freedom of speech, the press, and the public interest in holding government accountable. Conversely, conservative voices maintained that the release of secret documents does not serve the public interest; but, on the whole, Assange is perceived as a journalist simply doing a journalist's job of holding government accountable and subjecting its actions to the concept of transparency.

Have I read the documents that Assange placed on Wikileaks? No, although some were sent to me via intermediaries. I do not need to read Wikileaks to know that Gaddafi likes (until recently) to have his blonde Rumanian nurse close by, or that Berlusconi is lascivious. Other material I have read about, in the major newspapers, is fairly pedestrian. I am too busy to spend large amounts of time looking at Wikileaks. Had less attention been paid to this, fewer people would have even been aware of it and it might all have passed like a storm in a teacup. But outraged claims of infringing national security and putting national security in danger merely draw attention to the material, thereby serving Assange's objectives. Dissent is a public act; it is never meant to be consumed in private, but to be effective needs to take on a collective supra-individual identity, as Michael Walzer recognized.⁸ The duty to dissent arises out of the individual conscience but is expressed as a collective action with a public objective. To revert to J. S. Mill again: "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."

The Duty to Disobey

Since the Nuremburg Trials at the end of World War II and the International Military Tribunal for the Far East, the formulation of a duty to disobey an inherently immoral order or law has been incorporated in the Crimes Against Humanity formulation of international law, which has seen the establishment of the International Criminal Court and the International Court

⁷ Quoted by Philip Dorling, "Questioning those conflicts," *The Canberra Times*, 28 May 2011, p. 25.

⁸ Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, MA: Harvard U. Press, 1970), p. 4.

of Justice. In theory, and with hindsight and reference to attributes of “natural law,” the crimes of the Nazis and the Japanese were most reprehensible, correctly subject to established criminal law procedures and duly punished. The inference in all cases was that those who committed these crimes, under orders perhaps from higher authority, had a duty to disobey those orders even at the cost of their own lives, because the orders were inherently immoral. The recent arrest of the Bosnian Serb General, Ratko Mladic, is but the latest in a long line of military murderers who seek to escape retribution for their deeds by invoking the defense of “acting under orders.” International Law since World War II has firmly rejected this defense, thereby reifying the duty to disobey an immoral law as an international norm. By inferring that the individual has an active conscience which can and should distinguish a moral law from an immoral one, international law has succeeded in giving firm, legal foundation to the concept of the duty to disobey. Whistleblowers like Bradley Manning or his associates are not in the same league as the Nazis at Nuremburg or the Japanese during World War II. But whistleblowers do feel that they have an obligation to disobey what they may feel is a morally unjustified law in pursuit of a higher, more moral outcome: that of making available to the public information which the whistleblower feels the public has a right to know and a need to know. At heart here is the citizen’s relation with the modern state: does the state exist to serve the citizen or the citizen to serve the state? In Walzer’s words, the state “will always be confronted by citizens who believe themselves to be, and may actually be, obligated to disobey.”⁹

The caveat in Walzer’s argument is that the action can be tolerated, so long as it does not endanger or harm other citizens. So, have the actions of Assange or Manning, or whoever else provided the classified documents, endangered the state or other citizens? Walzer’s formulation would suggest that it may be unlikely. He writes: “Indeed, there is very little evidence which suggests that carefully limited, morally serious civil disobedience undermines the legal system or endangers physical security.”¹⁰ This of course is different from the perceptions of the guardians of the state, who may wish to ensure that heavy, exemplary punishment is meted out as a form of deterrence to anyone planning similar activities. Undoubtedly, also, the guardians of the state will put in place additional measures to seek to ensure that the security of their secret documents is unable to be breached in future. That such deterrence rarely works with those who are quite determined to break the law in the interests of what they perceive to be the public good is not likely to be considered. Bradley Manning, his associates, or yet unknown others perceived that they had a duty to make the secret documents available to the world of journalism in the interests of upholding the principles of a civil society, just as John Smith did in publicly excoriating the perceived abuses of power within the established Church in his time. Whistleblowers are the archetypal dissenters, driven by the need to address perceptions of wrongdoing by those in positions of power. Often their actions contribute to upholding the principles of a civil society; sometimes they do not. Emotive voices on both sides, supporting or denouncing their actions, seek to untangle the motivations by which their actions are judged. On the purity or otherwise of their motivations often turns public judgment as to whether their dissenting activities are in the public interest or not. The dividing line will frequently turn on whether harm arises either to other citizens, or to the state as a consequence of their actions; and conflicting views on this aspect will be unable to be reconciled.

⁹ Walzer, 1977, p. 16.

¹⁰ Ibid.

Conclusion

A distinguished professor of political theory, my colleague Robert E. Goodin, articulated the corrosive consequences for democratic states which arise from terrorism, or more precisely the responses which democratic states feel impelled to take to protect their institutions, their citizens, and their ways of life from terrorist violence. In *What's Wrong with Terrorism*,¹¹ he argues that the real, long-term problem for democratic states is that terrorism inveigles them to resile from the humanitarian political principles on which democratic states are based and which have taken centuries to evolve. In effect, by unleashing the catalytic consequences of irrational fear, terrorism lures democratic states to abrogate all the principles which distinguish them from authoritarian or totalitarian states; the distinction between the two types of polities and societies becomes blurred as democracies slide towards authoritarian social and political mores, curtailing the right to dissent, the right to habeas corpus, the right to trial by one's peers in an open court, the rights to freedom of the press, speech, and association. It is a perspective with which I profoundly agree. The spectacle of British police shooting an innocent Brazilian seven times in the head in a case of mistaken identity, not even pausing to check the accuracy of their information, is evidence of the corrosive effect the culture of fear unleashed in one of the oldest established democracies. Other incidents abound. I do not even wish to mention the obscenity which is Guantanamo, or the policy of "rendition" of prisoners in the so-called War on Terror. Over the past fifty years, we had become inured to the concept that torture had been outlawed by the 1948 Universal Declaration of Human Rights. We were mistaken; torture is currently the weapon of first resort across both democratic and non-democratic polities. Those who seek to justify torture under the guise of saving lives through obtaining information by these execrable means should remember the old adage: two wrongs do not make one right, but they do reduce the moral authority of democratic governments.

Assange, Bradley Manning, or any of their associates who exercised their obligation and right to dissent in the interests of protecting the civil society which we have come to expect to be provided by a democratic political and social framework, are surely working in the best tradition of whistleblowers. They seek to protect civil society from the depredations of those who have resiled from its principles. The legacy of Galileo and Copernicus, Sulak Sivaraksa and Liu Xiabao adheres to them, and to all who recognize the moral obligation to dissent from unjust laws in the interests of strengthening our civil society. The narrative of human history is the history of dissent, as dissenters challenge the received "wisdom" of their age in the interests of truth. Truth, however, is an uncomfortable bedfellow, both for democratic and non-democratic governments, and how each type of government responds to those who expose inconvenient truths distinguishes one from the other.

¹¹ (Polity Press, 2006).

Democracy and Civil Society

The Abandonment of Democracy Promotion

Tara McKelvey¹

One of the newest models in a Vargashi car factory is called the Avalanche-Hurricane or, as it is known among the Siberian workers, an anti-democracy truck. It is encased in steel armor and thick window grills and comes with accessories such as a water cannon and pepper spray canister, and each vehicle costs approximately \$500,000. The factory director told a *New York Times* reporter, who wrote about the trucks in an April 2009 article, that he hopes to sell two or three of the vehicles over the course of a year.

So far the trucks have not done much to thwart democracy, or to generate revenue either, since none have actually been sold, but the fact that they are being manufactured captures a growing sentiment in Russia that democracy has become unruly, and in this sense the new line of trucks is a disturbing sign of things to come. After nearly two decades of democracy, some officials in Moscow believe that freedom and liberty have gotten out of hand, and they are looking for methods to tamp it down. Part of the officials' discomfort seems to stem from the fact that tens of thousands of Russians have been expressing unhappiness with the corrupt leaders who are in charge of their country and are demanding change at the top.

Russia is not an isolated case. Democracy has been taking some serious knocks in countries around the world and, according to Freedom House, a New York-based organization that promotes democracy and liberty, it has been on the decline over the past three years. Yet despite the threat to political freedom in Russia, Pakistan, Egypt, Ethiopia, and other countries around the world, Americans have begun to show considerably less interest in helping to promote democracy as part of the nation's foreign policy. These trends will reinforce each other in the coming years and make things considerably bleaker for those who are fighting for freedom around the globe.

Americans have turned away from the principles of democracy promotion largely in response to President George W. Bush's disastrous efforts in this arena. It may seem natural to scale back on this aspect of foreign policy after the excessive zeal of the Bush Administration. Yet this shortsighted view will diminish the positive influence the United States has on the rest of the world. Even worse, pulling back on democracy promotion could harm people in other countries who are most vulnerable to autocratic leaders. With the election of Barack Obama, democracy advocates around the world are rightly concerned about whether they will continue to have American support in their dangerous work.

Albeit with recent exceptions, Obama Administration officials have been placing more emphasis on protecting the relationship between the United States and other countries than on supporting the work of local democracy activists. People who work for Freedom House say they have "met with several U.S. Embassy officials who have sought to distance themselves from civil society and human rights leaders who were not favored by the host government," according

¹ Tara McKelvey is a correspondent for *Newsweek / The Daily Beast* and a 2011 Guggenheim fellow. She is the author of *Monsterring: Inside America's Policy of Secret Interrogations and Torture in the Terror War*. Copyright 2011 by Tara McKelvey.

to a July 2009 report. If the efforts of local democracy activists are stymied, then the autocratic leaders of the nations they live in will be emboldened to take away even more liberties.

And yet despite the threat to freedom in countries around the world and the potential danger to democracy advocates abroad, President Obama has demonstrated that he is significantly less interested in democracy promotion than his predecessor; moreover, his views are shared by top members of his cabinet. Secretary of State Hillary Clinton, appearing before the Senate Appropriations Committee in April 2009, said, “The foreign policy of the United States is built on the three Ds: defense, diplomacy, and development.” Democracy was not included. Meanwhile, the Joint Chiefs of Staff have sent a national-security memo to President Obama, urging him to abandon democracy promotion in Afghanistan.

When President Obama gave his speech about Afghanistan at West Point in late 2009, he talked about defeating Al Qaeda and reducing the threat of terrorism but said nothing about helping to build democracy. He has been trying to tamp down expectations for the future of that country, and some U.S. officials seem almost disdainful of the attempts at building a democratic society that are currently underway. To be sure, the Afghan government has a long way to go. The 2009 election of President Hamid Karzai was widely considered a sham, and his government has been rife with corruption. One official who oversaw the elections in Logar province was forced to hide out in a barricaded office for three months because he had received death threats from the Taliban. He and other officials put their lives on the line in an attempt to build a democratic society; thousands of Afghan people risked their lives in an attempt to make sure the polls would be open. And yet, many of them felt their efforts were not fully acknowledged or appreciated.

President Obama’s attempt to scale back expectations for Afghanistan and overall for democracy promotion abroad has caused little stir among liberals. Democrats in general are less likely than Republicans to support the notion of democracy promotion, with only fifty-four percent saying that it should be featured in foreign policy, according to a 2007 Pew survey; seventy-four percent of Republicans believe U.S. foreign policy should embrace it, and are more likely to say that the United States should “help establish democracies in other countries.” This means few liberals will be willing to take on the issue of democracy promotion or try to ensure that it becomes a top priority.

The twenty-first century dawned as the age of democracy promotion. Then-President Bush made it clear to tyrannical leaders that he intended to tear down their regimes and to allow for the blossoming of democracy around the world. Rather than kowtowing to dictators because Americans wanted oil, gas, and natural resources or access to airbases within their borders, like former U.S. presidents, Bush made it clear that he would take a hard line against dictators and would support the efforts of those fighting for democracy.

These principles were the bedrock of the Bush Freedom Agenda—but that was not the way things turned out in the real world. Bush was tough on dictators in places like Zimbabwe, where Americans had few or no interests, and was considerably less strict with autocratic leaders in countries such as Uzbekistan, which was the home of the strategically important Karshi-Khanabad air base. Moreover, the war that was waged in Iraq to make that country safe for democracy descended into chaos while he was in the White House. To be sure, a fragile form of democracy gradually emerged in Iraq, but it has come at a terrible cost and has nearly discredited the undertaking of democracy promotion altogether.

The cost of the Freedom Agenda was staggeringly high, causing worldwide opinion of the United States to plunge to its lowest point in decades. Yet there was some merit in putting despots on notice. The current U.S. President is no longer making hyperbolic and inflammatory statements about democracy; instead, President Obama is circumspect in his efforts to assist activists who are working toward greater freedom and liberty in other countries. His approach to democracy promotion is cool and low-key, so much so that he appears to be overly cavalier about it. In fact, Obama's ambivalence about democracy promotion represents a sharp break with the past, and his approach to the issue has disturbing implications.

Democracy itself, of course, is wildly popular and is often cited by people on left and right in support of a broad array of programs. Democracy *promotion*, however, is a controversial part of U.S. foreign policy, based in a network of Washington-based institutions and rooted in bureaucratic flow charts and line items in the State Department budget. Moreover, a common understanding of the term has been elusive, since it seems to encompass everything from broadcasting jazz programs to Poland in the 1980s to deploying troops to Iraq in the 2000s.

President Ronald Reagan extolled freedom and democracy around the world and reached out to dissidents in Central and Eastern Europe through Radio Free Europe/Radio Liberty, which provided news programs as well as a message of hope to those who lived under repressive regimes. In Cuba, people tuned in to Radio Marti, which broadcast programs produced in the United States and provided a balance for the anti-American propaganda put out by the Cuban stations.

The U.S. information strategy worked, at least to some extent, since it provided news, as well as moral support, for Central European dissidents and Cuban activists. In 1990, Americans watched joyously as Lech Walesa, the leader of Solidarity, was elected to office in Poland, and then cheered as the Soviet Union began to crumble.

From the outside, the shift from Communism to democracy seemed quick and easy. Back then, however, it was not at all clear how things would turn out. In July 1989, after meeting with a group of dissidents in Eastern Europe, President George H. W. Bush wrote in his diary that he was afraid the situation was spinning out of control. He and his advisors also worried about what would happen if Germany were reunited. Nevertheless, he kept his cool and maintained cordial relations with Soviet President Mikhail Gorbachev. By the end of the following year, Bush and other world leaders had helped bring about not only the relatively peaceful revolutions across Eastern Europe, but also "a unified Germany, a transformed EU," wrote historian Philip Zelikow in *Foreign Affairs* (November/December 2009), and "a preserved and extended Atlantic alliance." It was an impressive string of successes.

The second President Bush was much more aggressive about democracy promotion, and yet in contrast to his father's efforts the countries of the Middle East have not made a smooth transition to democracy, despite tremendous investment in the region. This has caused many people in this country, particularly liberals, to swear off democracy promotion altogether. Even its most ardent supporters have trouble with the fact that democratic elections sometimes produce undesirable results. George W. Bush's historic push for Palestinian democracy turned out far differently than expected when Hamas, the Islamic resistance movement, won a majority in the Gaza elections in 2006.

In previous decades, Americans sometimes responded in a brutal manner to election outcomes they did not like. After a socialist candidate, Salvador Allende, was elected in Chile in

1970, Henry Kissinger famously said, “I don’t see why we need to stand by and watch a country go Communist because of the irresponsibility of its own people.” Three years later, Allende was deposed in a U.S.-backed coup. No policymaker today would advocate such extreme actions. Nevertheless, legions of people have spoken out strongly against incorporating democracy promotion into U.S. foreign policy; the enemies of such an approach have multiplied at an alarming rate and can be found on both ends of the political spectrum.

On the far left, where the work of Noam Chomsky is admired, many people believe democracy promotion is a diabolical plot to expand U.S. hegemony around the world. According to these critics, American-style democracy promotion conflates democracy with free-market capitalism, and actually places a higher value on the latter. American officials attempt to remake the world in their own image and graft their views about democracy onto other societies. Human-rights advocates and some progressives are also opposed to democracy promotion, but for a different reason. They argue that human rights, not democracy, should be the focus of U.S. foreign policy.

Meanwhile, on the far right, isolationist conservatives like former presidential candidate Pat Buchanan maintain that Americans should not get involved in difficult, messy projects abroad, regardless of how well-intentioned they might be.

So should we simply give up on democracy promotion altogether? That is clearly not the answer. Previous mismanagement of democracy promotion, however egregious, does not mean that all future efforts are doomed.

Promoting democracy in other countries is messy and hard, but abandoning these efforts constitutes a threat to freedom on a global scale. The United States should not ignore people in other countries who are risking their lives on behalf of democracy simply because the Bush Administration failed in its efforts. A Kabul-born psychologist who lives in Washington says that if Americans turn their backs on the Afghan women who have been marching in the streets in order to secure more freedom, “they will be lost.” And yet, despite the fact that Afghan women, Chinese students, and many others are counting on American support in their struggle for freedom, there are signs that President Obama will not be there for them.

Obama and his top officials apparently believe that it is better to get along with tyrants than to confront them, and to eschew symbols in favor of achieving pragmatic goals on the ground. This was the clear impression made by his failure to speak up for Iranian students protesting the repressive Islamic regime in 2009. When Administration officials favor a form of democracy promotion that values pragmatism above all else, however, they are missing something important. To put it simply, despotic leaders do not always listen to reasoned arguments. “I can’t remember any text of mine where it said one should fight Hitler without violence,” said Adam Michnik, who was one of the leading dissidents in Poland in the 1980s. “I’m not an idiot. In the state of Saddam, the opposition could find a place only in cemeteries.”

Maintaining a tough stance against tyrants and being vigilant about encroachments on democracy in other countries is crucial. In Lebanon, for example, where democracy is fragile at best (the nation currently ranks as only “partly free,” according to Freedom House) and ill-prepared to defend itself against the determined opposition of religious fanatics, America has a clear and vital (if limited) role to play, particularly since the international community has been weak and indecisive. Indeed, democracy experts have applauded President Obama’s decision to increase its support in this area. The administration’s proposed funding for democracy promotion

in Lebanon was raised fifty percent, from \$18 million in fiscal 2009 to \$27 million for fiscal 2010.

For many Americans, the success of democracy in faraway countries such as Lebanon may seem unimportant, but the U.S. benefits in a variety of ways from free and open societies in other parts of the world: Democracies are more likely to be economically advanced and, at least in theory, buy American goods and provide additional markets for the United States; democracies are also less likely to wage war on each other.

To be sure, the United States needs a finely tuned, culturally adept approach to promoting democracy, rather than the gunslinger one that was used in the past, and it should moreover be based on an understanding that simply granting people the right to vote does not guarantee a truly democratic result.

One cannot measure with precision the relationship between investments to support democracy in a particular country and its transformation into a free and open society; but some methods have been successful. People in Central Europe benefited from listening to Radio Free Europe, and these kinds of efforts should be continued. The United States should also support freedom of expression through online media and fund efforts to help prevent authoritarian governments from using the Internet to crack down on activists. (Iranian police have recently created a twelve-person unit to track activity on the Internet, and are stepping up efforts to collect information on activists from online sources.)

Financial support should be provided to reformers and democrats in Iran and other countries around the world in a more equitable fashion, rather than devoting resources almost exclusively to the places where the United States is engaged in armed conflict; currently, Iraq, Afghanistan, and Pakistan receive roughly three-fourths of the funding that is allocated for democracy promotion. In addition, the United States should work harder to present itself as a model of democracy, since its image as a beacon of freedom and justice suffered a blow in recent years because of the Abu Ghraib prison scandal and Guantanamo. (In Iraq, the Abu Ghraib picture of the hooded man is known as the Statue of Liberty, and insurgents have used it as a recruiting tool.)

Moreover, President Obama should say explicitly what he intends to do in the area of democracy promotion, since democracy advocates need to know that they have friends in the United States and that the funding will continue under the new administration. Over the past year, administration officials have been trying to make progress on global issues such as climate change, nuclear weapons, and financial reform, and have placed less of an emphasis on democracy promotion when dealing with leaders of other nations. At first glance, this seems like a realistic and wise approach, but it is a mistake. Idealism plays an important role in American foreign policy, and Obama should provide strong rhetorical support for the efforts of democracy activists abroad so that the leaders of authoritarian nations will hear the message.

By and large it is easier to promote democracy through development aid rather than to save or repair a democracy that is floundering. However, when things fall apart in other countries, the United States may have to intervene, whether through diplomatic or military means.

Just as a factory director in Siberia is counting the cash that he will earn from selling armored trucks, leaders in other countries are banking on the fact that they can smash their

opponents into the ground when there is no resistance from the United States. Despite the flawed history of democracy promotion, it belongs high on the U.S. foreign policy agenda and should be supported by substantial resources. The threat to freedom is strong in many countries around the world, and abandoning the people who live in those autocratic regimes would be a travesty.

Democracy and Civil Society

“When We Raise the Issue of the Corruption of Local Authorities, It’s the Rebels Who Descend on Us”

Frank van Lierde¹

Lawyer and activist Babloo Loitongbam, founder and director of Human Rights Alert, is educating and training local communities in violence-torn Manipur in how to resolve their own conflicts. For decades, India’s Northeastern states have been plagued by insurgency, state violence and endemic ethnic violence. For Loitongbam, the real solution lies in a movement that spirals up from local solutions rather than trickles down from bureaucratic procedures. The Human Rights Alerts curriculum is rooted in the local conflict reality and trains communities to resolve local conflicts independently before they spiral into violent abrogation; to awaken and access sleeping government agencies; to invite the scrutiny and procedures of the international human rights movement and assert citizen’s alternatives to existing conflict resolution systems.

Babloo Loitongbam is not yet forty, but has already crossed a lot of waters. And for the time being he continues to swim. “In twenty-five years, the change we are now working on will perhaps be taking shape gradually.”

As a young student of Meitei origin, he searched in vain for affiliation with student life in New Delhi. After all, it was a different world where a ‘slit-eye’ had no business. Back in Manipur, as an activist, he entered the confrontation with trigger- happy army entities, unpredictable rebel groups and corrupt rulers. With his organization, Human Rights Alert, he finds himself at the leading edge of social dissidence. Internationally he is looking for cooperation in order to get the conflict in Manipur on the map and keep it there. And in between, he is a young father and husband. Armed conflict freezes societies, yet at the same time it is a pressure-cooker making people like Babloo move faster than those in ordinary settings.

Babloo grew up in Manipur, in the seventies and eighties. As a young student his ambitions were not exactly in line with the secure administrative career that his father had in mind for him. He, in the first place, felt like a political animal, someone who wanted to improve the mechanics of power and the practice of justice, not a civil servant who limited himself to conscientious oiling and lubricating. It is understandable that fathers are on their guard for that, certainly in the North-East of India. Also with his first employer, a well-known human rights activist, a similar conflict took place.

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Cordaid is a Dutch development funding agency that focuses on relief aid, poverty eradication, society building, and policy influencing. Cordaid works hand in hand with organizations in the global south as well as in Europe and the United States for a more just and equitable society.

Outsider

“I come from a family that was relatively well off. My father did understand my dreams, after all, he was a lecturer of Political Science and, just like his father, he was aggrieved by what was happening in Manipur. But he did not put himself at the forefront of the political and social resistance movement, something that did appeal to me. He wanted one thing: that I would opt for the safety and security of the Indian Administrative Service.”

By the time Babloo was a teenager, higher education was what lay ahead of him. As a B.Sc first-year student, he travelled to New Delhi. It was his first acquaintance with the ‘mother land’ India and, in some ways, with himself. Living on campus put a lot in motion. But it would not lead to a position in the Service.

“I went to study anthropology in New Delhi. That was a shock. There was drinking, rocking, partying, studying and discussions, but no matter where I went and who I met, hardly any co student had the slightest idea where I came from. I was the slit eye, the ‘chinky’ who came from far away, from a backward, vague and barbaric world. When I told them that this world had already belonged to their own Union of India for half a century, they did not believe me. They simply didn’t know that Manipur existed. I even tried to join the English Debating Club, the cream of the crop amongst student associations. But the brahmanistic elite laughed at me outright. Did I really think that I would ever reach the peak of academia? So I helped to revitalize the MSAD, a Manipuri student association. We once even organized a ‘mini-Olympics’ with Students of the North-East.”

After anthropology came law. “Not only did I want to get to know the world, I also wanted to be able to change things.” And then it all happened so fast. He had two degrees in his pocket, but one meeting with Adrien Zoller from the International Service for Human Rights was what really sent him in the direction he was looking for; that of human rights activism. “Adrien has very much inspired me. Through him I ended up with the Civil Liberties Movement, more specifically the South Asia Human Rights Documentation Centre; an Indian organization with its head office in New Delhi. I did not work there for very long. One day, I was able to go to Switzerland at the invitation of Zoller, to give human rights training. My boss suspected me of allying myself too closely with the political resistance of rebel groups who, at that time, were also attending the session of the working group on indigenous peoples at Geneva. It was a ridiculous insinuation. I will never take up arms, but that doesn’t mean I think that rebel groups must stay away from the discussion table, nor that shouldn’t fight a battle of a fundamentally political nature. To my boss, the political fight and the fight for human rights were two totally separate paths, whereas I in fact think that you cannot or should not separate the two. To me, politics is not the struggle for power between political parties, nor is it solely a parliamentary or governmental activity. Those are already derivative forms of the original political motive, namely reflecting on and dedicating oneself to an equitable way of coexisting. Anyhow, the disagreement led to a break. In 1996, I left the South Asia Human Rights Documentation Centre. In that year I also paid a visit to the Dalai Lama with Zoller. That was an inspiring moment. But in fact, I was in a lot of trouble back then: I had to go back to the isolated and torn apart Manipur, my Manipur, without work, without money. I knew which path I wanted to take and I knew that my dad was not happy with the direction I opted for. I was 26.”

Traitor

Back in Manipur, Babloo continued to do what he had done: working on political reform through human rights. Only now he did so within the physical reality of the armed conflict itself, not in the relative safety of New Delhi. “I set up a documentation centre at the local human rights group in Manipur called the Committee on Human Rights (COHR). We documented, according to strict standards and after accurate verification of sources, the rapes, executions, disappearances, massive population displacements and other violations that armed parties were guilty of. Documenting facts is crucial. It reduces the obscurity which benefits perpetrators of violence and which makes impunity thrive. The result, although not immediate and not spectacular, is unmistakable. For example, Amnesty International has used the fifty-five executions carried out by soldiers, which we had documented in a critical report. And our documentation work has also prompted the UN to formally label the Armed Forces Special Powers Act (AFSPA) as an emergency exercise violating the obligations under article 4(3) of ICCPR.² Also the legal proceedings which we have taken in the public interest, the so-called PILs,³ incited the Supreme Court in 1997 to impose on the army clear dos and don'ts regarding the implementation of the AFSPA. Although in practice this still hasn't been followed up, we do have an extra instrument with which to exert pressure.”

In 1999 Babloo set up his own organization, Human Rights Alert. The citizen's initiatives such as those around Sharmila, the processes of conflict transformation that he accompanied in the villages and the distinctly critical analyses with which he had been associated since then, endangered him more than once. He got labeled as ‘state disruptive’, a ‘traitor’ and ‘anti-India’ in the media and was also arrested a couple of times. Meanwhile, his reputation reached beyond the borders of India. His international reputation protects him at times. But then people close to him risk to pay the price, either in the media or in police cells.

Crux

How did Babloo deal with these types of charges? Firstly by taking terms such as ‘terrorism’ and ‘violence’ out of the immediacy of the dominating security debate and consequently holding them up to the light of half a century of repression in Manipur. “The crux is in the simple questions ‘what is a terrorist?’ and ‘what is a rebel?’. These are also historical questions. The political run-up to the origin of the Indian Union, which had a kind of last threshold in the North-East, is rooted in a deep sense of suspicion towards populations and communities which pursue a form of autonomy and identity; something which has already been the case in the isolated North-East for centuries. That suspicion is perfectly illustrated in the AFSPA. After the promulgation of that law, the mistrust has moved on to a formal criminalization of any political ambition which went in the direction of more autonomy. The consequences of that can be seen in the increase of officially listed terrorist organizations. In 1958 there was one large armed resistance movement, the Naga National Council (NNC), which at that time had approximately a thousand men. After the AFSPA, which legally freed up the way for tough repression, and which classifies those who oppose this repression as public enemies, dozens of underground movements are being formed. One by one they end up on the prohibited lists. Instead of opening up the political space in which forms and degrees of

² International Covenant on Civil and Political Rights.

³ Public interest litigation.

autonomy can be negotiated or at least discussed openly, central government completely closes off that space and gives in to its own paranoia. The reaction to this structured state violence, which is not just political in its nature, but goes hand in hand with economic and cultural oppression, is the secondary violence of the underground movements. It is not so much secondary because it would bring about less personal suffering and social damage, but particularly because, in the logic of violence, it is a consequence rather than a cause.”

“The apparatus of laws, administrations and institutes which have been established in the North-East over the past fifty years in order to protect ‘national security’, has totally alienated citizens from their rulers. Rather than protecting national security, more insecurity has been created. State security has removed the basis for human security and trust. This in turn is a threat to the government’s main concern, namely the security of the state of India. It has become a cycle.”

Paranoia

Paranoia is the political pathology with which, according to Babloo, the central government has always treated the North-East and which, according to him, has been propagandized into political correctness in the current security debate. Perhaps the political analogy of this psychiatric term can be pursued in the analysis of the cycle of violence in Manipur and of the destructive interaction between terror and anti-terror. Instead of working towards recognizing and understanding the disease, people who feel persecuted develop behavior which confirms their delusion. By eavesdropping in a blatant way they incite the whispering that they wish to hear. The environment becomes the symptom. The disease becomes remedy. As a consequence, the distinction between delusion and fact, betrayal and trust, enemy and follower becomes blurred. One of the many examples, given by Babloo, of security violence in Manipur is the ‘re-utilization’ of the captured or disarmed fighters of underground groups (UGs), as mercenaries in the military battle against terrorism.⁴ As with the ‘social’ deployment of civilians in army or rebel offensives and the entanglement between rebels and army, underground and aboveground elites in para-states and para-societies, the suppression of ‘evil’ with ‘evil’ turns the disease into the symptom and the conflict itself into the most essential factor of power. Paranoia breaks out on all sides, always justifying those who want to strike. In such circumstances, whoever exposes and denounces the use of violence, easily becomes the fool who risks the most.

“Since 9/11 suspicion has increased, also in Manipur, with the Prevention of Terrorism Act (POTA). This act was revoked at a later stage, but in essence replaced by the 2004 Unlawful Activities Prevention Act (UAPA). With this act, even more so than before, the emphasis lies on the intentions of the suspect, that might precede any punishable act or deed. In this context, talking about secession, discussing more political autonomy is already a form of terrorism. In Manipur every social debate concerns these matters. What does that mean? That the entire political space of a society is criminalized. That the reality of Manipur is blotted out by the political and military term ‘disturbed area’. That central government is eager to open up the North-East economically because of the raw materials in its soil, but politically pursues an active policy of isolation, of maintaining a terra incognita where it has free play, both politically and in a military way. That, for example, an eighty-year-old activist, who talks to the press about political independence, is arrested as a terrorist and with him the journalists who had written about him. I will name a couple of activists who put up a non-violent social fight and who have

⁴ Dignity and Human Security in Manipur, in: *Eastern Quarterly*, vol. 3, issue 1 (2005)

been arrested as terrorists. Mentioning their names is important. Take Hebal Able Koloï, Chairman of the Borok Peoples Human Rights Organisation, illegally arrested in October 2006 without a warrant and without charge. At a later date the police explained, referring to sections of the UAPA, that Abel Koloï ‘wages war against the state’. After a number of months, he was released on bail as none of the courts found the charges to be proven. New charges on the basis of the National Security Act also remained unproven. A good result, but the couple of months of detention and the torture endured cannot be undone by anybody. Sapamcha Kangleipal is the young chairman of Manipur Forward Youth Front and devotes himself to democratic freedoms and rights. He was arrested in May 2008. But it also happens in Assam. Take Lachit Bordoloi, arrested in February 2008. Lachit is chairman of the People’s Consultative Committee. He was one of the initiators of negotiations between the government and the United Liberation Front of Asom (ULFA), a radical armed resistance group. It was one of the many times that he was arrested.”

Elimination

Sapamcha Kangleipal’s case perfectly illustrates the entanglements in which activists can be caught up. Sapamcha is someone who continues to stir things up in order to keep the political discussion, negotiation and where necessary dissidence, open and alive. Thus, in September 2007, he organized a solidarity action for Irom Sharmila, the woman who has been on hunger strike for nine years as a protest against the AFSPA. In April 2008 he led a protest march; with six hundred young people he walked through districts where gatherings of more than five people are illegal. On May 7th of that year, after the government in Heirok started to deploy citizens in the military fight against insurgents, he discussed the implications of arming civilians in a small circle and criticized Chief Minister Okram Ibobi Sing. The Minister would not ‘repair security’ in Heirok, but ‘rape democracy.’ Sapamcha was arrested for disturbance. A week later he was cleared, but even before his release, the same magistrate re-ordered his arrest and imprisonment, this time on the basis of the National Security Act. For seven days Sapamcha refused to eat. He ended up in Jawahar Lal Nehru Hospital, the hospital where Irom Sharmila is also held. Six months later he made a successful escape. Shortly before his escape he told those who visited his sickbed that the police and armed rebels had supposedly mutually agreed to assassinate him.⁵

Leaders and activists such as the above- mentioned Lachit Bordoloi, Sapamcha Kangleipal, Abel Koloï and Babloo himself, place themselves in the ‘middle ground’, the political, moral and sometimes also geographical strip between the army and the underground. Where repression by legal or illegal rulers has restricted or closed this space, they attempt to open it up. It is their working area. Instead of constructively involving these advocates of the middle ground in peace or conflict-transforming processes, the government sides them with the insurgents and opts for a path of elimination.

Babloo: “Military elimination is an illusion. You can eliminate rebels and terror networks, but the government forgets that an armed resistance group exists by the grace of ideological and political attraction. Only when their ambitions share a common ground with the needs within a society can a small group of armed men develop into a resistance movement. The fact that fractured, ‘homespun’ rebel movements have already survived for half a century in Manipur, without actually having branches in foreign countries, proves that the insurrection is

⁵ Also see: Sandeep Pandey, Why did Sapamcha Kangleipal run away from custody? Citizen News Service, 4 February 2009. <http://www.citizen-news.org/2009/02/why-did-sapamchakangleipal-run-away.html>.

deeply rooted in Manipur society and touches upon existing and widely felt grievances and aspirations. The fact that there are no foreign connections also has to do with the fact that the rebels in Manipur cannot be pushed into the corner of religious extremism. The North-East is religiously and ethnically too diverse and too divided for that, no matter how much the Indian government would like to push the armed resistance into the corner of international religious extremism. Thus they look for other stigmas and incitements. 'Terrorism' as well as the use of child soldiers, which is becoming increasingly more sensitive internationally. It does happen that armed rebel groups recruit children in the villages, but sometimes cases are faked and used in the media to execrate and demonize the armed resistance. But what a government cannot hide is that the underground groups, no matter how discreditable, have their story of origin in the grievances of the generations from which I originate. That deep social root is the main reason why the central government wages a security war that holds the entire society hostage. But you cannot act against social injustice with weapons; you can only do something about it through dialogue."

Systems of violence

The dynamics of suspicion, which can make a security apparatus degenerate into a system of power that creates insecurity and where the original or formal intention creates a contrary reality, can also be seen in the growth process of underground movements. Many small resistance groups that develop into larger, organized systems of violence lose their original political ambitions in that growth. Babloo: "Within the armed resistance there is on-going competition between ideology and the need to be able to maintain a system of violence. In the first place this literally means to survive, but often develops into a system of self-enrichment and the formation of an elite. Here, too, you see that violence produces violence. Political violence becomes coarse violence. Arming, feeding and housing a couple of hundred or five thousand men are two very different things. In the latter case you must continuously look for new forms of extortion, intimidation and illegal methods in order to survive as a movement. It is inevitable that this will be at the expense, of the national state, but above all of the society in the area of conflict. Extortion is mainly a tactic of the smaller splinter groups. The larger UGs such as the UNLF or the PLA have their own agricultural land, fixed sources and supply lines."

"So you find yourself caught up in a spiraling tension: state repression stirs up the political and social dissatisfaction, from which the armed resistance originates and which in turn can only survive at the cost of that same society. Those who remain unarmed pay dearly in many respects for all those things that are supposedly at stake: security, peace and freedom, without violence bringing those things closer. Violence only reproduces itself."

In the cycle that renders the violence in Manipur permanent, people create new forms of understanding and daily living. As Babloo says: "People find a way to carve out a living within the conflict. Everyone just wants to live, marry, work and go to school; it's no different in 'troubled areas'. There are places in Manipur where the army and rebels are dependent on the same water sources. They make agreements about who is allowed to pump where, one in the morning, the other in the evening. Rebels, district civil servants, politicians, ordinary citizens, everyone meets everyone in the reality of local life and to a certain degree people adjust to each other's existence. Political enterprise even exists thanks to that obliging attitude which can take on the form of corruption or fraud. In the run-up to local elections you will see, time and time again, that politicians adopt a lenient attitude, with a soft security policy, and afterwards, once elected, they do an about-turn and adopt a more extreme attitude by following the hard line of New Delhi. The reason is that it is impossible in Manipur to elect a politician or ruler without the

support of a rebel group, purchased with bribes. The political and administrative class of privileged civil servants installed by India during previous decades in Manipur is a pliable instrument with which central government can fulfill its own agenda, but it has also become entangled in the networks and interests of UGs. Corruption maintains a system of reciprocal dependence between parties that formally continue to fight each other. Take the example of food distribution, the Public Distribution System, for which the government is answerable. When we denounced the level of corruption within that system, not only did the civil servants come down on us, but also the rebels, who handled a large part of that distribution and did not want their sources of income to be jeopardized. In short, existing types of administration keep those who profit from the conflict in the driving seat and automatically push them to higher positions of power.”

Opportunities

What ways are there to fight that spiral of corruption and violence? Babloo: “You can only do that starting from the bottom up, by working with people who live in the conflict.

It requires time, patience and perseverance. First of all, you must try to heal people’s self-esteem. Families who have been living a life of fear and dependence for decades have often lost much of their sense of self-respect and ambition. They were forced by circumstances to learn to bow to violence, to ‘trigger-happy soldiers’. Helping people to get an insight in the forms of exclusion and violence of which they are victims is a first step in this. Alongside this mental and social guidance and healing we follow the legal or human rights strategy. The strength of this is that we work in isolated areas with internationally recognized human rights, laws and resolutions. This gives us a certain moral weight. It’s an instrument that allows us, on the one hand, to apply pressure internationally, and on the other, within the isolation of Manipur; to create openings by making people aware of their own rights and choices. Human Rights Alert collaborates with the treaty partners of the UN, not so much the civil servants who represent their national governments, but the expert lawyers and investigators. Through these people and their reports we can get our message across to the outside world: that the AFSPA is a grave violation of the rule of law, that this same AFSPA is a racist law. Reports from the UN Human Rights Commission, Amnesty International, and Human Rights Watch legitimize what we do and create a resonance which is difficult for the Indian government to ignore.”

“What we are now working on, in silence, is the documentation of torture. Torture raises moral indignation worldwide, and there is a clear and internationally recognized criminal law prohibiting torture. In principle, we can make use of the Indian legal system and its institutions to denounce the practice of torture. This also works two ways: we fight against impunity and against violations, with means offered to us by the state, in order to bring charges against that state, its army and police.”

“You cannot denounce abuses and violations without offering alternatives at the same time. Sharmila has become such an alternative herself. Without aggression she has succeeded in getting the AFSPA onto national and even international humanitarian agendas and she was able to gain the support of many Manipuri by giving them a feeling of respect and self-esteem. That has a huge impact, also on those who carry the weapons. The real alternative is the dream or the vision of Manipur in twenty-five years’ time, where the change that we are working on now will have taken shape: a society from which the murky cloud of violence and aggression is cleared away. That is my roadmap. Sharmila, in all her serenity and spirituality, embodies that vision for

me, because she gives answers to the questions that most Manipuri's ask themselves: 'who are we?' and 'where are we going?' It is a vision which appeals to individuals on a personal level, but which also dovetails the political and societal ambitions and desires which live within a population."

"The response of the world to what happens in Manipur is still very limited, but it is growing. I have the feeling that we are about to reach some kind of breaking point. The government and the army are also applying more pressure. India is eager to open up the North-East and exploit its raw materials. It has already made a start with the construction of large train networks that are of economic importance. But according to the government, that widespread economic liberalization of the North-East can only succeed if the backbone of the armed resistance is broken, which in their eyes makes the need for military-enforced security only greater and, as I stated before, that cannot work. The economic and political pressure on the one hand, and the social and humanitarian pressure on the other are both intensifying. With great risks but perhaps also with the possibility of meaningful negotiations."

"There are many initiatives and networks of solidarity and, where necessary, social resistance amongst the population. Sometimes these initiatives receive support from international donors. But in international cooperation also hides a danger, because many international donors cooperate too closely with governments and prefer to support organizations and NGOs which have the approval of the political establishment. The security climate and the spirit of economic liberalization make them more likely to shun the dissident movements which are set up by basic communities themselves, such as the women's networks of the Meira Paibi. By playing 'safe', donors threaten to create parallel pseudo-social movements, which push aside original, local initiatives that are far more critical. NGO legislation reinforces this. As a donor you can only finance organizations that are legally registered and approved by the government.

So if you get foreign support, you can be sure that you will be strictly monitored to ensure that you are not going too far politically. In such a climate, the Meira Paibi, for example, can be seen as subversive, whereas they, not so much a formal organization, but more a grass roots movement, dare to fight atrocities and corruption in the villages and confront local rebels and negotiate with them. NGO laws make it impossible for foreign donors to finance movements like the Meira Paibi."

The devil in the church

Just as the aid industry can become an instrument that turns itself against those in need of help, the human rights circuit can also become a pitfall instead of a road that leads to more protection. Babloo: "In 1997, the Indian government created Human Rights Commissions in Assam and Manipur. They were government bodies, but we were nevertheless able to achieve some results via those commissions. We could, for example, learn from them whether complaints that we had submitted had been dealt with by the police. The Human Rights Commission was an intermediate body that made it easier to start criminal proceedings. We sent all our documents, in duplicate, to the Human Rights Commission and to the police. After confirmation of receipt by the commission, our documents were at least formalized. They formally existed... that helped. But in 2004 they put the devil in the church by appointing a high-ranking officer of the security service as member of the Human Rights Commission in Manipur. Afterwards it became extremely dangerous to hand over files to that commission."

Babloo's work and the points of view that he defends in meetings and in the press regularly put him in danger. "That was already the case when I started with Human Rights Alert. In 1997, I was arrested and questioned for hours by the police. I had not violated any law and they could not sentence me. The last arrest was in 2006 when, together with others, I helped Sharmila to escape from Manipur to New Delhi. First they wanted to detain me on the basis of anti-terrorism legislation, which was not possible, and later, because I would supposedly help Sharmila to commit suicide, which was similar nonsense."

"Sharmila's action in New Delhi was very important. It was an illustrative action because it shows that activism is a form of walking on a tightrope. Strategically we did two things at the same time. We took Manipur out of the shadows of the North-East and put it into the spotlight of New Delhi. The press turnout was enormous. But in our criticism on the Indian government and the AFSPA, we also simultaneously played on Indian nationalist feelings, by putting the emphasis on Sharmila's great example, Gandhi. Everything took place at the Gandhi monument. Had we not done that, I would possibly have been arrested for 'exaggerating and sensationalizing the conflict in Manipur', which is prohibited. Sharmila was simply arrested once again in New Delhi and locked up in a hospital there for a while. We are not anti-India; we do not fight against the Indian population. We are part of that population. Our fight is aimed against the institutions and the laws that the Indian state uses to brutally oppress Manipur for more than half a century now. But then we were attacked by the rebels in Manipur for what we did in New Delhi! I received death threats because I had supposedly 'Indianized' Sharmila with that stunt at the Gandhi monument. But when you receive criticism from both the state and rebels for the same action, as also happened after our criticism on the Public Distribution System in Manipur, it is a sign that you are really on the road to start a genuine social debate and to carve out democratic space."

Democracy and Civil Society

Interview: Civil Society Organizations Respond to Government Regulations in Ecuador

Susan Appe¹

Ecuadorian social entrepreneur and policy expert Orazio Bellettini Cedeño talks about civil society/state relations in Ecuador of recent. While the focus is on Ecuador, the interview illuminates concerns that are relevant across borders and in various regions, specifically about regulation of civil society and organizations within the sector.

In 2008, the Presidential Executive Decree No. 982 (Presidencia de la República del Ecuador, 2008) in Ecuador reformed the legal formation process of civil society organizations and created a new government-driven database of civil society organizations. The Ecuadorian state seeks to standardize and centralize information on civil society organizations for better regulation and coordination through the implementation of its Registry of Civil Society Organizations included in the Decree No. 982. Since the Decree No. 982, public discourse on civil society is seeing an all-time high in Ecuador with President Rafael Correa and other officials publicly discrediting nongovernmental and nonprofit organizations in public statements and several press conferences—targeting both national and international organizations. In May 2010 President Correa denounced the fact that there are more than 50,000 organizations with legal status in Ecuador, citing vast corruption among civil society in general (Flores, 2010; La Prensa Latina, 2010). In the last two years, civil society organizations in response have organized themselves in order to analyze and debate the role of civil society and its regulation in Ecuador. On February 10, 2011, a recognized leader in civil society who has emerged in the last several years, Orazio Bellettini Cedeño, was interviewed in his office in Quito, Ecuador.

Orazio Bellettini Cedeño is a social entrepreneur, public policy expert, and a think tank manager. He is co-founder and currently the Executive Director of Grupo FARO (FARO Group), a “think-and-do tank” that promotes the participation of citizens in the strengthening of the state and civil society in Ecuador through the design, promotion, and implementation of public policies that encourage equity and growth. Orazio graduated from the Escuela Agrícola Panamericana in Honduras with a degree in Agricultural Economy and has two Master Degrees in Political Science and Business Administration from the Pontifical Catholic University of Ecuador. In addition, he has a Master in Public Administration and Public Policy (2004) from the Kennedy School of Government in the United States. Orazio has worked with several national and international organizations building public-private partnerships for the provision of public services and the promotion of social and economic public policies in Ecuador, Mexico, Guatemala, Spain, and Paraguay, among others.

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Here, he talks about civil society/state relations in Ecuador of recent. While the focus is on Ecuador, the interview illuminates concerns that are relevant across borders and in various regions, specifically about regulation of civil society and organization within the sector.

Let's start with what the role of civil society has been and what it is in Ecuador.

Historically, Ecuador has been a country with a rich civil society and citizen participation. Indeed, it has been characterized by a culture of participation, and many factors could help explain this. It is a country where we have had—like many countries in Latin America—relatively weak states; therefore, communities have looked for other mechanisms to solve collective problems. Actually, Ecuador is one of the Latin American countries with the greatest density of civil society organizations.

The Ecuadorian civil society sector has had a long history, very dynamic and creative, in the sense that it has proposed ideas and new knowledge, often on the frontier of important debates. In the last twenty years, civil society organizations had provided several of the proposals for reform and institutional changes that were reached in Ecuador's new 2008 Constitution of Montecristi. Civil society organizations generated and constructed the social base for new ideas, so that today Ecuador has rights for nature and is very progressive in the realm of other rights—rights for women, rights to political participation, et cetera.

And what about some of the challenges for civil society in Ecuador?

I would say within the challenges, the sector reflects a characteristic of Ecuador that I consider, and FARO Group considers, one of the principal obstacles for Ecuador's development: the fragmentation of the country. It is a sector very fragmented with little cohesion, with little coordination, and this has definitely diminished its space. It has diminished its impact and its public presence. Because every organization, formal or informal, works from its own environment, while it might think about the sector, there is difficulty working in a cohesive, more unified way. This is a principal challenge for the sector, but this also occurs in the country elsewhere. Fragmentation is found among actors in the market and also within the state. Unfortunately, in Ecuador everyone still goes his or her own way.

In Ecuador, there is a lot happening now in the realm of civil society and civil society's relations with the state and other government entities. What changes are directly impacting civil society organizations in Ecuador?

Let's start with the recent Constitution. I would say that in the 2008 Constitution of Montecristi exists a strong tension. On one side it incorporates institutions that are quite democratized, in the sense that the Constitution recognizes citizen participation within public management. The democratized institutions found in the 2008 Constitution of Montecristi seem only conceptual but they have very concrete implications. That is, it suggests that "the public" is not only the state, but rather that there is a public space beyond the state. It is to say, "Hey, public decisions are not only up to the state. They do not only come top down. Rather, movements and citizens' participation are active in governance from below. The citizenry also forms the public." But on the other hand, in the same 2008 Constitution of Montecristi, there are institutions with concentrated power. They give a lot of power to the central government and more concretely, the executive branch.

Can you give an example of such concentrated power?

Yes, this is something that FARO Group works on. Under the Constitution of Montecristi, the period of time for the general public budget to be sent to the legislature from the executive is reduced from three months which we had before, and which exists in almost all Latin American countries, to now one month. It can be said that this reduced period of time for public deliberation does not only limit the time for the National Assembly but also reduces it for Ecuadorian society in general. It limits the time civil society has to question, “Will this budget really reflect political priorities, the preferences that we have as a society?” There is a concentration of power, as it gives less space for public deliberation.

There are other examples in the 2008 Constitution where concentrated power exists. For example, it prohibits the importation of transgenic products, but with an exception that the president can authorize it; it prohibits exploiting petroleum in protected areas, except when the president authorizes it. Why am I telling you this? Because the guidelines that regulate civil society organizations, the Presidential Executive Decree No. 982 of 2008, and the draft regulation proposed in December of 2010 by the Secretariat of People also reflect this tension between democratized institutions and institutions of concentrated power in very visible way.

Let's talk about these regulations for the sector.

When you read the introductions of these Executive Decrees, they talk about the respect and the promotion of participation, et cetera, but then in many other parts of the actual bodies of the regulations, there exists significant discretion, even a bit of authoritarianism in regard to the power to dissolve an organization when the organization is not aligned to the political project of the serving government. How is it possible that there is a regulatory project like this, while we have the 2008 Constitution? It is because the Constitution has within it a schizophrenic tension: democratization on one side, and extreme concentration of power on the other side.

The content of the regulations reflects this tension. On the one hand, it says we believe in the promotion of civil society but on the other hand, it demonstrates unchecked power to establish the “field of play” of civil society organizations in general, particularly to place organizations only within the realm of the national development plan. The regulations reduce the margin of important projects, infringe on and put in danger the right to associate and the right to expression which are fundamental in any democracy and more so for a country that has a Constitution like we have.

Today in Ecuador, regulations and laws are important. Ecuador has been a country with very weak obedience to the law, but I believe that this is changing. There is a very clear intention in the current Administration to implement regulations and public policies more effectively, and this is positive, definitely, because there is now more enforcement, respect for the law—the state has made rule of law a priority. Because there is this intention to enforce the laws and public policies, we have to be careful of regulations. Ten years ago, we might have said that regulations do not matter, no one adheres to them. But today we see changes. Civil society organizations are telling us that when they reform their statutes, they are told by government officials that they have to incorporate the requirements of the Decree No. 982. For example, the organizations need to recognize in writing that they cannot participate in politics or the organizations will be shut down. The regulations are actually being applied. Therefore, these regulations need to be of good quality and democratic. Regulations and rules that respect the Constitution and international agreements are essential.

Neither the Decree No. 982 nor the new regulation proposed satisfy what is laid out in the Constitution and in international agreements. This puts us in a position and in the right to demand better regulation, not to defend NGOs, it is not only about this, but rather it is in the defense of democracy, it is in the defense of the Constitution. Therefore, we have initiated the formation of a Collective of Civil Society Organizations that in the last year and a half has come to meet, to propose, and to demand—every time with, I would say, more public visibility—a quality regulation that the Ecuadorian democracy deserves.

The Collective of Civil Society Organizations, as it is informally now called, has assumed with the support of FARO Group and other organizations a role within the current discussion of the regulation of civil society organizations in Ecuador. Can you talk a little bit about the process that has been going on for the last two years or so? How has the Collective developed and strengthened?

Yes, to start, I believe that as I mentioned, because of the characteristic of fragmentation, it has been difficult in Ecuador to find an element that has unified civil society organizations, an element around which to form a Collective. From this perspective, the current regulation generated an enormous window of opportunity, because it affects all of us. Indifferent to the political left or right, whether environmental or human rights organizations or economic development organizations, it affects us all.

Another element that has been very important to the formation of the Collective is the need for multiple leadership. I believe that if there had not been multiple leaders driving the Collective, it would have been hard to maintain and strengthen it without a risk of monopoly by a single organization. Because of this, we have decided as a concrete strategy to rotate the location of the Collective's meetings. This seems to me to be very important. It is a small detail, but it shows the Collective as having multiple nodes and not only a single node. The organizations have been empowered, because the duty to host a meeting of the Collective signifies a responsibility, signifies a promise. I would say that this has been an important concrete strategy.

In the beginning, there was the challenge of getting to know each other, really, because as a sector we did not know each other well. I believe that these two years have been a time to generate trust. We have established that this is not a Collective where one organization tries to benefit or particular persons with interests only benefit. Rather, we are trying to think about the interests of the Collective, of the sector. This is easy to say and difficult to verify; the verification has unfolded in the process of getting to know ourselves. In the beginning, we felt that we were not ready to go out to the public, that we did not have a level of organizational maturity or a level of cohesion and trust. We met with each other quietly and with government officials on occasion. But this initial strategy—to meet behind closed doors with each other and government officials—had limitations.

So we have made a conscious decision to go more public. On January 7, 2011, we published a sector Manifest (OSC Ecuador, 2011). It was a political act in the sense that it said that organizations involved in the Collective know each other, they trust each other, and that they have four clear principles. Granted, the organizations are not in agreement of everything, but we are in agreement of these four things. I believe that this showed a common front towards the public and the government, but also toward the media. Editorialists realize that now, while not a formal Collective, at least we have shown a strong organizational presence. I believe that this

decision to go public was the proper strategy, the proper sequence, given the times. Maybe we took a bit of time, maybe we could have gone public earlier, but the situation unfolded like this.

The Collective is working on two objectives: accountability within the sector and regulations for civil society organizations in Ecuador. In the next several months, how do you see these two objectives developing?

First, I believe that we are going to meet around accountability mechanisms, and this is going to be another moment to make the Collective more visible. We are ready to say to the public: “Here we are, a group of organizations, and we are conscious of our responsibility. We command a space in the public sphere but we are conscious of the responsibility that this brings. We practice ethics, we have to show what we are, with whom we work, how much of a budget we manage.” We are now planning more public events to share our accountability efforts—more public acts that say, “Look, we are here to be accountable because we believe we are important to society. We are not embarrassed by our work. Rather, we feel proud of what and who we are.”

But also, more visibility will be an opportunity to transmit to the public our concerns about and our proposals for better regulation for the sector. The Collective believes that Ecuador deserves a regulation of the sector of the best quality possible. This is a second objective for us. We believe that such a regulation needs to be generated with extensive participation from civil society. For this, we, as a Collective, are going to assume the responsibility and promote a process of a collective construction of a draft regulation.

In the next several months, I see a process generating the draft regulation for the sector. It is not going to be easy, because we want to include the entire country. We want to do a number of public forums, hopefully, in all of the Ecuadorian provinces in order that the organizations across the country participate, that they see the importance to having a good regulation. Then after we have a proposal that we have discussed at length, we will converse with other actors such as the state and the private sector, in order to be sure that the proposal is solid. After this, we will initiate a process to collect signatures—25,000 signatures are required by the Constitution—in order to present the project of a regulatory law for the sector to the National Assembly. If we achieve this, I believe that the Collective will be at a new and different level, a level of maturity, proactivity, organization, and responsibility that until now we have not had the opportunity to show.

Let’s finish with a more abstract question. You have mentioned the importance of civil society in Ecuador, including its strengths and challenges. But as many reading this might not be familiar with Ecuador or Latin America in general, why do you think we should pay attention to what is happening in Ecuador now?

I believe that Ecuador is a country with an enormous richness in participation. It is a country where one can see clearly, let’s say, the public goods that have been generated by civil society. You could construct a case study of the importance of civil society within democracies like Ecuador, to show that civil society is not only an abstraction. Rather in Ecuador there is a very concrete story to tell about these organizations and their important role in public wellbeing. Specifically, Ecuador in the last few years tells a story of how an adverse environment, an invasive regulatory system that violates rights, can be broken. There are different ways to react, and here civil society has found that in the political and legal moment we are living right now, there is an opportunity to achieve something that we had not been able to achieve previously. Even with the rich history of civil society participation in Ecuador, we were not able to achieve

unity, we were not able to achieve cohesion. Therefore I believe one can see in Ecuador that civil society can develop strategies of survival and more importantly means to strengthen itself even within adverse environments.

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Article

The Financial Crisis and the Nonprofit Sector: Can Philanthropic Foundations Support the Creation of a Civic Watchdog of International Finance?

Lorenzo Fioramonti and Ekkehard Thümler¹

Introduction

The global financial crisis has been ravaging economies in Europe and North America, but it has also severely affected many other regions of the world, including some developing and emerging countries. The long-term consequences of this crisis are hard to predict, but governmental responses point to a general downsizing of the public sector that will inevitably result in layoffs and cuts in the social sector and welfare systems. Moreover, the events have revealed how fragile the whole European monetary system actually might be: within the European Union, Greece is the most recent example of a country brought down to its knees by a mixture of budget overspending and financial speculation (with Ireland, Spain, Portugal, and some other EU members facing similar risks). The drastic reforms announced by major economies such as the UK attest to the gravity of the situation. At least in some countries the economic crisis is likely to turn into a widespread social crisis, affecting citizens and civil society, even though in some cases it might give rise to new social patterns at the local level and stimulate cooperation between progressive actors in the public, private, and third sectors.

Over two years after the fall of Lehman Brothers, the world economy is still struggling with the largest recession since the Great Depression of the 1930s and fears of a “double dip” crisis. In spite of the turmoil, there is little evidence that we have learned the lesson. Surprisingly few reforms have been introduced to more effectively monitor and govern financial markets. Banks have resumed their old habit of paying obscene bonuses to their CEOs and top management (even when they sink clients’ investments and retirement savings), hedge funds keep operating mostly beyond control, speculation is back on track as it was before 2008, and all actors know that in case of a new downturn, taxpayers will pay the bill again.

The nonprofit sector has also suffered the consequences of the financial downturn. Public as well as private funding has shrunk, while social tensions are on the rise, thereby placing an additional strain on NGOs, voluntary organizations, and other nonprofit entities already running on tight budgets. As funding has started plummeting, proposals for a “bailout” for the nonprofit sector have been voiced in a number of nongovernmental forums across the Atlantic. The [Foundation Center](#), a U.S.-based service provider to philanthropic foundations, has set up a specific program to [focus on the economic crisis](#) in order to support nonprofits through the recession and help them strengthen their fundraising skills. A few other foundations have launched programs to help nonprofits adapt to the new financial climate and reorganize their business model in an age of austerity.

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Yet, a [survey](#) focusing on how U.S. philanthropic foundations have been supporting nonprofits during the recession paints a rather bleak picture: poor communication, ad-hoc initiatives, and little systemic help in responding to the real challenges of the downturn. Most foundations seem to act poorly and, often, in a piecemeal fashion, with little coordination across sectors. As regards overall financial support, the [giving forecast 2010](#) put together by the Foundation Center confirms the downtrend among the biggest American foundations: a significant number of big philanthropies have been cutting down their budgets due to reduced endowment income and sharp decline in asset value.

Whether or not foundations are effectively helping nonprofits muddle through the dire straits of the financial crisis, their mainstream approach appears to be reactive at best. What we find lacking is a proactive attitude by nonprofits and, especially, endowed grant-making foundations to see the crisis as an opportunity to critically review global economic mechanisms and respond to the call for an overall reform of the financial sector.

This brings us to the next level of analysis, which concerns the root causes of the current global crisis. The financial downturn was caused by reckless behavior on the part of a multitude of investment and commercial banks and financial service providers – private and public alike – exacerbated by the liberalization of financial markets, lack of effective public monitoring, and a generalized bandwagon mentality paving the way for mass investment in rather obscure financial products. Just like many investors and businesses, even some foundations were lured into high-risk investments and faced fraudulent deals. Notorious is the case of the JEHT Foundation, which lost the bulk of its endowment through Bernard Madoff’s “Ponzi scheme” and was forced to close down in 2009.

Against this backdrop, it seems fair to argue that tackling the root causes of the financial crisis (rather than focusing exclusively on some of the symptoms) would be an important and meaningful goal for civil society as such, and philanthropic foundations in particular. In the German weekly newspaper [Die Zeit](#), nonprofit specialist Helmut Anheier has argued that the financial crisis should be seen as a window of opportunity for foundations and called on them to “jumpstart” the creation of a watchdog organization to rein in financial speculation and provide civil society’s oversight of markets. Indeed, unlike other areas within society, the financial sector is virtually unchecked: not only does it take advantage of poor governmental oversight mechanisms, but it also thrives due to a strikingly limited presence of civil society actors. According to Anheier, philanthropic foundations possess all necessary qualities to support the development of a civil society infrastructure that might lead to the establishment of the “Greenpeace” of financial markets—that is, a transnational network supported by national chapters and significant grassroots participation, which would be a point of reference for citizens and other public advocates in order to become the public eye on global finance and counter the speculative tendencies of financial actors. Foundations have not only the financial resources, the political clout, and the communication tools, but also the autonomy and freedom to do the job. Building on Anheier’s appeal, we then asked: have foundations made any moves in this direction? What did they look like? Are there any organizational, economic, or political reasons why some foundations might find it difficult to play such a proactive role? And are there options to overcome these difficulties?

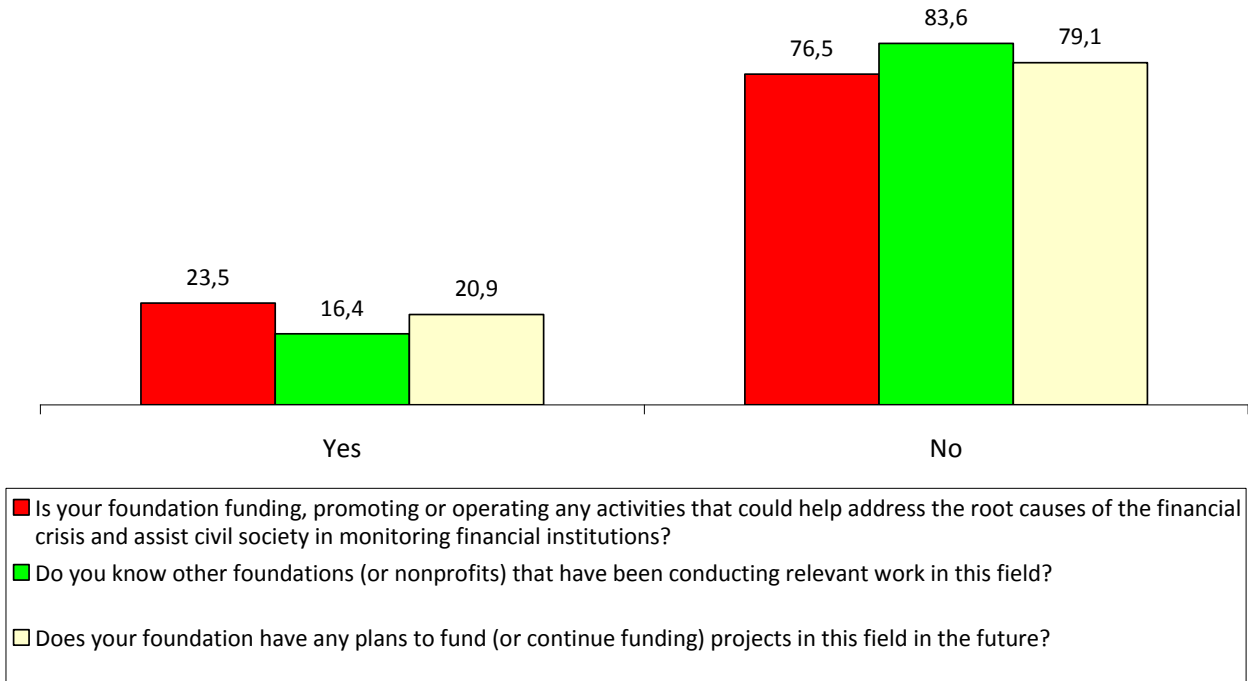
Addressing the root causes of the financial crisis

What can foundations do to address the root causes of the crisis (that is, the unaccountable and unchecked behavior of financial actors) rather than simply focusing on treating the symptoms (that is, the social impact of the crisis)? After all, so much social work, day-to-day community involvement, and other interventions in the social sectors have been wiped out by the economic downturn. Does it make sense to continue investing single-mindedly in social welfare initiatives, when the bursting of a financial bubble can easily plunge our countries into an economic recession threatening the very basic foundations of our societies? Shouldn't civil society become active in this field and learn from this experience so that it will not happen again? Can we expect at least some foundations (along with other public-good oriented institutions) to be the driving force behind such a civil society watchdog, in line with their proclaimed interest in serving the public good and being agents of change? For instance, can they provide the much-needed resources to build the necessary infrastructure so that civil society can bridge the information asymmetry and effectively monitor the behavior of financial actors? What foundations are more willing to take the lead? And what activities are they already supporting in this field?

With a view to answering these questions, we conducted an international survey of foundations based primarily in Europe (where the economic crisis is challenging the traditional welfare state) without excluding other regions of the world, from North America to Asia. We sent our questionnaire to more than 400 directors and other key staff of private foundations between November 2010 and January 2011, and received 85 responses. In what follows, we present some of our findings and a first tentative analysis, which is at the same time critical and encouraging.

The overall result of our survey is that most foundations are not active in this field. We draw this conclusion not only from the number of negative responses, but also from the feedback of those that did not complete the survey, arguing that the topic did not at all fit their areas of work. When the respondents are asked if their organizations provide funding, sponsor, or directly operate any activities/campaigns that may help "address the root causes of the financial crisis," a majority of respondents (over 76 percent) answers "no" (Figure 1). The number of negative answers grows even further when respondents are asked if they know other foundations that may be involved in this type of work: 84 percent provide a negative answer. The same trend holds true if we look at future developments: almost eight foundations out of ten admit not having any plans to fund (or continue funding) projects/campaigns that aim at addressing the root causes of the financial crisis.

Figure 1



Notwithstanding a large majority of respondents that appears to be insecure, indifferent, or uncommitted with respect to the role that civil society should play as a financial watchdog, some foundations (roughly a quarter of our sample) are involved in the field and have been promoting some type of initiatives and projects. The various examples they provided can be roughly grouped into three categories: 1) research initiatives aimed at rethinking our financial and economic framework; 2) advocacy campaigns aimed at promoting transparency; and 3) projects to support ethical investment.

Within the first group, we find – among others – references to initiatives such as:

- the [New Era Economics program of the Institute of Public Policy Research](#), in the United Kingdom;
- the New York-based [Institute for New Economic Thinking](#) launched by financial speculator and born-again philanthropist George Soros;
- the [High Pay Commission](#), investigating the salary gap in the public and private sectors;
- the [Task Force on Financial Integrity and Economic Development](#), focusing on illicit capital flows from developing to developed economies;
- the German initiative [Future Social Market Economy](#) and the admirable work of the [New Economics Foundation](#).

In the second category, we find references to campaigns such as:

- the [Bretton Woods Project](#) promoted by ActionAid to monitor the policies of the World Bank and the IMF;

- the [Tax Justice Network](#), fighting against tax havens;
- the Washington-based [Bank Information Center](#);
- the [Fair Pay Network](#), advocating for decent and proportional salaries;
- the British research and advocacy network [Corporate Watch](#);
- the initiative [Corporate Europe Observatory](#), focusing on the power of lobbies at the European level.

Finally, in the third group, we find campaigns such as:

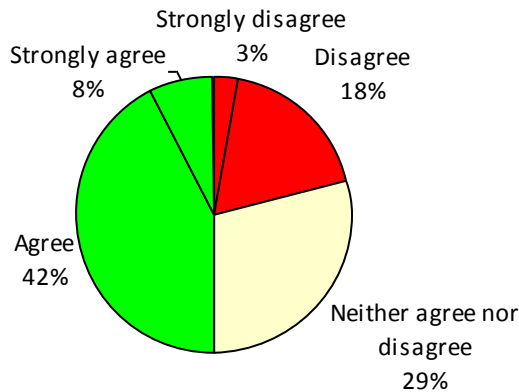
- the one-stop-shot for green and ethical finance [Your Ethical Money](#),
- the campaign for responsible pension investment to promote social change [Fair Pensions](#) and, among others,
- the [Social Business Tour](#) promoted by social entrepreneurs in 2010.

These are important areas of work and some of these projects are leading the way for more and more organizations to come aboard. Although often focusing on specific issues and only marginally on financial transparency and accountability, some of these initiatives may become interesting “incubators” to test the feasibility of an international watchdog movement of financial markets. Of course, a “Greenpeace moment” would require more support, more popular participation, and more outreach capacity. It would also need to play a more “political” role as well as adopt innovative advocacy strategies in order to stand out in public consciousness and influence citizens’ opinions and behaviors.

Problems of autonomy and willingness

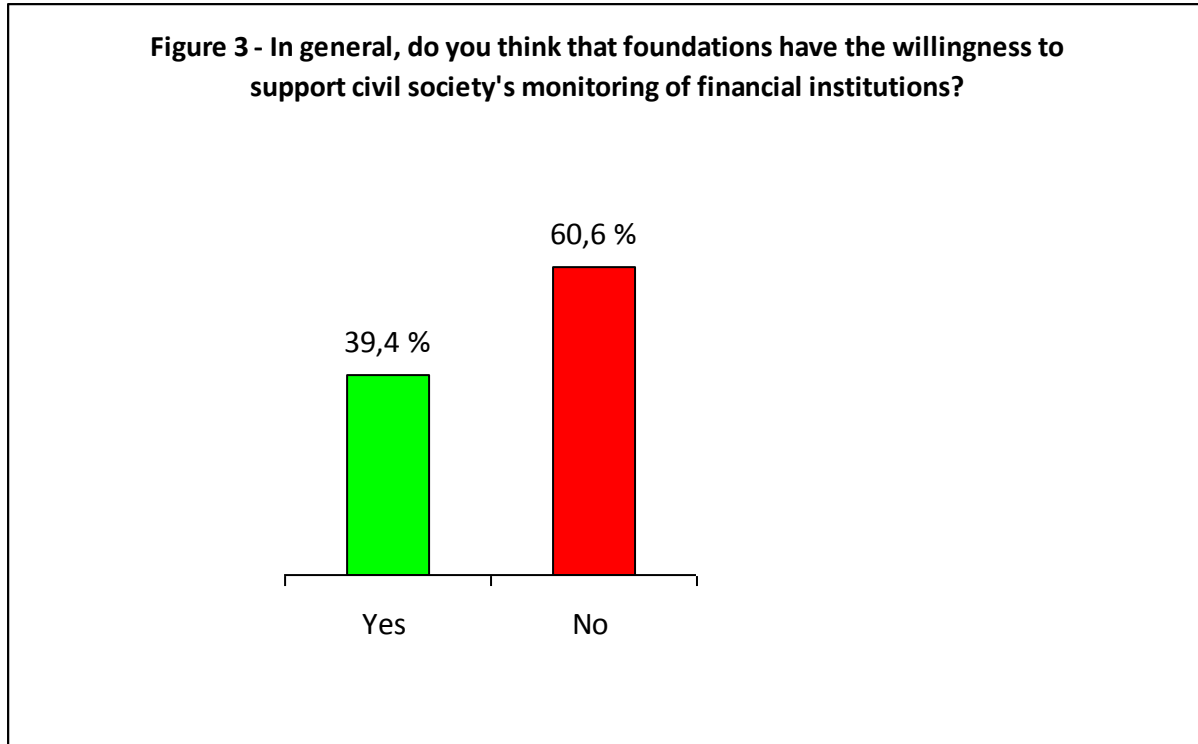
In the public discourse, foundations are often described as flexible and innovative public-good oriented organizations. In particular, the idea is that when it comes to the reaction to new societal challenges, foundations can be early movers, and that under certain circumstances they can more easily “get the job done,” while public institutions are often burdened by over-bureaucratic processes and political pressures. Our survey reveals that, with respect to the idea of promoting a civil society watchdog of financial markets, the opinions of the CEOs and key staff we interviewed can be divided into three camps. Fifty percent believe that “foundations possess the autonomy, innovative character, and resources to support civil society’s monitoring of financial institutions” (Figure 2, in green). Only 21 percent (strongly) disagrees (Figure 2, in red), while 29 percent neither agrees nor disagrees (Figure 2, in yellow).

Figure 2 - Do you agree with the following statement: "Foundations possess the autonomy, innovative character and resources to support civil society's monitoring of financial institutions"?



Let's go step by step. First of all, it is interesting to note that about one respondent out of five either disagrees or strongly disagrees with the idea that foundations are autonomous and innovative enough to support a civil society watchdog of financial markets. When looking at the explanations provided by respondents, we see a general acknowledgment that many foundations are actually risk adverse and "refrain from getting involved in new sectors." Some of them have been working almost exclusively on social welfare projects and their constitutions forbid them from entering new terrains. There are also issues with the boards of directors and "legal requirements that need to be fulfilled." Some argue that "the thematic focus of a foundation is hard to change."

Nonetheless, albeit a significant portion of respondents are not enthusiastic about the "autonomy, innovative character, and resources" of private foundations, at least half of them believe that foundations would be well equipped to take on the task. Then again, why have they not done so yet? In Figure 3, we report the responses to a question concerning the "willingness" of foundations to support a civil society watchdog of financial markets: over 60 percent of respondents provide a negative answer (Figure 3). Therefore it must be concluded that even some of the respondents that support the "autonomy and innovation" argument recognize that there might be some "willingness issues" at play. So, can we explain this lack of commitment?



Explaining why certain foundations might not want to get involved

A first set of answers focuses on the *demand side* of the problem—that is, the lack of an already existing and credible interlocutor in civil society: “civil society is not sufficiently organized nor knowledgeable to undertake effective monitoring of financial institutions,” “if there is a civil society group with a great proposal, we will fund it. But so far we haven’t heard anything,” “it is questionable whether civil society can truly fulfill a monitoring role as outsiders.” Another group points at the *supply side* of the problem—that is, the lack of a proactive role of foundations, highlighting that foundations have other missions, interests and goals than working towards the change of financial markets. There are also qualification issues at play. For instance, some respondents call into question the very idea that foundations are the right addressees for such a call. In their view “monitoring is the role of the state.”

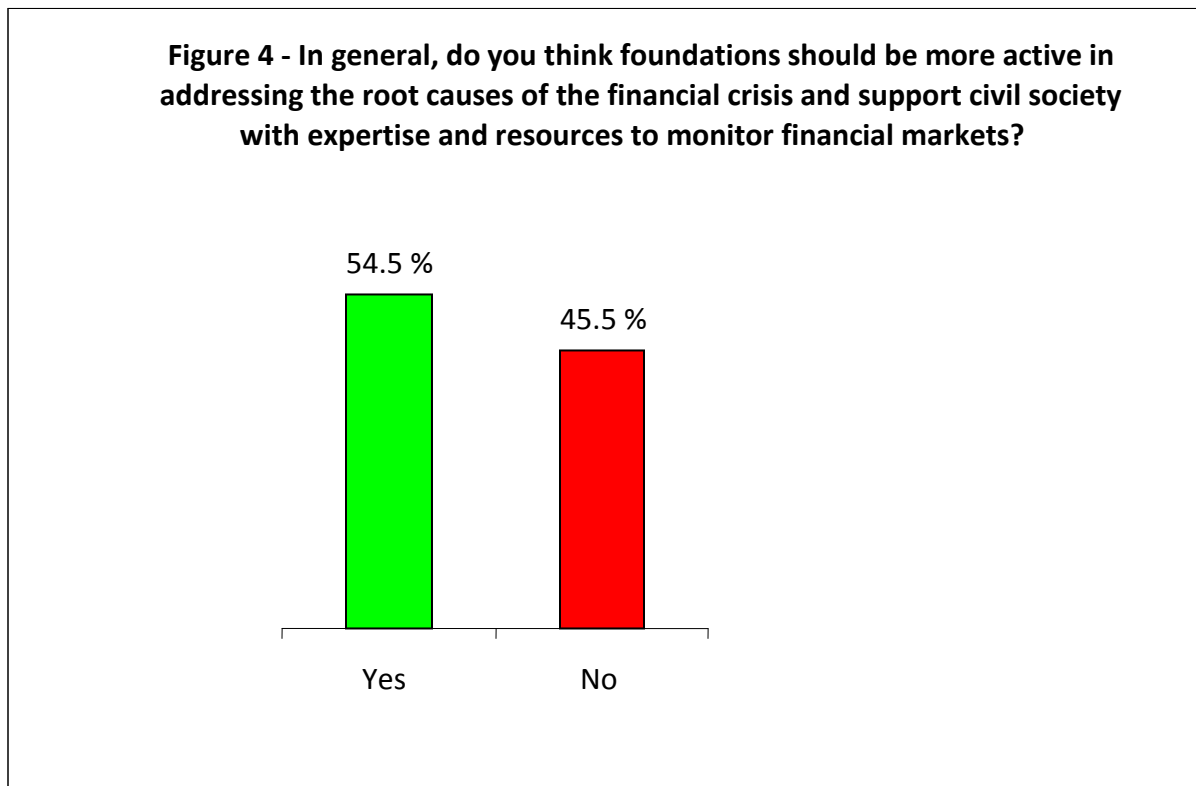
Others underline the lack of resources: “this is not what foundations have been established for. Therefore they lack the instruments and knowledge,” “given the amount of specialization required to monitor financial operations and the absence of control by public authorities, it would be presumptuous to think that foundations can help,” so that, in effect, “the lack of willingness to get involved may be the result of a rational choice.”

Another group stresses the limited power and capacities of foundations: “we are too small and too flighty to offer a true balance against the size, scope and power of financial institutions,” “I feel we are not confident that we can make a difference.” Some respondents point to a lack of interest: “while some change is under way, most foundations still aim to maximize investment income from their portfolios without giving attention to these important issues,” “the fact is that very few foundations pay much attention to how they get their own money, nor show a great interest in examining the financial and corporate sectors.”

And finally, there is the general tendency to prefer welfare issues and shying away from more “political” advocacy: “Foundations could play a key role here, but my experience is that few are interested. Welfare issues are much more attractive.” According to one respondent, most foundations have become reluctant to support controversial campaigns and any social movement that might challenge the status quo:

They have become afraid of controversy. It’s very sad. Recall the 1960s when it was Ford and other USA foundations to fund the civil rights struggle? Today Martin Luther King Jr. would never be able to get a grant, as he did then. I think it’s lack of will and interest, and perhaps a sense that government should do it.

It is interesting to note that most of our respondents acknowledge the limited commitment or active disengagement of their foundations. As illustrated in Figure 4, over 54 percent admit that their foundations should do more to address the root causes of the financial crisis (rather than its symptoms) and support civil society with expertise and resources to hold financial markets accountable to citizens (Figure 4).



Conclusion: what to do?

Obviously our survey does not offer a statistically significant representation allowing for easy generalizations. The foundation sector is a composite universe of hundreds of thousands of organizations, with different and at times competing agendas. However, we hope that this survey and the questions it raises will steer a more general debate about what civil society can do to monitor financial markets and act as a watchdog against its speculative tendencies. The task at hand is definitely complex and will require significant resources and knowledge. But the same can be said about a number of areas where civil society advocacy has covered significant ground

in the past decades. Advocating for human rights requires a lot of technical information, field research, access to secret documents, and also personal risks. Yet, this has not prevented civil society (and the foundations providing resources) from building a strong information basis, data, and global advocacy campaigns. Advocating for the environment necessitates significant research, expensive tools, and an excellent knowledge of biological and physical processes. Notwithstanding the challenges, the influence of environmental organizations and their capacity to affect political decisions is nowadays recognized by everybody. So, why shouldn't it be possible to do the same with the financial markets? Of course, there are a lot of politics and conflicting interests that need to be overcome, but the dramatic impact of the financial crisis undoubtedly calls for a new and dynamic role for civil society in this field.

Foundations can support this process in three ways that are not necessarily mutually dependent but certainly reinforcing. First of all, they should recognize the fundamental value of ethical investment, both in the way in which they accumulate resources ("where does the money come from?" "was it generated ethically?") as well as in the way in which they administer their own endowment and capital. It is no longer acceptable that foundations claiming to be concerned with the public good invest their resources in conventional (often high-risk) schemes. They should exclusively interact with ethical banks, use their pension funds to promote social welfare investments, and demand full transparency and accountability on the part of their banking counterparts. It might even make sense for foundations to scrutinize their salary scales – and, let's say, expenditures for housing and representation – according to principles of proportionality and appropriateness. By rethinking their internal functioning and their investment policies (and making all of this public), private foundations can already make first steps to reshape the financial system. These reforms are within reach of any foundation, big or small, international or local. Whether concerned exclusively with social welfare issues or some other area, these changes should be part and parcel of any public-benefit organization.

The second option concerns the pioneering if often rather small-scale initiatives identified by our survey, whose full potential may be brought to bear if foundations will make use of their convening capacity to connect such "disparate experiences" and provide a neutral locus for interaction, networking, and cooperation (at the national and the international but possibly even at the regional level).

Of course, the most innovative and courageous foundations can do even more, thus moving to the third level of action. By getting involved, directly or indirectly, to support civil society's action as a watchdog of the financial sector and sustain a full-fledged social movement, they may help citizens keep international finance in check, thereby strengthening our social welfare and, ultimately, our democratic societies. As underlined by the CEO of a foundation,

foundations are themselves crucially important actors of civil society and depend on the legislative framework and also the financial institutions which allow for their activities to continue. A critical civil society is a guarantor of transparency and good governance, and these are the two core values needed for the development of responsible financial institutions on which foundations depend to carry out their work.

In our view now, time has come for progressive foundations to take a bold stance, even if this implies abandoning the safe ground of uncontroversial gift-giving to move towards an

unknown and potentially contested territory. The global economic crisis might provide a unique once-in-a-lifetime window of opportunity for real change.

Although we have treated all foundations as a single, uniform entity, we are aware of how diverse the sector is in practice. However, we believe that the constraints discussed above might prevent only *some* foundations from getting actively involved in this “hot” field, while others – we hope – will find it easier to grasp the importance and timeliness of the task. Alliances have to be forged across various fields and actors within civil society in order to pull the best energies and resources together. This would also imply a stronger support for cutting-edge advocacy initiatives and a closer relationship with other social actors, such as grassroots movements, trade unions, and active citizenship organizations. Whatever civil society initiative might be born out of the ashes of the current financial crisis, it will need to grow organically, possibly from the bottom up, certainly fed by different springs and with participation from different sectors. Foundations should nurture this spontaneous process and help it get off the ground.

Needless to say, supporting such an alliance would require many foundations to rethink their role in society and become not only more “political” but also more critical of the problems caused by our economic systems. In this regard, this might also be viewed as a test bed of the scope as well as the limitations of foundations’ role in society. But if improving the quality of life of our fellow citizens and redressing social injustices are at the heart of the philanthropic impulse, then, given the abysmal impact economic misbehavior and aberration are exerting on the wellbeing of our societies, this is definitely a cause worth fighting for.

Article

The NGO Law: Azerbaijan Loses Another Case in the European Court

Mahammad Guluzade and Natalia Bourjaily¹

Introduction

On 9 October 2009, Azerbaijan lost a case in the European Court of Human Rights (ECHR) under Article 11 of the European Convention on Protection of Human Rights and Fundamental Freedoms (Convention). The case, *Tebieti Mühafizə Cəmiyyəti and İsrəfilov v. Azerbaijan*, addresses the dissolution of a registered public union.² This is the fifth time since Azerbaijan's ratification of the Convention in April 2002 that the ECHR has issued a decision against Azerbaijan on a case involving the freedom of association under Article 11 of the Convention. The purpose of this article is to provide a review of certain problems with Azerbaijani legislation relating to nongovernmental organizations (NGOs) that were identified in the case *Tebieti Mühafizə Cəmiyyəti and İsrəfilov v. Azerbaijan*, and to recommend how to improve Azerbaijani legislation based on international law and best practices.

History

Since 2002, citizens of Azerbaijan have submitted hundreds of applications to the ECHR. Many citizens faced problems with registering an NGO with the Ministry of Justice, as the authorized registration body. Domestic courts have not been supportive of NGOs and their founders in the lawsuits against the registration body. Frustrated founders have submitted several appeals for ECHR consideration relating, in particular, to problems with NGO registration. The ECHR swiftly resolved these cases with Azerbaijan losing all four considered cases: *Ramazanova v. Azerbaijan*,³ *Ismailov v. Azerbaijan*,⁴ *Nasibova v. Azerbaijan*,⁵ and *Aliyev and others v. Azerbaijan*.⁶ In all of these cases, the ECHR found Azerbaijan to be in violation of Article 11 (freedom of association) of the Convention. These four successful attempts of local NGOs to restore justice gave hope to many organizations having similar problems. Many similar cases relating to problems with registration of NGOs have also been submitted to the ECHR. As a result, the Government of Azerbaijan has improved the process of NGO registration, and has begun to settle issues relating to registration in favor of NGOs and their founders.

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² *Tebieti Mühafizə Cəmiyyəti and İsrəfilov v. Azerbaijan*, 8 October 2009, application no. 37083/03.

³ *Ramazanova and Others v. Azerbaijan*, 1 February 2007, Application no. 44363/02.

⁴ *Ismailov v. Azerbaijan*, 17 January 2008, Application no.4439/04.

⁵ *Nasibova v. Azerbaijan*, 18 October 2007, Application no.4307/04.

⁶ *Aliyev and others v. Azerbaijan*, 18 December 2008, Application no.28736/05.

The ECHR appeared to be an especially effective mechanism to address issues with realization of the freedom of association in Azerbaijan. We hope the most recent ECHR case *Tebieti Mühafizə Cəmiyyəti and İsrəfilov v. Azerbaijan*, and the articles and analysis coming in its wake, will contribute to improving the legislation relating to dissolution of NGOs in Azerbaijan.

Azerbaijani legislation on dissolution of NGOs

The Constitution of Azerbaijan delegates the power to dissolve an association exclusively to courts.⁷ In accordance with article 59 of the Civil Code of Azerbaijan, a legal entity may be dissolved by a court order, if:

- the legal entity was established with violation of legislation; or
- the legal entity engages in activities without the required permit (license) or in activities prohibited by law, or if it otherwise commits repeated or grave breaches of law, or if a public association or foundation systematically engages in activities that are contrary to the aims set out in its bylaws, as well as in other cases provided by law.

The Ministry of Justice, under Azerbaijani law, does not have authority to dissolve an NGO, including an association. However, the Ministry of Justice is required to supervise activities of NGOs to ensure that they comply with “objectives of the NGO Law.”⁸ When it determines that an NGO violates a provision of the NGO Law or other legislation, it notifies the organization in writing, instructing it to correct the violations. If an NGO is notified more than twice in one year for violations, the Ministry of Justice may apply to court for dissolution of the NGO.⁹ An NGO has the right to appeal a Ministry of Justice’s notification in court. However, in practice courts usually side with the Ministry of Justice taking into consideration only the Ministry’s findings and ignoring other facts presented by an NGO, such as whether a violation of a law took place in reality.

Case review

Tebieti Mühafizə Cəmiyyəti (TMC or Association), one of the first NGOs registered in 1995, operated until its dissolution by court in 2002. The local court justified its decision to dissolve the Association by arguing that its activities did not comply with the requirements of its own by-laws and domestic law. Specifically, it had not convened a lawful general assembly of its members from the moment of establishment. Before sending a dissolution request to the court, the Ministry of Justice issued several notifications to TMC in which the following violations of applicable law were listed:

- 1) not all members of the Association had been properly informed about the general assembly and thus had been unable to participate in it;
- 2) the Association’s local branches had not been equally represented at the assembly;
- 3) current membership records had not been properly kept and it was impossible to determine the exact number and identity of members; and

⁷ Article 58 (IV), Constitution of the Republic of Azerbaijan, 1995.

⁸ Article 31.2. of the NGO Law.

⁹ Article 31.4 of the NGO Law.

- 4) local branches of the Association had not held any regular local assemblies of members, and, as a result, members were unable to directly participate in governance.¹⁰

Before the ECHR, the Government of Azerbaijan stated that involuntary dissolution was the only sanction available under the domestic law against associations engaging in activities “incompatible with the objectives” of the NGO Law.

The European Court stated in the in TMC case:

A mere failure to respect certain legal requirements on internal management of non-governmental organizations cannot be considered such serious misconduct as to warrant outright dissolution. [...] The immediate and permanent dissolution of the Association constituted a drastic measure disproportionate to the legitimate aim pursued. Greater flexibility in choosing a more proportionate sanction could be achieved by introducing into the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits.¹¹

The ECHR underlined the following shortcomings of the NGO legislation of Azerbaijan in the TMC case:

- (i) The circumstances in which involuntary dissolution can be applied are not precisely defined;
- (ii) There are no alternative sanctions against associations engaging in activities “incompatible with the objectives” of the NGO Law; and
- (iii) There are no detailed rules governing the scope and extent of the Ministry of Justice's power to intervene in the internal management and activities of associations, or minimum safeguards concerning, *inter alia*, the procedure for conducting inspections by the Ministry or the period of time granted to public associations to eliminate any shortcomings detected.¹²

In this article, we will address each of the shortcomings identified by the ECHR and review relevant Azerbaijani legislation in light of international law and best practices.

(i) The circumstances in which involuntary dissolution can be applied are not precisely defined

In Azerbaijan, the legal provisions on involuntary dissolution of public associations are worded in rather general terms and may give rise to varying interpretations. For example, Article 59 of the Civil Code states that involuntary dissolution of a public association may take place if “the legal entity ... commits repeated or grave breaches of law, or if a public association or foundation systematically engages in activities that are contrary to the aims set out in its by-laws, as well as in other cases provided by law.”

Remarkably, the list of reasons for involuntary dissolution of NGOs is longer than the list for other legal entities. A public association and a foundation, but not a business, must be dissolved if it systematically engages in activities that are contrary to the aims set out in its bylaws, as well as in other cases provided by law. Taking into consideration that the law does not

¹⁰ Section 16, *Tebieti Mühafizə Cəmiyyəti and Israfilov v. Azerbaijan*, supra note 2.

¹¹ § 82, *Tebieti Mühafizə Cəmiyyəti and Israfilov v. Azerbaijan*, supra note 2.

¹² §§ 63-64, *Tebieti Mühafizə Cəmiyyəti and Israfilov v. Azerbaijan*, supra note 2.

set any limits on the purposes for which an NGO may be established, other than that the primary aim shall not be “generating profit,”¹³ NGOs may be set up and operate for any legitimate purpose. From the legal perspective, it is irrelevant how the aim of an NGO is defined in its own bylaws. The law does not (and may not) set any requirement on how the aim of an association may be defined. Therefore, it is common and appropriate that an aim is defined very broadly, such as “achieving public good” or “improving health care.” Even if an NGO’s bylaws set as a specific primary aim, for example, an “increase in literacy,” would it be illegal for an NGO to engage in activities other than educational activities? Certainly, an NGO should not be punished for engaging in legal activities simply because such activities are not explicitly spelled out in its bylaws.

Moreover, the NGO Law in Article 31.2 obliges NGOs to comply with the “aims” of the NGO Law, as defined in Article 1 of the Law. Obeying the “aim” of the law, as defined, not only the provisions of the law, is a confusing requirement impossible to consistently implement.

These confusing provisions allowed the Ministry of Justice to request the dissolution of the association for failure to organize its internal management, in contravention of international law and best practices.

We will briefly review the actual violations that were cited in the Ministry of Justice notices to the TMC and served as the basis for its dissolution. While states can set limitations on the freedom of association, including reasons for involuntary dissolution of an association, the list of such limitations must be short and well-defined. Freedom of association is not absolute¹⁴ and may under specific circumstances be restricted. Article 11, Paragraph 2 of the Convention sets the conditions for possible limitations. Restrictions on freedom of association may be allowed only if:

- a) the restriction is prescribed by law;
- b) it pursues a legitimate aim; and
- c) it is necessary in a democratic society.

All three conditions must be fulfilled cumulatively. Should any one of them not be met, the implied restriction will be considered in violation of the Convention.¹⁵ It is clear that, for example, when an association misses its deadline for conducting a members meeting, it does not create a danger to a democratic society, and therefore, there is no necessity to restrict the activities of the association in order to preserve the democracy. Such a violation of internal governance rules may not be used as the basis for involuntary dissolution of an association, as such an action is an impermissible restriction of the right to freedom of association.

In addition, none of the violations listed in the Ministry’s notification to the TMC serving as the basis for dissolution comply with the technical condition of “being prescribed by law,” not to mention others. At the time of dissolution of TMC, Azerbaijani law did not regulate such

¹³ Article 2.1 of the NGO Law.

¹⁴ One of the absolute rights guaranteed by the Convention is the right to freedom from torture, inhuman and degrading treatment or punishment embodied in Article 3 of the Convention. It is not subject to any limitations.

¹⁵ *On the Right to Freedom of Association Under the European Convention on Protection of Human Rights and Fundamental Freedoms*, Zvonimir Mataga, LL. M, Legal Adviser at the European Court of Human Rights; Strasbourg, October 2006.

issues as (1) how properly to inform members about participation in a general meeting or assembly, as the highest governance body of an association; or, (2) requiring equal representation of all association branches at the general assembly; or (3) how to keep membership records properly; or (4) setting the requirement for local branches of an NGO to call their own assemblies. In fact, Azerbaijani law complied with international law and practice by not regulating these issues. It was the intervention by the Ministry of Justice in the internal activities of the NGO that the ECHR identified as a problem. The ECHR considered that “it should be up to the association itself to determine the manner in which its branches or individual members are represented in its central governing bodies. Likewise, it should be primarily up to the association itself and its members, and not the public authorities, to ensure that formalities of this type are observed in the manner specified in the association's charter.”¹⁶

Neither of the violations cited in the Ministry of Justice’s notification, which served as the basis for the local court’s decision to dissolve TLC, met the legal conditions, and therefore, could not serve as the basis for dissolution of TLC.

(ii) *There are no alternative sanctions against associations engaging in activities “incompatible with the objectives” of the NGO Law*

Azerbaijani law contains only one sanction, dissolution, for associations that violate the NGO Law or their own bylaws. The issuance of more than two warnings in a year suffices for the launch of a dissolution lawsuit before the domestic court.

In the *Tebieti Mühafize Cemiyeti*, case the European Court underlined that “[...] involuntary dissolution was the only sanction available under the domestic law against associations engaging in activities ‘incompatible with the objectives’ of the NGO Act” and called this sanction “drastic.” Indeed, the Council of Europe Recommendations on the legal status of NGOs in Europe provide for dissolution of an NGO only in case of “serious misconduct.”¹⁷ Regrettably, the Azerbaijani NGO Law does not differentiate the seriousness of misconduct in the case of infringement of an NGO’s bylaws or legislation. For these purposes, Azerbaijan may benefit from the positive experience of other countries that do provide for alternative sanctions, such as fines payable by the manager of an NGO, for NGOs acting against the legislative acts described below.

In regards to international common practices, NGOs, including public associations, and their managers are subject to similar sanctions as other entities. The general rule is that if a sanction does not apply to a business, for example, for the failure to gather a meeting of shareholders, no penalties should apply to NGO for the same failure. Interested persons—shareholders in the case of a business, and members in the case of an association—may always bring a civil lawsuit if their interests or rights have been violated. Other than the dissolution of an entity, as a last-resort punishment against the most serious violations, the most common sanctions are fines against the management of either a business or an NGO.

(iii) *There are no detailed rules governing the scope and extent of the Ministry of Justice's power to intervene in the internal management and activities of associations, or minimum safeguards*

¹⁶ § 78, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, supra note 2.

¹⁷ § 44, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, supra note 2.

*concerning, inter alia, the procedure for conducting inspections by the Ministry or the period of time granted to public associations to eliminate any shortcomings detected.*¹⁸

As the ECHR noted, the NGO Law has afforded the Ministry of Justice rather wide discretion to intervene in any matter related to an association's existence.¹⁹ The NGO Law does not explicitly provide the Ministry of Justice with authority to audit NGOs. Instead, Article 31.2 states that "in case of actions contradicting the objectives of the present law, the relevant body of executive power [the Ministry of Justice of Azerbaijan] may in writing notify the NGO or instruct the latter to remove the violations." Currently, the Ministry of Justice may audit NGOs at any time, on any subject, and without any procedural safeguards at all, in order to verify that NGOs' actions are in compliance with the NGO Law. The Ministry of Justice, for example, may participate in the internal events of an association, request any internal documents, and demand provision of any information about an NGO or its managers or members. A broad and vaguely defined responsibility to watch for "actions contradicting the objectives of the present law" is burdensome not just for NGOs, but for the Ministry of Justice itself.

Azerbaijani NGO Law does not specify the minimum period the Ministry of Justice must give to an NGO for eliminating the deficiencies found in its statutory documents or internal management. Whereas under domestic law, the procedure for convening the general assembly of an NGO required at least two weeks,²⁰ the Ministry of Justice in its warning to TMC gave a ten-day period.²¹

The mere fact that the Ministry of Justice had special authority to audit such internal affairs already contradicts international common practices. It is critical to mention that in the vast majority of European countries, the authority in charge of registration of an NGO, and in particular, a public association, does not carry *any* responsibility to supervise the activities of a registered NGO. Its responsibilities in regards to a particular NGO end immediately after incorporating information about the newly registered entity into the registry of legal entities. Other government authorities are responsible for compliance with the law of entities and individuals, such as a prosecutors, police, fire inspection, or tax inspection, and carry supervisory responsibilities over certain activities of entities and individuals. (However, some specific requirements might apply to certain special types of NGOs, especially those eligible for substantial tax preferences, such as charitable foundations.)

Conclusion and recommendations

As the ECHR concluded in the *Tebieti Mühafize Cemiyeti* case, certain provisions of the Azerbaijan NGO law have assigned excessive authority to the Ministry of Justice to intervene in the internal activities of an NGO, and even to initiate its liquidation through a court when it has not violated the law. Such provisions, as illustrated in this article, do not meet international standards and best practices. Since the judgments of the European Court have binding force²² for Azerbaijan and they are treated as grounds for appeal of judicial decisions in both criminal and

¹⁸ §§ 63-64, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, supra note 2.

¹⁹ *Ibid.*, §§ 61-62.

²⁰ Article 25.6 of the NGO Law.

²¹ § 77, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, supra note 2.

²² In virtue of article 46 of the Convention.

civil cases (by the relevant decision of the Plenum of the Supreme Court of Azerbaijan²³), Azerbaijani authorities should seek a permanent and sustainable solution to the legislative deficiencies by introducing amendments to the NGO legislation rather than merely solving the problem of one NGO that won a case in Strasbourg.

In order to implement the decision of the European Court, and to avoid appeals to the European court similar to the TLC case, it would be beneficial if the following improvements were introduced into Azerbaijani legislation:

- specify and limit the circumstances under which involuntary termination may be sought in court. For example, we would recommend applying the same list of reasons for dissolution of an NGO as are applied to business under Article 59 of the Civil Code, by eliminating the provision: "...or if a public association or foundation systematically engages in activities that are contrary to the aims set out in its by-laws, as well as in other cases provided by law."
- clarify the competence of the Ministry of Justice in regards to supervision over activities of NGOs. Our proposal would be to take away such power from the MoJ, as no such supervision is currently applied to businesses. If this is considered inappropriate, we would recommend at a minimum (1) to apply to MoJ audits the procedure for government audits applicable to all legal entities, setting up procedural safeguards for NGOs and making audits more efficient for the Ministry itself; and (2) to set up clear objectives for audits. More specifically, we would recommend revising Article 31.2 of the NGO Law, replacing the words "in case of actions contradicting the objectives of the present Law" with the words "in case of actions contradicting the Law."
- introduce a timeframe for correction of deficiencies along the lines of the Ministry of Justice's notification letters (for example, three or four weeks from the day of receiving a notification letter); and
- introduce alternative sanctions for NGOs apart from involuntary dissolution—for example, fines imposed on the managers of an NGO, as is applied to other legal entities, or withdrawal of tax benefits or other privileges.

²³ Articles 455-456 of the Criminal Procedure Code (2000) and articles 431-1-431-3 of the Civil Procedure Code (2000) of the Republic of Azerbaijan.

Article

A Reflection on the Legal Framework for Civil Society in Nepal

Uttam Uprety¹

A. Introduction

Whether in formal or informal gatherings, open expression of thoughts has always played a key role in social transformation. Moreover, civilization and participatory democracy in any nation state are attributable to its commitment to basic human rights such as freedom of speech, association, and peaceful assembly. Hence for any developed and democratic state it is obligatory to ensure that its citizens enjoy human rights.

It has been proven in many cases that, while legal provisions do not ensure the freedoms of speech, assembly, and association, without such legal insurance people are unable to claim their rights. For a state to claim it is an “open society,” its citizens should be able to join hands for the cause for which they strive without state interference, regardless of the size, scope of work, or legal identity of their association. Moreover, it is widely acknowledged that society has been transformed as a result of collective actions regardless of whether such collective action is formal or informal in nature.

There are several reasons for a country to develop a legal framework protecting the right to associate freely. A state’s commitment to the international treaties and covenants to which it is a signatory may be a compelling force toward the adoption of an enabling legal framework that ensures the protection of freedoms of expression, association, and peaceful assembly.

Is it necessary for individuals and civic organizations to have legal identity to enjoy freedom? Remarkable numbers of vibrant social institutions are not registered with any formal state authority but are highly effective in social mobilization. However, it is worth considering that laws that permit groups to establish themselves as entities with legal personality strengthen these freedoms through guarantees provided for legal protection, possible specific benefits for registered organizations, and practical rights, for example, to open bank accounts, sue and be sued, and make contracts. Hence, the existence of a genuinely enabling legal framework will encourage such social institutions to have formal and legal identity and become more effective.

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The enabling environment for civil society is directly proportional to the governance circumstances of the state. Strong civil society makes the state accountable, whereas a democratic and accountable state ensures its citizens enjoy freedoms of speech, assembly, and association. Democratic society is inherently pluralistic and respects the rule of law. Civil societies play a significant role in supporting democracy and therefore the rule of law. Moreover, civic organizations provide an opportunity for communities with diverse ethnic, religious, cultural, and racial identities to come to the common platform and work together. The existence of an enabling legal framework makes it practicable for such social groups to function.

The civic sector, by virtue of its nature, is diverse. Generally, civil society organizations (CSOs) consist of mutual benefit organizations (MBOs) and public benefit organizations (PBOs). PBOs have a range of differing characteristics as well as some characteristics in common. Sometimes CSOs are categorized as operating organizations, donor institutions, or service providers. Thus a legal framework should permit, encourage, protect, and, to the extent appropriate, regulate the diverse organizations that make up the formal civic sector. Moreover, it should serve to balance the rights of individuals to exercise their freedoms and the need for protection of the public. Voluntary regulations, such as codes of conduct, for example, developed by CSOs themselves, also contribute by providing additional protections for members, participants, and the general public.

Background

Nepali Context

CSOs of various forms and types have been a vibrant vehicle for social transformation in Nepal, facilitating the democratization of society, rule of law, governance, and delivery of services to poor and marginalized groups. Democratization of the state is both the cause and consequence of the civil society movement in Nepal.

The emergence and development of CSOs in Nepal, particularly in the form of NGOs and interest-based networks, increased after the democratic movement in 1990. Before 1990, the political regime had policies that discouraged registering organizations and did not protect the freedom of speech and freedom of association. As a result, there were limited numbers of NGOs/CSOs in existence. In addition, most of the CSOs in existence were, in many ways, under direct supervision of the royal family members. Even so, these CSOs made significant contributions in restoring the democratic system.

Soon after the democratic movement in 1990 had overthrown the autocratic political regime and constitutionally guaranteed the freedoms of speech, assembly, and association, the number of CSOs began to rise. A conducive policy framework helped NGOs and community-based organizations to flourish and facilitated the formation of various interest-based networks later. Moreover, a second popular people's movement in 1996 further resulted in a favorable environment for identity-based associations and networks. However, it also created some challenges for the effective implementation of the legal framework. Because it does not accommodate a diverse range of CSOs, the prevailing legal framework's inherently limited scope is unlikely to facilitate the democratization process.

Nepal's civil society evolved into a vibrant movement for defending democracy and human rights during the people's movement in 2006, while the political parties were taking a

back seat in the King's autocratic regime. The vacuum of democratic movement was filled in by the NGO Federation, human rights organizations, and natural resource management networks, as well as women, indigenous people, and other marginalized groups throughout the country. The mobilization by these federations and networks created a common platform for promoting and extending democracy and justice. This collective and collaborative action was a major reason for the success of the movement.

CSOs: Image in Nepal

The broad concept of “a CSO” seems not yet to have been fully understood in Nepal. A large segment of CSO members do not actually consider themselves as “real” CSOs or part of the CSO community. Moreover, they identify CSO leaders essentially as politically motivated activists whose job is to pressure on the government on policy issues.

Despite enormous contributions and longtime involvement, CSOs in Nepal continue to suffer from the misconception of being cunning, donor-driven “dollar harvesters.” This negative image has partly been created by the media and partly by civil society members themselves. The media often presents CSOs as an urban-based “dollar earning group” that prefer a luxurious lifestyle. Accordingly, some CSO members are reluctant to introduce themselves as affiliated with the sector.

Growing international support has contributed to an explosive growth in the number of CSOs, while promoting criticism of CSOs as well. CSOs, in general, were expected to be more innovative, less corrupt, less bureaucratic, more efficient, and generally more reliable than government. Instead, they are often criticized for being non-transparent, donor-driven, and unreliable. This perception gives impetus to those who want strict regulations and restrictions on CSO operations. Significantly, some CSOs are blamed for working to spread Christianity, a damning accusation in the non-Christian Nepali culture.

Perhaps most important, CSOs in Nepal are being criticized for lack of accountability. A popular perception is that NGOs are in practice unaccountable to anyone not in government or private donor institutions. Transparency and governance are critical issues in this regard.

It can be said that CSOs in Nepal, despite operating in improved legal and political environments, have not been successful in winning the support of large segments of society.

- International Nongovernmental Organizations (INGOs) that operate in Nepal often raise the governance issue with respect to Nepali CSOs, while on the other hand some CSOs accuse INGOs for not being transparent themselves and for promoting the work of non-transparent organizations for their own interests.
- The antagonistic relationship between the government bureaucracy and NGOs at large has also played a role in the effort to defame the CSOs in Nepal. The antagonism arises both from the resource competition between CSOs and the government in some cases and from the relative freedom that CSOs enjoy in comparison to the bureaucrats.
- Nepali CSOs are also criticized for their apparent affiliation with partisan politics. While the ethical issue of conflicts of interest remains a valid concern, preventing CSOs from participating in partisan politics would violate their rights of speech, assembly, and association. A key area of exploration will be whether particular CSO activities are intentionally politically motivated or simply a function of poor internal governance.

Despite such allegation and counter-allegations, civil society in Nepal is on the rise, and even the government has accepted it as one of the key social agents with which it should partner. The core issue remains the need for a sound legal framework that will address the internal governance, transparency, and political issues within the CSO sector.

There are several types of CSOs in Nepal, including:

- NGOs
- Religious organizations
- Trade unions
- Social and cultural groups
- Identity-based associations
- Professional associations
- Networks
- Federations
- Trusts

Despite the range of CSOs, the sector faces considerable challenges. It seems that the concept of privately funded and managed public interest organizations is not well understood or widely encouraged. Moreover, corporate social responsibility is in its infancy. The legal framework for corporate philanthropy is unclear, and tax exemption is not guaranteed to promote public engagement. Raising funds locally is very difficult for local organizations in Nepal, and sustainability remains a vital issue for most CSOs. Though charitable contributions have been integral part of Nepali society irrespective of caste and religion, CSOs, other than religious associations, have not effectively mobilized local resources to the extent possible, largely because of their public image. The vast majority of people believe that NGOs and CSOs are supported financially by international sources, especially INGOs, and that they need no local support. However, research shows that local contributions are on the rise, especially those related to welfare work. Positive public appraisals of CSO operations have played a key role in promoting the sector and its contributions. The media plays a significant role in giving CSOs' activities favorable coverage, thereby encouraging others to contribute.

But “private” nonprofit organizations are very few in number, and they have been unable to persuade concerned stakeholders and, in particular, bureaucrats that they have a legitimate right to participate in making public policy and implementing public programs. The absence of a conducive environment makes it difficult to motivate CSOs to become involved in the areas of public policy and public programming.

The attitude of political parties towards CSOs remains unclear. They will support CSOs as long as they feel it is in their particular political interest. If a CSO has a different vision or approach from their own, politicians will blame the organization for being “anti-people” and supporting elite interests. (Of course, the organizations are free to make such a choice if they wish.) Recently, private sector CSOs demonstrated peacefully against an opposition political party for not following democratic norms or supporting progress. The opposition expressed its displeasure by saying CSOs were supporters of the establishment. Interestingly, the same

opposition parties were very supportive of those CSOs and their campaign as long as the CSOs were demanding the Government's resignation. On a similar note, CSOs were blamed for political activities targeting the Government.

Rationale and Key Questions of the Study

There is a growing concern among CSOs and people in general about the future of democracy, governance, and rule of law in Nepal. CSOs have demanded reform to the legal framework governing civil society for many years. Now, however, such change must wait for the new constitution to be drafted. Although the interim constitution contains clauses that protect human rights, democracy, and the rule of law as fundamental principles, these provisions must be ratified in the new constitution to make any significant contribution to CSO activity in Nepal. Political parties with contrasting ideologies and interests have made the situation volatile, and as a result the public is still uncertain about the constitutional guarantees of fundamental human rights. Frequent inter- and intra-party disputes that surface in public further increase such worries.

Despite their significant contribution, CSOs in Nepal continue to struggle. Although the sector successfully defeated proposed rules and regulations to further restrict CSO activity, verbal attacks on CSOs have been taken as attempts to justify CSO restrictions. NGOs, one of the key CSOs that appear in forefront of democratic movements, have been defamed and portrayed as *corrupt* and *dollar-harvesting groups*. Such characterizations damage CSOs as a whole. Developing the appropriate legal framework and requiring CSO compliance might help the sector replace the negative connotations, stop the attacks, and flourish in Nepal.

Now is the right time to review the legal framework for CSOs in Nepal and identify issues for advocacy. For the first time in its political history, the Nepali people are represented in the constitutional drafting process. However, the process has been delayed and there are still some key issues/principles to be agreed upon among the political parties. The issues are crucial and will have far-reaching effects in deciding the nature and scope of democracy, governance, and the rule of law in post-conflict Nepal. Moreover, despite the fact that political parties have expressed their commitment to respect fundamental human rights in the new constitution and to promote democracy and the rule of law, debate continues about the power-sharing and demarcation for the federal structure. The emphasis on federalism and power-sharing among the central and federal governments will also have an important impact on the legal environment for CSOs to function.

Another challenge facing the nascent government is managing a diverse population. CSOs can play an integral role by providing a social safety net for those sectors not adequately addressed by the government. Identity-based CSOs are especially adept at providing for underrepresented populations. Identity-based CSOs are usually treated as NGOs, despite differences in the issues they address and the methods they use.

The Society Registration Act 1960 was the first legal instrument in Nepal to legitimize the private sector's involvement in development. In 1977, the Society Registration Act was amended and renamed the Association Registration Act; it included clubs, public libraries, literary societies, self-help groups, NGOs, and cultural groupings. The Social Welfare Council, which replaces the pre-1990 Social Service National Coordination Council (SSNCC), was reconstituted and the Social Welfare Act of 1992 was promulgated with the mandate to facilitate,

promote, mobilize, and coordinate the activities of NGOs. Despite this new legislation, Nepal still lacks legislation that would provide an overall framework for civil society.

Due to the lack of a coherent civil society act and confusion of the government regarding its nature and functions, many civil society groups in Nepal are being treated as NGOs, and the establishment and functioning of a range of both mutual benefit CSOs and public benefit organizations are discouraged. Unlike NGOs and INGOs whose *de facto* and *de jure* operation in Nepal requires registration with the Social Welfare Council, civil society organizations operate under diverse mandates, and many of them work as unregistered informal organizations. For example, trade unions are registered with the Department of Labor, students unions with the universities, private consulting firms under the Department of Industry, and a few civic organizations with the Social Welfare Council.

Similarly, although government plans and policies claim to create a conducive environment for civil society, government involvement in the sector can be confusing and bureaucratic. First, Nepali NGOs must register with the Chief District Office and with the Social Welfare Council. Then, each NGO must submit progress reports to its District Development Committee, a local government body that must approve the progress reports before the organization's registration may be renewed for the next year. This complex system contributes, to some extent, to the poor functioning of civil society organizations in Nepal.

Moreover, philosophical questions are being raised about the origins of civil society in Nepal: Is the civil society rooted in the actual needs, experiences, and aspirations of Nepalese citizens, or do these organizations actually reflect the aspirations of donors and their aid conditionality?

Given the confusing legal framework, civil society in Nepal is likely to suffer more after the Constitutional Assembly finally sets the agreed-upon federal-state boundaries. The need for a clear legal and policy framework to ensure a conducive environment for civil society in the changed political atmosphere is clear.

With this backdrop, this study aims to answer following research questions:

- What are the provisions in the existing legal framework that regulate civil society activities?
- How does the existing framework support or hinder civil society's efforts to achieve its full potential?
- What changes in the existing framework would facilitate a more effective and efficient civil society?
- What could be the possible framework to strengthen civil society, especially in a federal structure?

B. Legal Frameworks in Nepal

Nepali CSOs are guided by several legal and policy documents. These include the Constitution, international treaties and covenants, the National Directorate Act, the Association Registration Act, the Social Welfare Act, the Good Governance Act, the Local Self-Governance Act, and various government plans and other policy documents. This section briefly highlights characteristics of those documents in regards to CSOs.

a. Constitution

The rapid rise in the number of CSOs in the recent past was a result of certain favorable developments.

The constitutional guarantees for freedom of speech, freedom of assembly, and respect for the International Declaration of Human Rights and other International Covenants are a key step towards the growth of the sector in Nepal.

The Constitution of the Kingdom of Nepal, 1990, was a milestone in this regard. Though the earlier constitution also had provisions to protect human rights, the Social Welfare Council (“SWC”), then chaired by the Royal Family, exerted such control over the general population that citizens were unable to establish CSOs of their choice without permission of the SWC. Some successfully registered CSOs had one of the royal family members as the “Patron” or “Chair.” The regime perceived CSOs as an agent of change that might enable people to raise their voices against the existing political system. The regime tried to control the number of CSOs and their activities. Although largely banned by law, political parties were successful in mobilizing people through civil society organizations. Political parties tried to make people aware of their fundamental rights.

Ever since the formulation of Constitution of the Kingdom of Nepal, 1990, and the people's movement, the state and political parties have been more positive towards civil society and its role in promoting the rule of law, governance, and service delivery at the community level. Accordingly, legislation has been more positive towards civil society, despite certain continued shortcomings and confusion.

In addition to listing substantive human rights and freedoms, national constitutions also often include procedural and institutional provisions that help to give effect to the substantive rights provisions. Thus, constitutions foresee systems for judicial remedy, lay down state responsibility for human rights protection and promotion, and establish independent national human rights institutions. Other provisions may relate to the incorporation of international human rights treaties in national legislation and their applicability and direct effect for individuals. Nepal has signed and ratified more than 20 important treaties. According to the Section 9 of the Treaty Act, 2047 BS (1991), all ratified treaties become the law in Nepal.

In Nepal, human rights are laid down as fundamental rights. Nepal has acceded to many international human rights instruments, and has set forth a comprehensive catalogue of human rights in the existing and previous constitutions. The Interim Constitution, 2007, is considered the most progressive of all the constitutions promulgated in Nepal in terms of the provisions related to human rights (mentioned in Part 3, “Fundamental rights”). In this constitution, Articles 12, 13, 16, 24, 25, 26, 29, and 31 relate to various individual freedoms, including the provisions of civil rights (rights to life, dignity, equality, freedom, etc.) and to political rights (rights to association, expression and exchange of ideas, participation in the state system, etc.). Similarly, Articles 12, 15, 27, and 28 protect economic rights (rights relating to the opportunity of proper employment, emancipation from hunger, the right to work for livelihood, the right to select one's own occupation, etc.). Articles 12, 13, 18, 19, 29, and 30 refer to social rights (rights to education, health and safety, medical facilities, maternal and infant health care, safety and security of children, etc.). Cultural rights (rights to participate in religious, cultural, and traditional practices without hurting the sensitivities and dignity of others) are mentioned in Article 23.

As per Part 3, Section (12): (3) of the Constitution of Nepal, every citizen shall have the following freedoms:

- (a) freedom of opinion and expression;
- (b) freedom to assemble peaceably and without arms;
- (c) freedom to form political parties or organizations;
- (d) freedom to form unions and associations;
- (e) freedom to move and reside in any part of Nepal; and
- (f) freedom to practice any profession, or to carry on any occupation, industry, or trade.

The Constitution has made the state accountable for fulfilling its responsibility towards international treaties. Part 4 of the Constitution requires the state *“to implement international treaties and agreements effectively, to which State is a party.”*

Similarly section 34 (“Directive Principles of the State”) provides:

(1) It shall be the chief objective of the State to promote conditions of welfare on the basis of the principles of an open society, by establishing a just system in all aspect of national life, including social, economic and political life, while at the same time protecting the lives, property, equality and liberty of the people.

(2) It shall be the objective of the State to maintain conditions suitable to the enjoyment of the benefits of democracy through maximum participation of the people in the governance of the country by the means of self-governance tribal, linguistic cultural or regional and to promote general welfare by making provisions for the protection and promotion of human rights, by maintaining tranquility and order in the society.

The Constitution has even foreseen the need to enact a legal framework that facilitates civil society. As mentioned in Section 35, under “State Policies,”

(19) The State shall pursue a special policy to regulate the operation and management of public and non-governmental organizations established in the country.

Moreover, the Constitution envisages popular participation in governance and democratic exercise. Part 17, Section 139, of the Constitution includes the “Provision for Local Self Governance”:

(1) Arrangements shall be made to set up local self governance bodies to ensure the people's exercise of their sovereignty by creating congenial atmosphere and thereby ensuring maximum peoples' participation in the country's governance, and also by providing services to the people at the local level and for the institutional development of democracy, based on the principle of decentralization and devolution of power.

As a part of the Constituent Assembly, several thematic groups are currently working to draft the key principles to be included in a new Constitution. Despite some disagreement over the demarcation criteria for the federal structure and priority rights for ethnic groups, the fundamental rights as already guaranteed by the current constitution will remain unchanged.

b. Act & Regulations

1. National Directorate Act

This is a special Act, and registration of entities under it may not be cancelled without an action of the cabinet. There are a few CSOs registered under this Act, including the Nepal Bar Association, Nepal Press Council, and NGO Federation of Nepal. Though the NGO Federation was initially registered under the Association Registration Act, it subsequently changed status and is registered under the National Directorate Act.

2. Association Registration Act

The Association Registration Act is the primary legal framework for CSOs in Nepal. Most of the CSOs in Nepal are registered under this Act. It was first promulgated in 1976 and has since been amended. However, CSOs in Nepal are not satisfied with its “controlling legacy.” The Act has not been able to address emerging issues and is not CSO-friendly in many ways. Hence, CSOs are demanding an update to the Act. Detailed provisions of the Act are discussed in the next section.

3. Social Welfare Act, 1992

After repealing the Social Service National Coordination Council Act, 1977, the Social Welfare Act was promulgated. The Act, as detailed in the preamble, provides a limited scope for CSOs to function, except in relief and service-delivery types of activities.

One of the important acts to regulate NGOs/CSOs is the 1976 Social Service Act under which most of the organizations are affiliated. While user groups are registered in their respective government authorities (line agencies)—such as Community Forest User Groups (CFUGs) in the District Forest Office and Water User Groups in the District Irrigation Office—all other organizations such as NGOs, federations, networks, professional associations, clubs, and community organizations are to be affiliated under the 1976 Social Service Act.

This Act (Social Service Act) was enacted during the autocratic regime that sought to control NGOs and ban political parties. However, the same Act remains in effect despite the dramatic political and social changes over the last two decades. The Act has created some problems in the changing political and social contexts of Nepal, for example:

- All organizations are considered legally to be NGOs and must register under the same Act, including sports clubs, professional organizations, federations and networks, religious groups, and development NGOs. Accordingly, the role of NGOs/CSOs in development is somewhat blurred.
- The Act creates confusion in categorizing whether an organization is an “NGO.”
- The Act limits its scope to a *welfare* (or “service provider”) approach to development, while most NGOs and CSOs have been advocating for a *rights-based* approach to development.

NGOs and CSOs in Nepal are lobbying for a new act, called the Social Development Act, which will properly categorize organizations based on their objectives and field of activities and interests.

4. Local Self-Governance Act

The Local Self-Governance Act has envisaged local government playing a pivotal role towards promotion of a CSO-friendly environment at the local level. It aspires to mobilize CSOs in democratization of the society, promoting transparency and accountability. To do so, it defines the functions, duties, and powers of two key local government institutions: the District Development Committee and the Village Development Committee (“VDC”).

As stated in Section 3on “Principles and Policies of Local Self-governance, “local bodies should be oriented towards establishing a civil society based on democratic processes, transparent practices, public accountability, and people’s participation in carrying out the functions devolved to them. Similarly, local bodies should encourage the private sector to participate in local self-governance by providing basic services for sustainable development.

Section 28 of the Act describes “Functions, Duties, and Powers of a Village Development Committee”:

“The Village Development Committee shall encourage consumer groups and other non-governmental organizations for the development and construction works to be done in the village development area and it shall have such works done through such groups or organizations.”

Similarly, the Act has clearly described one of the key functions of VDC: coordination with governmental and non-governmental agencies. As per section 47,

“In formulating its plans and service program, the Village Development Committee shall have to maintain coordination with governmental, non-governmental and donor agencies implementing different services and development program in the village development area.”

Moreover VDCs are given the responsibility of encouraging NGOs in many different aspects of development. As per section 51 of the Act,

“The Village Development Committee shall have to encourage the non-governmental organizations for the acts of identification, formulation, approval, operation, supervision, evaluation, repair, and maintenance of the village development program within each village development area.”

Similarly, local government is given the responsibility to supervise and approve the project implemented by CSOs. Section 53provides that:

“(1) After the completion of the project, it shall have to be examined, released and cleared as prescribed; (2) After receiving the information of the completion of a project from the project operating agency, the Village Development Committee shall examine, release and clear the project on the basis of the work completion report and the evaluation submitted by the technician.”

Very similar provisions exist for District Development Committees (“DDCs”), a higher level of local government. As per Section 204 of the Act, DDCs are supposed to coordinate with CSOs during annual planning. It explicitly states that:

“In formulating the integrated district development plan, there shall be held a meeting of governmental and non-governmental organizations implementing different

services and development program within the District and coordination shall be maintained between annual development plans.”

Similarly, it has a provision to mobilize community-based organizations, such as consumer's groups, in development activities. As per section 205 (4),

“The projects under the district level plan may be implemented and operated through consumers' group. The District Development Committee may, as per necessity, contribute to the implementation by obtaining external consultancy service.”

It defines the accountability of those CSOs to DDCs in Section 209 (4) of the Act:

“The consumers' group and non-governmental organization implementing the project shall have to give a report of the accounts of their transactions to the District Development Committee and the body implementing the project and the District Development Committee shall have the responsibility for getting the accounts audited.”

Despite the conducive policy framework, the absence of a legal structure and mandatory provisions makes implementing the policy framework ineffective. As a result, engagement of CSOs in development activities depends solely on the discretion of the individuals in the local government authority; it has not been something that CSOs can claim as a legal right.

5. Civil Rights Act, 1955

The Civil Rights Act, 1955, is a pioneering piece of legislation that guarantees the rights of Nepali people. As per the section 6 of the Act,

“Subject to the provision of the prevailing laws, all citizens shall have the following rights:

- (1) Freedom of expression and publication.*
- (2) To assemble peaceably and without arms and ammunitions.*
- (3) To run organizations and associations.*
- (4) To move all over Nepal without any obstacle.*
- (5) To reside and maintain household in any part of Nepal.*
- (6) To acquire, possess and sell property.*
- (7) To choose any profession, employment, industry or trade.*

6. Good Governance Act, 2007

The Good Governance Act reinforces the state's commitment to strengthen the foundation of democracy and, in turn, mobilize CSOs. As stated in the Act, the government of Nepal has specifically provided that the rule of law, respect for and promotion of human rights, participation of the people, transparency, and accountability may give rise to administrative actions. Further, Section 20 (1) of the Act says that the government may consult CSOs in a

Case Study:

NEPAN, a network of participatory development practitioners, was given responsibility for facilitating regional-level consultations to help draft regulations for the Senior Citizen Act. Similarly, while formulating the Act itself, the Government of Nepal consulted with key stakeholders, such as NEPAN and NNSCON, on aging issues.

matter of public interest when it is deemed necessary and solicit and acknowledge their responses when formulating a new policy or upgrading an existing one.

c. Policy and Program

National policy documents, such as five-year development plans, master plans, and long-term perspective plans developed after 1990, recognize the role of NGOs/CSOs as development partners. Those documents emphasize the promotion of participatory development through local user groups. The Ninth and Tenth Five-Year Plans recognized the role of NGOs as development partners, especially in the role of service providers. In another example, sectoral plans like the Master Plan for the Forestry Sector recognize the role of local communities in the management of particular resources. Community Forest User Groups (CFUGs) are given management rights over local forest resources, a move that has further facilitated the emergence and growth of thousands of CFUGs across the country. The CFUGs example demonstrates that a federated structure can provide a conducive policy and legal environment for interest-based networks and associations.

Three-Year Interim Plan, July 2007

The Three-Year Interim Plan formulated in 2007 reinforced the national commitment to democracy and the promotion of public participation. The challenges identified in the document include: to promote people's participation in the country's governance system by pushing forward decentralization and devolution, to make effective local-level service delivery, and to carry out institutional development of democracy from the grassroots level.

Moreover, the Plan recognizes that civil society and non-governmental sectors are becoming dynamic and empowered and are useful for the development process. One of the strategies adopted in the Plan is the "Promotion of good-governance and effective service delivery." Its goals are to strengthen the rule of law and state machinery; increase public participation, transparency, and accountability; create a corruption-free environment; and increase access for all Nepalese, including those traditionally excluded, to economic and social service delivery. As stated in the document, the private sector and civil society (including NGOs and community organizations) will be partners in development, and necessary laws, policies, and programs will be revised, formulated, and implemented to emphasize decentralization, institutional strengthening, and capacity development.

The plan has adapted various policies, including:

- *Public participatory policy will be adopted for the sustainable development, management, and use of the forest sector.*
- *Human rights and other provisions of United Nations and international declarations that Nepal has ratified will be implemented effectively.*

The plan states that activities will be implemented to make NGOs, communities, and the civil society active in the empowerment and development of the target groups. It further suggests that there remains a need for coordination with INGOs, as well as for evaluation of their contributions. The plan addresses some of the key issues for which CSOs in Nepal have been advocating. Action points described in the plan include:

- *Reviewing the Social Welfare Act, including Society Registration Act and other regulations, reforms will be initiated in structural and other domains;*

- *NGOs will be encouraged in social, economic and developmental activities as partners of development;*
- *After categorizing, NGOs will be mobilized in the area of their comparative advantage with a view to optimize their inherent capacities;*
- *One window system² will be made mandatory and facilitation effective. The Social Welfare Council will be developed into Social Development Council by making necessary institutional and procedural reforms;*
- *INGOs will be motivated to implement programs only through local bodies, NGOs and other community based organizations in forging close coordination with local planning process. NGOs will also be encouraged to actively engage in conflict transformation, peace building and in rehabilitation of those affected and displaced by the conflict.*
- *Mechanisms will be developed to monitor and evaluate the national and international NGOs regularly to increase their transparency and effectiveness.*

C. Specific Provisions for CSOs in Nepal

This section describes specific legal provisions that permit, encourage, protect, and regulate the range of civil society organizations. The existing specific legal provisions included in this section are related to Legal Existence of CSOs; Structure and Governance Prohibition on Direct and Indirect Private Benefit Activities of Civic Organizations; Fundraising; Reporting, Supervision, and Enforcement; Tax Preferences; Foreign Civic Organizations and Foreign Sources of Funding; and Methods of Voluntary Regulations. Legal provisions under each theme are analyzed based on the key principles as suggested in the Guidelines for Laws Affecting Civic Organizations published by the Open Society Institute.

1. Legal Existence of CSOs:

A. Establishment:

a. *Laws may require that certain specific acts must occur to create a formal civic organization.*

No person shall establish or cause to be established any Association without having it registered pursuant to the Association Registration Act. Moreover, according to the Section 12 of the Act,

“If an Association is established without having it registered pursuant to Section 3 or if an Association is operated without having been registered pursuant to Section 7, the Local Authority may impose a fine of up to Two Thousand Rupees on each member of the Management Committee of such an Association.”

b. *The establishment of a civic organization should require filing only a small number of clearly defined documents.*

Section 4 of the Association Registration Act provides that any seven or more persons willing to establish an Association shall have to submit to the Local Authority an application

² A single government authority to supervise and facilitate CSOs' activity.

setting out the following details on the Association, accompanied by one copy of the Statute of the Association, and with the prescribed fee:

- (a) Name of the Association,
- (b) Objectives,
- (c) Name, address and occupation of the members of the Management Committee,
- (d) Financial sources,
- (e) Address of the office.

c. Civic organization laws should be written and administered so that it is quick, easy, and inexpensive to establish a civic organization as a legal person.

The Association Registration Act, in most cases, is the only Act under which all CSOs are to be registered unless otherwise stated in other Nepal Law. As per the Section 16 (of Association Registration Act (Requirement of Registration or Establishment Pursuant to Other Nepal Law)):

“If any other Nepal Act contains separate provisions on registration and establishment of any Association, notwithstanding anything contained in this Act, such an Association must be registered or established in accordance with such Act.”

d. The establishment 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.

Subsection (2) of Section 4 provides:

“Upon receipt of the application referred to in Sub-section (1), the Local Authority shall make necessary inquiry, and register the Association, if he/she deems it appropriate to register the Association, and shall issue the certificate of registration.”

e. The rules for legal establishment should set short time limits within which the responsible state agency must act (e.g., a maximum of 60 days) and should provide that failure to act on complete applications within the required time results in presumptive approval. In certain situations (e.g., disaster relief), establishment should occur more quickly.

Subsection (3) of Section 4 provides:

“If the Local Authority makes a decision not to register the Association, a notice of such decision must be given to the applicant; and the applicant may make a complaint to the Authority specified by Government of Nepal against such decision within thirty five days of receipt of such a notice.”

f. The responsible state agency should be required to provide a detailed written statement of reasons for any refusal to establish a civic organization. Decisions to refuse to establish a civic organization should be appealable to an independent court. A reasonable time period should be available for such appeals. Where necessary, the civic organization law should specifically reinforce these rights.

Subsection (4) of Section 4 provides:

“Upon receipt of a complaint pursuant to Sub-section (3), the authority specified by Government of Nepal may, if he/she deems reasonable to register such Association upon making necessary inquiry, give an order to the Local Authority to register the Association; and upon receipt of such an order, the Local Authority shall register the Association.

As per Section 13 of the Act, CSOs may appeal decisions of the concerned authority in the Appellate Court, but the Act does not specify where to appeal a denial of registration.

g. There should be no extraneous requirements for establishment, such as a minimum endowment requirement for an association or other membership organization or a burdensome minimum membership requirement. Minimum endowment requirements for grant making organizations should be nominal.

As per Section 4, seven is the minimum number of members required to apply for the registration.

h. The permitted purposes stated in the law for formal civic organizations should embrace all activities that can legally be engaged in by individuals.

The Act’s Preamble states: “Whereas, it is expedient to make provisions on establishment and registration of social, religious, literary, cultural, scientific, educational, intellectual, physical, economical, vocational and philanthropic associations.” This language provides for the existence of both public benefit organizations (“PBOs”) and mutual benefit organizations (“MBOs”) but requires that all associations be non-political. Preventing associations from engaging in *partisan* political activities is not an unusual requirement in many countries. However, preventing activities in support of or opposed to particular *policies* is clearly a restraint on freedom of expression and prevents associations from raising issues related to their rights.

i. Civic organizations should be allowed to have perpetual existence (or limited existence, if chosen by the founders).

As per Section (1) of Section 5, “Each Association registered pursuant to this Act shall be an autonomous body corporate with perpetual succession.”

j. Both natural and legal domestic or foreign persons should be entitled to create civic organizations. Consideration should be given to allowing minors to participate as members in civic organizations.

Though minors are allowed to participate as members in civic organizations, foreign persons are not entitled to create civic organizations. All of the CSO members associated with an organization should submit their citizenship certificates when they apply for registration.

k. The law should clearly state the rights and duties incurred by a civic organization during the period of creation, including issues about transfers of property.

While there are no provisions governing transfers of assets during the period of creation, if the organization ceases to operate for any reason, properties owned by the organization will be transferred to the Social Welfare Council of the government.

l. Both mutual benefit and public benefit organizations should be allowed to exist.

There are number of MBOs and PBOs functioning as registered legal entities, including professional associations which are registered under the Association Registration Act.

m. As a general matter, membership in a civic organization should be voluntary; no person should be required to join or continue to belong to an organization.

The Association Registration Act does not mandate membership in a civic organization.

B. Responsible State Agency

a. The state agency or court vested with the responsibility for establishing civic organizations should be adequately staffed with competent professionals and be evenhanded in fulfilling its role.

There are insufficient staff and facilities in the responsible government agency to meet the needs of the burgeoning civil society sector. Moreover, the frequent transfer of staff hinders efficiency.

C. Amendments to Governing Documents

a. A civic organization should be allowed to amend its governing documents, without having to entirely reestablish the organization. Amendments should be filed with the responsible state agency.

“Section 8 of Association Registration Act, “Alterations in Objectives of Association,” states:

(1) If it deems it necessary to alter the objectives of the Association or deems it appropriate to amalgamate the Association with any other Association, the Management Committee of the Association shall prepare a proposal therefore and shall have to call an extraordinary general meeting pursuant to the statute of the Association to discuss the proposal.

(2) If more than two-thirds members out of the total number of members present at the extraordinary general meeting support the proposal, the proposal shall be deemed to have been adopted by the extraordinary general meeting.

Provided that, in order to implement the said proposal, prior approval of the Local Authority shall have to be taken.

Section 12 (4) provides:

“If changes are made in the objectives of the Association or the Association is amalgamated with another Association without obtaining approval of the Local Authority pursuant to Section 8, or if the Association performs any acts contrary to the objectives of the Association or fails to follow the directions given by Government of Nepal, the Local Authority may suspend or terminate the registration of such an Association.”

D. Public Registry

a. There should be a single, national registry of all civic organizations that is accessible to the public.

The Nepal Constitution guarantees public access to registry information. The Act governing access to registration information is in place, and therefore the public technically should have access to this information. However, in practice, there have not been many public inquiries about registration information, outside of media inquiries.

Unless otherwise stated in legislation, the District Administration Office is responsible for the registration of associations. However, the Social Welfare Council is meant to be a single national registry, but as the membership of the Social Welfare Council is not mandatory unless CSOs seek government funding or donor money, they are not required to affiliate with the Council. Hence, the government does not know exactly how many organizations actually exist and which are functional.

As per the Local Self Governance Act, Section 212, District Development Committees will function as information and records centers. The Act states:

“There shall be one information and records center in each District Development Committee to identify the real situation of the district and enhance the planned development process. Such information and records center shall have to collect information and records as follows:

(a) Updated objective report of each Village Development Committee, Municipality situated in the District and the District Development Committee....

(h) Description and progress of program of the non- governmental and private sector being operated in the district.

(i) Reports on study and research done in the District.”

E. Mergers and Divisions

There should be clear rules allowing, but not compelling, civic organizations to merge, divide, or modify themselves in ways that are permitted for other legal entities. There may be restrictions, however, on the ability of civic organizations to merge with for-profit entities or on the ability of PBOs to convert to MBO status through merger or division.

Section 8, Alterations in Objectives of Association, provides:

“(1) If it deems necessary to alter the objectives of the Association or deems it appropriate to amalgamate the Association with any other Association, the Management Committee of the Association shall prepare a proposal therefor and shall call an extraordinary general meeting pursuant to the statute of the Association to discuss the proposal.

(2) If more than two-thirds of the total number of members present at the extraordinary general meeting supports the proposal, the proposal shall be deemed to have been adopted by the extraordinary general meeting. Provided that, in order to implement the said proposal, prior approval of the Local Authority shall have to be taken.”

F. Termination, Dissolution, and Liquidation

The highest governing body of a civic organization, upon application, should be permitted to terminate the organization’s activities voluntarily, go through legal dissolution proceedings, and liquidate the organization’s assets pursuant to the decision of a court. Determinations to involuntarily terminate or dissolve a civic organization should be ordered by or be appealable to independent courts. A reasonable time period should be available for such appeals. Where necessary, the civic organization law should specifically reinforce these rights.

As per the Section 14 of the Association Registration Act,

“If an Association is dissolved due to its failure to carry out the functions pursuant to its Statute or for any other reasons whatsoever, all the assets of such Association shall devolve on Government of Nepal.

(2) In the case of the liabilities of the Association dissolved pursuant to Sub-section (1), Government of Nepal shall bear such liabilities to the extent that the assets of the Association cover [the liabilities].”

Section 20 of the Social Welfare Act, Subsection (1), provides:

“The Government of Nepal on the recommendations of the Council may suspend or dissolve the executive committee or those social organizations or institutions affiliated with the council or receiving economic assistance from the Council, if they do their business against prevailing laws or their own constitutions. However, a reasonable opportunity to provide an explanation shall be given to the executive committees before their suspension or dissolution.

Furthermore, Subsection (2) says

“The Government of Nepal may constitute an ad hoc committee from the general members of that organization and institution to carry out the business of that organization and institution until any suspension of that organization and institution is lifted, and until the constitution of new executive committee, when dissolved pursuant to Subsection (1).”

2. Structure and Governance

a. Mandatory Provisions for Governing Documents

Basic rights, limits, and powers of civic organizations should be defined by law. In addition, certain minimum provisions necessary for the operation and governance of a civic organization should be required in an organization’s governing documents. The requirements may be different for membership and non-membership organizations.

The Association Registration Act clearly defines the basic rights, limits, and powers of CSOs. Similarly, basic minimum provisions necessary for the operation and governance of a CSO should be a part of an organization’s governing documents. Sample governing documents for CSOs are made available at every District Administrative Office and those interested can make a copy. Organizations are encouraged to model their governing documents on the sample documents and maintain the key aspects, including section titles.

b. Optional Provisions for Governing Documents

A formal civic organization (through its founders or its highest governing body) should have broad discretion to set and change the governance structure and operations of the organization within the limits provided by law.

It is possible for an organization to change its governance structure and operations only with prior consent from the government authority. Organizations may not have fewer than seven members in the executive committee.

c. Liability of Founders, Officers, Board Members, and Employees

Founders, officers, members of the governing or management boards, and employees of a formally established civic organization should not be personally liable for the obligations of the civic organization.

Subsection 3 of Section 6:

“If any person including the member or employee of the Association commits any crime or wrong against the property, document, or reputation of the Association, the Association, any member of the Association, or the Local Authority may institute a case pursuant to the prevailing laws.”

Officers and board members should ensure that the organization operates within the requirements of the law (e.g., the Civil Code, the Labor Code, and other general laws) and should be liable to the organization and/or to injured third parties for willful or negligent performance or omission.

Every CSO must follow pertinent legal requirements. Even if not specifically mentioned in the organization’s governing documents, failure to comply with all existing laws will be considered as a violation of law. All staff and board members are supposed to comply with the organization’s rules and regulations, and violations of organizational rules and regulations should be dealt with internally. If a situation arises that was not envisaged when the organizational rules were drafted, the board of directors or executive committee should make a decision that will set a precedent for the future.

d. Duties of Loyalty, Diligence, and Confidentiality

a. Officers and board members of a civic organization should be required by law to exercise loyalty to the organization, to execute their responsibilities to the organization with care and diligence, and to maintain the confidentiality of nonpublic information about the organization.

A CSO develops its code of conduct and it applies to all staff members, as well as governing body members, and the code addresses these affirmative duties of officers and Board members.

b. The civic organization itself, or any affected person in the society, should be allowed to sue for redress of any violations of these duties.

CSOs have the right to sue to protect their interests. As per Subsection (3) of Section 5:

“The Association may sue by its own name and may be sued by the same name as an individual.”

e. Prohibition on Conflicts of Interest

As stated in Section (6) of Association Registration Act:

“(1) If any person, including a member or employee of an Association, misuses, possesses or holds up any property of the Association contrary to the statute of the Association, the Local Authority may obtain such property from such person who has misused, possessed, or held it up, and return it to the Association.

(2) A person who is not satisfied with the action taken by the Local Authority to return the property of the Association pursuant to Subsection (1) may appeal to the Court of Appeal.

(3) If any person including the member or employee of the Association commits any crime or wrong against the property or document or reputation of the Association, the Association, any member of the Association or the Local Authority may institute a case pursuant to the prevailing laws.

As per the Social Welfare Act, Section 22,

“The employees of the Council shall not be allowed to involve as authority or members of the executive committees of those social organizations or institutions affiliated with the Council.”

3. Prohibition on Direct or Indirect Private Benefit

Prohibition on the Distribution of Profits

a. Profits of a formal civic organization should not be permitted to be distributed as such to any person.

No CSO, especially a not-for-profit organization, is allowed to distribute profits.

b. Prohibition on Private Inurement

Employees, as well as officers, board members, and members of a civic organization should be permitted to be paid appropriate compensation for work actually performed for the organization, including appropriate fringe benefits and reimbursement for appropriate expenses.

The executive committee or board of directors shall decide/approve appropriate levels of compensation for employees, officers, and board members, in line with the existing fiscal policy of the organization. Traditionally, board members of a CSO serve without compensation. However, in those cases where board members are required to devote many hours to the organization and give technical input, organizations may pay board members appropriate compensation for their time. Such payments should be approved by the executive committee. Usually, board members are remunerated at no more than normal market rates.

A civic organization should be prohibited from providing special personal benefits, directly or indirectly (e.g., scholarships for relatives), to any person connected with the organization (e.g., founder, officer, board member, employee, or donor). Benefits may be made available to members of an MBO if they are made available on a nondiscriminatory basis to all members (e.g., special educational programs or life insurance plans).

Though the Association Registration Act and the Social Welfare Act do not specifically mention the issue, in practice conflicts of interest are resolved according to an organization's bylaws. The NGO Federation has developed a code of conduct that is useful as a model, but particular issues vary from organization to organization. Some mutual benefit CSOs work to promote the rights of specific groups of people and, despite their CSO legal status, provide benefits to some of their members, though they are founders and may be associated as board members. They provide such services and make benefits available to them solely because they are included in the classification of beneficiaries defined in the organization's statutes.

c. Prohibition on Self-Dealing

Any transaction (e.g., sale, lease, or loan) between a civic organization and any person connected with it (e.g., founder, officer, board member, member, employee, or donor) should be able to be consummated only after legitimate negotiation and only at a price and on terms that are not disadvantageous to the organization.

The Nepal Constitution and organizational financial policies and rules address the financial transactions between a civic organization and any person connected with it. The executive committee or board of directors is mainly responsible for ensuring that such transactions are fair. However, this remains one of the areas where CSOs are criticized, and clearer legal guidelines should be applied to prevent actual conflicts or the appearance of such conflicts.

d. Prohibition on the Reversion of Assets

a. No civic organization that has received significant funding from the public or the state should be permitted to distribute assets to its founders, officers, board members, employees, donors, or members upon its liquidation.

As per Section 6, Subsection (1), of Association Registration Act:

“If any person including the member or employee of an Association misuses, possesses, or holds up any property of the Association contrary to the statute of the Association, the Local Authority may obtain such property from such person who has misused, possessed, or held it up, and return it to the Association.”

b. An exception permitting distribution of assets to members upon dissolution and after the payment of all liabilities of the civic organization may be appropriate in the case of an MBO that never received significant contributions from the public (i.e., persons not affiliated with it as founders, donors, officers, board members, employees, members, or donors) or significant grants, contracts, or tax benefits from the state.

As provided in Social Welfare Act, when an organization ceases to function, the property is transferred to the government, through the Social Welfare Council.

4. Activities of Civic Organizations

Public Benefit Activities

a. Civic organization laws should allow organizations to qualify as “public benefit organizations” for the purpose of receiving special benefits from the state, such as special tax benefits or the right to compete for certain state contracts. Qualification may be accomplished through an application procedure to a specific state agency, such as the department of revenue, or a special commission set up specifically for that purpose.

Organizations are allowed to apply for a tax-exemption certificate. The Department of Internal Revenue is the agency that gives an organization its tax-exemption certificate once the required documents/evidence has been produced.

b. Determinations of public benefit status should not be time limited.

The tax exemption certificate is the only document required to demonstrate that an organization has public benefit status, and the certificate remains valid so long as the organization carries out its exempt/public benefit purpose.

c. All civic organizations should be permitted to engage in public benefit or charitable activities.

So far there is no legal restriction for civic organizations to engage in public benefit or charitable activities, provided the activity falls within the scope of the objectives mentioned in the organization's by-laws.

Public Policy and Political Activities

a. Civic organizations are key participants in framing and debating issues of public policy, and, just as is true for 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, civic organizations should have the right to criticize (or praise) state officials and candidates for political office. There should be no restrictions on the right of civic organizations to carry out public policy activities, such as education, research, advocacy, and the publication of position papers.

CSOs are involved in public policy to some extent. There are some success stories where civic organizations have been involved in policy framing. However, without mandatory provisions, participation depends on the discretion of the state authority and the personal will of officials.

b. Formal civic organizations should be permitted to engage in public-interest litigation.

Registered CSOs are allowed to be engaged in public-interest litigation, and there are several cases where CSOs have made government agencies accountable on public-interest issues through their exercise of legal procedures.

c. It may be appropriate to limit civic organizations with respect to activities such as fundraising to support candidates for public office or establishing candidates to qualify for public office.

Organizations are required to declare themselves non-political. An organization's statute should mention that the organization is "non-political" and does not support any specific political party, in order to be registered with District Administration Office.

Economic Activities

a. A civic organization should be permitted to engage in lawful economic activities provided that it is organized and operated principally for appropriate noncommercial purposes, and that no profits or earnings are distributed as such to founders, officers, board members, employees, or members. Such activities may be engaged in provided that any applicable requirements for licensing and permits are met.

Civic organizations are allowed to engage in lawful economic activities, provided that profits are used for the organizational benefit rather than distribution to individuals.

Economic Development Organizations

Laws should allow civic organizations to participate in economic development activities, such as microcredit, small business incubation, etc., through the borrowing and lending of funds. Economic development activities should be considered to be public benefit activities.

CSOs are, in many cases, involved in economic development activities. However, to start a microcredit cooperative, an organization must be registered under Cooperative Development Act. Nepal Rastra Bank also gives permission to selected CSOs to engage in microcredit activities

Licenses and Permits

Any civic organization engaging in an activity that is subject to licensing or regulation by a government agency (e.g., health care, education, social services to those living with HIV/AIDS) should be subject to the same generally applicable licensing and regulatory requirements and procedures that apply to similar activities of individuals, business organizations, or public agencies. If a permit is required for certain activities (e.g., a parade permit), including public policy activities, civic organizations should not be subject to requirements for obtaining permits that are more stringent than those applicable to individuals, business organizations, or public agencies. Licensing and permit requirements should not be used to stifle legitimate activities of civic organizations, including legitimate public policy activities

CSOs registered with the concerned authority are allowed to engage in activities that are subject to licensing or regulation by a government agency and, in some cases, government agencies partner with CSOs.

5. Fundraising

Permissible Fundraising Activities

a. Formal civic organizations should generally be permitted to engage in any legitimate fundraising activity, including door-to-door, telephone, direct mail, television, campaigns, lotteries, raffles, and other fundraising events.

The Home Ministry webpage states that one of its activities is to control public fundraising. However, with prior permission, CSOs are allowed to undertake certain fundraising activities. For some CSOs, a large part of their budget comes from locally raised funds.

Fundraising Activities – Limitations, Standards, and Remedies

a. It may be appropriate to require advance registration of public fundraising campaigns with a public agency responsible for issuing permits and, for in-person solicitations, issuing badges and other identification materials to the fundraisers. However, the government should not be permitted to screen or require approval of specific grants or sources of funds.

CSOs must obtain prior approval from the Ministry of Finance or the Social Welfare Council to receive grants from INGOs and other donors. Violations of this rule are subject to penalty.

b. Through either laws regulating fundraising or under rules established by voluntary self-regulatory mechanisms, civic organizations should be required to disclose publicly the way in which funds received from public donations are spent, and, specifically, the extent to which the funds raised are used or expected to be used to defray the direct and indirect costs of fundraising.

The Association Registration Act provides:

“Section 9: The Management Committee shall have to submit each year the statements of accounts of its Association to the Local Authority, along with the report of the auditor.

Section 10: (1) Examination of Accounts: (1) The Local Authority may, if it deems necessary, cause the accounts of the Association to be examined by an officer appointed by him/her.

(2) For the examination of the accounts pursuant to Subsection (1), the Local Authority may collect the fee in such a sum as may be determined by him/her not exceeding three per cent of the balance of the Association as shown upon the examination.”

c. General fraud and other criminal laws should apply to civic organizations and can be invoked if there is any misrepresentation or fraud in connection with the solicitation of funds from others.

Criminal laws and sanctions on fraud apply to all people, irrespective of their profession.

6. Reporting, Supervision, and Enforcement

Internal Reporting and Supervision

a. Civic organizations should be required to keep financial documentation, reports, and records of their activities. They should also be required to maintain records of meetings of their governing bodies.

The statute of a civic organization should mention who is specifically responsible for reporting. Unless this provision is thoroughly described in the statute, the organization will not be registered.

b. The highest governing body of a civic organization (e.g., the assembly of members or the governing board) should be required to receive and approve reports on the activities and finances of the organization to ensure that they are consistent with the purposes stated in its governing documents.

The Annual General Assembly of CSO, as set forth in its statute, is the forum where responsible persons present the reports on behalf of a CSO and get the Assembly's approval. Reports should also be presented to the District Administration Office when applying for the renewal process

c. Some organ of the civic organization (e.g., the governing board or an audit committee created by the governing board) should be given the responsibility, and each member of an MBO the right, to inspect the books and records of the organization.

Inspection policies are guided by the particular organization's policy and the self-regulatory system it has developed. Mostly, organizations create executive and subcommittees and give them the inspection duties.

d. Accounting records of civic organizations should be kept in accordance with generally accepted accounting principles.

Nepal has generally accepted accounting principles, developed by the Department for Fiscal Regulation, and these principles act as guidelines for both internal and external financial management for all organizations.

e. As a matter of good practice, any civic organization with substantial activities or assets should have its financial reports audited by an independent certified or chartered accountant, assuming such services are available at a reasonable cost. This should be a requirement for any sizable PBO.

This is a common practice and an external auditor should verify that financial rules and regulations are being followed. An external auditor is necessary for looking into the internal as well as external consistency of an organization's financial records at the end of each fiscal year (FY).

Reporting to and Audit by the Responsible State Agency

a. Any civic organization receiving more than minimal benefits from the state or engaging in a significant amount of public fundraising should be required at least annually to file appropriate reports on its finances and operations with the state agency that is responsible for general supervision of civic organizations.

As per Section 9 of the Association Registration Act:

"The Management Committee shall have to submit each year the statements of accounts of its Association to the Local Authority, along with the report of the auditor."

If the statement of accounts is not submitted pursuant to Section 9, the Local Authority may impose a fine of up to five-hundred rupees on each member of the Management Committee. Provided that, if a member produces a satisfactory evidence that he/she has tried his/her best not to violate Section 9, such a member shall not be liable to punishment.

Reporting to the responsible state agency, such as a District Development Committee or District Administrative Office, is a mandatory part of an organization's renewal application. Organizations are supposed to renew their registration within three months (after the expiry) of Nepali fiscal year. If they fail to register, they will be subjected to penalties, the amount of which will increase every year. If, for example, they fail to register for five years, they can pay a sum of Rs5,000 on the top of the regular yearly renewal fee (Rs500) in order to be renewed. Sometimes officers, in their discretion, can charge an Rs 500 lump sum for five years and renew the organization. Five years is the critical deadline because after five years of non-renewal, it is not possible to simply pay the fine and obtain a renewal. If not renewed for five years, the organization's registration will automatically be cancelled.

Section 18, subsection (5) of the Social Welfare Act says that the Council, if it so wishes, may inspect or cause to be inspected the accounts document along with cash and in-kind receipts of the social organization and institutions affiliated with the Council, at any time.

b. Reporting requirements should include a document retention policy that will enable the responsible state agency to adequately supervise the organizations required to file reports.

As per Section 10:

“(1) The Local Authority may, if it deems necessary, cause the accounts of the Association to be examined by an officer appointed by him/her.

(2) For the examination of the accounts pursuant to Subsection (1), the Local Authority may collect the fee in such a sum as may be determined by him/her not exceeding three per cent of the balance of the Association as shown upon the examination.

(3) It shall be the duty of the official, member and employee of the Association to submit the statement and documents or to answer the questions asked by the officer examining the accounts.”

c. All MBOs and small PBOs should be allowed to file simplified reports or none at all.

As per the Section 22 (2) of Social Welfare Act:

“Social organizations or institutions affiliated with the Council shall submit audit report, to the Council within the period of six months after the completion of fiscal year along with the detail descriptions of their work and activities.”

However, there is no reporting format so the CSO may choose to produce a simple report. Similarly to District Administration Offices and District Development Committees, Village Development Committees are supposed to receive reports by the end of every fiscal year for the organizations that are to be renewed in the next year.

Reporting to and Audit by Tax Authorities

a. Although reporting should be standardized as much as possible, it is appropriate for separate reports to be filed with the tax authorities. Different kinds of reports should be required for different kinds of taxes (e.g., income or profits taxes and the value-added tax or VAT).

The tax office has its standard format for all auditors to use. Moreover, CSOs are required to get a Permanent Account Number (PAN) and/or VAT number that is equally applicable for business sector. This practice discourages CSOs as it is a complex process, and many community-based organizations especially find it troublesome.

b. It is generally inappropriate for the tax authorities to examine any aspects of a civic organization other than those directly related to taxation (including whether the requirements for exemption from taxation have been satisfied) or the use of monies received from the state or the public.

Tax authorities do not examine any aspects of a CSO other than those directly related to taxation. Usually, the District Administration Office first reviews the audited financial report and, if it is not satisfied, it will not renew the organization.

c. Civic organizations with small amounts of income should be exempt from filing tax reports or allowed to file simplified ones.

Regardless of the amount of income, all CSOs are required to prepare financial reports to be audited.

Disclosure or Availability of Information to the Public

Any civic organization receiving more than minimal benefits from the state or engaging in a significant amount of public fundraising 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 responsible state agency, the tax authorities, or any licensing or regulatory agency and should permit anonymity for donors and recipients of benefits in addition to protecting other confidential or proprietary information.

Although CSOs are not compelled to disclose general finances and operations to the public, the Information Rights Act is intended to ensure that members of the public have the right to demand or obtain information on any matters that are consequential to themselves or the public. Section 27 of the Information Rights Act, Subsection (1), provides that

“Every citizen shall have the right to demand or obtain information on any matters of his/her own or of public importance. Provided that nothing shall compel any person to provide information on any matter about which secrecy is to be maintained by law.”

This provision is limited by Section 28 of the same Act:

“Except on the circumstance as provided by law, the privacy of the person, residence, property, document, statistics, correspondence, and character of anyone is inviolable.”

Special Sanctions

In addition to the general sanctions to which a civic organization is subject equally with other legal persons (e.g., in laws governing contracts and negligence), it is appropriate to have special sanctions (e.g., fines, penalty taxes, or the possibility of replacement of governing board members or involuntary termination) for violations peculiar to civic organizations (e.g., reporting violations, carrying on very substantial business activities, self-dealing, improper public fundraising practices, violations of expenditure limitations contained in tax legislation). Decisions to impose fines, taxes, or other sanctions, however, should be appealable to independent courts. A reasonable time period should be available for such appeals. Where necessary, the civic organization law should specifically reinforce the rights of notice and appeal.

Section 9 of the Association Registration Act provides:

“If the statement of accounts is not submitted pursuant, the Local Authority may impose a fine of up to Five Hundred Rupees on each member of the Management Committee. Provided that, if a member produces a satisfactory evidence that he/she had tried his/her best not to violate Section 9, such a member shall not be liable to punishment.”

As noted above, reporting to the responsible state agency, such as the District Development Committee and District Administrative Office, is a mandatory part of an organization's renewal application. Organizations are supposed to renew their registration within three months (after the expiry) of Nepali fiscal year. If they fail to register, they will be subjected

to penalties, the amount of which will increase every year. If, for example, they fail to register for five years, they can pay sum of Rs5,000 on the top of the regular yearly renewal fee (Rs500) and get a renewal. Sometimes officers, in their discretion, can charge an Rs 500 lump sum for five years and renew the organization. Five years is the critical deadline because after five years of non-renewal, it is not possible to simply pay the fine and obtain renewal. If not renewed for five years, the organization's registration will automatically be cancelled.

7. Tax Preferences

Income or Profits Tax Exemption for Civic Organizations

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

CSOs' income is generally tax free. Gifts (donations) and membership dues are not regarded as "income," while interest is taxed by the banks at source. If CSOs are providing services and are paid for that, they are supposed to pay tax unless they have a tax-exemption certificate, for which they must apply to the Tax Office.

8. Foreign Civic Organizations and Foreign Sources of Funds

Establishment and Supervision of Foreign Civic Organizations

a. A formal civic organization that is organized and operated under the laws of one country but that has, or intends to have, operations, programs, or assets in another country should generally be allowed to establish a branch office in that other country, and such branch office should enjoy all of the rights and be subject to all of the requirements of civic organizations in that other country.

Section 9 of the Social Welfare Act addresses the *Functions, Duties and Powers of the Council* and states:

(a) To run or cause to run the social welfare activities smoothly and effectively, to extend help to the social organizations and institutions and to develop co-ordinations among them and to supervise, follow-up and carry out evaluations of their activities....

(c) To work or cause to work as coordinator between Government of Nepal and social organizations and institutions....

(f) To work or cause to work as a center for dissemination of information and documentation to the affiliated service oriented organizations and institutions with Council....

(j) To make or cause to make contract or agreement with the local, foreign or international organizations and foreign countries....

(k) To collect grant from the national and international agency and to manage the received grant."

b. A foreign civic organization should also be permitted, if it wants a separate legal entity, to create a subsidiary or affiliated organization under the generally applicable civic organization laws.

Foreign Funding

a. A formal civic organization that is properly established in one country generally should be allowed to receive cash or in-kind donations, transfers, or loans from sources outside the country so long as all generally applicable foreign exchange and customs laws are satisfied. Such laws should not impose confiscatory taxes or unfair rates of exchange.

CSOs in Nepal are allowed to utilize resources from local as well as foreign sources. For foreign grants, CSOs must receive prior permission to receive funding from outside the country on a case-by-case basis.

As per the Social Welfare Act, social organizations and institutions wishing to receive any kind of assistance from the Government of Nepal, foreign countries, international social organizations and institutions, missions, or individuals shall submit a project proposal and application along with other details to the Council as prescribed. However, projects that shall be finished quickly and for up to Rs 200,000 may be undertaken with a simplified procedure. For these projects, organizations must only give prior notice to the Council, and after the completion of said work, a report should be submitted to the Council within three months.

(2) After receiving an application pursuant to Sub-section (1), the Council shall provide permission in coordination with the concerned ministry or agency within the period of forty-five days.

9. Methods of Voluntary Regulation

a. Methods and Subjects of Voluntary Regulation

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

CSOs in Nepal have a growing practice of developing and implementing a self-regulating code of conduct. For instance, the Association of INGOs in Nepal (AIN) has developed a Basic Minimum Standard. Similarly, the NGO Federation has also developed a Code for all of its member organizations.

b. The laws should permit, and society should encourage, the formation of umbrella organizations to adopt, promulgate, and enforce principles and standards of conduct and management.

A number of umbrella organizations, such as interest-based networks, federations, and alliances, are working in Nepal, and the legal framework in the Association Registration Act is open to all types of associations, unless otherwise stated in another Nepal Act.

D. Reflection on Existing Legal Framework

This section briefly reflects on the current legal environment for CSOs in Nepal. While doing so, key study questions are considered as well.

The Nepali constitution reflects its commitment towards all of the international treaties, covenants, and guarantees for freedom of speech, freedom of assembly, and respect for the Universal Declaration of Human Rights. The constitutions have foreseen systems for judicial remedy, laid down state responsibility for human rights protection and promotion, and established independent national human rights institutions. Other provisions in national legislation may incorporate the terms of international human rights treaties and their applicability to and direct effect upon individuals. Following the successful people's movement in 1990, the state and political parties have been more positive towards the civil society and its role in promoting the rule of law, governance, and service delivery at the community level. However, there remain some provisions and contradictions in legal frameworks that carry forward the legacy of a controlling mindset from autocratic regimes of the past.

Part 3, Section (12): (3) of the Constitution of Nepal provides that every citizen shall have the freedom to form organizations, unions, and associations of their choice. Apart from what is mentioned in the Directive Principles of the State to Promote Open Society, which encourages freedom of speech and association, the State has foreseen the need to enact a legal framework that facilitates CSOs.³

Apart from the constitution, there are several Acts that regulate the functioning of CSOs in Nepal. Principal among them are the Association Registration Act, the Social Welfare Act, and the Local Self-Governance Act. One Act that governs some of the key and leading CSOs, such as the Nepal Bar Association, the NGO Federation, and the Nepal Press Council, is the National Directorate Act.

The Association Registration Act is the primary legal framework for CSOs in Nepal. It was first promulgated in 1976 and since has been amended. However, CSOs in Nepal are not satisfied with its “controlling legacy.” While most CSOs are registered under this Act, it has not addressed emerging issues and is largely not “CSO-friendly.” Hence, CSOs are now demanding to update the Act to meet current conditions. Detailed provisions of the Act are discussed in next section.

Similarly, the Social Welfare Act, 1992, is another key legal framework that regulates CSOs in Nepal. This Act is criticized for treating diverse CSOs as “NGOs” and hereby creating confusion and limiting its scope to a “welfare” (service-delivery) approach to development. Hence CSOs in Nepal are lobbying for a new Act in the form of a Social Development Act that can properly categorize organizations based on their objectives and fields of interests.

Other policy documents and programs have repeatedly emphasized the need and the state's commitment to create a conducive environment for CSOs to function. As a result, formation of CSOs is skyrocketing. At the same time, it has been very difficult to facilitate the enabling legal environment as stated in 3rd Interim Plan. However, CSOs blame the government for taking a “use and throw away policy. Due to the poor implementation of the plan and

Case Study:

Madhesi Janaadhikar Forum

was established in 2004 as human rights NGO in Terai aiming to work for the rights of marginalized Madhesi people. When they felt their issues were not addressed they had pressure from the public to call a strike. The strike continued for 29 days. During the Constitution Assembly election, this NGO was registered as a political party.

³ Part 4, section 35 (19) of the Interim Constitution.

policies, CSOs are suspicious that the government strategically is making a policy and program to demonstrate its commitment to the international community as well as local stakeholders, but has no will to implement these policies and programs. Frustrated, one of the CSOs established as human rights NGO later turned out to be a political party.

Legal Existence of CSOs

Registration has been made *mandatory* for any CSO to be established. Forming a CSO without registering it is considered a violation and is subject to penalty. The application process requires filing certain essential documents. Primarily, all CSOs are to get registered under the Association Registration Act unless otherwise provided by law. No date is fixed for the submission of a registration application, or for the Local Authority to issue notice to the applicant if the association fails to register. On the other hand, the Act has made a provision for appealing any such decision. With this provision the applicant may make a complaint to the Authority specified by Government of Nepal against a notice of failure to register within thirty-five days of receipt of the notice. Upon receipt of a complaint the authority specified by Government of Nepal may, if he/she deems it reasonable, register such Association upon making necessary inquiry, or order the Local Authority to register the Association; and upon receipt of such an order, the Local Authority shall register the Association.

Such a mandatory registration requirement for CSOs constitutes a clear violation of the freedom of association, placing an impediment to free association. The sole reason for an organization to seek registration is in order for it to obtain legal personality, with all the rights and opportunities that status provides. If a group wishes simply to associate for its own purposes, the freedom of association to which Nepal has agreed as a nation should permit such a group to form, without constraint, if the group does not desire tax benefits, licenses, and or limited liability. The mandatory registration requirement appears to be intended to enable state control over the entity, rather than facilitating its functioning.

Another restricting provision that reflects controlling legacy inherited from past autocratic regimes is the condition that compels CSOs to declare their purposes as “non-political,” when “political” is defined so broadly as to apply to any group that expresses views on policy issues, and is not limited to preventing partisan political activity by CSOs. Otherwise, the condition is susceptible to misuse to control the advocacy activities that typically address policymaking issues.

The current provision has a minimum membership requirement. However, the Act provides legal space for both PBOs and MBOs to be established as autonomous bodies corporate with perpetual succession. Another restricting provision in the Act is about the disentanglement of foreign persons to create CSOs. Though it is open to all segments of Nepali people, foreign persons are not permitted to establish any CSOs in Nepal. Founders of CSOs have to submit their citizenship certificate along with other necessary documents.

There are some Trusts established under special legal provision but the Act fails to specify whether individuals are allowed to create a civic organization by testamentary act.

The state agency vested with the responsibility for establishing CSOs is not adequately staffed with competent professionals. Considering the ever-increasing number of civil society organizations in Nepal, staff and facilities are insufficient to carry out the work of the concerned

government agency. Moreover, the frequent transfer of those competent staff significantly slows the governance process.

CSOs are allowed to amend governing documents, in compliance with the provided process. An amendment must be first approved by two-thirds of the CSO's members and then filed with the Local Authority for approval. Moreover, a CSO is allowed to terminate its activities voluntarily and all of its assets will devolve on the Government of Nepal, while in the case of the liabilities of a dissolved Association, the government shall bear such liability to the extent that the assets of the Association cover such expenses. It should be noted that common, and preferred, international practice is for any such remaining funds to be transferred to another CSO performing the same or similar activities as the dissolving organization, especially in cases where the CSO is designated as a "public benefit" organization.

Structure and governance

Governance represents a key focus of the Act, which provides clearly defined basic rights, limits, and powers of CSO governing bodies. Basic minimum provisions necessary for the operation and governance of a CSO should be defined well in one of the prime documents, preferably the organization's statute. However, though it is possible to change an organization's governance structure and operations, it must receive approval from the government authority. As a legal entity, an organization is supposed to operate within the requirements of the law, and it is a responsibility of board members to ensure lawful operations. Furthermore, a CSO must develop its code of conduct, applicable to all staff members as well as governing body members.

CSOs have the right to sue to protect their interests. Subsection 3 of Section 5 provides:

"The Association may sue by its own name and may be sued by the same name as an individual."

Conflicts of interest are prohibited by law, as is misuse of the organizational property for individual benefit.

Other governance issues: A critical and ever-rising concern in Nepal is "to whom are the CSOs accountable?" Also, can an Executive Committee/Board of Directors member work as a program staff member? While government can make registration of organizations compulsory, why can't the same government make them accountable and disclose their report and financial reports to the public?

Prohibition on direct or indirect private benefit

No CSOs, as not-for-profit organizations, are allowed to distribute profits. However, within the limit of established norms, employees and board members of a CSO are entitled to be paid appropriate compensation for their professional input. Nepali CSOs are attacked if they provide any special personal benefits, directly or indirectly, to any person connected with the organization. As the Association Registration Act and Social Welfare Act do not specifically address the issue, CSOs are guided only by their bylaws. In order to address the question of benefits, the NGO Federation has developed and circulated a code of conduct among its member organizations. The Executive Committee or Board of Directors is ordinarily responsible for ensuring that any transaction between a CSO and any person connected with it is undertaken only after legitimate negotiation and is in the best interest of organization. Moreover, no CSO that has received significant funding from the public or the state should be permitted to distribute

assets to its founders, officers, board members, employees, donors, or members upon its liquidation.

Activities of Civic Organizations

Though the Local Self-Governance Act and other policy documents envisage civic organizations' participation in development activities and even in competing for certain state contracts, due to absence of law and other mandatory provisions, such participation depends on the sole discretion of concerned authority. However, CSOs are eligible to apply for tax-exempt status.

CSOs are allowed to be engaged in different kind of activities without any legal constraint. So far there is no legal restriction on civic organizations' undertaking public benefit or charitable activities, provided they come within the scope of the objectives mentioned in the statute. Moreover, CSOs have the right to speak freely on all matters of public significance, and there is no legal restriction on the right of civic organizations to carry out public policy activities, such as education, research, advocacy, and the publication of position papers. CSOs are allowed to be engaged in public interest litigation and there are several cases where CSOs have made government agencies accountable on public interest issues through legal procedure.

However, "political" activity by CSOs is one of the most controversial issues in Nepal. The statute of a civic organization should state that it is a nonpolitical organization and doesn't support any specific political party. It has thus created a unique image of CSOs among people that it is an apolitical group. Whenever CSOs participate in a public demonstration as one of the strategic activities to advocate for some public issue, they are accused of being "political."

Civic organizations are permitted to engage in lawful economic activities, provided that profits are used for the organizational benefit rather than being distributed to the persons operating the organization. CSOs are in many cases involved in economic development activities. However, starting a cooperative requires its registration under Cooperative Development Act. Nepal Rastra Bank also gives permission to selected CSOs for financial activities, such as money-lending institutions.

Fund raising

Registered CSOs are permitted to engage in legitimate fundraising activity provided they have prior permission from Home Ministry and its line agencies. The Home Ministry webpage mentions that one of its activities is to oversee raising public funds. There are some local CSOs running regular fundraising activities locally to sustain their activities. Technically, all CSOs need prior approval from the Ministry of Finance and the Social Welfare Council to receive foreign grants; otherwise they will be penalized. One of the criticisms that civic organizations face in Nepal concerns their lack of transparency. Though they submit audited reports to the concerned authority, and a few organizations disclose publicly the way in which funds received are spent through their publication, mostly such information is beyond view of the general public. Just a few organizations have initiated a public and social auditing process where they present the financial transactions and respond to the queries raised. Though all of the laws are applicable to CSOs, implementation remains worryingly weak.

Reporting, supervision and auditing

CSOs are required to maintain financial documentation, reports, and records of their activities. All CSOs are supposed to follow generally accepted accounting principles. It is a

common practice that financial reports of CSOs are audited by an independent certified or chartered accountant. The widespread comment on this aspect is that CSOs hire a certified auditor who just helps CSOs legalize mishandling of the fund. However, the professional ethics of some Chartered Accountants and certified auditors have been raised by the Chartered Accountants Association of Nepal recently. CSOs are also required to maintain records of meetings of their governing bodies. Statutes of the CSOs describe who is specifically responsible for these specific tasks. The report is available for Executive Committee members to inspect throughout. Moreover, the general assembly must approve reports on the activities and finances of the organizations. Then the approved report will be submitted to the District Administration Office and District Development Committee and Village Development Committee wherever applicable for the renewal process. As per the Association Registration Act, the Management Committee must submit annually the statements of accounts of its Association to the Local Authority, along with the report of the auditor.

Organizations are supposed to renew within three months (after the expiry) of Nepali fiscal year. If not, they will be subject to penalty, with amounts year. Not renewing the organizations continuously for five years results in automatic cancellation of the registration. This provision has restricted some CSOs from continuing to function legally after five years where they have temporarily voluntarily suspended operations. In order to resume their work, such organizations must essentially establish themselves anew, a process that is burdensome and costly.

Though all CSOs have to submit reports to various agencies such as the Direct Administration Office, the District Development Committee/Village Development Committee, and the Social Welfare Council, there is no simplified reporting format, and this provision has increased the cost and level of effort required from CSOs.

So far the tax office has a standard format that all auditors use. Moreover, CSOs are required to get PAN numbers and/or VAT numbers, as is the business sector. This requirement discourages CSOs as it is a complex process and many community-based organizations especially find it troublesome. However, this condition is not the part of the Act, and the Act itself has not been revisited and updated for a long time. This requirement is imposed through a Government order, and not a legislative process, and a large segment of people are not aware of it.

Though the Information Rights Act guarantees that “every citizen has the right to demand or obtain information on any matters of his/her own or of public importance. Provided that nothing shall compel any person to provide information on any matter about which secrecy is to be maintained by law,” most of the information on CSOs is still far from reach of general people and there is no mandatory provision to make it public. Weak enforcement of the law is one of the reasons for this.

The Social Welfare Council is responsible for monitoring and evaluation of the projects implemented by INGOs in partnership with local CSOs, but its technical capacity is not adequate to perform this task. Moreover, the Social Welfare Council charges NGOs and INGOs for any monitoring and evaluation work it performs. So I/NGOs are compelled to pay for such tasks to be done by the Social Welfare Council. Due to weak technical capacity the Council does not even maintain accurate proper data of functioning/non-functioning NGOs/INGOs in Nepal.

Tax preferences

CSO income is generally tax free. Gifts (donations) and membership dues are not regarded as “income,” while interest is taxed by the banks at source. If CSOs are providing paid services, they are required to pay tax unless they have a tax-exemption certificate from the Tax Office.

Foreign Civic Organizations and Foreign Sources of Funds

Foreign CSOs are generally allowed to establish branch offices under a general agreement with the Social Welfare Council, and they must also enter into project-specific agreements, a burdensome requirement for many. Moreover, foreign CSOs, under current law, may implement their programs only through local partners (CSOs).

There are some typical problems that foreign CSOs face in Nepal. Though the government talks about a one-door policy, it is multi-door in reality. One organization has to go through seven ministries to reach the required project-specific agreement. Moreover, the Social Welfare Council is supposed to work directly with foreign CSOs, but some CSOs must work directly with other line ministries. Out of 250 INGOs working in the country, only about 100 are working with the Social Welfare Council while other are working with line ministries, including the Ministry of Finance, the Ministry of Foreign Affairs, and the Ministry of Women, Children and Social Affairs. Similarly, even a single project involves an inordinately complex approval process. After overall agreement with the Social Welfare Council and the Ministry of Finance, the CSO must obtain thematic program approval. Social Welfare Council preapproval of plans and budgets has been made mandatory. Though agreement between donor and recipient organization has been previously reached, it may not be implemented until it has been approved by the Social Welfare Council. Moreover, the introduction of the Project Advisory Committee at various levels is challenges CSO autonomy and impedes smooth project implementation.

CSOs in Nepal are allowed to mobilize resources from local as well as foreign sources. Despite prior approval of the statute during registration, CSOs must obtain prior permission to receive funds from outside the country on case-by-case basis. Moreover, because not all proposals submitted to foreign donors will be funded, and in such cases obtaining permission from the Social Welfare Council is a fruitless exercise.

As an example of restrictions on funding to CSOs, the Peace Trust Fund, established by the government of Nepal, has funds, but NGOs are not allowed to apply for that resource. Moreover, there is a technical problem with the international community as well. They often do not work directly with local CSOs. Despite the global commitment to contribute 0.7% of GDP to the developing countries, foreign support comes through the government, and it is impossible for civil society organizations to access those funds directly.

Government policy does not encourage promotion of resource mobilization. There is no tax bracket for

Case Study:

Early in 2010, a Finish woman ran a campaign to reduce the weight of Finish people to make them healthier. As an incentive, she proposed to pay 15 Euro/kg weight lost for teacher education in Nepal. However, the proposal has not been approved by the government of Nepal, as so far there is no legal provision for an individual to support the Government and CSOs directly.

donating to CSOs, and, as a result, corporate sectors are not stimulated to make donations. Lack of a supportive policy has limited the promotion of corporate social responsibility in Nepal. Similarly, foreign individuals have no legal vehicle for support of government institutions and the CSOs.

E. Conclusions

- The Nepali constitution reflects its commitment toward all of the international treaties and covenants that guarantee freedom of speech, freedom of assembly, and respect for the IDHR. As the state and political parties have been positive towards the civil society, other policy documents are also CSO-friendly. However, there remain provisions and contradictions in the legal frameworks that carry forward the legacy of control from earlier autocratic regimes. The absence of consistency and practical rules and regulations that conform to the constitution and other policy documents have given CSOs reason to accuse government of employing a “use and throw away policy.” Hence, as stated in the Three-Year Plan, amendment of existing legal frameworks is a requirement in order to facilitate CSO functioning in Nepal.
- Apart from the constitution, there are several Acts that regulate the functioning of CSOs in Nepal. Among the major legal framework laws are the Association Registration Act, the National Directorate Act, the Social Welfare Act, and the Local Self-Governance Act.
- “Association” is used as a blanket term that encompasses an association, institution, club, circle, council, study center, etc., established for the purpose of developing and extending social, religious, literary, cultural, scientific, educational, intellectual, philosophical, physical, economical, vocational, and philanthropic activities, and also includes the friendship association. As a result of advocacy, the government of Nepal has agreed to categorize associations and used them in the areas of their comparative advantages. However, there is a valid question whether this approach is necessary, and whether in fact it would dilute the broader concept of CSOs and divide the CSO movement.
- Though the legal framework largely fulfills accepted principles for the regulation of civil society, the framework certainly has room for updating, amalgamating, and incorporating some new provisions to facilitate the CSO movement in Nepal.
- The mandatory requirement that CSOs be registered and obtain legal personality, even against their will and for no specific purpose, violates the basic right to freedom of association. It seems to be based on the “controlling legacy” from previous authoritarian regimes, rather than serving to enable the growth and operation of a free and sustainable civil society.
- The current law contains a minimum membership requirement. While the existing framework allows for amendment of a CSO’s governance structure, the minimum membership requirement cannot be changed, and if any organization attempts to do so, it will not be approved by the concerned authority.
- Another restricting provision in the Act concerns the entitlement of foreign persons to create CSOs. Founders of CSOs have to submit their citizenship certificate along with other necessary documents. However, even many Nepali people lack citizenship certificates, and this provision restricts them from founding CSOs.

- The state agencies vested with the responsibility for establishing CSOs are not adequately staffed with competent professionals. Considering the ever-increasing number of civil society organizations in Nepal, there are insufficient staff and facilities to accomplish the duties of the concerned government agency.
- Governance has been given due priority by the Act, and even CSOs develop their own codes of conduct. Despite the legal provisions, mostly Nepalese community-based organizations are criticized for poor governance and interestingly, the criticism even comes from CSOs. Accountability remains a critical and growing concern in Nepal, as well as the issue of whether a member of the executive committee/board of directors can serve also as program staff, as significant numbers of CSOs employ their board members as staff. No CSOs are allowed to distribute profits. However, employees and board members of a CSO are entitled to be paid appropriate compensation for their professional contributions.
- There is a gap between policy and practice. Though the Local Self-Governance Act and other policy documents envisaged civic organizations' participation in development activities and even in competing for certain state contracts, due to absence of legal provisions, such participation depends on the sole discretion of concerned authority.
- Raising fund is not easy. All CSOs must obtain prior approval from the Ministry of Finance and the Social Welfare Council to receive foreign grants, and in some cases CSOs cannot access the resources for a variety of reasons. For foreign grants, despite prior approval of their statutes during registration, CSOs must obtain prior permission to receive funds from outside the country on case by case basis, a lengthy process.
- CSOs are required to maintain financial documentation, reports, and records of their activities. All CSOs must follow generally accepted accounting principles. It is a common practice that financial reports of CSOs are audited by an independent certified or chartered accountant. Professional ethics of some Chartered Accountants and certified auditors have been improved by the Chartered Accountants Association of Nepal recently.
- It seems that the concerned authority has made renewal of the registration of CSOs a key tool to assess their status. As the state machinery is not efficient for monitoring CSO activities, they rely on brief reports submitted by the CSOs while applying for renewal.
- Though all CSOs have to submit reports to various agencies such as the Direct Administration Office, District Development Council/Village Development Council, and the Social Welfare Council, there is no simplified reporting format, and this has increased the cost and level of effort for CSOs.
- CSOs are asked to get PAN and/or VAT numbers, a requirement that is equally applicable to the business sector, despite recognizing their nonprofit motive (that is included in the CSO statutes) and registering them. The government requires CSOs to go through this complex process to obtain their PAN/VAT certification, a process not required by legislation but only by government order.

- The Social Welfare Council does a poor job in monitoring and evaluation, one of its key functions. It is inappropriate for the Council to charge fees to NGOs and INGOs for the monitoring and evaluation work that it conducts on behalf of the government.
- Foreign CSOs are generally allowed to establish branch offices under general agreement with the Social Welfare Council, but they must also negotiate project-specific agreements, an additional burden. Foreign CSOs, under current legal provisions, may implement their programs only through local partner CSOs.
- There are some typical problems that foreign CSOs face in Nepal. Though the government talks about a one-door policy, it is multi-door in reality. One organization has to go through several ministries to obtain necessary project agreements. Moreover, the Social Welfare Council is supposed to work directly with foreign CSOs, but some CSOs work directly with other line ministries. Out of 250 INGOs working in the country, only about 100 are working with Social Welfare Councils while others are working with line ministries, including the Ministry of Finance, the Ministry of Foreign Affairs, and the Ministry of Women, Children and Social Affairs. Similarly, there are too many agreements and approval processes required for a single project. After overall agreement with the Social Welfare Council and the Ministry of Finance, a thematic program approval must be entered into. Preapproval of the project plan and budget from the Social Welfare Council has been made mandatory. Though the donor and recipient organizations have reached an agreement, it cannot be implemented without Social Welfare Council approval. Moreover, the required Project Advisory Committee at various levels challenges CSO autonomy and impedes smooth project implementation.
- Government policy discourages resource mobilization. There is no tax benefit for donating to CSOs and as a result, corporate sectors are not encouraged to make donations.
- Current provisions requiring CSOs to submit reports to various line agencies and obtain their recommendation for the registration renewal process is illogical. Rather than strengthening the coordination and communication mechanism between various government line agencies, CSOs are compelled to go to various institutions. If local government approval and recommendation is necessary for the renewal, it would be more effective if the Local Development Officer or the Secretary of the District Development Committee were empowered to renew the registration of the organization directly. This process would strengthen supervision and coordination and enable the Government's devolution policy.

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Appendix: List of Acronyms

AIN	Association of INGOs in Nepal
CBOs	Community-based organizations
CDO	Chief District Officer
CFUGs	Community Forest User's Group
CSOs	Civil society organizations
CSR	Corporate Social Responsibility
DAO	District Administration Office
DDC	District Development Committee
FONIN	Federation of Nationalities and Indigenous NGOs
FY	Fiscal year
GAAP	Generally accepted accounting principles
GDP	Gross Domestic Production
GoN	Government of Nepal
INGOs	International non-governmental organizations
PAN	Permanent Account Number
PBOs	Public benefit organizations
MBOs	Mutual benefit organizations
MoF	Ministry of Finance
M&E	Monitoring and evaluation
NBA	Nepal Bar Association
NEPAN	Nepal Participatory Action Network

NGOs	Non-governmental organizations
SSNCC	Social Service National Coordination Council
SWC	Social Welfare Council
UDHR	Universal Declaration of Human Rights
VAT	Value added tax
VDCs	Village Development Committees

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