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LETTER FROM THE EDITOR

This issue of the *International Journal of Not-for-Profit Law* opens with a special section on Nurturing Civil Society. First, we take a look at the Panel of Eminent Persons on UN-Civil Society Relations, including its origins, recommendations, and impact. The author, **John D. Clark**, is a social scientist at the World Bank and a member of ICNL's Board who served as staff director of the Panel of Eminent Persons. Northwestern University's **Craig L. LaMay** scrutinizes some of the knotty, rarely acknowledged problems surrounding the media's contributions to civil society and democratic transitions. **Jim Sleeper** of Yale University probes the role of religion in "a nation with the soul of a church," as G.K. Chesterton characterized the United States, as well as the apparent inability of both the left and the right to come to grips with the issue. Finally, **Nayereh Tohidi** of California State University, Northridge, discusses women's important contributions to NGOs and civil society in post-Soviet Azerbaijan.

Our other features range just as widely. **J. Hana Heinekin** of the University of Tokyo and **Robert Pekkanen** of the University of Washington offer a primer to the complicated legal changes underway in Japan that affect not-for-profit organizations. Former diplomat **J. Peter Pham** of James Madison University discusses civil society against the backdrop of civil war in Sierra Leone. **Thomas Silk**, a San Francisco attorney, proposes a set of principles for governing not-for-profit corporations in this time of regulatory uncertainty. Ontario attorney **Terrance S. Carter** and his colleague **Sean S. Carter** discuss the perils that international information collection and sharing may pose for Canadian charities. **Milton Cerny**, an attorney formerly with the Internal Revenue Service, discusses IRS rules governing the political activities of churches and other religious organizations.

We close the issue with reviews of timely books. Our reviewers are **David Robinson**, an ICNL Advisory Council member who manages the Institute of Policy Studies Programme on Civil Society and directs the Social and Civic Policy Institute in New Zealand; **Gerald M. Easter**, a political scientist at Boston College; and **Matthew Crenson**, a political scientist at Johns Hopkins University.

In sum, *IJNL* once again presents expert commentary from around the globe on civil society, philanthropy, NGOs, and the legal and cultural environments that shape them. As always, we hope you find the issue informative, provocative, and useful.

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NURTURING CIVIL SOCIETY

The UN and Civil Society

By John D. Clark*

New Imperatives in Global Governance

The United Nations stands at a crossroads. The litany of global challenges and the dangerous schisms that confront the world make the organization more important than ever, yet in powerful political circles it is often seen as failing to make a mark, as trapped in a sterile word-game of drafting resolutions when something much bolder is needed, and – for some – as having outlived its relevance.

Part of the dilemma lies in the UN's origins. It was founded by about 40 governments at the close of World War II – the governments that really did rule the world. Now there are 191 Member States of the UN, and there are many other global powers in the shape of multinational corporations, media magnates, and leading NGOs that cannot be left out of international policy debate. Furthermore, citizens now expect democracy to be more than the opportunity to vote every few years for a president or parliamentary representative. They want to engage directly through civil society organizations in the debates on the issues that concern them most deeply. Traditional *representative* democracy is being supplemented by *participatory* democracy.

This phenomenon is particularly significant in matters of international policy for two reasons. First, new technology is changing the geography of politics. It is no longer necessary to be grouped together just according to the communities where we live. Through participatory democracy, we can aggregate by *communities of interest*, which can be global as easily as local. Second, in the era of globalization, there is an increasingly evident lacuna: while much of the *substance* of politics has been globalized (trade, economics, climate change, HIV/AIDS, the SARS pandemic, terrorism, etc.), the *process* of conventional politics hasn't. Its main institutions – elections, political parties, and parliaments – remain rooted at the national level, hence the gap. Civil society, by contrast, is able to adapt to working in strong global organizations and networks.

For the UN to rise to today's challenges, it needs to change how it works and to expand the array of actors that enter its global stage. The Secretary-General is mindful of these imperatives and has proposed a number of relevant reforms in these directions since he assumed office. While some have been implemented, others have been resisted by Member States. Mindful of the importance of the UN becoming more outward-looking, particularly enhancing relations with civil society and others, but also aware of the obstacles to progress, he commissioned a "Panel of Eminent Persons" to offer guidance. The panel was chaired by Fernando Henrique Cardoso, the former president of Brazil, and comprised twelve distinguished people from diverse geographic and sector backgrounds.

The following is a summary of the main proposals contained in the panel's report ("We the Peoples: Civil Society, the United Nations and Global Governance," published as a UN General Assembly document, A/58/817, 11 June 2004). The full report is available on the panel's website: www.un.org/reform/panel.htm.

How the UN Can Enhance Its Relations with Stakeholders

The panel's starting observation was that today's multilateralism is different from that of 30 years ago. Then, governments would come together to discuss an emerging issue until there was sufficient consensus for an intergovernmental resolution. They – and their intergovernmental organizations – would work on implementing this agreement. Today, it is increasingly likely that a civil society movement and a crescendo of public opinion puts a new issue on the global agenda; next, a few like-minded governments are first amongst their peers to recognize the power of the case and start pressing for global action; together with the leading civil society protagonists, they form an ad hoc coalition on the issue; this builds public and political support for global action through iterative processes of public debate, policy dialogue, and perhaps pioneering action to demonstrate ways to redress the problem. Such *global policy networks* have shaped responses to issues as diverse as landmines, poor countries' debts, climate change, affordable treatment for AIDS, and gender relations. Such networks influence the political agenda and generate a set of cosmopolitan values and norms that transcend national boundaries. They also spawn operational relationships that are pivotal, as partnerships are becoming increasingly important for getting things done.

Hence – like it or not – civil society is as much part of global governance today as governments. To adapt to this new multilateralism, the UN must continue to transform its institutional culture – as Kofi Annan has begun to do – from a rather inward-looking institution to an outward-looking networking organization.

This departure should not be seen as threatening to governments. Civil society and governments play *different* roles; one is no substitute for the other. Civil society is an arena for deliberation of policies, not decision-making. Yes, the sector greatly influences those governments that truly embrace democracy and bestow on civil society its full rights (the freedoms of expression, assembly, and association). But CSOs focus on specific causes, not overall political programs; this is both the sector's strength and its weakness. Aggregated, civil society presents a huge array of diverse interests, not an alternative governing blueprint. We still need a government to balance the competing demands and construct an overall policy framework.

Its reflections and widespread consultations led the panel to put forward about 30 practical proposals for strengthening UN-civil society relations (the principal ones are summarized in a box, below). Behind the specific proposals lie four key imperatives or paradigm shifts that it suggests should guide the UN in its reforms in this area:

1. Reinterpret multilateralism to mean multi-constituencies

The way multilateral agendas are shaped has changed – with civil society bringing new issues to the global agenda, and with governments taking effective actions not by consensus but through multi-constituency coalitions of governments, civil society, and others. Increasingly iterative processes of public debate, policy

dialogue, and pioneering action are the way to redress problems. The UN should explicitly adopt this important mode of multilateralism, and use its convening power to create multi-constituency forums, open formal UN forums to all actors necessary to solve critical issues, and regularize the use of a range of participatory modes such as public hearings.

2. Realize the full power of partnerships

Multi-stakeholder partnerships have emerged as powerful ways of getting things done and closing the implementation gap by pooling the complementary capacities of diverse actors. Achieving the Millennium Development Goals and other global targets demands a UN that is proactive and strategic in catalyzing new partnerships, incubating emerging ones, and investing in developing necessary staff skills and resources.

3. Link the local with the global

The deliberative and operational spheres of the UN are separated by a wide gulf, hampering both in areas from development to security. A closer connection between them is imperative so that local operational work contributes to the global goals and global deliberations are informed by local reality. The UN needs to give priority to enhancing its relationship with civil society at the country level. On the development side, this implies prioritizing relations in field offices. On the security side, it means strengthening informal engagement of the Security Council with civil society.

4. Help tackle democracy deficits and strengthen global governance

The new configurations of the 21st-century political landscape, described above, pose critical challenges for traditional mechanisms of global governance. They demand changes in the UN not just by engaging civil society in policy-making at all levels, but also by enhancing the role of parliamentarians and local authorities in the deliberative process on pressing global issues.

Promoting an Enabling Environment for Civil Society

The panel strongly believes that the UN and its Member States can benefit greatly from the insights and experience of civil society and from the partnership opportunities it offers. However, the panel was aware that these opportunities are much richer in some countries than others. There are many reasons for this, but one – familiar to all readers of this journal – is that the legal and policy environment in many countries obstructs the healthy evolution of civil society. Hence the panel included one recommendation (Proposal 30) stating that “Member States should encourage, through the forums of the United Nations, an enabling policy environment for civil society throughout the world and expanded dialogue and partnership opportunities in development processes. The Secretariat leadership, resident coordinators and governance specialists should use their dialogues with Governments to similar effect.”

Specifically, the panel suggested that the new Partnership Office in the Secretary-General's cabinet and Resident Coordinators at country level should use

their dialogue with governments to encourage improvements in the policy environment for civil society, including revision of relevant laws. The new civil society specialists appointed in Resident Missions should provide technical guidance in this area.

Where Now?

On September 13, 2004, the UN Secretary-General issued a response to the Panel's report (see: <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/507/26/PDF/N0450726.pdf?OpenElement>). In this, he urged Member States to adopt many of the panel's proposals, especially for reforming and easing the NGO accreditation process, for opening the General Assembly to civil society involvement, for strengthening the dialogue of the Security Council with civil society (especially on the ground in conflict-affected countries), and for engaging more systematically with parliamentarians and local authorities. He also announced a number of measures that he had decided to take, as chief executive, to implement panel proposals. These steps included establishing a trust fund to enhance the capacity of civil society in developing countries to engage more systematically with the UN; identifying a civil society focal point person in Resident Missions to coordinate the UN system's work and dialogue with civil society at the country level, guided by country-level UN-civil society advisory groups; and opening a Partnership Office in his cabinet to provide institutional leadership in strengthening relations with the full cast of actors important to the UN beyond its membership of governments – especially civil society, the private sector, parliamentarians, and local authorities.

The panel's report and Kofi Annan's response were discussed in the General Assembly on October 4-5, 2004. Although inconclusive, a number of Member States from all regions voiced support for the main proposals (although others also spoke against them). It is likely that groups of UN ambassadors will work together over the months ahead to promote agreement on these measures through specific committees of the General Assembly.

Undoubtedly, the coming years will see a growing role for civil society, the private sector parliamentarians, and local authorities in the UN and other forums of global governance. However, this will not be without controversy. Many in civil society resent the growing clout of large corporations – especially as hard-pressed international organizations increasingly seek funding and operational links with major companies. Similarly, central governments tend to resist the shifting power towards local authorities. And as matters of foreign policy come to dominate politics, parliamentarians resent their relatively weak voice in international forums.

The main tension, however, will concern the role of CSOs. As Jody Williams said of the sector, when accepting the Nobel Peace Prize on behalf of the International Campaign to Ban Landmines: "We are a superpower!" It is true. Even the most powerful governments find that CSO pressure forces them to be more accountable and often to moderate their policies, and corporate CEOs are routinely challenged to demonstrate "corporate social responsibility."

Superpowers, however, are inevitably resented. The clear ascendancy of policy-oriented CSOs has led to increasingly aggressive challenges from governments, corporations, the establishment media, and others. Questions are

increasingly asked: Who elects the CSOs? To whom are they accountable? How can they prove they speak with authenticity for particular constituencies or on specific issues? What is their level of integrity? Such concerns are certainly surfacing in the debate now underway about the implementation of the panel's proposals.

Key Proposals of the Cardoso Panel

Shift from a "fixed-slate" approach: The UN has tended, through its emphasis on admitting to its deliberative processes primarily those NGOs that have been accredited by an inter-governmental committee, to prioritize engagement with a *fixed* set of NGOs on *all* issues. Instead, it should engage with actors most relevant to the issue in hand (be they NGOs, private sector organizations, local authorities, or others). The responsible stakeholder networks focusing on those issues, rather than inter-governmental committees, should determine who speaks and who attends.

Establish a new "civil society and partnership tsar": A new high-level bureau should be established in the Secretary-General's office to help create critical mass for enhanced engagement. This would steer the UN's relations with civil society, parliamentarians, local authorities, the private sector, and others – making sure there are appropriate balances between these sectors. It would also catalyze institutional culture changes toward an outward-looking organization.

Open the General Assembly (GA) and its committees and special sessions to civil society: At present, accredited NGOs only have formal rights to engage with the UN's Economic and Social Committee (ECOSOC). This restriction is historical and no longer defensible. The GA is the overarching UN forum and hence should also be enriched through carefully structured inputs from CSOs and others.

Reform and de-politicize the accreditation processes: Some accreditation process will still be needed but this should be reformed: a) to allow entry to the GA as well as ECOSOC; b) to emphasize the technical merits of those applying, rather than political factors, and c) to become swifter and more transparent. The panel-proposed mechanism hinges on a review of applications by a *Secretariat* body (not, as at present, by a special inter-governmental committee), drawing on the experience of staff throughout the UN system who work most closely with CSOs. Recommendations on accreditation would then be presented in a consolidated report for inter-governmental approval, but specific applications would be discussed at this level only when deemed problematic. This process should be taken up in an existing committee of the GA (probably the General Committee) so that accreditation is not overemphasized and that it is considered alongside other organizational issues.

Enhance the UN Security Council's links with civil society. The Security Council should expand the growing practice of holding informal consultations with CSOs, but it should broaden this to include CSOs from the affected countries, not just those based in New York. The practice of Security Council "field missions" should be expanded, and these should always include meetings with civil society. Commissions of inquiry after Council-mandated operations should also become the norm, ensuring opportunities for civil society to contribute to these.

Strengthen links with Parliamentarians: The UN should convene “global public policy committees” on the most pressing issues to provide a link between Standing Committees relevant to those issues in a wide range of parliaments. As with their national-level counterparts, these would take evidence from a range of experts, forward policy proposals, and scrutinize progress on past agreements.

Revive multi-constituency forums: Governments have decided that the big conference has been an overused tool. Perhaps so, but it should not be completely abandoned. Used sparingly, it can help foster global norms on emerging policy issues. Smaller, more politically predictable events – public hearings – can also be staged to bring all relevant stakeholders together for reviewing progress on meeting globally-agreed goals, especially the Millennium Development Goals.

Focus at the Country-Level: The UN should appoint civil society and partnership specialists at the country level to help UN offices in the country strengthen their engagement.

Establish a fund to enhance southern civil society engagement with the UN and to promote innovations in partnerships: At present, Northern CSOs dominate processes of engagement with the UN. While many do a good job in representing Southern CSOs, the latter generally want the chance to engage directly. Also at present, while examples of partnerships abound, these are often little more than implementation contracts. Experience shows that more holistic approaches can add much greater value and should be developed fully. Addressing these challenges requires new sources of “venture funding,” for which a special donor-financed trust fund should be set up.

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NURTURING CIVIL SOCIETY

**Civil Society and Media Freedom:
Problems of Purpose and Sustainability in
Democratic Transition**

By Craig L. LaMay*

The problem of the press is confused because the critics and the apologists expect the press to ... make up for all that was not foreseen in the theory of democracy.^[1]

– Walter Lippmann, 1922

The embrace of civil society is now ubiquitous in the field of democracy-promotion, and conceptually and programmatically it almost always includes the project of media development. The majority of USAID's media assistance programs, for instance, fall under its civil society portfolio, and most non-governmental organizations that do media work will also justify media programs, implicitly if not explicitly, as an agent of civil society formation. The link is understandable: no matter how one understands the role of the media in a democracy, a primary purpose is to inform the public on issues of importance and thus to make their political participation meaningful. Further, of the many challenges journalists face virtually everywhere, in developed and developing countries alike, one they all share is a political and social environment they perceive to be, in one way or another, hostile to independent, professional journalism. Using the power of their voices, journalists presumably have the ability to change that environment through their engagement with and support of civil society associations. In short, both the media and civil society are forms of pressure from below that affect the decisions and activities of governments.

Over the past two decades, untold aid monies and conferences have been devoted to civil society and journalism, and a large literature has bloomed on the subject. Some of the literature on civil society is analytically helpful; much is conceptually muddy at best. Scholars debate the definition of the term^[2]; journalists use it to mean a variety of things (including simple civility) and invoke it as a remedy for any number of political and professional ills in both developing and developed media systems. One commentator notes that "rarely has so heavy an analytic cargo been strapped on the back of so slender a conceptual beast."^[3]

The beast can be summarized as that realm of voluntary association outside the state and the market, which acts as an organized counterweight to the power of the state, and whose existence is thus presumed to be a critical component of democratic transition and consolidation, perhaps even – insofar as civil society functions as a stand-in for public participation in political life – *the* critical

component.^[4] Juan Linz and Alfred Stepan define civil society as “that arena of polity where self-organizing groups, movements and individuals, relatively autonomous from the state, attempt to articulate values, create associations and solidarities, and advance their interests.”^[5] Civil society can include large social movements (most notably today, feminism, environmentalism, and human rights), and in its modern form, it places renewed emphasis on ethnic, racial, and religious identities and includes a wide array of single-issue groups with varying commitments to pluralism and democracy.^[6] So far as democracy and democratization are concerned, civil society is important because it is where political pluralism originates – in short, where citizens are made. At the level of global governance, international NGOs are often identified as the locus of international civil society, though their claim to public representation is less than convincing.^[7]

In democratic theory, civil society is also the essential element in mobilizing opposition to authoritarian or totalitarian regimes, and so at its most elemental, it includes ordinary citizens who are not part of any organization but who march, heckle the police and politicians, express their opposition to specific government measures, and challenge the regime in mass protests. Their activity is important because groups by themselves, no matter how many or heroic, are insufficient to overthrow a non-democratic regime. The presence of thousands of protesters in the streets forces the regime to decide whether it is willing to use massive force to sustain itself, an action that will almost certainly further weaken the government's claim to legitimacy. After the regime has collapsed, the problem for democratization is sustaining civil society in some form other than a purely oppositional one. Depending on the nature of the authoritarian regime that preceded the transition, civil society can be difficult to sustain in any form.^[8] And where political society and economic society remain intertwined in vast patronage systems, there will be a natural disincentive for people to get involved in associations of any kind that might cost them their social position or their job.

But it is precisely these associations in the non-governmental sector of society – churches, neighborhood groups, issue groups, sports clubs, civic groups, and so on – that are thought to perform a number of important social functions necessary to democratic consolidation: they provide a buffer between the individual and the power of the state and the market; they create social capital; and they develop democratic values and habits. Civil society, in short, gives democracy what the law, with its rules and sanctions, cannot: social trust, social authority, civic virtue and vision – the stuff of citizenship. In the developed West, civil society is sometimes conflated with ideas about social responsibility, specifically as a concept opposed to liberal individualism's tendency to see people not as citizens, but as bundles of legal rights and entitlements, cut off from any higher moral claims, or as consumers motivated only by economic self-interest.^[9]

Even accepting all this, it is not clear precisely why civil society is critical to democratization or how it actually connects citizens to the machinery of governance. Perhaps most troublesome is the view of civil society as a tolerant and cooperative space, when in fact its oppositional and fragmented character might just as easily be an obstacle to democratic consolidation, particularly where governments are weak. Ample evidence suggests that civil society can be anti-democratic, even disastrously so.^[10] And even where it is benevolent, it is something of a mystery how civil society's benefits are supposed to find their way into the more formal realm of “political society.”

In the democracy-promotion industry, the claims that donors, assistance providers, and even journalists make for civil society can be even more confusing, so much so that it's easy to become cynical about the whole subject. Civil society sometimes seems like a kind of catch basket, a category of last resort for a multitude of unique and complex social, economic, and political problems that do not fit under any of the industry's other rubrics. Its presumptive neutral character, too, can make it a useful venue in which to advance as democratic principles what are in fact the political preferences of aid providers, program implementers, and recipients.

Leaving aside problems of definition and application, journalism and civil society would seem to have some obvious connections as well as common interests. Both produce information and churn meaning from it. News organizations act as informal hubs in civil society networks, taking in information and sending critical bits of it back out, in the process composing a more or less coherent profile of public attitudes and values. Civil society associations and independent media organizations are thus interdependent and may even overlap. A social group or NGO might have its own publicity arm, for instance, and distribute its own newspaper or radio program. Many international NGOs – Human Rights Watch and IREX/ProMedia, to name two – are well regarded sources of original research in their respective fields. Media organizations, further, will often seek to identify and serve specific communities of interest, such as an ethnic or racial minority, women or immigrants, farm laborers or factory workers. In this way, speech and press freedoms are woven together in the growing democratic fabric. Media and civil society each is presumed to be a necessary condition for the other.

In practice, however, they are not always viewed this way. USAID, for example, places media development in a supporting role to civil society promotion in the hierarchy of its democratization objectives. The result can be confusion and disagreement over who is responsible for what. It is not at all uncommon to hear assistance workers talk with a distinct tone of impatience about journalists whose view of their independence does not include acting as the publicity arm of civil society groups and their causes. Journalists, in turn, sometimes find themselves facing the most severe pressure on their editorial decision-making, not from governments, but from civil society groups who are angered by what they view as unfair news coverage, and whose dedication to the cause of freedom does not extend to inquiries into their own activities. This can be especially true in countries such as Bosnia-Herzegovina, where the enormous number of international NGOs, intergovernmental organizations, and local NGOs together form a kind of *de facto* government. Very often these organizations do not see themselves as the legitimate subject of critical news coverage, and many of them, despite their professed dedication to transparency in governance, are not themselves very transparent. Local journalists complain that civil society organizations are unprofessional, uncooperative, and even disingenuous in discussing their programs and objectives. Civil society and independent media may therefore be necessary conditions for each other, but neither is a sufficient condition for the other. Their interests may overlap, but they are not the same.

Ultimately, how journalism fits into the mix of institutions that compose civil society depends on how one understands journalism's core purpose in a democracy. As Premesh Chandran, the CEO of *Malaysiakini*, the only independent news source in Malaysia, explained it to me recently, civil society's job is to "blow the whistle" when the government acts in ways that are repressive or irresponsible, and it is then the

journalist's job to pursue and report the story. This view, or something like it, is not uncommon in democratizing states, and it is one reason both journalists and aid organizations consider civil society formation so important. In their view, the journalist's job is both to build civic consciousness and social solidarity (as in the "civic" or "public" journalism movement in the United States, for example) and to expose government corruption and incompetence. In important ways, however, Chandran's formulation runs directly contrary to the Western "fourth estate" or "liberal" view of journalism, which follows closely on Western free expression theory and sees journalism as institutionalizing the expressive freedoms that provide a moderating influence on sources of power. Because those sources of power include civil society, this model is the least deferential to it. Put another way, in the fourth estate formulation, the journalist "blows the whistle" and civil society acts on the information. Finally, civil society also fits with a conception of journalism that is essentially developmental, which understands its role as promoting socio-economic change through education, economic expansion, and growth. The problem with this view is in the way governments typically use it. In Asia particularly, but also Africa and Latin America, nominally democratic governments continue to justify strict controls of the news media in the name of socioeconomic development and political stability. Those controls include restrictions on ownership, national security and sedition laws, and annual licensing requirements.

Of course, these conceptions of journalistic purpose are not exclusive of one another. In either a consolidated Western democracy or in an Asian transition state, for instance, a news organization might understand its mission as promoting both public engagement in civic life *and* the values of free expression. And in a transition state, the same news organization may also see itself as an agent of the economic development it will depend on for its own sustainability. *Malaysiakini*, for example, is an online newspaper in a country where print publications are restricted to the handful of companies with licenses to print them, and licenses go overwhelmingly to party-affiliated newspapers, none of them much worth reading.¹¹¹ *Malaysiakini* exists only because it has exploited the government's decision not to regulate the Internet as part of its policy to make the country an attractive site for information-technology industries. In that respect, *Malaysiakini's* future is closely linked with the success of the government's economic development policies – policies that to succeed will presumably compel the ruling Barisan Nasional coalition to allow an increasingly freer and larger space for information exchange.

Media and Civil Society in Democratic Transition and Post-Transition: The Chilean Case

To the extent that media freedom and civil society development are in fact interdependent, what challenges do they have in common? Journalists and democracy promoters in transition states typically name two. The first is the creation of social capital – "enhancing the bonds of community, building citizenship and promoting individuality," as one Filipino journalist said to me. The second is "building a culture of free expression," a process that usually emphasizes encouraging the "watchdog" role of the press and providing citizens with access to news and information. A quite different conception of the media's contribution to civil society focuses on providing citizens access to the instruments of communication, perhaps even against the prerogatives of those who own them, and especially where ownership is concentrated in the state or in private centers of economic power. These general concerns are joined in a larger one: how does a society actually do

these things, i.e., create *and* sustain media that engage the public in democratically centered discourse?

A useful case study for considering this question is Chile, a country typically regarded as one of the true successes of the Third Wave, and economically the most vibrant state in Latin America. Chile emerged from bureaucratic authoritarian rule with the election of a Christian Democratic President, Patricio Aylwin, in 1989, around the same time much of South America returned to civilian rule after more than a decade dominated by right-wing military governments. The modern Latin American political experience is unique in many ways, not least in the fact that the generals who ruled there often did so with the aid of the United States government, which in the name of democracy helped to launch numerous dictatorships in the region. Officially, U.S. policy in Latin America in the years following World War II was to fight communism; in 1961 President John F. Kennedy had announced the "Alliance for Progress," a sort of Marshall Plan for the region. For several decades the United States provided direct military, financial, and political support as part of its Pan-American alliance against communism, and particularly, in Latin America's case, against internal "enemies of freedom": labor, the poor, the intelligentsia.^[12]

Chile's experience was particularly tragic. "No other Latin American country could equal Chile's record of constitutional government," writes historian John Charles Chasteen. "For years, Chilean democracy had negotiated major ideological differences."^[13] But following the presidential victory of socialist-communist Salvadore Allende and his Popular Unity coalition in 1970 – and despite the fact that Allende disavowed violent revolution in favor of constitutional process – the U.S. Central Intelligence Agency adopted a "firm and continuing policy," in the words of the agency itself, "that Allende be overthrown by a coup."^[14] The United States embarked on an economic war against Chile, and in 1973, under General Augusto Pinochet Ugarte, the Chilean military overthrew Allende's constitutional government in what turned out to be "the bloodiest takeover in the history of Latin America."^[15] The country would not emerge from military rule until Aylwin took office in 1990, though the military – and Pinochet – have remained powerful figures in the Chilean transition, and Chileans continue to reconcile themselves to their legacy.

The experience of Chile in the final years of the Pinochet regime illustrates the surge of civil society and media activity that often precedes political transition, as well as the difficulty of sustaining that level of mobilization after the non-democratic government has been toppled. Faride Zeran, director of the journalism school at the University of Chile, says that a vibrant "independent press helped Chilean society to overcome dictatorship at the ballot box and made it possible for people to overcome their fears," but since 1989 the independent press has withered. During the decade of transition that followed the 1988 elections, Zeran says, "We did away with what Pinochet could not undo in 17 years."

Much of the independent press of which Zeran speaks had had an organic relationship with political parties that were illegal under the Pinochet government. As such it was also an elite press, its audience limited to the upper strata of Chilean society. Without question those media were important incubators of dissent and principled opposition to the military regime, but most students of the Chilean transition point to television, the country's only true mass medium, as the critical element in Pinochet's electoral defeat. Ironically, television's rise to prominence was at least in part the result of Pinochet's efforts to modernize the country's

communications system, to place it in private hands, and to orient it toward the market and away from a politically focused print press that depended heavily on the state. One consequence of that modernization was a six-fold increase in television set ownership between 1970 and 1983, such that television penetration had reached 95 percent at the time of the 1988 plebiscite.^[16]

More than editorial content, that geographic and demographic reach is what made television singularly important to democratic transition. Until 1988 Chilean television had offered no political debate; broadcast news under the Pinochet regime was whatever the regime said it was and typically showed political opponents only in a judicial context, where they were portrayed as criminals. Editorially independent broadcasting had ceased following the 1973 coup, when radio stations, magazines, and newspapers belonging to Unidad Popular, the left-wing coalition that had supported Allende, had been confiscated and either held by the military government or sold to private firms. Media belonging to other parties, such as the Christian Democrats, were not officially closed but rather hounded out of existence. The state television network, TVN, and all other television broadcasters came under the control of Pinochet-appointed university presidents. Within a few years the military government ended the practice of providing public financing to television, and in 1977 it ended all restrictions on television advertising, thus creating a unique situation where state-controlled channels were financed by the private sector.^[17]

In 1987 this state of affairs began to change with the visit of Pope John Paul II, the first-ever papal visit to the overwhelmingly Catholic country. Though the government tried to orchestrate television coverage of the visit in its favor, it was hard put to deny or suppress the pope's public call for a return to Chile's democratic traditions. "The result," writes one commentator, "was to legitimate an ethos antagonistic to the authoritarian regime, an ethos that would eventually serve as the basis for the victory of the 'No' side in the 1988 plebiscite."^[18] In advance of the plebiscite and under the rules of the government's National Television Council, the opposition received 15 minutes of airtime each day, though it was otherwise banned from news and public affairs programs. The opposition's brief message was juxtaposed with the government's own 15-minute message in 30-minute programs that aired at 10:45 p.m. on weekdays and at noon on weekends, time slots the government had chosen to ensure the smallest possible audience. To the government's great chagrin, the program drew enormous audiences and became the topic of public discussion throughout the country, thus allowing the opposition to surmount the enormous obstacles to defeating Pinochet at the ballot box: it had to overcome the negative images that the regime had used to portray it as inefficient and violent, even as it offered no candidate or program of its own; it had to convince people cowed by 15 years of state terror that a "No" vote against the government would not result in reprisals; and it had to explain that even if Pinochet lost the plebiscite he would remain in power for a full year before there would be a presidential election.^[19]

To meet these challenges, the opposition turned its media campaign over almost entirely to a team of producers, advertising executives, reporters, and political scientists who chose to attack Pinochet with the modern techniques of democratic campaigning: focus groups and polls designed to ascertain voters' concerns, and public relations strategies for targeting undecided voters, especially women and the young. Instead of trying to counter the government's relentless negativity and scare tactics, the opposition chose the motto "We are more" and was

positive and issue-focused. Rather than devote its entire 15-minute broadcasts to single topics, it did short vignettes on issues ranging from poverty and health to exile and torture, all hosted by a well-known personality and featuring musical jingles, comic sketches, and the personal testimony of common citizens. Pinochet became a target of humor intended to dispel his image of political invincibility, and painful subjects such as the “disappeared” were treated respectfully as the basis for national reconciliation rather than division.

So successful was the television campaign that it became a news story in its own right, covered by the nation’s print media. Importantly, where the opposition’s television campaign had made the conscious decision not to respond to the government’s attacks, the print media covering the campaign *did* respond, disputing the government’s arguments and thus providing a valuable complement to the television campaign. This activity underscored the fact that while the television campaign was critical to political mobilization, the print media performed the essential task of providing information. In that role the print media were among those associations that laid the groundwork for mobilization in the realm of civil society, contributing to and interacting with the social organizations and the political opposition that Pinochet had first tried to eradicate, then ignored, and finally misjudged. The television campaign, in turn, reinforced activity that went on in communities and in face-to-face contact with voters.

With few exceptions, says Zeran, the dynamism that existed among media in the years immediately before and after the plebiscite is now gone. Among the principal alternative weeklies that promoted democratization were *Cauce*, *Analisis*, and *APSI*, all now defunct. Much of the opposition press had depended for a significant portion of its financing on grants from foundations and political parties, and when those sources dried up, circulation and advertising revenue did not suffice to pay the bills. Some print media that campaigned for democracy did for a time successfully appeal to broader and more diverse audiences, but they, too, have closed. The last of the important opposition weeklies, *Hoy*, closed for financial reasons in 1998, as did the independent daily *La Epoca*, which had been founded in 1987 and was generally credited for high-quality reporting leading up to the election. *La Epoca* was unable to service its debt from sales and unable to attract advertisers after the transition because of advertiser discomfort with the paper’s editorial view. Today Chile’s newspaper market is dominated by two large and conservative conglomerates, El Mercurio, S.A., publisher of the Santiago daily *El Mercurio*, and Consorcio Periodístico, S.A. (COPESA), whose flagship paper is *La Tercera*. Both organizations gave political support to and received financial support from the former military government. *El Mercurio* has a reputation for being conservative, but it is also a far better paper than it once was, arguably one of the best in Latin America.

Television, which, in Chile as throughout Latin America, came of age in a period dominated by military governments, has increased its standing as the nation’s principal mass medium. TVN is now self-financing and subject to the same ratings pressures as other private broadcasters and cable channels. At the same time, TVN is subject to government oversight and interference, just as all media are subject to criminal prosecution under the country’s media laws. So far as the press is concerned, the worst features of Chile’s state security law and its code of military justice were repealed in 2001, but public officials, including judges and military officers, are still able to bring criminal charges against news organizations for virtually any kind of criticism.^[20]

Most worrisome, says Sebastian Brett of Human Rights Watch in Santiago, is that Chileans do not seem to care much that their news media are singularly conservative and uncritical, nor do they perceive their relative lack of choice in this regard or the government's punitive hostility to criticism as threats to or limitations on their own expressive rights. "If freedom of speech is the oxygen of democracy," Brett asks, "why are there not people in the streets asking for air to breathe? I remember in the early 1990s, there were people wearing gags on their faces standing outside of court buildings protesting. The Chilean Journalists Union led this protest. Now no one is in the streets anymore. What's the reason?" As if to answer the question, Santiago-based Ford Foundation officer Augusto Varas has said that, "The right for freedom of expression has not been deeply rooted in Chilean civil society." Zeran claims that of the country's 40 journalism schools, 33 are "controlled by the economic right" and "the question of freedom of expression is not on their curriculum."

Zeran's observation raises recurring and fundamental questions about civil society and "democratic" media: What constitutes "media pluralism" in a society, and what role should governments and markets play in creating and sustaining it? One could argue, for example, that Chile's media *are* both modern and pluralistic. Indeed, unlike most democratizing countries, Chile did not witness any fundamental changes in its communications system after the fall of the old regime. Rather, the process of privatization that began under Pinochet has continued under democratic governments, most notably with the privatization of Radio Nacional in 1994. Chilean television, at least, has also been globalized: Megavision is owned partly by the Mexican broadcasting giant Televisa, and the television operation of the Universidad de Chile is now 49 percent owned by the Venezuelan consortium Venevision. All of this activity has had the effect of reducing the government's involvement in the operational aspects of communications – from the point of view of many free expression advocates, an essential task of any meaningful transition to a democratic media sector. It is not the only goal, of course. With respect to editorial matters, the country's hostile press laws combined with the pressures of the market have had the undesirable effect of driving viewpoint diversity from Chile's media, though clearly that perception depends on how one defines viewpoint diversity.

Several journalists I met in Santiago in 2001, for example, pointed critically to *El Mostrador*, then a new online business publication. Their displeasure with the publication centered on its "elite" character as an online-only service and, more obliquely, on its non-oppositional approach to public affairs. But *El Mostrador's* general manager, Federico Joannon, made it clear to me that he and his partners were in business to turn a profit, not to serve as an opposition center to the government. "We care about recovering democracy," Joannon said, "but that is not our key issue. We created the company and risked our capital in the belief that the Internet will become the fundamental medium. We are not committed to the government, the church, or the business community. We are not a refuge for alternative groups – that is legitimate, but not the crux of what we do. We want to provide information to the majority of people – they have the right to be well informed, too – and are trying to be a watchdog on power, a viable business activity in the center of the business world."

Only a week after I returned from Santiago, a *New York Times* editorial on Latin American media praised *El Mostrador* for being "daring and innovative," but closed with the charge that in Chile "as elsewhere in Latin America, the market has

more often produced media that unquestioningly support the powerful in society, failing the public they are supposed to serve."^[21] Charges like these – especially when they come from large, private, and profitable Western media firms – are difficult to evaluate. Throughout developed democracies, for instance, the leading public affairs media, almost without exception, are private firms that earn the bulk of their revenues from advertising, not circulation.^[22] More generally, while it may be true that Chile's media do a poor job of covering public affairs, it is also true that the low levels of political involvement and political polarization in the Chilean public are at levels characteristic of consolidated democracies.^[23] In short, what some may view as public apathy and a diminished media market – i.e., democratic failure – others may fairly regard as measures of successful democratic transition. That transition has been aided by the country's economic success. By the time Pinochet stepped down in 1989, Chile had the strongest economy in the region, one that enjoyed broad popular support. The Christian Democratic presidents that followed the dictator, Patricio Aylwin, Eduardo Frei, and now Socialist Ricardo Lagos, have all emphasized social justice, but none has introduced significant economic changes. Arguably, the economic stability that Pinochet brought to Chile has provided some of the social stability necessary for the continuing investigation of and national reckoning with the dictator's crimes.^[24]

Clearly, there are multiple valid and important measures of media pluralism, and where, as in Chile's case, the state wields significant powers of censorship and control, pluralism will suffer. It may be circumscribed further where major sources of news and information are controlled by non-media sectors of the economy with links to the government or large stakes in public policy. COPESA, for example, is controlled by a group tied to Chile's banking industry – just as in the United States the television network NBC is owned by General Electric, a large defense contractor, and in Italy the country's prime minister owns three television networks. But as to the practical problems of *which* voices to sustain in a transition society and *how* to sustain them, journalists and many people in the democratization business hold conflicting views on the roles that governments and NGOs should play on the one hand, and the market on the other. With respect to the "how" question, in the early 1990s left-wing members of the Chilean legislature proposed to enforce pluralism by statute, essentially guaranteeing financial support for media unable to find sufficient footing in the market. The Chilean Supreme Court declared the law unconstitutional, a decision that Sebastian Brett calls correct. "Judges should not have that responsibility," he says, though he clearly supports the spirit of the legislation.

Sustaining Media Pluralism As a Civil Society Objective

Though in obvious ways unique, Chile's media experience mirrors that of many of other states with ongoing democratic transitions, as well as that of many consolidated democracies. For the democracy-promotion industry, that experience raises at least three issues.

The first is that while free and independent media may be a means to an end (civil society development), it is also important to think of free and independent media as ends in themselves. Only then is it possible to approach press development creatively and make news and public affairs media financially sustainable for the long term. In the early 1990s, the approach to democracy assistance was to provide a smorgasbord of programs on the theory that all made some contribution to consolidation. Media assistance followed the same assumption. The assumption was

obviously false in several important respects, not least that there was no necessary correlation between aid amounts and increases in press freedom. Worse, many media organizations became aid-dependent, in effect a drag on the entire democratic project. In response, many NGOs and government funders like USAID have developed sustainability criteria they can use to assess media projects before funding them and evaluation measures they can use afterward. Evaluation in democratization and media assistance is obviously difficult, requiring as it does objective measures of things that are inherently subjective. At the same time it is a valuable exercise, part of a long-overdue reassessment of Cold War thinking about what makes a media system “free and independent.”

Often as not, however, “free and independent media” remains a term of art and convenience (as do related terms like “diversity” and “media pluralism”). The “independence” of Czech Television, for example, came under international scrutiny in late 2000 and early 2001 when the government council that oversees the station dismissed its director and replaced him with Jiri Hodac, an experienced former BBC editor who purportedly had connections to former Prime Minister Vaclav Klaus and his Civic Democratic Party. The journalists at Czech TV suspected government meddling and had their suspicions confirmed when Hodac named former journalist and Klaus economic advisor Jana Bobosikova as the station’s news director. She promptly fired several editors and staffers, at which point the editors barricaded themselves in the newsroom and for a period of weeks broadcast their own “unofficial” version of the news using satellite and cable links. President Vaclav Havel and other prominent Czech writers and artists gave support to the protesters, and at one point some 75,000 Czechs rallied to their cause in Wenceslas Square, turning the entire episode into an international embarrassment for the government. Hodac eventually resigned and his cadre of new managers was fired; all the protesting editors stayed on, including those whom Bobosikova had fired weeks earlier.

Presumably the outcome of the Czech Television seizure was a victory for press independence; that was the common consensus in news accounts everywhere, particularly in the United States.^[25] But viewed in another light, the “rebels” (as they called themselves) may have paid too dearly for their cause. “The journalists behind the protests did a great job of manipulating their own media,” says Jeremy Druker of *Transitions Online*, a Prague-based news organization, “and were not at all independent or objective in their coverage of their own demonstration.” Ironically, Hodac had argued before resigning that one of his goals was to make Czech Television more professional. He had also said he wanted to make the service more efficient in the face of increased competition and a continuously dwindling audience share. Czech Television has continued to see its audience and revenues dwindle, and with them its ability to do quality public-service journalism

Too often the democracy-promotion industry forgets that while media outlets may be important contributors to civil society, they are embedded in economic society. Editorial mission counts for nothing if it cannot find sufficient revenues to sustain itself. The choice of revenues will *always* have implications for the core mission of any media organization, for-profit or not-for-profit. But that does not mean the revenue source – whether advertising or grants or loans or tax subsidies – has to define the mission (or gut the mission) of the company. The mix of revenue sources is important, but it is not everything. Throughout the world, non-profit organizations, from universities to museums to public broadcasters, survive on grants while also managing to build successful businesses and further their core

mission. In Europe and the United States, for example, public broadcasters have had to seek additional sources of revenue through private grants, for-profit subsidiaries, or partnerships with other non-profits or with private, profit-seeking firms.

In Africa, several state-private media partnerships have emerged. In Kenya, for example, Regional Reach Limited distributes video programming about health and community issues to rural areas in an alliance with the state-owned Kenyan Broadcasting Corporation, and with cooperation from the government (which provides security). Regional Reach is a for-profit firm based in Nairobi that provides free televisions and VCRs to rural communities, placing them in a central village location. People then congregate to watch entertainment and news programs that Regional Reach provides on VHS tapes, says Rose Kimotho, a former advertising executive who founded and now directs the service. A typical tape starts with the state television program, but then moves on to subjects like farming, AIDS, football, music, and religion. Revenue for the service comes from advertising, but some programming is provided through partnerships with not-for-profit organizations – churches, for example. USAID paid for 40 television sets and VCRs in return for free distribution of its messages on AIDS and malaria. The service operates in 200 village centers and has about 1 million adult viewers each month; as Regional Reach moves from VHS tapes to terrestrial broadcast transmission, Kimotho says, those numbers will increase. “For many of these people,” she says, “It’s the first time they’ve ever seen a TV. It’s like being in a theater – it’s very quiet. There are many runners from our area who so far as anyone remembers just left the village and went somewhere else. So we have programs on athletics, and they see these people running in Europe, in color and on TV. The impact is amazing – it’s the first contact they have with the wider world. Until now it was just government news on the radio.”

Interestingly, many American media assistance efforts, including in particular government ones, have shunned public-private models (including their own, such as U.S. National Public Radio) in favor of exclusively private, commercial media, thus foregoing the greater potential a mixed model has for public service *and* long-term economic sustainability. Thus the second issue: Democratization aid’s heavy emphasis on free markets and economic development arguably has left journalists in many countries in situations where their media markets have been commercialized, but they have won little if any autonomy from government. Especially for journalists in what Thomas Carothers calls “gray-area” or semi-authoritarian states, the few inches of breathing space that have come with political liberalization has been offset by having to negotiate competitive pressures in markets where the rules still heavily favor state media and entrenched elite interests. According to a 2001 World Bank report, for example, the largest media firms in 97 mostly developing countries are owned by the government or by a powerful family connected to the government.^[26] Television remains the least democratic of all media in this regard. These difficulties are compounded in countries like Indonesia and Russia, where governments have sought to re-regulate the media and rein in what they view as media excess. In others, political liberalization has simply meant the exchange of one source of repression (the state) for another (local government officials, gangs, religious authorities, powerful business interests, and others).

There is a third way to think about linking media assistance with civil society goals, and it is worth close examination by government and private aid organizations. Its specific concern is economic – the financial accounting side of civil society and free press promotion – and it borrows heavily from the management

principles of social entrepreneurship. A handful of organizations have begun this process, but the best of them is the New York- and Prague-based Media Development Loan Fund (MDLF), a not-for-profit venture capital firm that makes low-interest loans (program-related investments, as they are known in U.S. tax law, or PRIs) to high-quality news organizations in transition countries throughout the world.^[27] PRIs help recipients by allowing them to bridge gaps in credit, to accumulate assets, and, eventually, to leverage additional financing from more traditional sources. More significantly, PRIs help recipients build managerial capacity in their businesses and increase productivity. Repaid principal goes back into the loan pool, where the money is used again to help new clients, exponentially extending the impact of MDLF's assistance dollars; dividends and capital gains go to support MDLF's operating expenses.^[28]

Some MDLF clients do get grants, if not from MDLF then from other donor organizations, but the idea in every case is for the participating news organizations to wean themselves from donations entirely and to become full and competitive participants in the market. What makes MDLF unique in the field of media assistance is its commitment to its clients; the award of a PRI instead of a grant fundamentally changes the relationship between provider and recipient from one of donor/suppliant to a partnership: the funder takes a long-term interest in the financial and programmatic health of the recipient, which to pay back the loan must develop greater financial discipline and more strategic management. MDLF's clients include some of the best public-service media in the democratizing world, among them B92 and Beta News Agency in Serbia, Radio 68H in Indonesia, *Malaysiakini* in Malaysia, the *Feral Tribune* in Croatia, *El Periodico* in Guatemala, *Lviv Express* in Ukraine, and many more. Several former MDLF clients are today profitable businesses, still committed to their original public-service editorial mission but now with access to traditional sources of capital.

MDLF is not the only organization of its type. The Southern Africa Media Development Fund (SAMDEF) in Botswana, a subsidiary of the Media Institute of Southern Africa, also makes loans to media firms in its region, though with a broader focus that includes not just news but culture and entertainment.^[29] MDLF has a joint loan project with SAMDEF in Zambia and has discussed additional projects with the organization. In the United States, the San Francisco-based Independent Press Association makes relatively small loans (no more than \$50,000) to its members – “alternative” newspapers and magazines – to help them “rise to the next level” by expanding or diversifying their revenue sources through direct-mail and marketing campaigns, or by making small capital investments in things like fulfillment software and computers. The IPA was created in 1996 and counts in its membership well-known publications like *The Nation* and *Mother Jones*, along with about 400 others that include quarterly and on-line titles, most of them regional or urban-based publications for ethnic- and racial-minority audiences.^[30]

These organizations are important because they offer the best existing model for joining civil society and free press goals with a workable financial strategy. This “third way” is not the only funding model worthy of consideration in the democratization industry – in some parts of the world, loans simply cannot be secured, and so grants are still necessary and desperately needed – but it is the only one that explicitly takes sustainability as a central objective of media assistance.

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^[1] Walter Lippmann, *Public Opinion* (New York: Macmillan, 1922), 31-32.

^[2] See, for example, Gordon White, "Civil Society, Democratization and Development: Clearing the Analytical Ground," *Democratization*, Autumn 1994.

^[3] Robert W. Hefner, "Civil Society: Cultural Possibility of a Modern Ideal," *Society*, March-April 1998, 18.

^[4] There is a large and recent literature on the subject of civil society. See, for example, Gordon White, "Civil Society, Democratization and Development: Clearing the Analytical Ground," *Democratization*, Autumn 1994; John Keane, *Civil Society: Old Images, New Visions* (Stanford, CA: Stanford University Press, 1998).

^[5] Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996), 7.

^[6] See Michael Walzer, *Toward a Global Civil Society* (Providence, RI: Berghahn Books, 1998), 1-7.

^[7] For discussion on the changing role of government *vis a vis* NGOs, see Jessica T. Matthews, "Power Shift," *Foreign Affairs*, Jan.-Feb. 1997, 50.

^[8] Linz and Stepan, 40-65.

^[9] Don E. Eberly, "The Meaning, Origins and Applications of Civil Society," in *The Essential Civil Society Reader: The Classic Essays*, Don E. Eberly, ed. (New York: Rowman & Littlefield Publishers, 2000).

^[10] See Michael Foley and Bob Edwards, "The Paradox of Civil Society," *Journal of Democracy*, 1996, 38; and Marina Ottaway and Thomas Carothers, eds., *Funding Virtue: Civil Society Aid and Democracy Promotion* (Washington, D.C.: Carnegie Endowment for International Peace, 2000).

^[11] *Malaysiakini* is a subscription- and advertiser-supported online newspaper, available at www.malaysiakini.com.

^[12] John Charles Chasteen, *Born in Blood and Fire: A Concise History of Latin America* (New York: W.W. Norton, 2001), 275-301.

^[13] *Ibid*, 287.

^[14] *Ibid*, 289.

^[15] *Ibid*, 290.

^[16] Eugenio Tironi and Guillermo Sunkel, "The Modernization of Communications: The Media in the Transition to Democracy in Chile," in Richard Gunther and Anthony Mughan, eds., *Democracy and the Media: A Comparative Perspective* (New York: Cambridge University Press, 2000), 165-94, at 177.

^[17] *Ibid*, 170-179. Only in the final days of the Pinochet regime, in 1989, did the government authorize the creation of two private VHF television channels, Megavisión and La Red.

^[18] *Ibid*, 180.

^[19] Maria Eugenia Hirmas, "The Chilean Case: Television in the 1988 Plebiscite," in Thomas E. Skidmore, ed., *Television, Politics and the Transition to Democracy in Latin America* (Washington, D.C.: Woodrow Wilson Center Press, 1993), 82-95.

^[20] See Human Rights Watch, *The Limits of Tolerance: Freedom of Expression and Public Debate in Chile* (New York: Human Rights Watch, 1998), 46-57.

^[21] Tina Rosenberg, "The Monochromatic Media of Latin America," *New York Times*, May 7, 2001, A20.

^[22] See Craig L. LaMay and Burton Weisbrod, "The Funding Perils of the Corporation for Public Broadcasting," in Burton Weisbrod, ed., *To Profit or Not to Profit: The Commercialization of the Non-Profit Sector* (New York: Cambridge University Press, 1998).

^[23] See Bruce Bimber, "The Internet and political transformation: populism, community, and accelerated pluralism," *Polity*, Fall 1998, 133.

^[24] See William Ratliff, "Development and Civil Society in Latin America and Asia," *Annals of the American Academy of Political and Social Science*, September 1999, 91-113.

^[25] See, for example, "The Battle for Czech TV," *New York Times*, January 5, 2001, A16.

^[26] S. Djankov, *Who Owns the Media?* (Washington, D.C.: World Bank, 2001).

^[27] See the Media Development Loan Fund's web page at <http://www.mdlf.org/look/mdlf/index.tpl?IdLanguage=1&IdPublication=7&NrIssue=1>. MDLF was founded by Sasa Vucinic, a Serbian journalist and one of the founders of radio B92, and former *Washington Post* reporter Stuart Auerbach, who died in December 2003.

^[28] For federal tax purposes, income from a PRI is treated just like any other investment income, but when the principal is repaid it counts as a negative distribution. In effect, then, a provider must recycle PRI funds to another charitable purpose – loan or grant – in the year the principal is paid.

^[29] See the Southern Africa Media Development Fund at <http://www.samdef.com/>.

^[30] See the Independent Press Association's Revolving Loan Fund web page at <http://www.indypress.org/programs/loanfund.html>.

NURTURING CIVIL SOCIETY

Religion in Its Place

By Jim Sleeper*

Introduction

Alexis de Tocqueville's *Democracy in America* was so nuanced a description of this country's unprecedentedly democratic civic society of the 1830s that it set a standard against which sociologists and policymakers are now diagnosing a precipitous decline in civic responsibility. And in some of today's assessments, Tocqueville's understanding has become the admonition he sometimes intended it to be: We're told that the American people are losing what he called "habits of the heart" that accustomed good republicans to fuse self-interest with a deep dedication to the public good without having to think all that much about it, let alone having to study doing it. It is as if the habits of our hearts have become irreversibly bad habits. What Tocqueville called "the slow and quiet action of society upon itself"--the little ways in which Americans taught one another to commingle personal and public good--inducts us now instead into a proliferating "logic" of mistrust: self-fulfilling expectations of others' bad faith prompt guarded, antisocial exchanges, litigation in situations once mediated by a simpler good faith, and credulous watching of Fox News.

All this seems the more evident to me in the wake of the 2004 election, which mobilized millions who proclaim the power of faith but is institutionalizing the power of others who have always used such proclamations to "bless" powerful currents that are undermining Tocquevillian, republican felicity at every turn. Tocqueville's lucid descriptions of pre-industrial, pre-continental, corporate America seem no more reassuring now about a vibrant "democracy in America" than was the brilliantly dry-eyed Walter Lippmann in the 1920s, when he despaired of "the public," whose consent he said was "manufactured" in ways eerily evident in the recent election. It is not so clear from just what former state of civil felicity and political engagement we are really declining, and why. What once-great civic faith or social spirit is newly missing when Wal-Mart employees (that is, "associates") assemble for their morning pep rally? What, really, has been lost (or gained) in the fervors of Queer Nation or the Nation of Islam? If we are "one nation, after all," as apostles of an enduring civic moderation would have it, does the best of what Tocqueville described really endure?

The premise behind my questions is that liberal democracy and even republican self-governance have always depended on beliefs and civic virtues which the liberal state itself is constitutionally unable to nourish or enforce -- and which big-corporate employment and consumer marketing, quite as much big-government social engineering, does a lot to undermine. This premise about a vulnerability or self-contradiction inherent in liberalism casts doubt on some leftists' and liberals' statist, materialist prescriptions, but it also challenges conservatives' blaming of big-

government liberalism alone for the social decay to which it is often merely, in my experience, a maladroit response. Many widely noted instances of civic decay (recall the late Daniel Patrick Moynihan's complaint that we have been "defining deviancy down" by lowering our standards of pro-social conduct) reflect communally disruptive, degrading "free-market" forces at least as much as they do any "big-government" coddling or social engineering.

Better approaches, I will suggest here, come neither from "the left" nor "the right" as we have known them but from a new understanding of the separation of church and state that, by countenancing more religious vigor, would also strengthen nonbelievers like me who live in the interstices between faith and formal liberalism. The problem as I understand it was described by Tocqueville in a passage that is too seldom cited by contemporary liberal assessors of our civic decay and that is too easily touted by people who are joined at the hip to the consumerist promoters of that decay:

When the religion of a people is destroyed, doubt gets hold of the higher powers of the intellect, and half paralyzes all the others. Every man accustoms himself to have only confused and changing notions of the subjects most interesting to his fellow-creatures and himself. His opinions are ill-defended and easily abandoned; and, in despair of ever resolving by himself the hard problems respecting the destiny of man, he ignobly submits to think no more about them. Such a condition cannot but enervate the soul, relax the springs of the will, and prepare a people for servitude. Not only does it happen, in such a case, that they allow their freedom to be taken from them; they frequently themselves surrender it. When there is no longer any principle of authority in religions any more than in politics, men are speedily frightened at the aspect of this unbounded independence. The constant agitation of all surrounding things alarms and exhausts them. As everything is at sea in the sphere of the mind, they determine at least that the mechanism of society shall be firm and fixed; and, as they cannot resume their ancient belief, they assume a master.

For my own part, I doubt whether man can ever support at the same time complete religious independence and entire political freedom. And I am inclined to think that, if faith be wanting in him, he must be subject; and if he be free, he must believe.

I do not take Tocqueville to be saying that every individual must run out and "get religion," and surely he is not proposing to hand the public sphere over would-be apostles of religious truth. But the passage seems to me right enough about the sources of civic decay and distemper to suggest that public policymakers and "rational choice" analysts of our social condition may not be the best diagnosticians of a decline in civic virtue, let alone its healers.

In *The Closest of Strangers: Liberalism and the Politics of Race in New York*, I diagnosed an unhealthy decline in public policymaking itself, at least as it affected the urban civic cultures I had engaged as a journalist and activist in the city. While developing my account, I came, against my own left-liberal inclinations, to accept charges that a lot of social policymaking had itself become an accelerant of civic decline. But I had no idea what was missing besides a resilient public spirit whose own wellsprings remained obscure. I knew only that there was something almost

anomic about the American provision of social welfare that, whatever its intention to redress the very real damage that economic exploitation and racism had done, retarded any reliable balance between rights and responsibilities that might revive civic responsibility in a liberal republic.

But I also accepted, and still do, the liberal countercharge that a lot of the civic irresponsibility whose increase conservatives blame on entitlement and redistribution policies is driven even more strongly by something they tend to support as uncritically as some liberals do entitlements: the investment and consumer marketing methods of the legal, fictive "persons" we call corporations. Their methods, which are ever-more protean, intrusive, and absorptive of civic life, encourage a kind of spiritual privatization and civic disengagement by workers, consumers, and the unemployed. If liberal social-welfare policy, too, has accelerated civic decline, it has done so, I repeat, as a maladroitness and indeed often counterproductive response to this other, more basic cause of that decline. The classical liberal understandings of freedom and sovereignty which conservatives proclaim, and upon which the American republic perhaps uniquely relies, cannot be squared with today's conservative understandings of corporate freedom and sovereignty.

The thorny paradox we all face is one that Tocqueville only partly anticipated: These patterns of investment, broken loose from the religious ethos in which John Locke would have harnessed them, are generating an ever-more reckless, relentless, and intrusive "culture" of consumer marketing that degrades and atomizes civic and political culture in ways liberal government is not constitutionally empowered to constrain, much less redirect. Even Adam Smith's theory of the moral sentiments would have been violated and shocked by the practices of many who invoke him as a secular patron saint of free-marketeering. Arguably, John Adams foresaw the dimensions of the problem:

When the people give way, their deceivers, betrayers, and destroyers press upon them so fast, that there is no resisting afterwards. The nature of the encroachment upon the American Constitution is such as to grow every day more and more encroaching.... The people grow less steady, spirited, and virtuous, the seekers more numerous and more corrupt, and every day increases the circles of their dependants and expectants, until virtue, integrity, public spirit, simplicity, and frugality become the objects of ridicule and scorn, and vanity, luxury, foppery, selfishness, meanness, and downright venality swallow up the whole society.

If I were to end the diagnosis right here, the most obvious prescription would be to reconfigure somehow the relationship between liberal public sovereignty and corporate capitalism. We might ask President Bush, "If you want to assert American sovereignty, why not do it against tax shelters on the Cayman Islands and in other places abroad that enable companies to shift their tax burdens to the people who fight your wars?" We might even subordinate the "free speech" rights of conglomerates more than we do now to the civic conversation of people who are real, not fictive, and who are citizens, not just employees and consumers. "Public" corporations are not thinking beings with political ideas whose expression the First Amendment was written to protect; their "ideas" are tactical reiterations of one unexamined imperative—to pursue profit and market share. Yet their power to inundate public discourse in that pursuit, buying up political debate while assembling huge audiences on any other pretext, guarantees not democratic deliberation but

more off-screen spectacles, as when Time Warner CEO Gerald Levin's son, an inner-city teacher, was murdered by a 19-year-old aficionado of the gangster rap the elder Levin was pumping into the Bronx. Of course there is no legal or even investigative-journalistic connection between what the elder Levin does and what the 19-year-old did. But need one be an Aristotle or a Plato (or a Jeremiah or a Cicero or, heaven help us, a Jerry Falwell) to warn that a society that becomes a slippery web of contracts and rights will lack a civic vocabulary or culture thick enough to resist its own cultural and moral decay?

Where Religion Does and Doesn't Count

Where can anyone who makes such a diagnosis go to find a prescription? Here, sadly, both big-government liberals and the left have demonstrated repeatedly that they have nothing with any real civic and political traction to offer. Who can provide citizens--including those who serve corporate usurpers of the prerogatives of citizenship--with a healthier statutory or constitutional regimen or cultural diet that can reconstitute society? The medical metaphor fails--and, with it, a lot of the policymaking that relied without saying so on the civic strengths it meant to enhance but often displaced. The power to recast relations between corporate capital and civil authority would have to be generated somehow from an Aristotelian, perhaps Arendtian engagement with "the political." Or, if American history is a guide, real power to effectuate reform would have to come from politics that, while essentially liberal, could draw on nationalist and religious currents that at times in the last century proved more potent than either corporate investment and marketing or liberals' statist, materialist responses to it--responses stripped juridically of moral content.

This next step in my diagnosis--from an anti-capitalist accounting to a Calvinist or quasi-evangelical reckoning--is not as far-fetched as it may sound. David Chappell's justly celebrated *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* is one of the most compelling recent reminders from a serious historian that we cannot understand this country's most effective social-reform movements — from offshoots of the original Puritan errand itself to abolitionism and the Social Gospel, Progressive, suffragist, temperance, early labor, and civil rights movements — without also understanding the Hebraic/Protestant covenantal and prophetic-nationalist currents that have carried American reform across, and sometimes with, Enlightenment currents in our civic thinking.

Never mind that when Ronald Reagan invoked the Puritan "City on a Hill" against the Soviet "evil empire," liberals heard only rigid Cold War ideology; more Americans heard sounds of a longer struggle between Old World tyranny and an America they think chosen for great things. That struggle probably continues in the mind of George W. Bush. Even if you dismiss his way of inspiring governance with faith, look into the passion that produced 5,000 new, owner-occupied "Nehemiah" homes in "hopeless" inner-city New York, built by church-based organizations working with the Industrial Areas Foundation. These homes are named for the biblical leader who convinced his despondent neighbors to rebuild Jerusalem. The organizing that made them sound and affordable to first-time, non-white buyers--nurses' and teachers' aides, transit and hospital workers--did not demand or offer the deep subsidies of public housing where a surprising number of Nehemiah buyers had lived; it drew unapologetically on religious and patriotic currents to nourish civic

responsibility in the "power organizations" I sketch in *The Closest of Strangers* and IAF organizer Michael Gecan describes more intimately in *Going Public*.

Suffice it to say here that these organizations have stabilized neighborhoods that some had thought drained of economic and political clout, partly because they understand that while civic virtue may be aided by abstract or legalistic defenses, it cannot be awakened or sustained that way. For the Nehemiah builders who organized the crucial home-owner preparation and training, faced down the corrupt union and public officials who were driving up the costs of housing, and mounted the crucial home-owner training and living-wage campaigns in the basements of their churches as centers of a moral community, civic responsibility rests on sustaining a general, public expectation of religious faith without any imposition of doctrine.

There is a genius here that conservatives understand but abuse and leftists and liberals resist or simply have not grasped: in keeping American understandings of personal dignity and liberty free of doctrinal or ecclesiastical (and therefore corruptible) frames, the separation of church and state strengthens voluntarist religious enthusiasms, but it also reinforces presumptions of natural rights by sidelining arbitrary claims of divine right in politics. Among the unexpected benefits is that those of us who are nonbelievers find far better protection in the interstices of this balance between the Enlightenment of Locke and the Lord of the Covenant than we would in some post-modernist free-for-all, which would really be a Hobbesian free-for-all.

Expecting faith without imposing doctrine is only the beginning of any struggle. IAF organizer Gecan tracks the evolution and entanglements of three public cultures: the market, the bureaucratic, and the relational or voluntary. Organizations like his might not have been needed in the first place if Lockean capitalist property-making had not been just as important as religion to American civic culture, a duality that goes almost all the way back to the Puritans. But the lesson to draw from the "built-in" conflict between the spiritual and the material in American life is that liberal government cannot by itself regenerate politics by statute or social policy.

To put it more pointedly, a politics of civic responsibility cannot sustain itself without going into opposition to an economic dispensation which has overreached but which, contrary to what dialectical materialists thought, is not doomed; it needs reconfiguring, not abolishing. The question is where to find the public moral strength to reconfigure it. But there is a caution for left-liberals lurking in Max Weber's suggestion, in *The Protestant Ethic and the Spirit of Capitalism*, that a culture capable of inspiriting and tempering capitalism must draw, explicitly or surreptitiously, on religious wellsprings of personal responsibility. The caution is that, in the American scheme that has endured since Puritan times, capitalism is not ultimately the deepest threat to civic virtue. That threat runs far back beyond capitalism in history and myth, through the biblical accounts of the golden calf to the Garden of Eden, which contained a serpent and a couple of very corruptible human beings long before there was a single capitalist. Leftists still think and act as if capitalism itself was the original sin; fundamentalists still construe the problem biblically; but the last century taught many to prefer a civic politics that is not so Manichaean and utopian and that, by acknowledging people's divided nature in more prosaic, Madisonian ways, fortifies them to reckon with oppression's roots, in themselves as well as in their representatives and their "betters."

Still, Madison, Adams, and other framers drew, sometimes surreptitiously, on residues of the Puritan faith on which the commonwealth of Massachusetts was founded. It drew moral passion into a vortex of self-scrutiny, sometimes reducing political responsibility to personal authenticity (or "grace"). But whenever Puritan moralism was liberated from the surplus repressions that so often attended it (as in Lincoln's politics or Harriet Beecher Stowe's writings), it nourished the personal and civic responsibility upon which the republic relied repeatedly, if sometimes only in a pinch. It was in communing with a higher power that leaders (elected or insurgent) felt strong enough to confront the powers that be. That is how we got William Jennings Bryan, the Social Gospel, and Martin Luther King and the civil rights movement, but also, at least residually, the more avowedly secular Progressives and Debsian socialists, and the Bill Bradleys, John McCains, and other rebel tribunes.

Here, too, was the more prosaic civic leadership I sometimes encountered growing up in Yankee New England, with its ethos of plain living and high thinking, understated felicity of expression, willingness to volunteer for leadership in otherwise-leaderless circumstances, and capacity to bear pain with grace (if only because bearing it demonstrated that one's "grace" in salvation was guaranteed). The pain-bearing got transmuted into sportsmanship and is the point, I think, of those football prayer huddles: yes, we play brutal contact sports and fight wars and run toward death in collapsing buildings in order to save people. And while religion is used to "bless" some of the worst of these efforts--that is why we need constitutional liberalism to restrain it--we need to be sure that it has some room. Unless you think that capitalism is a more formidable obstacle than the divided human heart itself to heaven on earth, a religiously inflected civic nationalism may be needed to transmute public aggression (or despair) into something nobler against great odds, as in the Nehemiah organizing or in Lincoln's religiously inflected rhetoric and his fraught, agonizing decision to fight the Civil War.

In *The Souls of Black Folk*, W. E. B. Du Bois reprinted the poet James Russell Lowell's rendering of the long, twilight struggle with evil that is woven into the heart of American civic culture: "Truth forever on the scaffold; wrong forever on the throne / Yet that scaffold sways the future, and behind the dim unknown / Standeth God within the shadow, keeping watch above his own." Every so often, this God would loose the fateful lightning of his terrible swift sword, so that even in 1963 Martin Luther King could stir millions by crying, "Mine eyes have seen the glory of the coming of the Lord!"

In 1968 I saw Yale University Chaplain William Sloane Coffin, Jr., "bless" the courage of three students who handed him their draft cards to symbolize their defiance of the American government in the name of the American nation by refusing to fight in the Vietnam War. "Believe me," Coffin quipped, "I know what it's like to wake up in the morning feeling like a sensitive grain of wheat, lookin' at a millstone." It was a burst of Calvinist humor, jaunty in its defiance of the powers that be on behalf of a higher power, but against what seemed overwhelming odds. This vignette of constitutional patriotism makes little civic sense unless one complicates the idea by suggesting that such patriots might include civilly disobedient but peaceful anti-abortion activists who believe that life is a continuous, sacred thread, not to be broken by the state or individuals exercising their "rights." Some may loathe these activists as much as others loathed those who opposed the Vietnam War or, in the civil rights movement, the false racial comity of the old South. But the test of a constitutional patriotism leavened by an almost sacred sense of civic duty is that it

respects even bitter adversaries who are willing to accept legal punishment to strengthen peaceful dissent.

Such heroic protest is ... well, heroic, and rare. Not so the ordinary civic-republican ethos which the literary historian Daniel Aaron called "ethical and pragmatic, disciplined and free." This, too, used to be confirmed in folkways and friendships as well as in the Constitution, and it, I think, was part of what Ben Franklin had in mind when he answered, "A republic, if you can keep it," to a spectator outside Independence Hall who asked what kind of government the delegates were preparing. Another way of putting it is that, in the American view, civil society precedes, legitimates, and may even overthrow a regime and the interests it has empowered. We "keep" the republic by obeying its laws, but also by practicing the fair play, reasoned argument, and tolerance that cannot be mandated but are nourished in the folkways, friendships, and rites of passage of republican (small "r") training grounds--the after-hours schools, youth programs, summer camps, and other institutions that are established to strengthen civic attachments, not just to enhance the resumé of college applicants.

I realize that I have opened the door to questions about government funding of faith-based organizations, and in principle I am not opposed, although I hasten to repeat that conservatives abuse the principle as often as they understand it. Even some secular republican training grounds have drawn quite consciously on the Puritan/Hebraic religious currents in our culture as well as on Enlightenment affirmations of natural rights. I believe that it was civic crucibles like these that made the Jimmy Stewart of *Mr. Smith Goes to Washington* credible to the young Bill Bradley, John McCain, Mario Cuomo, or even Rudolph Giuliani.

What bears repeating--because it extends this article's "diagnosis" of our civic decline beyond the materialist critiques that the decline incorporates but transcends --is that American civic responsibility inheres in political projects recognizing struggles with evil in the protagonists' own hearts, as well as in their adversaries'. And the lesson I am inclined to draw from these ruminations is that the civic culture we see declining--the old one that cantilevered the Enlightenment of John Locke and James Madison with the Christian introspection of Jonathan Edwards--reckoned more fruitfully with our divided natures than does the palliative "culture" of sensationalism, anomie, and amnesia that is replacing it, attended by "helping" professions and policymakers who would medicate away even its irreducibly moral crises. To understand our decline, assess it against this loss of the resilient tension between good and evil, between faith and natural rights.

Capitalism and Conviction

Van Wyck Brooks wrote early in the last century that when the jug of old New England finally cracked, spilling its Puritan wine, the liquid ran into earth as rank commercialism, while vapor and aroma rose heavenward in the dissociated mysticism of Transcendentalism. Boston liberalism is still suffused by the latter, while the George Herbert Walker Bush who began his 1988 presidential campaign by lambasting Michael Dukakis as a Boston liberal was himself the embodiment of the Puritan liquid run aground in the oil fields of West Texas. The Bush tenures--this one even more than the last--serve an unrestrained Lockean ethos of property-making (or the appearance of it) that, however well it has served this country in Locke's Christian, quasi-Calvinist harness, is broken loose from that covenant and is running

rampant over civic virtue in a "culture" that degrades the individual and social dignity it pretends to enhance. It measures out individualism by the slender power of choice at the mall, draining other associations, inducing us to privatize our pleasures and socialize only our pains, as Robert Reich put it.

America has always been a rolling synthesis of forces no one could grasp or ride, certainly not by thinking ideologically, doctrinally, or perhaps any other way than mystically, like Whitman or Melville, or like a Jack Nicholson movie character, teetering on a tightrope between all-consuming materialism and rapturous faith. But lately the country seems to me not a synthesis but a riot of forces that are atomizing and dissolving us as a polity, in currents so swift that only a doomed national security state or empire would even pretend, quite wrongly, to channel them. Through both classical liberal and Puritan moral lenses we observe the fading of "the political," as Arendt envisioned it, and, with that, of Daniel Aaron's civic ethos, "ethical and pragmatic, disciplined and free."

But are those lenses right for us? Robert Bellah and others have described the loss I've just mentioned as a cause of diffused if quiet heartbreak, quiet because the therapeutic, medicating, or hedonist culture that is replacing it is depriving us of the vocabulary of moral connectedness I mentioned earlier in linking Time Warner's products with a murder. This is a risky way of seeing things. After all, American political culture has been riotous, scandalous, even licentious often enough in the past. But never, Robert Putnam warns us, has it seen such poignant disaffection.

More symbolically, the collapse of the World Trade Center, although caused by external forces, seems to mirror the implosion of mighty corporations and Catholic Church governance, as well as of standards of decency and civility in public places, as evidenced in fans' attacks on players in a former national pastime, baseball, which the market is eating alive. What George Orwell called the "prolecult" of mass entertainment is more gladiatorial, from the recent movie *Gladiator* to TV's *The Sopranos*, insinuating calculations of force and fraud into daily life. The degradation of even upper-middle-class morals and manners, from road rage to compulsive body building, suggests a *sauve ce qui peut*, "every man for himself" stance toward a society no one trusts.

For 30 years now, a lot of this decline has been marketed and even ideologized as "liberating." But the civil rights movement would have been inconceivable without its famous capacity to uphold some of the older civil society's supposedly hypocritical and oppressive conventions: when Rosa Parks, on her way home from a long workday in the department store that employed her as a seamstress, refused quietly to move to the back of the bus, the dignity in her bearing strengthened what was good in some old conventions even as it challenged what was bad in others. But now corporate marketing is dissolving them all, shuffling our racial and libidinal decks so indiscriminately that it "liberates" us only into a spacey, anomic meanness.

In the studios of television tell-all circuses and show trials, for example, blacks and whites vent their despair together in perfect equality. Native American "tribes," some concocted by activist-entrepreneurs and investor-friendly officials, use their sovereignty to set up casinos that, in a bitter poetic justice, hook busloads of flaccid, despairing whites on gambling as surely as whites once hooked Native Americans on firewater. Both the left, flummoxed by racist fantasies of liberation,

and honorable conservatives, flummoxed by free-market idolatry or libertarian doctrine, are speechless about this addictive, regressive tax of casino gambling. And our decline is accelerated by journalism's collapse into the tentacles of entertainment conglomerates.

If I sound like an old Roman citizen echoing Cicero's lament that we are too ill to bear our sicknesses or their cures, it's because I foresee for America neither the Soviet-style totalitarianism of conservative nightmares nor the fascism of the fevered leftist imagination, but a dissolution like ancient Rome's. Edward Gibbon's accounts of it leap off the page. He wrote that the imperial paternalism introduced a "long, slow poison" into the vitals of the republic, such that citizens "no longer possessed that public courage which is nourished by the love of independence, the sense of national honor, the presence of danger, and the habit of command." Especially interesting is his description of Rome's passage from republic to empire: Augustus framed "the artful system of the Imperial authority to deceive the people by an image of civil liberty," writes Gibbon, because Augustus knew that

the senate and people would submit to slavery, provided that they were respectfully assured that they still enjoyed their ancient freedom.... That artful prince ... humbly solicited their suffrages for himself, for his friends and scrupulously practiced all the duties of an ordinary candidate. The emperors disdained that pomp and ceremony which might offend their countrymen.... In all the offices of life they affected to confound themselves with their subjects and maintained with them an equal intercourse of visits and entertainments.

And there we are, arguably: George W. Bush may be no Augustus, but the resonance of these passages in his manner suggests the passing of a civic-nationalism that balanced conservative values with liberal opportunities in the name of a larger liberty and constitutional comity. Ideological thinking is part of the problem. It is when civic discipline loses ground to those who would impose on our politics the left-versus-right floor plan of the 19th-century French Chamber of Deputies that we find ourselves lurching back and forth between the opportunism of left and right, each side right about how the other is wrong, but each too partisan to follow its vaunted truths wherever they really lead.

But lamenting the rise of "empire" and the end of days is too easy a moralism for people whose abdication of civic responsibility is relatively insulated from the consequences for others' freedom. It would be better to try to regenerate civil society by recalling how it was generated in the first place, and that would return us to the irony with which I began: indispensable though the Enlightenment is to this country, Tocqueville's caution about the codependency of faith and freedom reminds us that we cannot know all of America's sources of strength without reckoning, even as an unbeliever, with the Judeo-Protestant legacies that have shaped its politics and still might temper its capitalism.

Perhaps it is because policy intellectuals have not so reckoned that their, and our, political responses to market depredations have been inadequate. Liberals have chosen statist, materialistic, and paternalistic answers--legalistic, bureaucratic entitlements (including "corporate welfare" in subsidies of all kinds)--that, combined with private mass marketing, insinuate the "slow poison" into the vitals of the republic and undercut civic responsibility as Gibbon recalled it (or projected it backward from his own England?) for ancient Rome. We have not sought new ways

to nourish or reassert the civic sovereignty and patriotism on which a republic stands.

But the paradox I mentioned earlier, in which unleashed market forces “liberate” us into crises over which liberal sovereignty has no sway, suggests that liberal government is a doubtful provider of civic virtue and responsibility, of energetic civic education, training, and rites of passage. Like settlement houses and some labor unions in the past, today’s crucibles of civic engagement, if not civic virtue, are the stronger neighborhood organizations and churches such as those organized by IAF, some employing community-organizing methods pioneered by Saul Alinsky. They do this in arms-length relationships with public as well as private supporters, whom they tend to fend off but sometimes cajole or embarrass into doing things their way, whether in supporting charter schools or other school reforms or in developing housing and living-wage programs that are far from the social-welfare models of the Great Society. They challenge both inner-city “welfare” programs and corporate welfare, both white racism and the reactive, non-white racialism of “liberationist” academics and activists.

I first saw their power and faith at work in 1982, in Brooklyn’s devastated Brownsville section, at a rally of 8,000 American and Caribbean blacks, Hispanics, and a few whites whose organization, East Brooklyn Congregations (EBC), was breaking ground for the first 1,000 of the Nehemiah single-family row homes on 15 abandoned city blocks. “Contrary to common opinion,” cried the Rev. Johnny Ray Youngblood, “we are not a ‘grassroots’ organization. Grass roots grow in smooth soil! Grass roots are shallow roots! Our roots have fought for existence in the shattered glass of East New York and the blasted brick of Brownsville! And so we say to you, Mayor Koch, ‘We Love New York! We Love New York!’” The crowd joined him, on its feet, shifting the emphasis to the “We,” in “We Love New York!” The mostly white dais was stunned. The bishop of Brooklyn blinked back tears.

Civic patriotism was not supposed to happen here. But these people had built a “power organization” that turned both capitalist and socialist assumptions upside down. In hundreds of house meetings and lay leadership training sessions run by Alinsky’s Industrial Areas Foundation, the EBC studied local power and began with simple goals. National parent church bodies contributed almost \$9 million. The city and state gave land and subsidies, but the initiative, training, and discipline came from the EBC. These poor, faithful people’s probity made local bankers, contractors, politicians, bureaucrats, and even progressive organizers seem opportunistic by comparison. And not just by comparison--by confrontation. The EBC had to face down corrupt unions and public officials demanding kickbacks, and it did so only by combining the power of numbers with the power of faith as represented in calls from the Roman Catholic bishop to the mayor and union leaders.

This certainly was not socialism or black power: in the crowd that day were 100 dazed-looking whites who came by bus from Archie Bunker neighborhoods in nearby Queens--members of a sister organization of churches. Their president, Pat Oettinger, took the microphone and cried, “Our trip to Brooklyn today has reinforced our belief that there is no boundary between us. We are all one neighborhood, one great city. Your heartaches are our heartaches! Your victories are our victories!” The crowd roared back its welcome. The Queens visitors loosened up and waved. “Two years ago,” Oettinger later told me, “you couldn’t have gotten my neighbors here in a tank.”

What they experienced would have to happen to tens of thousands more to change the civic culture of New York. But two things are worth noting. First, 8,000 low-income black and Hispanic people instructed white officials and fellow citizens in rebuilding civic consensus as well as housing. Second, years after that groundbreaking, I watched Mayor Rudolph Giuliani embrace Johnny Ray Youngblood on a stage in Queens. Giuliani wasn't one to subordinate politics to claims about capitalist root causes or to ideologizing people's pain. Valid though indictments of speculative misinvestment and its social consequences have been, Giuliani was elected--if only by default--because those indictments, and the racial flag-waving that accompanied them, were not in themselves prescriptions, let alone alternatives that could work. There seems to be no substitute for the covenant of civic trust that Nehemiah knew how to tap when other organizers had failed.

Again, I am not urging religious belief on anyone, only more respect for it as a civic wellspring. We can control it constitutionally without discouraging or censoring it as automatically as some of us have tended to do. Precisely because the United States is becoming even more racially, ethnically, and religiously diverse than any census color-coding or Ford Foundation ethnic corralling can comprehend, we should be working harder to forge a few republican/civic bonds.

I plead guilty to begging many policy questions in order to aerate this issue of civic decline. Against the explanations I have offered, policies such as the public funding of faith-based institutions and charter schools, stronger statutory support for organizing the unorganized, and "living-wage" contracts with private providers of certain public services are all preferable to the large state bureaucratic entitlements that have tried to offset the consequences of predatory corporate practices I have mentioned. We probably do better, morally as well as administratively, by helping people to help themselves. The efforts I have listed are doable, and probably with no more scandal than attends the often-corrupt, culturally vapid political system we sustain now, but only if a civic consensus to do them can be translated into an electoral one. I do not see that George W. Bush's invocations of God do more than gloss a fundamentally corrupt and socially decadent free-marketizing like that during the tenure of Karl Rove's favorite president, William McKinley; but Bush & Co. might do well to recall that the depredations of the 1880s and '90s prompted the Social Gospel and Populist movements. Ameliorative liberal policymaking rides on the cusp of those movements but tends only to enhance market pacifications. I see nothing that can break through the torpor besides a faith -- deeper and wiser than the present administration's -- that is resonant in an understanding of this country's history as a moral experiment. I believe our history should be taught that way and our projects should be undertaken in that spirit.

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NURTURING CIVIL SOCIETY

**Women, Civil Society, and NGOs
in Post-Soviet Azerbaijan**

By Nayereh Tohidi*

Although the public at large still knows little about the meaning, functions, and significance of non-governmental organizations (NGOs), the “Third Sector” in Azerbaijan is gaining prominence among intellectuals and activists. The recent surge of interest in civil society building, especially in non-partisan and non-governmental organizations, may reflect a new dynamism toward democratization in this country.^[1] The widespread misunderstanding and resentment of NGOs, especially on the part of government supporters in 1994-96, seems to be changing as many of the activists and officials, both proponents and opponents of the Heydar Aliyev government, show a relatively good understanding of and positive attitude toward NGOs.

In Azerbaijan, women have been active, often playing leading roles in the Third Sector from very early on, but women-focused NGOs did not form until a few years after the collapse of the USSR when women began to fear that they were losing social status. As pointed out by Valerie Estes, it is necessary to separate the role of women as actors in NGOs from the role of NGOs in addressing women’s and gender issues. Many women work in NGOs that do not address women’s concerns, and many NGOs that are not identified as women’s NGOs deal with problems specific to women or gender issues.^[2]

Why have women in Azerbaijan, as in other post-Soviet states, been so active in NGOs?^[3] According to Irada Kulieva, one of the founders of *Gulyum (my flower)*, aimed at strengthening environmental education for preschool children throughout Azerbaijan,

The Third Sector suits women, because NGOs are busy addressing many of the social problems that women have been left to address for years—disabilities, health, children’s issues and education.^[4]

There are more reasons behind women’s activism in NGOs. As argued by Estes, in the face of the exclusion of women “from the power centers of government and big business, NGOs offer women one of the few avenues currently available to them to promote broad-scale socioeconomic change, not just change connected with women’s issues.”^[5] Estes also suggests that, compared to the traditional positions of power, NGOs are new and relatively devoid of corruption and hence less liable to damage the reputation of women and their families. Additionally, one should consider that Azerbaijani women (compared to men) have better communication skills, foreign language proficiency, and stronger informal networking abilities. This can facilitate their contacts with foreign donors as well as grant writing and resource mobilization.^[6]

The main barriers to the growth of NGOs continue to be related to economic hardships and lack of resources and philanthropic institutions, exacerbated by the fact that the issues concerning Karabagh, the site of Armenian invasion, and refugees from there draw away most of the available resources. Despite some improvements in the NGO-government relations and communication, the legal and governmental barriers, long waits for registration, and lack of transparency continue to interfere with the proper and free function of NGOs. Due to scarcity of resources, NGO activism (for both men and women) is confined primarily to the capital. There are very few NGOs addressing gender issues in the provinces.

Generally, the initially fierce competition to establish contacts with donors and secure grants is slowly giving way to a realization of the necessity of cooperation among NGOs. By 2001, about ten coalitions of NGOs had emerged. One of the largest and most active NGO coalitions is the National NGO Forum (*Milli OHT Forumu*). Formed in 1998, the NGO Forum brings together and coordinates 262 NGOs, including a number of women's NGOs, and has recently established branches in five regions. It is encouraging to see that one of the Forum's main sectors of activity is gender (the others being human rights, development, ecology, peace, and democracy). Women make up 40 percent of the administrative body (6 out of 15), 37.5 percent of working staff, and 10 percent of experts in the Forum.¹⁷¹ The member organizations hold monthly meetings to share their concerns, experiences, and ideas. It was due to such coordination and cooperation that NGOs were able to bring more serious pressure on the government for legislative reforms.¹⁸¹

Currently, women's NGOs are of various types. Although these NGOs usually claim political independence, a number of them are directly or indirectly active in partisan politics as well as women's rights issues. For instance, the Azerbaijan Women's Majlis (*Sevil*) claims to be the largest women's association, with chapters or representatives in 72 regions of Azerbaijan, and is led by the President's daughter Sevil Aliyeva. The D. Alieva Society for the Protection of Women's Rights initially emerged as the women's wing of the Popular Front of Azerbaijan and up to 1995 engaged actively in nationalist politics with no clear gender perspective. However, as stated by its Chair, Navella Jafarova, in recent years, this organization has become "more inclusive, less militant, and more concerned with and active on women's and gender issues."

We practice what Ibrahimbeyova [Gender in Development coordinator] preaches and theorizes. For example, after a seminar in a village in Khachmaz region, we taught 40 women how to punish a man in that village who was battering his wife. We have been the first to address the issues concerning prostitution and trafficking in women. We teach women *and* men how to use contraceptives.¹⁹¹

One of the positive recent developments concerning women's NGOs has to do with the establishment of a Gender in Development (GID) unit in Azerbaijan in 1997 under the auspices of the United Nations Development Program (UNDP). Under the directorship of Rena Ibrahimbeyova, a capable, gender-conscious Azerbaijani woman with training in psychology, this Center has embarked on a series of impressive and unprecedented educational and capacity-building programs among women. Among the innovative and timely activities of the GID in Baku are organizing national and regional conferences on issues such as "Women's Rights Are Human Rights" and "Women in Conflict Resolution"; disseminating brochures on such taboo issues as

violence, rape, and sexual harassment^[10]; and producing educational and empowering TV programs dealing with gender relations.^[11]

The growing influence of transnational feminist networks, gender projects of United Nations agencies such as UNICEF and UNDP, UN-sponsored regional and world conferences on women, and the activities of some gender-sensitive international foundations such as the environmental group ISAR, the Soros Open Society Foundation, and the National Democratic Institute have combined with the urgency of Azerbaijani women's needs for information, resources, and gender education. Despite some undesirable consequences of intervention by foreign donor agencies in post-Soviet Azerbaijan, the interplay between domestic and international factors has contributed to an incremental shift toward gender sensitivity in the views, orientations, and goals of the women's NGOs.

Unfortunately, however, before such initiatives can have a wider impact in society, projects such as GID are terminated due to lack of funding. This underlies a serious concern over the sustainability of NGOs, since donations from international sources make up over 95 percent of financial sources of support for most NGOs. "Donors give birth to the child and leave it out there with no support to grow," according to Azer Allakhverov.

Thanks to the efforts of GID (led by Ibrahimbeyova), women's NGOs such as the Center for Women and Development (led by Elmira Suleymanova) and the D. Alieva Society (led by Navella Jafarova), as well as women in the government such as Fatma Abdollahzadeh and Zahra Quliyeva (head of the State Committee on Women's Issues), Azerbaijan has joined the Convention on Elimination of All Forms of Discrimination against Women and has officially adhered to several UN conventions concerning human rights and women's rights. The success or sincerity of Azerbaijan's authorities in the implementation of these conventions, however, remains to be seen. Since the creation of the above-mentioned state committees and especially since preparation for the Beijing conference began, a renewed sense of enthusiasm has emerged among women activists, especially those close to the government. Although still limited to a small number of elite women and some political activists, this has set in motion a more gender-focused, systematic, and sustained engagement of women's groups, which may pave the way for the emergence of a more popular and grassroots women's movement in the future.

Another encouraging development is increased cooperation between Armenian and Azerbaijani NGOs. Women activists and NGOs such as the Society of Azerbaijani Women for Peace and Democracy in the Caucasus (directed by Rena Safaraliev) have been playing an active role in peacemaking. Arzu Abdullayeva, the head of the Helsinki Citizens Assembly of Azerbaijan and a leading member of the Social Democratic Party of Azerbaijan, has been harshly criticized by Azeri ultranationalists for her increasingly bold peace initiatives. With the help of international donors, a number of Azeri, Armenian, and Georgian women have paved the way toward conflict management and peace building by holding meetings and establishing dialogue between Armenian and Azerbaijani NGOs (also including Georgian NGOs) in Baku, Yerevan, and Tbilisi.^[12]

The State Committee on Women, created in 1998, is supposed to "oversee and coordinate" all programs and activities, including those of the women's NGOs dealing with women's status in Azerbaijan. The extent of this oversight is not clear yet, nor is its relationship with women's NGOs. The independence of NGOs from state control, however, is necessary for the emergence of civil society. On the other hand,

certain aspects of the NGO movement, such as total dependency on foreign donors and orientation of issues and projects toward grant-giving external/foreign donors rather than internal/domestic needs and priorities, may increase the potential for bureaucratization, corruption, and homogenization of women's activism similar to that seen in the Soviet Union and other authoritarian regimes. Such a state-centered or foreign-dominated or grant-dependent "feminism" is bound to diminish women's grassroots initiatives and overshadow diversity and genuine agencies for change toward real needs, equality and democracy.

Although the overall impact of the post-Soviet transition on women's status, their economic and social rights has been negative so far, many women are taking advantage of recently introduced civil rights and new opportunities. Alarmed by the retrogressive gender agenda of the post-Soviet nationalist, conservative, and Islamist forces, many women have begun to redefine the gender parameters of national independence, the market economy, and democracy. Through their political and civic activism, many women, especially those with higher education, professional experience, and language skills, are taking part in civil society-building and democratization. They are fighting unemployment, political exclusion, and social marginalization by asserting their presence in both formal politics and the informal civic arena, especially NGOs.

Women's social activism, initially dominated by charity and promotion of nationalism, is gradually gaining gender-consciousness. Azerbaijani women currently avoid identifying themselves with feminism, especially "Western feminism," which is associated in their minds with hostility to men and the family. But many aspects of their social activism would serve a long-term feminist strategy.^[13] Activities indicative of a growing gender-sensitivity in women's civic activism in Azerbaijan include women's fights against unemployment and poverty, and more recently against domestic violence, sex discrimination, regressive attempts to reverse egalitarian family law, and trafficking in women, as well as their support for implementation of the Beijing Platform for Action and support for promotion of women's representation in the parliament and political parties.

Regardless of whether they characterize themselves as feminist, many women have begun to assert their agency by incorporating a gender-conscious approach in a struggle toward gender-sensitive socioeconomic development and democratization. The activism of many may evolve into a "national feminism"^[14] containing a nationalist undertone, or grow in line with "difference" feminism as observed in Latin America,^[15] but it seems unlikely that well-educated, professional and economically active Azerbaijani women will passively submit to a loss of their civil and human rights.

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^[1] For an informative overview of NGOs in Azerbaijan, see Allakhverano, Azer, "The Third Sector in Azerbaijan: Theory and Practice," and "The Report on the Development of the Third Sector in Azerbaijan (2000)" by Society for Humanitarian Research, Baku, August 22, 2001.

^[2] Estes, V. "Lessons in Transition: Gender Issues in Civil Society Development" in *Give & Take* (A Journal in Civil Society in Eurasia), 3: 2, Summer, 2000, pp. 5-6.

^[3] As of 2001, about 1,500 officially registered and nearly 1,000 unregistered public organizations exist in Azerbaijan. However, only about 200 of them are actually active. Of these 200 active NGOs, 37 are women-focused groups and 30 are aimed at youth. The most active and strongest NGOs (numbering 50-60) are concerned with Karabagh refugees and internally displaced persons, health and children's issues, human rights and women's rights, and environmental and ecology issues.

^[4] See Bickley, Charmaine, "Gyulum: Azeri College Friends Found NGO, Find New Opportunities" in *Give & Take* 3: 2, Summer, 2000, p. 8.

^[5] Estes, *Ibid.*

^[6] Higher rates of female students in philology and foreign languages has become a special asset for women in transitional context.

^[7] Figures calculated based on the information in the report, *2_illik Hesabat: Iyun 1999-May 2001*, Milli QHT Forumu, Baku, Azerbaijan, 2001, pp. 9-11.

^[8] Coalition building among women's NGOs has been much slower, however, and it has been only through the State Committee on Women's Issues and international agencies such as the UN-supported GID, as well as ISAR and Soros Open Society Foundation, that women's groups have established some degree of contact and cooperation. A related obstacle is the strength of the cult of personality. Many of the NGOs, including women's NGOs, are formed around a strong person rather than a vision, program, and plan of action. Personality and ego friction often limit the potential for solidarity, collaboration, and coalition building.

^[9] Author's interview, Baku, 7 August 2001.

^[10] See the "Azerbaycanda Qadinlarin Veziyyeti" in the *Me'lumat Buletteni* no. 1, part 1 (January 1-15, 1999), published by the Center for Defense of Human Rights in Azerbaijan.

^[11] See "The GID Unit in Azerbaijan: A Growing Experience," Baku, February 1998.

^[12] As a member of the Advisory Committee for the "Armenian-Azerbaijani Peace Initiative," I have been a participant observer to at least one of these on-going efforts that began in 1993 with the support of the Stanford Center for Conflict & Negotiation and the Foundation for Global Community.

^[13] Molyneux, Maxine correctly distinguishes between women's strategic (anti-patriarchal) and practical (welfare and immediate) interests in her "Mobilization without Emancipation? Women's Interests, the State and Revolution in Nicaragua," *Feminist Studies*, 11:2, 1985.

^[14] See West, Lois A. (ed.), *Feminist Nationalism* (New York: Routledge, 1997).

^[15] Based on an "ethic of care" as opposed to an "ethic of rights" proposed by scholars such as Carol Gilligan, "difference feminism" suggests that "women have something unique to bring to the content and practices of political life." See Jaquette, Jane, and Sharon Wolchik (Eds.), *Women and Democracy: Latin America and Central and Eastern Europe* (Baltimore: Johns Hopkins University Press, 1998), p. 26.

ARTICLE

Legal Changes Affecting Not-for-Profits in Japan

By Hana Heineken, University of Tokyo
and
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After a century of near-immobility, Japan's regulatory framework for not-for-profits has lurched into a spate of legal reforms. The current basic law governing not-for-profits was promulgated in 1896 and put into effect in 1898, as a part of Article 34 of the Civil Code. For the next century, the only significant legal changes were Occupation-era reforms after World War II, when the Supreme Commander of Allied Powers imposed a series of Special Laws that were attached to Article 34. These Special Laws carved out subcategories of not-for-profits (Religious Legal Persons, Private School Legal Persons, and Medical Legal Persons) with a distinct, and much easier, course for gaining legal status. Then, in 1998, the Specified Nonprofit Activities Law (NPO Law) was promulgated in an attempt to liberalize the legal framework for not-for-profits. Now, the 21st century opens with a frenzy of legal activity.

After a short background discussion, this article will analyze the three most important current changes:

- (1) Intermediary Legal Persons: A new type of not-for-profit legal person, the Intermediary Legal Person (*chuukan houjin*), applies to not-for-profits that are not explicitly in the public interest, such as clubs, alumni associations, and trade and business associations.
- (2) Tax Reform of NPO Legal Persons: The taxation of NPO Legal Persons (a subset of not-for-profits) has changed twice in the last few years with regard to obtaining tax-deductible status.
- (3) Reform of Article 34 of the Civil Code: The fundamental law governing not-for-profits in Japan is Article 34 of the Civil Code. For the first time, the government has created an advisory body charged with planning a fundamental reform of this law. Unlike the first two changes, this one is still under discussion, but it is expected to have a major impact on all not-for-profit organizations.

Background

Each of these three changes represents an important liberalization in the regulation of not-for-profit organizations in Japan.

Article 21 of the Japanese Constitution provides for freedom of association. In practice, however, this seemingly broad guarantee has not been construed to mean that any group can obtain legal status. Instead, the constitutional guarantee is

limited by Article 33 of the Civil Code, which requires that all legal persons be formed in accordance with its regulations. Article 33's general provisions are followed by Articles 34 and 35, which further categorize the legal persons. These two general articles are supplemented in turn by a host of attached Special Laws, which often serve to create special categories within the general framework. While Article 35 of the code provides for establishment of for-profit organizations, or companies, Article 34 does not create a corresponding category of nonprofit organizations, but rather a much more restrictive category of Public Interest Legal Persons (PILPs).

In the Civil Code nation of Japan, legal status, or "*houjinka*," is critical. However, under the Civil Code system, only a limited number of groups could gain legal status as nonprofit Public Interest Legal Persons. The application of Article 34 thus created a legal blind spot: most groups that were nonprofit but not in the "public interest" had no legal basis to form. Moreover, the Civil Code entrusted the authorization of a PILP to the "discretion of the competent ministry"--meaning that the bureaucracy decided whether or not a group was in the public interest.

In short, the basic law in Japan provided no legal basis for the existence of groups that were not-for-profit but not in the public interest (i.e., groups formed for private interest). They could exist without legal personality--which could pose a host of legal obstacles, such as difficulties in opening bank accounts in the group's name--or form as corporations.

The NPO Law of 1998 took a step toward liberalizing this system. It created an entirely new not-for-profit category, NPO Legal Persons, and thereby expanded the eligibility for legal status and reduced the discretion bureaucrats possess in deciding whether to grant legal status to applicants. Criteria for eligibility included the performance of specified not-for-profit activities deemed to be in the public interest, such as welfare and education. In other words, groups that were not-for-profit but clearly not in the public interest were excluded from this status.

Intermediary Legal Persons

Plans for establishing another not-for-profit category--the Intermediary Legal Person--were announced in 2000. Groups such as alumni associations, trade associations, mutual-aid associations, and neighborhood associations were envisioned as likely seekers of Intermediary Legal Personhood. This new category aimed to fill a void left by both the PILP Law and NPO Law, that is, by offering legal status to those groups that were not-for-profits but not advancing the public interest. The Intermediary Legal Person Law was enacted as Law No. 49 in 2001 and enforced starting in 2002.

The law distinguishes two types of Intermediary Legal Persons: unlimited liability and limited liability. The following provides the gist of the distinctions:

On the organization's relationship to its creditors, employees of the unlimited type bear a joint responsibility with the organization (Article 97), while employees of the limited type do not.

The unlimited type requires an employee assembly, director, and auditor (Articles 38, 45, 51); the limited type does not (Articles 102, 103).

Legal persons are permitted to become employees of the limited type (Article 10, Section 2) but not of the unlimited type (Article 96).

Employees of the limited type are not required to contribute to the organization's funds.

Both types are required to have at least two employees (Article 81, Section 4, Title 4; Article 108, Title 4).

Requirements for Establishment

An Intermediary Legal Person must register (*touki*) and meet specific legal conditions, but registration does not entail authorization from the bureaucracy. Compared to other not-for-profit organizations, Intermediary Legal Persons face minimal regulatory involvement with public authorities, similar to that of joint-stock companies and limited liability companies.

A limited liability Intermediary Legal Person must do the following:

Create the articles of association and obtain approval from a notary (Article 10);

Appoint a director and an auditor (Article 13);

Follow the necessary procedures for collecting, allocating, and paying funds (Articles 14, 15, 16);

Conduct an examination of the necessary procedures for establishment (Article 18); and

Register the establishment of the organization at the Legal Affairs Bureau located in the same precinct as the main office (Article 19).

An unlimited liability Intermediary Legal Person must do the following:

Create the articles of association (Article 93); and

Register the establishment of the organization at the Legal Affairs Bureau located in the same precinct as the main office (Article 94).

The following items must appear in the articles of association for a limited liability Intermediary Legal Person; requirements that also apply to unlimited liability Intermediary Legal Persons are followed by asterisks:

Purpose,*

Title,*

Total amount of funds,

Regulations concerning the rights of contributors,

Procedures for the return of funds,

Methods for publicity,

Names of employees, or their title and address,*

Location of the primary office, *
Regulations concerning the gain and loss of a license, and
Business year.

At least 3,000,000 yen is required to establish a limited liability Intermediary Legal Person (Article 12). The unlimited type has no minimum funding requirement due to its joint liability. There are no rules on the minimum number of contributors.

Regulation of Funds

Surplus funds cannot be distributed to members or employees. If the employee assembly decides to return a portion of the funds, the organization must assemble equivalent funds, without interest, to compensate for the loss. The total amount of funds, in other words, must not change.

The organization must prepare a special reserve fund in order to compensate for losses. The reserve can only be used for deficits, and not as a resource for returning funds.

Accounting

The following accounting requirements apply:

Under Article 9, based on commercial law, every Intermediary Legal Person must submit a list of assets and liabilities and a statement of profits and losses. A limited liability Intermediary Legal Person must also submit an activity report as well as measures concerning allocation of surplus funds and management of losses. Unlike PILPs and NPO Legal Persons, an Intermediary Legal Person does not have to submit a statement of income and expenditure or an inventory of property.

Limited liability Intermediary Legal Persons are obligated to open their accounts and statements to the public; unlimited liability Intermediary Legal Persons are not.

Because they are based on commercial law, Intermediary Legal Persons are not obligated to submit budget statements.

Limited liability Intermediary Legal Persons are required to have at least one auditor.

Taxation

The rate of corporate tax is the same as that for small and medium-sized corporations (30%, and 22% for income under 8,000,000 yen). At the end of each business year, the total income of the Intermediary Legal Persons, which includes all activities, will be taxed accordingly.

On the registration license tax, limited liability Intermediary Legal Persons will be taxed at the same rate as limited liability

companies, and unlimited liability Intermediary Legal Persons at the same rate as unlimited partnerships.

The rate of consumption tax is largely the same as that for PILPs. The transfer of taxable assets is subject to consumption tax. However, if the taxable sales volume of a standard term (two business years) is under 30,000,000 yen, then the organization is exempt. The consumption tax applied to membership fees is the same as that applied to cooperative societies.

There is no special tax applied to income for reserves.

An Intermediary Legal Person, as a legal body, is obligated to withhold income tax from payments. However, it must make a distinction between payment as income and payment as reward for services (such as volunteering).

Since enforcement of the law began in 2002, relatively few Intermediary Legal Persons have been created: only 966 (829 limited liability and 137 unlimited liability) as of April 2004. The current rate of formation is approximately 30 per month. Most have been trade and business associations; the number of alumni associations and clubs has been far fewer than anticipated during drafting of the law.

Tax Reform for Non-Profits

In 2001, as part of the Fiscal Year 2001 Tax Reforms, specially approved NPO Legal Persons were permitted to receive tax-deductible contributions. An NPO Legal Person could achieve tax-deductible status by applying to the National Tax Administration and satisfying several requirements, including a public-support test.

In conjunction with the Fiscal Year 2003 Tax Reforms, the government loosened the requirements to qualify for tax-deductible status. Most important, it lowered the threshold of the public support test from one-third to one-fifth of all revenues. In other words, NPOs receiving contributions equal to one-fifth of total revenue are now eligible for tax-deductible status. The definition of contributions has been revised to exclude contributions of less than 1,000 yen (previously 3,000 yen) and narrowed to exclude bequests that exceed the amount permitted per person, as well as grants-in-aid and commission fees from national and local public organizations and international organizations affiliated with the state. The contributions from one person cannot exceed 5% of the total contributions received, increased from the previous maximum of 2%. Moreover, in calculating the total revenue, the sum must exclude any amount of a contribution that exceeds the 5% criterion. The reforms have also removed the requirement for tax-deductible NPO Legal Persons to operate in multiple jurisdictions.

Overall, these reforms are commendable but fairly minor. Few groups have qualified for tax-deductible NPO Legal Person status. Of the 16,000 NPO Legal Persons, only 24 have met the criteria.

Reform of Article 34

As noted above, Article 34 is the core regulation covering not-for-profits in Japan, and so any significant reform of this Article holds the utmost importance for the legal framework of not-for-profit activity in Japan. Currently, the government is in the early stages of a process that will likely result in major changes to Article 34. Nothing is certain, and no laws are likely to be changed before 2005. However, the contours of the policy discussion can be distinguished through the workings of an advisory council, newspaper reports, and interviews.

A key change would be the transformation of Article 34 from a regulation allowing for the creation of Public Interest Legal Persons to one allowing for the creation of Nonprofit Legal Persons (*hieiri houjin*) (not to be confused with NPO Legal Persons). The new regulation would affect current PILPs and Intermediary Legal Persons, though not the groups created through Special Laws attached to Article 34 (including Religious Legal Persons, Medical Legal Persons, and Private School Legal Persons). Whether to include NPO Legal Persons is still under debate.

Another important change would be the shift in the standard by which legal personality is granted to groups, from a permission-based system to a registration-based system. Public Interest Legal Persons are currently granted legal personality by permission (*kyoka*), which gives the bureaucratic body substantial discretion. The standard of registration (*touki*), in contrast, confers nearly automatic legal personality. This change should make the process of gaining legal personality much simpler and more predictable, with applications no longer subject to rejection by the bureaucracy for unspecified reasons.

The third major change concerns taxation. As currently envisioned, the new system will have two or more tiers within the Nonprofit Legal Person category--much as tax-deductible NPO Legal Persons exist as a subcategory within NPO Legal Persons. All Nonprofit Legal Persons will probably enjoy some tax benefits; the precise nature and extent are not clear, but most likely their non-profit making activities will not be subject to taxation. Some Nonprofit Legal Persons will gain greater tax benefits, depending on their contribution to the public interest. Again, it is not certain what standards will apply or what body will determine which activities are in the public interest. Nor is it clear how many tiers will exist, though two or more seems likely. The greater tax benefits may include lower tax rates, fewer activities subject to taxation, and the ability to receive tax-deductible contributions.

Summary of Anticipated Changes

From Public Interest Legal Persons to Nonprofit Legal Persons

Including Intermediary Legal Persons

Possibly including NPO Legal Persons

Procedures for gaining legal personality will be drastically loosened from a discretionary, permission-based system to a less discretionary, registration-based system (*touki*).

Taxation changes remain under debate, but Nonprofit Legal Persons will probably gain various levels of tax

benefits depending on their contribution to the public interest.

Although the final dimensions are unclear, these legal changes will be quite far-reaching and substantial. They will affect tens of thousands of groups immediately, and even more in the short term. In the long term, too, this fundamental rewriting of the regulatory framework will have an important effect on the development of Japan's not-for-profit sector.

ARTICLE

Lazarus Rising: Civil Society and Sierra Leone's Return from the Grave

By J. Peter Pham^{*}

By the time Sierra Leone's brutal civil war received any significant international attention in the late 1990s—in large part through the global broadcast by CNN of the lurid images from Sorious Samura's Emmy-winning documentary film *Cry Freetown* with its footage of rampaging child soldiers, drug use, torture, plunder, and diamonds—the conflict had raged for nearly a decade and was itself the culmination of more than three decades of autocratic rule, economic malaise, and social disintegration.^[1] However, extraordinarily, the story has not ended with yet another entrant inducted into the growing fraternity of failed sub-Saharan African states. Rather, after years of mayhem, order and peace have returned to the West African country. While not entirely out of danger, it has emerged from the grave to which many observers had, not unreasonably, consigned it just a few years earlier.

After a discouraging series of failed peace deals and broken ceasefires—as well as several military coups, assorted international interventions, and even a few recourses to foreign mercenaries—the United Nations was able to formally declare an end to the conflict on January 17, 2002. Some 45,000 combatants have been disarmed. A UN-sanctioned mixed international-national tribunal, the Special Court for Sierra Leone (SCSL), has taken up the Herculean task of adjudicating the most grievous offenders against international humanitarian law and other human rights abusers during the long civil war, while a national Truth and Reconciliation Commission (TRC) has just submitted its long-awaited final report,^[2] complete with an innovative children's version.^[3] Sierra Leone's near-miraculous transition from self-destruction to reconstruction can be attributed not only to the interest of and subsequent forceful intervention by the international community, but also to the perseverance of the country's civil society. Consequently, the recent history of the country contains a number of useful lessons, not only about state collapse and violence, but also how to go about the process of state-building and how to achieve security and development in analogous post-conflict situations.

Background to the Conflict

While the heaviest responsibility is borne by Foday Saybana Sankoh, the leader of the rebel Revolutionary United Front (RUF) who died in prison in 2003 while awaiting trial before the SCSL, as well as his chief patron, former Liberian president Charles Ghankay Taylor, who has been indicted by the same tribunal but is still free in his Nigerian exile, it would be more accurate to decline to ascribe a single cause to the war in Sierra Leone. Rather, the conflict's origins are complex, rooted in the very history of the country.

Founded in 1789 by an eponymous company of British abolitionists and other philanthropists and intended as a haven for freed black slaves (thus the name of the capital, "Freetown")—including some 1,200 who had supported the loyalist cause during the American War of Independence and had consequently been driven from the thirteen newly-independent United States—Sierra Leone is one of the oldest modern polities in Africa, having become a Crown Colony in 1808. The establishment in 1827 of Fourah Bay College, the oldest university-level institution in sub-Saharan Africa, assured the country its pioneering role in higher education on the continent. Unfortunately, the seeds of political and ethnic division were also sown early, with a marked cleavage between the anglicized "Krio" (the local variant of "Creole") freedman-settlers of the Crown Colony and the diverse inhabitants of the country's interior where a British Protectorate was only proclaimed in 1896 and where the colonial administrators exercised indirect control through traditional rulers, designated "paramount chiefs," until independence.

Sierra Leone received its independence as an independent within the British Commonwealth in 1961 under the leadership of Sir Milton Margai and the Sierra Leone People's Party (SLPP). Although the proud scion of a Mende chiefly family from the former Protectorate, Sir Milton was also thoroughly at home in the Westernized world of Freetown's "Kriodom." Before venturing into politics, he had been the first native of the Protectorate to earn a bachelor's degree from Fourah Bay College and the first to qualify as a physician. Sierra Leone inherited from its departing colonial rulers a Westminster-style parliamentary democracy that was the envy of region as well as a healthy foreign reserve account. The new country was admitted to the United Nations as its 100th member state, an event that observers noted for its great symbolism since the country was founded as a haven for freed Africans and the world body was instrumental in bringing about decolonization of the African continent. One prominent American scholar of Africa, Thomas Patrick Melady, later United States ambassador to Burundi and Uganda as well as ambassador to the Holy See, was typical of his contemporaries in his enthusiastic optimism about the future of the new West African state:

Sierra Leone can emerge as a showcase of West Africa, progressive in its politics and forward-looking in its policies. Its prime minister, Sir Milton Margai, is strongly opposed to Communist infiltration. Building on a solid agricultural base, the economy has profited from diamond deposits and growing interest in its promising industries, which range from fish to oil. Sierra Leone is more than a symbol of freedom; it is an embodiment of the aspirations of Africa.^[41]

Tragically, the ensuing decades turned this promise on its head and made Sierra Leone the poster child for all that has gone wrong in Africa since the heady days of its liberation from colonialism—the veritable embodiment of the continent's dysfunctional politics, environmental exploitation, economic misery, and fratricidal conflicts. Today, despite the wealth of both its human capital and its natural resources as well as the billions of dollars in international assistance it has received in recent years, Sierra Leone enjoys the dubious distinction of holding last place in the annual rankings of the United Nations Development Program (UNDP) Human Development Index (HDI), 177th of the 177 countries surveyed.^[51]

The slide began after the hotly contested general elections of 1967, which the SLPP, led by the deceased Sir Milton's brother, Sir Albert Margai, who had transformed the ruling party from a national institution into one dominated by the

southeastern Mende, narrowly lost to the opposition All Peoples' Congress (APC), which was heavily backed by Temne tribesmen from the north as well as Krio urban dwellers. However, the new prime minister, Siaka Probyn Stevens, had barely been sworn in by the governor-general on March 21, 1967, when he was overthrown in a *coup d'état*. After a year in exile, Stevens was restored to power in 1968 when a popular uprising overthrew the erstwhile *putschists*. The experience, however, changed Stevens, who soon evinced signs of paranoia about conspiracies perceived to be swirling about him. In 1971, he used a legally questionable legislative maneuver in order to amend the Sierra Leonean constitution, transforming the parliamentary democracy into a highly centralized presidential republic.^[6] Several years later, he held used a farcical referendum to transform it into a one-party state with the APC as the only legal political organization.^[7]

Even worse than what Stevens did to Sierra Leone's political system was what he did to the economy. Having inherited a sound, if not necessarily rich, economy with a diversified base of diamonds and iron mining as well as agriculture—primarily coffee and cocoa production—that expanded between 1965 and 1973 at the respectable, if not spectacular, annual rate of 4 percent against an annual population growth rate of 1.9 percent, Stevens and his cronies gradually destroyed it all. The annual rate of growth dipped to an average of 0.7 percent between 1980 and 1987 before going into negative figures.^[8] Dwindling revenues from the government's diamond monopolies and agricultural marketing boards, compounded by governmental corruption and profligate spending on nonessential "prestige projects," only served to accelerate the sharp rate of economic decline.

Sierra Leone went from being the model for democratic governance and economic prosperity that it had been under Milton Margai to being the example *par excellence* of Africa's post-colonial "neopatrimonial" malaise whereby national resources were redistributed as "marks of personal favor to followers who respond with loyalty to the leader rather than to the institution that the leader represents."^[9] Sierra Leone had degenerated, in terms William Reno first coined to describe the country, into a "shadow state"—that is, a system of personal rule founded on neither concepts of legitimacy nor even governmental institutions but on the control of markets and on the ruler's ability to manipulate access to resources created by those markets so as to enhance his own power.^[10] In short, the shadow state—a patrimonial network working for private interests that is normally, but not necessarily, constructed behind the façade of formal statehood—was the very antithesis of civil society, understood as organizations outside government that function as constraints upon government and as advocates of the common good.^[11]

In no sector was the "neo-patrimonial" corruption of the shadow state more evident than in the fabled alluvial diamond fields of Sierra Leone's east. Before the APC took over, the diamond trade constituted one-third of national output and contributed over 70 percent of Sierra Leone's foreign exchange reserves. By the mid-1980s, less than \$100,000 worth of the precious minerals passed through legal, taxable channels.^[12] Most of the rest was appropriated by Stevens and a coterie of his closest associates, who also embezzled profits and other assets from various state enterprises. Having looted an estimated \$500 million and leaving a balance of barely \$196,000 in foreign reserves in the Bank of Sierra Leone on the day he left office, Stevens retired in 1985 after anointing the army chief, Major General Joseph Saidu Momoh, as his successor. Unfortunately for Sierra Leone, Momoh's regime did no better than its predecessor, thus perpetuating the already vicious cycle of

political, economic, and social malaise. As one former United States ambassador to Sierra Leone, John Hirsch, reported:

Unpaid civil servants desperate to keep their families fed ransacked their offices, stealing furniture typewriters, and light fixtures.... One observer has noted that the government hit bottom when it stopped paying schoolteachers and the education system collapsed. Without their salaries, teachers sought fees from the parents to prepare their children for their exams. With only professional families able to pay these fees, many children ended up on the streets without either education or economic opportunity.^[13]

Bereft of the resources to provide its potential clients with jobs and educational opportunities, the ruling APC lost its base of support and began to unravel altogether at the very moment when contracting services and collapsing infrastructure left the Sierra Leone state itself most vulnerable to attack. The *coup de grâce* came in the form of a spillover from the civil war in neighboring Liberia.^[14] In March 1991, Foday Sankoh, a charismatic former Sierra Leonean army corporal who had been jailed for several years in the 1970s for his part in an alleged plot against the Stevens regime and who subsequently underwent military training with a small group of Sierra Leonean dissidents in Libya (where Liberian warlord and later president Charles Taylor had also drilled his insurgents), invaded eastern Sierra Leone from Liberia. Sankoh, supported by Taylor, issued a call for anti-government uprising in the name of the heretofore unknown RUF. The rebels, initially little more than a few dozen disaffected rural youth whom Sankoh enticed to his cause with promises of free education and medical care, ostensibly fought for a redress of the iniquities of a Sierra Leonean society in which the APC regime continued to exploit the country's rich diamond resources for the benefit of its elite cadres while the living standards of the rest of the citizenry declined. Despite the banner of justice, however, as they sent the government's forces reeling and quickly seized control of most of the eastern part of the country, including the diamond fields, the RUF rebels soon proved themselves to be an even worse plague. Before long, RUF terror tactics—including the amputation of the limbs of civilians as a terror tactic, the systematic rape of women and girls, and the abduction of young boys to swell their ranks—provided rich fodder for Robert Kaplan's sensational article on "The Coming Chaos."^[15]

In April 1992, a group of disgruntled soldiers on leave in Freetown from the warfront, led by a 27-year-old captain named Valentine Strasser, overthrew President Momoh and formed a military junta, the National Provisional Ruling Council (NPRC). The coup was popular at the time, as most Sierra Leoneans had grown disgruntled with the APC's corrupt and ineffectual rule. However, disaffection over the inexperienced ruler's inability to end the war as well as his increasingly autocratic rule led to his overthrow, in January 1996, by his deputy, Brigadier Julius Maada Bio. Under increasing foreign and domestic pressure, Bio was forced to hold elections, which were boycotted and sporadically disrupted by the RUF. Despite various glitches, the elections took place and were won, after two rounds, by the newly revived SLPP, led by Ahmad Tejan Kabbah, a veteran UNDP official, who became the country's first directly elected head of state.

Given the lackluster performance of its own army and the reluctance of the international community to intervene in the conflict, the Sierra Leonean government had hired a private military company from South Africa, Executive Outcomes, to lead

its fight against the insurgents. Executive Outcomes was instrumental in halting the RUF offensives and, in fact, in rolling the rebels back for the first time, driving them out of the Kono diamond mining areas and the Sierra Rutile mines, both assets of great importance to the government, not the least because of their revenue potential. Kabbah's new government, with the support of the Executive Outcomes mercenaries and its newly organized "*kamajor*" (traditional tribal hunter) irregulars, pushed the RUF to the brink of defeat, driving Sankoh to the negotiating table.

In November 1996, a peace agreement was signed in Abidjan, Côte d'Ivoire, between the new government of President Kabbah and the RUF.^[16] The accord granted an amnesty for all acts committed prior to its signing and called for the transformation of the RUF into a political party.^[17] The agreement quickly unraveled, however, as violence resumed after only the briefest lull. When Sankoh was arrested on trumped-up charges while visiting Nigeria in March 1997, allegedly at the urging of the Kabbah government, the accord collapsed altogether. Two months later, however, yet another group of disgruntled Sierra Leonean soldiers led by Major Johnny Paul Koroma drove President Kabbah into exile, replacing his government with an Armed Forces Revolutionary Council (AFRC) that invited the RUF to join it. The country fell into complete chaos as most of the judiciary system—judges, attorneys, police officers, and other law enforcement professionals, all of whom had previously been targeted by RUF rebels—fled the country before what they imagined to be the imminent entrance of the dreaded insurgents into government. The angry populace, fearful not only of the RUF but also of the continuing decline of the country as schools, banks, and commercial services ceased to function, launched a series of civil disobedience campaigns.

The international reaction to the AFRC/RUF coup was swift and, for once, unequivocal. The overthrow of President Kabbah took place on the eve of the annual summit meeting of the heads of state and government of the Organization of African Unity (OAU) in Harare, Zimbabwe. Despite the fact that many of the leaders present at the meeting had themselves come to power through military coups and in contrast to the OAU's usual practice of non-interference in the internal affairs of member states, the 66th session of the OAU Council of Ministers called for "the immediate restoration of constitutional order" in Sierra Leone and urged "all African countries and the international community at large to refrain from recognizing the new regime and lending support in any form whatsoever to the perpetrators of the *coup d'état*." In particular, the African leaders called upon "the leaders of [the regional Economic Community of West African States, ECOWAS] to assist the people of Sierra Leone to restore constitutional order to the country" and to "implement the Abidjan Agreement which continues to serve as a viable framework for peace, stability and reconciliation in Sierra Leone."^[18] When, in October 1997, the UN Security Council unanimously adopted a resolution imposing economic sanctions against the AFRC/RUF junta,^[19] the embargo was scrupulously enforced by a regional military contingent, the ECOWAS Ceasefire Monitoring Group (ECOMOG).^[20] Koroma quickly capitulated and promised to allow Kabbah to return to power by April 1998. However, when the junta was slow to cede power, ECOMOG forces under the command of a Nigerian general and supported by yet another mercenary outfit, the British-based firm Sandline International, which had been hired by the exiled President Kabbah, launched an offensive against the now-combined AFRC/RUF forces in February 1998, which restored Kabbah to power the following month.

The restoration, however, was tenuous, the government's writ extending barely beyond the municipal boundaries of the capital. Increasing numbers of regional peacekeepers were required—by the end of the year nearly a quarter of the entire Nigerian army, some 20,000 men, were in Sierra Leone—to prop up the Kabbah government. The RUF military commander, Sam “Mosquito” Bockarie, backed by Major Koroma, now designated deputy commander of the RUF, threatened to make the country ungovernable if Sankoh, sentenced to death for treason by the Kabbah government, was not freed and included in the government. In January 1999, rebel forces encircled the capital. During this phase, apocalyptic scenes were commonplace at every rumor—at one point, 40,000 people sought refuge in Freetown's National Stadium. Using women and children as human shields, some RUF units managed to bypass ECOMOG forces and join comrades who had already infiltrated the city. Kabbah fled the country once more.

Eventually, after ferocious fighting, ECOMOG forces managed to reestablish control over the capital and its environs, but at the cost of some 7,000 civilians killed and two-thirds of the city leveled. Compounding the human tragedy, as the RUF units retreated, they abducted some 3,000 civilians, many of whom were never seen again. As a consequence of the mayhem, about 600,000 of Sierra Leone's estimated four million people sought refuge in neighboring countries, while two-thirds of those who remained were internally displaced. The Nigerians, worn out by the fighting that had claimed an estimated 800 of their peacekeepers and was costing them about \$1 million daily, announced their intention to withdraw and forced the two Sierra Leonean parties to enter into negotiations, which resulted in the July 7, 1999, Lomé Peace Agreement,^[221] signed in the Togolese capital. The deal made Sankoh the “Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development” and accorded him “the status of Vice-President answerable only to the President of Sierra Leone.”^[222] The accord also promised the rebel leader and his followers a “complete amnesty for any crimes committed ... from March 1991 up to the date of the agreement.”^[23] The Lomé Agreement was initialed by the two parties as well as by an impressive array of international guarantors, including a special representative of the UN secretary general, although the latter signed with the reservation that the amnesty provisions did not apply to “international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.”^[24]

The Lomé Agreement was ratified by the Sierra Leonean National Assembly and initially endorsed by a UN Security Council resolution.^[25] A second UN resolution also authorized the creation of the United Nations Mission in Sierra Leone (UNAMSIL) with 6,000 military personnel charged with assisting in the implementation of the peace agreement and facilitating humanitarian assistance.^[26] However, the accord, like its predecessors, quickly fell apart. In several incidents in late 1999 and early 2000, UN peacekeepers were themselves disarmed by RUF forces. In response, the Security Council increased UNAMSIL's personnel to 11,100 and revised UNAMSIL's mission to include protecting the government of President Kabbah.^[27] The situation only worsened. In early May, the RUF killed seven UN peacekeepers and captured fifty others. The number of peacekeepers taken prisoner soon increased to more than 500 as the UN forces apparently surrendered to the rebels without firing a shot. British forces, operating independently of the UN command structures, then landed in Freetown, ostensibly to help evacuate foreign nationals, but in fact to shore up the Kabbah regime and rescue the beleaguered UN force.

The capture of Sankoh while he led an incursion in Freetown saved the situation. The UN prisoners were released as the leaderless RUF forces began to disintegrate after their leader's arrest. Meanwhile the Security Council authorized UNAMSIL to increase its strength to 13,000 military personnel^[28] (a limit that was later raised to 17,500, making it the largest UN peacekeeping operation in the world^[29]). UN Resolution 1346, approved on March 30, 2001, also stretched UNAMSIL's brief, already expanded from mere peacekeeping to protection of the government, even further: "The main objectives of UNAMSIL in Sierra Leone remain to assist the efforts of the government of Sierra Leone to extend its authority, restore law and order and stabilize the situation progressively throughout the entire country, and to assist in the promotion of a political process which should lead to a renewed disarmament, demobilization and reintegration program and the holding, in due course, of free and fair elections."^[30]

As the country was gradually pacified during 2001, UNAMSIL celebrated the success of its disarmament program with an arms-destruction ceremony on January 17, 2002, at which the force commander, Kenyan General Daniel Opande, declared the civil war officially over. No one really knows the total number of casualties in the decade-long conflict. It was conservatively estimated that some 70,000 people lost their lives in the fighting, while hundreds of thousands of others suffered amputations or were otherwise maimed. Some 2.6 million Sierra Leoneans were either internally displaced or refugees in neighboring countries.

The peace culminated with presidential and parliamentary elections on May 14, 2002 (members of the security forces voted four days earlier). The polling was largely peaceful and, despite some irregularities, largely free and fair. Over 2.3 million Sierra Leoneans (approximately 85 percent of the eligible population) registered to vote, a significant increase over the 1.5 million citizens who registered to vote in the elections of 1996. Of those registered, some 2.2 million cast ballots to give incumbent president Ahmad Tejan Kabbah just over 70 percent of the vote. Kabbah's SLPP won 83 of the 112 parliamentary seats up for grabs (12 other seats are allocated to the country's paramount chiefs, a relic of the colonial system of indirect rule of the interior), compared with the 27 seats carried by the opposition APC, whose standard bearer, Ernest Koroma, received slightly over 22 percent in the presidential poll. The RUF Party (RUF-P), the new political incarnation of the former insurgents, garnered barely 1.7 percent of the votes cast. The former leader of the AFRC, Johnny Paul Koroma, drew just 3 percent of the vote, although his People's Liberation Party did gain two seats in parliament.

For a country that had endured more than a decade of civil war, preceded by three decades of political upheaval and stagnation, the first peaceful elections since independence represented an act of hope. Two months later, on July 12, 2002, at the state opening of the new parliamentary assembly, Kabbah concluded: "All Sierra Leoneans, at home and abroad, suffered considerable loss. Some lost their cherished and loved ones, others their belongings, and still others, their dignity and honor. The bitter experience of armed conflict will linger in our memories for as long as we need to remind ourselves of the mistakes that we should never ever make again."^[31]

Civil Society and the Search for Peace

While most analyses of the long road to peace have focused on the international diplomatic maneuvers that first led the Sierra Leonean government and

the RUF into the abortive Abidjan and Lomé peace agreements and, when these failed, to the international military interventions that ultimately pacified the countryside, these efforts were both preceded by and facilitated by a series of civil society initiatives aimed at seeking a peaceful settlement to the conflict. These third-sector efforts, originating in a diverse range of groups and individuals, went—like the entire Sierra Leonean civil war—unnoticed before the advent of the “CNN factor” and thereafter attracted little outside interest as higher-profile actors came on the scene. However, despite their apparently limited success, these local civil society efforts ought not to be undervalued. Notwithstanding the handicap under which they labored—most received almost no sustained support from abroad and had few resources at home—these organizations and individuals nonetheless first mobilized public opinion in Sierra Leone in favor of peace and democratization and then pushed successfully for the post-conflict accountability incarnate in the work of the TRC and the proceedings of the SCSL. In the long run, their participation will be essential if the present peace and security are to be consolidated in a way that would make Sierra Leone a true peace-building success.

Regrettably little attention has been paid to one of the earliest civil society initiatives to seek an end to war, which is a good example of some of the grassroots approaches taken. Almost all of the early third-sector efforts originated from below, in large part because the two decades of APC rule had resulted in the systematic cooptation—if not corruption—of the national leadership of most major societal institutions in the country. Using constitutional provisions that empowered him to directly appoint up to seven members to parliament (in addition to members whose election he secured in the one-party state by nominating them as the APC’s candidates for specific constituencies), Siaka Stevens managed to co-opt most potential rivals, but at the cost of weakening Sierra Leonean society’s capacity for dialogue over political and economic differences. For example, the leadership of the Sierra Leone Labor Congress (SLLC), the country’s principal labor union, was closely tied to that of the governing APC, insuring relative calm in the labor market. This alliance was threatened in early 1980s when the SLLC was led by the committed trade unionist James Kabia. In 1983, the government secured Kabia’s dismissal and the appointment of the president’s brother-in-law, Ibrahim Langley, as the new head of the SLLC. That same year, the new SLLC leader sabotaged his members in negotiations with the government and was duly rewarded with an appointment to parliament. At the same time, the restlessness of the teachers’ union came to an end when its president was likewise seconded into the legislature. As Sierra Leonean scholars Earl Conteh-Morgan and Mac Dixon-Fyle observed, these appointments “served as perks or carrots intended to neutralize the institutions by ‘buying out’ their leaders,”^[32] thus casting a pall over civil society that was only gradually removed after the overthrow of APC rule.

In December 1994, NPRC head of state Valentine Strasser proclaimed a unilateral four-week truce. Availing themselves of the lull in the conflict, officials of the Soro-Gbema chiefdom in Pujehun District, an area in southeastern Sierra Leone near the Liberian border that was a major staging area for the RUF during the early stages of the civil war, as well as other local leaders acting with NPRC sanction gathered on the Mano River Bridge. Fifteen of the local leaders then walked across the bridge into what was clearly rebel-controlled territory, singing hymns and carrying banners bearing peace slogans. While the parley between the government representatives and those of the RUF lasted after only six hours—in large part because of NPRC preconditions to more substantive discussions—a government radio announcement that threatened the rebels with bombing should they be recalcitrant

did not contribute to allaying deep-rooted suspicions. In fact, three members of the delegation—Musu Kpaka, Prince Massaquoi, and Alhaji Emurana Massaquoi—volunteered to remain with the rebels as guarantors of the truce. Although two subsequent meetings were held over the course of the next month, the talks ultimately failed and the three hostages remained RUF prisoners for over two years.

As it turned out this unpromising start, especially the heroism of the three volunteers who stayed with the RUF in order to give the failed talks a chance, led some sixty groups from the religious, civil society, and other non-governmental sectors—including the Council of Churches in Sierra Leone, the Sierra Leone Labor Congress, and the Sierra Leone Teachers' Union—to band together in early 1995 to form the National Co-ordinating Committee for Peace (NCCP). During its brief existence, the NCCP successfully organized a number of workshops and other educational forums with the goal of creating a groundswell of public opinion that would force the warring parties to the negotiating table. Unfortunately, its efforts to legitimize the RUF as an interlocutor in eventual national discussions—NCCP spokesman M'ban Kabu even put out a statement urging members of the press to adopt the more respectful designation of "fighters" for members of the RUF, rather than "rebels" or "bandits" as was then conventional—proved too much for the military junta in Freetown. Kabu, along with Philip Neville, the editor of the *Standard Times*, which had printed his statement on its front page, were tossed in jail. After Kabu's arrest, the NCCP fell apart, but many of its constituent organizations continued their work.

At about the same time that the NCCP was being organized, the Sierra Leone Association of University Women (SLAUW) proposed that the country's various women's groups meet regularly to exchange information and, as appropriate, collaborate toward common objectives. The meetings—which began with representatives of groups such as the Young Women's Christian Association (YWCA), the Women's Association for National Development (WAND), the National Organization for Women (NOW), and the Women's Wing of the Sierra Leone Labor Congress, as well as SLAUW, and gradually expanded to include members of Freetown's women traders' associations and religiously based women's groups as well as newly minted groups such as the National Displaced Women's Organization—led to the establishment of the Sierra Leone Women's Forum (SLWF). Out of these networking meetings, a new group, the Sierra Leone Women's Movement for Peace (SLWMP) was formed and became a member of the Forum. The SLWMP's founders operated on the premise that women were natural peacemakers with unique skills that they could bring to bear to resolve the civil conflict. Led by its president, physician Fatmatta Boie-Kamara, the SLWMP led a "peace march" of women professionals, students, traders, and even soldiers, singing and dancing through the streets of Freetown in January 1995. While the demonstration did not directly affect the course of events in the war, it was a major milestone in Sierra Leonean politics, representing the first time that women's groups, long a fixture on the nation's social landscape, had taken a political stance.

Women's groups took an active part, alongside other civil society organizations as well as trade unionists, journalists, tribal chieftains, and academics, in the National Consultative Conference that met in August 1995 at the Bintumani Conference Center on Freetown's Aberdeen peninsula, under the aegis of Sierra Leonean diplomat James Jonah, who had just finished his term as UN under-secretary general for political affairs and had been appointed by the NPRC junta as

chairman of the Interim National Electoral Commission. While many wanted general elections by the end of the year, Jonah persuaded the majority of the assembly—eventually known as “Bintumani I” to distinguish it from a subsequent national consultation, “Bintumani II”—that elections should be delayed until March 1996 in order to raise funds from international donors to finance the poll as well as to prepare voter rolls. However, the SLWF’s position paper, which stipulated that only another conference could authorize further postponement of the poll, was accepted as the consensus of the assembly.

In the period leading up to the election, the various components of the Forum worked to educate voters, especially women, about democracy and governance. They also called upon candidates to address women’s concerns, including access to education, healthcare, and business opportunities, as well as the need to reform provisions of family and inheritance laws that still reflected the biases of a patriarchal culture. When the RUF increased its campaign of violence and intimidation as the voting neared, the SLWMP organized branches in all accessible parts of the country to intensify democracy-promotion activities.

After the election of Ahmad Tejan Kabbah in March 1996, the role of the women’s groups decreased. The Forum had only an extremely limited role in the drafting of the Abidjan Accord, while the SLWMP dissolved in acrimonious disputes between its members over the justice (or injustice) of the agreement. The chaos following the May 1997 AFRC/RUF coup effectively ended the independent role of the women’s movement; thereafter the activities of the surviving groups were indistinguishable from those of other civil society organizations.

With Muslims making up approximately sixty percent of Sierra Leone’s estimated pre-war population of 4.5 million people and Christians—primarily Roman Catholics, Anglicans, and Methodists—making up another twenty percent, it comes as no surprise that organized religious groups and their social agencies have always played significant roles in Sierra Leonean society. With the slide of the Sierra Leonean state into neo-patrimonialism under the corrupt rule of Stevens and Momoh, these groups assumed an even more prominent place in the country’s educational, sanitary, socioeconomic, and cultural affairs—a trend that was only accelerated by the war.

Inspired by the example of the Interfaith Mediation Committee (later the Inter-Religious Council) of Liberia, which had attempted to mediate that neighboring country’s civil war and whose existence contributed significantly to the prevention of the opening of a religious dimension in that conflict,^[33] as well as intensifying attacks on religious leaders and institutions within Sierra Leone, the country’s religious leaders formed the Inter-Religious Council of Sierra Leone (IRCSL) in early 1997. Muslim groups that joined the IRCSL included the Supreme Islamic Council, the Sierra Leone Muslim Congress, the Federation of Muslim Women Associations in Sierra Leone, the Council of Imams, and the Sierra Leone Islamic Missionary Union. Constituent Christian members of the IRCSL included the three Roman Catholic dioceses in Sierra Leone (the Archdiocese of Freetown and Bo, and the Dioceses of Kenema and Makeni), the Pentecostal Churches Council, and the Council of Churches in Sierra Leone, which represented eighteen Protestant denominations. The leaders of many of these religious groups had been active in the Abidjan peace talks in 1996 and saw the formation of the new umbrella group as the natural institutional

continuation of their cooperation in using religious influence to facilitate a peaceful resolution of the conflict.

The IRCSL had barely held its first formal meeting with President Kabbah on May 23, 1997, when, two days later, a *coup d'état* mounted by junior officers acting in conjunction with the RUF sent the government as well as thousands of Sierra Leoneans fleeing for refuge in neighboring Guinea. During the eight-month reign of the AFRC/RUF junta, the IRCSL worked to sustain a campaign of protest and civil disobedience against the regime, both targeting its innate illegitimacy and denouncing its human rights abuses. This stance brought the Council into repeated conflict with the junta. On Sunday, August 17, for example, the IRCSL had planned an evening inter-religious worship service in Freetown's National Stadium. That morning, however, IRCSL co-chairman Alimamy Koroma, who was also secretary general of the Council of Churches, was arrested by AFRC security services and ordered to cancel the service. While the IRCSL was unsuccessful in its efforts to persuade the *putschists* to voluntarily return the country to civilian rule—that took a military intervention—most observers credit its presence, when all other institutions in Sierra Leone had either collapsed or fled, with preventing even worse conditions.

Not surprisingly, given its role in mounting nonviolent civil resistance to the brief AFRC/RUF regime, religious individuals and institutions were targeted for attack during the bloody December 1998-January 1999 rebel offensive. The RUF abducted a number of religious figures who were unfortunate enough to find themselves behind rebel lines. Among those taken hostage was Freetown's Roman Catholic archbishop, Joseph Henry Ganda, an ethnic Mende with close personal ties to his fellow tribesman, President Kabbah. According to his own subsequent account, Ganda somehow managed to escape his captors after a week and found refuge with an ECOMOG unit. Some of Ganda's fellow hostages were less fortunate: when the ECOMOG counteroffensive forced the rebels to abandon their provisional headquarters, the fighters decided to get rid of some of their prisoners. An Indian nun of Mother Teresa's Missionaries of Charity, Sister Aloysius Maria, and an Italian priest, Father Girolamo Pistoni, were shot by the rebels; Pistoni miraculously survived with a chest wound by twisting quickly when he was fired upon. Two other Missionaries of Charity, Kenyan Sister Carmeline and Bangladeshi Sister Sweva, were killed, although the circumstances of their deaths left unclear whether the rebels had executed them or they had died as a result of ECOMOG fire.

Immediately after the offensive was defeated, Ugandan diplomat Francis Okelo, then serving in Sierra Leone as the special envoy of the UN secretary general, invited the IRCSL to try to open a dialogue between President Kabbah and RUF leader Foday Sankoh, then a prisoner of the government. The new IRCSL co-chair Moses Kanu, who like his predecessor was also secretary general of the Council of Churches in Sierra Leone, took up the challenge and, after several meetings with Kabbah, led a delegation that was allowed to meet with Sankoh in a military installation near Freetown in March 1999. Sankoh affirmed that he was willing to negotiate a peaceful end to the war on the basis of the Abidjan Accord. To demonstrate his good will, the IRCSL asked Sankoh to order his forces to release some of the children it had recently abducted. For his part, the rebel leader asked for token humanitarian assistance for his fighters in the field. A few days later, the Roman Catholic bishop of Makeni, George Biguzzi, an Italian missionary who holds U.S. citizenship, met rebel forces near Waterloo and handed over twenty bags of rice and two of sugar donated by the government. In return the RUF released to him

twenty-three hostages, including twenty children ranging in age from five to seventeen years of age. The precedent being set, the IRCSL became the vehicle for a progressive series of confidence-building measures.

After wide consultations with traditional chieftains, members of parliament, and representatives of civil society groups, as well as Liberian President Charles Taylor, still the RUF's major patron, the IRCSL again met separately with Kabbah and Sankoh, convincing the president that the only hope for successful negotiations would be a neutral venue. Over the objections of his cabinet, Kabbah released Sankoh and allowed him to travel to Lomé, Togo, where President Gnassingbé Eyadéma held the rotating ECOWAS chairmanship. On May 18, a ceasefire between the government and the rebels was signed by Kabbah and Sankoh. One week later, formal peace negotiations began, which led to the July 7 signing of the Lomé accord. During the nearly two months of difficult talks, the IRCSL played a significant behind-the-scenes role, facilitating communications between the parties during the periodic impasses. Its role was recognized by the parties, which gave the IRCSL the leading role in the Council of Elders and Religious Leaders that was supposed to set up to mediate eventual disputes arising from the peace agreement, although the Council was never established due to the collapse of the accord.^[34] In perspective, this may have been a blessing in disguise as it saved the IRCSL from the need to sacrifice its civil society role in the manner that its Liberian counterparts have done through their formal entrance into government after Liberia's 2003 comprehensive peace agreement.^[35] Subsequent to the restoration of peace to Sierra Leone, the IRCSL has continued its role as the country's most prominent civil society organization, sponsoring human rights training conferences and national days of prayer and reconciliation, promoting religious tolerance, and constantly monitoring the adherence of the different parties to various peace deals.

The Role of Civil Society in Post-Conflict Accountability

The Lomé Peace Agreement stipulated that a Truth and Reconciliation Commission would be established "to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation."^[36] Although the Sierra Leonean parliament ratified the peace accord on July 15, 1999, not until February 22, 2000, did it adopt legislation establishing the commission to

create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.^[37]

The renewed fighting in early 2000, however, not only stalled the actual establishment of the TRC, but revived the debate over the amnesty provisions of the Lomé accord and forced both the Sierra Leonean government and the sponsors of the peace agreement to rethink their options, opening the way to a different approach, albeit one that does not necessarily preclude the work of the TRC.^[38]

On August 9, 2000, Ambassador Ibrahim M. Kamara, the permanent representative of Sierra Leone to the United Nations, delivered to the president of the Security Council a letter, dated June 12, from Ahmad Tejan Kabbah in which the Sierra Leonean president requested that the international body "initiate a process whereby the United Nations would resolve on setting up a special court for Sierra Leone" to "try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages."^[39] Citing both the precedents of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and the gaps in Sierra Leonean law that failed to encompass some crimes against humanity and other human rights abuses, as well as the collapse of the judicial system in Sierra Leone wrought by the conflict, Kabbah invited the Security Council to send a fact-finding mission to assess the situation and enclosed a suggested framework for the eventual tribunal. Solomon Berewa, at that time attorney general and minister of justice in Kabbah's cabinet, explained his government's changed *prise de position* in terms of *force majeure* at the time of the Lomé Peace Agreement:

1. After the atrocities of 6 January 1999, what every Sierra Leonean wanted most was peace and reconciliation. If, as we had hoped, we had achieved sustainable peace as a result of the Lomé Agreement, Sierra Leoneans would have grudgingly settled for this and gone about mending their shattered lives.
2. We needed a Peace Agreement with the RUF, which alone would have enabled the international community to come here as they have now done and to do things they are now doing.
3. We needed to have an agreement with the RUF on having a permanent cessation of hostilities. The need for a Peace Agreement at the time became obvious from the panicky reaction of Sierra Leoneans to a threat issued in Lomé by Corporel Foday Sankoh that he would call off the talks. I had to make a radio broadcast from Lomé to assure the Sierra Leone public that there was every probability that the Peace Agreement would be concluded....
4. Most importantly, the RUF would have refused to sign the Agreement if the Government of Sierra Leone had insisted on including in it a provision for judicial action against the RUF and had excluded the amnesty provision from the Agreement.^[40]

In response to Kabbah's request, the Security Council adopted Resolution 1315 on August 14, authorizing the Secretary General to negotiate an agreement with the government of Sierra Leone to create a special tribunal to try "crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law."^[41] Consequently, a team led by Assistant Secretary General for Legal Affairs Ralph Zacklin visited Freetown from September 18 to 20. On October 4, Secretary General Kofi Annan presented the Security Council with a report containing proposals for setting up the court, including a draft agreement between the UN and the Sierra Leonean government and a draft statute for the tribunal.^[42] Thereafter, although some of those slated for trial by the eventual court were already in custody, various events diverted the world's attention and prevented any action on the proposals until the end of 2001 when, in a letter dated December 26, Annan informed the Security

Council that he was authorizing the commencement of operations for the Special Court for Sierra Leone (SCSL), beginning with the dispatch of a planning mission to the West African country.^[43] During a twelve-day tour of the war-torn country in January 2002, the new UN delegation was joined by Under-Secretary General for Legal Affairs Hans Corell who, on behalf of the United Nations, signed an agreement with the government of Sierra Leone, represented by Solomon Berewa, on January 16, formally establishing the SCSL.^[44] The agreement was essentially the one contained in the Secretary General's October 2000 report, albeit with several notable amendments, including the abandonment of two trial chambers in favor of one. Annan communicated the agreement, along with the Statute of the Special Court, to the Security Council on March 6.^[45] Meanwhile, the implementing legislation for the tribunal was passed by the Sierra Leonean parliament on March 19 and signed into law by President Kabbah on March 29.

While copious references were made to the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda during the discussions leading to the establishment of the SCSL, there are notable differences between the bodies.^[46] The former two tribunals are subsidiary organs of the United Nations, having been established by resolutions of the Security Council.^[47] According to Corell, the SCSL, while endorsed by Resolution 1315, "is different from earlier *ad hoc* courts in the sense that it is not being imposed upon a state. It is being established on the basis of an agreement between the United Nations and Sierra Leone—at the request of the Government of Sierra Leone."^[48] As a consequence of the government's accord with its establishment, the SCSL would differ from the earlier tribunals in that it would sit within Sierra Leone, whose government would, according to the statute, appoint one of the three judges in the trial chamber and two of the five judges of the appellate chamber as well as the deputy prosecutor.^[49] The UN Secretary General was empowered to appoint the other judges and the prosecutor.^[50]

Civil society's contribution to and collaboration with both the TRC and the SCSL has been significant. The Truth and Reconciliation Act of 2000 mandated a transparent selection process for the selection of the seven members of the Commission, four of whom were to be Sierra Leonean citizens while three would be non-citizens.^[51] While the search for the three international commissioners was entrusted to the UN High Commissioner for Human Rights, that for the national commissioners involved wide consultation. In response to public notices in February 2001, some sixty-five nominations were received, and twenty names were included in a shortlist considered by a selection committee containing representatives of President Kabbah, the RUF leadership, the governmental National Commission for Democracy and Human Rights, the nongovernmental National Forum for Human Rights (NFHR), and the Inter-Religious Council. The same selection committee was also consulted by the UN High Commissioner with regard to the international appointments.

In August 2001, the NFHR, a coalition of twenty-seven local human rights organizations operating with assistance from the Open Society Institute and in cooperation with the Human Rights Office of UNAMSIL, mounted a national sensitization campaign aimed at informing paramount chiefs and other traditional rulers about the work of the TRC. One-day workshops were held in Bo, Kenema, and Freetown to encourage the chieftains, who continue to play a significant role in the social and political lives of Sierra Leoneans, especially those outside the major urban centers, to facilitate the voluntary giving and documentation of testimonies in their

respective chiefdoms and to assure the protection of victims, perpetrators, and other witnesses during the eventual process. An observer at these seminars found particularly fascinating the fact that the traditional leaders highlighted some of the traditional methods for conflict resolution, including offering sacrifices and performing purification and cleansing ceremonies for both perpetrators and victims. There are instances where these acts are done on community property, such as the “washing of the bush” and the pouring of libations for the appeasement of the spirits and ancestors. Many communities in Sierra Leone believe that all offenses committed always have the potential of angering the spirits and forefathers who community members believe continue to play a role in their daily lives. Likewise of interest was the discussion that some crimes committed during the civil conflict, such as amputation, were unknown to their communities, making it difficult to identify traditional methods of reconciling the perpetrators. For these abuses, the eventual TRC was looked upon as a possible response. A similar outreach was made to religious leaders with a meeting, convened under UNAMSIL sponsorship, in November 2001.

As a result of these meetings and other consultations, it was decided that the TRC’s work would be carried out in two phases: a preparatory phase lasting three months from the formal inauguration of the commission, scheduled for July 5, 2002, and an operational phase that was to last twelve months. In anticipation of this enterprise, the UN High Commissioner for Human Rights created an interim secretariat for the TRC in late March 2002 with an eye toward jump-starting the process. This interim secretariat, under the direction of Yasmin Jusu-Sheriff, a Freetown barrister and longtime advocate for women, established headquarters in Freetown that doubled as the provincial office for the Western Area while provincial offices for the Northern, Southern, and Eastern Provinces were opened, respectively, in Makeni, Bo, and Kenema. Other areas particularly affected by the conflict—including Kailahun, Kambia, and Kono—also had offices opened.

In accord with the authorizing legislation, seven commissioners—four Sierra Leoneans and three international members—were appointed: the Right Reverend Joseph Christian Humper, Bishop of the United Methodist Church of Sierra Leone and President of the IRCSL; Justice Laura Marcus-Jones, former judge of the High Court of Sierra Leone; Dr. John Kamara, a veterinary surgeon and former Principal of Njala University College; Sylvanus Torto, a teaching fellow at the Institute of Public Administration and Management of the University of Sierra Leone; Yasmin Louise Sooka, Director of the Foundation for Human Rights in South Africa and a former member of the South African Truth and Reconciliation Commission; Ajaaratou Satang Jow, a former education minister in The Gambia; and Dr. William Schabas, Director of the Irish Centre for Human Rights at the National University of Ireland. Bishop Humper was designated as Chairman of the TRC with Justice Marcus-Jones as his deputy. In his inaugural address, Bishop Humper outlined his expectations for the commissioners’ work:

All over the country, the scars of the conflict are refusing to heal. The indomitable spirit of our people is enabling them come to grips with the physical reconstruction that is required to rebuild their lives. The social and psychological reconstruction has been less successful. The question many people are asking is, why? Why were we visited with the conflict? Why were civilians the objects of attack rather than opposing armed forces? Why were our women and children made

objects of pleasure and abuse in the course of the war? Why were our buildings and other infrastructure deliberately and systematically targeted? What happened to our loved ones who are yet to return home even now that the war has ended? People need answers to these questions. Even if the loved ones were killed in the course of the war, the families and relatives need to know, so that at the least, they can give them a decent burial. These are no mean expectations. But our people are entitled to these explanations and more. It is only by grappling with these issues that we can chart an acceptable road map for the future and say, "Never Again."^[52]

Despite the bold commitment, the TRC faced severe funding difficulties. Just one month before the operational phase of the commission was to begin, the body had received just over \$1.1 million of the \$1,580,739 that the international community had pledged to it.^[53] The principal donors were the United States, the United Kingdom, and the European Union, with smaller amounts contributed by the Denmark, Norway, and Sweden. A report by the International Crisis Group (ICG) cited funding competition with the Special Court as part of the difficulty: "Money is not diverted *per se* away from the TRC and to the Special Court, but as one Western diplomat told ICG, the Special Court, although established well after the TRC, is far ahead in approaching donors and requesting funding."^[54]

The lack of means notwithstanding, the TRC began deploying statement-takers across Sierra Leone on December 4, 2002. These workers collected stories from all citizens who wished to come forward, regardless of their affiliation (or lack thereof) during the conflict. This testimony became the basis for the public hearings that began on April 14, 2003, and was to facilitate the creation of an official history of the war. At the official start of the statement-taking at Bomaru, Chairman Humper noted:

It is in the desire to construct this new Sierra Leone that the authors of the Truth and Reconciliation Commission Act charged I and my colleagues: create an impartial historical record of the violations and abuses of human rights and international humanitarian law related to the armed conflict; to investigate and report on the causes, nature and extent of the violations and abuses to the fullest degree possible including the antecedents; to investigate the context in which the violations and abuses occurred; to investigate whether the violations and abuses were the result of deliberate planning, policy or authorisation by any government, group or individual, and the role of both internal and external factors to the conflict.

This is an historic occasion not just because it marks the start of our statement taking programme; and not just because this was the place where it is accepted that the conflict began; and not just because we and all these other dignitaries have come here to start this process; but because for the first time in our history our people will be able to approach an official structure that has the mandate to listen and record the stories of all who were affected and all who participated in the conflict in order to acknowledge and record the wrongdoing that has been done. This marks the beginning for our nation of a difficult journey, that of looking inwards not because we want to apportion blame or act in vengeance, but because we want to acknowledge the experiences of those who suffered and to take account of those who

participated in the atrocities so that we can learn from what happened it and make sure that we can prevent it from happening again.^[55]

During the two-week pilot phase of the statement-taking process, some seventy statement-takers, worker under three regional coordinators, took a total of 1,371 statements, containing information on approximately three thousand victims, including more than one thousand killings and two hundred sexual assaults. Approximately one-third of those who gave testimony were women. On the basis of a review of these initial statements, subsequent statement-taking was organized to remedy groups and areas where statements had not been collected. By the end of 2003, more than eight thousand statements had been taken, a preliminary analysis of which showed that approximately ten percent involved child perpetrators.^[56]

Meanwhile, public hearings began in Freetown on April 14, 2003, with President Kabbah and members of the diplomatic corps in attendance. This first hearing was broadcast live on national radio. Subsequently, on those days that the commission held hearings, a half-hour program summarizing the day's proceedings—all of which were recorded with both video and audio tapes—would be presented on national television and radio in the evening. These broadcasts were thus widely followed by the population. Because of time limitations, only a small number (approximately three hundred) of the over eight thousand individuals who gave statements to the TRC were invited to testify in the public hearings that the commission held in Freetown and other locations throughout the country. By and large, the hearings were organized thematically around issues, including women, youth, mineral resources, corruption, and the role of international actors in the conflict.

Borrowing heavily from the example of the South African Truth and Reconciliation Commission,^[57] the hearings where women testified about sexual abuse—as well as those where minors were involved—were closed. In fact, the TRC showed particular sensitivity to gender issues, arranging for the women's hearings to be conducted by the three female commissioners with only female staff members present. Likewise, the video recording of the proceedings hid the identities of the women testifying.

Unlike the South African commission headed by Anglican Archbishop Desmond Tutu, which was criticized by some for its almost religious nature, the Sierra Leonean TRC placed less emphasis on personal repentance, forgiveness, and reconciliation. When victims named their abusers, the TRC made some efforts to locate the accused and to facilitate some sort of dialogue between victim and perpetrator, if the victim so desired. In a few instances, mainly outside the capital, the TRC commissioners held "reconciliation ceremonies" at the conclusion of their hearings which featured traditional rites adapted to "cleanse" the crimes away. However, the "reconciliation" element of the TRC was been more or less delegated to the Inter-Religious Council.

The final public hearing of the TRC was held on August 5, 2003, with President Ahmad Tejan Kabbah appearing before the commission to give more than two hours of testimony.^[58] Missing several deadlines, the TRC finally submitted its final report—some 1,500 pages plus 3,500 pages of transcripts—on October 5, 2004. While it will take some time to digest the four volumes, its very existence is a tribute to the perseverance over the years of human rights advocates and other third-sector exponents in Sierra Leone, including the TRC commissioners and their long-suffering

senior consultant, Ozonia Ojielo, a human rights lawyer and civil society activist from Nigeria who almost single-handedly ensured that the process remained on track even after the Commission ran out of funding in 2003.

While institutionally the role of civil society groups in the other post-conflict accountability mechanism, the Special Court, is almost nonexistent, civil society nonetheless has a considerable stake in its success, a sentiment that has been appreciated by the SCSL. In fact, although it is too soon to make definitive judgments—the first trials are still underway—indications are that the SCSL will provide a model for other post-conflict justice mechanisms, standing in contrast to the experience of the International Criminal Court for Rwanda, which has often been at odds with the Rwandan government and been received apathetically by the populace. In fact, it could be said that its activity has made the SCSL itself something of a *de facto* civil society institution within Sierra Leone.

Shortly after their appointments, prosecutor David Crane, an American who served most recently as the senior Inspector General of the U.S. Department of Defense, and registrar Robin Vincent, a career British civil servant, undertook extensive efforts to reach out to Sierra Leonean civil society groups and the population in general. On September 27, 2002, Crane traveled to the Kono region, one of the centers of the conflict, to hold the first in a series of “town hall” meetings to explain the SCSL’s mandate and receive input from citizens who participated in the encounters. In December, shortly after the tribunal was formally inaugurated, Crane, together with Vincent, met with students at Fourah Bay College to encourage their involvement with the university’s Human Rights Clinic. Subsequently, the SCSL has become perhaps the first international tribunal to create its own nongovernmental organization, the “Accountability Now Clubs,” a student-based program supported by the Special Court’s outreach budget. The main objective of the clubs is to promote understanding among students and their communities of the tribunal, as well as to study broader justice-related issues, including the rule of law, human rights, good governance, and accountability. The clubs will exist after the SCSL has concluded its work, and they represent an important part of the Court’s legacy.

Together with the Sierra Leonean branch of No Peace Without Justice, the international NGO made up of parliamentarians, mayors, and other local leaders promoting accountability for violations of international humanitarian law, the SCSL held “Train the Trainers” seminars to prepare 1,500 Sierra Leonean community leaders and activists to inform their constituencies about the work of the tribunal. The office of the Registrar has also organized regular meetings with representatives of civil society organizations and other stakeholders in the process to formally brief them on the progress of the SCSL’s work and to receive feedback.

In response to criticism about access to the proceedings, the SCSL’s Press and Public Affairs Office has produced weekly summaries of the proceedings that have been aired on local radio stations as well as the government-owned Sierra Leone Broadcasting System. When the trials started earlier this year, the press office also began producing weekly video summaries that it has been sending on tour around with mobile video units. These screenings have become something of a routine in many localities, further strengthening civil society through a sense of participation and ownership in a judicial system after years marred by lawlessness and fatalism.

While the SCSL will, in end, probably prosecute fewer than one dozen individuals, its real impact on Sierra Leone, especially the civil society sector, will probably be well beyond the tribunal's statutory mandate, through its capacity-building contribution to the country as well as its revitalization of the war-torn populace's sense of the rule of law. From the Appeals Chamber to the custodial staff of the courthouse, Sierra Leoneans are involved in every aspect of the tribunal's work. The Sierra Leonean personnel—who, overall, account for half of the SCSL's staff—have acquired significant skills that they will undoubtedly carry over, not only to eventual local prosecutions of lesser offenders, but to civic life in general. For example, unlike other international tribunals, members of the local bar have worked on all defense teams before the Special Court due to a requirement that at least one member of each team have experience in Sierra Leonean law. These attorneys have, in turn, acquired considerable experience in international and criminal law.

The Road Traveled and the Path Ahead

While it is not easy to isolate the specific impact of Sierra Leone's civil society sector on the resolution of the country's conflict, it nonetheless remains that, notwithstanding a lack of sustained outside support and its own internal organizational difficulties, the West African nation's third sector contributed constructively to its eventual democratization and pacification, indeed to its very salvation. At a time when the NPRC military regime viewed peace proponents as rebel sympathizers worthy of suspicion, it was civil society's voice that rendered negotiated peace an acceptable option in public discourse. Civil society groups participating in the National Consultative Conferences (Bintumani I and II) helped facilitate the holding of elections whereby the military handed power back to civilians in 1996. Likewise, the Labor Congress's campaign of non-cooperation with the AFRC/RUF junta after the May 1997 coup—advising its public-sector members to stay home, citing the state of insecurity and the non-payment of their salaries—helped erode the regime's claims to *de facto* control of the country and strengthened the hand of President Kabbah's government-in-exile. The participation of civil society not only facilitated but to a certain extent legitimized the tack adopted during the negotiations leading up to the Abidjan and Lomé peace accords. Since 2000, civil society groups have been an integral part of Sierra Leone's post-conflict transformation, engaging in advocacy, training, and capacity-building collaboration with both the Special Court for Sierra Leone and the Truth and Reconciliation Commission.

Despite this not insignificant record of achievement, Sierra Leone's civil society faces a number of challenges both from postwar conditions within the country and from persistent weaknesses on the part of third-sector organizations. While international intervention has addressed the country's immediate security concerns, its long-term security is intrinsically linked to development: the civil conflict arose, after all, out of a context of political failure, economic malaise, and social alienation. Consequently, a coordinated strategy is needed to address, among others, the following issues:

Former Combatants. Disarmament, demobilization, and reintegration into society of former combatants, especially child soldiers, is perhaps the most pressing challenge facing Sierra Leone. While UNAMSIL has successfully disarmed and demobilized most of the fighters, the international community has been less forthcoming with the wherewithal to provide the former combatants with the means

of supporting themselves lest they return to pose a threat to hard-won stability. On the other hand, where such support has been available—former combatants who turned in their weapons received a one-time payment of \$150, a sum equal to an average family's annual income—there has been a noticeable resentment of the “special treatment” of the former fighters on the part of victims and other non-combatants who received nothing. While there are no easy solutions to this dilemma, civil society groups—especially the faith-based and women's groups—can play an important role both in administering the reintegration process and in conciliating potential conflicts. As Mary Anderson has noted, in all civil conflicts there are elements that connect the people with the fight.^[59] It would seem that the role of civil society in such a context is to preemptively identify those points of tension, as well as those that offer opportunities to creatively conciliate the interests of different groups.

Increasing Participation in Government. Despite the literal revolutions that the country has been through in the course of the past decades, the government is remarkable for its almost unchanging cast of characters. President Ahmad Tejan Kabbah has been an on-again-off-again fixture in Sierra Leonean politics since his service as a political organizer for Sir Albert Margai's SLPP in the 1960s. The octogenarian leader of the opposition, Dr. John Karefa-Smart, has enjoyed an even longer run: he first entered parliament as a member of the colonial legislative council four years before Sierra Leone was granted its independence. While civil society and the international community have played a great role in fostering the democratization of the Sierra Leone, insufficient attention has been paid to the need to infuse “fresh blood” into the country's leadership. Nor is it just a question of age; there is likewise the question of gender. Notwithstanding the contributions of the Women's Forum and other women-led civil society initiatives, women are still comparatively underrepresented in the political process. International NGOs, partnering with local organizations, could do more to address these areas.

Maintaining Government Accountability. While civil society groups in Sierra Leone have long served as watchdogs against abuse by successive military and other autocratic governments, there are disturbing indications that many third-sector leaders have been less critical of the current civilian-led government. While the transgressions of the Kabbah government in no way approach those of its predecessors, it is not entirely free of blemish. The current SLPP-dominated regime has certainly not shied from using the Public Order Act passed by the SLPP government of Sir Albert Margai in 1965 to silence its critics, especially those in the media. This legislation allows for the criminal prosecution of newspaper printers and vendors as well as journalists for libel. On October 7, 2004, for example, Paul Kamara, founder and editor of the daily *For Di People* newspaper, was found guilty by a Freetown court of “seditiously libeling” President Kabbah and sentenced to two years' imprisonment. Kamara had previously served a six-month sentence after being convicted in November 2002 of “criminal libel” for allegedly defaming a judge. The court also ordered *For Di People* closed for six months. While Sierra Leone's press is notoriously sensationalistic, the cure for that malady is the development of a training program for journalists rather than the criminalization of activities that, however eccentrically, serve the public good of maintaining government accountability. Again, Sierra Leonean civil society organizations that already have relations with organizations abroad could serve as a bridge between international educational and journalistic organizations and members of the local press. The

establishment of a free and responsible press corps will play a crucial role in consolidating democracy, and this deserves greater attention and commitment.^[60]

Expanding Economic Opportunities. To date, efforts aimed at economic development have focused on debt relief—Sierra Leone has received assistance from the World Bank and the International Monetary Fund under the enhanced Heavily Indebted Poor Country (HIPC) Initiative—and increased transparency—under pressure from its British supporters, the government established an Anti-Corruption Commission. However, the key to the country's economic reconstruction lies not in fanciful schemes involving its diamond riches—diamond taxes need to be kept down to avoid giving incentive to the wholesale smuggling that fueled the low-intensity conflicts of the late 1980s—but in creating a business climate that encourages serious investment. A key to this is reversing the “brain drain” that has driven an estimated 80 to 90 percent of all Sierra Leonean professionals into the diaspora. A model for this might be found in the International Organization for Migration's successful Return for Qualified Afghans (RQA) program, which is co-funded by the European Commission and offers comprehensive assistance packages to highly qualified Afghan professionals residing in the European Union who wish to return to their home country and work in the public and private sectors. The RQA program also offers a “Self-Employment Option,” whereby grants of up to five thousand euros per person are awarded to Afghans who want to start their own small businesses.^[61] In turn, the expansion of the private sector lays, as the Ghanaian-born political scientist E. Gyimah-Boadi has pointed out, the material basis for a civil society that is truly independent of the state.^[62]

Assuring Justice. Sierra Leone is in the historically unique position of having both a post-conflict Truth and Reconciliation Commission charged with promoting societal reconciliation through the documentation and recognition of past abuses, and an internationally sanctioned tribunal, the SCSL, with the mandate of adjudicating those “most responsible” for crimes against humanity, war crimes, and other serious violations of humanitarian law during the conflict. As noted, civic groups have been involved with both processes. However, if the rule of law is to be restored, Sierra Leone also needs to have a working national judiciary. Sierra Leone's courthouses—the ones that were not razed altogether during the conflict—are dilapidated, and most of its legal professionals—the ones not slain—have long since dispersed. While the SCSL will have some “spillover” effects to the benefit of the domestic court system—not the least of which will be the eventual handover of the SCSL's multi-million dollar complex of buildings—more resources, both human and material, need to be dedicated to local justice institutions. Not only will the local judiciary be called upon to provide accountability beyond the limited SCSL prosecutions, it will be the foundation on which Sierra Leonean society's commitment to a legal order will rest.

Civil Society Dynamics. Given the vicissitudes of the country's recent history, it is not surprising that Sierra Leone's civil society groups have developed unevenly. Despite the successes of their earlier mass campaigns, many local NGOs have gradually become professionalized as a result of the resources becoming available through the international intervention. While this reliance on full-time, salaried professional staff led to a noticeable improvement in the reliability of many third-sector organizations that previously had depended on part-time volunteers, it has also served to isolate the same groups from the constituencies from which they had derived both their legitimacy and dynamism. Many organizations have become

top-down, Freetown-centered institutions dominated by the competing agendas of their leaders rather than representing concerns on the street. Over time, with the inevitable donor fatigue of the international community leading to a drying up of resources, the failure to build strong institutional ties to local communities could seriously undermine the viability of many civil society organizations.

While the forceful intervention of an international military force, seconded by a not inconsiderable civilian presence, ultimately turned the tide in the protracted Sierra Leonean conflict, the groundwork for recovery had been laid by the patient—albeit at times seemingly ineffectual—efforts of the country's civil society organizations. This gives rise to the hope that Sierra Leone might indeed break free of the endemic cycle of frustrated expectations, economic stagnation, social alienation, government collapse, and communal violence that has plagued it and many other African states since independence. If it can fully avail itself of the rare opportunity that the fortunate juncture of international attention, donor interest, democratic politics, and civic spirit has given it, Sierra Leone might not only return from the dead, but also live up to the aspirations of the liberated Africans who endowed the very name of its capital with its true meaning two centuries ago.

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^[1] The entire episode was a classic illustration of what Geoffrey Robertson, a barrister and human rights advocate who currently serves as a judge of the Appeals Chamber of the Special Court for Sierra Leone, has called the “CNN factor”—“the collective anger produced by [war crimes and other human rights abuses publicized by CNN] and its application to the conduct of one side in a foreign war which serves ... to tilt international opinion towards intervention on behalf of the opposing side.” GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 168 (1999).

^[2] Truth and Reconciliation Commission Report for Sierra Leone, *available at* http://www.nuigalway.ie/human_rights/publications.html (last accessed Oct. 25, 2004).

^[3] Truth and Reconciliation Commission Report for Children, *available at* <http://www.unicef.org/files/TRCCF9SeptFINAL.pdf> (last accessed Oct. 25, 2004).

^[4] THOMAS PATRICK MELADY, *FACES OF AFRICA* 39 (1964).

^[5] UNITED NATIONS DEVELOPMENT PROGRAM, *HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD* 142 (2004).

^[6] *See generally* BANKOLE THOMPSON, *THE CONSTITUTIONAL HISTORY AND LAW OF SIERRA LEONE (1961-1995)* 107-108 (1997).

- ^[7] See generally *id.* at 145-146.
- ^[8] See generally Michael Chege, *Sierra Leone: The State that Came Back from the Dead*, WASH. Q., Summer 2002, at 148, 151-153.
- ^[9] PAUL RICHARDS, FIGHTING FOR THE RAIN FOREST: WAR, YOUTH AND RESOURCES IN SIERRA LEONE 34 (2nd prtng. 2002).
- ^[10] See WILLIAM RENO, CORRUPTION AND STATE POLITICS IN SIERRA LEONE (1995).
- ^[11] See generally CHRISTOPHER CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM: POLITICS OF STATE SURVIVAL 248 (4th prtng. 1996).
- ^[12] See generally Fred Hayward, *State Consolidation, Fragmentation and Decay*, in CONTEMPORARY WEST AFRICAN STATES 165-180 (2nd ed.; Donal Cruise O'Brien et al. eds., 1989).
- ^[13] JOHN L. HIRSCH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY 30 (2001).
- ^[14] See generally J. Peter Pham, *A Nation Long Forlorn: Liberia's Journey from Civil War to Civil Society*, 6 INT'L J. NOT-FOR-PROFIT L. (2004), available at http://www.icnl.org/journal/vol6iss4/ar_pham.htm (last accessed Oct. 25, 2004).
- ^[15] See Robert D. Kaplan, *The Coming Anarchy: How Scarcity, Crime, Overpopulation and Disease are Rapidly Destroying the Social Fabric of Our Planet*, ATLANTIC MONTHLY, Feb. 1994, at 44.
- ^[16] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Nov. 30, 1996), available at http://www.usip.org/library/pa/sl/sierra_leone_10301996.html (last accessed Oct. 25, 2004).
- ^[17] *Id.* art. 12-13.
- ^[18] Organization of African Unity Council of Minister, Decisions Adopted by the Council of Ministers, 66th Sess., at 28-29, CM/Dec. 356 (1997), available at <http://www.africa-union.org> (last accessed Oct. 25, 2004).
- ^[19] U.N. SCOR, 3822nd mtg., at 1, U.N. Doc. S/Res/1132 (1997), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N97/267/13/PDF/N9726713.pdf?OpenElement> (last accessed Oct. 25, 2004).
- ^[20] See generally ADEKEYE ADEBAJO, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU 87-93 (2002).
- ^[21] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Jul. 7, 1999), available at http://www.usip.org/library/pa/sl/sierra_leone_07071999_toc.html (last accessed Oct. 25, 2004).

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[23] *Id.* art. IX.

[24] See *Seventh Report of the Secretary General on the United Nations Mission in Sierra Leone*, U.N. Security Council, at 2, U.N. Doc. S/1999/836 (1999), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N99/221/28/IMG/N9922128.pdf?OpenElement> (last accessed Oct. 25, 2004).

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[34] See Peace Agreement, *supra* note 21, art. VIII.

[35] See Pham, *supra* note 14.

[36] Peace Agreement, *supra* note 21, art. XXVI.

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^[49] Statute, *supra* note 45, art. 12, 15.

^[50] *Id.*

^[51] Truth and Reconciliation Act, *supra* note 37, art. 2.

^[52] Joseph Humper, *Address on the Occasion of the Inauguration of the Truth and Reconciliation Commission* (Jul. 5, 2002), available at www.sierra-leone.org/josephhumper070502.html (last accessed Oct. 25, 2004).

^[53] *Briefing by TRC Commissioner William Schabas* (Sept. 11, 2002), available at <http://www.sierra-leone.org/trcbriefing091102.html> (last accessed Oct. 25, 2004).

^[54] INTERNATIONAL CRISIS GROUP, SIERRA LEONE'S TRUTH AND RECONCILIATION COMMISSION: A FRESH START? 9 (2002).

^[55] Joseph Humper, *Address at the Commence of the Official Statement Taking by the Commission* (Dec. 4, 2002), available at www.sierra-leone.org/trc-humper120402.html (last accessed Oct. 25, 2004).

^[56] See PRISCILLA HAYNER, THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION: REVIEWING THE FIRST YEAR 3 (2004).

^[57] See generally LYN S. GRAYBILL, TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL? (2002).

^[58] *Statement of President Kabbah before the Truth and Reconciliation Commission* (Aug. 5, 2003), available at www.sierra-leone.org/kabbah080503.html (last accessed Oct. 25, 2004).

^[59] See MARY B. ANDERSON, DO NO HARM: HOW AID CAN SUPPORT PEACE—OR WAR 23-33 (1999)

^[60] See generally ROSS HOWARD, INTERNATIONAL MEDIA ASSISTANCE: A REVIEW OF DONOR ACTIVITIES AND LESSONS LEARNED (2003).

^[61] See <http://www.iom-rqa.org/> (last accessed Oct. 25, 2004).

^[62] See E. Gyimah-Boadi, *Civil Society in Africa*, 7 J. DEMOCRACY 129-130 (1996).

ARTICLE

Ten Emerging Principles of Governance of Nonprofit Corporations and Guides to a Safe Harbor

By Thomas Silk *

When clients look to legal counsel for advice and guidance, they expect to hear about current law. Sophisticated clients also look to us to keep them ahead of the curve, to alert them to evolving developments and trends in relevant laws and norms. This article represents my attempt to peer around the corner, to report on what I see, to identify and discuss what I believe to be the major developments and trends in principles of governance of nonprofit corporations, and to point the way to a safe harbor. This article is entirely subjective. It reflects my views alone, not necessarily those of my colleagues nor those of my clients.

* * * * *

The passage of Sarbanes-Oxley is a “wake-up call to the entire nonprofit community. If nonprofit leaders do not ensure effective governance of their organizations, the government may step forward and also regulate nonprofit governance.”

--The Sarbanes-Oxley Act and Implications for Nonprofit Organizations (Independent Sector and BoardSource, 2003)

“Public trust in our sector demands enforcement of legal standards, but it calls for more than that. Our world is migrating from a standard of what the law ‘allows’ us to do, to what we are comfortable reading about ourselves in the newspaper.”

--Dorothy S. Ridings, President of the Council on Foundations, Foundation News (November-December 2003)

“I do think the changes in corporate governance that we’re seeing through the voluntary best practices codes, for example ... have created a new set of expectations for directors. And that is changing how courts look at these issues.”

--Chief Justice Veasey, Supreme Court of Delaware, “What’s Wrong with Executive Compensation,” Harvard Business Review, pp. 68, 76 (January 2003)

Introduction

In response to the scandals at Enron, Arthur Andersen, Global Crossing, and other major corporations, Congress passed the Sarbanes-Oxley Act of 2002. Scholars (including judges) have pondered the possible implications of Enron for the law of corporations.^[1] Corporate watchdog organizations and professional associations of business and law have advocated and adopted more rigorous best practice codes of corporate governance.^[2]

Meanwhile the press has reported on scandals within the nonprofit sector as well.^[3] So far, nonprofit organizations have not been the target of reform legislation by Congress. States have been the first to act, with legislation patterned after Sarbanes-Oxley^[4] introduced in New York and California.^[5]

What new principles of governance are likely to emerge for the nonprofit sector? Based on an analysis of recent developments in the for-profit sector, including Sarbanes-Oxley and the recent spate of best practice codes of governance, I have identified ten likely emerging principles of governance for nonprofit organizations. My intent is not to hazard a prediction about the likelihood of federal or state legislation or regulations but to recognize and reflect the emergence of a fundamental aspirational shift. Whether or not additional legislation is enacted, community customs and practices are changing. Those changes may lead to revised interpretations by courts of the fiduciary duties of care and loyalty of directors of nonprofit corporations, because the meaning of these terms is based on current custom and practice.^[6] Moreover, a higher level of public expectation may prompt increased media scrutiny of nonprofit sector organizations. The likelihood of enforcement of federal and state laws regulating charitable organizations will continue to be less of a practical deterrent against improper conduct than the risk of reputational harm that may result from adverse media publicity targeting the nonprofit corporation, its directors and officers.^[7]

Emerging Principles

1. The board of directors of a nonprofit corporation must engage in active, independent, and informed oversight of the activities of the corporation, particularly those of senior management.
2. Directors with information and analysis relevant to the board's decision-making and oversight responsibilities are obligated to disclose that information and analysis to the board and not sit passively. Senior management should recognize and fulfill an obligation to disclose – to a supervising officer, to a committee of the board, or to the board of directors – information and analysis relevant to such person's decision-making and oversight responsibilities.
3. Every nonprofit corporation should have a nominating/governance committee composed entirely of directors who are independent in the sense that they are not part of the management team and they are not compensated by the corporation for services rendered to it, although they may receive reasonable fees as a director. The committee is responsible for nominating qualified candidates to

stand for election to the board, monitoring all matters involving corporate governance, overseeing compliance with ethical standards, and making recommendations to the full board for action in governance matters.

4. Every nonprofit corporation with substantial assets or annual revenues should develop and implement a three-tier annual board evaluation process whereby the performances of the board as a whole, each board committee, and each director are evaluated annually. The board should also develop and implement a process for review and evaluation of the chief executive officer on an annual basis.
5. Each board of directors is responsible for overseeing corporate ethics. Ethical conduct, including compliance with the requirements of law, is vital to a corporation's sustainability and long-term success. To establish an ethical corporate culture, the board should consider the following actions:
 - > communicate to personnel at all levels of the corporation a strong, ethical "tone at the top," set by the board, the chief executive officer, and other senior management, establishing a culture of legal compliance and integrity;^[8]
 - > assign to the chief executive officer or other officer the specific task of serving as compliance officer;
 - > adopt a Conflicts of Interest policy;
 - > include ethics-related criteria in employee qualification standards and in employees' annual performance reviews.
6. Every nonprofit corporation with substantial assets or annual revenue should be audited annually by an independent auditing firm. The corporation should change auditing firms or the lead and reviewing audit partner periodically to assure a fresh look at the firm's financial statements. The audit committee should be composed of completely independent directors and should set rules and processes for complaints concerning accounting and internal control practices. It is responsible for hiring, setting compensation, and overseeing the auditor's activities.
7. The chief executive officer and the chief financial officer of every nonprofit corporation should review Form 990 or Form 990-PF and other annual information returns filed by the nonprofit organization with federal and state agencies.
8. Any attorney providing legal services to a nonprofit corporation who learns of evidence that the attorney reasonably believes indicates a material breach of fiduciary duty or similar violation should report that evidence to the chief executive officer of the

nonprofit corporation and, if warranted by the seriousness of the matter, to the board of directors.

9. Every nonprofit corporation should adopt a written policy setting forth standards for document integrity, retention, and destruction. Section 1102 of the Sarbanes-Oxley Act provides that whoever alters or destroys any document with the intent to obstruct the investigation or proper administration of any matter within the jurisdiction of any federal agency or department is guilty of a felony. This provision applies to individuals within nonprofit corporations as well as business corporations.
10. Every nonprofit corporation should adopt a written policy to permit and encourage employees to alert management and the board to ethical issues and potential violations of law without fear of retribution. This is based on Section 1107 of the Sarbanes-Oxley Act, which treats as a felony any discharge, demotion, or harassment of any employee who provides to a law enforcement official true information about the potential commission of a federal offense. This provision applies to individuals within nonprofit corporations as well as business corporations.

Commentary

The ten principles of governance are derived primarily from the Sarbanes-Oxley Act and three corporate governance codes published after the Act became effective: the Report of the Task Force on Corporate Responsibility of the American Bar Association, the Findings and Recommendations of the Commission on Public Trust and Private Enterprise of The Conference Board, and Principles of Corporate Governance of The Business Roundtable.^[9]

Those sources address corporate governance in a business context, not in a nonprofit sector environment. This commentary identifies significant modifications to the principles made to adapt them to nonprofit corporations. As it turns out, the principles fit without much difficulty, which is consistent with the underlying reality that fundamental corporate governance standards are much the same for nonprofit corporations and for business corporations.

Principles 1 and 2

The laws of every state contain fiduciary duties, the twin duties of care and loyalty, applicable to directors of nonprofit corporations. But the meaning of the language used to define the duty of care is far from self-revealing. For example, California's defines the duty of care as the duty to act in good faith "with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."^[10]

The search for clearer guidance is unending. A recent version is offered by the American Bar Association. Principles 1 and 2 are derived from the corporate governance practices recommended by the Task Force on Corporate Responsibility of the American Bar Association and adopted by the ABA in August 2003.

The Task Force identifies as a major board problem “a culture of passivity with respect to senior executive officers, in which those officers are not subject to meaningful director oversight.... The goal of the policies and practices recommended in this Report will only be fully achieved if ... directors abandon the passive role many have been content to play, and replace it with a new culture stressing constructive skepticism and an active, independent oversight role.”^[11]

Concern with the culture of board passivity prompts the emphasis on an active board. The ABA standard does not call for micromanagement by the board, but it does provide that the director with knowledge relevant to the board’s responsibilities may not sit by quietly and withhold that information from the board; the director has an affirmative obligation to disclose relevant information to the board (Principle 2). The directors “must engage in active, independent and informed oversight” (Principle 1).

Board passivity is not limited to business corporations. Directors of nonprofit corporations have also been faulted for reluctance to ask key questions and to participate actively in board meetings.^[12]

Principles 3 through 5

The notion that every board of directors should have a nomination/governance committee is widespread in recommended practice codes. A common feature is that the committee should be independent in the sense that the directors serving on it are not part of the management team and are not compensated by the corporation for services rendered to it, although they may receive reasonable fees as directors.^[13]

Principle 4 reflects another consensus in the recommended practice codes of corporate governance. A requirement for annual evaluations of the executive director appears frequently in these codes. An annual evaluation requirement for directors appears less often. What is new here is the proposed three-tier evaluation at the board level. Annual evaluation is recommended not only for each director, but for each committee and for the board of directors as a whole, reflecting a concern that the result of individual director evaluations may reveal little about how the directors perform in relevant groups.^[14]

Principle 5 reflects a final common theme in recommended practice codes: a recognition that a strong ethical standard should be set by a “tone at the top.”^[15]

Principle 6

Only a few states currently require annual audits of nonprofit corporations. But that is changing. Some states have proposed mandatory audits for nonprofit organizations with assets or gross revenues over \$250,000. In other states audits are required only of larger nonprofits, those with assets of \$3 million or gross annual revenues of \$1 million. Below a certain size, the nonprofit corporation may not be able to afford the costs of an annual audit. Nevertheless, nonprofit corporations with substantial assets or annual revenue should anticipate that mandatory annual audits will be required.

The Sarbanes-Oxley Act requires that the board of directors have an audit committee composed entirely of directors who are independent in the sense that they are not part of the management team and they are not compensated for services rendered to the corporation, apart from fees for board service.

Similar requirements are likely to be imposed by state law on nonprofit corporations. Legislation proposed by the New York Attorney General would require nonprofit boards to designate an audit committee if the organization has gross revenues over \$250,000. Not only may the directors on the audit committee not be paid for services to the corporation, they may not have participated in any interested party transactions in the last year.^[16]

In California, SB 1262 has been introduced. The bill would require mandatory annual audits of charitable corporations with annual revenues of \$500,000 or more, public disclosure of the audited financial statements, an independent audit committee, and record retention (including electronic records) of the activities of the charity for 10 years.

Principle 7

The Sarbanes-Oxley Act requires the chief executive and chief financial officer to certify that the officer has reviewed the financial statements, that they contain no untrue statement or omission of material fact, and that they fairly present the financial condition and operations of the company. Willful false certification is subject to criminal sanctions.

Current law requires IRS Form 990 and Form 990-PF, the annual information returns filed by public charities and private foundations, to be signed by an officer. Those information returns are signed with a declaration under penalty of perjury that the officer has examined the return and accompanying schedules and that they are "true, correct, and complete." The Internal Revenue Code contains its own perjury and false statement statute making willful violations a felony. IRC § 7296(1).

The IRS has a wide choice of laws to select from to enforce the making of true statements in connection with tax returns. In this new climate of compliance, nonprofit corporations would be well-advised to follow the sound advice given by Independent Sector that both the "CEO and the CFO should review the Form 990 or 990-PF before it is submitted to ensure that it is accurate, complete, and filed on time."^[17]

Principle 8

The imposition by the Sarbanes-Oxley Act of regulations and restrictions on accountants has received extensive publicity. Less fanfare has accompanied a new rule imposed on lawyers. The Act seeks to improve compliance by requiring lawyers to "climb the ladder" within the client company. If the lawyer is aware of evidence of material violations of securities law or breach of fiduciary duty by the company or any agent, the attorney must report that evidence to the chief legal officer or chief executive officer. If that person does not respond appropriately, then the attorney must report to the audit committee or the board of directors.

The ethical rules of the legal profession are moving in a similar direction. California has a permissive reporting-up rule. Under California's Rule of Professional Conduct 3-600(B), when a lawyer learns of wrongdoing by a corporate client, the lawyer may refer the matter "to the next higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest internal authority." The ABA recently enacted a "climb the ladder" rule that is mandatory when applicable. In 2003, the ABA completely revamped Model Rule 1.13, which now provides that when an attorney learns of wrongdoing that is likely to result in substantial injury to the corporation, the attorney "shall refer" the matter to the highest authority in the corporation, the board of directors.

In the nonprofit sector, these trends in the law are likely to result in an increase in compliance discussions, initiated by the attorney, with the executive director and with the board of directors.

Principles 9 and 10

The Sarbanes-Oxley Act also adds two criminal offenses to federal law. Anyone who alters or destroys a document with the intent to obstruct a federal investigation is guilty of felony; so, too, is a person who discharges, demotes, or harasses an employee for providing true information to a federal law enforcement officer.

The scope of these criminal offenses extends to individuals in nonprofit corporations as well as businesses and would apply in connection with IRS audits or other federal investigations of tax-exempt organizations.

To the extent that state laws do not already criminalize similar conduct in connection with state law enforcement investigations, we are likely to see the adoption of such laws at the state level.

Accordingly, a nonprofit corporation would be well-advised to elevate awareness of these changes within the organization by adopting written policies setting forth standards for document integrity and retention and by making plain that employees, without fear of retribution, are encouraged to alert management and the board to ethical issues and potential violations of law.

Guides to a Safe Harbor

What can we learn from this analysis of emerging principles in nonprofit governance that may be of practical use to us? The most valuable teachings, I suggest, are not about the particular principles themselves, which will change over time, but about underlying truths. By following these guides when making policy decisions on matters of internal governance, charitable corporations will find the safest harbor:

1. Increasingly, charities are expected by the public to take the high road.
2. It is no longer sufficient for a charitable organization merely to comply with the letter of the law or even the spirit of the law. The charity must go beyond the law. The public now looks to charities to act as moral agents.

3. Charitable organizations with the greatest likelihood of satisfying emerging public expectations will be those that take all measures necessary to ensure that the conduct of directors, officers, and employees reflects the highest ethical standards appropriate to the organization structure and mission.
4. To settle for less is to run the risks that the charitable organization's reputation for integrity will be weakened, its respect by the community will be diminished, and its ability to fulfill its mission will be imperiled.

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^[1] Leo E. Strine, Jr. "Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle," 57 *The Business Lawyer* 1372 (August 2002); E. Norman Veasey, "Should Corporation Law Inform Aspirations for Good Corporate Governance Practices – Or Vice Versa?" 149 *U. Pa. R. Rev.* 2179 (June 2001).

^[2] "Findings and Recommendations: Part 2, Corporate Governance," Commission on Public Trust and Private Enterprise (*The Conference Board*, 2003); "Principles of Corporate Governance" (*The Business Roundtable*, 2002); "Corporate Governance Practices," adopted by the American Bar Association (2003).

^[3] See e.g., Margaret Gibelman and Sheldon R. Gelman, "Very Public Scandals: An Analysis of How and Why Nongovernmental Organizations Get in Trouble," paper presented at the International Society for Third-Sector Research at the Fourth International Conference, Dublin, Ireland, July 7, 2000; Marion R. Fremont-Smith and Andras Kosaras, "Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995-2002," 42 *Exempt Organization Tax Review* 25 (October 2003).

^[4] The Sarbanes-Oxley Act, enacted on July 30, 2002, imposes on publicly traded companies and their accountants and lawyers new requirements designed to improve corporate governance and thereby rebuild public trust in the corporate sector.

^[5] In January 2003, Attorney General Eliot Spitzer of New York announced the introduction of legislation to protect nonprofit corporations against financial fraud by adopting reforms similar to those enacted by Sarbanes-Oxley. Attorney General's Legislative Program Bill # 02-03. In California, Attorney General Lockyer's staff developed a legislative proposal which emerged as SB 1262, introduced by Senator Sher on February 13, 2004.

^[6] It is settled law in California and elsewhere that evidence of the custom or practice of others similarly situated is admissible in court on the issues of due care or

negligence. See *Bullis v. Security Pac. Nat. Bank*, 21 C.3d 801,809 (1978); Prosser & Keaton, *Torts* (5th edition) §33.

^[7] In a recent seminal article, the authors argue that “the behavioral phenomena of internalized trust and trustworthiness play important roles in discouraging opportunistic behavior among corporate participants.” They identify three sources of trust and trustworthiness: (1) enforcement of laws, (2) market sanctions (combining fear of retaliation, reputational loss, and social sanctions), and (3) internalized trust (an internalized belief or taste or preference for behaving trustworthily). Margaret M. Blair and Lynn A. Stout, *Symposium Norms & Corporate Law: Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. Pa. L. Rev. 1735 (June 2001).

^[8] Enron’s corporate culture of deceit amounted to an in-house joke, as captured by a song “Balance Sheet Blues,” which circulated within the company in 1998: “They call us innovators / We got to please the rater / Don’t feed us to the ‘gators / We got the balance sheet blues.” Jeffrey Toobin, “End Run at Enron,” *New Yorker*, p. 49, 55 (October 27, 2003).

^[9] The four documents are available at the following websites: www.findlaw.com; www.abanet.org; www.conference-board.org; and www.brt.org.

^[10] The definition of the duty of care for directors of business corporations and for directors of nonprofit corporations is often the same or similar. *Compare* Cal. Corp. Code §§ 309(a) and 5231(a); *compare* Revised Nonprofit Corporation Act §8.30(a) and Model Business Corporation Act §8.30 (a); *compare* New York N-PCL §717 and BCL §717; *see also* Bjorklund, Fishman, and Kurtz, *New York Nonprofit Law and Practice with Tax Analysis* §11.2(b).

^[11] *Report of the Task Force on Corporate Responsibility of the ABA*, pp. 10-11 (2003).

^[12] *See e.g.*, Chait, Holland and Taylor, *Improving the Performance of Governing Boards*, p. 4 (1996).

^[13] *See Principles of Corporate Governance*, p. 20 (Business Roundtable); *Corporate Governance: Principles, Recommendations and Specific Best Practice Suggestions*, p. 10 (Conference Board).

^[14] Business Roundtable, p. 27; Conference Board, p. 10.

^[15] Business Roundtable, p. 9; Conference Board, p. 25.

^[16] *New York Attorney General’s Legislative Program, Program Bill # 02-03* (January 21, 2003).

^[17] *The Sarbanes-Oxley Act and Implications for Nonprofit Organizations* p. 7 (Independent Sector and BoardSource, 2003).

ARTICLE

Emerging International Information Collection and Sharing Regimes: The Consequences for Canadian Charities

By Terrance S. Carter, B.A., L.L.B., and Sean S. Carter *

Introduction

Information sharing and centralized databases of personal information are fundamental mechanisms of anti-terrorism initiatives worldwide. Such sharing and collection of information has exponentially increased in recent years, not only between domestic government agencies, but also between security agencies of different states. A manifestation of these data collection and sharing initiatives in Canada of interest to charities are the Advance Passenger Information/Passenger Name Record ("API"/"PNR") programs, which have been gradually implemented since the fall of 2002. The API/PNR programs involve the Canadian Border Services Agency ("CBSA") maintaining a database of airline passenger information that will be collected and subjected to ongoing analysis.^[1] As part of the federal government's anti-terrorism initiative, these programs were introduced under a purported concern for public safety and security, but they may have much broader implications. Charities with representatives who travel internationally need to be aware of the potential risks that the charity and the individual may consequently be subject to as a result of these programs.

Commentary

The API program, implemented by the CBSA in October 2002, is a database of basic information about passengers collected during the check-in process for air travel. The PNR program, which began its staged implementation during the summer of 2003, involves information concerning the individual traveler's reservation and itinerary as recorded by the carrier's reservation system, a travel agent or reservation system. The PNR collects the passenger's full name, date of birth, gender, citizenship or nationality, and "any other information relating to the person in a reservation system."^[2] The PNR program is in its final stage of implementation, which involves the automated sharing of information with authorities in the United States, and began in the spring of 2004.

Information collected under the API/PNR programs is subject to ongoing intelligence analysis for not only present but "future threats" pertaining to anti-terrorism and to "security, public health and criminal activity." This information will be kept for six years. Additionally, the information, which is stored in a central database, may be shared with other agencies or departments for *non-customs* purposes under certain circumstances. The CBSA has further indicated that these programs, which are currently limited to air travel, will ultimately be expanded to all modes of transportation. All Canadian API/PNR information on potentially "high-risk" persons will be shared with U.S. customs and immigration

authorities, in accordance with a "Memorandum of Understanding" between Canada and the United States.^[3]

Information sharing and collection initiatives, such as the API/PNR programs, stem from a collection of non-legislated bilateral security agreements with the United States, international conventions, and domestic legislation and regulations. This includes the "32 Point Smart Border Agreement," which calls for increased coordination and information sharing between Canadian and U.S. police and intelligence services, and the aforementioned "Memorandum of Understanding." Data collection initiatives like the API/PNR programs were given statutory and regulatory force in fulfillment of the bilateral security agreements.

One of the central pieces of legislation implementing the bilateral security agreements is the controversial *Public Safety Act, 2002*, S.C. 2004, c. 15, which received Royal Assent on May 7, 2004 (the "Public Safety Act"). The Public Safety Act contains provisions for the collection and sharing of personal information through the API/PNR programs between airlines, Canadian Security Intelligence Services, the Royal Canadian Mounted Police, and various government agencies, as well as with foreign governments, for purposes that extend beyond air safety and national security. The API/PNR programs have come under criticism from many fronts. The Privacy Commissioner of Canada, Jennifer Stoddart, and organizations such as the Canadian Bar Association ("CBA") have openly raised concerns about this type of data collection system in Canada. In its submission on the Public Safety Act, the CBA said the Act "fails to find any appropriate balance between security and privacy and human rights."^[4] In a March 2004 submission to the Senate Standing Committee on Transport and Communications regarding the Public Safety Act, the Privacy Commissioner stated that "the legislation goes beyond fighting terrorism and enhancing transportation safety" and that would set a "very dangerous precedent."^[5]

Two further pieces of legislation were used to implement the initiatives of the bilateral security agreements: the Senate's *An Act to amend the Customs Act and to make related amendments to other Acts*, S.C. 2001, c. 25 ("Bill S-23"), and the House of Commons' *An Act to amend the Aeronautics Act*, S.C. 2001, c. 38 ("Bill C-44"). Under Bill S-23, Canada Customs has access to all information in airline or travel agent reservation systems pertaining to travelers arriving in Canada, and can widely share the information. Bill C-44 authorizes Canadian air carriers to provide passenger information to authorities in foreign states. Canada's commitment to these initiatives was clearly reiterated in Canada's first "National Security Policy," which was released in April 2004.^[6] A new National Risk Assessment Centre (the "Centre") was opened in Ottawa in January 2004 in order to implement the program. The Centre will receive all passenger information, analyze it, and share it with U.S. counterparts, with virtually no restrictions on what happens to information once it passes out of Canadian hands.^[7] Concerns about the implications of the new regime of information sharing and collection, and what happens to information once it leaves Canada, were highlighted by the Maher Arar case and his deportation to Syria by the United States. The outcome and recommendations of the public inquiry into his deportation and the events surrounding it may play an important role in reforming the current information collection and sharing system.

Implications for Canadian Charities

The API/PNR programs should be of particular concern to directors, officers, employees, and volunteers of charities who travel internationally, especially to regions that may be considered 'conflict zones'. An individual's travel patterns may subject that person and the organization that he or she represents to an investigation as a potential 'security threat' under the API/PNR programs. This type of information may be considered in an investigation for the deregistration process of charities under the *Charities Registration (Security Information) Act*, as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41, s. 6 (in force December 24, 2001).^[8] Charities, their directors, officers, employees, and volunteers need to also be aware that not only may the information collected under the API/PNR programs be subject to ongoing scrutiny and investigation by various Canadian and U.S. authorities, but the information may also be shared with, or obtained by, other foreign security agencies.

Conclusion

It is difficult to speculate on what the long-term ramifications of this unprecedented information collection and sharing regime will be, largely because many of the details of its implementation and specifics of its operation are kept from public scrutiny in the interests of 'national security.' However, charities need to be particularly aware of these programs and the potential risks that both the organization and involved individuals may be subject to as a result.

The API/PNR programs are part of an emerging regime of comprehensive information awareness that have been introduced and justified as anti-terrorism initiatives, but have a much broader range of application and use. These types of information collection and sharing programs are not specific to Canada or even to North America; rather, they are an ever-emerging reality internationally. In May 2004, the United States and the European Union, after protracted discussions over many months, and despite ongoing opposition by the European Parliament and human rights groups, entered into a formal agreement to share information on all airline passengers crossing the Atlantic.^[9] Such programs are substantial, widespread, and likely a permanent part of the foreseeable future. It is, therefore, essential to understand, as much as possible, the scope of information that is being collected, what is being done with it, and who has access to it, in order to protect individuals and organizations that the individuals represent. More information about the API/PNR programs is available from CBSA in the form of a fact sheet^[10] and press releases.^[11] Additional commentary on the API/PNR programs and fact sheets advising Canadians on protecting their personal information when it crosses borders is available from the Privacy Commissioner's website.^[12]

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^[1] The CBSA integrates several key functions previously spread among three organizations: the Customs program from the Canada Customs and Revenue Agency, the Intelligence, Interdiction and Enforcement program from Citizenship and Immigration Canada, and the Import Inspection at Ports of Entry program from the Canadian Food Inspection Agency.

^[2] "The CCRA: Protecting Canadians", Press Release, (September 27, 2002), available at <http://www.ccr-aadrc.gc.ca/newsroom/releases/2002/sep/api-e.html> (accessed June 12, 2003).

^[3] "Smart Border Action Plan: Progress Report" available at http://www.cbsa-asfc.gc.ca/general/blue_print/compliance/report-e.html (accessed August 9, 2004).

^[4] "Submission on Bill C-17 *Public Safety Act 2002*" available at <http://www.cba.org/cba/pdf/c-17-eng.pdf> (accessed August 11, 2004).

^[5] "Senate Standing Committee on Transport and Communications Bill C-7, the *Public Safety Act, 2002*" available at http://www.privcom.gc.ca/speech/2004/sp-d_040318_e.asp (accessed August 11, 2004).

^[6] "Securing An Open Society: Canada's National Security Policy" available at http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf (accessed August 9, 2004).

^[7] "Anti-terrorism and the Security Agenda: Impact on Rights, Freedoms and Democracy" available at <http://www.antiterrorismlaw.ca/Public%20Forum%20-%20ICLMG.pdf> (accessed August 12, 2004).

^[8] For more information about the deregistration process and the evidence that may initiate or be used during the process, please see *Charities and Compliance with Anti-Terrorism Legislation in Canada: The Shadow of the Law* available at www.antiterrorismlaw.ca

^[9] "EU in passenger data deal with US" BBC Online News, May 17, 2004, available at <http://news.bbc.co.uk/1/hi/world/europe/3721625.stm> (accessed: August 19, 2004).

^[10] "Advance Passenger Name Record" Factsheet, July 2003, available at http://www.ccr-aadrc.gc.ca/newsroom/factsheets/2003/july/july_api_pnr-e.html (accessed: November 11, 2003).

^[11] "The CCRA: Protecting Canadians", Press Release, (September 27, 2002), available at <http://www.ccr-aadrc.gc.ca/newsroom/releases/2002/sep/api-e.html> (accessed: November 11, 2003) and "Advance Passenger Information/Passenger Name Record" available at <http://www.cbsa->

asfc.gc.ca/newsroom/factsheets/2004/0124passenger-e.html (accessed August 19, 2004).

^[12] "Privacy Commissioner of Canada criticizes CCRA's plans for "Big Brother" database", *available at* http://www.privcom.gc.ca/media/nr-c/02_05_b_020926_2_e.asp (accessed: August 20, 2004), and "What Canadians Can Do to Protect Their Personal Information Transferred Across Borders" *available at:* http://www.privcom.gc.ca/fs-fi/02_05_d_23_e.asp (accessed: August 20, 2004).

ARTICLE

Politics and the Pulpit

By Milton Cerny*

With every election season comes a flurry of information — and misinformation — about what churches and other religious organizations can and cannot do. Fortunately for religious leaders, the law is relatively clear.

The Law

Like all organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and eligible to receive tax-deductible contributions under section 170(c)(2) of the Internal Revenue Code, churches are prohibited from supporting or opposing any candidate for elected public office. This prohibition applies to candidates for federal, state, and local offices. The IRS enforces this prohibition through audits, fines, and loss of tax-exempt status.

Q: Doesn't the First Amendment allow churches to support and oppose candidates?

A: No. Churches, like all organizations tax-exempt under section 501(c)(3) of the Internal Revenue Code, are absolutely prohibited from supporting or opposing candidates for elected public office. As recently as 2000, a federal appellate court squarely rejected a church's claim that the First Amendment's free exercise of religion clause allowed the church to urge the public to vote against a candidate. *Branch Ministries and Dan Little, Pastor v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); see also *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983) (Supreme Court held that "not all burdens on religion are unconstitutional The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (citation omitted)). The fact that a church may be motivated by its religious principles will therefore not prevent a church from losing its tax-exempt status and facing other penalties if it supports or opposes any candidate.

What Is Supporting or Opposing a Candidate?

The courts and the IRS consider all of the relevant facts and circumstances in determining whether a church has supported or opposed a candidate. While making donations to candidates, raising funds for candidates, and endorsing candidates are prohibited, so are more subtle efforts to support or oppose candidates. In its recently updated *Tax Guide for Churches and Religious Organizations* (Publication 1828), the IRS provides the following examples of prohibited activities by churches:

Sermon. Minister D is the minister of Church M. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the importance of voting in the upcoming election, and concludes by stating, "It is

important that you all do your duty in the election and vote for Candidate W." Since Minister D's remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention attributable to Church M.

Church Newsletter. Minister B is the minister of Church K. Church K publishes a monthly church newsletter that is distributed to all church members. In each issue, Minister B has a column titled "My Views." The month before the election, Minister B states in the "My Views" column, "It is my personal opinion that Candidate U should be reelected." For that one issue, Minister B pays from his personal funds the portion of the cost of the newsletter attributable to the "My Views" column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the church. Since the endorsement appeared in an official publication of Church K, it constitutes campaign intervention attributed to Church K.

Candidate Invitation. Minister F is the minister of Church O. The Sunday before the November election, Minister F invited Senate Candidate X to preach to her congregation during worship services. During his remarks, Candidate X stated, "I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday." Minister F invited no other candidate to address her congregation during the Senatorial campaign. Because these activities took place during official church services, they are attributed to Church O. By selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O's actions constitute political campaign intervention.

Voter Guides. Church S distributes a voter guide during an election campaign. The voter guide is prepared using the responses of candidates to a questionnaire sent to candidates for major public offices. Although the questionnaire covers a wide range of topics, the wording of the questions evidences a bias on certain issues. By using a questionnaire structured in this way, Church S is participating or intervening in a political campaign.

Court decisions, IRS rulings, and IRS publications provide the following additional examples of prohibited activity:

Statements. Publishing or distributing written or printed statements or making oral statements on behalf of or in opposition to a candidate. Treasury Regulation § 1.501(c)(3)-1(c)(3)(iii); *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

Evaluating Candidates. Considering the qualifications of all candidates, selecting those determined to be best qualified or evaluating the candidates based on objective and nonpartisan

criteria, and publicizing the results of that selection or evaluation. *Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989); Revenue Ruling 67-71.

Distributing Others' Evaluations of Candidates. Distributing the evaluations of candidates by others, such as the views of the audience for a candidate forum. Technical Advice Memorandum 9635003 (Apr. 19, 1996).

Legislative Voter Records. Publishing a compilation of the voting records of incumbents on a narrow range of issues, such as land conservation, and distributing the compilation widely among the electorate, even if the guide does not include express statements in support of or in opposition to any candidate. Revenue Ruling 78-248, *Situation 4*.

Campaign Material. Distributing voter education material prepared by a candidate, political party, or PAC. Kindell & Reilly, "Election Year Issues," *IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2002*, at 372.

Allowing Use of Space, Services, or Mailing Lists. Selling or renting space, services, or mailing lists to a candidate unless available to all candidates on an equal basis, also available to the public on the same basis, and provided on a regular basis (not provided for the first time to a candidate). Kindell & Reilly, "Election Year Issues," *IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2002*, at 383-84.

Loan Funds. Making a loan to, or guaranteeing a loan to, a candidate, political party or PAC. Technical Advice Memorandum 9812001 (Aug. 21, 1996).

Q: Does this mean churches and pastors can't do anything related to an election?

A: No. Churches are allowed to engage in strictly *non-partisan* election-related activities. For example, churches can encourage their members to register to vote and to vote as long as they do not encourage them to support or oppose particular candidates or parties. Encouraging support of a candidate includes oblique references, such as, for example, referring to a candidate for reelection as President by talking about all of the progress made during the "past 3-1/2 years" immediately before the election and discussing the importance of protecting the "conservative" (or "liberal") agenda, even if the candidate is not mentioned by name.

Pastors are also allowed to personally support and even endorse candidates, but they must not use any church resources, such as letterhead, newsletters, or facilities to do so and must make it clear that they are speaking on their own behalf and not on behalf of the church.

Q: Does this mean churches can't speak out on public policy issues?

A: No. Churches can speak out on public policy issues as long as such messages are not attempts to urge support for or opposition to any candidate. Churches can also engage in lobbying (supporting or opposing legislation, including ballot initiatives) as long as doing so remains an insubstantial part of the church's total activities. Neither the IRS nor the courts have set a bright line for what is "insubstantial," but generally spending less than five percent of the church's expenditures, time, etc. on such activities should be insubstantial.

What Can Happen if a Church Supports or Opposes a Candidate?

A church that supports or opposes a candidate can find itself facing an IRS audit, fines and loss of tax-exempt status. Public information about IRS audits is relatively scarce because the IRS is not permitted to release such information, but here are a few examples of what has happened to some churches and other religious organizations:

Branch Ministries (The Church at Pierce Creek). Four days before the 1992 presidential election, this church placed full-page advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues. The IRS began an inquiry of the church within a matter of weeks. Eight years later, after extensive litigation, the U.S. Court of Appeals for the District of Columbia upheld the IRS's revocation of the church's tax-exempt status.

Christian Broadcasting Network. In the mid-1980s, this ministry supported the presidential campaign of its founder, Rev. Pat Robertson, according to the IRS. Ten years later CBN settled with the IRS by agreeing to the revocation of its tax-exempt status for 1986 and 1987, the revocation of the tax-exempt statuses of three former affiliates, making a "significant payment" to the IRS, avoiding partisan campaign activities in the future, placing more outside directors on its board, and implementing other organizational and operational changes to ensure tax law compliance.

Old Time Gospel Hour. In 1986 and 1987, this ministry affiliated with Rev. Jerry Falwell raised money for a PAC, according to the IRS. After a four-year audit by the IRS, the IRS revoked the tax-exempt status of the ministry retroactively for 1986 and 1987 and the ministry agreed to pay the IRS \$50,000 in taxes for those years and to change its organizational structure so that no future political campaign intervention activities would occur.

These examples illustrate the following burdens churches that support or oppose candidates may face:

IRS Audit: The IRS can only open a church tax inquiry, which can then lead to an audit, if it has sufficient evidence to create a reasonable belief that the church has in fact violated federal tax law. Evidence of a single incident of a pastor endorsing a

candidate from the pulpit or of a church hosting a candidate or PAC fundraiser is enough to meet this standard, however. As shown by the above examples, such audits can take years to resolve, cost tens of thousands of dollars in legal fees, and distract church staff from their other responsibilities and duties.

Fines: The Internal Revenue Code imposes a 10% excise tax on amounts expended for supporting or opposing a candidate by a section 501(c)(3) organization, including a church, and a 2.5% excise tax (up to a maximum of \$5,000) payable by any manager who approved the expenditure knowing it was against the law. The Code imposes additional taxes if a church or other section 501(c)(3) organization refuses to correct the violation. Correction involves recovering the political expenditures to the degree possible and taking steps to prevent future violations.

Injunction and Immediate Taxation: Congress has also given the IRS the authority to seek an immediate injunction in the case of flagrant violations of the prohibition on supporting or opposing candidates, and authority to immediately assess tax for willful and flagrant violations of the prohibition.

Revocation of Tax-exempt Status: The IRS can revoke the tax-exempt status of a church that supports or opposes a candidate. For churches that only receive income in the form of contributions, revocation itself does not have any financial consequences because gifts are generally not taxable. For churches with investment or other income, however, becoming taxable for one or more years results in that income becoming taxable.

Changes in Operations and Organization: The IRS may agree not to revoke the tax-exempt status of a church or to impose the maximum financial penalties, but only if a church agrees to take certain steps to prevent future violations of the law. These steps may range from requiring a church's leaders to agree to a written policy against supporting or imposing candidates to seeking changes in a church's governance structure to the degree that structure is not based on specific religious convictions.

Election Law: Supporting or opposing a candidate may also violate federal or state election law. For example, a church that is incorporated and makes a contribution to a candidate's campaign has violated federal election law. Violations of election law can lead to an investigation by the Federal Election Commission or its state equivalent, the imposition of fines, and even criminal penalties.

Other Consequences: A church that improperly supports or opposes a candidate may face negative publicity. It may also face loss of state or local tax-exempt status, including property tax exemption, if that exemption is based on federal exemption or applies the same criteria as federal exemption. The IRS is required to inform state authorities of any revocation of tax-exempt status.

Q: Isn't loss of tax-exempt status only "symbolic," and so there is no real penalty for a church that supports or opposes a candidate?

A: Mathew D. Staver, President and General Counsel of Liberty Counsel, has stated that because churches can easily reclaim tax-exempt status, and donations to churches are not taxable as income, "churches do not need to fear the loss of their tax-exempt status" as a result of supporting or opposing candidates. He bases this view on the result of the Branch Ministries case, described above. This position is wrong for several reasons.

Even if a church does not suffer any financial penalty from the loss of tax-exempt status for one or more years because its only income is contributions, a church will still bear the burden of responding to an IRS inquiry and possible audit. More important, an IRS investigation will almost certainly distract church leaders from their other responsibilities and duties, often for several years.

A church may also face financial penalties. The IRS may assess excise taxes on both the church and its leaders. If the church received investment or other non-contribution income during the year for which it is no longer tax-exempt, it may be required to file IRS Form 1120 (corporate income tax return) and pay tax on that income. State or local authorities may also demand taxes for that period as well, including property taxes.

Rev. Jerry Falwell, in the July 21, 2004, edition of his e-newsletter *Falwell Confidential*, cites Mr. Staver's views and states that Branch Ministries only lost its "IRS letter" for one day. This is simply incorrect. The IRS revoked the tax-exempt status of Branch Ministries on January 19, 1995, retroactively to January 1, 1992, and the courts upheld that revocation. The only reason this may not have resulted in tax was if Branch Ministries' sole source of income was contributions.

Rev. Falwell also states that no church has ever really lost its tax-exempt status. This is clearly false. A simple search of IRS announcements for the word "church" reveals that on average about one church a year loses its tax-exempt status.

The greatest penalty, however, may be reputational. If the church becomes, fairly or not, primarily known in the community as the church that violated the law by supporting or opposing particular candidates, its ability to witness to the community may be irrevocably damaged.

Additional Resources

Additional information about the rules for churches and election-related activity include:

IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, available at www.irs.gov/pub/irs-pdf/p1828.pdf

Churches and Politics: A Guide for Religious Leaders, produced by Americans United for Separation of Church and State and available at www.au.org/resources_pastorsguide

Politics and the Pulpit: A Guide to the Internal Revenue Code Restrictions on the Political Activity of Religious Organizations, written by Deirdre Dessingue, Associate General Counsel of the United States Conference of Catholic Bishops, published by The Pew Forum on Religion and Public Life, and available at www.pewtrusts.com/pdf/religion_pew_forum_irs.pdf

Analysis: Churches & Politics: A Primer for Following the Law, written by George R. "Chip" Grange, Stephen H. King and Stephen S. Kao, published by the Baptist Press (the Southern Baptist news service), and available at www.bpnews.net/bpnews.asp?ID=18752

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CURRENT BOOK

Effective Economic Decision-making by Nonprofit Organizations

Edited by Dennis R. Young

**National Center on Nonprofit Enterprise and the Foundation Center. 228 pp.
\$34.95 (paper)**

Reviewed by David Robinson*

Dennis Young, editor of *Effective Economic Decision-making by Nonprofit Organizations*, is founding CEO of the National Center on Nonprofit Enterprise (NCNE). This book is the first publication of the center, which aims to help managers and leaders of nonprofit organizations by "offering current and relevant knowledge on critical economic and business decision-making issues."

The book covers eight areas relating to economic decision-making: pricing, employee compensation, outsourcing, fundraising costs, investment and expenditure, commercial ventures, institutional collaboration, and Internet commerce. Each chapter is based on the work of a task force that deliberated before the NCNE inaugural conference in January 2002. The task force reports, which were revised following the conference discussions, form the basis for the core eight chapters. As well as editing the volume, Dennis Young provides an introduction and a final chapter setting out seven key insights of effective nonprofit economic decision-making drawn from the preceding discussions.

This book is directed at filling a critical space in the nonprofit literature, with its focus on *economic* decision-making within *nonprofit* organizations. The sector has tended to focus on what makes it different from the business or government sectors, rather than confronting areas where decisions are subject to similar influences. However, this publication does also clearly identify the special nature of nonprofit organizations, in particular the importance of their mission, the values that underpin their operation, and their genesis "outside" the usual economic sphere.

Nonetheless, the special nature of community or nonprofit organizations does not remove them from having to deal with economic issues. Setting wages and salaries, collaborating or "making deals" with other organizations through outsourcing, and so on are in reality, whether openly recognized or not, heavily subject to economic influences. It is critically important that managers of nonprofits understand the economic factors that affect these decisions, and that they recognize when the special nature of the community sector is predominant and when generally accepted economic guidelines best apply.

For a community sector manager rather than an economist, the discussion of the difference between efficiency gains and effectiveness gains is especially useful. Combining activities in a similar activity, such as the shared use of an MRI machine by two nonprofit hospitals, can lead to an increase in efficiency. Combining different

and complementary resources can improve existing services or create new services that contribute to greater effectiveness in meeting both organizations' missions. Above all, the nonprofit sector has an emphasis on being effective.

As the above comments indicate, this is a book that would repay being read in a process of "dip, delve, reflect, and act," depending on the issues facing an organization at a particular time. The very density of issues covered makes it difficult to pick out any specific section for comment--they are all important and insightful, with the degree of relevance depending on the situation within an agency. Looking briefly at three of the areas covered--employee compensation, institutional collaboration, and use of Internet technology--gives an indication of the wide range of issues canvassed.

In the recruitment of staff, in many cases, nonprofits must compete in an open market with for-profit businesses and therefore need to understand and promote the difference or advantage the nonprofit offers a potential employee. For some employees, there may be little immediate difference between working for a commercial or a nonprofit organization. Doctors in a private hospital and in a charitable hospice would expect similar work conditions and salary, for example, while a lawyer in a community law center may accept a lower salary than a lawyer in private practice but might expect parity with lawyers in the public (government) sphere. The growing importance of technical skills in the nonprofit world and the use by for-profit organizations of human relations staff means that many workers can move easily between these different forms of organization, in addition to the more traditional movement within each sector.

Nonprofit organizations may not be able to compete with the business sector on financial reimbursement. However, as chapter 3, "Compensation in Nonprofit Organizations," points out, understanding why highly educated professionals are often attracted to work where wages and salaries are on average below salaries paid to similar individuals with similar attributes in other industries may help suggest the kind of compensation structure that can retain and motivate other employees. Non-financial factors such as the mission and values may make working for such an organization more attractive to some employees, and therefore allow a "discounting" of the salary offered.

Beyond this dependence (and even "faith" in some cases) on the mission and values to recruit and retain staff, more complex influences are covered. An example is how to recognize and reward employees for their performance in agencies where even measuring the desired outcome can be difficult. A connected issue is that of the advantages and disadvantages of employing staff directly or outsourcing services (chapter 4).

Chapter 8, "Institutional Collaboration," raises the concept of developing and managing a "partnering portfolio" and recommends that organizations assess the desirability of alliances based on relative benefits and costs. The chapter suggests that collaboration for the sake of collaboration is seldom justified, and goes on to state that "measuring social value and the benefit to society is complicated methodologically and often lacks the degree of precision one would desire." Although useful as a general reminder of the importance of understanding why an alliance or partnership might be of value and when it is useful to move in this direction, I would

have liked to see consideration given to the often unquantifiable but very real outcomes of a consciously collaborative approach "for its own sake."

As Dennis Young states in the final chapter, trust is one of the key underlying values in the non-profit sector. The role of the sector in building this trust, and not just in using it, could have been covered in more detail. Collaborative forms of working, whether through a "cluster" of agencies involved in a similar field of work or more formal alliances and partnerships, are a key element in building trust. This suggests that taking a collaborative approach can be justified as a matter of policy, not just for an instrumental purpose.

In focusing on "economic" decision-making, the book does not cover in detail the informal and unplanned "organic" partnerships that are often the reality and the strength of the sector. Too much focus on planning and achieving defined outcomes can risk losing this essential aspect of the sector. The discussion is based on an assumption of the nonprofit organization as a planned enterprise. In reality, partnerships often grow out of a combination of social and community functions. The role of these connections as a vital element in building social capital is not covered in the text, although reference is made to social capital theorists and practitioners at the end of chapter 8.

While chapter 9 focuses specifically on Internet commerce and fundraising, the whole area of understanding and dealing with changing technology, especially IT, represents a particular challenge to many nonprofit organizations, especially those with a social service focus. In the initial development of the Internet, it was particularly difficult to get community sector agencies engaged with this technology. In general, the environmental movement was more innovative in dealing with these developments. The human social services were extremely suspicious of the concept--agencies that were built and employed staff on the basis of personal contact could be excused for feeling uncomfortable with the concept of "electronic communication" that could potentially exclude face-to-face dealings.

In the long run, technology has caught up with them all. The moral of this is that you ignore technological change at your peril, while the message of this book could be stated as "you ignore economic realities at your peril and the peril of your organization." This is not to suggest that the unique aspects of the nonprofit organization should be rejected in favor of economic determinism. Rather, it is a matter of engaging, understanding, and ensuring that nonprofits retain their core values. Then technology can be turned to the advantage of the organization.

Where is the defining difference in the nonprofit world? One difficulty conceptually is the term "nonprofit" itself. The term begins by defining the sector in relation to what it is *not* and in terms of its economic purpose, even when those funding, working in, and being served by the sector see the organization in terms of what it *is*: what services it carries out, what values underpin these activities, and the underlying values of the organization. In spite of the focus in terminology on "for profit" versus "not for profit," terms that highlight economic differences, it is issues of values and mission that often hold overriding significance. The essential difference between the sectors, in other words, lies in the mission of the organization and the values that underpin it.

In the final chapter, Young draws out these underlying factors. The word "mission" appears in the headings of four of his "seven insights of effective nonprofit economic decision-making." I would underscore this mantra of "mission, mission, mission" with "values, values, values."

In Young's words, "Mission is a primary concern, central to all wise economic choices in nonprofit organizations." The second insight says, however, "As a practical matter, mission-related effects are often difficult to codify and quantify, but they should be made as precise as possible."

This book is directed to ways of dealing with this "tension between mission and market that must be understood and appropriately managed." In particular, the final chapter could well be copied and produced as a pamphlet (copyright permitting) for distribution to all management and administration staff in a nonprofit.

Young cautions that

"danger lies in the mistaken but common notion that becoming an entrepreneurial nonprofit economic enterprise means becoming just like an aggressive, corporate business enterprise. Certainly at this point in the early 21st century, one cannot say that corporate business is serving well as a model for nonprofits to emulate. If anything, the recent accounting scandals serve as cautionary tales of what can happen when institutions entrusted with public confidence betray that faith. *The nonprofit sector is built on trust. Trust lies at the core of why these institutions are granted their special status in public policy.* Accordingly, nonprofits must responsibly demonstrate their trustworthiness by applying sound economic principles to their business decision-making--in the service of achieving their social missions rather than selfish or self-serving ends. This is a constant that transcends whatever changes take place in the environment of nonprofit organizations over time."

(Emphasis added.)

The message I take from this collection of essays is a dual one:

1. Understand the similarities with other forms of business; don't neglect your understanding of basic technical information, skills, and practices throughout the organization.
2. Don't underestimate or neglect the importance of the uniqueness of your agency--especially its values. A key component of the charitable or nonprofit sector is that organizations are based on values. These values are not a secondary factor to profit-making or technological advancement; they are the core of the organization.

A key attribute of the nonprofit sector is that it provides a place for the expression of values. The combination of elements is what is unique about the sector--that is, both elements shared with public sector social and community services (caring for others, development of individual potential, etc) and elements shared more with the private sector (independence, entrepreneurial spirit, etc). Independence, a caring nature, and a reliance on collective action are what set the voluntary sector apart.

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CURRENT BOOK

Framing Democracy: Civil Society and Civic Movements in Eastern Europe

By John K. Glenn III

Stanford University Press. 272 pp.
\$55 (hardcover), \$18.95 (paper)

Reviewed by Gerald M. Easter*

In *Framing Democracy*, John Glenn seeks to explain the variation in regime transitions that have occurred in Eastern Europe. The book "offers a critique and reformulation of existing theories of democratization, as well as earlier understandings of the fall of communism." It claims to make three distinct contributions to scholarly understanding of post-communist politics: first, to move beyond the "Gorbachev-effect" explanations of communism's collapse; second, to identify the mechanisms of mobilization and bargaining that influenced transition paths; and third, to redefine the concept of "civil society" as a framing strategy of movement leaders. The analytical framework of the book is drawn from the comparative literature on social movements. To demonstrate the analytical claims, the book provides a systematic comparison of the processes of communist collapse in Poland and Czechoslovakia.

The book's initial claim to provide a unique perspective on the fall of communism in Eastern Europe seems somewhat exaggerated. Glenn makes a good point in stressing that the promotion of Mikhail Gorbachev to the leadership the Communist Party of the Soviet Union is a necessary but not sufficient explanation for the subsequent events in Eastern Europe. He argues that these regimes did not all of a sudden lose their ability to use force as a result of Gorbachev's arrival. Instead, he rightly insists that scholars should distinguish between the *capacity* to use force and the *willingness* to use force. The key to the old regime collapse, he argues, is the emergence of a "political opportunity structure" that constrained those in power and emboldened their challengers. While the concepts associated with social movement literature offer a nice analytical packaging, this observation really is not distinct from the conventional take on the collapse found among comparative scholars. The fact of the matter is that the Soviet leadership is intricately a part of the political opportunity structure in these countries, and Gorbachev's coming to power cannot be separated from that.

Glenn does a better with the second claim, to identify mechanisms of bargaining and mobilization. Here the reader is sure to be impressed by the real strength of the book--the solid case studies focusing on the strategizing and maneuvering of the opposition movements. The book provides original case studies constructed from an array of primary and secondary sources. The studies get inside the opposition movements in Poland and Czechoslovakia, revealing the rifts that

divided movement leaders over how best to respond to the powers that were. It reminds the reader that these movements for the most part lacked consensus on goals and tactics. It was only the changing political opportunity structures that ultimately dictated the appropriate course of action: in Poland, roundtable bargaining and gradual reform; and in Czechoslovakia, rapid mobilization and sudden collapse. The case studies are particularly good at showing why the Church in Poland and the theater community in Czechoslovakia emerged as influential actors in shaping the strategies of the opposition movements. The book's empirical chapters are generally well-written and tell an interesting story.

The book's final claim is to redefine the concept of civil society as a kind of "framing" strategy to explain better the collapse of communism and the subsequent trajectory of the democratic transitions in Eastern Europe. This is a controversial claim. A number of scholars have attempted to link communism's demise in Eastern Europe to the challenge presented by an emergent civil society, but these efforts have failed to persuade post-communist scholars. If a consensus does exist, it is that groups such as Solidarity and Civic Forum represent "movement society," as opposed to civil society, because they lack institutional foundations and organizational coherence. *Movement society* is a term popularized by Steven Fish over ten years ago in a book on the Russian transition, arguing that the social movements that brought down communism lacked the institutional basis upon which new democratic regimes could be built.

Glenn rejects this institutional dimension and instead argues that civil society is a product of a "framing" discourse. This redefinition is likely to meet resistance from most comparative scholars, who will charge that Glenn is engaging in "concept stretching." Besides, the notion of frames is not applied to great effect here. It is a loose concept applied to such a wide range of events that it softens its analytical punch. Speaking more generally, the concept of "frames" itself, while certainly popular of late in comparative politics, is not without problems, and this work does not escape them. A frame is supposed to be a strategy employed by aspiring political leaders to stir up collective action, *and* an unconsciously embedded cognitive filter in the heads of the targeted masses. But the transition from instrumental leadership tactic to widespread collective belief is not clearly explained. Do frames shape actions, or do actions shape frames? In the end, this work does not come up with a convincing answer.

Despite the limitations of the analytical framework, *Framing Democracy* warrants the attention of comparative scholars. The cases, in particular, bring nuance to the general understanding of the processes of the communist collapse in Eastern Europe.

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CURRENT BOOK

**American Creed:
Philanthropy and the Rise of Civil Society,
1700-1865**

By Kathleen D. McCarthy

University of Chicago Press. 319 pp. \$35

Reviewed by Matthew Crenson*

This interesting book falls some distance short of its title. Its coverage of antebellum civil society is highly selective--no male fraternal organizations, scarcely any immigrant mutual aid societies, and no workingmen's associations. Instead, the author concentrates on philanthropic and reform groups whose members stood outside the coverage of the American Creed: unenfranchised women and African Americans, who sought to advance their causes by petition and protest partly because they had been excluded from the electorate.

Kathleen McCarthy, it is true, places Benjamin Franklin near the origin of civic America. Alone in Philadelphia and distant from his kinsmen in Boston, he created voluntary associations as fictive "families" to sustain his conception of republican virtues. These were manly virtues, says McCarthy, proofs against "luxury, effeminacy, and vice." To be a man was to be self-denying and committed to the common good. Franklin's associational experiments provided a "template for the creation of social capital, the trust that enables individuals to work collaboratively to benefit themselves and the larger society."

But the organizations that populate McCarthy's civil society were mostly engines of contention. Even partisans now concede that social capital does not reliably produce the mutual trust that enables members of a society to collaborate for the common good. "Bonding ties," Robert D. Putnam writes in *Bowling Alone* (2000), create in-group solidarity at the expense of intergroup suspicion and enmity. That is what seems most evident in McCarthy's account of African Americans' struggles against the superficially benign project of the American Colonization Society, which sought to send them into exile. The charitable enterprises of female activists may have been less combative at first, but they prepared the way for female abolitionists and suffragists. What they had in common with the African American associations was a communalism that set them apart from the individualistic society in which they operated.

The organizational heirs of Franklin also benefited from the legacies of Jefferson and Madison. The Virginia Statute for Religious Freedom decisively moved religion into the private sector, where denominations became the armatures for collective enterprises in charity and moral uplift. Jeffersonian egalitarianism helped to legitimate widespread participation in these ventures. But they were no longer so clearly the vehicles for the manly republican virtues that Franklin had championed. Women predominated in Protestant church congregations, and those congregations spawned organizations that expressed female sensibilities about slavery, inequality, and charity. Meanwhile, independent black churches spun off schools, charities, and

abolitionists who challenged the patriarchal authority of slave-owners in the name of republicanism.

The nonprofit sector of the early nineteenth century did not stand apart from business or government. McCarthy traces the development of charities that financed themselves through capitalist enterprise, and others that received government subsidies.

But their outside support weakened with the coming of Jacksonian democracy, which, in McCarthy's telling, was scarcely democratic at all. Its support for slavery, its policy of Indian removal, and the menace that it posed to abolitionists all count among the "raucous and illiberal consequences" of mobilizing the male electorate. Elections and associations were two manifestations of American democracy that seem to have coexisted uneasily, if not in outright hostility, before the Civil War. The experience of the Jacksonian era sharpened the distinction between two different versions of civil society--"one rooted in Southern political imperatives and a growing white male electorate; the other in a sprawling array of highly autonomous charitable, educational, and social reform movements." The Southern edition tried to keep associations under state control and regarded them as sources of political patronage. For a time, male-dominated associations shouldered aside charities run by women.

This is virtually the only point in McCarthy's book at which we get a glimpse of the beneficiaries, inmates, and pupils of philanthropic organizations. They make a brief entrance, mostly to demonstrate the inhumanity and inefficiency of male charity as compared to the female variety. The patriarchal philanthropic institutions of the South receive only passing attention. They differed from their Northern counterparts not in their extent but in their subjection to public control. One would like to know whether the auspices under which Southern charity operated made any substantive difference in their treatment of recipients.

The two cultures of civil society came by fits and starts of violence to the Civil War, when the blue states and the gray states discovered that their competing versions of democracy and freedom could not coexist. Ironically, the hostilities unleashed a wave of female philanthropy in the South that echoed its more substantial Northern counterpart.

One can appreciate the intensive research that went into this book and yet wish that it had been more comprehensive. Its coverage is clearly guided by the convictions of its author. She concentrates on the organizational accomplishments of groups that were traditionally excluded from institutional authority. But the case for the distinctiveness of female and African American philanthropy would be stronger if some of the charities controlled by white males were examined in as much detail as those that stand at the center of this book. The author's claims for this distinctiveness may be true, but they are not demonstrated, and their uncertain status undermines a potentially powerful and provocative account of the two civic cultures of Jacksonian America.

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