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Letter from the Editor

The *International Journal of Not-for-Profit Law,* the grateful recipient of so many intellectual gifts since its founding in 1998, devotes this issue's special section to philanthropy. **Claude Rosenberg** and **Tim Stone** of the NewTithing Group argue that the affluent donate less, proportionally, than the middle class. The authors show how donors can make generous yet affordable gifts by taking into account cost of living, tax incentives, and other factors. Next, economist **Arthur C. Brooks** of Purdue University maps a different divide in American giving: religious conservatives donate far more than secular liberals. His findings, as Brooks told the *Chronicle of Philanthropy,* should represent "a call to action for the left, not a celebration of the right."

Our articles begin with positive developments on three fronts. First, International Center for Not-for-Profit Law President **Douglas Rutzen** analyzes *The Salvation Army v. Russia,* a significant reaffirmation of civil society's importance from the European Court of Human Rights. Second, **TÜSEV**, a network of Turkish foundations and not-for-profit organizations, reports on a bill to reform Turkish foundation law. The bill was passed by the Parliament, vetoed in part by the President, and now awaits final action. Despite the veto, TÜSEV sees the legislation as a noteworthy move toward international standards of freedom of association. Third, **Tessa Brewis and Ricardo Wyngaard** of the Non-Profit Consortium discuss new income tax legislation in South Africa, which significantly benefits not-for-profit organizations.

Providing, perhaps, less ground for celebration, political scientist **B.U. Nwosu** of the University of Nigeria, Nsukka, argues that free, fair, and meaningful elections in Nigeria will require a great deal of effort on the part of civil society. **Martin Beck Matuštík**, a Charta 77 member who now teaches philosophy at Purdue University, ponders the ironies of Czechoslovakia's Velvet Revolution, as well as the prospects that it might be imitated, or even bettered, in Iran. **Alison Kamhi** of Harvard Law School critically examines the Russian NGO law and its conflicts with constitutions, treaties, and laws. **Monsiapile Kajimbwa** of the Danish Association for International Cooperation's MS-Training Centre for Development Cooperation urges NGOs working in the global south to help people achieve sustainable livelihoods through programs that are locally rooted rather than imposed from afar. **Vladislav Valentinov** of the Leibniz Institute of Agricultural Development in Central and Eastern Europe views the not-for-profit sector through the lens of economic theory, stressing the tension between actors' monetary and nonmonetary motivations. Finally, the **United States Department of State** has just issued *Guiding Principles on Non-Governmental Organizations (NGOs).* In crafting the principles, the State Department relied heavily on ICNL and its partners.

We're thankful to those who made this issue possible: *Logos* and the *Stanford Social Innovation Review*, for letting us republish articles; Rebecca See of ICNL, for her masterly web work; and, especially, our authors, for their enlightening articles.

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SPECIAL SECTION: PHILANTHROPY

A New Take on Tithing

Claude Rosenberg and Tim Stone[1]

Too often, individuals make decisions about how much money to donate to charitable causes on an ad hoc basis. As a result, many people give less money than they can actually afford. If the affluent contributed as much to nonprofits as the authors believe they can, charitable giving in the United States would increase by $100 billion a year – enough to solve many of the world's most pressing problems.

Malnutrition, illiteracy, disease – the problems of the world often seem insurmountable. But we see grounds for hope. According to our calculations, individual charitable donations in the United States alone could increase more than $25 billion a year if affluent households donated as high a proportion of their assets to charity as do the middle class and those below. This 17 percent "generosity gap" is our low-end estimate of how much additional money could be donated. If affluent donors gave as much as we think they could afford, based on our conservative donation benchmarks, charitable giving in the U.S. would rise by about $100 billion per year.

To put those numbers in perspective, consider a recent analysis of how much money it would take to solve some of the world's most pressing problems. According to the Borgen Project, annual expenditures of $19 billion between now and 2015 could eliminate global starvation and malnutrition. Another $12 billion per year over that same period could educate every child on earth. And an additional $15 billion each year could provide universal access to clean water and sanitation.[2] In other words, three of the world's most pressing problems could be solved in less than a decade if our nation's affluent stepped up to the plate. And there would still be another $46 billion left over to tackle other causes.

How do we know this? The NewTithing Group, our San Francisco-based philanthropic research organization, has been studying this issue since its founding in

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[1] Philanthropist and retired money manager Claude Rosenberg is founder and chair of the NewTithing Group, and Tim Stone is the organization's executive director. The NewTithing Group, www.newtithing.org, is a non-profit private operating foundation and 501(c)(3) committed to educating the public on how to determine the maximum affordable donation levels.

[2] See the Borgen Project (http://www.borgenproject.org). The Borgen Project estimates that annual expenditures of $40 billion to $60 billion would meet the eight U.N. Millennium Development Goals for eliminating world poverty and would ensure environmental sustainability by 2015.

1998. We have used our knowledge of asset management and financial planning to come up with formulas for determining how much people can comfortably donate given their income, expenses, assets, and future needs. We have also closely examined Internal Revenue Service data on the incomes, assets, and giving levels of various groups of U.S. citizens over the years to understand how much people actually donate. By combining these studies, we are able to project with some certainty the gap between how much people currently donate and how much they could donate.

If hundreds of thousands of Americans possess a huge untapped potential to help secure our collective future, then why do the "haves" not give more to worthy charities? Anecdotal evidence from fundraisers suggests that many donors give in a piecemeal fashion, discovering their total donations only after preparing their tax declarations. Such a haphazard approach may depress major gifts, because without a financial reference point, households often lack the financial perspective to donate sums commensurate to their wealth.

For example, even for the few donors who already budget for charity, the only generally accepted giving formula, tithing, calls for donations equaling up to 10 percent of income. But this guideline ignores the bulk of Americans' wherewithal – investment assets. According to the IRS, in 2003, nearly two million income tax filers with adjusted gross incomes of $200,000 to $500,000 owned average investment assets of $1.2 million, not including their personal homes and retirement pensions. Even with these substantial assets, this group donated an average of just $8,230 per household to charity.

If these affluent households had systematically examined their financial plans and investments, and anticipated the tax savings they would gain from charitable gifts, would they still have concluded that the maximum they could comfortably afford to donate to charity amounted to less than 1 percent of their assets (which is the actual amount of money they did give)? We believe the answer is no. That's why we have developed the approach that we call "new-tithing," along with a sophisticated formula to help people understand how much money they can actually afford to give to charity.

Give Now

One of the principles that underlie our approach is the belief that donating money to charity *now* yields more substantial rewards for donors and society than donating money later. According to "Rosenberg's Rule," a donation now will likely solve more than that same donation later because "societal ills generally increase at an exponentially greater rate than does return on capital." This rule was named after coauthor Claude Rosenberg, founder and chairman of the NewTithing Group and author of the 1994 book, *Wealthy and Wise: How You and America Can Get the Most Out of Your Giving.* Before founding NewTithing, Rosenberg was founder and chairman of RCM Capital Management, an institutional money-management firm that is now a unit of the Allianz Group AG.

We devised Rosenberg's Rule in reaction to Warren Buffett, who, until his dramatic announcement in June 2006 that he would begin distributing his immense wealth, had planned to postpone the bulk of his charitable giving until after his death. Buffett reasoned that by postponing his giving, he could use his wealth to generate superior investment returns, which would benefit society more in the long term.

We disagree. Rosenberg's Rule is buttressed by a McKinsey & Company report that concludes, "The time value of money shows that delaying investments in the social sector exacts an enormous [societal] cost."[3] The McKinsey study confirms our own observation that if ignored, societal ills may cascade through families, potentially disadvantaging siblings, parents, future generations, and the community at large. We can't determine whether Buffet's rate of investment return has exceeded, or ever will exceed, the expansion rate of the world's societal ills. However, we are delighted that he has changed his mind, and hope that his decision to give most of his wealth to charity over the next few years sets an example for affluent households.[4]

How Much People Give

One impediment to new-tithing, and thus to increased giving by affluent households, is the flawed way that many donors, financial advisers, and researchers gauge charitable-giving capacity. The mantra of philanthropic giving and research is to measure gifts relative to income, not assets. This approach incorrectly suggests that the superrich donate more than the middle class and below.

When one measures charitable gifts against investment assets, a different picture emerges. By this measure the upper middle class and the middle rich, whom we call the affluent, donate *half as much* to charity as do the middle class and below.

To better understand the giving patterns of the affluent, and how much money they are capable of giving, we broke this group down by age. Using the latest available IRS data (tax year 2003), we found the following:

- If 189,000 affluent (upper middle class and middle rich) filers age 35 and younger had donated to charity the same proportion of their assets as did their less-affluent peers, they would have donated an additional $2.6 billion, or 19 percent more than they actually gave.[5]
- If 1.1 million affluent filers age 36 to 50 had donated to charity the same proportion of their assets as did their less-affluent peers, they would have donated an additional $12 billion, or 25 percent more than they actually gave.[6]

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[3] Jansen, P.J. & Katz, D.M. "For Nonprofits, Time is Money," The McKinsey Quarterly 2002, no. 1. One of the report's many examples that support Rosenberg's Rule: "When asked to choose between receiving a donation now or in 12 months' time, the managers of nonprofit organizations whom we interviewed indicated that to accept a delay, they would need an implied interest rate as high as 50 percent because they could use those additional resources today to address pressing social needs."

[4] As of June 2006, the value of Warren Buffett's planned charitable gifts to the Bill & Melinda Gates Foundation and foundations run by members of his family total $37 billion, according to Fortune. This equals 85 percent of the wealth of the world's second-wealthiest individual.

[5] Based on the latest available IRS data (tax year 2003), for income tax filers aged 35 and younger, the middle class and below were three times as generous as the upper middle class and the middle rich. The former donated 1.87 percent of asset wealth to charity versus 0.54 percent by their wealthier counterparts.

[6] For income tax filers aged 36 to 50, the middle class and below were twice as generous as the upper middle class and the middle rich. The former donated 1.52 percent of asset wealth to charity versus 0.74 percent by their wealthier counterparts.

- If 876,000 affluent filers age 51 to 64 had donated to charity the same proportion of their assets as did their less-affluent peers, they would have donated an additional $10.5 billion, or 22 percent more than they actually gave.[7]

Added together, the affluent could have donated an additional $25 billion, an increase of 17 percent in the total amount of actual giving in 2003. As big a number as this is, the true "generosity gap" exceeds these estimates because of the following factors:

- The philanthropic capacity of the affluent is *understated* because the findings do not account for charitable deductions, a factor which disproportionately reduces the cost of donations by the affluent.
- The actual generosity of the middle class and below is *understated* because IRS data do not capture non-itemized charitable contributions, which would likely reveal higher donations by these more modest groups.
- Estimates of investment assets are *understated* because they do not count pensions, personal homes, farm real estate, and over $300 billion in (illegally) undeclared income, generated from hundreds of billions of dollars in unidentified assets.[8]

Why People Don't Give More

If charitable giving can not only help the underprivileged, but also safeguard humanity, why do the affluent donate a lower proportion of their considerable asset wealth to charity than do their middle-class peers? There are a number of factors that cause donors to think illogically and give less than they can comfortably afford, all stemming from their lack of a systematic method for determining how much to donate.

The myopia of eyeballing. When donors eyeball, they probably lowball. Many donors react to charitable solicitations in a piecemeal manner. If donors eyeball how much they give without actually knowing how much they can afford to give, they may feel the need to lowball the amount to protect themselves. This approach can cause donors to err on the side of caution, significantly underestimating their giving power. Failing to decide on an annual giving level at the beginning of each year may further depress donations because making several decisions over time may make the same total donation "feel" more costly.

The failure to anticipate tax savings. Many donors evaluate the face value of a contemplated gift without anticipating the charitable tax deduction that lowers its out-of-pocket cost. For example, if a person with an adjusted gross income of $120,000 donates $1,000 to a nonprofit, it actually costs about $700, not $1,000. That's because the $1,000 donation generates about $300 in tax savings. Tax savings can be even greater when

[7] For income tax filers aged 51 to 64, the middle class and below were nearly twice as generous as the upper middle class and the middle rich. The former donated 1.22 percent of asset wealth to charity versus 0.72 percent by their wealthier counterparts.

[8] The IRS estimates the annual "tax gap" at $312 billion to $353 billion in undeclared income.

people donate a long-term appreciated asset instead of cash, allowing them to avoid capital gains taxes.

The herd mentality. Most people want to give at or below the perceived average level of giving, which appears reasonable by virtue of consensus, even if the logic behind it is faulty. "What's the average major gift?" a donor might ask a development officer. Since the majority of donors tend to have less money than the affluent, the less-affluent multitudes tend to depress the average giving level, even of major gifts. This in turn can discourage those with more wealth from giving at a higher level commensurate to their financial wherewithal.

The problem with old tithing. When people tithe, they typically base the amount they give on their income alone, not on their income and investment assets. If the bulk of a donor's wealth resides in investments, tithing even 10 percent of their income may fall short of their actual giving capacity. It's important to note that although we ask people to factor income and investments into their charitable choices, new-tithing is often more conservative than old tithing for those with moderate incomes, because it takes into account their living expenses and need to save for future costs such as tuition, healthcare, and retirement.

The deceit of inflation. Many donors give away a fixed amount of money each year, without adjusting upward for inflation. The effect of doing this is that the amount of their giving actually declines every year. What many donors forget is that given long-term rates of return, the value of their investment assets are probably rising well ahead of inflation.

The more money syndrome. The drive to amass ever more wealth can become an irrational reflex that detracts from charitable-giving decisions. Some donors may have trouble adjusting their giving upward even when their wealth is rising. The desire for more money comes from many sources. Not only do many Americans want to "keep up with the Joneses," virtually the entire financial industry is paid to grow its clients' wealth according to risk/reward ratios. Few financial advisers, including those at the most sophisticated levels, suggest to a client the personal and societal advantages of *reducing* their net worth, even if the client has more than enough money to live on, retire on, and pass on to heirs.

The fear of death. The thought of parting with money may trigger in some people an association with death, which may cause some donors to avoid spending down assets for any purpose, including charity. Social workers note that some elderly adults choose to reduce their lifestyle rather than spend down their assets and acknowledge the proximity of death. Since most people can't time their own demise, few people can predict their lifetime living expenses. However, donors reluctant to draw on assets to donate to charity – even when their assets dwarf all conceivable lifetime living expenses and financial plans – may want to reexamine their giving strategy.

The desire to leave enough to heirs. Some donors say that they can't give as much to charity as they would like because they want to leave their heirs as much as possible. Yet leaving large amounts of money can sometimes impede their heirs' personal drive, self-esteem, and career. It often makes more sense to leave one's heirs a generous yet moderate amount of money. Warren Buffett devised an instructive rule of thumb in

the mid-1980s, observing that "a very rich person should leave his kids enough to do anything but not enough to do nothing."[9]

Determining How Much to Give

To help donors more wisely decide their giving levels, NewTithing Group has developed the PrudentPal Charitable Giving Planner, an online tool available at http://www.newtithing.org. This tool encourages users to explore their emotional reaction to various high-, medium-, and low-donation levels. By monitoring their gut reactions to donation levels and financial scenarios, users can employ a "Goldilocks method" to find just the right giving level.

PrudentPal's scenarios are based on donors' investment assets, charitable deductions, and living expenses, as well as on conservative long-term rates of return. Accounting for these factors, our giving benchmarks aim to preserve donors' assets ahead of inflation after charitable gifts. According to these benchmarks, average households earning over $200,000 in adjusted gross income can comfortably afford to more than double, or even quadruple, their annual donations.

One Couple's Giving Plans

To demonstrate how the new-tithing approach actually works, consider a fictional couple – Susan and John Goodhue of Wilmette, Ill., an affluent suburb north of Chicago. The Goodhues have a combined salary of $230,000, $500,000 in investment assets, and a $450,000 pension, to which they annually contribute 8 percent of their salary. They have annual living expenses of $168,000, including $24,552 that they save toward college tuition for their two children, and another $18,400 that they deposit into their retirement pension. Their employer adds 5 percent of income.

Only when filing their tax return do the Goodhues discover that they donated a total of $4,500 to charity – $2,500 in religious dues and Sunday school fees; $1,000 to the public school attended by their two children, ages 9 and 12; and $500 each to their college alma maters. But something doesn't feel right. They'd like to do more for their local community and for the world their descendants will inherit. They also want to serve as stronger civic role models for their children. John wants to give to a local nonprofit organization that helps underprivileged adults go to college. Susan wants to support an organization that helps convert farmland to corn for the production of cleaner-burning alternative fuels. What's the maximum they can comfortably afford to give without sacrificing their lifestyle and financial plan?

To try on various donations for size, the two log on to http://www.newtithing.org and click "PrudentPal." After entering their assets and salary, they first check the suggested giving level, which comes to $4,800 – about $300 more than what they donated the previous year. Given conservative long-term rates of return,[10] PrudentPal

[9] Warren Buffett, quoted in "Should You Leave It All to the Children?" *Fortune* (Sept. 29, 1968).

[10] Users can alter PrudentPal's returns, which are initially defaulted at 9.29 percent total return for common stocks, 5 percent interest income for taxable bonds, 4.9 percent interest income for tax-exempt bonds, and a total return of 17.3 percent for other private investments (investment real estate, stakes in private businesses, professional partnerships, collectibles, etc.).

estimates that after living expenses and charitable donations, the couple's year-end investment assets (not counting their home, possessions, or pension) will total $529,000.

The couple then run a quick approximation to see what would happen if they donated half as much to charity as they did the previous year, or $2,250. This scenario would force them to skip contributions to either their children's public school and their colleges maters, or to their religious congregation. This donation level seems too small.

They run a second scenario, this time doubling their previous year's contributions to $9,000. This would allow them to continue their gifts of the previous year, and to donate an additional $2,250 each to help at-risk youth go to college and help farms develop better fuels. According to PrudentPal, the couple's increased donations of $4,500 would cost them only $2,800 after accounting for tax deductions.

A third option offers to show how tax savings would allow them to donate *more* than their contemplated $9,000. Clicking this option reveals that for $9,000 in out-of-pocket costs, they can make $14,500 worth of donations. In other words, $14,500 in donations minus $5,500 in tax savings produces a net out-of-pocket cost of $9,000.

They decide that the last scenario feels just right. The resulting $14,500 worth of gifts (a $10,000 increase in gifts over the previous year) will allow the couple not only to continue their previous donations, but also to add $3,500 to help the at-risk kids' college program, $3,500 to the renewable-energy initiative, $1,000 to a teacher-training program at their children's school, and an additional $1,000 to each of their college alma maters.

Not only are the Goodhues able to give more money to causes that they believe in, they are also able to do so without agonizing over these decisions on a piecemeal basis throughout the year. They don't experience any gnawing doubt about how much to give, or any uncertainty about saying "no" when confronted with other solicitations. Instead, they can watch the progress of their gifts, show their children the programs that they support, and feel positive about their contributions.

Transforming the World

New-tithing helps transform philanthropy from a reactive obligation to a proactive passion, one that helps ensure freedom and security for everyone, everywhere, for generations to come. It will also help create substantial amounts of new money for nonprofits of all types. Much of that money will end up going where charitable donations from the affluent often go – to religious organizations, universities, and prestigious arts organizations. But some of that new money will also go toward solving critical social problems such as poverty, malnutrition, and illiteracy.

Can we really afford not to address these pressing issues? If the haves don't step in to help the have-nots, ownership of capital may become increasingly tenuous. In many developing countries, the gap between rich and poor has caused a draconian taxation on wealth, expropriation of private industry, or a threat of crime so great that owners of capital live with armed guards. Gated communities in America already suggest that wealth disparities can affect personal freedom even in our stable capitalist democracy. And given the state of the world, the security of our capital is the least of our problems. In the past, we smiled tolerantly at those who hoped to "save the world." Now, many more people need to share that goal.

SPECIAL SECTION: PHILANTHROPY

The Great Divide in American Giving

Arthur C. Brooks[1]

'Tis the season to give. Our mailboxes are filling with appeals from fine organizations and worthy causes, competing for our holiday spirit and tax-deductible dollars. Millions of Americans will answer the call, donating in December as much as a third of the quarter-trillion dollars we give away each year. Per capita, Americans give more in this single month than most nations give all year long.

Before congratulating ourselves too heartily, however, we should note that charity is not a virtue shared by all. While 85 million American households give away money each year to nonprofit organizations, another 30 million do not. And this distinction goes beyond "formal" giving. Recent survey data reveal that people who fail to donate money to charities are only a third as likely as donors to give money to friends and strangers. Non-donors are half as likely as donors to give blood. They even are less honest: non-donors are much less likely than donors to return change mistakenly given to them by a cashier. When it comes to charity, we are two nations.

Why does Giving America behave so differently from Non-Giving America? The answer, contrary to what you might be thinking, is not income; America's working poor give away at least as large a percentage of their incomes as the rich, and a lot more than the middle class. The charity gap is driven not by economics but by values.

Nowhere is the divide in values more on display than in religion, the frontline in our so-called "culture war." And the relationship between religion and charity is nothing short of extraordinary. The Social Capital Community Benchmark Survey indicates that Americans who weekly attend a house of worship are 25 percentage points more likely to give than people who go to church rarely or never. Religious folks also give nearly four times more dollars per year than secularists, on average, and volunteer more than twice as frequently.

It is not the case that these enormous differences are due simply to religious people giving to their churches. Religious people are more charitable with all sorts of nonreligious causes as well. They are 10 percentage points likelier than secularists to give money to explicitly nonreligious charities like the United Way, and 25 points more likely to volunteer for secular groups such as the PTA. Churchgoers were far likelier in 2001 to give to 9/11-related causes. On average, people of faith give more than 50 percent more money each year to non-church social welfare organizations than secularists do.

A second core value affecting charity shows up in the belief citizens have about the government's role in their lives. Some Americans (about a third) believe the government should do more to reduce income differences between the rich and poor –

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[1] Arthur C. Brooks, a professor at Syracuse University's Maxwell School of Public Affairs, is the author of *Who Really Cares: The Surprising Truth About Compassionate Conservatism* (Basic Books).

largely through higher taxation and social spending. Others (about 40 percent) do not favor greater forced income redistribution. This is a major difference in worldview – not just about taxation, but also about the perceived duty of individuals to take responsibility for themselves and others. This difference affects people's likelihood of giving to charity. The General Social Survey shows that people who oppose government income redistribution donate four times as much money each year as do redistribution supporters.

Note that the charity gap is not due to anything the government is actually doing; rather, to what people think the government should be doing – in other words, nothing more than a political opinion. This fact throws a wrench into the traditional stereotype that conservatives in America are hardhearted while liberals are the compassionate ones. In the words of one common 2004 campaign yard sign in my town, "Bush Must Go! Human need, not corporate greed." However, the General Social Survey indicates that people who opine that government is "spending too little money on welfare" – not a viewpoint typically associated with George W. Bush's supposedly venal supporters – are less likely to give food or money to a homeless person than people who oppose greater welfare spending. Regardless of which view on welfare is superior, ask yourself this: who will personally do more for a poor person today?

A third key value affecting charity is reflected in family life. Couples, even when they earn the same amount as single people, are more likely to give to charity, and the simple act of raising children appears to stimulate giving as well – children help us fill the collection plate even as they drain our wallets. Further, family life is the ideal transmission mechanism for charitable values: data show that people who see their parents behave charitably are far likelier to be charitable themselves as adults.

As you probably noticed, the values predicting private charity in America tend to smile on the political right. Conservatives are twice as likely as liberals to attend a house of worship regularly; conservatives are one third as likely as liberals to say the government should "do more" to reduce income inequality; conservatives also have about 40 percent more children than liberals. Furthermore, there is a fringe on today's political left that goes beyond simple neglect of charity, and openly condemns it, claiming that it lets governments off the hook from having to pay for services. So while there may be nothing inherently charitable about political conservatism, today's conservatives do outperform liberals on most measures of private giving.

What does this mean in the wake of the Democratic takeover of Congress? Will the new Democratic majority look for ways to protect and expand private giving? Or will the majority allow cultural forces to manifest themselves in policies uncongenial to private giving – such as punitive regulation of private foundations, expanded public subsidies to nonprofits that squeeze out charity, and various schemes that lower disposable income among major givers?

But an even greater moral test is personal, not political. Left or right, secular or religious, single or married, the cultural forces of giving and non-giving are not destiny for any of us. Private charity is a choice: a choice to express our values in a private and singularly humane way. This is worth remembering as we hold requests for charitable support in our hands this month – and make the right choice.

ARTICLE

Salvation in Court: *The Salvation Army v. Russia*

Douglas Rutzen[1]

On October 5, 2006, the European Court of Human Rights issued an important judgment in the *Case of the Moscow Branch of the Salvation Army v. Russia*.[2] In this case, the Court reaffirmed the important role of civil society and specifically addressed the re-registration of foreign organizations in Russia. We recently obtained this judgment and have already received a number of requests to provide a summary. Accordingly, we have prepared this case note. Further analysis will be posted at www.icnl.org.

We begin with a brief factual overview. The Salvation Army worked in Russia from 1913 to 1923 before it was dissolved for being an "anti-Soviet organisation." *Salvation Army* at para. 8. In 1992, the Salvation Army resumed its activities, registering as the Moscow branch of the Salvation Army and obtaining legal entity status. Id. at 9-10.

In October 1997, a new Law on Freedom of Conscience and Religious Associations ("the Religions Act") entered into force. It required religious organizations that had previously obtained legal entity status in Russia to bring their articles of association into conformity with the Religions Act and to re-register.

The Moscow branch of the Salvation Army applied for re-registration but was unsuccessful. Several reasons were advanced, including the involvement of five nationals who had multiple entry visas but who lacked residence permits. Id. at 12-18.

On December 31, 2000, the time limit for re-registration expired. Organizations that failed to re-register were liable for dissolution. Id. at 19.

In September 2001, the Salvation Army lodged a complaint before the Constitutional Court, arguing, *inter alia*, that it was unconstitutional to dissolve an organization for failing to re-register. Id. at 23. According to the European Court, the Russian Constitutional Court:

> held that re-registration of a religious organisation could not be made conditional on the fulfillment of requirements that were introduced by the Religions Act and had not legally existed at the time of the founding of the organisation.

Id. at 24.

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[1] Douglas Rutzen is President of the International Center for Not-for-Profit Law.

[2] This case is available on the website of the European Court of Human Rights: http://www.echr.coe.int/echr

The Russian Constitutional Court also held that dissolution could occur only if the organization ceased its activity or had engaged in unlawful activities; dissolution should not be based on "formal grounds" such as the failure to re-register. Id.

In response to the Constitutional Court case, the dissolution order was dismissed, but the organization was still refused re-registration. The European Court noted that the refusal to re-register had a significant impact on the organization. According to the Court, "the lack of re-registration made it impossible for twenty-five foreign employees and seven non-Moscow Russian employees to obtain residence registration in Moscow, the refusal resulted in negative publicity that undermined fundraising efforts, and the organization was unable to deliver hot meals to house-bound elderly because a local official refused to work with the branch since it had no official registration." Id. at 31-33.

After reviewing these facts, the Court then examined "general principles." It reiterated the legal baseline, namely that the right to form an association is an "inherent part" of the freedom of association under Article 11 of the European Convention. Id. at 59. The Court also recognized that associations are important for the "proper functioning of democracy." Id. at 61.

The Court then reaffirmed the right to form an association as a legal entity:

> [T]he ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the freedom of association, without which that right would be deprived of any meaning. The Court has consistently held the view that a refusal by domestic authorities to grant legal-entity status to an association of individuals amounts to an interference with the applicants' exercise of their right to freedom of association.

Id. at 71.

Reviewing the facts, the Court found that Russia had indeed interfered with the freedom of association through the re-registration process. Id. at 74. The Court then addressed arguments presented by Russian authorities to justify this interference.[3] Among other issues, Russia argued that the interference was justified based on the "foreign origin of the applicant branch."

The Court was clear on this point, finding that there is "no reasonable and objective justification for a difference in treatment of Russian and foreign nationals from being founders of Russian religious organisations." Id. at 82. The Court concluded: "It follows that the arguments pertaining to the applicant's alleged 'foreign origin' were

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[3] The Court also stated general principles concerning restrictions on the freedom of association:

> The State's power to protect its institutions and citizens from associations that might jeopardize them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom.

Id. at 62. Article 11 of the European Convention states that restrictions on freedom of association are permissible only if they are "necessary in a democratic society"; the Court observed that "the notion 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable.'" *Salvation Army* at 62.

neither 'relevant and sufficient' for refusing its registration, nor 'prescribed by law.'" Id. at 86.

This case is important for a number of reasons. The European Court of Human Rights reaffirmed the essential role that civil society plays in a democratic society. The Court reiterated the "inherent" right to form an association as a legal entity and stated that the limitations on this right should be "strictly construed." Finally, the Court found that the freedom of association extends to organizations with a "foreign origin," as ICNL and human rights groups have argued in the past, and is not limited to entities formed by "domestic persons."

ARTICLE

Turkish Grand National Assembly Approves New Law on Foundations

TÜSEV[1]

The wave of democratic reforms in Turkey continues with Turkish Parliament approval of the new Law on Foundations on November 9, 2006. Since its establishment in 1993 to promote the legal, fiscal, and operational strength of the sector, TÜSEV has been working to encourage reform of the foundations law (as it affects new foundations). In 2004, TÜSEV, in partnership with the International Center for Not-for-Profit Law (ICNL), prepared a series of comparative reports (see www.tusev.org.tr and www.icnl.org), which proposed a number of reforms and best practices for revising the foundations, associations, and public benefit laws in Turkey. These reports, in conjunction with continued research and advocacy, were incorporated into the new law passed in early November.

The new law creates a single set of rules for the different types of foundations spanning the Ottoman and Republican Eras. The new provisions will affect "old" foundations (foundations established during the Ottoman Era), minority foundations (foundations established by non-Muslim communities during the Ottoman Era), and "new" foundations (mainly cash foundations, established according to Civil Code provisions after the founding of the Turkish Republic in 1923).

Following parliamentary approval, the President vetoed nine provisions and returned the draft to Parliament for further action. The vetoed articles affect both minority foundations and new foundations. If accepted by the Parliament, the vetoed provisions would require new foundations to list in their bylaws economic enterprises, international relationships, and other specific areas of activity in order to be permissible, whereas the original draft made new foundations permissible by default. To comply, some foundations would have to change their bylaws, which requires court approval. A final resolution is likely in early 2007, which will mark the beginning of the third year since the original draft was submitted for discussion. Upon the law's approval, TÜSEV hopes to continue its cooperation with the Foundations Directorate in preparing the new regulations, which must be published within six months of the law's ratification.

Although the veto process creates setbacks, the new law is by and large compatible with international standards of freedom of association and represents significant improvement in Turkey's environment for civil society and philanthropy. Some of the changes include the following:

- Moving from prior approval toward prior notification

[1] TÜSEV (the Turkish acronym for Third Sector Foundation of Turkey) is a network organization for the nonprofit sector, formed in 1993 by Turkey's leading foundations. TUSEV now comprises more than a hundred Turkish foundations and nonprofit organizations.

- Increasing the rights of the executive board in operational and economic decisions of the foundation
- Expanding tax benefits of certain forms of donations to foundations
- Easing the ability of foundations to cooperate with foreign counterparts, and allowing foreigners to establish foundations and to be board members of Turkish foundations

Though the notable shift from prior approval toward prior notification is a positive change, it is critically important that the regulations and the General Directorate of Foundations (GDF, hereafter referred to as "regulatory authorities") minimize procedures and costs, which can otherwise burden foundations as well as government authorities with needless paperwork.

Increasing the governance and oversight standards for the executive board and expanding this responsibility to staff members will enhance the transparency and accountability of foundations. However, foundations should continue to develop ethical and operational self-regulatory codes to ensure the highest possible standards in foundation management. A good example of these codes can be found through the European Foundation Center (www.efc.be).

Expanding tax benefits of certain types of donations to all foundations, and not solely those with public benefit status, also indicates a more favorable direction in government policy toward philanthropy. However, additional reform in this area is needed, specifically the following: (a) increasing individual and corporate deduction levels for cash and in-kind donations, as well as broadening certain tax exemptions; and (b) improving the procedures and systems for associations and foundations to obtain and retain public benefit status from the Council of Ministers, which allows for additional tax benefits.

Finally, one central point of discussion during the course of this legislation has been the Turkish government's policy toward enabling cooperation with foreign foundations. One critical provision in the Civil Code still requires prior authorization (permission) for cooperation between Turkish and foreign associations and foundations. However, the regulations for accepting grants from foreign sources have been changed from authorization to notification. This provision continues to be of concern and prevents both the associations and foundations laws from fully complying with international standards. In particular, the provisions below marked with asterisks remain at odds with international standards.

Some of the provisions of Law on Foundations ***affecting new foundations*** are as follows:

Establishment

As per best practice, registration of foundations will continue to be overseen by the courts. However, minimum endowment amounts for newly established foundations will now be determined on a case-by-case basis, depending on the scope of the foundation's objectives.

Foundations may undertake international relations and open branches or representative offices abroad without restraint, so long as (a) these activities are included in the bylaws, and (b) prior notification is provided – prior authorization is no longer necessary.

Board Membership

The former law did not allow foreigners to create foundations in Turkey. The new law permits this, but requires a majority of the executive board of directors to physically reside in Turkey.

Members of the board may be removed from their position only by court order based on evidence of criminal acts.

Members of the executive board as well as the staff of the foundation can be held personally responsible for negligence.

Foreign Foundations and Grants

* The principle of reciprocity replaces the previous ban on foreigners establishing foundations in Turkey. In the new law, foreigners (persons who are not citizens of Turkey) can establish foundations in Turkey as long as the law in their home country allows Turkish citizens to establish foundations.

* Foundations may receive grants from foreign funders with prior notification; permission is no longer necessary.

* Foundations are still required to obtain authorization from regulatory authorities before cooperating with foreign foundations (the same provision exists for associations).

Property and Assets

In the former law, foundations needed approval from regulatory authorities before acquiring or selling assets. In the new law, foundations may acquire or dispose of property based on the guidance of an independent expert's report (to ensure fair market value) and a decision from the executive board. For endowment assets put forth at the time of establishment, foundations no longer need regulatory agency approval; they can proceed directly to the courts.

In the previous law, foundations needed prior approval of regulatory authorities in order to become partners of economic enterprises. In the new law, foundations will be able to do so merely with prior notification.

Taxation

In the new law, finally, donations to all foundation – with or without public benefit status – will be exempt from inheritance and estate taxes. Previously, only foundations with public benefit status had this benefit.

ARTICLE

Non-Profit Organizations in South Africa: Reaping the Benefits of the Income Tax Campaign

Tessa Brewis and Ricardo Wyngaard[1]

In November 2006 an Amendment Bill was passed by Parliament in South Africa that will significantly improve the tax system for non-profit organizations.[2] The amendments are viewed as yet another victory for the non-profit sector, as well as an affirmation of the importance of the ongoing Tax Campaign.

The Tax Campaign, which began in the early 1990s, yielded its first major results in 2001 with a complete overhaul of the system of taxation for non-profits and the introduction of the concept of public benefit organizations (PBOs) into the tax legislation. Since then, the Non-Profit Consortium, with the support of key partners such as the Legal Resources Centre, the South African Council of Churches, the Charities Aid Foundation Southern Africa, and more recently the International Center for Not-for-Profit Law, has continued to campaign for the further refinement and improved implementation of the law.

The budget tax proposals announced by the Minister of Finance in February 2006 signified a triumph for persistent advocacy, in that they addressed many of the issues raised by NPC in its submissions and meetings with revenue officials. The budget tax proposals placed the following items on the agenda for the year: the lists of tax-exempt public benefit activities would be refined and extended; the rules for permissible investments for PBOs would be relaxed; the statutory tax rates for the taxable trading activities of all PBOs irrespective of their legal form would be aligned; the dual registration process would be streamlined; and tax benefits would be extended to foreign PBOs operating in South Africa.

The draft version of the bill, published in September 2006, reflected the items identified by the Minister of Finance and concerns raised by the NPC. Although the majority of proposals in the draft bill benefited the non-profit sector, a number of shortcomings were identified. For example, the new aligned tax rates would have meant a 5% increase for most organizations,[3] and complicated rules were proposed to prevent PBOs from undertaking foreign investments. The Non-Profit Consortium responded by making a joint submission, together with the Legal Resources Centre and Douglas and Velcich, to the Finance Portfolio Committee, and also arranging an

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[1] Tessa Brewis and Ricardo Wyngaard are affiliated with The Non-Profit Consortium.

[2] The Revenue Laws Amendment Bill (33 of 2006) was released on November 3, 2006. For a discussion of earlier developments in law concerning non-profit organizations, see Karen Nelson, "The Taxation of NPOs in South Africa: Rapid Change After a Decade of Lobbying," *International Journal of Not-for-Profit Law*, vol. 3, no. 1, http://www.icnl.org/JOURNAL/vol3iss1/ar_nelson1.htm.

[3] PBOs exceeding the trading limitations contained in the Income Tax Act must pay tax on the income generated from such excessive trading.

urgent meeting between civil society stakeholders and revenue officials. The final version of the amendments include the majority of NPC's recommendations.

The final changes to the legislation, which will come into operation in early 2007, include the following major advances:

- Organizations will no longer be required to register as Non-profit Organisations under the Non-profit Organisations Act of 1997, as a prerequisite to registering as PBOs. This will simplify the regulatory burden for many organizations.
- The statutory tax rates for taxable trading activities of all PBOs, irrespective of legal form, will be 29%.
- PBOs can invest without restrictions.
- Tax exemption will be granted to foreign legal entities operating in South Africa, on condition that they qualify for tax exemption in the country in which they are established.

The ongoing interaction between civil society stakeholders and revenue officials has yielded many positive outcomes. Over the years, the relationship has developed into one of mutual assistance and respect, resulting in consistent improvements to the tax system for non-profits. Already on the agenda for 2007 is relief for small organizations, a possible tax amnesty for NPOs, and an increase in tax benefits for donors.

ARTICLE

Civil Society and Electoral Mandate Protection in Southeastern Nigeria

B. U. Nwosu[1]

The lack of accountability on the part of elected officeholders in Nigeria is easily discountenanced by the incumbents. Their brazen alibi is that people's votes did not bring them into office, so accountability to voters is irrelevant. Indeed, candidates who receive the most votes can be denied victory. Some literature traces this problem to the learning status of Nigerian democracy, which should mature with time. Yet a stronger current links the trend to the postcolonial character of the Nigerian state, which predisposes it to intervene in the economy. Ruling groups use state power to strengthen their weak material base. As a result, seeking access to state power becomes a contest without rules. The same overbearing postcolonial state renders civil society weak and unable to counter certain tendencies of the state.

The above explanations simply rationalize the docility of Nigerian civil society. Elections in the Southeastern part of Nigeria in 2003 and the lackluster role of civil society in them offer little basis to expect either the maturing of Nigerian democracy or a democratic transformation of the postcolonial state.

This article contends, by contrast, that civil society itself could create an environment conducive to true democracy, if it became a social force and participated in the electoral process to protect the popular mandate. The solution lies in stimulating civil society to rise beyond episodic activities and become a continuing force.

Introduction

One way to simplify the understanding of civil society is to view it as those interactions above the individual and the family but beneath the state. By implication, then, we speak of civil society in the context of other variables, namely the family and the state. The space between the family and the state is the sphere of the civil society.

The character of interaction between the state and civil society defines the nature of the society. A state that overwhelms civil society is likely to be absolutist and repressive, whereas a civil society that overwhelms the state may tend toward creating anarchy. Striking a balance between the two categories becomes necessary.

Many aspects of the state in Nigeria are inconsistent with a liberal democratic form. The ruling class engages in corruption to strengthen its weak economic base. Public power offers the opportunity to steal state revenues. Consequently, the contest

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for state power becomes a desperate affair (see Ibeanu, 2005). Elections are massively rigged, and popular electoral mandate is absent. The state's regulating framework is weak, with only limited capacity to protect people's electoral mandate. Consequently, civil society, in terms of influencing politics and governance, is subordinated to the state.

Hegelian and Marxian theories envision different relationships between the state and civil society. Because electoral mandate impinges on the state, it is important to explore civil society's permissible role at the level of epistemology. This is particularly so because of the importance of elections to democracy. Civil society is significantly affected by the government, whether it is a democratic and responsive one or a repressive and unaccountable one, so it is appropriate to examine civil society's role in protecting the mandate of candidates favored by the public.

This article argues that the civil society in Southeastern Nigeria has limited engagement with the state, and that its weak role in protecting electoral mandates results from the character of the postcolonial state.

Civil Society, State, and Electoral Mandate Protection

A plethora of conceptions of civil society exist, most of which find shade under either Hegelian or Marxian notions. John Hall (cited in Kukah 1999:43) defines civil society as "an opposite of despotism, a space in which social groups could exist and move something which exemplified and would ensure softer and more tolerable conditions of existence." Hall stresses civil society in terms of freedom from tyranny. But the conception could have been stronger if it placed civil society in the context of the relationship between society and public power. Once we speak in terms of public power or the state, we have a framework for the activities of civil society within which Hall could more appropriately speak of "more tolerable conditions of existence."

Agnelli (in Helmich and Lemmers, 1998:12) designates civil society as "the meeting of autonomous subjects of the state and its institutions, united not only by values and cultures but also by the desire to act conjointly and to assume specific responsibilities in projects of general interest." For Agnelli, civil society is made up of all voluntary associations, local community organizations, and cultural and research institutions, in addition to representative bodies of private enterprise and business sectors. This conception by implication gives civil society space to assume a wide range of roles, including engaging the state on issues of democracy and elections. Uniting out of desire to "act conjointly … in projects of general interest" is wide enough to accommodate electoral mandate protection.

Civil society, according to Larry Diamond (cited in Kukah 1999:44), is

> the realm of organised social life that is voluntary, self-generating, self supporting, autonomous from the state and bound by legal order or set of shared rules.... It involves [people] acting collectively in a public sphere to express their interests, passions and ideas, exchange ideas, exchange information, achieve mutual goals, make demands on the state and hold state officials accountable. It is an intermediary entity standing between the private sphere and the state.

Diamond's conception is comprehensive in terms of civil society's social location as well as its frame of activities. He enriches his conception further by characterizing an organized civil society as follows (see Kukah 1999:45):

1. a check against excesses of government;
2. an accelerator of participation and skills of various segment of society;
3. an alternative to political parties;
4. a promoter of bargaining power of interest groups;
5. a mitigator of fundamentalist extremists and maximalists and provider of alternatives for negotiation on a multifaceted society; and
6. a field of leadership recruitment.

Although the above characterization covers *organized* civil society, in the sense of entities that may qualify as nongovernmental organizations (NGOs) (see Racelis, 2000), it nevertheless captures relations within the sphere between the family and the state. Diamond's notion clarifies roles that can engender democratic transformation. This proceeds from the dynamic characteristics he correctly assigns to civil society.

Our conceptual point of departure could be enriched by blending the Diamond thesis with the functions that Thijn and Bernard (1998) identify with civil society:

- mediator;
- countervailing power, increasing the accountability of the state;
- vehicle for participation by citizens;
- promoter of social cohesion;
- contributor to a sense of community;
- creator of learning and socialization;
- stimulator of plurality; and
- creator of social capacity.

Taken together, these ideas suggest that an optimal civil society exerts force throughout the political conjuncture.

To be sure, civil society does not compete with the state. Rather, it opposes excesses of the state – a veritable platform for demanding accountability. This, of course, means that a state's undemocratic tendencies can be questioned by a civil society whose constituents are also subjects of the state. It follows that civil society can confer a mandate on managers of the state and guard that mandate.

This argument touches on the epistemological issues associated with Hegelian and Marxian notions of civil society and state. Put briefly, for Hegel, the state is superior to the civil society, while Marx sees the opposite.

In Hegelian theory, family and civil society are merely dialectic steps to a higher synthesis, the state, which is greater than its components (see Stumpf, 1977). Hegel contends that the relationship between the state and civil society is mutual, yet the state is superior and its authority absolute. In fact, the state creates civil society for its own ends, and civil society needs the state for intelligent supervision and moral significance (Sabine and Thorson, 1973). Hegel's grant of superiority to the state

derives from the origin and character he assigns it. He holds that "the state is divine will … which unfolds itself into actual configuration … and into the organisation of a world" (Friedrich, 1954:282). Given the theosophic nature of Hegelian theory of the state, civil society exists at the pleasure of the state and cannot challenge the state. Under this theory, an absolute and undemocratic state denies civil society the latitude of relevance; electoral issues, including mandate protection, are closed off.

The Hegelian state is inadequate for understanding contemporary civil society. Indeed, modern conceptions and theories of relations between civil society and the state largely diverge from Hegel's (see Bayart, 1986; Lehning, 1998; Hadenius and Uggla, 1998; Breed, 1998).

Here as elsewhere, Marx stands Hegel on his head. Marx holds that "civil or bourgeois society is the basis of the state" (Tucker, 1978:16). Put differently, the character of the state reflects the character of the civil society. Insofar as civil society serves as the foundation of the state, civil society can establish the patterns of state organization. Accordingly, democratic norms, including the protection of electoral mandate, belong in the sphere of civil society.

Electoral mandate protection is tied to a seminal question raised by Jinadu (2005:24):

> are the conditions that are precedent to and on the election date, including the administration of the electoral process, ones that ensure the ex ante indeterminacy of the election, in other words, is the electoral process generally fair and free?

Civil society in new democracies is challenged by the above question, given that a weak regulatory framework can sometimes subvert electoral mandate. A deficit in mandate protection generally creates a democracy deficit (cf. Jinadu, 2005). But it is important to stress the point made by Jinadu (2005:25) that "electoral mandate is bound up with a country's constitutional and political history. It grows out of the struggle for the expansion of the democratic space in the country." This brings us to the character of the state as determined by material and historical forces, which shapes its nature as a mediator in the society, including mediating whether citizens decide who governs the state.

The Nigerian State and Civil Society

It might be necessary to clarify, at least theoretically, whether it does "make sense to speak of civil society in Africa" (Sedogo, 1998:111).

From the Hegelian perspective, "Africa has no history." It signifies an ahistorical and underdeveloped world, entirely enslaved to the natural mind (Sedogo, 1998:113). By implication, it lacks the "divine will" (state) that unfolds in historical moments, along with the civil society that the state creates. Here Hegel's idea clashes with reality: the state actually exists in Africa.

Contrary to Hegel, Mamdani (2002:13) posits that "civil society exists as a fully formed construct in Africa as in Europe, and the driving force of democratization everywhere is the contention between the civil society and the state." But civil society in Africa is not the creator of the state but "a creation of the colonial state" (Mamdani, 2002:19). This creation has not yet achieved a balance in its relationship with its creator.

The imbalance between state and civil society does indeed persist in contemporary African states, including Nigeria. The cause is the character of the postcolonial state. The colonial state was conceived, nurtured, and sustained in violence (Kukah, 1998). It was absolutist, and either excluded politics altogether or viewed it in terms of administration (cf. Bayart, 1986). The civil society of the colonial state consisted of the few enfranchised colonists and settlers, with enfranchisement based on such factors as income, education, and urban residency. The 1922 Clifford's constitution in Nigeria introduced the elective principle based on limited franchise, with qualification based on similar conditions. Peasants in the colonial state were not accorded these civic privileges (cf. Mamdani, 2002).

The civil society aimed to circumvent pressures that could create social instability. But some who were excluded from the political space occasionally challenged the colonial state. Particularly instructive was the women's riot in 1929 at Aba in Southeastern Nigeria. This incident and other episodic eruptions of the peasantry suggest that the society suppressed a crucial category. To sustain its exploitative essence, the colonial state had to retain its absolutist and undemocratic character, leaving only limited participatory space for civil society.

The postcolonial state that emerged at independence retained the trappings of the colonial order. Government personnel changed but the state was not reconstituted. Postcolonial Nigeria thus limits the participatory latitude of civil society, especially on critical issues of democracy and governance. As in the colonial order, the postcolonial order controls significant economic resources in the state. State power offers opportunity for embezzlement. A result is the common quest to personalize public power and make the state unduly coercive.

Personalizing state power brings about the client-patron relationship between state officials and their loyalists. Supporters of the current government are rewarded with perquisites such as contracts, gifts, and public appointments, whereas the opposition is hounded and punished. This trend has so deeply pervaded social consciousness that civil society virtually worships power. Various types of people's organizations make solidarity visits to the government in power, no matter how it emerged. Such visits do not reflect goodwill or genuine support, but rather the political economy of corruption, in which genuine "civil society," according to Kukah (1999), is "driven and choked by the thorns of the contradictions of the post colonial state." Such an environment can hardly foster the sort of sustained civil society necessary for electoral mandate protection or democratic transformation; it can generate only episodic agitations that yield piecemeal and inconclusive ends. The buildup of civil society that ended military rule, for instance, fizzled with the inception of civil rule, instead of remaining as a vanguard of democratic transformation.

Civil Society and Elections in Southeastern Nigeria

The nature of elections in contemporary Southeastern Nigeria exemplifies a disturbingly pervasive trend in postcolonial Nigeria. Two terms summarize the trend: vote-rigging and "godfatherism." Vote-rigging is no longer limited to the state and political parties. Political entrepreneurs now sponsor candidates for office so that they, the godfathers, can get public funds as well as political influence. This is not unique. In such democracies as the Philippines and Mexico, political entrepreneurs try to buy votes of the poor. Ghana is accused of similar practices (Ojo, 2006).

Unassailable evidence proves vote-buying in the 1999 and 2003 general elections in Nigeria (Pamsha, 2006). The case of Southeastern Nigeria in the 2003 elections is particularly instructive. In Abia State, one of the five Southeastern States, Elder Imo, a man who ran on the platform of the All Nigerian Peoples Party (ANPP), received a majority of the votes cast and was declared the winner by the Independent National Electoral Commission. However, a certificate of victory was given to Adolphus Wabara. Elder Imo was robbed of his public office, it was alleged, because the hierarchy of the ruling Peoples Democratic Party (PDP) had earlier chosen Adolphus Wabara as the next Senate President (Global Rights, 2005).

Similarly in Anambra State, Dr. Chris Ngige was declared the winner of the 2003 gubernatorial election, even though the candidate of the All Progressive Grand Alliance (APGA) received more votes. Indeed, President Obasanjo openly told Nigerians that Chris Uba, the purposed godfather of Anambra State politics, admitted to having rigged the 2003 election (Global Rights, 2005). Chris Uba himself declared, in a gathering of World Igbo Congress, that he rigged the 2003 elections in Anambra State (see Okonkwo, 2003). Further, the Senatorial victory of Ben Obi from Anambra State, stolen through political manipulations of the Peoples Democratic Party (PDP), was recovered only through litigation.

In all the above occurrences, the political heat of the moment seemed to melt civil society. Apart from poll watching by the Justice, Development and Peace Commission of the Catholic Church and a few other groups, there was hardly any response from the civil society in the Southeast. Of course, the vibrancy of the media cannot be denied. But the shocking political events in the region seem a normal outgrowth of power worship. This contrasts sharply with the actions of civil society in the Philippines. Strong civil society brought down the dictatorship of Ferdinand Marcos and the populist but corrupt government of Estrada (Kotte, 2001). Poll watching for mandate protection is also a part of civil society's commitment to democracy in Philippines. Southeastern Nigeria's vote rigging is not an isolated case. Other parts of the country suffer too. The problem is symptomatic of a strong coercive state that overwhelms the civil society.

Conclusion

Civil society in Nigeria is a victim of the state. This arises from civil society's failure to reconstitute the coercive state in line with liberal democracy. Hence, the character of the state resembles that of its predecessor, the colonial state. The contradictions of the state suppress civil society and prevent the consolidation of democracy. Elections remain a farce, while protecting the electoral mandate is regarded with levity. Civil society in Southeastern Nigeria is too weak to perform its functions.

In spite of the experiences in the Southeast, a flicker of hope remains. The same 2003 elections that were rigged in parts of the Southeastern region could not be rigged in Kano State gubernatorial elections. A civil society coalition protected the mandate of Shekarau of the All Nigerian Peoples Party (ANPP), despite the determination of the ruling PDP to return the incumbent Kwankwaso to power through rigging (Global Rights, 2005).

Civil society's limited and weak engagement with the state in Nigeria could gradually be overcome by strengthening institutional civil society into a social force. The intelligentsia can commence proactive actions on matters of governance,

including elections. This can open the space for other professional, community-based, and religious associations to turn proactive in protecting the electoral mandate, demanding accountability in governance, and, ultimately, transforming the nation into a true democracy.

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ARTICLE

Velvet Revolution in Iran?

Martin Beck Matuštík[1]

November 17, 2006, marked seventeen years since the Czech Civic Forum and the Slovak Public against Violence choreographed the demise of one of the last Soviet-orbit regimes. In kind, there are three anniversaries coming up in 2007—the centennial of Jan Patočka's birth; thirty years since his death; and the thirtieth anniversary of "Charta 77." That bold Czechoslovak Manifesto for human rights issued in January 1977 by Václav Havel, Jan Patočka, and Jiří Hájek, Charta 77 paved the way to the events of the "Velvet Revolution" of November 17, 1989. Patočka's birth and his Socratic death (in March 1977, he suffered brain hemorrhaging during his interrogation at the hands of the Czech secret service and was left untreated at the police station) will be commemorated in Prague April 22-28, 2007.[2]

"A specter is haunting Europe—the specter of Communism," famously wrote Marx in the *Communist Manifesto* of 1848. "A specter is haunting Eastern Europe: the specter of what in the West is called 'dissent'," said Václav Havel in 1978 in "The Power of the Powerless." Jacques Derrida prophesied in his 1994 *Specters of Marx* about "a spectrology of Marx" that continues to haunt us even after the fall of the Soviet empire in 1989.

Indeed, the specter of "velvet revolution" continues to haunt, perhaps nowhere so much as in the Islamic Republic of Iran of today.

* * *

Not unlike the Czech philosopher-dissident Patočka, the Iranian philosopher Ramin Jahanbegloo is an intellectual in deep trouble with the ruling regime. And just like Havel in pre-1989 Czechoslovakia, Jahanbegloo has become part of a democratic, nonviolent movement of the Iranian powerless. On April 27, 2006, the Iranian philosopher was detained at Tehran's Mehrabad airport, and shortly after was accused of actively preparing to take part in a "velvet revolution" in Iran. This polyglot thinker did his Ph.D. at the Sorbonne while Western Marxism was demanding the impossible, but elected to write his doctoral dissertation on Gandhi's philosophy of nonviolent change, *Satyagraha*. Jahanbegloo continued to espouse nonviolence after returning from the West to his homeland. The question of violence looms large in Iran, whose regime was born of the convulsions of 1979. The Iranian Revolution contained

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[2] While a first-year student at Charles University, at age nineteen, I signed Charta 77. I became a political refugee in August of that same year.

several currents of thought—it included Marxist anti-imperialists and Third-Worldists as well as liberal-democratic nationalists and feminists. Yet in the end it was overtaken by the anti-modernist Islamists, and so became a conservative-clerical revolution rather than a democratic one. On one of his many trips to India, Jahanbegloo met with the Dalai Lama, who in turn has made frequent visits to Prague to meet with Havel since 1989. All such links reinforce suspicion among Iran's clerical rulers that "the velvet revolution" is at hand.

Rasool Nafisi has suggested that the main reason for Jahanbegloo's arrest was his research project for the German Marshall Fund in which he compared the Iran's democratic dissidents with their East-Central European predecessors.[3] This line of comparative inquiry analyzed the balance of political power between Iranian civil society and the governing clerical regime. While Jahanbegloo sat in Tehran's notorious Evin prison, eminent international figures—among them Havel and Habermas—sent an open letter to Iran's president Mahmoud Ahmadinejad protesting the philosopher's detention. The Iranian minister of the interior, Hojjatoleslam Qolamhoseyn Mosheni Eyhe'I, said in a July interview that Jahanbegloo was arrested on suspicion that he had been assisting the United States to provoke "a velvet revolution in Iran," an activity that, according to him, seems to be the main business of the United States these days. Of course, nonviolence has not exactly been the modus operandi of U.S. foreign policy strategy: that the empire should be accused of fomenting nonviolence is rich in paradox.

Meanwhile, the reaction of Tehran's clerical regime to this Iranian dissident was as if taken out of the (secular) Soviet cookbook. The state-run press, *Kayhan* and *Resalat*, and the student agency, *Isna*, proclaimed the good news of Ramin's video "confession" in which he uttered *mea culpa* for his sins: he was to be used by foreign agents (the CIA and Mossad) in order to act against the regime that was once called by the head of the Assembly of Experts, Ayatollah Ali Meshkini, "the most divine and heavenly" in the world. The confession was at first observed by the Revolutionary Cultural Committee, whose members are appointed by Iran's supreme religious leader (today Ayatollah Ali Khamenei, before him the inventor of the clerical regime, Ayatollah Ruhollah Khomenei), and whose task it is to supervise the ideological correctness of all cultural and educational programs in the land. Just as during the Soviet-era witch hunts on domestic spies and Zionists, or during the Joseph McCarthy-era witch hunts of Communists in every closet, so also in Iran today, Ramin Jahanbegloo is far from alone in being compelled to "confess" to appease the regime. Such confessions have been prepared for televised public propaganda.[4] Just as in the Soviet bloc, so also in Iran are assassinations and torture gradually being replaced by "softer" methods of psychological and economic repression. The Iranian regime now uses more varied threats to keep would-be dissidents in line: threats of financial reprisals, loss of home or medical care, forced exile, or repeated arrest. When Jahanbegloo was released on August 30, 2006, he was given a valid passport, but he had to place as bail both his house and the house of his mother as a guarantee

[3] Rasool Nafisi, "Ramin Jahanbegloo: a repressive release," *openDemocracy,* September 1, 2006, www.opendemocracy.net/democracy-irandemocracy/jahanbegloo_3867.jsp; and Nafisi, "The Meaning of Ramin Jahanbegloo's Arrest," *openDemocracy,* May 16, 2006, www.opendemocracy.net/democracy-irandemocracy/jahanbegloo_3545.jsp.

[4] See Ervand Abrahamian, *Tortured Confessions, Prisons and Public Recantations in Modern Iran* (University of California Press, 1999).

that he would not speak about the tortured origin of his confession or otherwise against the regime.

* * *

Who's afraid of the "velvet revolution"? Fearful are those who don't understand civil society or non-governmental initiatives. Such fears nowadays strike Central East Europe itself, where one of the most vocal and persistent critics of Charta 77 and of the entire era of Central-East European dissent and today's NGOs is Havel's nemesis, the current Czech President, Václav Klaus. His and similar revisionist voices of the dissident history and of the role that civil society played in 1989 arise as if taken from another cookbook—that of the Great Leader, by which I mean not the Soviet cult of personality but the Supreme Iranian cleric. If Timothy Garton Ash is correct that Supreme Leader Ayatollah "Khomenei was both the Lenin and the Stalin of Iran's Islamic revolution,"[5] then Supreme Leader Ayatollah Khamenei is the one who tries to suppress and normalize all mounting dissent against it.

Klaus would like his cronies to believe that the dissidents were a bunch of elitist losers; that the Actually Existing socialist regimes collapsed of their own overweight; and that unfettered pro-market forces played the main role in the overthrow of Communism and should play the leading role in post-Communist societies. Dissidents, with the exception of Havel and, at the beginning, of the Polish Solidarity leaders, were effectively pushed aside after 1989. The market entrepreneurs and party technocrats took over. Klaus heard Lenin's question loud and clear when he worked at the top Prague Communist think-tank, the Prognostic Institute: What is to be done? He formed the Civic Democratic Party (ODS) soon after 1989, which proved more effective than the dissident Civic Forum that facilitated the velvet transfer of power, and Klaus thus took power.

Yet can both Central-East European revisionists and the Iranian clerics be right about dissidents and civil society? When unlearned lessons of history repeat themselves, they return as farce. Enter the first farce: the clerical regime fears that it will suffer a recurrence of something that Klaus claims never happened. Then comes the second farce: the conservative religionists in Iran and the conservative market ideologues of Central-Eastern Europe—like the Communist *apparatchiks* before them—agitate against civil society. Klaus, who likes to portray himself as a student of American democracy and of Margaret Thatcher, invented and introduced derogatory anglicized neologisms into Czech political discourse, such as "NGOism" and "humanrightism," so as to poke fun at the civil and non-governmental initiatives in his country that Toqueville once identified as the heart of American democracy.

Here comes the third farce: the reactionary Islamist regime recruits former agents who spied on anti-Communist dissidents but were left unemployed by the fall of the Berlin Wall; they collaborate on figuring out how to prevent democratic dissent from turning into "velvet revolution."[6]

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[5] Timothy Garton Ash, "Soldiers of the Hidden Imam," *The New York Review of Books*, November 3, 2005.

[6] Cf. Timothy Garton Ash, "Cedar revolution," *The Guardian,* March 3, 2005; Ash and Timothy Snyder, "The Orange Revolution," *The New York Review of Books*, April 28, 2005.

The specter of nonviolent democratic Islam is haunting the suicide bombers and religious zealots of every stripe. The fear of democratic civil society among Islamist fundamentalists grips the Middle East, fueled by the realization that the Iranian dissidents have outgrown both the ultra-left and the religious right—the two forces responsible for the anti-democratic subversion of the 1979 revolution's emancipatory promise. It is possible that this might only apply to Iran, and that the situation in other Islamic countries is more complex, especially regarding the relationship between Islamism, civil society, and democracy; yet crucial for my point is that the Iranian dissidents, within the framework of Islam, now embrace nonviolent change and what Karl Popper and George Soros call the open society. Iranian dissent has become, like the Central-East European and Soviet underground before it, the laboratory for imagining another possibility, a future world that would wed the most spiritual resources of religious life with the most advanced forms of democratic and economically just institutions. This is the fear that the Prague Spring of 1968 shares with the Velvet Revolution of 1989, and both share with the current global situation: the pro-democracy yet deeply religiously inflected dissent in Iran is underscored by its radical nonviolence and opposition to all religious terror, whether by a totalitarian state or by religious fanatics. Yet it is likewise opposed to the notion of a permanent war on terror, which is perceptively unmasked by proponents of nonviolent change as the Jacobin variant of all aggressive wars and modern revolutions.

Any violent foreign intervention in Iran would mean the end of the democratic movement. Even Condoleezza Rice's offer of $75 million to support the opposition forces in Iran threatened, in this situation, the kiss of death (and was dead on arrival—the dissidents don't want a dime). The Islamist regime fears the velvet of dissidents as much as they fear the mystical dance of the Sufis, whose prayer gathering was attacked by a state-sponsored gang in February 2006. Both the Iranian dissidents and the Sufis embody dangerous ideas that another world is possible. Just as Søren Kierkegaard in 19th-century Denmark protested from within Christianity that in Christendom there were hardly any Christians left (the uneven length of Kierkegaard's pants was then the only Danish religious caricature), so today the devout Muslim dissidents ask where are the Muslims in Islamdom? Their voices, along with those of secular critical modernists, Jahanbegloo chief among them, have been sorely missing from the entire equation! Should suicide bombers and authoritarian clerical regimes be confused with Islam, any more than our post-Christendom Christianity or democracy with what Noam Chomsky calls military humanism?

Saturated by the suffering at the hands of the Islamic Republic, the democracy movement in Iran has been tested by its own incredibly accelerated modernity. The result is the post-Jacobin realization that it is impossible to impose democracy and freedom by force. Religious dissent in Iran is to Islam today what Kierkegaard was to Christianity in Denmark. The major world conflicts are not, as Samuel Huntington claims, among world civilizations or between the secular and religious worlds, but rather between religious-political fundamentalisms and open societies. This conflict exists today as much within as among civilizations, including within developed Western societies. The global question before us is this: shall we learn to share public and open space in which, as the Mayans in Chiapas say, "many worlds could coexist"? Afraid of a "velvet revolution" are those who do not want to live in an open space of many secular and sacred worlds.

* * *

"Reading philosophy in Iran is like reading Patočka and Husserl in Prague in the late 1970s," Jahanbegloo said in an interview with Danny Postel in *Logos*.[7] This entirely astonishing comparison resounded with even greater truth during the presidency of Iran's reformist Mohammad Khatami (1997-2005). Just as the Central-East European dissidents during the 1970 and '80s gathered in apartments to hold underground seminars with philosophers visiting from the West, so too Jahanbegloo has organized international conferences and interfaith debates, publishing books and essays, and attracting a great number of thinkers to Tehran, among them Richard Rorty, Agnes Heller, Adam Michnik, Ashis Nandy, Antonio Negri, Michael Ignatieff, and the late Paul Ricoeur. Ramin has published more than twenty books; numerous articles on tradition and modernity, nonviolence, and studies of Kant, Machiavelli, Hegel, Schopenhauer, and Tagore; and books of conversation with Isaiah Berlin, George Steiner, and Nandy. Some of Ramin's seminars on Kant and Hegel were attended by more than four thousand students.

Having awakened intellectually in Prague during the totalitarian period of the early 1970s, I feel a certain envy about the intellectual hunger and omnivorous literacy of Iran's youth: they remind me of my own famished soul thirsting for conversation and books during the post-1968 normalization of my native Czechoslovakia. The new regime of President Ahmadinejad—he has famously denied the Holocaust (he organized an exhibit of Holocaust caricatures in Tehran, which virtually no Iranians attended) and cracked down on intellectuals and journalists—has effectively ended those reformist hopes. Iran today is somewhat comparable to the Czechoslovak normalization after the Soviet invasion, with the birth of Charta 77 in 1977 and the Velvet Revolution in 1989.

Postel's interview with Ramin was conducted via email in the weeks before his April 2006 arrest.[8] When I wrote *Postnational Identity* (Guilford Press, 1993) and placed together in the subtitle the names of Havel, Habermas, and Kierkegaard, who could have imagined that in today's Iran Havel and Habermas would jointly become intellectual stars? What do Habermas and Havel bring to the Iranian pro-democracy movement? I put this question to the Iranian dissident Akbar Ganji during a dialogue between him and the philosopher Martha Nussbaum at the University of Chicago in September 2006.

Ganji is perhaps the best known Iranian dissident and journalist. He was sentenced to six years in prison for writing a series of articles exposing the roles of high-level Iranian officials in committing political murders of intellectuals and writers. On May 11, 2005, Ganji began a hunger strike from his cell in Evin prison, both against the conditions of his imprisonment and for his unconditional release. That fast lasted an incredibly long time: double the full length of Ramadan (and with no food consumed either before or after sundown). Upon his release from prison, Ganji traveled through Europe and the United States in the fall of 2006. He fully expects to return to prison directly from the airport upon returning to Tehran. Ganji was fasting during his dialogue with Nussbaum, as it was the first week of Ramadan

[7] Danny Postel, "Ideas Whose Time Has Come: A Conversation with Iranian Philosopher Ramin Jahanbegloo," *Logos* 5.2, spring/summer 2006, www.logosjournal.com/issue_5.2/jahanbegloo_interview.htm.

[8] The interview now appears as well in Postel's book *Reading* Legitimation Crisis *in Tehran: Iran and the Future of Liberalism* (Prickly Paradigm Press, 2006).

and he is a deeply devout Muslim. At dinner we continued our conversation about Havel and Habermas.

Havel and Charta 77—both now under assault in their place of origin by those in power who have no dissident credentials—are for the Iranian dissidents symbols of nonviolent democratic change. The clerical regime has not yet managed to become thoroughly totalitarian and, as with Charta 77, the pro-democracy movement gathers many different strata of the society, including former Marxists and leftists, secular liberals, religious believers, Muslim feminists, and many students. Habermas represents for the young generation perhaps the most attractive model of open, deliberative, and communicative democracy. He was treated as a rock star during his visit in Tehran in 2002. The Masarykean-humanist Havel and the left-liberal Habermas have thus become two axes of the Iranian democratic vision integrated into what, after Kierkegaard, I would call an existentially transformed Islamic religiosity suited to open society.

My all-too-idyllic comparison neglects three glaring anomalies, though I am prepared to mount a small defense of each one. First, Heidegger, who, along with Husserl and Patočka, inspired the Czech dissidents (including Havel himself), enjoys popularity in Iran today among conservative clerics. (Yet the Czechoslovak Communist regime could stomach neither Husserl, nor Heidegger, nor Patočka, who was also hated by the Nazis, nor the Jewish thinker Emmanuel Lévinas, who was read by Czech dissidents along with Heidegger.) Second, Habermas supported the first Persian Gulf War and the NATO bombing of Serbia. (Yet with the U.S. invasion of Iraq, Habermas articulated a highly forceful critique of Bush and U.S. foreign policy more generally.) Third, Havel, unlike Habermas, supported the U.S. invasion of Iraq. (Yet Havel also warned the United States in an ironic comment to a NATO conference in Prague that the allies could easily end up as hated as the Soviets with their brotherly invasion of Czechoslovakia.)

Indeed, there is a fourth anomaly: Ganji, sometimes called the Havel of Iran, was as a teen a fervent Iranian revolutionary who helped to form the Revolutionary Guards, which were to protect Iran during its war with Iraq but which turned into an instrument of repression at home, a fixture of the Islamic Republic's domestic security apparatus.

In an interview,[9] Ganji voiced the view that "revolution cannot create democracy." The anti-Shah revolution was not hijacked by the clerics, he said, just as the Bolshevik revolution was not stolen by Stalin, as Trotsky had claimed. "We began revolution, in order to create a paradise, but we created hell." An unjust regime can be changed only by civil disobedience, nonviolently, he holds. Invasion cannot export or impose democracy. The American Revolution avoided the Jacobin variant of the French revolutionary model of founding. Enter a political holy trinity: Jefferson, Habermas, and Havel. In today's Iran, the struggle is about not religious orthodoxy but power. Ganji thinks that many clerics in power, like the late Communist *nomenclatura*, no longer "believe" in anything but their own power, producing what Max Weber called a "sultanist" regime. This is one more reason why relations between civil society and the established powers in present-day Iran are comparable to those of the 1980s Soviet bloc. Ganji has always worried about the fascist reading

[9] "Islam and Democracy: Conversation with Akbar Ganji," August 10, 2006, http://globetrotter.berkeley.edu/people6/Ganji/ganji-con0.html.

of religion and wrote about clerical fascism twenty years ago. For his reporting on Iran's then-President Hashemi Rafsanjani and the murders of dissidents, he earned a six-year prison sentence. He expects a third sentencing upon his return home.

At our dinner in Chicago, our table debated the Iranian nuclear program. Ganji worried about the Libyan model: the United States and the European Union would compromise with the authoritarian Iranian regime, trading assurances of the preservation of the regime for the end or control of the nuclear program. One could also call it the Soviet post-Yalta model, or perhaps the Saudi cheap-oil model. Paradoxically, from an entirely different barrel, the question of the nonviolent transfer of power from the Communists to the dissidents and the preservation of certain sinister post-Communist elements after 1989 will haunt the legacy of the Velvet Revolution for many years, precisely for its non-ultra, nonviolent, or "orange" handling of the deposed regime. That revolution, some say, was no revolution—it lacked the Jacobin or Bolshevik edge and neither executed its enemies nor ate its own children; it only pushed aside the majority of dissidents, whose story today it wishes to revise. Not only do fascist regimes desire to destroy civil society—a fact the Iranian dissidents are keenly aware of—no authoritarian politician or party can tolerate private citizen initiatives. Ganji, who declined an invitation from the White House, has on his current trip met with Habermas and with Havel during a fall conference in Geneva. He has also met with Chomsky, Rorty, David Held, Mary Kaldor, Alasdair MacIntyre, Anthony Dworkin, and Nancy Fraser.

Ganji was a bit surprised when I told him that a great number of former dissidents and student participants in the events of November 1989 think that something has been robbed from the Czecho-Slovak Velvet Revolution. But if Ganji is right that we are creators of our futures in the way we act in the present, then, I proposed to him, he should ask Havel how the story of Charta 77 ended: what happened to East European civil society and the dissidents, whether ushered overnight into political power or again rendered powerless? Ask Havel, I said: given the Central-East European experience, what should Iranian dissidents be thinking about today? We might learn whether or not Havel and Ganji did discuss this topic when a new chapter, about which one dreams Iranian "velvet" dreams, is written.[10]

[10] This essay is published simultaneously in Czech, "Sametová demokracie v Iránu?" *Literární noviny,* Prague, November 13, 2006, www.literarky.cz. On a related topic, see Matuštík, "Sametová demokracie a jiné změny režimů," *Literární noviny,* November 15, 2004, and, in English, "From 'Velvet Revolution' to 'Velvet *Jihad*'?" *openDemocracy*, November 18, 2004, www.opendemocracy.net/faith-europe_islam/article_2231.jsp. I am thankful to Danny Postel and Nader Hashemi for helpful editorial comments.

ARTICLE

The Russian NGO Law: Potential Conflicts with International, National, and Foreign Legislation

Alison Kamhi*

Introduction

Since the Russian Federation's emergence in 1991, its laws governing free speech and the right to association have been studied and scrutinized by the outside world, most notably by the United States. The state of civil society in Russia during the political upheavals of the early 1990s, as well as throughout the last decade of relative transitional stability, has been a source of optimism, concern, and speculation: Would the "New Russia" promote a free exchange of ideas and tolerate dissent? The answer, after the new non-governmental organization (NGO) legislation passed this year, unfortunately appears to be a resounding no.

On January 10, 2006, the Russian Federation passed a law addressing the situation of NGOs in Russia. This law, officially entitled "On Introducing Amendments into Certain Legislative Acts of the Russian Federation,"[1] came into effect on April 15, 2006. In common parlance, its vague title has been replaced by "Russian NGO Law" to reflect the actual target of the legislation, namely nongovernmental organizations. The full consequences of this law are not yet known, because no prosecution has been brought to date; it remains to be seen, therefore, how this law will be applied and how courts will interpret its provisions.

The language of the law, however, significantly expands government control over NGOs and considerably restricts the right to association and the right to privacy of NGOs and NGO members. The Council of Europe reviewed a draft of the law and declared many of the provisions problematic.[2] The Russian Government then revised its law, incorporating several recommendations made by the Council.[3] Many restrictive provisions remained, however. The Russian Government also added new amendments in the final version limiting the rights of foreign NGOs and NGO members that were not in the original draft evaluated by the Council of Europe.[4] These amendments potentially violate international and national law. This analysis

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[1] Federal Law #18-FZ.

[2] Provisional Opinion on Amendments to Federal Laws of the Russian Federation Regarding Non-Profit Organisations and Public Associations. December 1, 2005. See http://www.coe.int/T/E/Com/Press/News/2005/20051206_opinion.asp

[3] Council of Europe Analysis of the Russian NGO Legislation. Press release, February 17, 2006.

[4] Id.

will review the NGO Law[5] and then address the possible breaches of the legislation, law by law, article by article.

Provisions of the Russian NGO Law

- **Registration Requirements**

The Russian NGO Law has introduced new documentation requirements for NGOs. In order to register under the new law, organizations must fill out roughly 100 pages of documents, listing detailed personal information about each founder and each member.[6] If any of the founders are deceased, the organization must provide death certificates. These new requirements create an excessive burden on NGOs, and any mistake in the paperwork can be grounds for denial of registration, essentially providing the government with another excuse to dissolve – or refuse to recognize legally – organizations.

A letter condemning the new legislation from Amnesty International commented: "The experience to date has been that the law is unduly burdensome, diverting resources from substantive programs, while using a regulatory framework that can be arbitrarily applied, has key provisions which lack a precise legal definition, and sanctions that are disproportionate."[7] As of June 29, 2006, forty foreign NGOs had applied for official registration under the new law – and not a single one was successful.[8] All received notification that they did not comply with the documentation requirements and must resubmit their applications. The fact that all forty were denied registration indicates how complicated the new requirements are and confirms NGOs' fears that this law can be used to harass NGOs, creating unnecessary work for them and excuses for the government to deny organizations registration.

Between 500 and 2,200 foreign NGOs work in Russia, and all had to obtain registration by October 18, 2006.[9] As of October 19, Human Rights Watch,[10] Amnesty International, the Danish Refugee Council, two branches of Doctors without Borders, and other prominent international NGOs were forced to stop working temporarily for allegedly failing to comply with registration requirements.[11] Even if other NGOs have more success with the process, this law has already succeeded in disrupting human rights work within Russia.

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[5] This analysis uses the unofficial ICNL English translation of the Federal Law #18-FZ. See http://www.icnl.org/knowledge/news/2006/01-19_RussianNGOLawEng.doc.

[6] For example, the personal address and tax identification number is required for each founder and member. See Federal Law #18-FZ, Addendum No. 1.

[7] "Amnesty International Urges Putin to Review NGO Legislation" MosNews, July 5, 2006. Found on website NCSJ, Advocates on Behalf of Jews in Russia, Ukraine, the Baltic States & Eurasia, "Russian Civil Society Examined, as G-8 Looms," see www.ncsj.org.

[8] Anastasia Kornya, "Non-Governmental Organizations Fail the Test," Vedomosti, June 29, 2006. Translated by A. Ignatkin.

[9] According to the Federal Registration Service. Id.

[10] Human Rights Watch has been able to resume activities after registering on November 7, 2006.

[11] Charles Digges, "Amnesty International, Human Rights Watch, and Others Temporarily Halted by Russian NGO Law," October 19, 2006. Available at http://www.bellona.org/articles/Rejected_NGOs.

Many organizations are responding by either re-registering as commercial in order to avoid the documentation requirements[12] or uniting to simplify the registration procedures. For example, approximately twenty organizations in Murmansk that were denied registration under the new NGO Law have decided to join forces, rather than each organization having to resubmit all 96 pages of registration forms.[13]

In response to international and national criticism concerning these documentation requirements, President Vladimir Putin has replied that additional bureaucracy was not his goal: "This law was meant to create order in this sphere, not to stiffen" registration requirements. "If we find that there is, in fact, a stiffening of the regulations, I myself am ready to act to initiate changes. . . ."[14] Whether he keeps his word remains to be seen; there is no doubt that the new documentation requirements have unnecessarily burdened NGOs. As an aid worker in Chechnya described the NGO Law, the excessive and impossibly difficult documentation forms have turned NGO registration into "Kafka's wet dream."[15]

- **Funding Reports**

Additionally, NGOs must complete annual reports, listing all foreign donations received and the ways in which those funds were used. This documentation requirement essentially outlaws anonymous donations. It also complicates large-scale public fundraising; NGOs do not have the necessary personal information about each small donor, who, for example, puts ten dollars in a collection bucket at a rally. These requirements are especially problematic for NGOs involved with human rights, because these organizations receive most of their financial support from foreign sources.[16]

When confronted with these potentially dire consequences of the NGO Law, President Putin has repeatedly reconfirmed his stance against foreigners participating and sponsoring Russian NGOs: "I personally – I will speak completely openly and honestly – have only one concern. I will always speak and fight against foreign governments financing political activity in our country, just as our government should not finance political activity in other countries."[17] International NGOs subsist only through donations from international sources, however, and international cooperation is therefore necessary for them to survive.

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[12] According to Sergei Tsyplakov of Greenpeace Russia. Id.

[13] According to Elena Kruglikova, head of Gaia Ecological Center. Id.

[14] Anastasiya Lebedev, "Putin Says NGOs Won't Be Crushed," Moscow Times, July 5, 2006. Putin addressed NGO Activists Tuesday, July 4, 2006.

[15] Oliver Bullough, "NGOs in Chechnya Told to Report to FSB," St. Petersburg Times, July 25, 2006.

[16] See John Machleder, INDEM Foundation, *Contextual and Legislative Analysis of the Russian Law on NGOs* (2006), 4. See http://www.indem.ru/en/publicat/Russian_NGO_Law_03252006.pdf.

[17] "Putin Restates Opposition to Overseas Financing for NGOs," RIA Novosti, July 4, 2006. See also "Putin on Charm Offensive at NGOs Meeting," Agence France Presse, July 4, 2006.

- **Membership**

The Russian NGO Law limits who may found, participate, or join an NGO to individuals domiciled in Russia, thus denying foreign nationals or stateless persons full freedom of association. Additionally, the NGO Law forbids certain others from becoming NGO members, including "undesirable" foreigners, individuals on a money-laundering and anti-terrorist financing watch list, individuals found by the court to have participated in extremist activity, individuals currently imprisoned, and members of organizations that have been suspended under the Law Countering Extremist Activity. The NGO Law does not define "undesirable" or "extremist," and the money-laundering and anti-terrorist financing watch list is a non-published private government document. In other words, without knowing the definition of the government's terms or who is on the government's watch list, NGOs cannot protect themselves from accidentally accepting "illegal" members and thus facing dissolution.

- **Government Supervision**

The NGO Law expands the government's powers to supervise and thereby control NGO activity. It gives the government the authority to review an NGO's private documents, including those related to financial and policy decisions, as well the ability to send a government representative to any NGO meeting, including private strategic and financial meetings. These provisions, if exercised broadly, would drastically limit the ability of NGOs to function as independent organizations. If an organization is in constant fear that its documents will be requested or its meetings observed, it can neither operate efficiently nor remain uninfluenced by the political leanings of the government.

Possible Violations of International Law

European Convention on Human Rights

The Russian NGO Law, as written, allows the government to violate the European Convention of Human Rights.[18] Though it is unclear how the law will be applied, the text potentially violates five articles of the ECHR, most notably Article 11, the affirmative duty to protect the right to association.[19]

Article 1: Obligation to respect human rights

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

The NGO Law, by restricting founding or participating in an NGO to citizens or Russian domiciles, violates Russia's duty under Article 1 to protect the rights guaranteed by the ECHR to *all* persons within Russia's jurisdiction. Because the right to participate in an NGO has been recognized as protected by the right to association and the right to free expression, Russia is bound by the ECHR to protect the rights not

[18] For full text of the ECHR, see http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

[19] The International Center for Not-for-Profit Law has compiled a thorough analysis of the NGO Law's potential violations of Article 11. See Analysis of Law # 18-FZ, *On Introducing Amendments to Certain Legislative Acts of the Russian Federation* (February 17, 2006). Much of the information about ECHR here was taken from this analysis; many thanks to ICNL. See http://www.icnl.org/knowledge/news/2006/01-19_Russia_NGO_Law_Analysis.pdf (hereinafter "ICNL Analysis").

just of Russian domiciles but also of all foreigners and stateless persons living in Russia.[20] The European Court of Human Rights has interpreted "within" the country's jurisdiction to apply at least to all individuals on the country's territory.[21] The legal concept of jurisdiction also extends the guarantee to all individuals subject to the nation's authority, regardless of whether they are on its territory.[22]

In its analysis of the NGO Law, the International Center for Not-for-Profit Law demonstrates that ECHR Article 1 was rephrased, from "all persons residing within their territories" to "within their jurisdiction," in order to expand the application of ECHR rights and ensure that text not be interpreted too narrowly.[23] Thus, there is no question that the ECHR intended "within their jurisdiction" to apply not just to individuals domiciled in Russia but to all persons living on Russian territory.

Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The NGO Law's provision allowing government representatives to attend NGO events potentially violates ECHR Article 8. Unrestricted government access to all NGO meetings, fundraising and project brainstorming meetings included, not only undermines the purpose of nongovernmental organizations (if government employees attend NGO meetings, one might argue, NGOs cease being strictly *non*governmental organizations), but also violates the ECHR guarantee of privacy. Article 8 has been interpreted to protect professional organizations from arbitrary interference by the government. In Niemetz v. Germany, the court held that the right to privacy extends to places of work, because an individual's private life is also conducted at the office.[24] In Halford v. United Kingdom, the European Court of Human Rights specifically

[20] See Sidiropoulos and Others v. Greece (1998). See also Maria Bideke, *Non-Governmental Organizations*, http://www.legislationline.org/?tid=2&jid=1 (2006).

[21] Bankovic v. Belgium, 11 BHRC 435, para. 19/21 (2001): "As to the 'ordinary meaning' of the term jurisdiction in Article 1 of the Convention, the Court was satisfied that, from the standpoint of public international law, the jurisdictional competence of a State was primarily territorial. While international law did not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) were, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States."

[22] G. v. United Kingdom and Ireland (Application No. 9837/82), para. 25. Cited in ICNL Analysis at 12.

[23] ICNL Analysis at 12.

[24] Dec. 16, 1992, Series A, No. 251-B, 16 EHRR (1993), para. 31.

applied this right of privacy to public organizations.[25] As both professional and public organizations, this right to privacy applies to NGOs as well.

Article 10: Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protections of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The NGO Law, by denying foreign nationals and stateless persons the right to found or participate in an NGO in Russia, violates the fundamental right to expression. Being denied access to civil organizations deprives these individuals of their right to participate in civil society and express themselves. This is a clear violation of Article 10, which through the language of Article 1 is guaranteed to all individuals within Russia's jurisdiction, including non-domiciles.

Article 11: Freedom of assembly and association

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

The NGO Law violates the right to association in particular. The expanded supervision allowed to the government – namely, the right to attend NGO meetings – threatens the right to free association; the presence of government officials could intimidate NGO members from not participating or even attending meetings. Additionally, by allowing the government discretion to terminate particular programs or activities of NGOs,[26] the law violates the right to association of the participants in the particular programs or activities. The ECHR allows the government to close NGO programs only if "necessary to a democratic society in the interests of national

[25] (1997) 24 EHHR 523, cited in Adam Warren, "Right to Privacy? The Protection of Personal Data in Public Organizations." 103 *New Library World* 446-56 (2002).

[26] LNCO, Article 23.

security or public safety." Without any guidelines as to when termination of programs is allowed, this law appears to grant the government complete discretion, conflicting with the principles and text of the ECHR.

Article 18: Limitation on use of restriction on rights

> The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

While the Convention allows certain restrictions to be placed on the right to associate (see Articles 10 and 11), the vague restrictions allowed by the NGO Law are not permitted. The NGO Law similarly violates ECHR Article 18 by denying the right to associate for "undesirable" non-domiciles, individuals or organizations found to be participating in extremist activity, individuals appearing on a money-laundering or anti-terrorist watch list, and prison inmates. It is unclear how the Russian government defines "undesirable" or "extremist activity," and the money-laundering and anti-terrorist watch list is not published. An NGO has no way of knowing if its members are on the list and, if informed by the government, no way of checking the truth of the accusation.[27] Additionally, restricting the rights of prison inmates violates the Russian Constitution, Article 32 (3).[28]

Universal Declaration of Human Rights

In addition to violating provisions of the European Convention of Human Rights, the NGO Law violates articles of the Universal Declaration of Human Rights.[29] The NGO law diminishes the opportunities for civil discourse and deprives Russian and international citizens of basic human rights, rights so fundamental as to have been included in the Universal Declaration of Human Rights. This section will briefly explore how the NGO Law violates Articles 2, 19, and 20.

Article 2

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The NGO Law requires that a foreigner be domiciled in Russia in order to found or even participate in an NGO.[30] This restriction on who is allowed to found an organization violates Article 2 by distinguishing foreign nationals and stateless persons from Russian citizens and reserving the right to association to Russian citizens.

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[27] Federal Law #115-FZ, *On Combating Legalization (Laundering) of Criminally Gained Income and Financing of Terrorism* (2001). For a discussion, see ICNL Analysis at 15.

[28] See Article 32 (3), discussed subsequently.

[29] The Universal Declaration of Human Rights was adopted on December 10, 1948, and proclaimed by *General Assembly Resolution 217 A (III)*. For full text, see http://www.un.org/Overview/rights.html

[30] ICNL Analysis at 3.

Article 19

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The NGO Law allows the government to request documents from NGOs' leaders regarding policy and finance decisions.[31] The Law also lets the government attend all NGO events, including meetings.[32] This expansion of government authority over NGO practices violates Article 19 by restricting NGO participants' freedom of opinion and expression and imposes a chilling effect on both written and oral discussions.

Article 20

> 1. Everyone has the right to freedom of peaceful assembly and association.
>
> 2. No one may be compelled to belong to an association.

By implementing stringent requirements for NGO registration, the NGO Law expands the power of the Russian government to deny registration to new NGOs and disband existing ones due to a failure to register properly. This broad allowance for the government to control the formation and lifespan of NGOs violates Article 20. Though most governments have some registration requirements,[33] the limitations that the NGO Law places on Russian organizations are unduly onerous and place excessive discretion in the government's hands.

International Covenant on Civil and Political Rights

The fundamental rights to assembly, association, and expression are also codified in the International Covenant on Civil and Political Rights (ICCPR), a document written in 1966, signed by 104 countries, and ratified by 103 countries, including Russia.[34] The NGO law violates no fewer than four articles.

Article 17

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

The NGO Law's requirement that every organization submit personal information on all founders, participants, and donors potentially violates the ICCPR prohibition on governmental interference with individuals' privacy. To the extent that

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[31] Id.

[32] Id.

[33] The United States, for example, requires NGOs to complete forms and pay a filing fee for such actions as applying for a reserved name, transferring a registered name, or renewing a registered name. For a list of actions requiring filing fees, see Revised Model Nonprofit Corporation Act, § 1.22 Filing, Services, and Copying Fees (1987), available at http://www.paperglyphs.com/nporegulation/documents/model_npo_corp_act.html#1B.

[34] http://www.hrweb.org/legal/cpr.html. For a list of signatories, see http://www.hrweb.org/legal/cprsigs.html

an NGO is recognized as a legal entity, the documentation requirements also violate the rights of an organization to privacy in its affairs and finances.[35]

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    a. For respect of the rights or reputations of others.
    b. For the protection of national security or of public order (ordre public), or of public health or morals.

The NGO Law, by allowing the government to request resolutions from NGOs as well as send representatives to NGO meetings, potentially violates the right to hold opinions without interference. If NGO members are aware that any document can be requested and any meeting infiltrated, they will be more hesitant to express their opinions openly. Once these opinions are expressed, either in written or spoken form, the government's ability to request resolutions documenting these opinions or attend meetings where these opinions are to be discussed can only be described as "interference."

Additionally, the NGO Law's restrictions on who can found and participate in civil organizations violate this Article's guarantee of the right to seek, receive, and impart information.

The third paragraph of this Article acknowledges the possibility that these rights may not be unlimited; in the event that the right to express and share opinions threatens others' rights or endangers national security or health, these rights can be curtailed. Similar language appears concerning possible restrictions on the right to free association in the European Convention of Human Rights.[36] As the European Court of Human Rights confirmed, however, these restrictions can be justified only by "convincing and compelling reasons."[37] The Russian government's explanation that

[35] In the United States, an organization is seen as having "at least" equal rights to a person. See Perry v. Los Angeles Police Dep't, 121 F.3d 1365 (9th Cir. 1997) (holding that discrimination between the exercise of First Amendment rights by nonprofit organizations and individuals is patently unconstitutional).

[36] Article 11. See also ICNL Analysis.

[37] Sidiroupoulos v. Greece, 4 Eur. Ct. H.R. 500 (1998) (holding that denying an NGO registration violated the organization's right to association because exceptions to the freedom of association "must be narrowly interpreted"). See also United Communist Party v. Turkey, 4 Eur. Ct. H.R. 1 (1998) (holding that Turkey's interference with an NGO constituted a violation of ECHR right to association).

this law is needed to combat terrorism[38] is vague. Putin's additional justification is similarly unconvincing; the Russian President has been quoted as saying that the NGO Law is "aimed at preventing the intrusion of foreign states into Russia's internal political life . . . ."[39] However compelling the purpose may be, the government has failed to explain why combating terrorism requires such stringent regulation of *all* NGOs.

Article 21

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

The NGO Law's restrictions on who may found and participate in NGOs similarly violate this provision guaranteeing the right to peaceful assembly. Again, the Article's limitations on the right to assembly have been construed strictly and do not permit the vague and all-encompassing restrictions outlined in the NGO law.[40]

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

This Article is recognized as guaranteeing the right to association. The language is almost identical to Article 11 of the European Convention on Human Rights, which has been interpreted by the European Court of Human Rights to include the right to form an NGO. The NGO Law violates this Article perhaps most blatantly of all Articles in the ICCPR, because of the Law's multifaceted restrictions on this

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[38] See John Machleder, INDEM Foundation, *Contextual and Legislative Analysis of the Russian Law on NGOs* (2006), 4. See http://www.indem.ru/en/publicat/Russian_NGO_Law_03252006.pdf.

[39] Barry Lowenkron, Assistant Secretary for Democracy, Human Rights and Labor, Testimony at the Hearing of the Commission on Security and Cooperation in Europe, See http://www.state.gov/g/drl/rls/rm2/2006/68669.htm

[40] Sidiroupolous v. Greece; United Communist Party v. Turkey; see also ICNL Analysis at 4.

right to associate.[41] The Law's restrictions on who may form and participate in NGOs, its provisions to allow government supervision of NGOs, and its introduction of new grounds for denying registration or dissolving NGOs all undeniably contradict the right to association expressed in this Article and the protection afforded it under the ICCPR. Again, the ways in which this Article permits curtailment of the right of association do not include and in no way allow the restrictions currently in place under the NGO Law.

Organization for Security and Cooperation in Europe Principles

The NGO Law also contradicts the principles codified by the OSCE. In 1975, the former Conference on Security and Cooperation in Europe became the Organization for Security and Cooperation in Europe,[42] and the 35 member states, Russia included,[43] ratified 10 principles known as the "Decalogue."[44] The NGO Law violates Principle VII:

VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief

> The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.
>
> They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development....
>
> In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.

The NGO Law's restrictions on who can found and participate in NGOs, as well as the expanded government supervision of NGOs, threaten the freedom of thought and conscience protected in this international treaty.[45] Additionally, the burdensome registration requirements implemented by the NGO Law not only fail to

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[41] Maria Bideke, Non-Governmental Organizations, http://www.legislationline.org/?tid=2&jid=1.

[42] See Helsinki Final Act: http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

[43] The following nations are signatories of the Helsinki Final Act: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Soviet Union, the United Kingdom, the United States, and Yugoslavia.

[44] For the full text of the Decalogue, see http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

[45] This law also potentially threatens the freedom of religious organizations as well, but because a separate law addresses religious organizations in Russia (Federal Law, "On Freedom of Conscience and on Religious Associations"), this analysis will concentrate on secular nongovernmental organizations.

"promote and encourage the effective exercise" of these freedoms, but actively deter and even punish their exercise.

The last paragraph of Principle VII references the Universal Declaration of Human Rights and International Covenants on Human Rights. Russia did ratify the Universal Declaration of Human Rights[46] and signed the European Convention of Human Rights.[47] By signing the OSCE Principles as well, Russia not only agreed to uphold the freedoms guaranteed by the document, but also reinforced its commitment to the other international human rights treaties it had signed; in this way, this Decalogue strengthens Russia's duty to protect these human rights as pledged.

European Union Constitution

The NGO Law violates similar provisions of the European Union Constitution.[48] Though Russia is not a member of the European Union, many Russian NGO donors and participants currently live in the European Union, and the European Union Constitution serves as a helpful example of what many countries hold to be fundamental rights.[49]

In the Charter of Fundamental Rights of the Union, the NGO Law violates three Articles:

Article II-70

Freedom of thought, conscience and religion

> 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
>
> 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

The right to conscientious objection is exercised most effectively through the right to association. Without the right to meet freely, citizens can only privately object, weakening the efficacy of any "conscientious objection." By denying individuals the right to association, the Russian Federation is indirectly violating their right to freedom of thought, conscience, and religion, and their right to conscientious objection.

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[46] Russia signed the UDHR in 1948. See UDHR section above.

[47] Russia signed and ratified in 1950. See http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

[48] Treaty establishing a Constitution for Europe: http://www.unizar.es/euroconstitucion/library/constitution_29.10.04/part_II_EN.pdf.

[49] The European Constitution has been ratified by Austria, Belgium, Cyprus, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, and Spain; and vetoed by France and the Netherlands. The Czech Republic, Denmark, Finland, Ireland, Poland, Portugal, Sweden, and the United Kingdom have postponed the ratification process. For more information about the ratification process, see http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const_Rat.htm .

Article II-71

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

The NGO Law allows the government to attend NGO meetings, threatening the right of NGOs and NGO members to hold opinions freely. Additionally, government attendance at private meetings constitutes "interference by public authority" and violates this Article's provisions. The NGO Law's stipulations enabling the government to control who founds and joins an NGO, as well as what programs an NGO is allowed to implement, likewise constitute "interference by public authority." If the government denies individuals the right to join organizations or carry out their organizations' projects, this intervention undoubtedly amounts to government interference.

Article II-72

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

This Article codifies the right to assembly and to association, rights particularly threatened by the NGO Law's provisions. This Article also guarantees the right to "freedom of association at all levels," something that NGOs provide. By restricting the right to participate in NGOs, the Russian Government is limiting individuals' right of association at all levels.

Possible Violations of Russian Law

Constitution of the Russian Federation

Besides violating international law and international treaties, the NGO Law conflicts with the Russian Constitution itself. As written, the Law potentially violates six constitutional articles. Though a breach of only one paragraph of one article would suffice to render the NGO Law unconstitutional, it is noteworthy how many constitutional provisions NGO Law potentially violates:

Article 17

1. The basic rights and liberties in conformity with the commonly recognized principles and norms of the international law shall be recognized and guaranteed in the Russian Federation and under this Constitution.
2. The basic rights and liberties of the human being shall be inalienable and shall belong to everyone from birth.
3. The exercise of rights and liberties of a human being and citizen may not violate the rights and liberties of other persons.

Paragraph 1 of this Article guarantees the Russian people the fundamental rights codified by international law. The right to association is among the basic rights recognized by international law, and the NGO Law's provisions interfering with this right violate the Russian Constitution. In this way, Russia is bound not only by multiple international treaties, which reference and reinforce one another,[50] but also by its own Constitution to abide by these international treaties and protect the rights guaranteed by their provisions.

Article 23

1. Everyone shall have the right to privacy, to personal and family secrets, and to protection of one's honor and good name.
2. Everyone shall have the right to privacy of correspondence, telephone communications, mail, cables and other communications. Any restriction of this right shall be allowed only under an order of a court of law.

The NGO Law's provisions allowing government representatives to attend NGO meetings potentially violate the general right to privacy guaranteed by Paragraph 1 of this Article, and plainly violate Paragraph 2, which protects private communications. The financial and decision-making conversations of NGOs are undeniably private communications, and any mandatory disclosure contradicts the purpose of this Article. Additionally, this Article unambiguously prescribes that the only permissible method to restrict this right is through a court order. The NGO Law's provision offering the government blanket permission to restrict NGOs' and NGO members' privacy is therefore unconstitutional.

Article 29

1. Everyone shall have the right to freedom of thought and speech.
2. Propaganda or campaigning inciting social, racial, national or religious hatred and strife is impermissible. The propaganda of social, racial, national, religious or language superiority is forbidden.
3. No one may be coerced into expressing one's views and convictions or into renouncing them.
4. Everyone shall have the right to seek, get, transfer, produce and disseminate information by any lawful means. The list of information constituting the state secret shall be established by the federal law.
5. The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.

Paragraph 1 of this Article guarantees the right to expression, which the NGO Law threatens to violate by allowing government attendance at NGO meetings. NGO participants will not be able to exercise their right to free speech if they are monitored or in constant fear of being monitored by the government.

Additionally, Paragraph 4 of this Article protects the right to produce and receive information. The NGO Law's provision allowing the government to close NGO programs interferes with NGOs' and NGO participants' right to produce information as well as the public's right to receive information. Moreover, the NGO

[50] For example, see the OSCE Decalogue in previous section.

Law's restrictions on who can participate in an NGO violate the rights both to produce and receive information of those individuals forbidden to participate in NGOs.

Article 30

1. Everyone shall have the right to association, including the right to create trade unions in order to protect one's interests. The freedom of public associations activities shall be guaranteed.
2. No one may be coerced into joining any association or into membership thereof.

Most significantly, the NGO Law violates Article 30, Paragraph 1, which codifies the fundamental right to association. Besides being expressed, as shown, in multiple international treaties, this right is stated clearly in this Article of the Russian Constitution. The expanded government supervision and interference allowed by the NGO Law is a serious breach of the Russian government's duty to protect the right to association.

Article 31

Citizens of the Russian Federation shall have the right to gather peacefully, without weapons, and to hold meetings, rallies, demonstrations, marches and pickets.

This Article also guarantees the freedom of association and reinforces the Russian government's duty to protect the right to association. An NGO is an organization defined by the fact that its participants gather peacefully and hold meetings; the NGO Law's interferences with individuals' ability to continue this activity therefore violates the Constitution.

Article 32

1. Citizens of the Russian Federation shall have the right to participate in the administration of the affairs of the state both directly and through their representatives.
2. Citizens of the Russian Federation shall have the right to elect and to be elected to bodies of state governance and to organs of local self-government, as well as take part in a referendum.
3. Citizens who have been found by a court of law to be under special disability, and also citizens placed in detention under a court verdict, shall not have the right to elect or to be elected.
4. Citizens of the Russian Federation shall have equal access to state service.
5. Citizens of the Russian Federation shall have the right to participate in administering justice.

Article 32, Paragraph 3 restricts the rights of Russians convicted of crimes, namely convicted criminals lose their right to vote or be elected to office. This Article imposes the only restrictions on the rights of the convicted[51] and says nothing about the right to association or the right to free expression. The NGO Law, by denying convicted criminals the right to found or participate in NGOs, violates the Russian Constitution.

[51] ICNL Analysis at 16.

Article 55

1. The listing of the basic rights and liberties in the Constitution of the Russian Federation shall not be interpreted as the denial or belittlement of the other commonly recognized human and citizens' rights and liberties.
2. No laws denying or belittling human and civil rights and liberties may be issued in the Russian Federation.
3. Human and civil rights and liberties may be restricted by the federal law only to the extent required for the protection of the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, for ensuring the defense of the country and the security of the state.

Once again, Russia has bound itself by its Constitution to respect basic human and civil rights. Paragraph 2 expressly prohibits laws restricting these rights. Thus not only are the provisions of the NGO Law and their potential consequences unconstitutional, but the very act of passing the Law violated the Russian Constitution.

Additionally, Paragraph 3 unambiguously describes the sole permissible grounds for restricting basic rights. This provision allows the Russian government to suspend civil liberties only in the face of such national emergencies as a military invasion or an uncontrollable epidemic.[52] By contrast, the NGO Law appears to provide the government with the authority to limit or deny completely the right to association essentially at its discretion. In this way as well, the NGO Law is in direct conflict with the Russian Constitution.

Possible Conflicts with Foreign Law

Potential Violations of United States Privacy Law

The past sections have shown the NGO Law's potential violations of the rights of individuals with regard to their participation in NGOs. The NGO Law's restrictions on who may found or join an organization and what programs NGOs can implement were analyzed in terms of their potential conflict with international treaties and national constitutions. This section, by contrast, will explore a different aspect of the NGO Law – namely the new requirement that Russian NGOs provide extensive annual documentation on donations received – and the potential constitutional consequences this requirement has for foreign donors. In particular, this section will analyze how the Russian NGO Law's documentation requirements potentially violate the rights of American citizens.[53]

The NGO Law requires that Russian NGOs report complete personal information about each foreign donor. The government has not justified this

[52] The United States has similar provisions and has restricted citizens' civil rights only in times of national emergency, such as the internment of Japanese and Japanese-American residents during World War II; even these restrictions were publicly controversial and later declared unconstitutional by the Supreme Court. Ex parte Endo, 323 U.S. 283 (1944) (holding that the detention program was an exercise of unauthorized power by federal officials).

[53] The NGO Law's requirements have the potential similarly to violate other nations' constitutions and the rights of other foreign donors, but because of the sheer number of American donors who may be affected as well as the ease of accessibility to information about donors' rights in the United States, this analysis focuses particularly on the United States.

amendment or explained how it will store or use the information. The collection of personal information for any purpose raises issues of confidentiality; this silence on the part of the government leads to concerns that the government may collect excessive information on individuals of interest, and retain and use the information for purposes other than NGO documentation.

This requirement creates unnecessary work and additional hurdles for NGOs, too, especially for smaller NGOs, many of which are already overburdened and understaffed. An NGO that fails to comply with the documentation requirement can be liquidated, giving the government yet another discretionary tool for controlling NGOs. Additionally, this amendment has the unintended consequences[54] of essentially outlawing anonymous donations and complicating public fundraising campaigns, which customarily encourage many people to make small donations.[55]

Most significant, however, is the potential for this requirement to violate foreign constitutions as to the privacy rights of foreign citizens. In the United States, for example, privacy of personal information is protected by the Constitution[56] as well as both state and federal legislation.[57] This legislation has been interpreted to guarantee multiple privacy rights: the Supreme Court has recognized the right to bodily privacy, membership in political groups, informational privacy, privacy in physical places, and decisional privacy.[58] The NGO Law's documentation requirement threatens both the right to privacy in membership in political groups and the right to informational privacy.

If the Russian government does violate an American citizen's right to privacy, the individual's recourse is not self-evident. The potential violations will be addressed, followed by some possible remedies.

I. Privacy in Membership in Political Groups

By requiring United States citizens, whether living in Russia, the United States, or elsewhere, to give personal information when they donate to a Russian NGO, the Russian NGO Law potentially violates American donors' right to privacy in membership in political groups. Not only does this requirement outlaw anonymous donations, as noted previously, but it also forces donors to reveal any Russian organizations they sponsor or belong to.[59] The U.S. Supreme Court has held, however, that individuals have a legally cognizable right to privacy concerning their membership in political organizations. In NAACP v. Alabama, for example, the Supreme Court found that the organization was "immune[e] from state scrutiny of

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[54] See ICNL Analysis at 8.

[55] Id.

[56] See discussion of United States Constitution, Fourth Amendment, below.

[57] Levy and Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*. Stanford Law and Policy Review.

[58] Id.

[59] American citizens can potentially belong to Russian NGOs in three ways. First, American citizens domiciled in Russia can belong to Russian NGOs under the NGO Law as long as they are not found "undesirable" by the government. Second, any American citizen may be able to retain "honorary membership" in Russian NGOs (see Analysis of NGO Law, 17). Third, Americans currently participating in Russian NGOs may be allowed to retain their membership, depending on whether the NGO Law applies retroactively, which is currently an open question.

membership lists."[60] The NAACP had refused to comply with a court order to disclose its members, and the Supreme Court upheld the NGO's decision as protected by its right to privacy under the Federal Constitution.[61]

American donors have a similar right to privacy concerning their membership in or involvement with Russian NGOs. The Supreme Court protected the NAACP's right to privacy in the face of a lower court order to the contrary[62]; given the Russian government's failure to address why it needs such personal information or how it will handle the information, such a breach of privacy appears even more unnecessary.

II. Informational Privacy

Whereas United States legislation exists to protect individuals' right to privacy of information on a general level, such as privacy of personally identifiable driver information[63] or privacy of prescription drug use,[64] personal information regarding individuals' business activities is especially protected, as demonstrated by such legislation as the Fair Credit Reporting Act,[65] the Fair Debt Collection Practices Act,[66] the Right to Financial Privacy Act,[67] and the Health Insurance Portability and Accountability Act.[68]

These laws do not specifically address NGOs, however, leaving undefined whether and how the laws apply to NGOs and their members.[69] Though courts are divided on whether to treat donors as consumers,[70] donors face the same threats of intrusion to their privacy as consumer. As such, they should be protected by consumer informational privacy laws.

Though donations to Russian NGOs are technically gifts and not sales, the interests of the donors are the same as those of consumers who trade with Russian organizations. Donations and sales differ in the nature of the transactions, but, from a

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[60] 357 U.S. 499 (1958).

[61] Id.

[62] Id.

[63] Drivers Privacy Protection Act, 18 U.S.C. § 2721 (2000). See also Reno v. Condon, 528 U.S. 141 (2000). This list of Acts is based on Ely and Silber's analysis, at 523-34, nn. 12.

[64] The Supreme Court invoked the Fourteenth Amendment to protect privacy in prescription drug use. See Whalen v. Roe, 429 U.S. 589 (1977) (requiring states to assure confidentiality when collecting prescription use information in order to comply with the Fourteenth Amendment right to privacy).

[65] 15 U.S.C. § 1681a (ensuring consumers' rights to privacy in credit reporting).

[66] 15 U.S.C. § 1692 (protecting debtors from "invasions of individual privacy").

[67] 12 U.S.C. § 3410 (requiring a legitimate inquiry before law enforcement officials can request an individual's financial documents and a reasonable belief that the documents requested are relevant).

[68] 43 Am Jur 2d Insurance § 1059 (limiting how health insurance companies can use medical and genetic information about clients).

[69] See Maria Bideke, Non-Governmental Organizations, http://www.legislationline.org/?tid=2&jid=1 at 526.

[70] See Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (holding that charities and businesses are separate institutions for statutory purposes); but see FTC v. Saja, No. CIV-97-0666-PHX-SMM (holding that an NGO is a business under the FTC Act and could be indicted for fraud) (cited in Levy and Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*. Stanford Law and Policy Review, 520, 539, 559 (2004)).

broader perspective, donors and consumers both expect to pay a predetermined recipient for a predetermined purpose. As Ely Levy[71] and Norman Silber[72] explain:

> Any distinction based on the difference between a gift and a sale fails to take into account the purpose of all privacy laws, namely, to control the dissemination of personal information without the consent of the persons about whom the information is collected, or, as Justice Brandeis insisted more than a century ago, the assurance of the right to be let alone.[73]

In this way, donors require the same informational privacy as consumers and must be protected by privacy legislation.

Surprisingly, given that many of its provisions have reduced individuals' and organizations' privacy in the United States, Ely and Silber have demonstrated that the USA PATRIOT Act significantly *strengthened* the rights of American donors: the PATRIOT Act amended the Telemarketing Act to include "charitable" activity.[74] By explicitly mentioning charities, this amendment brings charitable institutions under the jurisdiction of the Federal Trade Commission Act.[75] In other words, the FTC now has explicit authority to protect the privacy interests of NGOs and their members.

In this context, American donors have an expectation of privacy in dealing with Russian NGOs, and any breach of this privacy can be seen as unlawful. By requiring personal information from donors, the NGO Law threatens American donors' right to informational privacy.

III. Possible Remedies

The question remains, however, how a United States citizen might bring suit against the Russian government for such a constitutional violation. Two options are possible: individuals can bring suit themselves, or the suit can be brought by the public, namely by the Federal Trade Commission (FTC).[76] The following possibilities have been suggested as remedies for American donors domestically.[77] This analysis proposes them as potential remedies in the international context as well.

A. Private Claim

Under international law, nations are not immune from claims by foreign citizens, especially concerning commercial and business relations.[78] The Foreign Sovereign Immunities Act makes a point of noting that consent to jurisdiction is not required for suits regarding commercial activities between foreign states and United States citizens:

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[73] Levy and Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*. Stanford Law and Policy Review, at 520-21.

[74] USA PATRIOT Act, Pub. L. No. 107-56, § 1011(b)(1), 115 Stat. 272, 396 (2001).

[75] Levy and Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*. Stanford Law and Policy Review, at 554.

[76] The possible remedies are based on the argument posited by Levy and Silber. Id. at 557-65.

[77] Id.

[78] 40 *Columbia Journal of Transnational Law* 595, 597 (2002) (hereinafter "40 *Columbia*").

> No separate express consent to jurisdiction shall be required in addition to the waiver itself;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state or instrumentality; or upon an act performed in the United States in connection with a commercial activity of the foreign state or instrumentality elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state or instrumentality elsewhere and that act causes a direct effect and substantial effects in the United States; for purposes of this paragraph (2)[79]

This act also gives Congress the power to declare foreign governments and businesses vulnerable to suits unless it "would serve the interests of justice and would protect the rights of ... foreign states, instrumentalities, and litigants in United States court."[80] Barring such a decision, however, a United States citizen could potentially bring a civil case against the Russian government in the federal courts, which have original jurisdiction pursuant to 28 U.S.C. 1330 (actions against foreign states).[81]

B. Public Legislation

The Federal Trade Commission (FTC) is responsible for preventing unfair business practices in the United States.[82] Its authority has been interpreted to include policing certain kinds of privacy invasions.[83] So, though such a case has not yet been brought, the FTC may have the authority to sue the Russian government on behalf of American citizens for a violation of their privacy.

Comparative Legislation

Though some countries, such as China and Korea,[84] have restrictive NGO laws, many nations, notably Russia's fellow G8 countries, do not.[85] This section will briefly explore how the Russian NGO Law differs from American NGO legislation.

United States Constitution

Similar to the Russian Constitution, the United States Constitution protects the rights to association and to privacy, both of which the NGO Law potentially violates.

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

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[79] Foreign Sovereign Immunities Act (FSIA) Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611 (1988)).

[80] 40 *Columbia* 597.

[81] 28 U.S.C. 1330.

[82] FTC Act, 15 U.S.C. 45(a)(2).

[83] Levy and Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*. Stanford Law and Policy Review, at 558.

[84] See Karla W. Simon, "NGO Regulation in Southeast Asia: A Comparative Perspective," Thailand Law Forum, http://www.thailawforum.com/articles/ngo.html#f1.

[85] For a comparison of certain NGO regulations in twenty-five European Union Countries, Japan, and the United States, see http://www.cesifo-group.de/portal/page?_pageid=36,34661&_dad=portal&_schema=PORTAL&item_link=proj-oes-steuer-gemeinn-org.htm.

> the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This Amendment protects the right to free speech and the right to assembly. Though the First Amendment does not specifically name the right to association, the Supreme Court acknowledged that its "cases have recognized that it [First Amendment] embraces such a right. . . ."[86] The Supreme Court has interpreted the right to association in the following way:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.[87]

The Russian NGO Law restricts the right to association in both lines of cases. By refusing foreign nationals and others the freedom to participate in NGOs, the NGO Law interferes with their right to form relationships with those they choose. Additionally, by reserving the power to deny NGOs registration or to terminate projects, the Russian government violates the second form of freedom of association, concerned with free speech and assembly. Accordingly, the Russian NGO Law would be found unconstitutional by American standards.

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This Amendment has been interpreted to protect an individual's "reasonable expectation of privacy,"[88] which extends to cover the home, the office, the body, personal information, and personal beliefs.[89] As the previous section suggested, an enormous body of legislation protects the right to privacy in the United States. If any law similar to the Russian NGO Law were enacted in the United States, consequently, this threat to privacy would provide an additional ground for courts to rule it unconstitutional.

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[86] Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

[87] Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).

[88] Katz v. United States, 389 U.S. 347 (1967) (holding that individuals have a right to a reasonable expectation of privacy in government searches).

[89] See Levy and Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*. Stanford Law and Policy Review, at 523-24.

United States Revised Model Nonprofit Corporation Act

The Revised Model Nonprofit Corporation Act (RMNCA) was written in 1987 to serve as a guide for states in enacting their nonprofit laws.[90] Most states have enacted variants of it. The Russian NGO law differs significantly from the RMNCA, most importantly in terms of NGO privacy, members and memberships, and dissolution.

I. NGO Privacy

Section 16.02. Inspection of Records by Members.

(a) Subject to subsection (e) and section 16.03(c), a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in section 16.01(e) if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.

(b) Subject to subsection (e), a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) and gives the corporation written notice at least five business days before the date on which the member wishes to inspect and copy:

(1) excerpts from any records required to be maintained under section 16.01(a), to the extent not subject to inspection under section 16.02(a);

(2) accounting records of the corporation; and

(3) subject to section 16.05, the membership list.

(c) A member may inspect and copy the records identified in subsection (b) only if:

(1) the member's demand is made in good faith and for a proper purpose;

(2) the member describes with reasonable particularity the purpose and the records the member desires to inspect; and

(3) the records are directly connected with this purpose.

(d) This section does not affect:

(1) the right of a member to inspect records under section 7.20 or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

(2) the power of a court, independently of this Act, to compel the production of corporate records for examination.

(e) The articles or bylaws of a religious corporation may limit or abolish the right of a member under this section to inspect and copy any corporate record.

Whereas the Russian NGO Law grants the government power to summon documents from an NGO, the RMNCA grants this power only to NGO members and

[90] Online version at Online Compendium of Federal and State Regulations for U.S. Nonprofit Organizations, http://www.paperglyphs.com/nporegulation/documents/model_npo_corp_act.html.

courts, and the latter only pursuant to litigation.[91] In subsection (c), the RMNCA limits this power further by allowing members access to their organizations' documents only when the member's request is for a particular purpose, specifically tailored to that purpose, and the documents requested meet that purpose. In contrast, the NGO Law does not limit when the government can inspect an organization's private documents, or what documents it can inspect.

II. Members and Memberships

Section 6.01. Admission.

(a) The articles or bylaws may establish criteria or procedures for admission of members.

(b) No person shall be admitted as a member without his or her consent.

Section 6.02. Consideration.

Except as provided in its articles or bylaws, a corporation may admit members for no consideration or for such consideration as is determined by the board.

The RMNCA's section on members and memberships contrasts sharply with the Russian NGO Law's provisions. The model statute gives NGOs complete power to determine their membership, so long as "no person shall be admitted without his or her consent."[92] Instead of being concerned with whether an NGO includes foreigners or "undesirables," the RMNCA is concerned only with whether individuals choose to become members of the NGO.

III. Dissolution

The secretary of state may commence a proceeding under section 14.21 to administratively dissolve a corporation if:

(1) the corporation does not pay within 60 days after they are due any taxes or penalties imposed by this Act or other law;

(2) the corporation does not deliver its annual report to the secretary of state within 60 days after it is due;

(3) the corporation is without a registered agent or registered office in this state for 60 days or more;

(4) the corporation does not notify the secretary of state within 120 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or

(5) the corporation's period of duration, if any, stated in its articles of incorporation expires.

The RMNCA gives the Secretary of State the power to dissolve an NGO in five specified circumstances.[93] The second criterion, requiring the NGO to submit an

[91] The United States government does, however, retain authority to audit NGOs and summon documents for tax purposes.

[92] Subchapter A, Section 6.01.

[93] According to the RMNCA, an NGO may also be dissolved pursuant to a judicial finding that the organization was involved in fraud or other criminal activity. See Subchapter C, Section 14.31, Procedure for Judicial Dissolution.

annual report, appears the most similar to the requirements under the Russian NGO Law. It can be distinguished, however, on the basis that the required report is much briefer and simpler than the one required in Russia, and any dissolution procedure allows the organization to appeal as well as to seek to be reregistered following dissolution.[94]

It is noteworthy that all five circumstances involve failure on the part of the NGO to fulfill a duty, such as to pay taxes, deliver an annual report, or notify an agent of a change of address. The Russian NGO Law, in contrast, additionally allows the government to dissolve an NGO when the state finds the NGO a threat to the nation's political independence, cultural heritage, national interests, etc. – all highly discretionary grounds largely outside of the NGO's control.[95] In other words, the RMNCA allows the state to dissolve an NGO that violates a concrete law or fails to complete a specific and unambiguous administrative duty; the Russian Federation allows the government to dissolve an NGO that it deems threatening, a vague and amorphous standard.

Conclusion

The Russian NGO Law is unconstitutional and violates domestic, international, and foreign law. It has been condemned formally and informally throughout the world. The United States House of Representatives even passed a Resolution in December 2005, calling for Russia to withdraw the NGO legislation drafts.[96] The Law remained a controversial topic at the July 2006 G8 Summit in St. Petersburg.

A Russian colleague in St. Petersburg lamented during the G8 Summit that she was proud of her language and her country's history, but she was still awaiting an opportunity to be proud of her government. By repealing or significantly relaxing the NGO Law, the Russian Federation could reassure the world and Russian citizens that it is ready to take seriously its obligations to its people.

[94] See §14.22 Reinstatement Following Administrative Dissolution.

[95] The NGO Law also permits dissolution of an NGO for failing to submit documentation. See LNCO, Article 32.

[96] See "U.S. House Urges Russian Deputies to Withdraw NGO Draft," Associated Press, December 16, 2005. http://www.rferl.org/featuresarticle/2005/12/8cead03a-038d-4d3f-a562-78b5a7d23f6e.html.

ARTICLE

NGOs and Their Role in the Global South

Monsiapile Kajimbwa*

Why do NGOs exist today? Two reasons: the retreat of centralized government and the keen interest of donors. In the era of governance reform, one of the NGO's key mandates is to advance social, political, and economic development. To succeed at this, NGOs must reassess their operations. NGOs in the South ought to shift from implementing their own programs to building the community's capacity to achieve sustainable livelihoods. And NGOs in the North ought to concentrate on helping Southern ones achieve their goals.

1.0 What Are NGOs?

Turner and Hulme (1997, p. 200) define NGOs as "associations formed from within civil society bringing together individuals who share some common purpose." Hulme (2001, p. 130) characterizes them (as well as civil society) as "peopled organizations [that] are both not part of the state structures, are not primarily motivated by commercial considerations or profit maximization, are largely self-governing, and rely on voluntary contributions (of finance, labour or materials) to a significant degree." So, as Fowler (2000, p. 112) observes, "for our purpose, business is not included." In support of this analysis, Edwards and Hulme (1995, p. 20) expound that "most organizations referred to as NGOs thus belong, analytically, to the private sector, albeit to the service (i.e., not-for-profit) sub-sector thereof."

From a larger perspective, the prominent elements of a society are the state, the market (private sector), and the civil society – the "third sector." The state maintains public order and, to one degree or another, serves its citizens' needs. Companies in the marketplace pursue profits. And NGOs? They, like the state, seek to serve community needs, such as health, education, water, and sanitation. They may do so at least partly with government funding. For example, Clark (1991, p. 5, citing W. Fernandes) states that "Indian NGOs are now of much significance to the country's development efforts.... The government's latest five-year plan has a one and a half billion rupee provision for funding NGOs." At the same time, though, NGOs stand apart from the state, engage in policy advocacy, and sometimes criticize government institutions and officials. As Fowler observes (1997, pp. 12-13), NGOs may provide a link between micro-level actions (providing individuals or communities with construction materials, farming equipment, or legal advice, for example) and macro-level actions (policy advocacy, lobbying, and monitoring how the state uses its powers).

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Micro and macro can be viewed from a different perspective, as Turner and Hulme (1997, p. 201) do: "a primary distinction can be made between organizations that are based in one country (or several countries) and [those that] seek to assist in the development of other countries. These are international NGOs (INGOs). Intermediate NGOs which operate across developing country or a region of a country [in the South can be termed] Southern NGOs. Closest to the practice of development are grassroots organizations (GROs) that operate within a limited area such as in a group of villages or part of a city."

2.0 Why Do NGOs Exist?

The existence of NGOs stems from both internal and external factors. Internally, the gradual retreat of the government in public service delivery has left a vacuum that NGOs try to fill. The retreat is due to governments' inability to provide high-quality public services to citizens. From after World War II to the late 1970s, the role of governments was primarily to run the public sector, oversee the economy, and treat its citizens as consumers. In development, especially in Africa, the dominant approach during this period was top-down, state-controlled, and supply-driven (see also Chambers 2005, pp. 1-29; Lewis 2005, pp. 11-13). As a result, citizens could not realize their potential to organize and make optimal use of their human, financial, and natural resources.

The period was characterized by malfeasance. As Tendler (1997, p. 1) observes, "public officials and their workers pursue[d] their own private interests rather than those of public good." Many countries in Africa developed noticeably weak public institutions with inefficient operations, incapable of combating poverty. Hulme (2001, p. 132) notes that "during the 1970s the failure of this approach rapidly to deliver economic growth and poverty reduction was increasingly acknowledged and by the early 1980s a paradigm shift was evident." Budget cuts during this period left the state increasingly "unable to cope with its basic functions of provision of infrastructure and social service" (Hoeven and Kraal 1994, p. 24).

The wave of globalization has challenged the effectiveness of the state and its bureaucratic systems, especially centralized political, administrative, economic, and fiscal systems. As the Commonwealth Secretariat (1996, p. iv) argues, "the capacity of the public sector to establish the right regulatory frameworks for development, to enforce them, to develop national productive capacity, to attract capital, and to act as producer, are all in question."

Into this gap stepped NGOs, with new approaches to enhance efficiency and effectiveness in providing public services and infrastructure. At the same time, NGOs have filled a crucial role in enabling people to organize themselves and share responsibility for governance. "NGOs exist as alternatives" to a governmental, centrally led economy, in the view of Mitlin, Hickey, and Bebbington (2005, p. 1). With new models of public management and many governments seemingly open to reform (see also Minogue 2001, pp. 1-43; Obsorne and McLaughlin 2002, pp. 7-33; Flynn 2002, pp. 57-91), the view of NGOs as alternatives is justified.

In large part, the governance reforms require the state to devolve its powers from the central government to institutions closer to the public. An important result, according to Hulme (2001, p. 129), is "the return of the state for civic organizations – and particularly NGOs and GROs – with a focus on the role that they can play to

improve the access that poorer and disadvantaged publics have to basic social and economic service."

Externally, the existence of NGOs has also been stimulated by increased eagerness on the part of the donor community to channel aid through them. As Hulme (2001, 137, citing Edwards, M., and Hulme, D.) argues, "the rise and rise of NGOs throughout the 1980s and 1990s was fueled by international development agencies and aid donors who assumed that civic organizations should rapidly scale their direct service provision function" (see also Duhu 2005, pp. 45-55). As a result, during the last two decades, both developed and developing countries have witnessed steady increases of NGOs. In the South, for example, "the number of registered NGOs in Nepal increased from 220 in 1990 to 1,210 in 1993; in Bolivia from 100 in 1980 to 530 in 1992; and in Tunisia from 1,886 in 1988 to 5,186 in 1991" (Edwards 2004, p. 21, citing Edwards and Hulme).

NGOs have also grown more numerous in Tanzania during the last two decades. As Oda van Cranenburgh and Rolien (1995) report, "since the early 1980s and especially 1990s a considerable growth in the number of national NGOs in Tanzania has taken place [with] an increase from 137 NGOs in 1986 to 470 NGOs in the 1990s, ranging from socio-economic development type of NGOs, professional, religious, environment, women, youth, health, education, to HIV-AIDS NGOs." The number of NGOs increased particularly during the past decade, following the approval of Tanzania's NGO policy. TANGO now includes "620 NGOs, most of which are regional and district networks that have members in the regions of 50 plus. This makes the TANGO membership by proxy to be around 1500 NGOs" (TANGO 2005).

Figures from developed countries, the North, also show that NGOs have dramatically increased over the same period. "In western Europe and the USA the pattern is more complex. In America as whole the national non-profit organizations have increased from 10,299 in 1968 to almost 23,000 in 1997" (ibid., p.22, citing Salamon and Anheier.). The number of NGOs in the United Kingdom is even more dramatic: "Britain has a well developed voluntary sector, with a total of 200,000 registered charities in 1995" (Charities Aid Foundation, as quoted in Randel and German, 1999).

In sum, I concede to Shivji (2003, 694), who argues that "an alternative world, a better world ... is possible." That is why NGOs exist. But what role and function should they adopt in the first decades of the 21st century?

2.1.0 The Role and Function of NGOs

In general terms, NGOs provide potent forces for social, political, and economic development (see also Edwards, M (2005, p.13-15). In specific terms, the literature cites a great many roles and functions of both the Southern and Northern NGOs, see for example Helmich (1999, pp. 1-6), Lewis (2001, pp. 62-82), Edwards and Hulme (pp. 31-40), and Smillie (pp. 71-84).

In what follows I discuss two specific roles and functions. First is the facilitative role and function of Southern NGOs in their countries or region. Second is the role and function of Northern NGOs to strengthen capacity of Southern NGOs. This approach provides a comparative analysis based on the different capacities in resources and skills of the two types of NGO.

2.1.1 Facilitating Community Programs

During the first decades of the 21st century, Southern NGOs will have to refocus their role and function. Although Lewis (2001, p. 69) argues that the NGO is an implementer and "can be engaged in providing services to its clients through its own programmes," I argue, on the contrary, that the NGO should not implement its own programs, but rather should help communities achieve their own sustainable programs economic, political and social areas. As Fowler (1997, p. 13) underlines, "facilitation is a critical aspect of participation process" that Southern NGOs need to learn and practice. The term *facilitate* here refers to the process of creating space for people to act. Under this definition, how can an NGO have its own programs, unless those programs specifically seek to build local skills and capacities? As suggested by Lewis, NGOs customarily adopt a top-down and supply-driven approach to social, political, and economic development. Where NGOs directly implement their own programs, they are likely to minimize any sense of ownership on the part of the community. The top-down approach in turn locks up people's potential to act.

In that respect, community at the grassroots level may not see any need to mobilize resources and contribute toward implementing someone else's programs. They will instead simply depend on the NGOs, "the experts," to implement programs. Such NGO programs as health, water, income generating, civic education, and advocacy often unfold with minimal dialogue between the community and the NGO.

If, by contrast, community development programs facilitated by NGOs are seen as negotiated undertakings, which match local livelihood strategies and development opportunities, NGOs in the South may, as Lewis suggests, be reluctant to assume ownership of any program. By assuming ownership, Smillie (1999, p. 34) argues, NGOs "are likely to make fundamental trade offs every day between the needs of their beneficiaries and the opportunities created by the emotive culture of charity." In this view, the programs, even if contracted by government or a donor agency, belong not to the NGO but to the community.

How can an NGO assume that it owns a program that is influenced and in part undertaken by the community? That is why Helmich (1999, p. 5) observes, "while the practical expertise of NGO in poverty reduction is large, a gap needs to be closed between the setting of NGO goals and actual NGO practice." Optimal programs emerge when they are organized jointly, with the NGO pursuing a specific *community* goal, whether economic, social, or political. Bridging the gap requires participatory facilitative skills, which Southern NGOs too often lack.

Resources that Southern NGOs mobilize from within and outside their countries may be used as seed money for the community to map out programs that will enable citizens to secure sustainable livelihoods – as Fowler (2000, p. 117) puts it, "catalysing the citizen base." Southern NGOs have to also be serious about their role and function. Most of them seem to lack clear vision and mission. In fact, Shivji (2004, p. 690) comments, "most NGOs do not have any grand vision of society, nor are they guided by large issues; rather, they concentrate on small, day-to-day matters. In NGOs, we seldom spend time defining our vision in relation to the overall social and economic context of our societies" (see also Clark 1991, pp. 12-13). Lacking vision and mission, NGOs find it difficult to articulate their facilitative role and function.

2.1.2. Strengthening the Capacity of Southern NGOs: The Role of Northern NGOs

In the upheavals of recent years, both developing and developed countries have witnessed three important shifts. First, governments have decentralized, particularly in developing countries, with a view toward empowering the public. Civic organizations and the market are granted considerable space. Governments in developing countries are slimming down and delegating responsibilities, so NGOs and other institutions gain increasing responsibility over political space. However, emerging institutions, both government and civic, are often weak in these countries.

Second, Southern NGOs that are keenly interested in providing an alternative approach to government are increasing and growing. These NGOs often lack the capacity to constitute a potent force in social, political, and economic development. Southern NGOs need improved capacities if they are to meet those challenging scenarios.

Third, CARE, Oxfam, Save the Children, Concern World Wide, and many other NGOs from the North are streaming to the South in the name of development. These NGOs either fund Southern NGOs or directly implement programs in the South. The Northern NGOs need to refocus. They ought to make a radical shift from implementing programs in the South to strengthening the capacity of Southern NGOs. To support the argument, Smillie (1999, p. 75) provides a substantive example. The Canadian Partnership Branch "has articulated several objectives. Among them is capacity building in developing countries: to strengthen the capacity of southern organizations and institutions to make a significant and sustainable development impact among the disadvantaged communities" (see also Duhu 2005, p. 44; Tapaninen 2000, p. 40).

Seemingly, this is a realistic and achievable objective for Northern NGOs during the first decades of the 21st century. Additionally, Northern NGOs have greater skills in fundraising than Southern NGOs. For example, Randel and German (1999, p. 236, citing Charities Aid Foundation) argue that "in 1996 the voluntary income of Britain's top 500 charities reached almost £2 billion (about $3 billion)." Southern NGOs can hardly dream of amassing such resources.

Northern NGOs may use their resources to strengthen the capacity of Southern NGOs on many fronts, as Duhu (2005, p.44) notes: "program support, institutional support, technical support, partnerships and coalitions." Skills in the area of strategic planning, for example, cannot be overemphasized. Sadly, Lewis (2001, p. 158) argues that "in many aid-dependent contexts it is common for partnerships involving NGOs to have passive character, often because the idea of partnership is forced in some way."

There is cause for optimism. The very concept of partnership is relatively new, and Northern NGOs may not shy away from the needed changes. "Many Northern NGOs moved in recent years in broad terms from the approach in which they implemented projects themselves in developing countries ... to one which most now seek to form partnership" (ibid., p. 157). The partnership strategy, in itself, is necessary but not sufficient.

Integrative partnership, which enables Southern NGOs to learn by doing, is the necessary approach. As James (2001, p. 61) argues, "while Northern NGOs may have been instrumental in capacity building process on the agenda, ownership for the

capacity building must quickly reside in the client NGO." It may empower the client to own the change process for sustainable development programs. Northern NGOs need to further search for ways to enhance effective and efficient partnership and thereby strengthen the capacity of Southern NGOs. Otherwise, as Edwards (2005, p. 35) cautions, the South faces the danger of having outsiders "promot[e] certain associations over others on the basis of preconceived notions of what civil society should look like."

3. 0 Conclusion

This article has argued that NGO exist for two broad reasons. Internally, they exist because the government cannot deliver high-quality public services to its citizens, leaving a space for NGOs to step in – and, ideally, to help people organize and self-develop, and to make the best use of the community's human, financial, and natural resources. Externally, NGOs exist because donors channel funds to them.

In the era of new public management, NGOs hold increasing responsibility for social, political, and economic development. To succeed, Southern NGOs must help the community implement its own vision. They must become responsible agents of change. And Northern NGOs must help them succeed.

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ARTICLE

Toward an Economic Interpretation of the Nondistribution Constraint

Vladislav Valentinov[1]

This article seeks to identify the integrative core of the theoretical understanding of the nonprofit sector. It argues that the nonprofit organization generally represents a response to the difficulties in the adaptation of some economic agents' monetary motivations to others' nonmonetary motivations. From this viewpoint, switching off the profit motive implies the elimination of the intermediating role of monetary motivation and, in turn, the implementation of activities aimed at directly satisfying nonmonetary motivations, through the adoption and advancement of a mission. Theories of the nonprofit sector indicate special cases where monetary and nonmonetary motivations are out of balance; the article proposes an alternative conceptualization of the demand-side and supply-side reasons for the existence of nonprofits.

INTRODUCTION

The economic theory of the nonprofit sector has witnessed significant progress in the last decades. The existence of nonprofit organizations has been attributed to a number of specific market and government failures that create the need for alternative institutional frameworks to perform some socially useful tasks. However, an important challenge faced by the evolving economic theory of this sector lies in taking account of the extraordinary heterogeneity and diversity of organizations in it. So far, different economic theories, such as information asymmetry and the public goods perspectives, have successfully explained parts of the nonprofit sector (Ben-Ner and Gui, 2003), yet they do not identify the integrative conceptual core of a theoretical understanding applicable to the whole sector.

To be sure, the existence of important similarities among nonprofits cannot be denied. A good illustration is provided by the "structural-operational" definition of nonprofit organizations offered by Salamon and Anheier (1992, 1996). According to the definition, nonprofits must be institutionalized to some meaningful extent, as well as be private, non-profit-distributing, self-governing, and voluntary. The last three characteristics are particularly important in capturing the specific nature of the sector. The fact that nonprofits share a number of common institutional characteristics argues in favor of the existence of an integrative conceptual core, and, moreover, suggests that this core should be somehow related to these characteristics.

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Therefore, a possible approach to identifying the common core of nonprofit sector theories lies in examining the general significance of the characteristics commonly shared by nonprofits. By "general significance," I mean that the examination should not be confined to particular classes of situations, whether information asymmetries in markets or supply of public goods, but rather a priori apply to the whole range of nonprofit organizations. The relevant questions here are two. First, why can nonprofit orientation be important for our society in general? Second, how do bottom-up governance and voluntary economic action produce social utility?

This article will contribute to addressing these questions by focusing on one major characteristic of nonprofit organizations – the profit distribution constraint. Specifically, the article will seek to explore the general reasons for switching off the profit motivation, and then analyze how these reasons coincide with existing theories of the nonprofit sector. The objective will be to demonstrate that these theories are essentially variations on one theme, and, moreover, variations that can be systematically organized in a logical framework. Identification of this framework represents a step toward identifying the integrative conceptual core of the sector's theoretical understanding.

I limit my inquiry here to the nonprofit character of nonprofits and disregard their other essential features, such as bottom-up governance and voluntary membership. Analyzing all of the features is crucial to identify the common conceptual core of nonprofit sector theories, even though each feature represents a quite complex object of investigation.

NONPROFIT ORGANIZATION AND ECONOMIC ADAPTATION

This section will discuss why pursuit of profits may fail to satisfy human needs in a market economy. The objective is not to analyze the whole spectrum of negative consequences of profit seeking, but rather to focus on those consequences that can be overcome by creating nonprofit organizations. Specifically, the section will propose an alternative theoretical view of the problem of economic adaptation and will rationalize nonprofit organization as a partial solution to that problem.

Profit as the basis for economic adaptation

It is common knowledge that pursuit of profits has fundamental significance for the operation of markets. The prospect of receiving profits motivates entrepreneurs to produce products and services intended to satisfy human needs. The nature of competition implies that the greater an entrepreneur's ability to satisfy these needs, the greater his profits. It is from this perspective that the existence of nonprofits may look paradoxical in a market economy.

To expand somewhat on the motivational role of profits, let us recall the admiration for markets expressed by Hayek, who viewed the economic problem of society as that of "rapid adaptation to changes in the particular circumstances of time and place" (1945, p. 524). Hayek considered it a "marvel" that "in a case of a scarcity of one raw material, without an order being issued, without more than perhaps a handful of people knowing the cause, tens of thousands of people whose identity could not be determined by months of investigation, are made to use the material or its products more sparingly, i.e., they move in the right direction" (ibid., p. 527).

Yet, whereas Hayek praised the adaptive capacities of decentralized pricing systems and the ability of prices to codify essential knowledge, this adaptation results

from the fact that it brings better economic performance – i.e., higher profits. The role of the price system, according to the Hayekian view, lies in economizing on information costs. This economizing, however, is not an end in itself; it gives entrepreneurs no incentives to work better. The incentives come from profits, not prices. Prices and profits stand here in a dialectical relationship: profits motivate entrepreneurs to effect better adaptation, whereas prices ensure that this adaptation is feasible and efficient.

As suggested by Williamson (1996, p. 101), the view of adaptation as the central economic problem was also shared by Barnard (1938), though he considered internal organization rather than markets to be its major institutional mechanism. The views of Hayek and Barnard are complementary in that the adaptive capacity of markets is realized because entrepreneurs are able to effect internal changes in their organizations. Like Hayekian adaptation in markets, internal adaptation is motivated by the prospects of receiving monetary rewards.

Thus there must exist an important conceptual linkage between pursuit of profits and both types of economic adaptation – through markets and through internal organization. The prospect of monetary gains in the form of profits motivates entrepreneurs to change the structures and activities of their firms whenever new opportunities emerge. This explains why markets are flexible and efficient in satisfying some human needs – and it also, paradoxically, underlies disadvantages of markets in organizing the satisfaction of some other needs.

The profit-based adaptation and the role of nonprofit organization

The problems of profit-based adaptation stem from the fact that the market represents a system of indirect, rather than direct, coordination between consumers and suppliers, in that these two major categories of stakeholders pursue qualitatively different objectives. The former want specific products and services, whereas the latter seek profits and are essentially indifferent toward the nature of products and services they supply. The extent of this indifference of suppliers is directly proportional to the effectiveness of their profit motivation. This is what may be called "objective mismatch" of markets, which presupposes the possibility that greater profits may not always be associated with better satisfaction of human needs. Evidently, this mismatch is also characteristic for the relationship between employees and employers. Insofar as employees are motivated by the prospect of receiving remuneration for their labor from the employer, they can be considered indifferent to the nature of their work. And insofar as they are indifferent, another potential for inconsistencies arises between their motivations and those of their employers. These inconsistencies are basically represented by agency problems, which presuppose that agents pursue their own interests at the expense of principals (see e.g. Jensen and Meckling, 1976).

The commonality shared by both types of "objective mismatches" – between suppliers and consumers on the one hand and employers and employees on the other – can be generalized as the conflict between monetary and nonmonetary motivations, conceptually returning to the distinction between use value and monetary value in classical economic theory. The crucial point here is that monetary motivation is always associated with economic agents' indifference to the products or processes concerned. Even though empirically, the agents may not be *fully* indifferent to them – i.e., they may also have some nonmonetary motivations – they can be considered

indifferent to the extent that they are motivated by the monetary dimension of the products and services.

In contrast, nonmonetary motivation is related to specific types of products and processes, and is lost whenever any of relevant idiosyncratic characteristics are significantly altered. In this sense, nonmonetary motivation presupposes the opposite of indifference in the attitude of economic agents toward products and processes. This view allows us to reformulate the problem of economic adaptation in a way different from that of Hayek: not as adaptation of resource allocation to ever-changing relative prices, but rather as adaptation of the monetary motivations of some economic agents to the nonmonetary ones of other agents. This second type of adaptation, like the first one, presents no serious challenge in the frictionless world of neoclassical economics. The second type of adaptation no longer looks unproblematic, however, if we move from this imaginary world into the real one, characterized by positive transaction costs, opportunism, public goods, externalities, and the non-trivial effect of political and cultural institutions on the organization of economic transactions.

Just as relaxing the assumptions of neoclassical models reveals the importance of institutions in the operation of an economy, the actual difficulties of adapting monetary motivations to nonmonetary ones may be supposed to have led to the emergence of certain institutions intended to overcome those difficulties. Theoretically, these institutions should function to eliminate the intermediating role of monetary motivation, which in some cases provides incorrect incentives, and ensure that all major participants in transactions share the same (or at least mutually consistent) nonmonetary motivations. In the ideal case, these institutions would make suppliers have the same nonmonetary motivations as consumers, and employees have the same nonmonetary motivations as employers (with respect to the nature of the work). This, of course, sounds paradoxical. Is it really possible that entrepreneurs supply a product for its own sake, rather than for the sake of profits? Or that employees perform their duties because they derive positive utility from the process of work, rather than because they expect extrinsic remuneration?

Common sense suggests that these situations, paradoxical as they seem, are nevertheless possible. Behind the somewhat special vocabulary adopted in this description, one can recognize the nonprofit organization. Specifically, the proposed approach suggests that a nonprofit organization, of whatever type, is essentially a response to the difficulties in adapting monetary motivations to nonmonetary ones. A nonprofit attempts to overcome these difficulties by "switching off" the profit motive and replacing it with a "mission," which is invariably formulated in terms of specific outputs and thus represents the object of nonmonetary motivation. The nature of the outputs, whether research or social services or arts, gives a nonprofit its essential identity and legitimacy.

Thus, the role played by mission in a nonprofit organization is to some extent equivalent to the role played by profit in a for-profit firm. But substituting mission for profit raises the difficulty of shifting from the monetary motivation related to a particular product or activity to the pertinent nonmonetary motivation. If suppliers or employees are driven only or principally by monetary motivations, the result is frustration of the nonmonetary motivations of consumers regarding specific products and services and the nonmonetary motivations of employers regarding specific work activities.

Toward an integrative view of nonprofit, for-profit, and cooperative organizations

The distinction between monetary and nonmonetary motivations represents a possible criterion for constructing a continuum of different types of organizations. At the one end of the continuum are for-profit firms, where for both entrepreneurs and employed staff, monetary motivation overshadows nonmonetary motivation. At the other end are mission-oriented nonprofits, whose participants provide their contributions in the form of money and time because they derive positive utility from the process. To be sure, not all for-profit firms lie at one end of the continuum, and not all nonprofit firms lie at the opposite end. That is, nonmonetary motivations are relatively important in some for-profit firms, and monetary motivations – such as motivations of employed staff and motivations of consumers paying for rendered services – are relatively important in some nonprofits. Many firms of both types lie at various points along the continuum.

Near the middle of the continuum is an intermediate type of organization that unites monetary and nonmonetary motivations: cooperatives operating on the principles of mutual self-help. The principal goal of such organizations is for the members themselves to provide specific products or services to fellow members (self-supply). Here, the specific (or even idiosyncratic) nature of these products and services is important, because other products that the cooperative might produce would be useless for at least some members. On the other hand, the outputs generated by cooperatives ordinarily promote some monetary motivations of the members. Hansmann (1980, p. 889) suggests that "cooperatives often appear to be established to limit the price charged to the consumer." Additionally, although cooperatives as legal entities are not themselves entitled to accumulate profits, they may distribute their net earnings to members rather than reinvest them in the operation (ibid).

Even where controlling the prices charged to consumers is not the principal function of a cooperative, the interests pursued by its members are essentially related to improving their economic standing, which corresponds to monetary motivation in the broad understanding of the term, as individual material gain. Hence, those nonprofits that aim primarily to improve the economic standing of their beneficiaries will be located relatively close to cooperatives on the above-mentioned continuum. A graphical representation of the continuum is offered in the Figure 1.

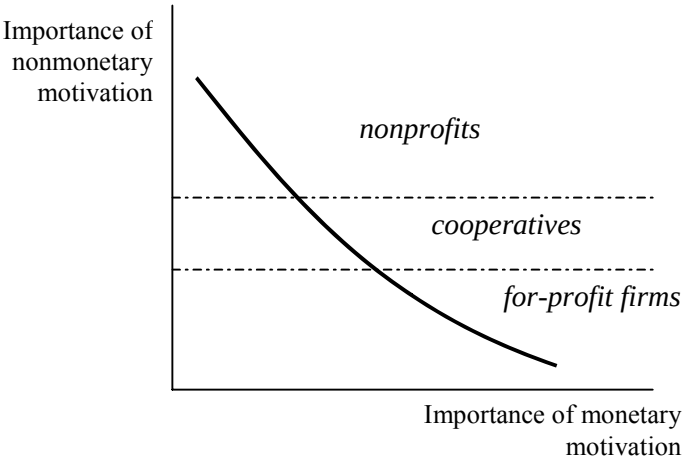

Fig.1. A continuum of organizational forms

In a general sense, both cooperatives and nonprofits reflect stakeholders' reactions to the inability of profit-based economic adaptation to satisfy certain human needs. Both types of organizations seek to eliminate the monetary motivations responsible for the emerging economic or social problems. It is interesting, however, to note the different mechanisms that they use to ensure that suppliers and consumers share the same nonmonetary motivation: cooperatives rely on direct internalization of activities by means of vertical integration, whereas nonprofits do not necessarily make suppliers identical to consumers. While the mechanism adopted by cooperatives appears relatively straightforward (economic agents generate the required outputs for themselves), most nonprofits – those where the bulk of resources do not come from beneficiaries – avoid the "objective mismatch" in a remarkably different way. Managers of nonprofits commit themselves to act in the direct interests of their consumers (beneficiaries) by abandoning the monetary motivation, adopting nonprofit status, and promising adherence to a certain mission.

Evidently, this self-commitment makes sense in some cases but not in others. It is easy to imagine that an organization providing personal services adopts the nonprofit constraint to enhance its trustworthiness in the eyes of actual and potential clients. By contrast, it would be almost absurd to believe that a large agribusiness firm buying produce from farmers would adopt this constraint to assure farmers that it would not abuse its bargaining power and damage the farmers' economic interests. Instead, farmers create cooperatives to protect themselves from such dangers.

What, then, generally determines whether a cooperative or a nonprofit organization is chosen to protect against opportunism? This is a complex question that merits a separate theoretical investigation. As a preliminary note, the feasibility of these types of organization is determined by characteristics of the respective supply and demand stakeholders. Cooperatives may be expected to dominate when the suffering stakeholders can efficiently engage in collective action and organize an alternative, whereas nonprofits arise when the suffering stakeholders are more diffuse and less able to organize. Additionally, the opportunistic behavior of both supply and demand stakeholders may be discouraged by their adherence to certain social values. The adherence to values may therefore facilitate, depending on the circumstances, their self-commitment in the form of adopting nonprofit status or their internalization of activities through vertical integration.

REVISITING THE THEORIES OF THE NONPROFIT SECTOR

This section will seek to reconcile the proposition advanced here – that the nonprofit organization represents an institutional response to the difficulties in adapting monetary motivations to nonmonetary ones – with the major existing theories of the nonprofit sector. This can be done by showing that these theories represent special cases of the above-mentioned "objective mismatch" in the operation of markets. The proposed approach will also be used to develop an alternative conceptualization of demand-side and supply-side reasons for the existence of nonprofits.

Reasons for discrepancies between monetary and nonmonetary motivation

Although the preceding argument rested on the assumption that the "objective mismatch" between suppliers and consumers, on the one hand, and employers and employees, on the other, complicates and distorts processes of economic adaptation, no specific instances of these distortions have been discussed. This subsection aims to

fill in this gap. It also seeks to investigate why the monetary motivation of some stakeholders sometimes fails to harmonize with the nonmonetary motivation of others, thus preventing profit-based adaptation from adequately satisfying human needs. Based on the existing literature, four reasons can be proposed to explain this discrepancy.

One reason why the pursuit of monetary interests may not optimally satisfy nonmonetary ones is the problem of opportunism, which emerges due to asymmetric distribution of information between suppliers and consumers. The concept of opportunism is the basis of the by-now classical "contract failure" theory of nonprofit organizations, developed primarily by Hansmann (1980, 1987; also Easley and O'Hara, 1983), and the "consumer control" theory offered by Ben-Ner (1986). These theories represent two above-discussed views on how opportunism can be combated by abandoning the profit motive: (1) self-commitment on the part of suppliers, in the form of adopting the nondistribution constraint (Hansmann); and 2) internalization of production activities by backward vertical integration by consumers (Ben-Ner). The concept of opportunism, however, also fits well in the proposed framework of (dis)harmony between the two types of motivation: by the opportunistic provision of false information about the attributes of products and services, suppliers are able to gratify their monetary motivations better than if they would provide honest information, and the result fails to gratify the nonmonetary motivations of consumers.

Another reason is that people may benefit from the existence of some products, services, and activities even if they do not pay for them. Essentially, this reason relates to the fact that some goods that satisfy consumers' needs are public or quasi-public rather than private. This reason represents another by-now classical theory of nonprofit organization, this one offered by Weisbrod (1977), who argued that governmental provision of public goods is insufficient because it is oriented to the preferences of the median voter and needs to be supplemented by nonprofit provision. Nonprofit organizations, according to this theory, act as "extra-governmental providers of collective consumption goods" (ibid., p. 30). Public goods theory is also consistent with the proposed framework insofar as suppliers' monetary gratification does not increase alongside consumers' nonmonetary satisfaction when they do not pay for the goods they consume. Nonprofit provision of public goods is evidently based not on internalization of production by consumers, since consumers here are likely to be diffuse and difficult to organize, but rather on suppliers' self-commitment to act in the interests of consumers. This self-commitment presupposes relevant value orientations of entrepreneurs, volunteers, and donors. Social values motivate volunteers and donors to contribute time and money to such nonprofits, whereas these resources could not become available to entrepreneurs through the regular market mechanism. An individual's value orientation depends on the characteristics of his or her personality, as suggested by Young (1986). In a similar vein, James (e.g. 1984, 1986) found that nonprofit firms are often ideological, seeking to pursue abstract ideas rather than to make profits.

Still, social values appear to have a more general significance for the nonprofit organization, since they evidently represent a special class of nonmonetary motivations with no corresponding monetary motivation that could be gratified through the market mechanism. Social values are understood here as enduring beliefs that specific states of existence are socially preferable to opposite or converse states (based on Rokeach, 1973, p. 5). People with these beliefs are motivated to realize them, by moving social reality in the direction of the ideal. A possible mechanism for

changing social reality presents itself in the form of supporting a nonprofit organization with the mission to promote the particular values.

The importance of nonprofits in realizing social values is also explained by limitations of both the market and the government sectors. Markets are disadvantaged here because social values – both their specific contents and their degree of acceptance in society – are unrelated to the economic performance of organizations that seek to promote them if performance is determined solely by market forces (see e.g. Sagoff, 1988; Lane, 1991). Unexpected variations in performance consequently represent a risk factor that can be reduced by nonprofits receiving donations. Markets also presuppose specific patterns of managerial behavior that are not necessarily consistent with the pursuit of social values. For their part, governments are bound by strict rules that may increase the costs of activities aimed at realizing social values; in addition, performance of these activities by government requires a broad consensus about their importance in society (Douglas, 1987). Finally, both markets and governments, if entrusted with the performance of social value-related activities, may crowd out private voluntary initiatives (Weiss, 1986; Steinberg, 1993; Frey, 1997).

The fourth reason behind the conflict of monetary and nonmonetary motivations is that people sometimes derive positive utility from activities involving communication and association with one another. These activities are ordinarily organized in the form of clubs, though the clubs may undertake many other activities as well. It is difficult, indeed, to imagine any alternative organizational arrangements for such activities as playing cards or chess, singing, or dancing, if the objective lies in enjoying the process rather than acquiring particular skills. The problem here is similar to that of social values, since the respective nonmonetary motivations do not have monetary counterparts. The importance of associational activities is emphasized by Hansmann (1980) in his treatment of exclusive social clubs. He argues, however, that the for-profit organization of such clubs is theoretically possible but would result in monopolistic exploitation of members by club owners. Members can obviate this danger by organizing the club as a mutual nonprofit, which in this case is functionally equivalent to a cooperative. As Hansmann himself notes, the rationale for the nonprofit organization of exclusive social clubs falls outside his "contract failure" theory and is more characteristic of cooperatives than of nonprofits. However, whereas Hansmann bases his discussion on the example of nonprofit country clubs in the United States, the possibility of monopolistic exploitation seems less relevant for other activities involving interpersonal association, such as singing or playing cards, in which case no realistic market alternatives to the nonprofit organization exist.

Thus, all of the reasons mentioned for discrepancies between monetary and nonmonetary motivations – opportunism, public goods, social values, and direct enjoyment of interpersonal association – represent situations that logically cannot be integrated into the framework of market mechanism, since the monetary motivations are either giving systematically wrong incentives or totally missing. The use of the for-profit organization in these situations can therefore be described as structurally infeasible. This stands in an interesting contrast to the rationale for the cooperative organization, which is based on the partial abandonment of the profit motive. Whereas the cooperative organization can also be rationalized as a response to the imbalance between monetary and nonmonetary motivations, the for-profit organization of activities performed by cooperatives does not appear structurally infeasible. To the contrary, many activities performed by cooperatives, especially those related to purchasing and selling, can be also carried out by individual members for whom the

nonprofit constraint is not relevant. Cooperative organization is preferred (when it is) on the basis of its superior cost-economizing characteristics related to the economies of scale and gains of collective action. This cost economizing of course reflects the monetary motivations of cooperative members, so cooperatives have been classified above as "hybrids" between nonprofit and for-profit firms.

Integrating the demand and supply dimensions of the nonprofit organization

The development of the theory of nonprofit organization so far has been generally driven by two distinct questions. (1) Why do people need this organization? (2) Why does somebody agree to contribute resources to found and operate it? (Ben-Ner and Hoomissen, 1993). The theories that provide answers to these questions have been classified, respectively, as demand-side and supply-side. Though analytically insightful, however, this distinction further complicates the formation of an integrative theoretical understanding of the nonprofit sector, as do the internal distinctions within the body of demand-side theories. This section will apply the proposed framework of relationships between monetary and nonmonetary motivations to substantiate the view that the demand-side and supply-side reasons for the existence of the nonprofit organization, like the internally differentiated demand-side reasons, can be arrayed along a continuum.

This continuum can be structured along two major criteria: the extent of inconsistency between relevant monetary and nonmonetary motivations, and the extent to which relevant nonmonetary motivations focus on one's own consumption rather than concern for others. The first criterion underlies the distinction between the two major organizational strategies that can bring the two types of motivation in balance or at least reduce their discrepancy: self-commitment on the part of producers, and internalization of the activity in question in the form of self-supply. These two strategies have obvious differences in transaction costs: the first requires a particular legal status for the organization (non-profit distributing), whereas the second presupposes collective action by demand stakeholders. The first therefore appears a cheaper alternative, preferable in those cases where harmonizing the motivations is sufficient; it is logical to suppose that the second strategy will be used when the first proves too weak.

Indeed, the nondistribution constraint's failure to prevent opportunism in all cases has been recognized and criticized as a limitation of contract failure theory (James, 1983; Ben-Ner, 1986). Moreover, the adoption of this constraint requires from an entrepreneur only a somewhat deeper understanding of the specificity of the market he is in; no altruism or ideological inclination is necessary, though the latter can of course promote the choice of nonprofit organizational form (see, e.g., Rose-Ackerman, 1996). As Glaeser and Shleifer (1998) demonstrate, completely self-interested entrepreneurs can rationally opt for nonprofit status as a means of committing to soft incentives. Obviously, much more is needed to ensure that a certain number of group members can work together for the common benefit.

So, if the self-supply strategy involves higher transaction costs than the self-commitment strategy and is likely to be used only after the self-commitment strategy proves inadequate or too weak, the choice between these strategies can be explained by the extent of inconsistency between relevant monetary and nonmonetary motivations. Small inconsistencies can be compensated by the relatively cheaper and weaker strategy of adopting the nondistribution constraint; for larger inconsistencies, in contrast, the nondistribution constraint will not prevent opportunism, requiring

instead the more radical remedy of self-supply. Although this explanation does not suggest what circumstances make this inconsistency strong or weak, it demonstrates that the extent of this inconsistency underlies the incentives to contribute resources to a nonprofit organization.

Specifically, whereas a nonprofit organization requires both demand and supply to exist, the types of nonprofit organizations differ with respect to the relative scarcity of these factors – i.e., with respect to whether demand or supply constitutes the major limitation. The self-commitment strategy can be considered more demand-driven than supply-driven because, given a certain demand for a nonprofit organization, it requires only the minor efforts of supplying it (adoption of the nondistribution constraint). Put differently, the overall scope of a society's self-commitment strategies (e.g., the amount of business transactions performed by trust-based nonprofits) depends principally on consumers' need for trustworthy organizations, rather than on entrepreneurs' readiness to create nonprofit organizations or to convert for-profit operations into nonprofit ones.

The pure self-supply strategy, in contrast, is equally demand- and supply-driven, since the supply and the demand for it come from the same individuals. If those individuals reduce their demand for it, the supply shrinks in tandem; in other words, the individuals supply as much nonprofit organization as they demand, given their system of preferences and constraints. The supply of this type of nonprofit organization (mutual benefit) will therefore always be optimal in the sense of correctly reflecting demand, as long as no legal or other barriers restrain the creation and operation of such organizations.

Thus, the extent of inconsistency between relevant monetary and nonmonetary motivations – the first proposed criterion of structuring the continuum of demand-side and supply-side reasons for nonprofits' existence – encompasses nonprofits whose dependence on supply factors, relative to dependence on demand factors, ranges from low to intermediate (by intermediate, I mean that both factors are equally important). Many organizational varieties of nonprofits are located between the pure models of self-commitment and self-supply. The essential characteristic of such hybrids is partial, rather than full or nonexistent, identity of demand and supply stakeholders.

The limitation of this criterion is that it cannot account for those situations where the supply of nonprofit organization is scarcer than the demand. Therefore, it cannot explain the existence of supply-driven nonprofits. This explanation, however, is made possible by the second criterion – the extent to which the relevant nonmonetary motivations focus on one's own consumption rather than one's concern for others. As noted above, concern for others depends on the extent to which individuals share social values. Social values reflect a commitment to general or abstract views about improving the society, rather than a commitment to consumption. For example, some people prefer to live in a physically healthier society, or a society that better cares for disadvantaged individuals; others prefer a society that is more open and conducive to certain types of art; others want a society that places greater emphasis on religious activities; still others favor a society that promotes particular types of education and research. The key consideration here is that the value-based nonmonetary motivations presuppose a concern for others, regardless of whether this concern rests on true altruism or hidden selfish motives (see e.g. Halfpenny, 1999; Ben-Ner and Putterman, 1998).

As noted above, monetary motivations cannot be harmonized with value-based nonmonetary motivations. This is evidently a strong inconsistency, which precludes a self-commitment strategy based on common monetary motivations. Therefore, only an internalization or self-supply strategy seems possible. In this case, however, self-supply also seems to make no sense, because the suppliers' own consumption is not the motivating factor. Rather, individuals' social value-based nonmonetary preferences leads to the emergence of supply-driven nonprofits, whereby some individuals provide resources that benefit *others* – i.e., engage in charitable activity by contributing either time or money.

The continuum of hybrid organizational types of nonprofits, between "self-supply" and what may be called "pure supply," reflects a particular distinction among supply-driven nonprofits: the extent to which seemingly altruistic charitable giving still advances the donor's own interests by containing self-serving elements. A donor's interests can be external to the act of supplying – i.e., be motivated by a belief in the moral value of reciprocity, or by private benefits to the donor such as prestige, pride, and attendance at elite parties (Rose-Ackerman, 1996, p. 714). Or the donor's interests may be internal, in the sense of reflecting feelings of commitment and sympathy (ibid.), or psychic income in the form of "warm-glow" effects (Andreoni, 1989). In general, it seems that external interests presuppose a higher proportion of self-serving than internal ones. "Pure supply" nonprofits probably represent an extreme and unrealistic model; at some level, self-interest always plays a role. Nonetheless, charitable nonprofits stand closer to the pure supply model than do other types of nonprofits.

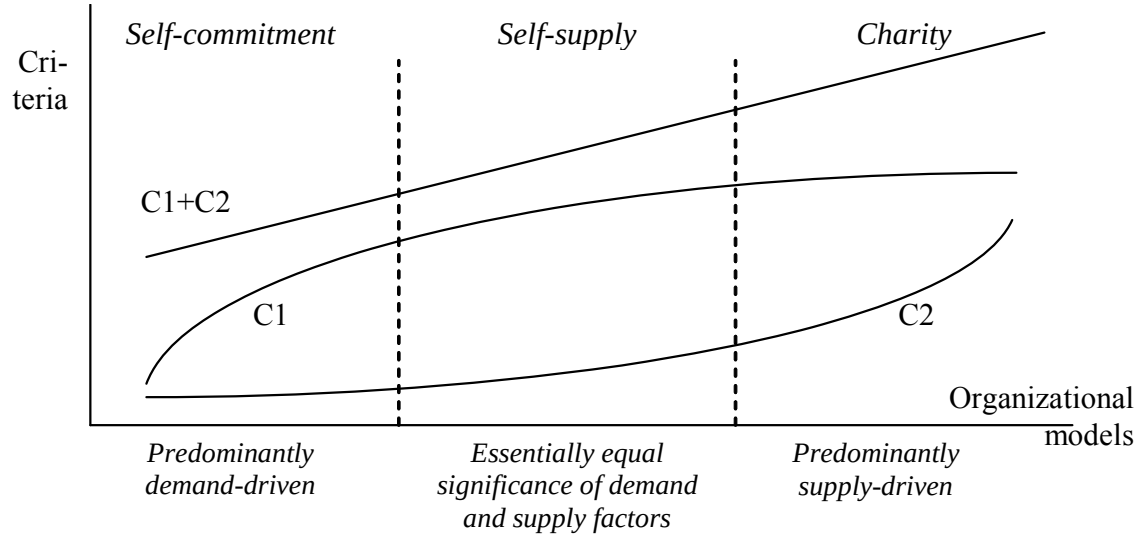

Figure 2. Continuum of organizational models of nonprofits based on the criteria of extent of inconsistency between monetary and nonmonetary motivations (C1) and extent of concern for others (C2)

The combination of the two proposed criteria yields a continuum of organizational models, presented in Figure 2. The first criterion – the extent of inconsistency between relevant monetary and nonmonetary motivations – is reflected by the line C1. The line shows greater differences between self-commitment and self-supply models than between self-supply and charity models. As the inconsistencies start to grow, the transition from self-commitment to self-supply may be warranted. The slope of the line, however, becomes insignificant in the interval between self-

supply and charity models, which reflects the fact that this criterion cannot adequately explain the existence of nonprofits that are predominantly supply-driven.

By contrast, the line C2, reflecting the other criterion – extent of concern for others – exhibits relatively low values and no significant variation in the interval between self-commitment and self-supply models. The line rises, however, in the interval between self-supply and charity models. So, whereas the second criterion cannot adequately explain the existence of demand-driven nonprofits, it can explain the existence of supply-driven ones. The two criteria are combined in the line C1+C2, which reflects a uniform pattern of the role played by demand and supply factors in organizing nonprofit activities.

The domination of demand factors in any existing nonprofit should not imply the total absence of supply factors, and vice-versa. The importance of demand considerations (self-serving elements) in supply-driven nonprofits was discussed above. A similar argument applies to the role of supply factors – i.e., social values – in the normal operation of demand-driven nonprofits. Indeed, the organizational strategy of self-commitment is, at least formally, based on the social values of rendering high-quality and honest services to consumers. Social values are even more important for self-supply nonprofits, in which people work together to achieve common goals. Since any form of collective action is potentially vulnerable to free-riding and conflicts of interest, adherence to social values helps reduce these risks. Consider, for example, the explicit reference to social values in the Statement of Cooperative Identity adopted by the International Cooperative Alliance in 1995: "co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity. In the tradition of their founders, co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others" (International Cooperative Information Center, 1996).

CONCLUSIONS

Why do nonprofit organizations exist in a market economy? The approach suggested here highlights inner controversies in the process of economic adaptation, driven by the pursuit of monetary rewards. Specifically, whereas the operating principle of the market economy can be conceptualized as the constant adaptation of the monetary motivations of some stakeholders (suppliers) to the nonmonetary motivations of others (who exercise demand), the objectives of the interacting agents remain essentially different, which creates the potential for "objective mismatches." The resulting inconsistency between monetary and nonmonetary motivations can be considered a general reason for the nondistribution constraint, since switching off the profit motive implies the elimination of intermediating monetary motivation and the implementation of activities aimed at directly satisfying nonmonetary motivations. Arguably, identifying this general inconsistency constitutes a step toward recognizing the integrative conceptual core of existing theories of the nonprofit sector.

Indeed, the proposed meaning of the nondistribution constraint seems to represent the common ground for existing theoretical interpretations, in that all of these interpretations essentially point out special cases where behavior driven by profit-seeking deviates from behavior that appears optimal from the viewpoint of satisfying particular nonmonetary motivations. Under the principal theories, opportunism caused by information asymmetries can prevent maximization of profits from leading to maximization of useful service to those requiring it (Hansmann, 1980; Ben-Ner, 1986); the presence of public goods has the same effect (Weisbrod, 1977).

In addition, monetary motivations seem to be inapplicable where the nonmonetary motivations are either social values or direct enjoyment of interpersonal association. The classification of these situations with respect to two criteria – the extent of inconsistency between relevant monetary and nonmonetary motivations, and the extent to which relevant nonmonetary motivations focus on one's own consumption rather than concern for others – allows the integration of the major demand-side and supply-side reasons for nonprofit organizations, and the development of a continuum of organizational models of nonprofits ranging from demand-driven to supply-driven.

The proposed theoretical interpretation of the nature of the nondistribution constraint has many implications for further research, both empirical and theoretical. A key proposition of the article – that the nonprofit organization represents an institutional response to the difficulties in adapting monetary motivations to nonmonetary ones – is essentially amenable to empirical verification by means of analyzing the motivations of respective stakeholders. Moreover, it may be hypothesized that monetary motivations are more important for demand-driven nonprofits than for supply-driven ones, keeping in mind that demand-driven nonprofits are characterized by less severe inconsistencies between the two types of motivations. Both theoretical and empirical research are necessary to better understand what determines the choice between the two major models of nonprofit organization, self-commitment and self-supply. Moreover, the idea of a balance between monetary and nonmonetary motivations provides a new methodological guideline for further inquiries into demand-side and supply-side rationales for nonprofit organizations, again in both theoretical and empirical respects. Finally, the nonprofit organization is characterized by attributes beyond the nondistribution constraint, such as a bottom-up governance orientation and a voluntary character, as suggested by Salamon and Anheier (1992, 1996); similar integrative approaches might be developed for these factors. Such approaches seem crucial to construct a truly comprehensive theoretical understanding of the nonprofit sector.

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On December 14, 2006, U.S. Secretary of State Condoleezza Rice announced ten Guiding Principles on Non-Governmental Organizations (NGOs), *the full text of which is reprinted below. "We were pleased to be asked to participate in this initiative and to engage with human rights partners," said Douglas Rutzen, President of ICNL. "The key question is how these principles will be implemented, and we look forward to a discussion with civil society and government representatives on how to translate them into concrete and appropriate action."*

Guiding Principles on Non-Governmental Organizations (NGOs)*

United States Department of State

Recognizing that non-governmental organizations (NGOs) are essential to the development and success of free societies and that they play a vital role in ensuring accountable, democratic government,

And recalling the right to freedom of expression, peaceful assembly and association enshrined in the U.N. Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the U.N. Declaration on Human Rights Defenders,

We hereby pledge our commitment to the following principles and our determination to work for their full implementation throughout the world:

1. Individuals should be permitted to form, join and participate in NGOs of their choosing in the exercise of the rights to freedom of expression, peaceful assembly and association.

2. Any restrictions which may be placed on the exercise by members of NGOs of the rights to freedom of expression, peaceful assembly and association must be consistent with international legal obligations.

3. NGOs should be permitted to carry out their peaceful work in a hospitable environment free from fear of harassment, reprisal, intimidation and discrimination.

4. Acknowledging governments' authority to regulate entities within their territory to promote welfare, such laws and administrative measures should protect – not impede – the peaceful operation of NGOs and be enforced in an apolitical, fair, transparent and consistent manner.

5. Criminal and civil legal actions brought by governments against NGOs, like those brought against all individuals and organizations, should be based on tenets of due process and equality before the law.

* As used here, the term NGOs includes independent public policy advocacy organizations, non-profit organizations that defend human rights and promote democracy, humanitarian organizations, private foundations and funds, charitable trusts, societies, associations and non-profit corporations. It does not include political parties.

6. NGOs should be permitted to seek, receive, manage and administer for their peaceful activities financial support from domestic, foreign and international entities.

7. NGOs should be free to seek, receive and impart information and ideas, including advocating their opinions to governments and the public within and outside the countries in which they are based.

8. Governments should not interfere with NGOs' access to domestic- and foreign-based media.

9. NGOs should be free to maintain contact and cooperate with their own members and other elements of civil society within and outside the countries in which they are based, as well as with governments and international bodies.

10. Whenever the aforementioned NGO principles are violated, it is imperative that democratic nations act in their defense.