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Letter from the Editor

This issue of the *International Journal of Not-for-Profit Law* features a comprehensive overview of a particularly timely topic, restrictions on foreign funding of NGOs. The author, **Rebecca Vernon**, is a third-year student at Cornell Law School and a former ICNL intern. Next, **Ibrahim Saleh** considers challenges that confront civil society in the Middle East and North Africa. Saleh is a Fulbright Scholar and Senior Media Expert in the Media Sustainability Index, the Middle East and North Africa. Two former Fellows at ICNL assess prospects for reform in NGO law in Kenya: **Rahma Adan Jillo**, an attorney with the NGOs Coordination Board of Kenya, and **Faith Kisinga**, Consultant for the Government-CSO Collaboration Program - PACT International. **Marek Rymysza**, Editor-in-Chief of *The Third Sector* quarterly, summarizes state policy toward the Polish civic sector. Finally, **James Austin** and **Ezequiel Reficco** discuss corporate social entrepreneurship. Austin is Eliot I. Snider and Family Professor of Business Administration, Emeritus, at Harvard Business School; Reficco is currently a Professor in the Strategy Area at the University of Los Andes School of Management, Bogotá, Colombia.

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Restrictions on Foreign Funding of Civil Society

Closing the Door on Aid

Rebecca B. Vernon *

INTRODUCTION

On July 2, 2008, Russian Prime Minister Vladimir Putin issued a decree removing the tax-exempt status of 89 of the 101 nongovernmental organizations (NGOs) with this status.¹ As of January 1, 2009, these organizations, including the Red Cross and the Ford Foundation, will be subject to a 24 percent tax on all grants made inside Russia.² The tax is “deemed prohibitive by many civil society activists,” and the government’s move appears to target organizations engaged in advancing human rights and environmental protection.³

The Ethiopian government recently passed a law that would prevent charities receiving more than ten percent of their funding from foreign sources from engaging in certain activities.⁴ The prohibited activities include “the advancement of human and democratic rights,” “the promotion of equality of nations, nationalities and peoples and that of gender and religion,” “the promotion of the rights of the disabled and children’s rights,” “the promotion of conflict resolution or reconciliation,” and “the promotion of the efficiency of the justice and law enforcement services.”⁵

An array of other legal measures limiting what, when, and how foreign donors may give to civil society groups are on the books in countries as far-flung as Zimbabwe, Uzbekistan, Egypt, Eritrea, Moldova, Algeria, Russia, Ethiopia, and Venezuela.⁶ As these examples show, in addition to standard forms of oppression, such as imprisonment of dissidents and holding unfair elections, authoritarian governments across the globe have enacted legal obstacles to the formation and operation of NGOs⁷ as a means of restricting their citizens’ attempts to exercise

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¹ Svetla Marinova, “Russia: No Country for Charitable Souls,” EURASIANET, Aug. 1, 2008, <http://www.eurasianet.org/departments/insight/articles/eav080108.shtml>.

² *Id.*

³ *Id.*

⁴ Draft Charities and Societies Proclamation, (Aug. 3, 2008) arts. 2(2), 14(2)(j)–(n), (5).

⁵ *Id.* art. 14(2)(j)–(n).

⁶ See *infra* Part I.B–F.

⁷ The terms civil society organizations, nongovernmental organizations, nonprofit organizations, and civic organizations are often used interchangeably. They all refer to not-for-profit groups established and operating in what has come to be known as civil society. In this article, for clarity purposes, I only use nongovernmental organizations. For a brief and informative description of civil society, see London School of Economics, “What is Civil Society?” (Mar. 2004), http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm.

fundamental rights.⁸ Among these measures have been restrictions on foreign sources of funding for NGOs.⁹ Because NGOs often engage in activities that threaten the ruling regime's grasp on power, such as human rights and equality, limiting the organizations' ability to function lowers the risk of the government weakening.

Preventing NGOs from receiving foreign funding has severe consequences for the people of poor and developing nations. In these countries, domestic funding for civil society is extremely limited or nonexistent. In Ethiopia, where the gross domestic product per capita is estimated at \$700,¹⁰ prohibiting charities that receive more than ten percent of their funding from foreign sources from engaging in certain activities is a de facto prohibition on these activities nationwide. As increasing aid to developing nations is channeled through NGOs rather than governments,¹¹ the ability of NGOs to obtain and use such aid is ever more important. For example, the Ethiopian Women's Lawyer Association, a women's rights group that receives 99 percent of its funding from abroad, will be forced to cease its operations under the new Charities and Societies Proclamation.¹²

In addition to the practical human-aid consequences of restrictions on foreign funding of civil society, many of these restrictions violate the legal obligations of the countries that enact them, including obligations under the International Covenant of Civil and Political Rights (ICCPR). The ICCPR prohibits limiting the freedom of association, except when the limitations are prescribed by law and "are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."¹³ Laws restricting or eliminating foreign funding of NGOs rarely if ever are able to withstand the demands of the ICCPR: the interests the Covenant identifies are not threatened by legitimate foreign funding of NGOs.¹⁴ While governments sometimes attempt to justify restrictions on foreign funding by invoking concerns about terrorism or maintaining state sovereignty, these apprehensions are either unfounded or better

⁸ INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW & WORLD MOVEMENT FOR DEMOCRACY, DEFENDING CIVIL SOCIETY 3 (Feb. 2008), available at <http://www.icnl.org/knowledge/news/2008/3-21.htm> [hereinafter DEFENDING CIVIL SOCIETY].

⁹ *Id.* at 19–20.

¹⁰ CIA World Factbook, Ethiopia, <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (last visited Jan. 17, 2009).

¹¹ See Sam Chenge, "Donors shift more aid to NGOs," AFR. RECOVERY, Vol. 13 (June 1999), <http://www.un.org/ecosocdev/geninfo/afrec/subjindx/13Ingo.htm> (noting that in 1992, the United States adopted a policy of working more closely with NGOs in countries with corrupt governments). See also The Bill & Melinda Gates Foundation Information for Grant Seekers, available at <http://www.gatesfoundation.org/grantseeker/Pages/overview.aspx> and Funding from 1994 to Present, available at <http://www.gatesfoundation.org/grants/Pages/overview.aspx> (noting that approximately \$11.38 billion in grants was handed out by its Global Development and Global Health program areas from 1994 to June 2008, and that the majority of its grantees are U.S. 501(c)(3) organizations and other tax-exempt organizations).

¹² *Ethiopia imposes aid agency curbs*, BBC NEWS, Jan. 6, 2009, <http://news.bbc.co.uk/2/hi/africa/7814145.stm>.

¹³ International Covenant of Civil and Political Rights, Dec. 16, 1966, art. 22(2), 999 U.N.T.S. 331 [hereinafter ICCPR].

¹⁴ See *infra* Part III.B.1.

addressed in other ways.¹⁵ In addition, many of these restrictions violate various investment treaties nations have signed.¹⁶

This article seeks to offer a global view of the challenges of NGOs seeking foreign funding and donors hoping to provide resources to civil society. By not limiting the analysis to a single or country or region, it will show that the problem of government restrictions on foreign funding is not isolated, but instead affects the operation of civil society in the four corners of the globe. It will also argue that not only do these restrictions prevent citizens of poor countries from receiving much-needed aid and hinder economic development, but they are also patently illegal in many cases. Part I will outline the types of legal restrictions governments have placed on civil society's receipt of foreign funds in Moldova, Eritrea, Uzbekistan, Venezuela, Algeria, Egypt, Ethiopia, Zimbabwe, and Russia. Part II will address the reasons governments give for enacting these restrictions and will attempt to debunk some of the more illegitimate reasons. Part III will examine the legal instruments that are being violated by these laws. Part IV will propose several means, both legal and non-legal, of eliminating the restrictions.

I. RESTRICTIONS ON FOREIGN FUNDING OF CIVIL SOCIETY: A GLOBAL SURVEY

A. NGOs under International Law

NGOs occupy a precarious place in international law.¹⁷ Typically, they only have legal personality under domestic laws, not under international law.¹⁸ NGOs must therefore depend on individual states to grant them legal personality.¹⁹ Because states are traditionally seen to be the exclusive holders of rights and duties under international law,²⁰ NGOs encounter difficulties appealing to international law when a country does not grant them legal personality or places limits on their operation.²¹

Despite the lack of formal legal personality under international law, international bodies have recognized varying roles for NGOs. For instance, Article 71 of the UN Charter provides that "[t]he Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence."²² Several other international organizations have followed this "consultative model" for participation by NGOs: the Organization of American States has adopted Guidelines for the Participation of Civil Society Organizations in OAS Activities,²³ and the Constitutive Act of the

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.B.2.

¹⁷ For a description of the role of nongovernmental organizations and international law, see, e.g., Steve Charnovitz, "Nongovernmental Organizations and International Law," 100 AM. J. INT'L L. 348 (2006); Daniel C. Thomas, "International NGOs, State Sovereignty, and Democratic Values," 2 CHI. J. INT'L L. 389 (2001).

¹⁸ Charnovitz, *supra* note 17, at 355.

¹⁹ *Id.* at 355–356; Chandler H. Udo, "Nongovernmental Organizations and African Governments: Seeking an Effective International Legal Framework in a New Era of Health and Development Aid," 31 B.C. INT'L & COMP. L. REV. 371, 383 (Spring 2008).

²⁰ Mark W. Janis, *An Introduction to International Law* (2003) 185.

²¹ See generally Charnovitz, *supra* note 17.

²² UN Charter, Art. 71.

²³ Guidelines for the Participation of Civil Society Organizations in OAS Activities, CP/RES.759(1217/99) (Dec. 15, 1999).

African Union created an Economic, Social, and Cultural Council, an “advisory organ composed of different social and professional groups of the Member States.”²⁴ Additionally, some international courts have provided limited opportunities for NGOs to bring cases.²⁵ The African Commission on Human and Peoples’ Rights permits NGOs with observer status to submit a claim of violation of the African Charter.²⁶ And the European Court of Human Rights allows an NGO to sue if it is itself a victim.²⁷ Finally, several international tribunals, including the Appellate Body of the World Trade Organization and the International Court of Justice, allow NGOs to submit amicus briefs or similar informational documents for pending cases.²⁸

Thus, while NGOs are not without recourse in more traditional channels of international law when they feel they have suffered violations of their rights, these solutions are quite limited. An NGO must have status as an actual victim of a law that violates a state’s obligations under an international treaty, or it may participate as a mere amicus, simply an outside party urging the tribunal to find in a certain way. The result is that nonprofits are largely powerless, from an international legal standpoint, to force domestic governments to accede to their demands to undertake their activities without undue government interference. With this background in mind, this section will examine specific types of restrictions on foreign funding of civil society and the countries that have enacted such restrictions.

B. *Outright Prohibition on Foreign Funding of NGOs*

The most severe form of restriction on foreign funding of civil society is, quite simply, a complete or near-complete prohibition on funding from non-domestic sources. These types of laws are in force, or have recently been in force, in several countries.

1. Moldova

In 2006, the president of the Moldovan separatist government in the Transnistria region signed a decree prohibiting foreign funding of NGOs registered in the region.²⁹ The comprehensive prohibition forbade NGOs from receiving direct or indirect funding from any international or foreign organization, foreign government, Transnistrian organization with a foreign capital share in excess of twenty percent, foreign citizen or stateless person, or anonymous source.³⁰ Any foreign funds received by NGOs could then be seized by the government, and a court could order them expropriated into the state budget.³¹

Although the decree was amended just over a year later to apply only to those organizations “whose statutes stipulate involvement in electoral campaigns,”³² the significance of the outright restriction on foreign funding of the nonprofit sector should not be ignored.

²⁴ Constitutive Act of African Union, Art. 22.

²⁵ See Charnovitz, *supra* note 17, at 354.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 353–354.

²⁹ Decree of President of Pridnestrovian Moldovan Republic of March 7, 2006, No. 101.

³⁰ *Id.*

³¹ *Id.*

³² Decree of President of Pridnestrovian Moldovan Republic of May 10, 2007, No. 340.

According to the CIA World Factbook, Moldova is one of the poorest countries in Europe, with a GDP per capita of only around \$2,300.³³ As a result, most NGOs rely exclusively on foreign donors for their income and must effectively cease functioning once foreign funds are no longer available.³⁴ Thus, cutting off foreign funding sources for any amount of time in the Transnistria shuts civil society. The Transnistrian measure, although it continued for only one year, was a dramatic and broad assault on the nonprofit sector in a country where social services provided by NGOs are very much needed.

2. Eritrea

A similar though slightly narrower restriction is currently in place in Eritrea. In May 2005 the government issued a Proclamation prohibiting all NGOs, whether domestic or foreign, from receiving funding to engage in relief or rehabilitation work from the United Nations, its affiliates, other international organization, or through bilateral agreement.³⁵ Because the Proclamation defines an NGO as an organization that engages in relief and/or rehabilitation work,³⁶ the prohibition effectively applies to all NGOs. Furthermore, organizations are only authorized to operate if they have “at their disposal in Eritrea one million US Dollars or its equivalent in other convertible currency.”³⁷ Eritrea, even more so than Moldova, is extremely poor and has little domestic money to allocate to civil society: it rates 157 out of 177 on the UN Development Index, and its GDP per capita is only about \$800.³⁸

Soon after the Proclamation was issued, an international organization operating in Eritrea predicted that “[i]f the new proclamation results in the closing down of the few independent local NGOs and the departure of the few remaining international NGOs, there will be no independent civil society left.”³⁹ The prediction has largely become a reality: in the ten months between the Proclamation in May 2005 and March 2006, the number of NGOs operating in the country fell from 37 to 13.⁴⁰ Without foreign funding, the number has further dwindled, and the U.S.

³³ CIA World Factbook, Moldova, <https://www.cia.gov/library/publications/the-world-factbook/geos/md.html> (last visited Jan. 17, 2009).

³⁴ THE 2007 NGO SUSTAINABILITY INDEX (USAID, Washington, D.C.), June 2008, at 166, *available at* http://www.usaid.gov/locations/europe_urasia/dem_gov/ngoindex/2007/complete_document.pdf [hereinafter 2007 NGO SUSTAINABILITY INDEX].

³⁵ A Proclamation to Determine the Administration of Non-Governmental Organizations, No. 145/2005, arts. 8(5), 9(3) (May 11, 2005). *See also* International Center for Not-for-Profit Law, “Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations,” *INT’L J. NOT-FOR-PROFIT L.*, Aug. 2006, at 76, 80.

³⁶ A Proclamation to Determine the Administration of Non-Governmental Organizations, No. 145/2005, art. 2(1) (May 11, 2005).

³⁷ *Id.* at art. 8(1)(c).

³⁸ HUMAN DEVELOPMENT REPORT 2007/2008 (UN Human Dev. Program, New York, NY), 2007, at 231, *available at* http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf [hereinafter HUMAN DEVELOPMENT REPORT 2007/2008]; CIA World Factbook, Eritrea, <https://www.cia.gov/library/publications/the-world-factbook/geos/er.html> (last visited Jan. 17, 2009).

³⁹ CIVICUS, “New NGO law threatens the existence of civil society in Eritrea,” Aug. 26, 2005, <http://www.civicus.org/new/content/ERITREANGOLaw.htm>.

⁴⁰ UN Office for the Coordination of Humanitarian Affairs, “Eritrea: Authorities expel three foreign NGOs,” Mar. 23, 2006, <http://www.irinnews.org/report.aspx?reportid=58532>.

Department of State reports that only 11 NGOs were registered in the country in both 2006 and 2007.⁴¹

C. *International Aid Must Be Channeled through Government Organs*

In several countries, although foreign donors can fund civil society, they cannot give directly to NGOs. Rather, their funding must go through government channels, often a sort of government-operated “bank” that receives foreign donations and then, theoretically, distributes them to domestic NGOs. Oftentimes, this prohibits donors from ensuring that their funds go to the desired purpose or that they go to a nonprofit purpose at all.

1. Uzbekistan

In early 2004, the Uzbek Cabinet of Ministers issued a banking regulation requiring increased governmental scrutiny of money transfers to NGOs through local banks.⁴² Furthermore, it stipulated that foreign funding for NGOs must be channeled through one of two government-controlled banks.⁴³ According to reports, by examining the transfers to NGOs, government officials could decide whether the proposed use of the funds would be “beneficial” for Uzbekistan and whether they were going toward goals the government felt it was achieving on its own.⁴⁴ Officials are also able to take a portion of the transfer, whether as an administrative fee, a tax, or a personal payment.⁴⁵ According to some sources, up to 80 percent of intended donations is siphoned off in this way.⁴⁶ Furthermore, the process is not transparent and can take

⁴¹ *Eritrea: Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (Mar. 11, 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100480.htm>; *Eritrea: Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (Mar. 6, 2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78733.htm>; *Eritrea: Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (Mar. 8, 2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61568.htm>. In addition to the prohibition on foreign funding of domestic Eritrean civil society organizations, the Proclamation and subsequent government actions have made it nearly impossible for international NGOs to operate within the country. The Proclamation requires that work by international NGOs be carried out through either the Ministry of Labor and Human Welfare or another relevant government entity. A Proclamation to Determine the Administration of Non-Governmental Organizations, No. 145/2005, art. 9(1) (May 11, 2005). Only if the Ministry or government entity is unable to carry out the work of the NGO, or if “any other serious cause justifies it,” may an international organization undertake its desired activity directly; even then, it must secure the agreement of the government. *Id.* at art. 9(2). Like domestic NGOs, international NGOs can only engage in “relief and/or rehabilitation” work, and the capital requirement for international organizations is \$2 million. *Id.* at arts. 7(1), 9(5). They too are forbidden from receiving funding from the United Nations, its affiliates, international organizations, or through bilateral agreement. *Id.* at arts. 8(5), 9(3). This has made it virtually impossible for international organizations to operate within Eritrea, as they are prohibited from obtaining their funding from most international sources. In 2006, the government also asked five international NGOs to cease their work and leave the country. *Eritrea: Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (Mar. 11, 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100480.htm>; see also UN Office for the Coordination of Humanitarian Affairs, “Eritrea: Authorities expel three foreign NGOs,” Mar. 23, 2006, <http://www.irinnews.org/report.aspx?reportid=58532>.

⁴² 2007 NGO SUSTAINABILITY INDEX, *supra* note 34, at 240.

⁴³ DEFENDING CIVIL SOCIETY, *supra* note 8, at 19.

⁴⁴ 2007 NGO SUSTAINABILITY INDEX, *supra* note 34, at 240–1.

⁴⁵ DEFENDING CIVIL SOCIETY, *supra* note 8, at 19–20.

⁴⁶ *Id.* at 20.

several months to complete.⁴⁷ The effect of these regulations has been to curtail severely the foreign aid that reaches civil society groups in Uzbekistan and force local NGOs to rely on personal sources of income from their leaders and members, such as wages from a second job or individual savings.⁴⁸ In a country with a stagnating economy, widespread poverty, and a weak culture of philanthropy, foreign money is essential to maintain any semblance of a civil society.⁴⁹

Advocates of NGOs see this measure as a clear “attempt to wall off the country completely from outside influences” and part of a larger “systemic effort to crack down on civil society.”⁵⁰ Across Central Asia, government leaders saw the Rose Revolution, the 2003 peaceful demonstrations against unfair elections by Georgian opposition forces that resulted in the ousting of President Eduard Shevardnadze, as the work of foreign-backed NGOs.⁵¹ The similar Orange Revolution in Ukraine, just a year later, only strengthened the beliefs of leaders that foreign support of civil society threatened governmental stability. The 2004 Uzbek banking regulations, passed in the midst of great concern about the influence of foreign-backed organizations, are part of a larger struggle to remove such organizations not only from positions of influence in the country but from the country altogether.⁵² Quite simply, the Uzbek government has been engaged in a coordinated battle against foreign NGOs and the funding they provide to their domestic counterparts. And the government’s plan seems to be working: in the last few years, an estimated 3,000 NGOs have either disbanded or ceased their work under mounting governmental pressure and diminishing resources.⁵³

2. Venezuela

In 2006, the Venezuelan legislature began deliberation on a law creating an International Cooperation and Assistance Fund, through which donations to civil society organizations intended for “international cooperation” must be funneled.⁵⁴ The bill, introduced by Hugo Chávez’s government, was preapproved by the legislature and has remained under consideration in a legislative committee.⁵⁵ The law leaves it to government officials to determine what

⁴⁷ 2007 NGO SUSTAINABILITY INDEX, *supra* note 34, at 241. *See also* Jeff Erlich, “Banking Decree Hurting Uzbek NGOs,” EURASIANET (June 6, 2004), <http://www.eurasianet.org/departments/insight/articles/eav061004.shtml>.

⁴⁸ 2007 NGO SUSTAINABILITY INDEX, *supra* note 34, at 240.

⁴⁹ *See id.*; CIA World Factbook, Uzbekistan, <https://www.cia.gov/library/publications/the-world-factbook/geos/uz.html> (last visited Jan. 17, 2009).

⁵⁰ Antoine Blua, “Uzbekistan: Largest Private Donor Denied Re-Registration,” RADIO FREE EUROPE (Apr. 20, 2004), <http://www.rferl.org/content/Article/1052389.html>.

⁵¹ *See* Bruce Pannier, “Where Georgians See Roses, Regional Leaders May See Thorns,” EURASIANET, Nov. 28, 2003, <http://www.eurasianet.org/departments/rights/articles/pp112803.shtml>; Martha Brill Olcott, “Uzbekistan: Stifled democracy, human rights in decline,” Testimony before the Helsinki Commission, *available at* <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1569>.

⁵² Olcott, *supra* note 51. In December 2004, the government, claiming a recent influx in the number of foreign organizations, issued a decree requiring the enforcement of a 1999 law stipulating burdensome registration procedures for foreign NGOs. Blua, *supra* note 50.

⁵³ 2007 NGO SUSTAINABILITY INDEX, *supra* note 34, at 238.

⁵⁴ CIVICUS *urges Venezuelan government to reconsider proposed law*, CIVICUS, Aug. 7, 2006, <http://www.civicus.org/new/media/CIVICUSurgesVenezuelan.doc>.

⁵⁵ *Id.*; Human Rights Watch, *Human Rights Watch World Report 2007 – Venezuela*, UNHCR REFworld, Jan. 11, 2007, <http://www.unhcr.org/refworld/docid/45aca2aa2.html>.

donations, whether foreign or domestic, are meant for “international cooperation.”⁵⁶ Could all foreign funding qualify under the rubric of “international cooperation,” simply because its provenance is international? The government will also control how these funds are obtained, who can receive them, and how they will be doled out.⁵⁷ If the law is passed, the vague language and broad grant of discretion will effectively place foreign donations to NGOs under the control of Hugo Chávez’s government.⁵⁸ And although the law has not yet passed, “a climate of possible criminalization of receipt of foreign funding” persists in Venezuela.⁵⁹

D. *Government Approval Required to Receive Foreign Funding*

Some countries, while they allow NGOs to receive funds directly from foreign sources, require that the organizations obtain government approval before the funds are received. This process, in addition to being lengthy, may result in the rejection of the application for foreign funds, especially if the organization’s activities are seen as a threat to the government’s goals and stability.

1. *Algeria*

Under Algeria’s 1990 Associations Act, the “relevant public authority” must agree to any donation to an association from a foreign source.⁶⁰ Before granting permission, the government must “verify the source, amount, compatibility with the stated goal in the statutes of the association and any restrictions that may arise therefrom.”⁶¹ In reality, the “relevant public authority” that oversees all associations is the Ministry of the Interior, known for being especially corrupt and ineffectual.⁶² In addition, Algerian NGOs seeking foreign funding must obtain permission from the Ministry of National Solidarity.⁶³ As a result, government approval for a foreign donation to an association is “extremely difficult” to obtain, and few civil society organizations will be able to receive any funding from foreign sources.⁶⁴

⁵⁶ *CIVICUS urges Venezuelan government to reconsider proposed law*, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ Eric Green, *Proposed Law Called Threat to Free Civil Society in Venezuela*, AMERICA.GOV, Sept. 21, 2006, <http://www.america.gov/st/washfile-english/2006/September/200609211234221xeneerg0.1661951.html>.

⁵⁹ *Venezuela: Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, Mar. 11, 2008, <http://www.state.gov/g/drl/rls/hrrpt/2007/100657.htm>. Additionally, in 2008, the Venezuelan Supreme Court “ruled that nongovernmental organizations that receive funds from foreign governments are not to be considered part of civil society.” Human Rights Watch, *Human Rights Watch World Report 2009 – Venezuela*, UNHCR REF WORLD, Jan. 14, 2009, <http://www.unhcr.org/refworld/docid/49705f8755.html>.

⁶⁰ Associations Act (No. 90/31) of Dec. 4, 1990, art. 28.

⁶¹ *Id.*

⁶² See Chafika Kahina Bouagache, *The Algerian Law on Associations Within Its Historical Context*, INT’L. J. NOT-FOR-PROFIT L., Apr. 2007, at 37, 44, 50–54.

⁶³ FREEDOM OF ASSOCIATION UNDER THREAT: THE NEW AUTHORITARIANS’ OFFENSIVE AGAINST CIVIL SOCIETY, (Freedom House, Washington, D.C.), Nov. 17, 2008, at 15, *available at* http://www.freedomhouse.org/uploads/2008_11_14_FOA_Report.pdf [hereinafter FREEDOM OF ASSOCIATION UNDER THREAT].

⁶⁴ *Id.*

Algeria is comparatively well-off for a developing country. Its GDP per capita is approximately \$6,700, and the UN Human Development Index categorizes it at a state of “Medium Human Development” (it is ranked 107 out of 177 countries).⁶⁵ However, the country was plagued by a lengthy and bloody civil war in the 1990s and continues to face threats from extremist militants.⁶⁶ Recently, it has also seen a surge of international terrorist activity.⁶⁷ In such an environment, humanitarian needs are great, and the difficulty of obtaining foreign funding renders NGOs much less capable of providing vital services.

2. Egypt

Likewise, government approval is required for associations to receive foreign funding in Egypt. Associations that do not receive such approval face strict penalties: an association may be fined 2,000 Egyptian pounds (approximately \$350), and its leaders may be imprisoned for six months.⁶⁸ While the Ministry of Social Affairs is reviewing the application to receive foreign funds, the funds must be placed in a designated bank account, where the association cannot access them.⁶⁹ While technically the government should take no more than 60 days to review the application, it often takes longer, leaving the association with no operating budget and facing insolvency.⁷⁰ Leaders of human rights organizations were imprisoned in 1998 and 2000 for failure to obtain government authorization prior to receiving foreign funding.⁷¹ Furthermore, the government has taken a step not authorized by the 2002 law: in September 2007, the governor of Cairo issued a decree dissolving a human rights NGO for its failure to obtain government approval prior to receiving funds from abroad.⁷²

As in other less-developed nations, foreign funding is a vital source of income for the nonprofit sector. While Egypt has a more developed civil society than many of its neighbors, the availability of outside funding remains extremely important.⁷³ The Egyptian civic sector accounted for \$1.5 billion in expenditures in 1999, with much of its funding coming from the sale of goods and services.⁷⁴ The Muslim tenet of *zakat*, or charitable giving, “contributes significantly to the strength and operation of many charitable organizations with religious

⁶⁵ CIA World Factbook, Algeria, <https://www.cia.gov/library/publications/the-world-factbook/geos/ag.html> (last visited Jan. 17, 2009); HUMAN DEVELOPMENT REPORT 2007/2008, *supra* note 38, at 230.

⁶⁶ CIA World Factbook, Algeria, *supra* note 65.

⁶⁷ See, e.g., Souad Mekhennet et al., *Ragtag Insurgency Gains a Lifeline from Al Qaeda*, N.Y. TIMES, July 1, 2008, available at <http://www.nytimes.com/2008/07/01/world/africa/01algeria.html?partner=permalink&exprod=permalink>; Roger Hardy, *Algeria: a new front for Al Qaeda?*, BBC NEWS, Dec. 13, 2007, <http://news.bbc.co.uk/2/hi/africa/7142050.stm>.

⁶⁸ Law No. 84/2002 on Non-Governmental Organizations (June 5, 2002), arts. 17, 76.

⁶⁹ James G. McGann, *Pushback Against NGOs in Egypt*, INT’L J. NOT-FOR-PROFIT L., Aug. 2008, at 29, 36.

⁷⁰ *Id.* at 36–37.

⁷¹ *Government Orders Closure of Egyptian Human Rights Group*, HUMAN RIGHTS FIRST, Sept. 20, 2007, http://www.humanrightsfirst.org/middle_east/egypt/alert_092007_ahrla.htm.

⁷² *Id.*

⁷³ LESTER M. SALAMON ET AL., 2 GLOBAL CIVIL SOCIETY 217–25 (2004).

⁷⁴ *Id.* at 218, 224.

association.”⁷⁵ Nonetheless, a fifth of the population lives in poverty, greatly reducing the charitable giving capacity of Egyptians in general and greatly increasing the need for services provided by NGOs.⁷⁶ The Ministry of Social Affairs reported that foreign sources had contributed \$12 million to associations, a number that likely “understates the full extent of foreign funding” of the civic sector.⁷⁷ Clearly, international sources remain a crucial element of NGO funds, and the situation is exacerbated for human rights organizations: because these groups directly challenge the government, they do not receive public funds, and there are limited resources available to them at the local level.⁷⁸ The UN Special Representative on Human Rights Defenders stated that the restrictions on foreign funding “have seriously endangered the very existence of human rights organizations” in Egypt, as “the ability of human rights defenders to carry out their activities rests on their ability to receive funds and utilize them without undue restriction.”⁷⁹

E. *Certain Groups Cannot Receive Funding*

Governments have been able to allow foreign funding of NGOs they find desirable and prohibit foreign funding of those they dislike by limiting the activities an organization receiving foreign funds may undertake. Often the proscribed activities relate to human rights, the effective functioning of the government, and equality among citizens.

1. Ethiopia

In early 2009, the Ethiopian legislature passed a Charities and Societies Proclamation that drastically reduces the rights of NGOs.⁸⁰ It defines “Ethiopian Charities” as those that receive no more than ten percent of their funds from foreign sources and whose members are all Ethiopian.⁸¹ The Proclamation then prohibits non-Ethiopian charities from participating in a variety of activities, including human and democratic rights; equality of genders, religions, and nationalities; the rights of children and the disabled; conflict resolution and reconciliation; and “the promotion of the efficiency of the justice and law enforcement services.”⁸² The activities unavailable to charities receiving any significant foreign funding seem clearly targeted to those pursuits that will threaten the government’s power: the advancement of democracy, human rights, and the executive and judicial branches of government. Violation of any of the provisions of the Proclamation, including those relating to permissible activities of non-Ethiopian charities, will result in prosecution under the criminal code.⁸³

⁷⁵ James G. McGann, *supra* note 69, at 32.

⁷⁶ *Id.*

⁷⁷ SALAMON ET AL., *supra* note 73, at 225.

⁷⁸ *Government Orders Closure of Egyptian Human Rights Group*, *supra* note 71.

⁷⁹ *Id.* In addition to Algeria and Egypt, Jordan requires government approval for associations to receive foreign funding. Law on Societies (2008). The new Law on Societies, passed in the summer of 2008, provides that “[i]f the Society wants to obtain any contribution, donation or funding from non-Jordanians, whatever its form, it must submit an application to obtain the approval of the Relevant Minister.” *Id.* art. 17(B)(1).

⁸⁰ See generally Draft Charities and Societies Proclamation, (Aug. 3, 2008); *Ethiopia imposes aid agency curbs*, BBC NEWS, Jan. 6, 2009, <http://news.bbc.co.uk/2/hi/africa/7814145.stm>.

⁸¹ Draft Charities and Societies Proclamation, art. 2(2) (Aug. 3, 2008).

⁸² *Id.* art. 14(2)(j)–(n), (5).

⁸³ *Id.* art. 103(1).

Ethiopia is, by all measures, an extremely poor country whose citizens are almost universally unable to provide funding to the nonprofit sector. It is ranked 169 out of 177 countries on the United Nation's Human Development Index.⁸⁴ Its agriculture-based economy is subject to frequent droughts,⁸⁵ and there are concerns of a widespread famine on the horizon.⁸⁶ The poverty of Ethiopian citizens means that for a charity to survive, it must be funded by outside sources. As a result, the ban on non-Ethiopian charities undertaking certain activities translates into a de facto ban on those activities altogether.

Organizations that advocate for human rights, gender equality, and conflict resolution, although virtually banned under the Proclamation, are extremely valuable in Ethiopian society today. Human rights abuses include politically-motivated killings, torture, arbitrary arrest and detention, and taking political prisoners.⁸⁷ Domestic violence and rape are widespread problems, with perhaps only forty percent of rapes ever reported.⁸⁸ Laws codify the inferior status of women in family, divorce, and inheritance matters, and discrimination against women is most severe in rural areas, home to eighty-five percent of the population.⁸⁹ The Ethiopian army has been engaged in warfare with Islamist insurgents in Somalia for the last two years.⁹⁰ Within its borders, the government is facing a rebel movement in the Ogaden region and has forced untrained civilians to take on a military role.⁹¹ Simply put, the country's dire problems stretch far beyond food shortages and engulf many of the areas that non-Ethiopian NGOs are forbidden from addressing.

2. Zimbabwe

Zimbabwe's 2004 Non-Governmental Organizations Bill, which was enacted but never signed into law,⁹² prohibited organizations from receiving "any foreign funding or donation to carry out activities involving or including issues of governance."⁹³ The Bill defines "issues of

⁸⁴ HUMAN DEVELOPMENT REPORT 2007/2008, *supra* note 38, at 232.

⁸⁵ CIA World Factbook, Ethiopia, <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (last visited Jan. 17, 2009).

⁸⁶ Nicholas Benequista, *As famine looms in Ethiopia, only the neediest get food aid*, THE CHRISTIAN SCIENCE MONITOR, June 27, 2008, available at <http://www.csmonitor.com/2008/0627/p01s08-woaf.html>.

⁸⁷ *Ethiopia: Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, Mar. 11, 2008, <http://www.state.gov/g/drl/rls/hrrpt/2007/100481.htm>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ BBC News, Country Profile: Ethiopia, http://news.bbc.co.uk/2/hi/africa/country_profiles/1072164.stm (last visited Jan. 18, 2009).

⁹¹ Jeffrey Gettleman, *In Rebel Region, Ethiopia Turns to Civilian Patrols*, N.Y. TIMES, Dec. 14, 2007, available at <http://www.nytimes.com/2007/12/14/world/africa/14cnd-ethiopia.html?partner=permalink&exprod=permalink>.

⁹² Although the Bill is not law because President Robert Mugabe did not sign it in the time required, it is included here as another example of the leaders of a nation stricken by poverty, unrest, and human rights abuses attempting to foreclose NGO efforts to ameliorate dire circumstances. Furthermore, the Bill served as a psychological threat to human rights NGOs: "having such a law has left a pervasive sense of fear and paralysis in some organizations," a Zimbabwean professor reports. Cris Chinaka, *NGOs Tiptoe Through Africa's Political Minefields*, GLOBAL POL. F., Oct. 11, 2005, <http://globalpolicy.org/ngos/state/2005/1011tiptoe.htm>.

⁹³ Non-Governmental Organizations Bill, H.B. 13, cl. 17 (July 2004).

governance” as “the promotion and protection of human rights and political governance issues.”⁹⁴ As in Ethiopia, because virtually all NGO funding comes from abroad, the prohibition on foreign-funded organizations participating in these activities is a de facto prohibition on work in the fields of human rights and political governance altogether.⁹⁵ In Zimbabwe, a country known for its political turmoil, leadership struggles, and human rights abuses,⁹⁶ even a proposed law prohibiting foreign-backed NGOs from engaging in human rights and good governance advocacy adversely affects the activities of organizations and robs the country of needed services. The mere act of proposing such a law places foreign-backed NGOs on notice that their activities are under scrutiny and that the government is hostile to their operations.

F. *Tax Laws Make Giving to NGOs Undesirable or Financially Impractical*

Governments may ostensibly allow unlimited foreign funding to domestic civil society organizations participating in a wide array of activities, yet make such funding financially unviable through tax laws. The result is that because so much of foreign grants are eaten up through taxation, foreign donors find giving to organizations in the country ineffective.

1. Russia

In July 2008, Prime Minister Vladimir Putin issued a decree greatly limiting the number of foreign nongovernmental organizations that may provide tax-exempt grants to domestic Russian NGOs.⁹⁷ The decree revises the “Regulation on the List of Foreign and International Organizations Whose Grants are Not Included into Taxable Income of Russian Organizations – Recipients of Grants” to eliminate eighty-nine NGOs from the list.⁹⁸ As of January 1, 2009, only twelve organizations retained the right to give tax-exempt grants.⁹⁹ They are virtually all intergovernmental organizations in which Russia has a voice: the Commission of the European Communities, the Council of the Baltic Sea States, the Nordic Council of Ministers, the International Atomic Energy Agency, the Black Sea Economic Cooperation, the European Fund for the Support of Co-production and Distribution of Cinematographic and Audiovisual Works, the Joint Institute for Nuclear Research, and several United Nations groups.¹⁰⁰ In contrast, the NGOs that were removed from the list were private groups that often financed projects relating

⁹⁴ *Id.* cl. 2.

⁹⁵ Udo, *supra* note 19, at 384; *see also* Press Release, Amnesty Int’l, Zimbabwe: NGO Act is an outrageous attack on human rights (Dec. 10, 2004), available at <http://www.amnesty.org/en/library/asset/AFR46/039/2004/en/dom-AFR460392004en.html>.

⁹⁶ *See* BBC News, Country Profile: Zimbabwe, http://news.bbc.co.uk/2/hi/africa/country_profiles/1064589.stm (last visited Jan. 18, 2009); CIA World Factbook, Zimbabwe, <https://www.cia.gov/library/publications/the-world-factbook/geos/zi.html> (last visited Jan. 18, 2009); U.S. Department of State, Background Note: Zimbabwe, <http://www.state.gov/r/pa/ei/bgn/5479.htm> (last visited Jan. 18, 2009); *Zimbabwe: Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, Mar. 11, 2008, <http://www.state.gov/g/drl/rls/hrrpt/2007/100512.htm>.

⁹⁷ Marinova, *supra* note 1; Council on Foundations United States International Grantmaking, Country Information: Russia, <http://www.usig.org/countryinfo/russia.asp> (last visited Jan. 18, 2009).

⁹⁸ *Id.*

⁹⁹ Marinova, *supra* note 1; Charles Digges, *Prime Minister Putin slaps tax on foreign NGOs in effort to purge Russia of foreign influence*, BELLONA, July 3, 2008, http://www.bellona.org/articles/articles_2008/ngo_tax.

¹⁰⁰ Digges, *supra* note 99.

to human rights and the environment.¹⁰¹ They include the American Red Cross, the Global Fund to Fight AIDS, the Royal Society, the World Wildlife Fund, the Macarthur Foundation, and the Ford Foundation.¹⁰²

The taxation rate for grants from foreign organizations is twenty-four percent, deemed prohibitively expensive by some NGO leaders.¹⁰³ Many Russian NGOs, already lacking in funds, will be unable to bear the tax burden and will be forced to close.¹⁰⁴ To avoid this result, the foreign NGOs will have to increase their grants by a quarter, reducing the effectiveness of their aid. For the Ford Foundation, which distributes more than \$10 million in grants each year in Russia, this will mean an additional \$2.4 million to maintain the same level of giving.¹⁰⁵

II. SOME JUSTIFICATIONS (GOOD OR NOT)

To justify restrictions on foreign funding of the nonprofit sector, governments invoke the need for anti-terrorism and security measures and the principle of state sovereignty. While these justifications, when examined superficially, appear perfectly valid, upon deeper inspection the faults of these justifications become clear.

A. Anti-Terrorism Measures

Since September 11, 2001, NGOs in general, and their funding in specific, have come under scrutiny as a source of terrorist income.¹⁰⁶ Donor countries, such as the United States and the United Kingdom, have enacted laws and regulations to ensure that charitable donations are not in fact financing terrorism.¹⁰⁷ Likewise, other countries have enacted legal provisions to prevent terrorism financing from masquerading as nonprofit funding.¹⁰⁸ Because restrictions on the right to free association are permitted under the International Covenant of Civil and Political Rights, so long as they are “prescribed by law” and “necessary in a democratic society in the

¹⁰¹ Marinova, *supra* note 1.

¹⁰² Marinova, *supra* note 1; Digges, *supra* note 99.

¹⁰³ Marinova, *supra* note 1.

¹⁰⁴ Digges, *supra* note 99.

¹⁰⁵ Marinova, *supra* note 1.

¹⁰⁶ See, e.g., Kay Guinane, *U.S. Counterterrorism Developments Impacting Charities*, INT’L J. NOT-FOR-PROFIT L., Dec. 2007, at 3; Debra Morris, *Charities and Terrorism: The Charity Commission Response*, INT’L J. NOT-FOR-PROFIT L., Sept. 2002; Mark Sidel, *Counterterrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of “War on Terror” States*, INT’L J. NOT-FOR-PROFIT L., June 2008, at 7; Mark Sidel, *The Third Sector, Human Security, and Anti-Terrorism: The United States and Beyond*, VOLUNTAS, Sept. 2006, at 199.

¹⁰⁷ See, e.g., Privacy Act of 1974, Implementation of Exemptions, 74 Fed. Reg. 1 (Jan. 2, 2009) (to be codified at 22 C.F.R. pt. 215) (providing new screening procedures by U.S. intelligence agencies and law enforcement for USAID employees and organizations receiving grants from USAID); Morris, *supra* note 106.

¹⁰⁸ See, e.g., *Communication from the Commission to the Council and European Parliament on the prevention of and the fight against terrorist financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions*, COM (2004) 700 final (Oct. 20, 2004); Sidel, *Counterterrorism and the Enabling Legal and Political Environment for Civil Society*, *supra* note 106, at 40–46.

interests of national security or public safety,” countries may permissibly impose some restrictions on NGOs and their funding in the name of anti-terrorism.¹⁰⁹

However, these restrictions become problematic when they infringe on the ability of legitimate NGOs to receive necessary funding to carry out their activities. This phenomenon has occurred in several states with restrictive foreign funding laws. In Uzbekistan, the government has described the restrictions on foreign funding of NGOs¹¹⁰ as “part of wider antiterrorism efforts to prevent funding from passing to extremist groups.”¹¹¹ A Venezuelan legislator invoked the need for anti-terrorism measures to defend the creation of the International Cooperation and Assistance Fund.¹¹² He said the legislation would be a “certain blow . . . to those disguised NGOs, because in truth they are terrorist organizations, prepared to claw.”¹¹³

Despite the claims of government leaders, burdensome restrictions on foreign funding of civil society, such as those imposed by Uzbekistan, Venezuela, Algeria, and Egypt, do not truly address the anti-terrorism issue. As a matter of common sense, terrorist groups are unlikely to be deterred by a law restricting foreign funding of the nonprofit sector. Such groups are, by definition, operating outside the law, and breaking a narrow law on nonprofit funding will be dwarfed by the many other domestic and international laws they will break in the commission of a terrorist act. Additionally, the incidence of foreign charities supporting terrorism is extremely rare. Of approximately 1.4 million charities, foundations, and religious organizations in the United States, none has ever been convicted of material support of terrorism.¹¹⁴ In 2006, U.S. foundations gave in excess of \$4.2 billion in international grants.¹¹⁵ Using U.S. grant makers as but one limited example, it seems clear that the anti-terror justification for restricting foreign funding of civil society is insufficient. This is especially so when considering the anti-terrorism measures imposed by developed countries on grants sent abroad.¹¹⁶ Finally, the programs implemented by civil society, for which foreign funding is often a necessary precondition, can weaken local support for terrorist groups, reduce terrorist recruits, and generally address the root

¹⁰⁹ ICCPR, *supra* note 13, at art. 22(2).

¹¹⁰ *See infra* Part I.C.1.

¹¹¹ Blua, *supra* note 50.

¹¹² *See infra* Part I.C.2.

¹¹³ Memorandum from Human Rights First on the Venezuelan International Cooperation Bill, *available at* www.humanrightsfirst.info/pdf/07126-hrd-venez-ngo-law-analysis.pdf. Leaders in Algeria and Egypt have also used anti-terrorism measures as justification for blanket restrictions on civil society. FREEDOM OF ASSOCIATION UNDER THREAT, *supra* note 63, at 11.

¹¹⁴ *U.S. Charities are Not a Significant Source of Terrorist Fundraising*, GLOBAL NONPROFIT INFORMATION NETWORK (Grantmakers without Borders, San Francisco, CA) Aug. 2008, *available at* http://www.gwob.net/advocacy/pdf/gnin_091508-2.pdf.

¹¹⁵ *Summary of Domestic and International Grants*, THE FOUNDATION CENTER, 2008, http://foundationcenter.org/findfunders/statistics/pdf/03_fund_geo/2006/09_06.pdf. During the same year, the officially-recorded value of private remittances sent abroad from the U.S. was more than \$42 billion. Dilip Ratha and Zhimei Xu, *Migration and Remittances Factbook 2008*, 2008 WORLD BANK, *available at* <http://go.worldbank.org/U1S23A9QR0>. The fact that private remittances outnumbered charitable grants by a power of ten suggests that the preoccupation with charitable giving as a way of preventing terrorist financing is unfounded.

¹¹⁶ *See, e.g.*, Privacy Act of 1974, Implementation of Exemptions, *supra* note 107; Guinane, *supra* note 106; Morris, *supra* note 106.

causes of terrorism, such as poverty and social isolation.¹¹⁷ In fact, the UN General Assembly has called on “non-governmental organizations and civil society to engage, as appropriate, on how to enhance efforts to implement” the UN’s Global Counterterrorism Strategy.¹¹⁸

B. *State Sovereignty*

Many countries have justified restrictions on foreign funding of the nonprofit sector by claiming such funding infringes on state sovereignty.¹¹⁹ Leaders often portray foreign funding as a new sort of imperialism, importing Western values, especially in the realm of human rights.¹²⁰ In Egypt, those in power “accuse NGOs of representing ‘a homogenous block of Western interests seeking to dominate Egypt.’”¹²¹ African nations, such as Zimbabwe and Eritrea, view foreign-supported NGOs as “Trojan horses,” masquerading as aid groups, but intent on diminishing the government’s sovereign authority.¹²² When the Zimbabwean Non-Governmental Organizations Bill was introduced, President Robert Mugabe declared that “we cannot allow CSOs to be conduits or instruments of foreign interference in our national affairs.”¹²³ The Russian government explained the need to restrict the influence of “meddlesome” foreign charities by removing the tax-exempt status of many such charities.¹²⁴

The sphere in which NGOs operate is protected by international instruments such as the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights.¹²⁵ When countries enter into such instruments and agree to their terms, they do so willingly as an exercise of their sovereignty. As a result, signatories cannot claim that allowing organizations to exercise their right to free association by obtaining funding from abroad violates their sovereignty.¹²⁶ Many of the activities prohibited by laws restricting foreign funding of NGOs, such as human rights and equality before the law, are protected by these instruments.¹²⁷

¹¹⁷ See generally KIM CRAGIN & PETER CHALK, *TERRORISM & DEVELOPMENT: USING SOCIAL AND ECONOMIC DEVELOPMENT TO INHIBIT A RESURGENCE OF TERRORISM* (2003) (using data from projects in Northern Ireland, the Philippines, and the West Bank and Gaza Strip to examine the relationship between social and economic development programs and reduced terrorism); see also *The Role of Civil Society in Preventing Terrorism*, 2007 ORG. FOR SECURITY & COOPERATION IN EUR. OFF. FOR DEMOCRATIC INST. & HUM. RTS, available at <http://www.osce.org/item/24495.html>.

¹¹⁸ G.A. Res. 60/288, ¶ 3(e), U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

¹¹⁹ DEFENDING CIVIL SOCIETY, *supra* note 8, at 22.

¹²⁰ Thomas, *supra* note 17, at 393.

¹²¹ McGann, *supra* note 68, at 33 (quoting Nicola Pratt, *Human Rights NGOs and the “Foreign Funding Debate” in Egypt*, in HUMAN RIGHTS IN THE ARAB WORLD 114, 124 (Anthony Chase & Amr Hamzawy, eds., 2006)).

¹²² Chinaka, *supra* note 92.

¹²³ Adong Florence Odora, *Rising from the Ashes: The Rebirth of Civil Society in an Authoritarian Political Environment*, INT’L J. NOT-FOR-PROFIT L., June 2008, at 79, 85.

¹²⁴ Marinova, *supra* note 1.

¹²⁵ ICCPR, *supra* note 13, art. 22; African (Banjul) Charter on Human and Peoples’ Rights art. 10, June 27, 1981, 1520 U.N.T.S. 26363 [hereinafter Banjul Charter].

¹²⁶ Thomas, *supra* note 17, at 393.

¹²⁷ E.g., ICCPR, *supra* note 13, arts. 2, 6, 9 (providing equal protection of the guarantees of the Covenant, guaranteeing the right to life, and prohibiting arbitrary arrest or detention); Banjul Charter, *supra* note 125, arts. 6, 8,

Allowing NGOs, even those funded by foreign sources, to participate in the political and civil life of a country does not lead inevitably to a reduction in state sovereignty. Public international law scholar Steve Charnovitz points out that “a state is not weakened just because its citizens speak through diverse voices.”¹²⁸ When a nation’s citizens form domestic organizations, determine their policy agendas, and then seek funding, whether at home or abroad, to advance those agendas, the result does not undermine state sovereignty; rather, it produces a growth in the domestic capacity of a state vis-à-vis other states.

IV. LEGAL VIOLATIONS

In addition to the very real everyday problems that restrictions on foreign funding of civil society create, these restrictions contravene a variety of laws and legal obligations, including international human rights conventions and bilateral treaties between states.

A. *International Covenant on Civil and Political Rights*¹²⁹

The International Covenant on Civil and Political Rights provides that “[e]veryone shall have the right to freedom of association with others” and that “[n]o 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, the protection of public health or morals, or the protection of the rights and freedoms of others.”¹³⁰ The right to start and run an organization is covered under the right to free association.¹³¹ In the decision *Sidiropoulos and Others v. Greece*, the European Court of Human Rights found that under the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹³² “the right to form an association is an inherent part” of the right to free association, “without which the right would be deprived of any meaning.”¹³³ In another case under the European Convention, the European Court of Human Rights confirmed that the right to free

19 (prohibiting arbitrary deprivations of freedom, providing freedom of conscience and religion, and guaranteeing equal rights).

¹²⁸ Charnovitz, *supra* note 17, at 362.

¹²⁹ The ICCPR was a model for regional covenants protecting civil and political rights that also have binding force on their signatories, including the European Convention on the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples’ Rights, and the American Convention on Human Rights. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]; Banjul Charter, *supra* note 125; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 17955; *see also* LEON E. IRISH ET AL., GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS 18 (2d ed. 2004) [hereinafter GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS]. Because it applies most broadly and is most well-known, the discussion here focuses on the ICCPR. However, much of the analysis in this section applies to the validity of restrictions on foreign funding under these regional covenants as well.

¹³⁰ ICCPR, *supra* note 13, art. 22 ¶¶ 1–2.

¹³¹ *See, e.g.*, GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS, *supra* note 129, at 17–20.

¹³² Because the language of Article 11 of the European Convention is virtually identical to the language of Article 22 of the ICCPR, decisions interpreting the European Convention are considered extremely persuasive for interpreting the ICCPR, although they obviously lack binding authority. *Compare* European Convention, *supra* note 129, at art. 11, with ICCPR, *supra* note 13, art. 22; *see also* GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS, *supra* note 129, at 19.

¹³³ *Sidiropoulos and Others v. Greece*, 4 Eur. Ct. H.R. 500, ¶ 40 (1998).

association “lasts for an association’s entire life.”¹³⁴ In order to realize the right to association, organizations should be allowed to obtain funds, through fundraising or other permissible economic activity, to use for the accomplishment of their goals.¹³⁵ Because in many parts of the world foreign funding is the only funding that is available, the right to free association guaranteed by the ICCPR would be largely illusory without access to foreign funding.¹³⁶

To satisfy the requirements of Article 22 of the ICCPR, a restriction on free association must meet three conditions: it must be prescribed by law, it must be in pursuit of one of the four legitimate state interests identified in the Article, and it must be necessary in a democratic society. Any restriction that fails to meet even one of the conditions is unlawful under the Covenant. Almost all restrictions on foreign funding of nonprofits fail to meet at least one of these three conditions.

Vague language that gives administrative officials broad discretion to limit the rights of NGOs would not satisfy the requirement that the restriction be prescribed by law.¹³⁷ The proposed Venezuelan law that requires donations to NGOs intended for “international cooperation” to be funneled into a government-controlled fund, yet leaves it to government officials to determine what “international cooperation” means, would violate this requirement of the ICCPR.¹³⁸ The Uzbek banking regulations that allow government officials to determine whether the use of the foreign funds would be “beneficial” before allowing NGOs access to the money is similarly too vague to satisfy the ICCPR.¹³⁹ The Algerian Associations Act leaves it to the government minister to determine whether the foreign donation is “compatible with the stated goal in the statutes of the association.”¹⁴⁰ Without any specific standards to determine compatibility, the Act’s language is too vague for the restriction to be truly “prescribed by law.”

Second, a restriction on free association must be in pursuit of one of four legitimate state interests: national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.¹⁴¹ These interests are quite limited, and the ICCPR provides no mechanism for expanding them, either through interpretation or adding to the list.¹⁴² Preservation of state sovereignty is not listed as one of the legitimate state interests, so laws restricting foreign funding of NGOs in order to preserve state sovereignty are unlawful under the Covenant. Thus Egypt’s efforts to maintain state sovereignty in the face of encroaching Western cultural imperialism by requiring government approval for civil society funding from international sources do not conform to the mandates of Article 22.¹⁴³ Similarly,

¹³⁴ *United Communist Party of Turkey and Others v. Turkey*, 4 Eur. Ct. H.R. 1, ¶ 33 (1998).

¹³⁵ See GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS, *supra* note 129, at 56–58, 62–64.

¹³⁶ *Id.* at 89.

¹³⁷ DEFENDING CIVIL SOCIETY, *supra* note 8, at 23.

¹³⁸ See *infra* Part I.C.2.

¹³⁹ See *infra* Part I.C.1.

¹⁴⁰ Associations Act (No. 90/31) of Dec. 4, 1990, art. 28; See *infra* Part I.D.1.

¹⁴¹ ICCPR, *supra* note 13, art. 22 ¶ 2.

¹⁴² See generally ICCPR, *supra* note 13; DEFENDING CIVIL SOCIETY, *supra* note 8, at 23.

¹⁴³ See *infra* Parts I.D.2 & II.B.

Russia's method of heavily taxing grants by foreign-based NGOs to protect Russian sovereignty from "meddlesome" foreign charities does not meet the Covenant's requirements.¹⁴⁴

Likewise, because the Zimbabwean Non-Governmental Organizations Bill was passed, according to the president, to prevent foreign encroachments on state sovereignty, it lacks a lawful basis under the ICCPR.¹⁴⁵ The Bill, which would prohibit foreign funding for organizations promoting human rights or political governance issues, cannot be seen to fall under the four legitimate interests either: it does not protect national security or public safety; it does not seek to maintain public order; it does not protect public health or morals; and it does not protect the rights and freedoms of others.¹⁴⁶ In fact, because it would prevent foreign funding of organizations promoting human rights, it undermines the last of the legitimate interests. The Ethiopian Charities and Societies Proclamation falls victim to the same legal defects: in addition to failing to meet any of the legitimate state interests, its prohibition on foreign funding of organizations advancing human rights, equality, conflict resolution, and law enforcement and justice services undermines national security, public safety, public order, and the protection of the rights and freedoms of others.¹⁴⁷

The final requirement in Article 22, that restrictions be "necessary in a democratic society," means that a mere casual linkage between the restriction and a legitimate interest will not justify curtailing freedom of association.¹⁴⁸ Rather, the restriction must be proportionate to the interest pursued and may not go beyond what is necessary to obtain the interest.¹⁴⁹ As a result, justifying a restriction on free association as an anti-terrorism measure by itself is insufficient to satisfy the ICCPR, although anti-terrorism falls under the legitimate state interest of protecting national security and public safety. Rather, the restriction must be narrowly tailored to address a valid terrorism concern. The terrorist threat must be real and likely to affect the territorial integrity or political independence of the nation.¹⁵⁰

Venezuela and Uzbekistan, among others, have invoked terrorist concerns to justify the passage of their laws restricting foreign funding of NGOs.¹⁵¹ Especially in Uzbekistan, where terrorism is a valid concern, the government should take measures to protect national security.¹⁵² However, the measures in Venezuela and Uzbekistan to funnel foreign NGO funding through government-controlled organisms are far from necessary to prevent terrorism.¹⁵³ The impulse to seek government oversight of foreign funds flowing to domestic organizations may seem

¹⁴⁴ See *infra* Part I.F.

¹⁴⁵ See *infra* Part II.B.

¹⁴⁶ See *infra* Part I.E.2.

¹⁴⁷ See *infra* Part I.E.1.

¹⁴⁸ See *DEFENDING CIVIL SOCIETY*, *supra* note 8, at 24.

¹⁴⁹ *Id.* at 24–25.

¹⁵⁰ *DEFENDING CIVIL SOCIETY*, *supra* note 8, at 24.

¹⁵¹ See *infra* Part II.A.

¹⁵² See C. J. Chivers, *At Least 2 Are Killed in Coordinated Blasts at Embassies in Uzbekistan*, N.Y. TIMES, July 31, 2004; Seth Mydans, *19 Killed in Uzbekistan; Terrorism Blamed*, N.Y. TIMES, Mar. 30, 2004.

¹⁵³ See *infra* Part I.C.

reasonable in light of terrorist financing concerns, but there are more effective and less restrictive means of ensuring that terror money is not masquerading as legitimate civil society funding.¹⁵⁴

As a general matter, laws governing NGOs should require some sort of financial reporting and supervision to ensure that funds are being obtained and disbursed for a legitimate nonprofit purpose.¹⁵⁵ In some cases, regular auditing by the responsible ministry or tax authorities may also be appropriate.¹⁵⁶ These generally-applicable policies can be used to ensure that foreign funding of NGOs comes from a legitimate source and is used for purposes relating to the organization's goals. Because less intrusive means of accomplishing the legitimate state interest are available, the restrictions on foreign funding of NGOs in Uzbekistan and Venezuela are not "necessary in a democratic society" and are therefore unlawful under the ICCPR.¹⁵⁷ Similarly, the total bans on foreign funding of civil society in Moldova and Eritrea do not comply with the condition of necessity in Article 22 because there are much less restrictive means of accomplishing legitimate state interests.¹⁵⁸ The United States Department of State's Guiding Principles on Non-Governmental Organizations confirm that the right of NGOs to seek foreign funding is compatible with antiterrorism measures under the ICCPR: "NGOs should be permitted to seek, receive, manage and administer for their peaceful activities financial support from domestic, foreign and international entities."¹⁵⁹

B. *Bilateral Investment Treaties*

The United States and other developed nations have concluded treaties with many developing nations to safeguard foreign investments in those countries. These bilateral investment treaties (BITs) provide core investment protections, including fair and equitable treatment and prohibitions against arbitrary impairment and expropriation.¹⁶⁰ Restrictions on civil society often conflict with provisions of BITs, especially restrictions on the foreign funding of civil society.¹⁶¹

In order for a BIT to apply, the NGO must first qualify as a protected investor (or company), and its funding must qualify as a protected investment under the treaty.¹⁶² Some treaties, such as the United States-Egyptian Treaty Concerning the Reciprocal Encouragement and Protection of Investments, specify that a "company" does not have to be organized for pecuniary gain.¹⁶³ Other treaties do not specify whether a company must be a for-profit entity, or

¹⁵⁴ See GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS, *supra* note 129, at 68–71.

¹⁵⁵ See *id.* at 68.

¹⁵⁶ See *id.* at 69–72.

¹⁵⁷ ICCPR, *supra* note 13, art. 22 ¶ 2.

¹⁵⁸ See *infra* Part I.B.

¹⁵⁹ *Guiding Principles on Non-Governmental Organizations*, U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, Dec. 14, 2006, <http://www.state.gov/g/drl/rls/77771.htm>.

¹⁶⁰ Luke Eric Peterson & Nick Gallus, *International Investment Treaty Protection of Not-for-Profit Organizations*, INT'L J. NOT-FOR-PROFIT L., Dec. 2007, at 47, 56.

¹⁶¹ See *generally id.* Peterson and Gallus provide an excellent in-depth analysis of the ways in which BITs may be used to challenge the legality of restrictions on civil society.

¹⁶² *Id.* at 52–53.

¹⁶³ Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, art. I(1)(a), Sept. 29, 1982, 21 I.L.M. 927 [hereinafter U.S.-Egypt Bilateral Investment Treaty].

whether the definition may include NGOs.¹⁶⁴ Likewise, a treaty may fail to specify whether an “investment” may include funding for a nonprofit purpose.¹⁶⁵

If the foreign funding of the NGO does meet these requirements, the host country must provide certain protections to foreign grant-making groups, such as the same treatment it would accord to domestic companies.¹⁶⁶ The BIT between Egypt and the U.S., for example, provides that “each Party shall accord investments in its territory, and associated activities related to these investments, of nationals or companies of the other Party treatment no less favorable than that which it accords in like situations to investments and associated activities of its own nationals or companies.”¹⁶⁷ Under this standard, Egypt’s law requiring government approval of foreign funding of NGOs violates its treaty with the United States,¹⁶⁸ as Egypt imposes the burden on foreign donors but not domestic ones.

Additionally, the U.S.-Egypt treaty stipulates that the treatment of investments “shall never be less than that required by international law and national legislation.”¹⁶⁹ The Secretary of State’s letter transmitting the treaty to the President explains that this provision is intended to ensure that U.S. investments in Egypt receive “fair and equitable treatment.”¹⁷⁰ Tribunals arbitrating claims under BITs have found that “excessive and harassing administrative burdens” violate the requirement of fair and equitable treatment.¹⁷¹ Because the process of obtaining government approval is often lengthy and the organization does not have access to the funds while it awaits approval,¹⁷² Egypt is imposing an excessive administrative burden on both the foreign organization and the domestic recipient of the funding in contravention of its BIT obligations.

BITs often require that a state pay compensation when it expropriates foreign investments.¹⁷³ For example, the U.S.-Uzbekistan Treaty Concerning the Encouragement and Reciprocal Protection of Investment only allows expropriation of investments for “public purpose,” and must provide compensation in the fair market value of the expropriated investment.¹⁷⁴ The Uzbek practice of taking up to eighty percent of foreign donations to NGOs

¹⁶⁴ Agreement for the Promotion and Protection of Investments, U.K.-Uzb., art. 1(d), Nov. 24, 1993, 1863 U.N.T.S. 31724 [hereinafter U.K.-Uzbekistan Bilateral Investment Treaty].

¹⁶⁵ See *id.* art. 1(a); U.S.-Egypt Bilateral Investment Treaty, *supra* note 163, at art. I(1)(c).

¹⁶⁶ Peterson & Gallus, *supra* note 160, at 61–2.

¹⁶⁷ U.S.-Egypt Bilateral Investment Treaty, *supra* note 163, at art. II(2)(a).

¹⁶⁸ See *infra* Part I.D.2.

¹⁶⁹ U.S.-Egypt Bilateral Investment Treaty, *supra* note 163, at art. II(4).

¹⁷⁰ Letter from George P. Schultz, Secretary of State, to President Ronald Reagan (May 20, 1986), available at <http://www.state.gov/e/eeb/afd/43255.htm>.

¹⁷¹ Peterson & Gallus, *supra* note 160, at 58.

¹⁷² See *infra* Part I.D.2.

¹⁷³ Peterson & Gallus, *supra* note 160, at 62.

¹⁷⁴ Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uzbek., art. III, Dec. 16, 1994, S. TREATY DOC. NO. 104-25 [hereinafter U.S.-Uzbekistan Bilateral Investment Treaty].

during the transfer of foreign funds through a government-controlled bank¹⁷⁵ clearly contravenes the expropriation provision of the BIT.

C. *Investment Incentive Agreements*

The United States has also entered into investment incentive agreements with many of the states that restrict foreign funding of the nonprofit sector. These agreements deal with the services that the Overseas Private Investment Corporation (OPIC), a U.S. government agency, provides to U.S. businesses seeking to invest overseas.¹⁷⁶ All of these agreements contain a provision stating that OPIC can transfer funds to any person or entity (likely an American business investing in the foreign country), and that the funds are freely available for use by the recipient.¹⁷⁷ From the language of these agreements, it appears that so long as an American business operating in the foreign country receives funds from OPIC, it can then use those funds as it wishes, including by making donations to NGOs. In this way, the investment incentive agreements protect donations from American entities to NGOs operating in other countries, so long as the American entity is operating in the same country.

A number of restrictions on foreign funding of NGOs violate these agreements. In Algeria, for example, the requirement of government approval for NGO receipt of foreign funding¹⁷⁸ does not allow American entities to distribute the funds from OPIC “freely,” as the agreement requires.¹⁷⁹ Likewise, the prohibitions on all foreign funding of NGOs in Eritrea and the Transnistria region of Moldova¹⁸⁰ do not allow American entities operating in those countries to distribute OPIC funding to domestic NGOs, in violation of those countries’ agreements with the United States.¹⁸¹

IV. ENFORCEMENT OPTIONS

In the face of violations of international norms and specific legal obligations, those injured by the restrictions on foreign funding of civil society may wish to challenge the restrictions either in legal fora or through other means. From a legal perspective, the relevant treaties may create enforcement mechanisms or provide causes of action. Practically, however, such relief is difficult to maintain. Thus, the realpolitik option of forcing change through a

¹⁷⁵ See *infra* Part I.C.1.

¹⁷⁶ See Investment Incentive Agreement, U.S.-Alg., June 22, 1990, T.I.A.S. No. 12075; Investment Incentive Agreement, U.S.-Eri., May 4, 1994, T.I.A.S. No. 12179; Investment Incentive Agreement, U.S.-Mold., June 19, 1992, T.I.A.S. No. 12459; Investment Incentive Agreement, U.S.-Russ., Apr. 3, 1992, T.I.A.S. No. 11471; Investment Incentive Agreement, U.S.-Venez., June 22, 1990, T.I.A.S. No. 12098; Overseas Private Investment Corporation, About Us, <http://www.opic.gov/about/index.asp> (last visited Jan. 19, 2009).

¹⁷⁷ See Investment Incentive Agreement, U.S.-Alg., art. 5, June 22, 1990, T.I.A.S. No. 12075; Investment Incentive Agreement, U.S.-Eri., art. 3, May 4, 1994, T.I.A.S. No. 12179; Investment Incentive Agreement, U.S.-Mold., art. 4, June 19, 1992, T.I.A.S. No. 12459; Investment Incentive Agreement, U.S.-Russ., art. 4, Apr. 3, 1992, T.I.A.S. No. 11471; Investment Incentive Agreement, U.S.-Venez., art. 5, June 22, 1990, T.I.A.S. No. 12098.

¹⁷⁸ See *infra* Part I.D.1.

¹⁷⁹ Investment Incentive Agreement, U.S.-Alg., art. 5, June 22, 1990, T.I.A.S. No. 12075.

¹⁸⁰ See *infra* Part I.B.

¹⁸¹ Investment Incentive Agreement, U.S.-Eri., art. 3, May 4, 1994, T.I.A.S. No. 12179; Investment Incentive Agreement, U.S.-Mold., art. 4, June 19, 1992, T.I.A.S. No. 12459.

carrot-and-stick approach of conditioning foreign aid on removal of these restrictions may be more effective.

A. *Treaty-Based Enforcement Mechanisms*

1. The International Covenant on Civil and Political Rights

The ICCPR has three monitoring systems: states submit periodic reports to the Human Rights Committee (HRC), explaining the measures they have taken to implement the guarantees of the Covenant;¹⁸² a state may complain to the HRC about another state's breach of the Covenant;¹⁸³ or, under the Optional Protocol to the ICCPR, individuals may submit communications to the HRC claiming to be victims of a state's violation of the Covenant.¹⁸⁴

The Article 40 periodic reporting requirement remains largely toothless, both because of the vague description of the requirement and the ease with which states can manipulate facts and circumstances to create a favorable impression of their human rights records.¹⁸⁵ The ICCPR requires that the reports describe "measures" that the states have adopted to "give effect to the rights" of the Covenant, as well as the "progress made in the enjoyment of those rights."¹⁸⁶ The imprecise language allows states to refer to laws that have been adopted for other reasons, as well as to court and administrative decisions and practices.¹⁸⁷ As a result, the reports are regularly "abstract" and "not substantiated."¹⁸⁸ Thus, there is a tendency for reports to fail to accurately reflect the situation of Covenant implementation in a given state. In the end, the HRC often resorts to reports from other UN organs and outside NGOs to obtain a more realistic view of a state's implementation of the Covenant rights.¹⁸⁹ Despite this crucial input from NGOs in the HRC reporting process, they cannot seek enforcement of their rights through this mechanism, as the HRC does not issue binding judgments with the force of law in the reporting process.

Likewise, the HRC is unable to issue binding decisions when a state utilizes its Article 41 right to complain about another state's breach of the ICCPR.¹⁹⁰ The effectiveness of the Article 41 complaint process is further blunted by the infrequency of states taking advantage of it. Often, states prefer to tolerate violations, especially if they are not particularly grave, to avoid injuring often precarious international relations.¹⁹¹

¹⁸² ICCPR, *supra* note 13, art. 40. The Human Rights Committee, created by the ICCPR, is composed of eighteen "persons of high moral character and recognized competence in the field of human rights," all nationals of the parties to the Covenant. *Id.* art. 28.

¹⁸³ *Id.* art. 41.

¹⁸⁴ Optional Protocol to the International Covenant on Civil and Political Rights art. 41, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter *Optional Protocol*].

¹⁸⁵ See CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 68–72 (Tullio Treves et al. eds., 2005).

¹⁸⁶ ICCPR, *supra* note 13, art. 40(1).

¹⁸⁷ Treves, *supra* note 185, at 69.

¹⁸⁸ *Id.* at 85.

¹⁸⁹ See generally *id.* at 72–83.

¹⁹⁰ *Id.* at 84.

¹⁹¹ *Id.*

The most promising method of challenging a state's laws restricting NGOs' right to foreign funding is the Optional Protocol's individual communication mechanism. Even this method has severe limitations, though. First, any individual wishing to bring a complaint before the HRC must have "exhausted all available domestic remedies."¹⁹² Thus, the individual must devote the time and expense to litigating his case in domestic court, including the appeals process, before he may seek a remedy under the Optional Protocol. In addition, the HRC has ruled that NGOs cannot submit complaints, as only individuals have the right to do so under the Optional Protocol.¹⁹³ An NGO that is unable to receive foreign funding because of legal restrictions cannot bring a complaint to the HRC. Rather, the complainant must be an individual who has been directly harmed by the restriction: for example, someone who ceased to receive services from an NGO because the organization's foreign funding became unavailable due to legal impediments. Finally, many states that have adopted the ICCPR have not adopted its First Optional Protocol, so it is impossible to bring individual complaints against them to the HRC.¹⁹⁴

Clearly, the class of individuals capable of bringing suit exists; however, the members of this class are those who are least likely to be able to withstand the process of pursuing all domestic remedies prior to filing a complaint before the HRC. Thus, while laws restricting foreign funding of NGOs can technically be challenged under the Optional Protocol to the ICCPR, such challenges are likely to be rare.

2. Bilateral Investment Treaty Claims

Another treaty-based option for legal challenge to restrictions on foreign funding of NGOs is through bilateral investment treaties' arbitration clauses. Generally, two sorts of claims may be brought related to an investment treaty: a state may bring a claim when there is a dispute about the interpretation or application of the treaty, or investors may bring a claim against a state for violating the treaty.¹⁹⁵ Often, the treaties provide that any disputes arising under the treaty, including alleged breaches of the rights conferred by the treaty, should be solved through arbitration or other alternative dispute resolution processes.¹⁹⁶ In some instances, an investor may bring a claim before the courts or administrative tribunals of the state it claims is in breach.¹⁹⁷ If their claims are successful, investors may win damages for a breach of the treaty.¹⁹⁸ Furthermore, the enforcement mechanisms when an individual investor brings a claim are seen to be stronger, especially if the dispute is settled through arbitration.¹⁹⁹

¹⁹² Optional Protocol, *supra* note 184, art. 2.

¹⁹³ See, e.g., *A Group of Associations for the Defence of the Rights of Disabled and Handicapped Persons in Italy etc. v. Italy*, p. 198, Communication No. 163/1984, U.N. Doc A/39/40 (1984).

¹⁹⁴ Optional Protocol, *supra* note 184. Among the states that have not ratified the Optional Protocol are Egypt, Eritrea, Ethiopia, Zimbabwe, and the United States. *Id.*

¹⁹⁵ See Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 53–54 (2005).

¹⁹⁶ See, e.g., U.S.-Egypt Bilateral Investment Treaty, *supra* note 163, art. 7(3)(a); U.K.-Uzbekistan Bilateral Investment Treaty, *supra* note 164, art. 8(1).

¹⁹⁷ See, e.g., U.S.-Uzbekistan Bilateral Investment Treaty, *supra* note 174, art. 9(2)(a).

¹⁹⁸ Franck, *supra* note 195, at 54, n. 29.

¹⁹⁹ *Id.*

Foreign donors whose aid-granting capacity has been limited or interrupted by laws restricting foreign funding of NGOs can thus seek redress if the restriction violates an investment treaty in place between the donor's country and the recipient's country. An American donor to NGOs in Uzbekistan that has had a portion of its donation siphoned off by the government-controlled banks²⁰⁰ may bring a claim arguing that it is owed compensation for expropriation of a foreign investment.²⁰¹ Under the Bilateral Investment Treaty between the United States and Uzbekistan, the donor could choose whether to bring the suit in Uzbek courts or pursue international arbitration.²⁰² In either case, the donor could seek compensation for donations already seized by the government, as well as an agreement or legal order prohibiting future violations of the BIT in this manner.

While BIT claims can provide legal remedies for restrictions on foreign funding of NGOs, this option contains limitations. First, it is only available to the donor organization, and not to recipient groups. In the case of the government appropriating a portion of the money donated, it is easy to see how a foreign NGO would have an interest in pursuing a claim. However, for violations that may affect the donor less directly, such as the Ethiopian law prohibiting NGOs receiving foreign funding from engaging in certain types of activities, the donor groups may be less willing to pursue remedies under BITs. Making a treaty-based legal claim, whether in arbitration or a more traditional court system, is costly and time consuming. For organizations seeking to maximize their limited resources, the costs may simply be too high.

B. *Conditioning Foreign Aid on Compliance*

The U.S. government, like the governments of other wealthy nations, has long used foreign aid as an instrument to influence the domestic policies of recipient states.²⁰³ In the middle of the twentieth century, for instance, the U.S. provided foreign aid to states it feared would become allies of the U.S.S.R. and adopt communist regimes.²⁰⁴ A 2004 Congressional report notes that foreign aid "can act as both a carrot and a stick, and is a means of influencing events, solving specific problems, and projecting U.S. values."²⁰⁵

The governments of donor states could therefore influence change in recipient countries' laws governing foreign funding of NGOs by conditioning foreign aid on eliminating undesirable restrictions. With a total budget of over \$9 billion in 2006 alone,²⁰⁶ the United States Agency for International Development (USAID), the principal U.S. federal government agency for overseas assistance,²⁰⁷ has an enormous "carrot" at its disposal to encourage recipient nations to enact

²⁰⁰ See *infra* Part I.C.1.

²⁰¹ See *infra* Part III.B.

²⁰² U.S.-Uzbekistan Bilateral Investment Treaty, *supra* note 174, art. 9(2)-(3).

²⁰³ See generally CAROL LANCASTER, AID TO AFRICA 75-77 (1999); see also Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 588-89 (2007).

²⁰⁴ E.g., *id.* at 84.

²⁰⁵ CURT TARNOFF & LARRY NOWELS, CRS REPORT FOR CONGRESS, FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY 1, n. 1 (2004).

²⁰⁶ *Summary of FY 2007 Budget and Program Overview*, USAID BUDGET (USAID, Washington, D.C.), available at <http://www.usaid.gov/policy/budget/cbj2007/summary.html>.

²⁰⁷ About USAID, USAID, http://www.usaid.gov/about_usaid (last visited March 3, 2009).

specific changes. One of the goals of U.S. foreign assistance is to “advance human rights and freedoms,” and the Director of Foreign Assistance’s operating principles include “prioritizing the allocation of resources to ensure that U.S. policy objectives are achieved” and “using our convening authority to bring stakeholders together to develop coordinated approaches to issues and challenges.”²⁰⁸ USAID could very well use its funding as both a carrot and a stick by increasing funding to those countries that allow NGOs to receive funds from foreign donors and greatly reducing funding to those countries that do not. The governmental interest in ensuring that NGOs can receive foreign funding is compounded by recent developments in governmental grant-making: increasingly, the federal government is channeling its aid to NGOs rather than governments, especially in areas where the government is seen as corrupt.²⁰⁹

In 2004, the U.S. government established an additional branch to administer foreign aid: the Millennium Challenge Corporation (MCC).²¹⁰ To determine whether countries will be eligible for grants, MCC examines their “performance on independent and transparent policy indicators.”²¹¹ Two of these policy indicators relate to the freedom of association: civil liberties and political rights.²¹² A country’s restrictions on foreign funding of NGOs will lower its scores on these two indicators, decreasing its chances of becoming eligible for MCC grants. The grants thus serve a carrot function by providing economic incentives for countries to liberalize their laws governing foreign funding for the nonprofit sector. In the end, this “carrot and stick” approach may be a more effective method of bringing about reform of foreign funding laws. While legal challenges may be more expedient, their availability is limited. Furthermore, because foreign aid incentives invite changes across the spectrum of fundamental rights and good governance, they are more likely to have systemic, rather than localized, impact.

CONCLUSION

Civil society is generally coming under attack across the globe from authoritarian and semi-authoritarian governments, and restrictions on foreign funding of organizations operating within the civic sphere are but one manifestation of a much larger problem.²¹³ Limits on the receipt of foreign funds often strip NGOs of their only source of income, as domestic funding for civil society is extremely scarce in most developing nations. The result is the reduction or even elimination of life-saving social services and development aid. Despite a rather grim outlook for the continued viability of the civic sector in countries that limit foreign funding, both donor and recipient organizations should remain cognizant of legal tools that can be used to challenge such restrictions. When lobbying a repressive government to amend its laws is unlikely to produce change, the best solutions may be legal challenges through international treaties and covenants and persuading donor governments to condition aid on removal of foreign funding restrictions.

²⁰⁸ *Director of U.S. Foreign Assistance*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/f/> (last visited March 3, 2009).

²⁰⁹ See Chenge, *supra* note 11.

²¹⁰ *About MCC*, MILLENNIUM CHALLENGE CORPORATION, <http://www.mcc.gov/about/index.php> (last visited March 3, 2009).

²¹¹ *Id.*

²¹² *Selection Indicators*, MILLENNIUM CHALLENGE CORPORATION, <http://www.mcc.gov/selection/indicators/index.php> (last visited March 3, 2009).

²¹³ See DEFENDING CIVIL SOCIETY, *supra* note 8, at 6–8.

Article

Living in a Lie and Dying in Silence: The Trauma of Civil Society in the Middle East and North Africa

Ibrahim Saleh¹

Veteran political activists and NGOs in the Middle East and North Africa (MENA) express concern over the future of civil liberties. There is consensus that the region is currently witnessing a genuine crisis as a result of recent government efforts to crush political dissent in Egypt, Syria, Morocco, Tunisia, Kingdom of Saudi Arabia, Algeria, and Iran. Many in the development field believe that civil society is the key to effective defense of civil liberties, and they are disheartened by civil society in the MENA countries because it seems to be characterized by only weak and uncoordinated NGOs. However, occasional outbursts of public opposition to oppression and the increasing strength of radical religious organizations demonstrate that civil society in the MENA countries has deep potential for promoting change. The potential of civil society is strictly constrained by government policies and practices that restrict expression and alienate Arab publics from government, the media, the international community, and each other. To resolve the crisis and prevent violent responses to government oppression, governments will need legal reform that enables expression in the media and the public.

“I have a dream that one day this nation will rise up and live out the true meaning of its creed: ‘We hold these truths to be self-evident, that all men are created equal,’” Martin Luther King Jr. said on August 28, 1963, from the steps of the Lincoln Memorial during the March on Washington for Jobs and Freedom. Inspired by his words, we cannot keep living in a lie in the Middle East. We cannot overlook the urgency of the moment. The discontent of the mid-2009 will never pass until there is an invigorating outlet of freedom and equality. “The MENA lives in a lie and dies in silence” is not just a metaphor but also a reality in the absence of civil liberties.

The authoritarian regimes in the region have witnessed a blossoming of associational activity that resembles similar events in other autocracies prior to democratization, such as Egypt and Iran. The chronic failures of rulers to meet popular economic and political demands carved a public space in which new groups could “attract a following, develop a bureaucratic form, and formulate policy alternatives” (Entelis, 1999). Citizens were “drawn into political life to an

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unprecedented degree” as activists stirred waves of rage (Bellin, 1994), while complacent elites reeled from social unrest, amplified by sluggish economic growth and draining fiscal endowments (Henry and Springborg, 2001).

In that regard, it has become impossible to realize any sustained process of Arab democratization without establishing an effective civil society. In terms of both the total number of NGOs and their “density” (quantity of organizations per 100,000 inhabitants), Egypt, Morocco, Algeria, Lebanon, and the Palestinian territories enjoy the largest and most active civil societies, the oil-rich Gulf countries the most enervated, and the other Arab countries fall in between.

A basic requirement when dealing with civil society is to consider some of its operational values such as “What is Arab civil society?” and “What counts as a civil society organization?” Civil society has become a buzzword in Arab discourse; public officials use the term “to promote their projects of mobilization and ‘modernization;’ Islamists use it to angle for a legal share of public space; and independent activists and intellectuals use it to expand the boundaries of individual liberty” (Bellin, 1990). Most Western political scientists and liberal Arab research institutes, such as the Ibn Khaldun Center for Development Studies in Cairo, define civil society as “the place where a mélange of groups, associations, clubs, guilds, syndicates, federations, unions, parties, and groups come together to provide a buffer between state and citizen (Norton, 1993).

In that context, civil society actors must be secular in ideology, because the religion and the state were unified entities since the 18th century in the region. As religion is part of the culture, ethnicity, and social identity, it was citizenship. Besides, many of the regional societies have suspended their belief in the Arab nation and prioritized their Muslim faith. At times, their lexicon has turned “the Arabs” into a derogatory label, implying wastefulness, incompetence, and subservience, while others prefer to be known as Egyptians, Syrians, Jordanians, Moroccans, or citizens of another independent state, each with its own flag and own interests (Saleh, 2009b).

As a result, the public has been always been torn between the internal subjection to dictatorial governments as well as the external cut off from the world—a situation that has been extensively used by the extremists, by manipulating the the religious text to reach certain desires in the name of god and Islam. Such interpretation uses the slogan of “just war” to kill and sacrifice others from different religions with the pretext that they complying with the Islamic religious doctrine (Saleh, 2006).

This serves geopolitical and economic objectives. The terms “Islamic-fascism” and “Manifest Destiny” serve to degrade the policies, institutions, values, and social fabric. The enemy in both cases is characterized as evil, with a view to justifying military action, including the mass killing of civilians. It is not limited to assassinating or executing rulers, journalists, and politicians, but rather extends to entire populations. It purports to break national consciousness and the ability to resist the invader. It denigrates peaceful Islam or the respect and tolerance to others manifested in religious and non-religious societies (Saleh, 2009b). That is why civil society activists must also be civil in their behavior, legally recognized, and supportive of democratic reform.

One can explain the failure of civil society in two ways: First, individual civil society organizations have not mobilized a critical mass of supporters throughout society. For example, although NGOs can limit the depredations of authoritarian rule by publicizing abuses such as

torture of political dissidents, they cannot directly challenge the state without popular support. However, popular support is limited because most NGOs are dedicated to single issues and cannot mobilize support for broad reforms (Nasr, 2005).

Second, certain NGOs suffer from widespread apathy among their members. In Egypt, for example, board elections for trade unions seldom elicit more than ten to fifteen percent voter turnout. Second, the controversy over Islamists' role in democratic reforms reflects the difficulty of measuring the effectiveness of Arab civil society. If only secular democrats are considered to be part of civil society, then the civic sector appears weak and fragmented, unable to extract weighty reforms from autocratic executives (Alterman, 2004). On the other hand, should Islamists be included within the view of civil society, then traditional explanations behind the failings of people power lose persuasiveness; the "Arab street" appears passionate and popular as measured by the Islamists' membership and resources, and on numerous fronts seems on the brink of mounting a frontal assault on the authoritarian state (Bayat, 2003).

At a time when the MENA countries are full of potential for developing its human resources, the oppressive political systems, the lack of awareness, and the absence of strategic vision have caused social unrest, political agitation, and a setback of civil liberties, not to mention a severe brain drain.

As a consequence, a persistent malaise has developed in the relations between the media, the public, and the government, in which all parties involved feel there is little shared interest. This situation has caused a cohort of veteran political activists and media personnel to express regret and concern over the future of political and civil liberties in the region (Saleh, 2009a)

All MENA states have similar laws and legislation restricting freedom of expression and diffusion of ideas. Yet the problem goes far beyond the law's content. Codes related to publishing books and newspapers create other limitations to civic freedom. Common examples include MENA penal codes, journalism regulation laws, printing laws, civil servant laws, political parties laws, and national security laws (Bassiouni, 2007).

During the second half of the 20th century, the MENA region aimed at unifying the general framework of its respective legislative processes, particularly through multilateral cooperation within the League of Arab States. In 1981, at the Second Conference of Arab Ministers of Justice in Sana'a, the capital of Yemen, the "Sana'a Strategy" unified domestic legislation through a series of integrated codes, including civil law and procedures, penal law and procedures, juvenile law, prison standards, combating information technology crime, matters related to personal status, and judicial organization and regulation (Saleh, 2009a).

The League of Arab States also formed a committee to unify legal and judicial terms, structures, and processes to achieve a more integrated and harmonized legal system. Concurrently, to implement the recommendations of this committee, the League of Arab States established the Arab Center for Legal and Judicial Studies in Beirut.

It is also noteworthy that during the session of the 2005 Arab Summit in Algiers (Algeria), the Pan-Arab Parliament in Damascus (Syria) was established to demonstrate that the consecrated Islamic Shari'a represents a solid foundation for Arab jurisprudence, while utilizing other legal systems employed in the region, such as the Latin system in Egypt and other North African states and the Anglo-American system in Sudan.

Such perpetuation of government control across the region has led to a sense of misinformation and suspicion among the public. It has perpetuated a general feeling of falsehood that some have termed “collective fraud,” which is a systematic and knowing suppression of unwelcome truths by a set of experts who either “shade” reality or acquiesce to such shading. This prevalent situation in many parts of the MENA has resulted in media distortions, untruths, evasions, and biases collectively produced and maintained by willing journalistic lies.

To reinforce their politicizing solidarity, Arab governments have never allowed media to evaluate critically national domestic policies or those of friendly governments. Besides, media nearly never delve into national or local issues because these are the issues that most threaten their governments’ authority and legitimacy.

In this political context, what is perhaps most disturbing is the unfortunate rise of a soft form of destructive self-censorship among journalists. For example, basic information such as demographic statistics is treated as if it were a state secret, and it is almost impossible to report on the inner working of governments. This is reinforced by the fact that most of the media personnel and journalists lack professional training. Informing the public is not valued, and there is a reckless use of power by senior bureaucrats (Kienle, 1998).

It is thus very common to find that journalists and editors are co-opted by officials and business interests, while others who expose their governments’ corruption or heavily criticize their regimes’ practices are often subject to arbitrary arrests or threats or acts of violence. The fear of such retribution leads to poor government transparency, allows corruption to remain ingrained, and serves to prevent any meaningful discussion of issues that could lead to policy reform.

Thus, force and violence are used to silence those who have doubts about what to believe, especially when the public’s dependence on the state news is paradoxically creating periodic “crises” of acute form. Such crises can take the form of a moral panic or an alarm over security; or they may be part of a longer-term, more diffused sense of crisis over Arab or Muslim identity.

In this context, NGO leaders and activists have expressed four main criticisms. The first is that MENA governments only half-heartedly endorse freedom of expression and the press while ignoring other basic human needs. The second is that MENA governments take a superficial approach to freedom and democracy, which results in the marginalization of the interests of the majority to preserve the ruling minority’s interests. The third problem is the governments’ overemphasis on major regional issues such as the invasion of Iraq, Islamophobia, and the “resentment and tyranny” motivated by hatred for the Arab-Israeli Conflict. And the fourth problem deals with the simplistic official analysis of the multifaceted complexities that produce a perception of fear of the Green Danger, or the establishment of a radical Islamist state in Egypt and other MENA nations (Saleh, 2006).

In the MENA, ministers of information execute the agenda of their states to control the media and shape their content by enforcing harsh laws with imprisonment and physical violence. In the last decade, the complexity of the media has ballooned as new means of expression have proliferated between the Internet and other mobile communications. However, the growing complexity has not overwhelmed Ministers’ ability to regulate expression. Ministers have developed techniques to monitor the messages of the mushrooming new media scene, especially on the Internet; to block the emerging activism of the expanding population of a predominately poor, illiterate youth; and to limit the growing audience for radical Islamist groups in the media,

especially on TV, by offering news coverage of events through a prism of individual and collective humiliation and resentment. As a result, the media portray the distorted reality created by this prism; and to compete with each other, they exaggerate the distortion. Despite emergent signs that regime reform may indeed be gaining ground in the region, regnant regimes have much to lose in terms of power and wealth, threat of bloody insurgencies by jihadists, and retribution from those who replace them (Saleh, 2009a).

MENA states are generally characterized by a combination of oversimplification of terminology and concepts with empty rhetoric paying lip-service to freedom of expression and information diffusion. Free speech is severely restricted in the midst of internal subjection to governments on the one hand, and the external separation of the MENA from other regions of the world on the other hand, a separation that is reinforced by stereotypical negative images that cast MENA populations and governments as savage and barbarous.

Such government maneuvers are symptomatic of a tactic called “scare and confusion” (Shaheen, 2006). The regional media environment suffers from brutal enforcement of censorship and assiduous self-censorship. At the same time, members of the public view themselves as victims of two forms of media colonialism: one imposed by their own national governments and the second by the United States and its allies. Oppressed populations see their national and international oppressors working hand in hand to threaten their livelihood and to humiliate them. The underground voices of dissent are channeled into and through radical Islamist movements. These movements are not favorable to media freedom either, though they try to use media to promote their cause.

An unprecedented spate of mass protests swept the region in 2006. Some progressive and radical circles perceived the protests as a public awakening after long years of stagnation. It was also interpreted by the government as proof that the Muslim Brotherhood movement had infiltrated civil activities and syndicates—Al-Zawaheri, the second-ranking man in *al Qaeda*, for instance, became radicalized while jailed in Egypt (Shahine, 2006).

This reality provides an ironic twist to the non-aligned pan-Arab political rhetoric of the fifties and sixties that was ushered in by Gamel Abdul Nasser, according to whom nationalized Egyptian media purported to speak for all Arabs. In the post-Nasser period, pan-Arab rhetoric was left to journals and newspapers located in London or Paris, where a Western-educated intelligentsia debated post-Marxist or postmodern constructs rather than pushing for individual rights and freedoms in their own countries.

Though it is difficult to assess the patron states’ intentions, the fact remains that regional media tend to violate internationally recognized journalistic ethics and norms. In fact, the tension between the propriety of showing gruesome images on the one hand, and the protection of freedom of speech and the right to know on the other hand, will remain unresolved unless effective media education policies for journalists and for the general public are put in place.

Markets limit communication within the countries and thereby alienate regional publics. Members of the public grow desperate at the lack of coverage of national problems and the distorted coverage of terrorist proclamations and acts.

The worrying point here comes from the erosion of civil liberties in the MENA and the increasing gap between publics and governments. An additional alarming point is the nature of change, as it might come through the turbulence of a revolution that could be bloody and

confusing—bloody because so much is at stake for the regional actors, be they government officials, radical Islamists, or progressive activists, and confusing because nobody is quite sure who the actors are and what interests they represent.

In a region where many people are still suspicious of change and resist innovation, including basic rights like political participation, the risks of living in a lie are magnified. This is not to say that agents of change don't exist: there are many progressive civil movements, like *Kefaya* (Enough) in Egypt, that are fighting against governments' corruption. But the extreme and radical voices are also becoming louder and louder. At the same time, the marginalized discontented public is a world unto itself, largely detached from other sectors in society and loath to engage with them (Saleh, 2009).

The absence or ineffectiveness of laws allowing the practice of the right to expression and free opinion allows governments to close many newspapers and put many journalists in prison, accused of crimes such as insult and defamation. Many administrative obstacles also stand in the way of effective media by impeding journalists' access to official information. These obstacles hinder the practice of fair and independent journalism; they also lead some journalists into the "false information" trap by publishing inaccurate news and advocating different types of crusading journalism, which makes them subject to imprisonment or fines.

The 2007 decision of the Cairo Misdemeanor Court to imprison the Editor-in-Chief of *Al Dostour* (*The Constitution*), Ibrahim Essa, and the journalist Sahar Zaki, along with a citizen from Warak accused of insulting Egyptian president Hosni Mubarak, stands out as a case in point of living in a lie. Many other lawsuits have been filed against *Al Fajr* (*The Dawn*) newspaper, headed by Adel Hamouda. Another illustration is the case of the executive editor-in-chief of *Sout Al Omma* (*Voice of the Nation*), Wael Al-Ibrashy. He was referred to the criminal court in the judges' crisis, when the newspaper expressed ire over widespread electoral fraud during the first presidential elections. Because of legal irregularities such as unfair trials of opposition figures, attacks on members of the judiciary also escalated (Amin, 2006).

The "Arab street" has become an extension of another infamous concept, the "Arab mind," which also reified the culture and collective conduct of an entire people in a violent abstraction. It is another subject of Orientalist imagination, reminiscent of colonial representation of the "other," which has been internalized by some Arab selves. The Arab street is seldom regarded as an expression of public opinion and collective sentiment like its Western counterpart, but is perceived primarily as a physical entity, a brute force expressed in riots and mob violence.

Governments only understand the Arab street as a site of violence and only respond when it is poised to imperil interests or disrupt grand strategies. Such perceptions enable Western policy-makers to flout Arab public opinion with increasingly unequivocal support for Israel while proceeding to dismantle the Palestinian Authority, or in another context by waging war on Iraq.

But street politics in general and the Arab street in particular are more complex. The Arab street is not mere brute force. The Arab street is primarily an expression of public sentiment, but its modes and means of articulation have gone through significant changes since 2006, when regional governments, such as Egypt's, started changing the social contract by ending 50 years of subsidization. Such change has further deteriorated the economic and social conditions, which has caused the long years of silence to be replaced by vibrant and angry public. Street politics is the modern platform of contention *par excellence*. The street is the chief locus of politics for

ordinary people, those who are structurally absent from positions of power. Simultaneously social and spatial, constant and current, a place of both the familiar and the stranger, the visible and the vocal, the street represents a complex entity where sentiments and outlooks are formed, spread and expressed in a unique fashion (Saleh, 2008).

When traditional social contracts are violated, Arab publics have reacted swiftly. The 1980s saw numerous urban protests over the spiraling cost of living. In August 1983, the Moroccan government reduced consumer subsidies by 20 percent, triggering urban unrest in the north and elsewhere. Similar protests took place in Tunis in 1984, and in Khartoum in 1982 and 1985. In summer 1987, the rival factions in the Lebanese civil war joined hands to stage an extensive street protest against a drop in the value of the Lebanese currency. Algeria was struck by cost-of-living riots in the fall of 1988, and Jordanians staged nationwide protests in 1989 over the plight of Palestinians and economic hardship, forcing the late King Hussein to introduce cautious measures of political liberalization. And the best example is when King Hussein lifted subsidies in 1996 that provoked a new wave of street protests, leading the king to restrict freedom of expression and assembly (Andoni and Schwedler, 1996).

To make the confusion worse, the Arab governments have money, talk about completely new themes, and use incomprehensible terminologies such as “Mushrooming Terrorists” to avoid or block any serious attempt of change. During the first years of the transition after decolonization and independence, there was an exponential rise in the number of civil society groups and a call for democratization. However, years later the Arab countries are still excluded from real “international civil society.” Wars for independence have been replaced by a multitude of more localized conflicts. And the new system benefited from ever-cheaper communication technologies that increased local interdependence and interconnectedness. For example, the Arab public still prefers to pay high taxes but to have the government take care of social services and enjoy subsidization in almost every aspect of life.

Furthermore, many people are still suspicious of and resistant to new things, even basic rights such as political participation. Most members of the Arab public do not participate in associational life, and lack of participation correlates with highly pronounced general mistrust. But the picture is complicated by marginal developments; in some cases, no doubt, they have been capable of initiating or participating in tremendous social change. For example, the liberalization of the media in many parts of the region such as in Lebanon, Kingdom of Saudi Arabia, and Egypt resulted after offshore media financed by businessmen attempted to overcome the political patronage. In today’s public agenda, many civil movements like Kefaya (Enough) in Egypt courageously fight government corruption. But the critical voices are also becoming louder and louder. As noted above, the marginal, discontented proletariat plays little role; it often seems detached from other sectors in society.

The most significant problem facing the Arab public is that its members are usually not rooted in communal solidarity but in small, unmanaged, scattered structures. This raises many dilemmas about their legitimacy, accountability, and cultural relevance. Ambiguous public consideration often results in lack of cooperation from both business and government.

Globalization plays a role as well. Citizens in the MENA countries need to develop their own cultural responses to globalization either through the introduction of a reenergized religion or through overcoming the current impediments of real cross-cultural dialogue by engaging their counterparts in non-MENA regions.

At the end, the only way to stop living in the lie and dying in silence is by opening up to the world and enriching instead of diluting or erasing local identities.

Khalil Gibran said in his poem "Freedom" that freedom can only be attained through harnessing our desires for freedom. He said, "You shall be free indeed when your days are not without care nor your nights without a want and a grief.... And how shall you rise beyond your days and nights unless you break the chains which you at the dawn of your understanding have fastened around your noon hour? In truth that which you call freedom is the strongest of these chains, though its links glitter in the sun and dazzle your eyes...."

"If it is an unjust law you would abolish, that law was written with your own hand upon your own forehead. You cannot erase it by burning your law books nor by washing the foreheads of your judges, though you pour the sea upon them.

"And if it is a despot you would dethrone, see first that his throne erected within you is destroyed. For how can a tyrant rule the free and the proud, but for a tyranny in their own freedom and a shame in their own pride? And if it is a care you would cast off, that care has been chosen by you rather than imposed upon you. And if it is a fear you would dispel, the seat of that fear is in your heart and not in the hand of the feared...."

"And thus your freedom when it loses its fetters becomes itself the fetter of a greater freedom."

References

- Alterman, J. (2004). "The False Promise of Arab Liberals," *Policy Review* (June/July 2004).
- Amin, N. (2006). Soapbox: Judges in crisis. *Al-Ahram On-line*, 4 - 10 May 2006, Issue No. 793. <http://weekly.ahram.org.eg/2006/793/op7.htm>
- Andoni, L., & Schwedler, J. (1996). "Bread Riots in Jordan," *Middle East Report* 201 (Fall 1996).
- Bassiouni, C. (2007). A Compilation of Legislative Laws and Regulations of Select Arab Legal Systems. JUSTICE AND HUMAN RIGHTS Technical Assistance Projects in Afghanistan and Iraq Activities 2003-2006, International Human Rights Law Institute at DePaul University (IHRLI). <http://216.239.59.104/search?q=cache:qsKFzFQViUJ:www.isisc.org/public/BrocDesigned.pdf+A+Compilation+of+Legislative+Laws+and+Regulations+of+Selected+Arab+Legal+Systems.&hl=en&ct=clnk&cd=6>
- Bayat, A. (2003). "The 'Street' and the Politics of Dissent in the Arab World," *Middle East Report*, No. 226 (2003), pp. 10-17.
- Bauml, K.-H. & Aslan, A (2006). "Part-list cuing can be transient and lasting: The role of encoding." *Journal of Experimental Psychology: Learning, Memory, and Cognition*.
- Bellin, E. (1994). "Civil Society: Effective Tool of Analysis for Middle East Politics?" *PS: Political Science and Politics*, Vol. 27, No. 3 (1994), p. 510.
- Entelis, J. (1999). "State-Society Relations, Algeria as a Case Study," in Mark Tessler (ed.), *Area Studies and Social Science: Strategies for Understanding Middle East Politics* (Bloomington: Indiana University Press), p. 16.
- Kienle, E. (1998). "More than a response to Islamism: The political de-liberalization of Egypt in the 1990s." *Middle East Journal*, 52 (2), 219-235.
- Henry, C. & Springborg, R. (2001). *Globalization and the Politics of Development in the Middle East*. Cambridge: Cambridge University Press, pp. 30-61.
- Kramarae, C. (1981). *Women and Men Speaking*. Rowley, MA: Newbury House Publishers, Inc.
- Kubba, L. (2000). "The Awakening of Civil Society," *Journal of Democracy*, Vol. 11, No. 3 (2000), pp. 84-90.

- Nasr, S. (2005). "Good Governance for Development in the Arab Countries: Arab Civil Societies and Public Governance Reform," Working Paper of the UNDP Dead Sea Conference, UNDP Programme on Governance in the Arab Region, Jordan, February 2005, p. 8
- Norton, R. (1993). "The Future of Civil Society in the Middle East," *Middle East Journal*, Vol. 47, No. 2 (1993), p. 211.
- Saleh, I. (2009).
- a. "Media Literacy in MENA: Moving Beyond the Vicious Cycle of Oxymora," *Mapping World Media Education Policies, Latin American Scientific Journal of Media Education Comunicar, Comunicar*, 32, 1, (Feb.).
 - b. "In the Foggy Middle East: Just Wars Remain the Name of the Game," *Global Governance Research Network*, Anthem Press, Wimbledon Publishing Company, India.
- Saleh, I. (2008). "Sitting in the Shadows of Subsidization in Egypt: Revisiting the Notion of Street Politics," *Journal of Democracy and Security*, Philadelphia: Routledge, Vol. 4:1–24.
- Saleh, I. (2006). *Prior to Eruption of the Grapes of Wrath in the Middle East: The Necessity of Communicating Instead of Clashing*. Cairo (Egypt): Taiba Publications Press.
- Shahine, G. (2006). "Is the Fire Going Out?" *Al-Ahram Weekly Online*, 8 - 14 June, Issue No. 798. <http://weekly.ahram.org.eg/2006/798/eg4.htm>.
- UN Development Program (2002), *Arab Human Development Report 2002* (New York), p. 90.

Articles

NGO Law in Kenya

On a continent frequently shaken by political instability and repressive authorities, African non-governmental organizations (NGOs) often find themselves subject to laws that range from inconvenient to incapacitating. In Kenya, NGOs have complained about faults with their own laws. They have criticized the unaccountable authority vested in government officials and opined inadequate definitions for distinguishing different types of organizations from each other. Kenyan government officials, NGO leaders and many others have developed a consensus that Kenya's 1990 NGOs Co-ordination Act is gravely flawed. However, precisely how to reform the law has inspired intense and prolonged debate. Finally, two decades of advocacy and exhortations to comprehensively reform the NGOs Coordination Act may be close to fruition.

Two experts from Kenya's NGO sector and the regulatory body overseeing the sector visited ICNL's headquarters in July 2009 to conduct research on the reforms and suggest the next steps the reform process should take. *Faith Kisinga*, Consultant for the Government-CSO Collaboration Program—PACT International, argues that the process must be as inclusive as possible. There is a wide range of stakeholders in Kenya's NGO sector, including NGOs, government agencies, parliament and the media. Broad participation, she argues, is crucial for a successful new law. She proposes specific strategies for cultivating the participation of the numerous stakeholders. *Rahma Adan Jillo* is an attorney with the NGOs Coordination Board, the agency responsible for regulating the NGOs sector and enforcing the NGOs Coordination Act. Ms. Jillo examines the substance of the NGO law. She critiques the current NGOs Act, compares the virtues and faults of NGO laws elsewhere in Africa, and articulates features the new law ought to include to support a vibrant and accountable NGO sector. Their work presents a snapshot of a contentious and potentially productive reform process. As the process advances, it has become evident that the consequences of the Kenyan reform project may affect developments elsewhere in Africa for years to come.

NGO Law Reform in Kenya: Incorporating Best Practices¹

Rahma Adan Jillo

ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CBOs	Community-Based Organization
CSO	Civil Society Organization
EAC	East African Community
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICNL	International Center for Not-for-Profit Law
NED	National Endowment for Democracy
NGO	Nongovernmental Organization
NPO	Not-for-Profit Organization
PBO	Public Benefit Organization
UDHR	Universal Declaration of Human Rights
US	United States of America
UK	United Kingdom
WMD	World Movement for Democracy

CHAPTER 1: INTRODUCTION

This article is a product of a fellowship offered by the International Center for Not-For-Profit Law (ICNL)² with the financial support of USAID. It considers the legal and regulatory concerns that underpin the review of NGO laws in Kenya. Because of the great significance of NGOs in any country, we argue in this paper that it is important to ensure that “best practices”

¹ This study is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the author and do not necessarily reflect the views of USAID or the United States Government.

² The International Center for Not-for-Profit Law (ICNL) is an international not-for-profit organization that promotes an enabling legal environment for civil society, freedom of association, and public participation around the world. See www.icnl.org.

guide such a reform. We intend to examine the gaps in the NGO laws in Kenya and determine how appropriate international best practices can fill such gaps.

The NGOs Co-ordination Act was drafted without due consideration of best practices despite NGOs' significance in Kenya's growing economy.

We settled on a working definition of NGO and CSO since they are a largely elusive concept. Further, information on NGOs and CSOs in Kenya is scarce. There is no data on the output of the sector other than data found in publications by ICNL and The University of Nairobi's Institute for Development Studies.³

The research was primarily library-based. Primary sources included statutes, while secondary sources included textbooks, articles, journals, newspaper articles, and internet sources. Primary data was also obtained by face-to-face interviews based on open-ended questionnaires. A sample of respondents was interviewed based on their experience in the sector. This article has also incorporated two case studies. This article has found that it is paramount that international best standards are consulted when drafting NGOs laws for any country.

1.1 Background

Kenya has a rich tradition of philanthropy and volunteerism with roots in the communal relationships of a rural African society. This tradition was augmented by a host of educational and social welfare institutions established by the 19th-century Christian missionaries, by the social clubs created to serve the British colonial settlers, by the social, political, and protest organizations that arose to combat British rule, and by the networks of self-help or *harambee* (pooling together) groups promoted by the first post-independence government.⁴ Civil society in Kenya owes its origins to three major sources: African communal traditions and values, early Christian missionaries, and British colonialization during the 19th century.⁵ Civil society organizations in Kenya have operations that are broad and diverse ranging from relief and social services to human rights.

In 1990 the government of Kenya enacted the NGOs Coordination Act⁶ (hereinafter referred to as the Act) to be a central reference point for registration of all NGOs (both local and international) operating in Kenya.⁷ Prior to this, NGOs in Kenya were registered in different legal regimes. These are operational agreements with the Kenyan Government through the Ministry of Culture and Social Services,⁸ Legislation,⁹ the Department of Social Services,¹⁰ and

³ ICNL; Kanyinga, Karuti and Winnie Mitullah (2007) "The Non Profit Sector in Kenya; What we Know and What We Do Not Know," The Institute for Development Studies (IDS), University of Nairobi.

⁴ Kanyinga, Karuti, Winnie Mitullah, Walter Odhiambo, S. Wojciech Sokolowski, and Lester M. Salamon (2004) "Kenya," *Global Civil Society*. Eds. Lester M. Salamon, S. Wojciech Sokolowski, and Associates, Vol. Two, Chap. 3, p. 95. Johns Hopkins Comparative Nonprofit Sector Project.

⁵ *Ibid*, p. 99.

⁶ No. 19 of 1990 of the Laws of Kenya.

⁷ This has not been achieved to date.

⁸ An example is Plan Kenya before its registration at the NGOs Coordination Board. This agreement is filed at the Bureau's registry, File No. OP/218/051/9242.

⁹ An example is the Kenya Red Cross Society Act CAP 256 of the Laws of Kenya.

the Attorney General's Office, seeking registration as Societies,¹¹ Companies Limited by Guarantee,¹² or Trusts.¹³ Due to the multiple registration frameworks available for registration, NGOs in Kenya operate in diverse forms and operational structures, making consistent regulation difficult.

In its Sessional Paper of 2006, the Government of Kenya explicitly recognized that NGOs are potent forces for social and economic development, important partners in national development, and valuable agents in promoting the qualitative and quantitative development of the Gross Domestic Product (GDP). This Sessional Paper has come more than fifteen years after the enactment of the NGOs Coordination Act. The Act was enacted without a policy paper. It is, however, an important policy document that sets the legal basis for the needed review of the Act. The Sessional Paper provides an opportunity to expand the definition as provided in the Act and achieve the objective of bringing together all NGOs under a single definition and a consistent regulatory regime.

1.2 Definitions

For the purposes of this paper we will attempt to identify a definition of Nongovernmental Organizations (NGOs) and Civil Society Organizations (CSOs). There are as many definitions of NGOs and CSOs as there are numbers of people who attempt to define them. There is no single right definition. However, common themes run through most definitions, and we therefore adopt the following as working definitions:

Nongovernmental Organization refers to an association, society, foundation, charitable trust, non-profit corporation, or other juridical person that is not regarded under the particular legal system as part of the governmental sector and that is not operated for profit – viz., if any profits are earned, they are not and cannot be distributed as such. It normally does not include trade unions, political parties, profit-distributing cooperatives, or churches,¹⁴ which are usually regulated under separate legislation.

Civil Society is the sphere of institutions, organizations, and individuals located among the family, the state, and the market, in which people associate voluntarily to advance common interests.¹⁵ In this sense, it includes (but is not limited to) legal entities such as the various forms of NGOs (associations, societies, companies limited by guarantee, foundations, trusts, etc.) as well as trade unions, political parties, cooperatives, and churches.

All voluntary associations are CSOs, while NGO specifically refers to the above definition.

¹⁰ Ministry of Gender and Youth.

¹¹ The Societies Act CAP 108 of the Laws of Kenya.

¹² Companies Act CAP 486 of the Laws of Kenya.

¹³ Trustees Act CAP 167 of the Laws of Kenya.

¹⁴ The International Center for Not-for-Profit Law, (1997) "Handbook on Good Practices for Laws Relating to NGOs," The World Bank.

¹⁵ The London School of Economics and Political Science (LSE), "How to Measure Civil Society," 2001, <http://fathom.se.ac.uk/features/122552>, accessed on May 26, 2009. This definition has also been adopted by Helmut K. Anheier and CIVICUS, *Civil Society: Measurement, Evaluation, Policy*, published by Earthscan in the UK and USA in 2004 at p. 22.

1.3 Theoretical Framework

Civil Society is a complex and multifaceted concept

—Volkhart “Finn” Heinrich and Kumi Naidoo

Civil Society is probably one of the most elusive concepts used in the social sciences and in development discourse today. Since NGOs represent one form of CSO it is necessary to understand civil society conceptually.

Civil society and legal traditions differ widely in different countries and cultures. This certainly is a consequence of the vast heterogeneity of civil society actors and the location of civil society in the midst of multiple spheres of influence of the state, market, and family.¹⁶ Or in Cohen’s words, “there is no sufficiently complex theory that is available today.”¹⁷ Anheier states that only a multidimensional approach is able to describe the various kinds of interplay between the dimensions as well as the specific strengths and weakness of civil society.

Many theories have developed that are helpful for understanding civil society. Civil Society theories can be summarized as follows:¹⁸

1. Civil society may be perceived as a *part* of society distinct from states and markets, formed for the purposes of advancing common interests and facilitating collective action. Often referred to as the “third sector,” civil society in this sense encompasses all associations and networks between the family and the state except firms. However, there is no assumption that these diverse forms of associational life share a normative consensus or a common political agenda.
2. Civil society may be defined in *normative* terms, as the realm of service rather than self-interest and a breeding ground for the “habits of the heart”: attitudes and values like cooperation, trust, tolerance, and non-violence. In this sense, civil society means a *type* of society that is motivated by a different way of being and living in the world or a different rationality, identified as “civil.” Although it is often conflated with the first set of theories in circular arguments about “forms and norms,” this model must be seen as separate for two interrelated reasons: first, associations have different normative agendas, and second, the same normative agendas are also shaped by differing sets of institutions—government and the market as well as voluntary associations.
3. Civil society may be defined as an *arena for public deliberation*, rational dialogue, and the exercise of “active citizenship” in pursuit of the common interest—in other words, as the “public sphere.” Though often ignored in the policy and practice of governments, international agencies, and even parts of academia, civil society cannot be completely understood without a full appreciation of the role played by the public sphere in democracy and development.

¹⁶ Anheier, Helmut K. and CIVICUS, (2004) *Civil Society: Measurement, Evaluation, Policy*, Earthscan.

¹⁷ Cohen, J.L., & Arato. (1992) *Civil Society and Political Theory*, Cambridge, MA, MIT Press.

¹⁸ Rutzen, Doug and Adam Kolker, “International Civil Society Law,” Law 732 – 001-08A, University of Pennsylvania Law School, pp 10- 11, Spring 2008. This classification was adopted from *Civil Society* by Michael Edwards, published by Polity Press USA, 2004.

These different schools of thought are not *per se* contradictory. On the contrary, they are complementary and differ only in emphasis or explanation as opposed to the underlying principle at work.

1.3.1 Role of CSOs

Civil society has recently emerged as a central topic of discussion among policy makers and practitioners. In the US, officials have launched civic renewal projects to counteract increased social isolation and distrust among citizens. The German parliament has implemented programs to revitalize volunteerism. The UK Cabinet Office has attempted to modernize the voluntary sector to the World Bank's new approach to economic development. The European Union encourages a "citizens' Europe." And NATO operates a program to seek ways of constructing a civil society in countries torn by civil war. All of these are indications of heightened policy relevance.¹⁹ Civil society is the platform in which people associate voluntarily to advance their common interests. As these examples demonstrate, civil society plays different roles in different countries because individuals' needs differ from country to country.

The important role played by NGOs must be emphasized. For instance, since the enactment of the Act, Kenya has experienced a general increase in the economic importance of NGOs as providers of health, educational, social, and environmental services. The NGO sector in Kenya employs almost half (43%) as many people as the entire public sector.²⁰ Further, it accounted for \$270 million in expenditures as of 2000.²¹ The workforce (paid and volunteer) represents over 290,000 full time employees. This constitutes 2.1 percent of Kenya's economically active population.²²

A strong NGO sector provides many benefits for a country; a supportive legal and regulatory framework is one of the pillars sustaining the sector.

1.3.2 Legal Barriers to Civil Society Organizations

Many jurisdictions around the world, including Kenya, have provisions in their laws that restrict the space in which CSOs thrive. These are designed to intimidate, suppress, and control CSOs and their activities. Civil society is facing serious threats today across the globe.²³

These legal constraints fall broadly in five categories:²⁴

a. Barriers to entry

These are restrictive legal provisions that are used to discourage the formation and/or registration of CSOs. These barriers include limits to the right to associate, prohibitions against unregistered groups, restrictions on founders, burdensome registration

¹⁹ *Supra* Note 2, at p. 2

²⁰ *Supra* Note 18, at pp. 96 – 97.

²¹ *Ibid.*

²² *Ibid.*

²³ The International Center for Not-For-Profit-Law and The World Movement for Democracy, (2008) *Defending Civil Society: A Report of the World Movement for Democracy*, p. 3.

²⁴ *Ibid.*, at p. 10.

procedures, vague grounds for denial, and barriers preventing international organizations from operating in the country.²⁵

b. Barriers to operational activity

These are obstacles in the law that directly prohibit or otherwise constrain legitimate activities. These barriers are direct prohibitions against spheres of activity, invasive supervisory oversight, government harassment, criminal sanctions against individuals, failure to protect individuals and organizations from violence, termination and dissolution, and establishment of government-organized NGOs.²⁶

c. Barriers to speech and advocacy

These are legal restrictions against expression of speech mainly in advocacy and policy engagement. They include prior restraints and censorship, defamation laws, broad or vague restrictions against advocacy, criminalization of dissent, and restrictions on freedom of assembly.²⁷

d. Barriers to contact and communication

These are legal restrictions hindering the free flow of information and communication. They include barriers to the creation of networks, to international collaboration, and to communication as well as criminal sanctions against individuals.²⁸

e. Barriers to resources

These are legal provisions that hinder the ability of NGOs to secure resources to carry out their activities. These barriers include prohibitions against funding, requirements for advance government approval, and policies to route funding (especially from foreign sources) through the government.²⁹

State regimes around the world have tried to justify these legal restrictions under the pretext of promoting NGO accountability, protecting state sovereignty, or preserving national interest. These justifications are not only rigid but they also confer a variety of meanings. For instance, a concept like “national interest” is particularly prone to abuse. Further, governments often offer flimsy excuses as illustrations for such interferences. Prof. Mbote states, “The Board (NGOs) inextricably links national interest to public security with the appalling result that more than 100 NGOs have reportedly been denied registration on grounds of ‘national interest’ or ‘public security.’”³⁰

1.3.3 International Principles Protecting Civil Society Organizations

Rights of individuals to form, join and participate in CSOs are protected under international law. These rights are enshrined in the Universal Declaration of Human Rights,³¹ the

²⁵ Ibid, at pp. 10- 12.

²⁶ Ibid at pp. 13 – 15.

²⁷ Ibid at pp. 15 17.

²⁸ Ibid at pp. 17 18.

²⁹ Supra.

³⁰ Kameri-Mbote, Patricia, Dr., (2000) “ Dr. Patricia Kameri – Mbote, The Operational Environment and Constraints for NGOs in Kenya: IELRC Working Paper International Environmental Law Research Centre, p. 17. (citing NGO Council (1995) “Kenyan based NGOs: Rising to the Challenge.” Report of the workshop held at the Fairview hotel, July 13-14, 1995, at p. 7.

³¹ <http://www.ohchr.org/english/about/publications/doc/fs2.htm>. Adopted by the General Assembly Resolution 217a (III) of 10th December 1948.

International Covenant for Civil and Political Rights (ICCPR),³² the International Covenant on Economic Social and Cultural Rights (ICESCR),³³ and other international agreements like the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, etc.

First, in order to be exercised, freedom of association cannot be made dependent on registration or legal status. Under international law, individuals are free to associate without formal legal status, and the state should enable organizations to obtain legal status if they so desire.

Second, once formed, CSOs have a right to operate free from unwarranted state interference.³⁴ However, there are permissible grounds for some restrictions on the grounds of national security, public order and morality, and the protection of the rights and freedoms of others. Such restrictions must be expressly provided for by law and they must be "necessary in a democratic society."

Third, as noted above, CSOs themselves, as legal persons, enjoy the right to freedom of association as articulated in international law.

Fourthly, CSOs have a right to communication and cooperation with their affiliates and through any medium.

Fifth, CSOs have a right to seek and secure funding from any legal resources.

Last, States have a duty to promote and respect human rights and protect the rights of CSOs.

All these principles are clearly articulated under international law. They are the foundation upon which states strive to protect and promote to effectively build an enabling legal environment for CSOs in their countries. There are a variety of reasons why countries like Kenya have to ensure the existence of strong, independent, and dynamic CSOs; the key is to protect the internationally recognized freedoms of association.

CHAPTER 3: THE KENYAN REGULATORY FRAMEWORK OF NGOS

3.1 Background

Internationally, Kenya embraces the Universal Declaration of Human Rights of 1948 that enshrines the freedom of association. Kenya is also a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) since January 3, 1976³⁵ and to the African Charter on Human and Peoples' rights. Regionally, Kenya is also a party to the East African Community Treaty (EAC) which guarantees freedom of association.

³² <http://www.ohchr.org/english/law/ccpr.htm>. Adopted by the General Assembly in Resolution 2200A (XXI) of 16 December 1966.

³³ http://www.unhcr.ch/html/menu3/b/a_ceschr.htm. Adopted by the General Assembly in Resolution 2200A (XXI) of 16 December 1966.

³⁴ Supra footnote 29, at p. 30.

³⁵ The date of its inception.

The Constitution of Kenya promotes and respects the freedom of association as provided for by these international and regional legal instruments.³⁶ The Constitution guarantees the right to assemble freely and associate with other persons. However, there are exceptions to this right. The right to freedom of association can be restricted if necessary for public defense, public morality, public health, public order, public safety, rights and freedoms of other persons, or for the imposition of reasonable conditions relating to registration and martial law.³⁷

The legal and regulatory framework in Kenya for NGOs is the NGOs Co-ordination Act of 1990 and its Regulations of 1992.³⁸ The intention of this law was to act as a single authority for registration and regulation of all NGOs in Kenya.³⁹ The Act commenced its operations on 15 June 1992. It provided for a six-month transition period⁴⁰ and later extended this period by three months to 15 February 1993 during which all existing NGOs were required to register with the NGOs Coordination Board.

3.2 The NGOs Co-ordination Act No. 19 of 1990 and Its Regulations of 1992: A Critique vis-a-vis Best Practices

It should be noted at the outset that the Act provides for mandatory registration of NGOs. It outlaws any activity for unregistered NGOs—these requirements clearly constitute limitations on the freedom of association and appear to abridge rights guaranteed by the Constitution.⁴¹

As discussed in Chapter 1, civil society organizations in Kenya were registered under different legal regimes before and after the enactment of the Act. They function and render their services according to their different policy and legal structures. Such a diverse process of registration leads to difficulties in establishing an equitable regulatory system. The Act argued for the case of unification of the legal regimes. This noble intention has not been realized until today.

The main reason why the Act was not able to bring all these organizations under its umbrella is because of legal gaps that exist in the law. In this subheading we shall identify these key issues and how they are dealt with under the Act *vis-a-vis* best practices.

3.2.1 Definition

An NGO has been defined in the act to mean “a private voluntary grouping of individuals or associations not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare development, charity or research in the areas inclusive but not restricted to health relief, agricultural, education, industry and supply of amenities and

³⁶ Chapter V section 80 providing for protection of the freedom of association and assembly.

³⁷ Sec 80(2) of the Constitution.

³⁸ Supra Note 6.

³⁹ Sec 25(2) states that all NGOs presently registered under any written law in Kenya shall, within the period specified in subsection 1 (six months), apply and obtain a certificate under the Act.

⁴⁰ Sec 25 states that “there shall be a transitional registration period not exceeding six months from the date of the commencement of this act; provided that the Minister may extend the period upon application by a NGO. All NGOs that are presently registered under any written law in Kenya shall, within the period specified in sub section 1 apply and obtain a certificate under this Act.”

⁴¹ See note 35, supra, and Sec. 5.2.1, infra.

services.”⁴² This is a weak operational definition of an NGO. This definition has failed to encompass all the other CSOs that are for public benefit. As a result, these other organizations have been forced to seek registration in the other legal regimes that fit their definition. Examples include trusts. In Kenya, trusts are for all intents and purposes public benefit organizations; however, not having members, they do not fit the definition provided by the Act. Therefore, they are registered under the Trustees Act. A definition that encompasses all public benefit organizations under one single regulator will simplify the regulatory regime.

3.2.2 Arbitrary powers

Under the act, both the Board and the Bureau⁴³ of the NGOs Coordination Board are permitted excessive discretion. For example, no guidelines have been provided for the formulation of the terms and conditions attached to a certificate of operation.⁴⁴ This absence of guidelines may be subject to abuse. Further, the process of refusal of registration⁴⁵ as provided in the Act may be abused by the Board. Permissible restrictions on associational rights as provided under the Kenyan Constitution must meet some certain and unambiguous requirements. First, the restriction must be accomplished under the authority of the law, and second, it must be reasonably justifiable in a democratic society. Unfortunately this “national interest” exception has been used to unjustifiably curtail the rights of NGOs in Kenya.⁴⁶

Wide discretionary powers are given to the Board and the Minister in Sections 12, 14, 19, and 32,⁴⁷ which subject the exercise of the associational rights granted under section 80 of the Constitution to unreasonable prior restraint for registration to obtain legal status. The law ought to provide explicit guidelines in these provisions. Sections 10, 11,⁴⁸ and 12 require all organizations that fit the description of an NGO to apply for a certificate of registration. The law does not specify the length of time of an application may be considered by the Board. In practice this process can take as long as two years. This slow process represents another barrier to the operations of NGOs.

3.2.3 Non-Governmental Organizations Council

The NGOs Council is established under section 23 of the Act. Its role⁴⁹ is to advise the Board on the code of conduct of NGOs in Kenya. The Law states that once an NGO is registered it automatically becomes a member of the NGOs Council. This provision is contrary to section 80 of the Constitution which provides for the freedom of association. The Act compels NGOs to

⁴² Section 2 of the Act.

⁴³ The Board is established under Sec 3 of the Act while the Bureau is established under Sec 5 of the Act.

⁴⁴ Sec 12 subsection 4 provides that the certificate of registration may contain such terms and conditions as the board may prescribe.

⁴⁵ Sec 14 on refusal of registration states, “The Board may refuse registration of an applicant if: it is satisfied that the proposed activities and procedures are not in the national interest, or it is satisfied that the applicant has given false information on the requirements of subsection (3) of section 10; or it is satisfied, on the recommendation of the council, that the applicant should not be registered.”

⁴⁶ See footnote 29.

⁴⁷ Sec 12 Certificate of registration, Sec 14 Refusal of registration and Sec 32 Ministerial rules on Regulation.

⁴⁸ Sec 10 Registration of NGOs and Sec 11 Fees.

⁴⁹ Sec 23(1).

become members of the NGOs Council once they are registered. This provision raises serious constitutional issues. It is unlawful to compel someone to associate with those with whom they do not wish to. Instead such an “umbrella” organization should be voluntary for its members, for the promotion of good practices through, for example, the adoption and enforcement of principles of voluntary self regulation as may be enshrined in its code of conduct. It is in line with best practices to have umbrella organizations for NGOs; however, such organizations ought to be voluntary and draw legitimacy from membership and not the law, as is the situation in Kenya.

3.2.4 Taxation

NGOs in Kenya contribute approximately 80B Kenya Shillings annually to the GDP.⁵⁰ This is a tremendous contribution towards complementing government’s efforts in the delivery of services. Unfortunately, these organizations are not in practice exempt from taxation. The process of exemption from taxation in Kenya for NGOs is tedious and confusing. Prof. Kameri Mbote says “accessing this facility can be a cumbersome process and submission of a request does not necessarily mean that such a request will be granted.”⁵¹ To encourage philanthropy and charity, donors and NGOs should be entitled to a reasonably generous income or profit tax preference with respect to donations made, and PBOs should be exempt from payment of income or profits tax on their earnings. In addition, the law should provide for adequate exemptions and deductions from duties for NGOs.⁵²

3.2.5 Regulation

The functions of the Board are set out under section 7 of the Act. Among them is facilitating and coordinating the work of all NGOs operating in Kenya. In carrying out this function the Board is expected to coordinate with other government agencies. But this provision raises problems. First, the term “coordinate” is ambiguous and undefined under the Act. The term can be misused by a Board under the pretexts of ensuring national security and stability. Further, it may serve to restrict on NGO activities.

Second, for a number of reasons other than registration, not much regulation actually takes place at the Board. The physical capacity of the Board in terms of human resources and financial resources is limited. The Bureau’s office is currently situated in Nairobi and it is expected to serve all the NGOs in the country. It has a staff of 50 and a clientele of approximately 6,000. Its annual budget covers only operational costs.

The Board also lacks technical capacity. The role of the Board in registration of NGOs is perfunctory. There is no clear understanding of the sector by either the government or other stakeholders. The law may not necessarily address this issue; however, it is critical that stakeholders are aware of the principles that underpin this sector, especially management and governance structures of NGOs.

⁵⁰ NGOs Board Annual Report of 2002.

⁵¹ *Supra* footnote 29, p. 11

⁵² Regulation 29 provides that an NGO shall apply to the Minister responsible in Finance for exemption from Taxation after they prove that the foreign exchange they use cannot be raised in Kenya among others. *Ibid* Note 44 At pg. 11 it states that “a cursory look at these provisions evinces the main rationale for these regulations as to preserve foreign currency within the country.”

Finally, due to the multiplicity of forms of registration available in Kenya, it is safe to state that there is unnecessary duplication across the multiple regulators. There is no collaboration between the different registration state agencies.

CHAPTER 4: COMPARATIVE ANALYSIS

4.1 Introduction

In addition to Kenya, several other countries have recently undertaken reform of their NGOs laws. This chapter provides a comparative case study of two nearby countries in the developing world where such reform has been undertaken: Rwanda and South Africa. It is important to note that there is no perfect model for NGOs laws in the world. However, there are positive attributes to these laws that have encompassed best practices. In this section we will highlight these principles when drawing the comparative lessons.

4.2 Rwanda⁵³

CSOs are protected under the Rwandan Constitution. The law regulating them is Law No. 20/2000 of 26/07/2000 relating to Non Profit Making Organizations (NPOs).

The law makes reference to Article 11⁵⁴ of the Constitution. Article 33 of the Rwandan Constitution protects the freedom of thought, opinion, conscience, religion, worship, and public assembly. Article 25 further protects freedom of association which shall be exercised under conditions determined by law. What have not been made clear are these conditions.

Article 2 of Law No. 20/2000 recognizes the freedom of association as enshrined in the constitution. It states that “every person is free to form an association with others ... but not founded for an illicit objective, contrary to laws, public order or morality.”

An NPO in Rwanda is formed by at least three members presenting aims and plans of action to the local authority at the place it intends to work in order to get provisional agreement.⁵⁵ Thereafter, an application requesting legal entity is addressed to the Minister of Justice six months following the date of a provisional permit. Legal entity is granted on the signing date of the ministerial decree six months from the date the request was made by the Minister of Justice. In case the legal entity is not granted the reasons must be communicated to the organization within six months of the application request. Further, every foreign organization has to be authorized to operate in Rwanda.⁵⁶ The Ministry of Local Government regulates all local NPOs while the Ministry of Internal Affairs regulates all International NPOs. Every NPO submits a detailed report on its achievements, balance sheet and financial situation by April 30 of every year. Non-submission of annual reports may lead to a suspension of the organization's

⁵³ It should be noted that the laws of Rwanda are currently under review, with amendments before parliament in August, 2009.

⁵⁴ “All Rwandans are born and remain free and equal in rights and duties. Discrimination of whatever kind based on, *inter alia*, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical and mental disability or any other form of discrimination is prohibited and punishable by law.”

⁵⁵ Article 4 and Article 8, paragraph 1, respectively.

⁵⁶ Article 32.

activities. Further, any NPO may be dissolved on a decision taken by a two-thirds majority of the registered members of the judiciary.

This law has positive aspects. Of importance, it expressly asserts the freedom of association, it anticipates organizations serving as vehicles for advocacy on matters of public interest, it provides for government support of service providers through the relevant ministries' budgets, it provides for tax benefits to help sustain the organizations. Further, the rules for registration are adequate, providing for sensible time limits, a deadline for the registrars to act or the organization will be deemed registered, and it has a sound appeals process including in conflict situations the possible use of mediation.

4.3 South Africa

There are a number of laws that govern CSOs in South Africa. These are:⁵⁷

1. Common and statutory law that recognize voluntary associations, trusts and Sec 21 Companies⁵⁸ as legal entities;
2. The NPOs Act;
3. The Income Tax Act; and
4. PBOs that apply for the right to receive tax deductible donations, called donor deductible status.⁵⁹

An advantage to this type of arrangement is the different levels of requirements to form these organizations. For instance, to form a voluntary association the only requirement is an agreement between three or more people to have a common objective other than making profits. This agreement may be written or oral.⁶⁰ This voluntary association is a product of the common law and is not regulated by statute. It can be established within a period of one to two days since no registration with a government department is required. There is no better way of ensuring freedom of association than this way. The other forms, Trusts and Section 21 Companies, have more requirements. For instance, a company is an incorporated entity while a trust is not a separate entity; it lacks a legal personality as it only holds property in the name of the trustees. Incorporating a company requires a memorandum of association together with a number of prescribed forms which takes two weeks to register. A trust is incorporated by lodging the trust deed with the master of the high court which takes a week to lodge.⁶¹

To seek registration as an NPO is voluntary for these organizations. There are, however, conditions required. They must be established for a public purpose and they must be non-state actors. Section 30 of the Income Tax Act of South Africa creates the framework for NPOs to be approved as PBOs. They must set out in their founding documents the organizational structures and mechanisms for governance.⁶² In Section 6, the Directorate for NPOs prepares and issues

⁵⁷ Brewis, Tessa: *The legal environment for nonprofit organizations in South Africa, NPO Management Programme* May 2007, p. 2.

⁵⁸ Companies Act 61 of 1973 of the Laws of South Africa.

⁵⁹ Income Tax Act, Sec. 18A

⁶⁰ Brewis, op.cit., p. 3.

⁶¹ Supra note 53, p. 5.

⁶² Sec 2 of the Non Profit Organizations Act 71 of 1997 encourages NPOs to maintain adequate standards of governance, transparency and accountability and to improve those standards.

codes of good practice for NPOs and those persons, bodies, and organizations making donations and grants to NPOs. Further, Section 30 of the Income Tax Act imposes other conditions on the governance and operations of PBOs. For instance, the organization's constitution must provide that there are at least three unrelated persons with fiduciary responsibility for the organization and no single person directly or indirectly controls the decision making powers relating to the organization.⁶³

There are attempts underway to simplify this registration process. Nonetheless, the South African model enshrines the principle for the protection of fundamental freedom of association. Further, it asserts a sound governance structure which is core in constituting CSOs, especially those of public benefit.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Kenya is at an important phase of its history with the intended review of its NGOs law. It is very important that key principles are identified to guide this important review process. In this last chapter and in the next subheading, we identify key principles that must guide the review process to ensure that a fair and enabling legal and regulatory framework forms the foundation and function of NGOs to sustain the sector.

The Act currently gives wide discretionary powers to the Board and the Minister. There are no guidelines provided under the Act on the terms and conditions attached to the certificate of registration. This subjects the freedom of association enshrined in the constitution to unreasonable prior restraint for registration and deregistration of NGOs. Informal groups with common interests should be allowed to engage in lawful activities without having to acquire a legal identity which is viewed as a barrier to entry.

5.2 Recommendations

ICNL has developed a checklist of principles that should be included in legislation governing CSOs. This checklist is based on research collected over 150 countries and analyzed to ascertain to prevailing international practices.⁶⁴

5.2.1 Protecting Fundamental Freedoms – Freedom of Association

International law protects and promotes the rights of individuals to form, join, and participate in CSOs. It is important to note that this freedom does not require one to become a legal entity in order to enjoy it. Once registered as an NGO as defined in the act,⁶⁵ an organization should be permitted to engage in activities for the benefit of its members in line

⁶³ Tax Exemption Guide for Public Benefit Organizations in South Africa: Legal and Policy Division in South African Revenue Service. Date of third issue, 10 October 2007.

⁶⁴ Access to information about various countries, including individual country laws and regulations, codes of ethics, and information about government – CSO partnerships can be obtained through ICNL's website at www.icnl.org.

⁶⁵ See sec. 3.2.1, *supra*

with public benefit or other charitable activities. Finally, the highest governing body of the CSO should be permitted to voluntarily terminate its activities.

5.2.2 Integrity and Good Governance

Certain minimum provisions should be included in the governing documents of CSOs. These provisions are internal reporting and supervision, duties and liabilities of their members, prohibition on conflicts of interest, and prohibition on the distribution of profits and other private benefits. Methods of voluntary self regulation could be encouraged, through establishment of a listed code of standards, which an umbrella organization should enforce.

5.2.3 Financial Sustainability

CSOs have a right to seek resources from legal sources. Furthermore, they are permitted to engage in profit making activities to sustain themselves provided that their core business remains that of public benefit. These organizations should be exempt from taxation, and donations made by individuals or companies should be entitled to income tax benefits to encourage a Kenyan philanthropic environment.

5.2.4 Accountability and Transparency

CSOs should by law be required to file annual reports on their finances and operations to the relevant state law office. Large organizations should be required to provide independent audited financial reports. All such reporting is subject to auditing by the authority provided it is not used to badger these organizations. Information provided should be accessible to the public, especially from those organizations that receive substantial support from the public through direct contributions or through tax benefits or government grants.

REFERENCES

INTERNATIONAL LEGAL INSTRUMENTS

1. The African Charter on Human and People's Rights
2. The Universal Declaration of Human Rights
3. The International Covenant for Civil and Political Rights
4. The International Covenant on Economic Social and Cultural Rights
5. The International Convention on the Elimination of all Forms of Racial Discrimination
6. The Convention on the Elimination of all Forms of Discrimination Against Women
7. The Convention on the Rights of the Child

STATUTES AND POLICIES

1. The Constitution of Kenya
2. The Companies Act Cap. 486 of the Laws of Kenya
3. The Societies Act Cap. 108 of the Laws of Kenya
4. The Trustees Act Cap. 167 of the Laws of Kenya
5. The NGOs Co ordination Act No. 19 of 1990 of the Laws of Kenya
6. The NGOs Co ordination Regulations of 1992 of the Laws of Kenya
7. Sessional Paper No. 1 of 2006 of Kenya
8. Law No. 20/2000 of 26.07.2000 relating to Non Profit Making Organizations of Rwanda
9. Non Profit Organizations Act 71 of 1997 of the Republic of South Africa
10. Income Tax Act of 1962 of the Republic of South Africa

BOOKS AND ARTICLES

1. Kanyinga, Karuti, Winnie Mitullah, Walter Odhiambo, S. Wojciech Sokolowski, and Lester M. Salamon (2004) "Kenya," *Global Civil Society*. Eds. Lester M. Salamon, S. Wojciech Sokolowski, and Associates, Vol. Two, Ch. 3, p. 95. Johns Hopkins Comparative Nonprofit Sector Project.
2. The International Center for Not-for-Profit Law (1997) *Handbook on Good Practices for Laws Relating to NGOs*: The World Bank Publication.
3. The London School of Economics and Political Science (LSE) (2001) *How to measure Civil Society*. <http://fathom.se.ac.uk/features/122552>.
4. Anheier, Helmut K. and CIVICUS (2004) *Civil Society: Measurement, Evaluation, Policy*, Earthscan.
5. Cohen, J.L., & Arato (1992) *Civil Society and Political Theory*: Cambridge, MA: MIT Press.
6. Rutzen, Doug and Adam Kolker, "International Civil Society Law," Law 732 – 001-08A, University of Pennsylvania Law School, pp. 10- 11, Spring 2008.
7. Edwards, Michael (2004) *Civil Society*: Polity Press.
8. Kanyinga, Karuti and Winnie Mitullah (2007) *The Non Profit Sector in Kenya: What we Know and What We Do Not Know*, The Institute for Development Studies, University of Nairobi.
9. The International Center for Not-For-Profit-Law and the World Movement for Democracy, (2008) *Defending Civil Society: A Report of the World Movement for Democracy*.
10. Kameri-Mbote, Patricia, Dr., (2000) "The Operational Environment and Constraints for NGOs in Kenya: IELRC Working Paper." International Environmental Law Research Centre.
11. Tengera, Gloria (2008) *NGO Law Formulation, A guide for Rwandan NGOs* (Ms. Tengera was a fellow at ICNL in August 2008).
12. Brewis, Tessa: *The legal environment for nonprofit organizations in South Africa, NPO Management Programme* May 2007 at p. 2.
13. Legal and Policy Division in South African Revenue Service, *Tax Exemption Guide for Public Benefit Organizations in South Africa*. Date of third issue, 10 October 2007.
14. The International Center for Not-For-Profit-Law, www.icnl.org.

The Process of Reviewing the NGO Coordination Act, 1990: A Step-by-Step Road Map¹

Faith Kisinga

Introduction

This article comes in the wake of increasing acknowledgment by Government of Kenya (GoK) and Non-Governmental Organization (NGO) actors of the need to revise the outdated NGO Coordination Act of 1990.

An enabling environment cannot be created simply through legislation or policy statements. Of key import to legislative reforms is the need for improvement in the way government and other stakeholders relate to each other. This article seeks to answer the question: What is the best way to ensure that NGOs participate effectively in the review process? It also seeks to answer the question: Is the participation of NGOs useful for the development of a sustainable and effective legislative framework?

The following are the **Key Objectives**:

- To help NGO and Government stakeholders develop a mutual understanding of their roles in the reform process so as to contribute to a successful and sustainable outcome.
- To guide NGO and Government stakeholders through the steps they need to follow for a successful review of the NGO Coordination Act.
- To promote an appreciation for an inclusive, collaborative process for review of the NGO Act.

The article makes the following **hypotheses**:

- That NGO stakeholders are interested in participating in the NGO Coordination Act review process.
- That NGO stakeholders have very little information about how they can participate, or what role they should play in the review process.
- That Government stakeholders are interested in moving ahead with the review process.
- That not all Government stakeholders have a comprehensive understanding of the significance of participation of NGOs in the review process and what this entails.
- That Government and NGO stakeholders need to work together for the outcome of the review process to be sustainable.
- That the review process will build the capacity of NGOs to effectively engage in legal reform in their various sectors. The process will therefore lay the basis for multi-sectoral reforms.

The term Civil Society Organizations (CSOs) is used generally in Kenya to refer to the wide array of organizations that operate in the realm between the individual and the state and are

¹ This study is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the author and do not necessarily reflect the views of USAID or the United States Government.

formed to promote the interests of their members or the public good. NGO is used to specifically refer to entities that are registered by the NGO Coordination Bureau. Though NGOs are just a small part of the larger CSO sector, they are the most visible. Under the NGO Coordination Act of 1990, NGOs can be established for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services.

This article will focus on the participation of NGOs in the review of the Non-Governmental Organizations Coordination Act of 1990. It is expected, and proposed by Sessional Paper No. 1 of 2006 on Non-Governmental Organizations,² that the reforms to the NGO Coordination Act will result in a more inclusive definition and legal framework for civil society organizations (CSOs). The Sessional Paper broadly defines an NGO as “a voluntary organization or grouping of individuals or organizations which is autonomous and not-for-profit sharing; operating in the voluntary sector; organized locally at the grassroots level, nationally or internationally for the purpose of enhancing the legitimate economic, social and/or cultural development or lobbying or advocating on issues of public interest or interest of a group of individuals or organizations; but shall not include Trade Unions, social clubs and entertainment sports clubs, political parties, private companies or faith propagating organizations”.

Outline of the Article

The article has three main parts.

In **Part One**, the article briefly outlines the history of the process that led to the current legislative framework for NGOs in Kenya and the role played by NGO and Government stakeholders in it. It also gives the prevailing context behind the review of the NGO Coordination Act. This section also uncovers the risks facing the review process and the legal and policy framework for participation of NGOs will be pointed out. In addition, this part discusses the rationale (legal, socio-political, or other) for a participatory legal reform process. It also makes the case for a participatory process. Reference will be made to participatory and representative democracy and an attempt will be made to offer sound reasons for a participatory process.

In **Part Two**, the article discusses the broad principles for effective legislative processes. The broad principles are reinforced by comparative practice.

Part Three sketches or proposes a road map for the legal review process based on the principles delineated in Part Two and grounded on the local context. It identifies the key stakeholders in the process and their roles as well as the methods that are required to bring them on board and enable them to participate effectively. Key activities of the process will also be outlined.

Research Method

This research has been conducted through secondary research and consultation of NGO law experts at the International Center for Not-for-Profit-Law (ICNL) as well as NGO practitioners from a variety of NGOs in the USA. Secondary data was obtained through a desk study of publications at ICNL with a bearing on the agreed study issues. The study has also used secondary data to show examples of international best practice in NGO law development from

² This article contains the National Policy for NGOs in Kenya.

around the world. This research report has been prepared with specific recommendations for the legislative process in Kenya. It will serve as a basis to make a case for a participatory and inclusive reform of the current NGO legislation.

PART ONE

Context and History

The NGO Coordination Act of 1990 is the product of Government and NGO efforts to provide a legal framework for NGOs. The context in which the Act was promulgated was, however, not conducive for NGOs. Mistrust between the Government and NGOs was very high. The Government proposed and passed the NGO Coordination Act in an attempt to regulate the sector. Members of the NGO sector reacted strongly to the law, claiming that its provisions were not enabling but aimed at stifling and controlling the sector. A frenzied series of consultations in the sector resulted in proposed changes which were presented to the Government. The two sectors deliberated on the proposals and eventually reached a compromise. A draft bill was then developed. It formed the basis of the NGO Coordination Act of 1990.

Though NGOs participated in the development of the law, they did so belatedly and with strong suspicions about the Government's intentions. The Act therefore reflected the desire by NGOs to self-regulate and limit the Government's role to coordination of the sector. Hence, some of the problems being faced by the sector today are as a result of limitations within the self-regulation mechanism that was envisioned. Others are as a result of issues that were never anticipated, for instance, the contending factions within the sector, the sector's deteriorating reputation, the exclusive nature of the definition of NGO, and the exponential growth of the sector.³

Many in the Government and NGO sector later questioned the efficacy of having a law on NGOs in the absence of a national policy on NGOs. Where the law was silent or gave rise to confusion, there was no general framework to which to refer. In 1996, the NGO Coordination Board decided that there was a need for a national policy on NGOs.⁴ The executive committee of the NGOs Council, the national umbrella body of NGOs,⁵ also reaffirmed its commitment to the development of the policy.

During the second half of 2000, the NGO Council conducted a survey. The results showed that NGOs desired a policy to guide the sector's operations. NGOs also called for a review of the NGO Coordination Act of 1990 once the policy was formulated. In May 2001, the Government's interest in an NGO Policy was rekindled. It called for a brainstorming meeting, of Government and NGO representatives, which was followed by the preparation of a concept paper on the proposed strategy for developing the NGO Policy.

³ NGOs grew by over 400 percent in the period between 1997 and 2006 – from 836 entities in 1997 to a significant 1,234 organizations in 1999 and to about 4,500 in 2006. Today, there are more than 6,000 registered NGOs in Kenya.

⁴ The NGO Coordination Board is a Government Agency which exists to register, coordinate and facilitate the work of all national and international NGOs operating in Kenya.

⁵ The NGO Coordination Act of 1990 recognized the creation and role of a national umbrella body for NGOs in the country.

The NGO Council led the process of drafting the paper. A steering committee was established, including members of the NGO Council and the NGO Coordination Board, the Vice President, and key government officials. The process was to be participatory and inclusive of NGOs, Government, and the private sector. The paper observed that the NGO Act of 1990 came into force before a national policy was developed. The lack of an agreed-to policy framework inhibited the implementation of some provisions of the Act, leading to lack of coordination, facilitation, and harmonization in the NGO sector. There was general agreement that a comprehensive policy would facilitate the formulation of a sound legislation on the NGO sector. In September of 2001, the structures for facilitation of the process for development of the Policy were established. A technical committee was constituted.

By 2002, the process of developing a national policy on NGOs was in full swing. It was led by the Government with input from NGOs through the NGO Council. This process continued for about a year. Input from the discussions was then consolidated in a report, which served as a basis for the preparation of a draft policy. A consultant was commissioned to develop the draft policy. He presented it to the NGO Coordination Board, which was tasked to ensure that the paper went through the government mechanisms and became policy.

This process depended heavily on the Government's leading. Though NGOs were eager to participate in the process, they were not able to effectively mobilize themselves to engage fully in the policy making process, right through to the end. It was not until January 2006 that Sessional Paper No. 1 of 2006 was released. The paper contains the National Policy on NGOs.

Today, the environment is more conducive for collaboration between the Government and NGOs. On one hand, there is generally willingness by the Government to engage with NGOs on broad issues ranging from service provision to constitutional and legal reforms. The Government views NGOs as vital partners in the realization of sustainable development and crucial watchdogs in fostering good governance. It is expected that government goodwill will continue, as well as its willingness to provide space for NGOs to engage and participate in activities that promote the public good. On the other hand, there is generally willingness by large NGO networks to mobilize support from their constituencies for the review process.

It is therefore necessary to ensure that a more deliberate engagement and participatory process is undertaken. NGOs and Government need to participate from a mutually informed and empowered position. Only then will the results from the process be sustainable.

Legal and Policy Framework for Participation

National development policies have consistently affirmed and appreciated the role of the NGO sector in national development. Civil society organizations, the private sector, and other actors are increasingly expected to participate in the formulation, implementation, monitoring, and evaluation of development policies and plans.

Several policies provide the framework and space for participation of CSOs generally and NGOs in particular in the broad development agenda. Vision 2030, which is the country's blueprint for development, envisions the participation of all stakeholders in the realization of its objectives. The participation of Kenyans from all sectors—government, private, and voluntary sectors—was vital in the formulation and completion of the framework. Consultation forums were held in nearly all parts of the country to collect the views of a diverse range of Kenyans. The team that coordinated the development of Vision 2030 was also representative of the broad

sectors. Vision 2030 was launched at a national public meeting where the endorsement of Kenyans was sought. Efforts were then made to disseminate the Vision around the country.

Participation of stakeholders was not limited to the *formulation* of Vision 2030 but was also emphasized in its *implementation*. For example, the business sector and the Government are partnering to implement various projects under Vision 2030, through public-private partnerships (PPPs). The regulatory and institutional frameworks for PPPs are currently being developed. Similarly, NGOs in the health sector worked closely with the Ministry of Health Services to develop the health sector's strategic plan. The plan foresees increased engagement of civil society organizations in its realization.

The National Accord, which was the result of the National Dialogue and Reconciliation Process following the post-election violence in Kenya in 2008, has four main agendas. The agendas are significant for the creation of an enabling environment for a stable, democratic, and prosperous country. NGOs and civil society in general are expected to participate in initiatives aimed at realizing Agenda Four.

As outlined in Sessional Paper No.1 of 2006, the NGO Sector Policy anticipates review of the NGO Coordination Act and the participation of NGOs in the review process. Recently, a working group of Government and Civil Society Organization representatives developed principles for GOK-CSO Collaboration.⁶ The principles are expected to serve as guidelines that will empower GOK and CSO actors at all levels to pursue their collaborative initiatives. They form an important basis for the legislative process as they provide the main stakeholders – GoK and NGOs – with principles for engagement.

Further support for participation by NGOs in decision making processes is found in bilateral agreements and international resolutions. Article 2 of the Cotonou Agreement describes participation of Non State Actors (NSAs) as a “fundamental principle” of African, Caribbean, and Pacific (ACP) and European Union cooperation. Kenya is one of the ACP countries. The agreement aims to facilitate and promote a broad-based and wide-ranging people-centered partnership through empowering NSAs and creating conditions to enable them to play an active role in development and democracy building amongst other processes.

Kenya is a member of the United Nations. Hence, resolutions made by organs of the international body are applicable in the country. In February 2001, the General Assembly of the UN adopted a resolution which stated that:

“There is no one universal mode of democracy ... but democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives....”(GA Resolution to Promotion and Consolidation of Democracy of February 28, 2001)

Notwithstanding the space provided under these international, regional, and national legal and policy frameworks, effective participation by NGOs is fraught with challenges due to weak

⁶ The Working Group on Government and Civil Society Organizations (CSO) collaboration was constituted in December 2008. The Group comprises eight Government Ministries that work in close collaboration with NGOs and twelve NGOs. The Group is facilitated by a coordinating committee made up of the NGO Council, the Ministry of State for National Heritage and Culture, and Pact Kenya, an NGO. Through a series of discussions, the Working Group has deliberated on the challenges to Government and CSO collaboration and developed principles for Government-Civil Society Organization Collaboration.

internal capacity and a deficient legal framework. If the NGO sector is to be fully strengthened to play an effective role in the legislative review process, it will need to have a clear understanding of its role in the process and how it should relate with other stakeholders. It will also need sufficient information to enable it to contribute substantively with regard to the specific reforms that are required.

Challenges and Risks

The NGO Sector is faced with a number of challenges which have considerably reduced its capacity to effectively engage in legislative, policy, and other reform processes, including the following:

- The long, drawn-out leadership wrangles and warring factions of the NGO Council have weakened the NGO sector. Further, the relationship between the NGO Council and the NGO Coordination Board is strained with suspicion, each viewing the other as invading its turf. These issues have translated to the NGO sector's inability to find common ground and forge joint agendas on issues of mutual interest. They have also curtailed the political buy-in that is sorely needed for such a sector-wide initiative to succeed.
- There have been declining standards and professionalism, largely due to the lack of an enabling regulatory and institutional framework for effective self-regulation. The NGO sector's dented image and credibility have had a negative impact on the relationship between NGOs and other stakeholders and played a role in extending the historical mistrust between the Government and NGOs. However, an initiative aimed at strengthening competence and sustainability amongst CSOs in general is underway. The initiative has developed sector-wide standards and aims to build the capacity of CSOs to comply with the standards. It will therefore lay the foundation for improved relationships between CSOs and the government.
- High dependence on one or a few sources of foreign funding and lack of creativity in local resource mobilization, as well as lack of awareness with regard to incentives for individual and corporate philanthropy, have reduced the sustainability of many NGO initiatives, especially reform processes which are usually long-term in nature.
- Many NGOs lack the know-how on legal and policy reform processes and few have the capacity to engage in them or willingness to engage. Nonetheless, there are NGOs that exist to help others build their technical capacity in coordinating and participating in legislative reform processes.⁷
- The Government is eager to move ahead with the NGO law review. Ultimately, it will decide whether and to what extent NGOs participate in the process. It is therefore essential to ensure that the Government agencies which will play a role in the review process are well informed about the importance of the participation of NGOs in the review.

Theoretical Framework for Participation

Participatory democracy is a process that emphasizes broad participation (decision making) of constituents in policy formulation and direction through the operation of political systems. It strives to create opportunities for all members of a political group to make

⁷ Pact Kenya and the Poverty Eradication Network are two of these.

meaningful contributions to decision-making, and seeks to broaden the range of people who have access to such opportunities (Johns, 2005).

Participatory democracy assumes that all citizens are political actors and will spend considerable time in defense of their interests and ideas. Representative democracy, however, rests heavily on the idea that almost every citizen delegates participation to a public agent, a member of parliament, thereby increasing the obligation of the citizen to be vigilant and active in the selection of candidates for office and oversight of representatives once elected.

Rosemann posits that democracy has shifted from a right to elect representatives to a right of participation within processes that have a direct or indirect impact on individuals' lives (Rosemann, 1969).⁸ The desire by citizens to take a greater role in determining their future lies at the heart of the desire to "democratize" democracy as a means of restoring faith in the institutions of government. According to Ron Miller, the term "participatory democracy" has been used by people who seek to reclaim the essence of democratic idealism in a society that has grown over-organized, hierarchical, and authoritarian and represents a renewed faith in the intelligence and moral judgment of common citizens pursuing their daily lives and interests. (Miller, 2005). Hence, one of the stimulants to this interest in participatory democracy is the apparent "reduce(d) trust in public and private institutions, especially disillusionment with politicians, political parties, and political institutions" (Pharr, Putnam and Dalton, 2000).

While public participation in democratic society is vital, it is also problematic. Sometimes governments seek extensive public input in numerous forms only to ignore the public's comments later. Some public meetings are so dysfunctional that observers end up wishing someone in charge would bring an end to the chaos and misery (Co-intelligence, 2008). In the absence of a sure direction, the consensus method so typical of participation becomes less likely to produce good policy.

Accordingly, Johns proposes that the quality of the democracy will be measured by the ability to incorporate and resolve issues, not just voice them (Johns, 2005). In his view, the emphasis should be on ensuring transparent relations between organized voices and the government. These organized voices represent civil society.

It has been argued that the involvement of civil society in democratization will give the people ownership over their institutions of governance in a way that was not possible without it (Roland, 2006). This view finds support in the GA Resolution on Promotion and Consolidation of Democracy of 2001, which states that democracy needs *guaranteed* mechanisms for consultations with and the contribution of civil society in processes of governance and encouraging cooperation between local authorities and nongovernmental organizations (GA Resolution to Promotion and Consolidation of Democracy of February 28, 2001).

Several attempts have been made to give direction to participatory democracy. The following section outlines the principles for effective participation by CSOs in legislative processes.

⁸ Herbert states that only through participation is it possible to build and consolidate democracy.

PART TWO:

BROAD PRINCIPLES FOR EFFECTIVE LEGISLATIVE REFORM PROCESSES

There will always be initiatives geared at revising or developing laws to govern a variety of aspects of life. Some may result in laws that are widely accepted and respected. Others may end in laws that are rejected by certain segments of society or even ignored.

Whether a legislative reform process is successful or not is dependent on a variety of factors, including the context in which the process is undertaken, the commitment and interest of the stakeholders, and the resources available. Over and above this, however, certain basic guidelines or principles must be observed to ensure that legislative reform processes are successful. They include the following:

1. ***The process must be indigenous.*** This principle is an answer to the question: For whom is the law being reviewed? To be successful, the process must be led and owned by those for whom the law is being created—local institutions and individuals. Only then will the law be applicable and reflect the social, economic, and political realities experienced by the people it affects. Local institutions and people are generally very good at working out solutions to their own problems if they are given the time and resources to do so.
2. ***The process must be inclusive.*** The voices and views of the actors and sectors that will be affected by the law – the stakeholders – must be represented. Otherwise, the legitimacy of the process may be questioned or even threatened. It is therefore vital for organizers and participants to have a sound understanding of the prevailing social dynamics. Selection of representatives to the process must also be transparent.

A process that is representative of the views of NGOs, government officials, parliamentarians and others can lead to good laws, a stronger likelihood of enactment, and a vested interest among participants in continuing the reform process. (Rutzen, ICNL 2008)

3. ***The process must be participatory.*** A participatory process promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers. To the extent that people feel involved in creation or ratification of democratic decisions, they will support the implementation of those decisions.

The process should therefore give stakeholders the chance to provide input through a variety of methods including consultation, dialogue, information, or partnership.

An example of the effective use of various tools for participation is found in Hungary, where an NGO-Government drafting group published its draft law in a leading Hungarian newspaper. This encouraged input from both NGO representatives and the broader public. The drafters then organized town meetings around Hungary to promote further public participation. Comments were codified and reflected in the final version of the draft, which was enacted in 1997.

The parameters for participation must also be clear: for instance, participants must have knowledge and skill to carry out the tasks but also be sufficiently representative of the various constituencies to provide their perspectives.

4. ***The process must be transparent.*** Participants need to be well informed in order to participate in a meaningful way in the discussions on reform. The process must

therefore provide information to the broad constituencies of the stakeholders and be employed as a channel for disseminating information and opinions from those stakeholders. In addition, it should provide participants with information about how the input they provide will be used. Where transparency is a key element of the process, trust will readily be nurtured amongst the stakeholders.

5. ***The process must be accepted as valid across the country.*** The need for legal reform must be expressed widely in the sector if the law is to be broadly and readily accepted and applied. To foster widespread support, it will be crucial to begin the process by laying emphasis on the *common goal*. This will help to minimize conflict and reinforce the cultivation of respect among the stakeholders.
6. ***The process must be empowering.*** The process will be most effective if associated with a *broad capacity building* effort that ensures that the constituency at large as well as those directly participating in the legislative process are reasonably knowledgeable of and proficient in articulating the concerns and wishes of the constituency. It must give those involved the chance to develop their capacities to organize and influence change in their respective fields, thus leading to reforms on a larger scale.
7. ***The process must be collaborative.*** The process must involve a reciprocal relationship among decision makers and stakeholders in which all parties listen as well as talk and contribute towards achieving a mutually agreed objective. Central to this principle is the need to ensure that stakeholders are deliberately and actively involved and share responsibilities for various elements of the review process. In Afghanistan, the legislation drafting process in 2005 was government-led and allowed for civil society input only reluctantly. Moreover, the process was quite hurried. Consequently, the law that was ultimately enacted, although a big step toward a more enabling environment, was not enabling as it would have been if the process had been collaborative.
8. ***There must be wide consultation throughout the review process and fair utilization of all relevant input.*** This will ensure that decisions reached are sustainable and have legitimacy. The failure to invite sufficient input may cause the resulting law to lose the benefit of valuable perspectives and insights. In addition, some NGOs may perceive the reform initiative as the work of an elite group, thereby undermining the legitimacy of the reform effort. Hence, stakeholders should be convinced that their participation will achieve something worthwhile in order for them to buy into the process.

The following example highlights how wide consultation was undertaken during the tax reform process in South Africa. Between 1998 and 2000 the Non-Profit Partnership (NPP),⁹ together with the Legal Resources Center (LRC), the South African Grantmakers' Association (SAGA), and other representatives of the nonprofit sector launched a tax campaign targeted at improving the tax legislation governing nonprofits as the nation's tax laws came under review. The campaign involved liaising with dozens of nonprofit organizations, preparing discussion papers and reports, and drafting submissions for the Finance Portfolio Committee of Parliament to consider. By July 2002, the Revenue Act repealed large portions of the

⁹ A coalition organization for non-profit organizations in South Africa

existing tax framework and created a more favorable tax environment for the sustainability of nonprofits.

Nonetheless, the legislation still did not address some of the concerns highlighted by the group in their position papers and draft submissions. Between 2001 and 2006 therefore, the NPP and its partners strengthened their campaign by initiating dialogue with the South African Revenue Service (SARS) and the Ministry of Finance to promote further cooperation and development of favorable tax laws for the nonprofit sector. Biannual meetings and, later, annual meetings were held between the actors. The NPP produced discussion papers to highlight the continuing objectives of the Tax Campaign. Ongoing consultations aim to bring gradual and holistic changes to the tax framework, which support the continued survival and development of the nonprofit sector.

A similar example of wide consultation is found in Rwanda. In general, the NGO law reform process was open and participatory. The Ministry of Local Government, Community Affairs and Social Affairs (MINALOC) initiated work on four draft laws governing national NGOs, international NGOs, religious organizations, and political parties. The process was opened up to solicit input from CSOs, other stakeholders and the public through various channels including consultative meetings and public hearings in parliamentary committees. Changes to the draft were made on the basis of the participant recommendations.

These consultative efforts in South Africa and Rwanda were crucial in securing the buy-in of stakeholders during the revision of the Tax and NGO laws.

PART THREE: THE ROAD MAP

I STAGE ONE

Assessment of the legal framework

Local and international practice has shown that many reform initiatives are informed by identified issues, which have been captured and condensed in the form of research reports, and used to mobilize support. The first stage of the review process will therefore consist of conducting research on constraints, gaps, and challenges of the legal framework for NGOs in Kenya in order to build a strong case for the creation of a more enabling environment for NGOs.

The research will be conducted through a desk study. It will identify the key issues of concern and propose legislative solutions that will be linked to the sections of the law that require amendment. It will also compare the legal framework in Kenya with international good regulatory practice around the world and will utilize information from the globally acknowledged International Centre for Not-for-Profit Law (ICNL).

Since research has already been undertaken, the task will be to package the findings into a report format that is useful for stakeholders. For example, policy briefs will be prepared for government officials. Other promotional information, education, and communication (IEC) and behavior change communication (BCC) materials will also be developed and targeted at NGO and GOK audiences.

This report will be used to inform stakeholders' consultations. It will also be disseminated widely beyond those who will participate in stakeholder discussion forums, to affected members of the NGO community and government circles. The report will therefore play

a crucial role in setting the reform agenda.

Dissemination of the research will be done through broadcast radio and TV, as well as through leading national newspapers, identified NGO network focal points, and a website dedicated to the law review initiative. The dedicated website will be created and monitored by a technical team.¹⁰ The site will have comprehensive access to additional relevant documents and will post announcements on activities related to the review process as well as other information updates. It will also have an email account that interested stakeholders can use to provide input. The input will be passed on to the Working Group for consideration.¹¹

II STAGE TWO

During the second stage of the review process, comprehensive discussions within and between the NGO sector and Government on the changes needed for an enabling legal framework for NGOs will be facilitated and convened by *an NGO Law Working Group*. The Working Group will be composed of representatives from the NGO sector, government, the NGO Coordination Board, the NGO Councils, the National Civil Society Congress, NGO sectoral or thematic networks, and other persons selected by dint of their professional/technical experience or on some other strategic basis.

A *technical team* will be established to support the Working Group. It will be composed of persons with deep knowledge of the local environment and the requisite technical experience for managing policy and legal reform programs, together with skills in communicating with a wide spectrum of participants. The technical team will be hosted by the NGO Coordination Board and/or by an organization that commands respect widely across Government and the NGO sector. Financial support for the initiative will be mobilized by members of the NGO sector and the NGO Coordination Board prior to the start of the first phase of the review process.

Selection of the members of the Working Group will be by stakeholders, during the first joint consultation meeting. Participants at the first consultation meeting will also jointly develop a road map for the participatory review process and agree on the key objectives for the process. Additional stakeholders will also be identified at later meetings.

Further activities throughout this stage will include the following:

- i. ***Consultative meetings with NGOs***: The NGO Law Working Group will meet with representatives of the NGO Councils and key civil society networks such as the National Civil Society Congress (NCSC) and the Kenya Civil Society Alliance (KCSA) to seek comments, views, and feedback from their constituencies, to develop sectoral consensus and to mobilize support for the review process.
- ii. ***Intra-sectoral consultation workshops*** will be convened to facilitate comprehensive discussions by NGOs and consolidate the case for an enabling environment. In particular, the forums will raise awareness on NGO sector law and policy. They will aim to build consensus on the most effective model for self-regulation in the NGO sector, to complement the development of a truly enabling legislative framework. The Working

¹⁰ See stage 2 for further information on this technical team.

¹¹ See stage 2 for further information on the Working Group.

Group will convene the workshops and will pay particular attention to ensure the participation of representatives from a spectrum of NGOs that will be affected by the reforms.

- iii. ***Engagement with government and parliamentary officials.*** The Working Group will engage with government and parliamentary officials to secure buy-in for a progressive NGO legal framework consistent with policies formulated and agreed to throughout the process. This activity will begin as early as possible and include the following steps:
- *Identification and engagement of relevant parliamentary committees.* The Working Group will establish relationships with members of relevant parliamentary committees such as the Departmental Parliamentary Committee on Health, Housing, and Labour & Social Welfare as well as with members of parliament who are allies of the sector, in a bid to build support for reform.
 - *Strategic meetings to get buy-in from relevant parliamentary committees and Members of Parliament* allied to the sector. These meetings will be geared toward creating awareness amongst the Parliamentarians with regard to the value of the NGO sector and of an enabling environment for their activities.
 - *Strategic meetings with relevant government officials:* These will secure buy-in from relevant government agencies for the reforms.
 - *Engagement of the President and the Office of the Prime Minister.*

Early efforts will be made to contact these offices, especially the President, whose assent will be crucial in determining whether the draft law (bill) finally gets enacted.

- iv. ***To build consensus between the NGO sector and Government*** on specific changes needed in the NGO Coordination Act, fifteen (15) cross-sectoral region-wide dialogue forums will be convened. From these joint dialogue forums, specific proposals will emerge.

The fora will also help to improve the understanding of both sectors with regard to their reciprocal roles in the review process, their respective realities and their common objectives, thereby promoting mutual appreciation.

Recommendations from all these forums will be captured and consolidated to develop definitive proposals for reform. The forums will also serve as primary communication conduits between the initiative and stakeholders, allowing for the gradual and essential “buy-in” by all affected parties as the process proceeds. Additional information channels will be dedicated to providing free information on the process to the public. These will include identified NGO network focal points and a website dedicated to the law review initiative.

III STAGE THREE

During the third stage, the revisions to the NGO Coordination Act will be agreed to, drafted, and endorsed by stakeholders.

Due to the busy schedule of Parliamentarians and the technical nature of the proposals sought, it will be crucial to ensure that the proposal submitted before Parliamentarians is as clear and complete as possible. This will reduce the amount of time that will be required to have the law appropriately drafted, understood, debated, and enacted.

Recommendations from the consultation forums will be used to inform the development of the draft law. The draft law will then be disseminated to the wider NGO community through various channels, including email, broadcast, and print media, NGO network focal points, and the dedicated website. Since it is crucial to secure buy-in from stakeholders at every stage of the process, feedback will be consistently solicited and used to further refine the draft law.

The activities in this stage will include the following:

- ***An NGO Working Group workshop to consolidate the proposals from the consultation forums:*** The Working Group members will convene a workshop, following all the consultative meetings and workshops, to consider and consolidate the proposals made at those forums and draw up specific recommendations for reform.
- ***Dissemination of the recommendations*** through broadcast radio and TV and leading national newspapers, NGO network focal points, and the dedicated website.
- ***A workshop to validate all the proposed recommendations.*** This workshop will ensure that the proposals developed are in line with the expectations of the stakeholders from the government and the NGO sector and receive their sanction. This workshop, which will be convened by the Working Group, will invite select representatives from the government and the NGO sector, who attended the consultative workshops.
- ***Technical Drafting of the NGO law:*** The Working Group will commission a qualified legislative draftsman to assist them to develop a draft of the revised NGO Law. The draft of the law will be based on recommendations made by the Working Group, as proposed in light of the comments made at the consultation workshops. It is anticipated that the Working Group will be actively involved throughout the drafting process and together with the draftsmen will complete the draft law.
- ***Dissemination of the draft law and information about the drafting process to stakeholders:*** This will be conducted through broadcast radio and TV and leading national newspapers, NGO network focal points, and the dedicated website.
- ***Consolidation of feedback*** reflecting the comments and views captured from the dissemination: This will be undertaken by the Working Group.
- ***Development of a final version*** of the draft law. The drafters will receive the consolidated feedback to revise and finalize the draft law. Sufficient copies will be produced for dissemination to identified target audiences.
- ***Dissemination of the draft law to a broad group of NGO stakeholders for endorsement:*** This will be conducted through broadcast radio and TV and leading national newspapers, NGO network focal points, and the dedicated website.

- **Validation of the final draft:** There will be a National Validation workshop to present and validate the final version of the draft NGO law. A broad group of NGO stakeholders will be invited to endorse the draft. The workshop will be convened and facilitated by members of the Working Group.

IV STAGE FOUR

The revised NGO Coordination Act will be passed during the final stage of the review process. The following activities will take place:

- **Submissions before Parliament on the draft NGO law:** The Working Group members will engage with and make submissions before the relevant parliamentary committee on the draft NGO law. The submissions will be accompanied by letters of endorsement from the NGO sector. The Working Group will also use the recently published case studies and principles for CSO-Government collaboration, along with material from the ongoing discussions on civil society standards for competence and sustainability, to conduct a high-impact campaign for law reform. This material will lay out a *clear basis for the relationship between NGOs and the Government and hence, facilitate ongoing dialogue and mutual understanding.*
- **Monitoring of the bill and lobbying for enactment:** Together with the NGO Coordination Board, the Working Group will follow the decision-making process to make sure that it is democratic, transparent, and effective. It will also work closely with NGO networks to mobilize the sector in sustaining the demand for a new law, through campaigns and lobbying.

The Working Group will take advantage of platforms provided by various NGO initiatives, e.g., the NGO Week, the discussion forums about enhancement of standards for the sector, the NGO of the Year Award (NGOYA), and the Civil Society of the Year Award (CSOYA) to advocate and inform NGOs about the progress being made in Parliament. Media releases, the dedicated website, and NGO websites will also be used in conducting the civic engagement campaign.

Actions to sway more decision makers in favor of passing the law will include breakfast meetings between Working Group representatives and members of the parliamentary committee; contacts with the Office of the President; posting summarized copies of the draft law, leaflets, and position papers in all the pigeon-holes of the parliamentarians; and promoting public debate through radio, TV, and leading national newspapers.

THE STAKEHOLDERS IN THE REVIEW PROCESS

The NGO Coordination Act review process will be inclusive and participatory. The following is a description of the main stakeholder organizations as well as their mandate and responsibilities in the review process.

The NGO Law Working Group

The NGO Law Working Group (comprising both government and nongovernmental stakeholders) will take the lead in the review process. It will play a key role in convening or facilitating the consultation forums as well as other activities. Representation on the group will be broad and include many categories of NGOs (thematic sector and regional network

representatives), civil society networks, persons with technical expertise, the NGO Coordination Board, and the NGO Councils.

Selection of the Working Group members will be by stakeholders, during the first joint consultation meeting. The working group will, however, be open to invite additional members of key stakeholder constituencies who will be identified and proposed later in the process. The inclusive structure of the Working Group will reflect both the diversity of the NGO sector and the fact that no single NGO represents the whole sector. The Working Group will therefore have an advantage over other institutions in reinforcing trust amongst the stakeholders in such a process. Its composition will also help to secure the legitimacy and success of the initiative.

The Working Group's brief will be to facilitate wide, inclusive consultations with a variety of stakeholders, including NGOs, relevant Government agencies, parliamentarians, and parliamentary committees. The consultations will be geared towards building multi-sectoral consensus on the changes needed for a conducive legal framework for NGOs. The Working Group will also consider the findings of the research report on the legal framework for the NGO sector. It will also consider and consolidate feedback from stakeholders, make recommendations, and seek endorsement of the recommendations from the stakeholders.

Through its secretariat or technical support team, the Working Group will ensure easy and open access to relevant, accurate and timely information on the process and content of the review. It will therefore play a pivotal role in catalyzing civic engagement for the review process.

To augment the progress of the review process, the NGO Law Working Group will, after consultations and dialogue forums have taken place, work with a draftsman to develop a draft of the NGO Coordination Act. The Working Group will submit the draft law before the relevant parliamentary committee(s) and follow-up on its progress in Parliament.

The NGOs Coordination Board

The NGOs Coordination Board is a semi-government agency, established by the NGO Coordination Act, 1990. Its main mandate is to streamline the registration and coordination of NGOs. Among its many responsibilities is providing policy guidelines to NGOs for harmonizing their activities with the National Development Plan for the country so that NGOs avoid activities which contradict state programs.

The NGOs Coordination Board will be the link between the Working Group and government institutions in the course of the implementation of the review process. The Board will coordinate activities that relate to securing consensus among Government institutions and agencies on the need for a positive NGO legal framework. It will also play a key role in helping to move proposals through the necessary legal reform channels and in ensuring that the laws are subsequently implemented accordingly. In addition, the Board will participate as a member of the NGO Law Working Group. It will provide the Working Group with access to up-to-date accurate and timely information on the progress made by the bill during the legislative process.

Being a semi-autonomous government agency, the Board will need to rely on NGOs to undertake activities with regard to the mobilization of the sector. Hence, NGO networks will mobilize the NGO sector to engage in the review of the NGO Coordination Act.

Civil Society/NGO Networks

As already mentioned, it is imperative that the initiative get the buy-in of a diverse range of organizations in the NGO sector for it to be successful. The Working Group will therefore work with key Civil Society networks such as the National Civil Society Congress (NCSC), and the Kenya Civil Society Alliance (KCSA), and the two *de facto* NGO Councils to develop sectoral consensus, mobilize support for an improved working environment for NGOs, and sustain demand for change. It will take advantage of platforms provided by the NGO networks' ongoing initiatives, for instance the NGO Week, the NGO of the Year Award, and the Civil Society of the Year Award amongst others. The NGO networks will also use a variety of channels for mobilizing their members including forums, posters and leaflets, websites, and media releases. The Working Group, through infrastructural organizations, will provide the NGO networks with assistance in the form of training on how to build and effectively coordinate sustainable sector-wide reform campaigns.

Media

The value added through the participation of the broadcast and print media is their powerful role in shaping public opinion and reaching a critical mass of supporters for the campaign. Media participation will help frame the case for the need of an enabling environment for NGOs and presenting it to the public.

Most of the opinions associated with the poor image of the NGO sector are mainly held by those in urban areas, usually as a result of media coverage.

It will therefore be vital to establish a system for dissemination of information on the initiative to broadcast and print media. The Working Group and NGO network representatives will seek opportunities to convey the need for a more enabling legal framework through speaking on broadcast media. The broadcast media will also be requested to feature a forum through which public debate on the topic will be conducted. During this forum, an NGO and Government official will be invited to speak and a media survey will be conducted. The results from the survey will be deemed to reflect the views of a sample of the Kenyan population on the issues discussed. Information to be published in leading newspapers will include the draft law or a summary of proposals for reform of the NGO Coordination Act.

Members of Parliament Who Are Allies of the NGO sector and Parliamentary Committees

The Working Group will establish relationships with members of relevant Parliamentary Committees, for instance the Departmental Parliamentary Committee on Health, Housing, Labour and Social Welfare, as well as with Members of Parliament who moved from the NGO sector in a bid to build support for reform.

The parliamentary select committees will need to have their knowledge about the sector and its contribution to society fostered. Former NGO members will be reminded of where their real mandate comes from. The Working Group, through consulting with these stakeholders, will therefore build their understanding of and appreciation for the need for reform of the legislative framework for NGOs. This will ensure that in future, the parliamentarians will have the capacity to effectively champion the cause of the sector.

Capacity building will be carried out through specific workshops, designed for the parliamentary committee members and through invitations to participate in NGO functions and meetings where the issue of an enabling legal environment is being discussed. The parliamentary

committee members and identified members of Parliament will also provide the Working Group with access to information and updates on the progress being made in the decision-making process of the revised law.

Government Institutions and Agencies

These include government actors with a bearing on NGO operations and those likely to have direct influence in the final decisions about legal reform, e.g., the Ministry of State for National Heritage and Culture, the State Law Office, the Office of the Prime Minister, and the Office of the President, as well as agencies currently regulating other forms of CSOs, e.g., trusts, societies, CBOs, etc. These agencies will play an important role in the consultations leading to the development of the draft law as well as in determining the speed with which the proposals move through the legislative process and their eventual success. They will also have an important role to play in the implementation of the amended laws after the reforms. Capacity building efforts will be vital to ensure that these stakeholders understand their role in the review process and in the implementation of the reformed law vis-à-vis other agencies and actors, so as to ensure harmonious participation and implementation.

BIBLIOGRAPHY

- Bulgarian Center for Not-for-Profit Law, "Participation of NGOs in the Process of Policy and Law Making: Comparative Analysis."
- Code of Good Practice for Civil Participation in the Decision-Making Process (Draft version approved by the Conference of INGOs of the Council of Europe at its meeting on 29 April 2009).
- Co-intelligence, "Principles of Public Participation," http://www.co-intelligence.org/CIPol_publicparticipation.html.
- Foley M. and Edwards, B., "The Paradox of Civil Society," *The Journal of Democracy*, 7 (3):39 (1996).
- GA Resolution on Promotion and Consolidation of Democracy of February 28, 2001 – GA/Res.55/96.
- de Souza, Herbert, "Participation."
- International Center for Not-for-Profit Law, "The Participatory Process of Legislative Advocacy," 2006.
- James Bohman and William Rehg (Eds.), *Deliberate Democracy – Essays and Politics*, MIT Press (1997) (found in Roland Rich (2003) at www.cdi.anu.edu.au/).
- Johns, G., "Participatory Democracy: Cracks in the Façade," *IPA Background*, Vol. 17 No. 3, July 31, 2005.
- Kanyinga, K., Mitullah, M. and Njagi, S., *The Non-Profit Sector in Kenya: Size, Scope and Financing*. Nairobi: The Institute for Development Studies, 2007.
- Non-Profit Consortium, "Summary of NPC's involvement in Tax Reform for the non-profit sector" (unpublished, Cape Town, 2007).
- Pangilinan, Francis N., "A Confidence Gap Needs To Be Bridged," *International Journal of Not-for-Profit Law*, Vol. 1, No. 2, 2008.
- Participatory Practitioners for Change, 2007, <http://www.ppfk-uk.net/resources>.
- Pharr S., R. Putnam and R. Dalton, "A Quarter Century of Declining Confidence," *Journal of Democracy*, 11 (2):13, 2000.
- Principles of Public Participation, http://www.co-intelligence.org/CIPol_publicparticipation.html.
- Robinson, David, "Be Prepared to Get Your Hands Dirty," *International Journal of Not-for-Profit Law*, Vol. 11, No. 2, February 2009.
- Rich, Roland, "Public Participation in the Democratisation Process," Center for Democratic Institutions, Australian National University, www.cdi.anu.edu.au/.
- Miller, Ron, "Toward Participatory Democracy," *Free Voices*, No. 2, Summer, 2005.

<http://www.pathsofllearning.org/articles>.

Rosemann, Nils, "From the Principle of Democracy to a Right of Participation?" Institute for Strengthening Democracy in BiH, Presentation at the Fourth International Seminar Democracy and Human Rights in Multiethnic Societies, Konjic, July 2001.

Rutzen, Douglas, Practice Notes: "The Process of NGO Law Reform in Central and Eastern Europe and the Newly Independent States," *International Journal of Not-for-Profit Law*, Vol. 1, No. 4, 1999.

Sessional Paper No. 1 on Non-Governmental Organizations, Office of the Vice President and Ministry of Home Affairs, 2006.

The International Association for Public Participation's Core Values, http://www.co-intelligence.org/CIPol_publicparticipation.html.

Article

State Policy Toward the Civic Sector in Poland

Marek Rymśa¹

The article analyzes the evolution of the policy of the State towards the civic sector in Poland after 1989. The author identifies five stages, which approximately match subsequent terms of office of the Polish Parliament. The analysis shows that the policy of the State has evolved from the provision of room for independent civic initiatives to the involvement of NGOs in co-operation with public administration. The growing interest in cooperation is accompanied by the trend to increase control over the non-governmental sector.

Phases of development of government policy toward the third sector in Poland

In the years after 1989, we can distinguish three fundamental phases in the evolution of government policy towards the third sector. First was the phase consisting of the creation of the scope for civic initiatives to operate within the new system with the simultaneous creation of a set of “privileges” for formalized forms of civic activity (the activities of associations and foundations). This phase was accompanied by the dynamic development of the civic sector as a reaction to the restrictions of the communist period. The second phase was a phase of declarative support on the part of the government for the third sector, though its significance was in fact marginalized, thanks to the public policy reforms undertaken. This phase was accompanied by stagnation in the development of civic initiatives due, in part, to the exhaustion of possibilities for societal self-organization under the legal and financial conditions created in the previous phase. Finally, in the third phase we see a defining of the principles of inter-sector cooperation with concurrent efforts towards the bureaucratization and control of organizations undertaking cooperation and the marketization of the mechanisms of public support for the activities of non-governmental organizations acting for the public benefit. This phase of government policy (still ongoing) seems to be accompanied, among others, by a progressive stratification within the third sector and the marginalization of informal grassroots local initiatives, at least within the system of inter-sector cooperation.

Two elements of government policy concerning the third sector come to light as crucial:

- (1) The formulation of the legal conditions for the functioning of non-governmental organizations; and
- (2) The creation of a model of cooperation between public administration and the civic sector.

¹ Dr. Marek Rymśa is Editor-in-Chief of *The Third Sector* quarterly. This article is a revised English version of the paper published originally in Polish as M. Rymśa, „*Polityka państwa wobec sektora obywatelskiego w Polsce w latach 1989–2007*,” in M. Rymśa, G. Makowski, M. Dudkiewicz (eds.), *Państwo a trzeci sektor. Prawo i instytucje w działaniu*, Instytut Spraw Publicznych, Warsaw 2007, pp. 23–42. A version of the paper was published in the quarterly *Trzeci Sektor* as M. Rymśa, *Polityka państwa wobec trzeciego sektora w Polsce w latach 1989–2006*, *Trzeci Sektor* 2006, no. 8, p. 2–10 (editors’ note). This article was originally published in “Social Economy, Non-Profit Sector and Social Policy,” the *Trzeci Sektor* quarterly special English edition, the Institute of Public Affairs Foundation, Warsaw 2008. Reprinted with permission from the Institute of Public Affairs Foundation.

Looking closely at these two aspects of government policy,² one can distinguish five periods which more or less coincide with successive parliamentary terms and reflect changes in government policy resulting from the shifts in power of various forces on the political scene. Government policy towards the third sector seems to have been so far a function of the general approach of decisionmakers towards reforming the social sphere. These periods can be outlined as follows:

- 1989–1993 - creation of the scope for civic initiatives;
- 1993–1997 - stagnation policy;
- 1997–2001 - policy of missed opportunities;
- 2001–2005 - building of a model of inter-sector cooperation;
- 2005–2007 - between cooperation and control.

Below is a brief description of these periods of the development of government policy towards the third sector as well as a short account of the pretransformation period (1980–1988). The rise of the original Solidarity as a mass social movement (1980–1981) brought about the eventual democratization of Poland. Although it broke up this movement, martial law did not manage to stop the process of “making the public sphere more civic.” In other words, the rise of the third sector and its development after 1989 constitute a continuation of the changes initiated a decade earlier.

1980–1989: The politics of repression and weakening control in the period of “corroding communism”

1980–1989: Corroding socialism

- *Experiences of the original Solidarity as a mass social movement (1980–1981)*
- *The politics of repression (1982–1985)*
 - *the breaking up of Solidarity as a legal entity*
 - *the “social vacuum” effect*

but concurrently

- *Toleration of selected social activities (1986–1989):*
 - *grass-roots self-help, charitable and educational activities organized in cooperation with the Catholic Church*
 - *the Act on Foundations (1984)*

The original Solidarity, though formally a trade union,³ was in fact a mass social movement with a strong ethical orientation in which three currents could be distinguished: trade

² At the Institute of Public Affairs, under the KOMPAS Project, we conduct a systematic monitoring of both the legislative process concerning the third sector as well as follow the development of inter-sector cooperation. See www.isp.org.pl/kompas.

³ The official name of the movement was the Independent Self-governing Trade Union “Solidarność” (*Niezależny*

Samorządny Związek Zawodowy “Solidarność; NSZZ “Solidarność”).

unionist, political and civic currents.⁴ The communist authorities mostly feared the political current, yet all three challenged their legitimacy, not submitting to the control of the power apparatus.

The politics of repression, undertaken together with the introduction of martial law, led to the delegalization of NSZZ “Solidarity” as a legal entity and its breakup as a mass social movement. The Union opened underground structures, the significance of which, however, was on the decline as the very formula of underground activity was running out. Many people engaged in the original Solidarity left Poland and went abroad or chose “internal emigration” – an escape to their private lives. Stefan Nowak defined this state as a “social vacuum.”⁵

Communism, however, was clearly undergoing corrosion and the controlling capabilities of the government apparatus were weakening. That is why the 1980s saw the development of “above-ground” self-help, charitable and educational activities, often in cooperation with the Catholic Church and with the use of Church infrastructure.⁶ The development of social movements in the 1980s⁷ surely facilitated the creation of the infrastructure for civil society in the next decade and constituted a link between the experiences of the original Solidarity and the system transformation that occurred in 1989.⁸ In the middle of the decade (1984), the authorities allowed citizens to set up foundations although it controlled and limited their numbers.⁹ The Act on Foundations, passed during this time, with small changes, has been in force until today.

1989-1993: The policy of creating the scope for formalized civic initiatives under the Solidarity-rooted governments

1989–1993: The first years of transformations under the Solidarity-rooted governments

- *The Law on Associations is enacted (1989): civic freedom as a guarantee of democratization process*
- *Dynamic development of the third sector infrastructure: “removing the lid” effect*
- *Tax exemptions for civic and Church-related organizations granted*
- *Lack of proposals in social policy: NGOs try to “patch the transformational holes”*

The first years of system transformation after the Round Table talks (1989) consisted in the government’s freeing space for formalized civic initiatives and the creation of regulations conducive to the activities of associations, foundations and church organizations, including

⁴ See *Organizacje nie są piątym kołem u wozu, czyli o solidarności przez duże i małe „s”*. Interview with Bogdan

Borusewicz, speaker of the Senate of the Republic of Poland, “Trzeci Sektor” 2006, no. 6.

⁵ See S. Nowak, *Studenci Warszawy w latach 1986–1989*, PWN, Warsaw 1989.

⁶ See E. Leś, *Od filantropii do pomocniczości*, Wydawnictwo ELIPSA, Warsaw 2000, chapter 6.

⁷ The examination of these movements also contributed to the development of Polish sociology; in the 1980s even a subdiscipline—“the sociology of social movements”—came into being, yet it was not developed until after 1989.

⁸ The question of continuity, especially in the axiological dimension, of the “Solidarity” movement in current Polish civic sector requires deepened analysis. See papers published in “Trzeci Sektor” 2007, no. 11.

⁹ One such independent foundation was the Stefan Batory Foundation, a co-financer for the publication of the “Trzeci Sektor” quarterly.

“friendly” tax regulations that would allow them to conduct social activities at relatively low costs.¹⁰ The ruling Solidarity-rooted governments¹¹ saw it as obvious that it was not the government’s task to exercise control over the association movement. It is worth remembering that the passing of the Act on Associational Law was a direct result of the Round Table talks, during which Solidarity’s social activists made signing the agreement with the communist authorities dependent on their agreement to pass this Act. Civic freedoms, including the right to associate were treated as a guarantee of system change.

After 1989 there was a rapid proliferation of non-government organizations: initiatives which were merely tolerated by the authorities under the previous system were legalized and new ones were undertaken. This dynamic development is commonly described as the “removing the lid” effect. Another factor which should be pointed out is one external to Polish government policy: the accessibility of foreign funds, both public and private (and here, American donors deserve a special mention), contributed greatly to the creation of civil society infrastructure in Poland.

At the same time there was a notable lack of offer for non-government organizations in public policy. Organizations were perceived as entities “patching the transformational holes,” that is, supporting groups perceived as “reform losers” and performing tasks neglected by public services. These tasks, however, were neither commissioned nor even recommended by the public administration, but rather were spontaneously undertaken by the organizations themselves.

1993–1997: Policy of stagnation under the rule of the defensive post-communist coalition

1993–1997: Period of self-preservation of the governing post-communist coalition

- *Attempts to gain administrative control over non-governmental organizations (in the case of foundations)*
- *First local experiences of inter-sector cooperation (local law)*
- *A slowdown in the dynamics of third sector infrastructure development*
- *First attempts to regulate activities for the public benefit (1996)*
- *Principles: subsidiarity of the state and social dialogue inscribed into the Constitution of the Republic of Poland (1997)*

In the 1993 Parliamentary elections central-right Solidarity-rooted parties lost power and a new Cabinet was created by a post-communist leftist coalition.¹² During most of the next parliamentary term (1993–1997) there was still no coherent or clear government policy towards non-government organizations aimed at the development of inter-sector cooperation at a central level. What’s more, the government coalition was distrustful towards nongovernment organizations, especially those set up after 1989, which was manifested, among others, by dissolution of the Department for Cooperation with Non-government Organizations at the

¹⁰ See J. Wygnański, *PIT a filantropia*, “Trzeci Sektor” 2004, no. 1.

¹¹ During the first stage of transformation (1989–1993) the political scene was undergoing the process of creation. Although many new parties appeared and disappeared, during the entire period power remained in hands of Solidarity-rooted politicians.

¹² The coalition consisted of two parties: SLD (Democratic Left Alliance) and more centrist PSL (Polish Peasant Party).

Ministry of Labor and Social Affairs. If at all, the authorities preferred to cooperate with organizations existing before 1989. This was a manifestation of the general mistrust of the government politics favored during the Solidarity governments.

On the other hand, initiatives of cooperation were undertaken at the municipal level based on regulations of local law – resolutions of county (*gmina*) councils. This was a positive effect of the politics of decentralization started in the previous period consisting in rebuilding local self-governance at the *gmina* level.

In general, however, this period witnessed the slowing down of the dynamics of the development of the third sector infrastructure. Updates of data bases on non-governmental organizations run by the Klon/Jawor Association¹³ showed that the third sector stopped growing in numbers: the establishment of new organizations was accompanied by the dying out of many others. Foreign aid also significantly decreased in the mid-90s: foreign donors moved their support and international activities eastwards (to strengthen civil society infrastructure in the countries of the former Yugoslavia and former Soviet Union).

Toward the end of this parliamentary term, works on system solutions were, however, undertaken. Thanks to the engagement of Jerzy Hausner (then advisor to the Minister of Finances), in 1996, the first attempts were undertaken to draft legal regulations on the cooperation between public administration and non-government organizations. It is worth mentioning that at the end of this term the National Assembly passed a new Constitution of the Republic of Poland (1997), in which two governing principles important for the development of civil society found their place: the principle of social dialogue and the principle of subsidiarity of the state.

1997–2001: Policy of missed opportunities during the period of system reforms of the central-right coalition

1997–2001: Period of social reforms of the central-right coalition

- *Unsolved dilemma: Decentralization or marketization of the social sphere? Between the German and Anglo-Saxon models*
- *Lack of a place for non-governmental organizations in the four social reforms*
- *Narrow operationalization of the principle of subsidiarity: priority for local authorities*

The 1997 parliamentary elections were won by two Solidarity-rooted parties that created a new coalition: AWS and UW.¹⁴ The main achievement of the AWS-UW coalition, which came into power after the 1997 elections, was the simultaneous carrying out of four social reforms: reforms in the social security, health care, public administration and education systems. Unfortunately, nongovernment organizations were not considered as potential partners of public administration in any of these four programs of reforms. This was in part a result of the lack of coherence in the reforms package because in some areas (i.e., the social security system) the

¹³ The Klon-Jawor Association provides a well-known database for Polish NGOs, and conducted several research projects, mainly quantitative. All their research reports are available on the NGO portal (also run by the Association) www.ngo.pl.

¹⁴ AWS (Electoral Action Solidarity) was a political entity directly created by the Solidarity trade union (NSZZ “Solidarność”); UW (Union of Freedom) was also a Solidarity-rooted party but more liberal and leftist than AWS. Both parties disappeared from the political stage after losing the next election.

concept of marketization of the social sphere dominated, while in others (i.e., administrative reform, education) decentralization of social policy was favored, and still in others (i.e., health care) the two directions were combined.¹⁵

We can also thank these administrative reforms for the narrow operationalization of the principle of state subsidiarity in a manner unfavorable to the third sector. This meant an increase in the importance of local authorities, but not of non-governmental organizations.¹⁶ A notable effect of this operationalization is the dispute observable in recent the social mandate.¹⁷

The condition of non-government organizations continued to be difficult. The lack of regulated access to public funds and the limited availability of foreign aid weakened the financial condition of the third sector and led to an interest in payable systems of social services delivery. Thus there was growth in third-sector support for passing an act regulating public benefit activities (although there also were people working or otherwise involved in the third sector that questioned the necessity of this act). There was, however, no political will in the government structures to finalize the draft law; and one of the reasons for this was the conflict between the positions of the Ministry of Labour and Social Policy and the Ministry of Finances with regards to the form of these regulations.¹⁸ Therefore, in spite of active government policy, the 1997–2001 term can be described as a period of wasted opportunities.

2001–2005: Building a model of intersector cooperation during the finalization of Poland's accession to the EU

2001–2005: Towards a model of inter-sector cooperation

- *Act on Public Benefit Activities and Volunteer Work (2003)*
- *Establishment of a special legal status for NGOs – public benefit organization*
- *Impact of EU priorities in the fields of employment policy and counteracting social marginalization*
- *Development of the basis for a model of intersector cooperation*

Undoubtedly, the direction of activities of public administration in the next term (2001–2005) was determined by the Act on Public Benefit and Volunteer Work passed in 2003 (leftist SLD once more in power). This Act regulated a few key issues regarding nongovernment organizations and inter-sector cooperation. These were: the principles and forms of cooperation, including the commissioning of organizations for public works projects; the conditions for

¹⁵ See an analysis of the directions of the reforms in M. Rymśa, *Urynkowanie państwa czy uspołecznienie rynku?* Wydawnictwo TEPIS and Instytut Stosowanych Nauk Społecznych Uniwersytetu Warszawskiego, Warsaw 1998; M. Rymśa, *Reformy społeczne lat dziewięćdziesiątych. Próba podsumowania*, in M. Rymśa (ed.), *Reformy społeczne. Bilans dekady*, Instytut Spraw Publicznych, Warsaw 2004.

¹⁶ See M. Rymśa, A. Hryniewicka, P. Derwich, *Jak wprowadzić w życie zasadę pomocniczości państwa: doświadczenia lat dziewięćdziesiątych*, in: M. Rymśa (ed.), *Współpraca sektora obywatelskiego z administracją publiczną*, Instytut Spraw Publicznych, Warsaw 2004.

¹⁷ See P. Gliński, *Style działań organizacji pozarządowych w Polsce: grupy interesu czy pożytku publicznego*, Wydawnictwo IFiS PAN, Warsaw 2006.

¹⁸ See M. Rymśa, *Szanse i zagrożenia inicjatyw obywatelskich w świetle przygotowywanych regulacji działalności pożytku publicznego*, in J. Hryniewicz (ed.), *Przeciw ubóstwu i bezrobociu: lokalne inicjatywy obywatelskie*, Instytut Spraw Publicznych, Warsaw 2002.

receiving status of a public benefit organization (PBO; an equivalent to the British *charity*) and the accompanying additional entitlements (such as the possibility for individuals to assign 1% of their tax liabilities to PBOs); and conditions under which nongovernment organizations (and public administration) can make use of the work of volunteers.¹⁹ It can be said that the Act contributed to (although, unfortunately, only to a limited degree) the popularization of a “broader” definition of the principle of state subsidiarity embracing third sector actors as well.²⁰

The Act initiated, however, directions of government policy towards the third sector which were disadvantageous, such as a growing fiscalism (subjective and objective limitations of tax exemptions as an offset to the 1% mechanism in the PIT system), increased government control (especially over PBOs) and standardization of intersector cooperation without taking into account the logic of the functioning of non-government organizations (especially in executive regulations²¹).

Another major factor shaping government policy was the finalizing of Poland’s accession to the European Union (full membership since May 1, 2004). One could observe the influence of EU program document priorities stressing the value of non-government organizations in employment policy and the so-called active social policy (increase of the significance of the third sector as an employer),²² as well as in the ways structural funds are spent, especially funds of the European Social Fund (the participation of the nonprofit sector in the new wave of the social economy is thanks, in part, to the accessibility of funds from The EQUAL Community Initiative²³).

Summing up the 2001–2005 period, one can say that during this time the basis of a Polish model of inter-sector cooperation was created which will be discussed below.

2005–2007: Between cooperation and control – “carrot and stick” policy

2005–2007: Between cooperation and control

- *Attempts to strengthen the state: But at whose expense?*
- *Yellow card for decentralization, red one for marketization of the social sphere*
- *Continued absorption of EU funds*

Since 2005 there have been no breakthroughs in government policy towards the third sector. In spite of the continuation of policy from the previous period, there is, however, a

¹⁹ See M. Rymśa, G. Makowski, M. Dudkiewicz (eds.), *Państwo a trzeci sektor. Prawo i instytucje w działaniu*, Institute of Public Affairs, Warszawa 2007, part II; J. Herbst, *Stare problemy wedle nowych regul. Współpraca między organizacjami pozarządowymi i administracją w świetle badań ilościowych*, “Trzeci Sektor” 2005, no. 3.

²⁰ See M. Rymśa, A. Hryniewicka, P. Derwich, *Zasada pomocniczości państwa w Ustawie o działalności pożytku publicznego i o wolontariacie*, in: M. Rymśa (ed.), *Współpraca sektora obywatelskiego... op. cit.*

²¹ See M. Guć, *Uwagi do projektu nowelizacji Rozporządzenia Ministra Polityki Społecznej w sprawie wzoru oferty realizacji zadania publicznego*, “Trzeci Sektor” 2005, no. 3.

²² See S. Kelly, *Ekonomia społeczna i przedsiębiorczość społeczna w Unii Europejskiej*, in T. Kaźmierczak, M. Rymśa (eds.), *W stronę aktywnej polityki społecznej*, Instytut Spraw Publicznych, Warsaw 2003.

²³ One of the EQUAL Community Initiative priorities chosen by Poland was: Strengthening the social economy (the third sector), in particular the services of interest to the community, with a focus on improving the quality of jobs.

noticeable constraint in the government's position regarding forming partnerships between the state administration and non-government organizations. It seems that one of the reasons for this stiffening was the strategic political goal of the Law and Justice Party (which dominated the governing coalition until its collapse in the summer of 2007 and later led a minority government) to strengthen state structures. The government's program for state reform consisted, among others, in fighting corruption and the murky areas of political/business arrangements. It turned out that this strengthening of the state apparatus also resulted in the growth of control over the activities of social entities.

This explains, for instance, the restrictive regulations concerning foundations in the proposed new Act on Foundations²⁴ and similar propositions regarding all non-government organizations (and specifically public benefit organizations) presented by political decision-makers during works on preparation of the government's draft amendment to the Act on Public Benefit and Volunteer Work.²⁵ In this case, if one takes a closer look at the government proposals, at least in relation to inter-sector cooperation, they would constitute a further bureaucratization of the third sector more characteristic of the government policy during the previous phase (and finding its confirmation in the original version of the Act on Public Benefit and Volunteer Work from 2003).

Parallel to the tendency to increase control over the activities of the third sector, one also finds government attempts to limit the independence of local authorities. When one considers the arrangement of powers on the political scene, it was, in a way, a "reversal of alliances," because throughout the transformational period the central right-wing parties supported decentralization, while centralizing tendencies were manifested by the left-wing parties with communist origins. This aspect of "strengthening of the state" had for non-government organizations an ambivalent character, because many local governments were and still are reluctant to cooperate with them. However, the policy till then for developing cooperation had been directed at increasing decentralization though the aforementioned operationalization of the subsidiarity principle.

The policy of spending ESF resources on projects where non-government organizations participated was continued from the previous period. Although this signified greater possibilities for the creation of workplaces in the third sector, research of the Klon/Jawor Association from 2006²⁶ confirmed neither an increase of the economic potential of the third sector nor growth in the position of the third sector as a collective employer. The role of EU structural funds,

²⁴ See G. Makowski, *Kalendarium zmian prawnych*, "Trzeci Sektor" 2006, no. 7. The government proposal of the Act on Foundations was submitted to the Sejm, yet due to the shortening of the parliamentary term it did not go through all legislative paths; therefore the Act from 1984 is still in force.

²⁵ Government proposal of the Act on foundations was submitted to the Sejm, yet, due to shortening of the Parliamentary term it was not passed; therefore the Act from 1984 is still in force. See A. Krajewska, *Konsultacje społeczne w praktyce. Studium dwóch przypadków*, in M. Rymśa (ed.), *Organizacje pozarządowe. Dialog obywatelski. Polityka państwa*, Instytut Spraw Publicznych, Warsaw 2007. G. Makowski, *Kalendarium zmian prawnych*, "Trzeci Sektor" 2006, no. 8. These restrictions were included in the draft proposal of the Act in a version from Fall 2006, presented for public consultation. In further works on this proposal, some of the suggestions put forward by organizations in the course of the consultation process were taken into account (compare, among others, "Stand on the proposal of amending the Act on Public Benefit Activity and Volunteer Work" prepared by the Program of Social Policy of the Institute of Public Affairs, www.isp.org.pl), which to some extent weakened the government proposals.

²⁶ See J. Herbst, *Trzeci Sektor na rozdrożu – kondycja organizacji pozarządowych w Polsce w świetle badań*, "Trzeci Sektor" 2006 no. 8.

especially from the European Social Fund, in financing the activities of non-government organizations, however, will expand.

To sum up, the 2005–2007 period did not bring any fundamental breakthroughs in government policy towards the third sector. But although the interest of government bodies in controlling organizations and the hierarchization of relations (attempts to re-centralize the social sphere) surely grew, this growth was manifested to a larger extent in declarations rather than in actions.²⁷ This negative tendency for the civic sector was, however, to some extent counterbalanced by the growing role of organizations as beneficiaries and performers of projects financed from EU structural funds. Because these structural funds are also managed by the public administration, one can talk about the appearance of “two-speed politics” in administrative attitudes on cooperation with civic sector organizations.

The question of politics towards the third sector - Poland in the setting of international experience

Summing up the characteristics of consecutive phases in the evolution of government policy towards the civic sector in Poland, it is worth pointing out the international context of the observed changes. The examples of Germany, Great Britain and Hungary will be presented here. Germany and Great Britain represent two historically and politically grounded models of public administration – non-government organizations, thus determining *de facto* frames of state policy towards the third sector and a range of possible choices.²⁸ Hungary, on the other hand, is Poland’s “companion” on the journey from communism to political democracy, market economy and civil society.

The experiences of Germany are very important for Poland because it is precisely the postwar Federal Republic of Germany to which we owe the operationalization of the principle of state subsidiarity. This consisted of incorporating the ethical principles guiding state-civil society relations formulated in the Catholic Church’s social teachings²⁹ into the legal frame of a democratic country. The legitimization of this principle opens a broad scope for public services and non-government organizations to act jointly, limiting at the same time the risk of excessive commercialization of the civic sector with simultaneous assurance of its financial stability.³⁰ Legally defined subsidiarity of the state signifies, in the German model, the primacy of nongovernment organizations in delivering social services financed from public sources.³¹

Inscribing the principle of subsidiarity of the state in the Preamble to the Constitution of the Republic of Poland of 1997 represented a turn towards the German concept of social order.³²

²⁷ The years 2006 and especially 2007 were characterized by a growing “theatricalization” of the public debate in Poland and a related increase in the temperature of political disputes disproportionate to the scale of decisions in fact made concerning public sphere. Hot, but unproductive: as far as policy is concerned, disputes over the issue of civil society were not an exception.

²⁸ See M. Rymsza, *Kontraktowanie zadań publicznych jako forma współdziałania państwa i organizacji non-profit*, in B. Rysz-Kowalczyk, B. Szatur-Jaowska (eds.), *Wokół teorii polityki społecznej*, Instytut Polityki Społecznej Uniwersytetu Warszawskiego, Warsaw 2003.

²⁹ See Pius XI, *Quadragesimo anno*, “Znak” 1982, no. 7–9.

³⁰ See D. Kramer, *Trzeci sektor w Niemczech*, “Trzeci Sektor” 2007, no. 10.

³¹ See E. Leś, *Od filantropii do pomocniczości*, Elipsa, Warsaw 2000.

³² See M. Rymsza, A. Hryniewicka, P. Derwich, *Jak wprowadzić w życie... op. cit.*

We should also note that German non-governmental structures made a significant impact on the shape of the third sector in Poland by providing numerous social organizations with organizational and financial support.³³

The disadvantage of the German model of inter-sector cooperation seems to be, however, the entangling of the subsidiarity principle in corporate solutions.³⁴ This results, among others, in excessive federalization of non-government organizations providing social services, which is conducive to the development of so-called “social cartels.”³⁵ Thus there is the legitimate question of whether with the introduction of the operationalized principle of state subsidiarity according to the German model, we do not accidentally adopt it with “the whole German package.” In this way one can explain the observable tendencies since passing the 2003 Act on Public Benefit and Volunteer Work of the state towards control of non-government organizations and the perception of their main role as service-providers. It seems then that in light of proposed changes, there is a real threat of bureaucratization of NGOs delivering social services and thrusting inter-sector cooperation onto a corporate trajectory.

It is worth noting that Germany is currently looking for ways of limiting excessive bureaucratization and the routinized actions of professionalized NGOs delivering social services. On the one hand, self-help organizations – less formalized and less professionalized – are being “rediscovered” since they often retain more of the spirit of acting for the common good than professional public benefit oriented NGOs financed by public funds. On the other hand, however, attempts are being made to introduce competitive mechanisms to the system, through enabling the possibility to contract works to corporate entities, for now, limited to nursing services.³⁶

Consideration of the British concept is, in turn, essential because British methods in the area of inter-sector relations were a second point of reference during works on the Act on Public Benefit and Volunteer work. One can also find several similarities in the evolution of British politics towards the voluntary sector (as the civic sector is commonly referred to in that country) in the 80s and 90s of the twentieth century and the evolution of such a policy in Poland after 1989.

The changes in British policy were a response to the crisis of the welfare state. The first reaction, characteristic for the period of the government of Margaret Thatcher, was the state’s withdrawal from direct service provision and the introduction of competitive mechanisms (commissioning of tasks by public tender open to non-profit organizations and commercial firms, commonly described as the independent sector³⁷). In fact this broadened the scope for voluntary organizations, which had been previously pushed by public services and institutions to the

³³ See K. Balon, *Współpraca polskich i niemieckich socjalnych organizacji pozarządowych od 1990 roku – wybrane aspekty*, “Trzeci Sektor” 2007, no. 10.

³⁴ See D. Kramer, op. cit.

³⁵ See M. Rymza, A. Zimmer, *Embeddedness of Nonprofit Organizations: Government – Nonprofit Relationships*, in A. Zimmer, E. Priller (eds.), *Future of Civil Society. Making Central European Nonprofit Organizations Work*, VS Verlag für Sozialwissenschaften, Wiesbaden 2004.

³⁶ See D. Kramer, op. cit.

³⁷ See N. Deakin, *Public Policy, Social Policy and Voluntary Organisations*, in M. Harris, C. Rochester (eds.), *Voluntary Organisations and Social Policy in Britain*, Palgrave, New York 2001.

margins of the social service system. However, it also led to the advanced commercialization of the third sector (many organizations started resembling economic entities providing social services) and the formalization of its activities.³⁸ It also provoked an internal polarization (the process of strengthening the economic potential of large organizations thus “pushing” smaller, local and volunteer-based organizations to the system’s margins).³⁹

During Tony Blair’s rule, the government, while continuing the politics of contracting out public services, searched for possibilities to “soften” the market rules for contracting such work to non-profit organizations through the policy of *social compacts* and popularization of the culture of partnership. Comparing the policy of Thatcher and Blair, Jane Lewis shows how British organizations are currently freeing themselves, with government support, from the “double corset”: (1) of being dominated by public social service institutions during the period of the welfare state doctrine, and (2) of undergoing commercialization in the period of Thatcherism.⁴⁰

From the sociological perspective the crucial question is whether and how in Great Britain the “state crisis” was used for strengthening social institutions in accordance with the general idea of moving from *welfare state* to *welfare society*.⁴¹ The answer seems to be only partially, since the aforementioned processes of commercialization and polarization of the non-profit sector weakened its civic character and led to both permanent divisions and a crystallization of the concept of the so-called informal sector as a social service provider on the local level.⁴² This “fourth sector” can be conceived as an alternative to the over-formalized and commercialized “third sector.”

In this context it is worth mentioning that the 2003 Act on Public Benefit in Poland includes elements of a compromise between the two extreme tendencies dominating in Great Britain during the two successive periods: namely, the period of marginalization (the pre-Thatcher period) and the period of marketization of the third sector (the reforms of the 80s and 90s of the twentieth century). For example, legal regulations from the Act on Public Benefit and Volunteer Work are so constructed that the generalization of *quasi*-market mechanisms in the open-bid system of commissioning public tasks is not accompanied by the equalization of commercial and non-profit entities in competition for public tasks (priorities are given to NGOs). All the more reason to warn Polish legislators against rash changes which could upset that balance. It has to be added that the Polish model: privileges for NGOs in delivering social services plus competition inside the third sector may be also seen as a moderate solution between the German patterns (no competition in social service delivering system) and the British ones (open competition for all providers).

Unfortunately, we are currently observing in Poland, as in Great Britain two decades earlier, the phenomenon of the polarization of the civic sector and pushing small and local

³⁸ See J. Lewis, *What Does Contracting do to Voluntary Agencies?* in D. Billis, M. Harris (eds.), *Voluntary Agencies. Challenges of Organisation and Management*, Macmillan Press, London 1996.

³⁹ See N. Deakin, *op. cit.*

⁴⁰ See J. Lewis: *Relacje państwo – sektor ochotniczy w Wielkiej Brytanii*, “Trzeci Sektor” 2006, no. 8.

⁴¹ See J. Roger, *From a Welfare State to a Welfare Society*, Macmillan, London 2000.

⁴² See N. Johnsos: *Mixed Economies of Welfare. A Comparative Perspective*, Prentice Hall Europe, London 1999.

organizations to the margins of inter-sector cooperation. This is caused by both the Act on Public Benefit and Volunteer Work⁴³ and the rules for making use of ESF funds, which practically exclude organizations of low economic potential (for instance without adequate capital to enable temporary crediting of contracted tasks). The British experiences are valuable for Poland not only because of their unfavorable consequences in the third sector which are dynamically growing as a result of the policy of “rolling back the state,” but also as a way of finding methods to alleviate the side-effects of implemented reforms. We should also finally note that this model is of value due to the government policy that facilitates the entry of non-profit organizations into social entrepreneurship.⁴⁴

Poland’s experiences, to a great degree, converge with those of Hungary⁴⁵ and seem to point to general regularities in the evolution of government policies towards the civic sector in the countries of the Visegrad Group (which besides Poland and Hungary includes the Czech Republic and Slovakia).⁴⁶ This is obviously a result of “transformation logic” (leaving communism), but is also thanks to the common traditions regarding the functioning of public administration and relations between the government and citizens dating back to the Habsburg era.⁴⁷

Both in Poland and in Hungary after 1989 there was a growth in the significance of nongovernmental and Church-related organizations in the area of social services. This is not only a result of the democratization of the countries in the region (creating the headway for grassroots civic and social activities is one of the basic dimensions of transformation), but also a result of limiting the activities of the state in the social sphere (which also can be seen as part of the transformation process, although it should be noted that we have seen a similar process in Great Britain and other countries of Western Europe caused by the crisis of the welfare state as already mentioned in this text). At the same time we witness the evolution of state policy regarding the development of civil society: from creation of free space for civic activities as an institutional reaction to the old communist system to later attempts to involve third sector organizations in performing public tasks with concurrent attempts to spread control over NGOs.

An excellent illustration of this second phase of state policy towards the third sector in the transformation period is the 1% mechanism in the PIT system, introduced first in Hungary⁴⁸

⁴³ See M. Rymśa, G. Makowski, M. Dudkiewicz (eds.), *Państwo a trzeci sektor...*, op. cit.

⁴⁴ See M. Aiken, *Non-Governmental Organisations and Social Enterprises: Their Role in Employment*, “Trzeci Sektor,” special English edition, 2008, pp. 19-29.

⁴⁵ See M. Szabo, *Organizacje pozarządowe na Węgrzech – uwarunkowania prawne i polityczne*, “Trzeci Sektor” 2006, no. 8.

⁴⁶ This large convergence of the Visegrad Group countries (VG) in the area of the developing relations between government and the third sector has already been observed in comparative research. Describing the specifics of this was the aim of, among others, the international research project FOCS (Future of Civil Society), within which the situation of the third sector in four VG countries as well as Germany and Austria was analyzed. See A. Zimmer, E. Priller (eds.), *Future of Civil Society...*, op. cit. Currently comparative research on the strategy of civic sector development in the VG countries is being carried out within the framework of a project of the Sasakawa Foundation.

⁴⁷ See A. Zimmer, E. Priller (eds.), *Future of Civil Society ... op. cit.*

⁴⁸ See N. Bullain, *Rzecz o cudach i błędach percepcji: lekcje „prawa jednego procenta” na Węgrzech*, in M. Rymśa (ed.), *Współpraca sektora obywatelskiego...*, op. cit.

and then other countries of Central-and Eastern Europe, including Poland.⁴⁹ And this is not only a question of the very mechanism of the 1%, but the accompanying activities, such as, for instance, the growth of state fiscalism (restriction of organizations' tax privileges as the "price" for benefits connected with the 1% mechanism) or the introduction of elements of intensified control and licensing of organizations entitled to profit from those 1% deductions (e.g., the PBO status in Poland).

A comparison of the evolution of state policy towards the civic sector in Poland, Germany, Great Britain and Hungary points out to some similarities in the countries' political and economic conditions at the turn of the century: the "logic of transformation" in the case of post-communist countries and the logic of the "welfare state crisis" in the case of the two others. Reforms undertaken in Great Britain and Germany bring these two models closer to one another (introduction of market elements to the German model and elements of the culture of partnership to the British model). Also, similar new ideas have appeared (the growing role of self-help organizations in the German model and the informal sector in the British model). However, the British model still bases inter-sector relations on market mechanisms, while such relations in the German model have a more negotiations-based administrative character. The legal and institutional situations of the civil sector in Poland and in Hungary are certainly similar, but one can venture to say that Hungary is a bit closer than Poland to the corporate-federative German model, while in Poland such German patterns are rather counterbalanced by quasi-market British solutions.

⁴⁹ See T. Schimanek, *Prawo jednego procenta w Polsce – nadzieje i obawy*, in M. Rymza (ed.), *Współpraca sektora obywatelskiego...*, op. cit.

Corporate Social Entrepreneurship

James Austin and Ezequiel Reficco¹

Corporate Social Entrepreneurship (CSE) is a process aimed at enabling business to develop more advanced and powerful forms of Corporate Social Responsibility (CSR).

The CSE Concept

CSE emerges from and builds on three other conceptual frameworks: entrepreneurship, corporate entrepreneurship, and social entrepreneurship. CSE's conceptual roots begin with Schumpeter's vision that nations' innovation and technological change emanate from individual entrepreneurs with their *unternehmergeist* or fiery spirit generating "creative destruction" of old ways with new ones (1912, 1934, 1942). Stevenson (1983; 1985) provided a different definition of **Entrepreneurship**: "the pursuit of opportunity through innovative leverage of resources that for the most part are not controlled internally." Schumpeter had projected that the engines of entrepreneurship would shift from individuals to corporations with their greater resources for R&D, which did happen. However, over time corporate bureaucracy was seen as stifling innovation.

To remedy this, a focus on **Corporate Entrepreneurship** within companies emerged, with Covin and Miles (1999) defining it as "the presence of innovation with the objective of rejuvenating or redefining organizations, markets, or industries in order to create or sustain competitive superiority." In parallel, the concept of **Social Entrepreneurship** emerged. Dees (1998) defined it as "innovative activity with a social purpose in either the private or nonprofit sector, or across both." Others have offered conceptual refinements (Bornstein 2004; Nicholls 2006; Martin and Osberg Spring 2007; Light 2007; Elkington and Hartigan 2008; Ashoka 2009).

CSE integrates and builds on the foregoing concepts and has been defined by Austin, Leonard, Reficco, and Wei-Skillern (2006) as "*the process of extending the firm's domain of competence and corresponding opportunity set through innovative leveraging of resources, both within and outside its direct control, aimed at the simultaneous creation of economic and social value.*" The fundamental purpose of CSE is to accelerate companies' organizational transformation into more powerful generators of societal betterment.

Carroll (2006) provided a rich historical account of the evolution over the last fifty years of businesses' approach to societal responsibilities. Over the past two decades, the traditional concept and practice of corporate philanthropy has undergone a significant evolution into **Corporate Social Responsibility** with a variety of labels, such as corporate citizenship, triple bottom line, and strategic philanthropy (Zadek 2001; Carroll 2006; Visser, Matten et al. 2007; Googins, Mirvis, and Rochlin 2007). While significant progress is being made in involving companies in CSR, a national survey (Center for Corporate Citizenship 2004) in the USA

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revealed that most firms have not been able to significantly integrate CSR into their organizations. Googins and Rochlin (2006) assert: "What is clear is the widespread agreement on the need for a more active and strategic citizenship," and they also note that there is no dominant framework or model for bringing that about. Doing more of the same or making incremental changes will not bring about the needed form of CSR but rather process for invigorating and advancing the development of CSR.

The analysis that follows is based first on an in-depth qualitative study of two companies that were considered to be pioneers in the practice of CSE: The Timberland Company (Austin, Leonard, and Quinn 2004; Austin, Leonard, and Quinn 2006), maker of outdoor apparel and accessories, and Starbucks Coffee, a prominent specialty coffee company (Austin and Reavis 2002; Austin, Wei-Skillern, and Gendron 2004). These studies were supplemented with a review of practices of dozens of other companies.

Key Elements of CSE

CSE aims to produce a significant and comprehensive transformation of the way a company operates. The following elements are central to that process: creating an enabling environment, fostering corporate social intrapreneurs, amplifying corporate purpose and values, generating double value, building strategic alliances.

Enabling Environment. For companies to move from their old approach to CSR to the CSE approach they must adopt an entrepreneurial mindset and cultivate an entrepreneurial environment that enables fundamental organizational transformation. This can only happen if top leadership champions the change. This requires a powerful vision of where the CSR revolution is taking the company and why it is vital to the organization's success. Orin Smith, former President and CEO, Starbucks Coffee Company expressed it this way, "Aligning self-interest to social responsibility is the most powerful way to sustaining a company's success." That vision and strategy must also be accompanied by changes in the company's structures and processes. There must be performance measurement indicators for the economic and social value generated and the incentive and reward system must be aligned with these indicators. Through these "guidance systems" (Paine 2003) top management helps to assure that operating performance is aligned with professed commitment to social value creation.

With the entrepreneurial culture these companies seek to "bring down the castle walls," and to create internal synergies in their decision-making processes. Thus, they rely heavily on crossfunctional teams which bring to the table all relevant stakeholders in any given issue. This system helps the company "think out of the box" and "work across silos." While in traditional companies management teams are comprised exclusively by those who create revenue, when companies engage in CSE, management teams are also filled by those with the primary responsibility of creating social value. This is meant to ensure that organizational values permeate all units of the company and are thoroughly integrated into its internal processes. The guidance systems support entrepreneurial activity in a corporate setting, as entrepreneurial talent is actively sought and recruited, and autonomous entrepreneurs are empowered and given clear goals consistent with a solid value-based organizational culture.

The Corporate Social Intrapreneur. The CSE process is powered by multiple change agents or Intrapreneurs. Social and corporate entrepreneurship differentiate the roles of the social or corporate entrepreneur from the role of managers. Both are distinct and usually sequenced: the former is a change catalyst for the launching of start ups, the latter is critical for seeing these

initiatives through and implementing them. (Thompson, Alvy, and Lees 2000). In CSE, on the other hand, both roles coexist permanently; corporations need to be entrepreneurial in order to innovate and go beyond their traditional managerial approaches. This means ultimately transforming the way the company is managed. The key vehicles for moving the company in this direction are individuals within the enterprise who are focused on fostering and bringing about the *internal* organizational transformation and innovation that moves the organization to more advanced state of CSR.

Previous research (Austin, Leonard et al. 2005) has identified some defining characteristics of CSIntrapreneurs. They are internal **champions**, continuously advocating for the integration of social and business value as a central tenet for the company. They are good **communicators**, particularly articulate about the rationale and importance of the transformation. They are also active listeners to various stakeholders and are able to speak to these groups in ways that reveal how the social action is relevant to their needs and interests. They are **creators** of innovative solutions: new resource configurations, actions, and relationships. They are not managers of the status quo, but creators of a new, sometimes disruptive one. They are **catalysts** for change, who inspire and create synergies in the work of others. They are **coordinators**, able to effectively reach across internal and external boundaries, mobilizing, and aligning interests and incentives. They are perceived as useful **contributors** who support the success of others. Rather than being perceived as building a new power center, Corporate Social Intrapreneurs are team players who enable other groups. Finally, they are shrewd **calculators**; cognizant of the realities of the corporate environment, they are cost-conscious and mindful of the bottom line. Change is not framed in terms of ideals or intentions, but in terms of aligned incentives. Plus, as organizational change agents, they need to be able to assess how fast and far they can move the transformational process within the realities of the organization.

Corporate Purpose: values-based organizations. One of the key focal points of CSE is company values. Getting organizational values right is vital to advancing CSR. The CSIntrapreneurs need to ensure that social value generation – fulfilling social responsibilities – is seen as an essential component in companies’ mission and values statements. The CSE process aims to ensure that the words are translated into action. The values-based organizations see themselves as trustworthy, moral agents, capable of generating trust based on sustained ethical behavior and innovative solutions to social problems. Their goal is not just to comply with the law, or to be responsive to key stakeholders: they seek to lead through example, to exceed expectations, and to set new standards. In these organizations, social values are not viewed as a shiny patina meant to embellish the “real” company, but rather as a structural component, a cornerstone of their organizational identities. Values were not adapted to an existing strategy, but the other way around. This feature empowers individuals and unleashes their creative energies. Substantial levels of adherence to shared values bring down the costs of coordinating the work of different organizational units (Paine 2003), and facilitates working across departmental lines.

Timberland, in a fundamental move, formulated a set of values - “humanity, humility, integrity, and excellence” - that held the company and its people should make a positive difference in society and that its culture should foster involvement in confronting and solving social problems. A Timberland Human Resources manager noted, “The awareness of values is what we are trying to raise with folks. It’s no longer going to be acceptable just to get the business result.” The company translated these values into action through supporting employee

community service and became a leading innovator by giving each employee up to 40 hours of company time off for such work, more than any other company.

Value congruency across the organization allows for the infusion of a social entrepreneurship spirit under the umbrella of a large structure. In the words of Colleen Chapman, Starbucks Director for Brand Management, their approach is “continued application of our values inside of everything we do, from a marketing standpoint, from a product development standpoint, who we hire, how we hire, how we treat our people.”

Value Creation and The Double Return. Entrepreneurship is all about finding innovative ways to create value. CSE aims to ensure that the very purpose of these corporations migrates from one of maximizing returns to investors to optimizing returns to stakeholders, with those being defined as groups who are significantly affected by company actions and who can in turn impact the company. The underlying premise is that serving such a broader constituency will make the company more sustainable. This amplified purpose means that the company is producing both economic and social value, which some have referred to as a double or triple (if one breaks out environmental value as a separate category) bottom line, or “blended value” (Emerson 2000, 2003, March 2006; Emerson and Bonini 2003). The important purpose of CSE is to discover ways make these returns complementary and synergistic rather than competing (Paine 2003). In this approach organizations’ social value creation is not treated as something separate or peripheral. On the contrary, it is imbedded in a larger and transparent accountability system that reports performance to the internal and external stakeholders. We are witnessing the emergence of a multitude of such indicators, standards, and codes. The CSE approach aims to ensure that these measures of performance have parity with the traditional ones and become part of the corporate DNA.

CEO Jeff Swartz stated, “I’m convinced business can create innovative, valuable social solutions that are good for business and society. Commerce and justice don’t have to be antagonistic notions.” He explained the company’s approach, “We operate on the core theory, on the belief that doing well and doing good are not separate ideas; they are inseparable ideas. That, in fact, they are inextricably linked and that everything we do, every business decision we make, every strategy we promulgate, every speech we make, or every pair of boot or shoes that we ship, have to be the embodiment of commerce and justice, and that’s a different model.”

Co-generating Value. A vital part of the value generating strategies is collaborating with other organizations – businesses, civil society, or governmental. These alliances are the vehicles for achieving what the CSE definition referred to as *extending the firm’s domain of competence and corresponding opportunity set through innovative leveraging of resources outside its direct control*. Strategic alliances that combine complementary core competencies can create new resource constellations that enable innovative solutions to long-standing social and economic problems. This leveraging of distinct organizational capabilities and resources produces powerful co-generation of social and economic value (Austin 2000; Austin, Reficco et al. 2004; Kanter 1999). Strategic alliances also seem to be critical to the success of emerging innovative business strategies with low income sectors at the “base of the pyramid” (Prahalad 2005; Hart 2005; Rangan, Quelch et al. 2007; Márquez, Reficco, and Berger forthcoming).

CS Intrapreneurs are also Entrepreneurs who are constantly reaching out to leverage these resources outside their direct control, building internal and external bridges. Externally, these companies leverage intensively their relationships with stakeholders for joint action through

partnerships. The aligning of company agendas with those of external groups to create social value becomes an institutional habit, engrained in the company's culture, and carried out through CSE. Partnerships are considered assets through which organizations overcome their organizational constraints. By engaging decisively their external stakeholders, these companies are able to multiply the impact of their efforts.

In the words of Sue Mecklenburg, Starbucks Vice President of Business Practices, partnerships allows the company "to extend our reach to areas where we have interests, but perhaps not influence or expertise. It's a real extension of what we can do, and often what we would like to do, or what our customers expect us to do --issues that are very complex and difficult to solve." Starbucks entered into a partnership with Conservation International to foster environmentally sustainable coffee production among small farmers in Chiapas, Mexico. This nonprofit brought to partnership its environmental expertise and its capacity to work with small farmers. Starbucks contributed its knowledge of quality coffee production and its marketing channels. This entrepreneurial combination of distinctive competencies created a process that developed new production techniques and new supply of organic coffee for Starbucks, which in turn generated significant income enhancements to the farmers and improved environmental conditions in the growing areas. This initial partnership expanded to other countries and even led to the reformulation of Starbucks' basic coffee procurement criteria and procedures.

The Challenges and Opportunities of Applying CSE

The penetration of the social realm into corporate strategy has gathered momentum in the last years. The movement for CSR has "won the battle of ideas" (Crook 2005). By now, most wellmanaged companies have adopted the practices and certifications *de rigueur* in their industries, having gone through what Zadek (2004) calls the "defensive" and the "compliance" stages of CSR. Managing the social and environmental footprint of economic activity is generally accepted as part of the cost of doing business. But much remains to be done. If companies are to move their CSR activities from satisficing behavior and take their commitment to society and the environment to the next level, they will need to rethink their current approaches to CSR, tapping into the creativity of every individual. CSE, like all entrepreneurship, is not about managing existing operations or CSR programs; it is about creating disruptive change in the pursuit of new opportunities. It combines the willingness and desire to create joint economic and social value with the entrepreneurial redesign, systems development, and action necessary to carry it out.

Accelerated organizational transformation faces a host of obstacles well-documented in the change management literature. Because CSE expands the core purpose of corporations and their organizational values, it constitutes fundamental change that can be particularly threatening and resisted. Furthermore, it pushes the corporation's actions more broadly and deeply into the social value creation area where the firm's experiences and skill sets are less developed. The sought for disruptive social innovations intrinsic to the CSE approach amplify this zone of discomfort. However, these challenges are superable, as experiences in innovative companies reveal. Furthermore, it is continually becoming more evident that values-based leadership, synergistic generation of social and economic value, and strategic cross-sector alliances are key ingredients to achieving sustainably successful business. The CSE process will contribute to our collective quest for superior organizational performance and societal betterment. This is the great opportunity and action imperative.

References

- Ashoka. 2009. *What is a Social Entrepreneur?* 2009 [cited February 2 2009]. Available from http://ashoka.org/social_entrepreneur.
- Austin, James. 2000. *The Collaboration Challenge: How Nonprofits and Businesses Succeed Through Strategic Alliances*. 1st ed. San Francisco, CA: Jossey-Bass Publishers.
- Austin, James E., Herman B. Leonard, and James Quinn. 2006. Timberland: Commerce and Justice. Teaching Note 306-089, Harvard Business School, Division of Research, Boston.
- Austin, James E., Herman B. Leonard, and James Quinn. 2004. Timberland: Commerce and Justice. Teaching Case 9- 305-002, Harvard Business School, Division of Research, Boston.
- Austin, James E., and Cate Reavis. 2002. Starbucks and Conservation International. Teaching Case 303-055, Harvard Business School, Division of Research, Boston.
- Austin, James E., Jane Wei-Skillern, and Alexis Gendron. 2004. Starbucks and Conservation International. Teaching Note 304-100, Harvard Business School, Division of Research, Boston.
- Austin, James, Herman Leonard, Ezequiel Reficco, and Jane Wei-Skillern. 2005. Social Entrepreneurship: It's For Corporations, Too. In *Social Entrepreneurship: New Paradigms of Sustainable Social Change*, edited by A. Nicholls. Oxford, GB: Oxford University Press.
- . 2006. Corporate Social Entrepreneurship: The New Frontier. In *The Accountable Corporation. Volume 3: Corporate Social Responsibility*, edited by M. Epstein and K. Hanson. Westport, CT: Praeger.
- Austin, James, Ezequiel Reficco, Gabriel Berger, Rosa Maria Fischer, Roberto Gutiérrez, Mladen Koljatic, Gerardo Lozano, and Enrique Ogliastrì. 2004. *Social Partnering in Latin America: Lessons Drawn from Collaborations of Businesses and Civil Society Organizations*. Cambridge, MA: Harvard University, David Rockefeller Center for Latin American Studies, distributed by Harvard University Press.
- Bornstein, David. 2004. *How to change the world: social entrepreneurs and the power of new ideas*. Oxford ; New York: Oxford University Press.
- Carroll, Archie B. 2006. Corporate Social Responsibility: A Historical Perspective. In *The Accountable Corporation. Volume 3: Corporate Social Responsibility*, edited by M. Epstein and K. Hanson. Westport, CT: Praeger.
- Center for Corporate Citizenship. 2004. *The State of Corporate Citizenship in the U.S.: A view from the inside, 2003- 2004*. Boston, MA: Boston College and The U.S. Chamber of Commerce Center for Corporate Citizenship.
- Covin, Jeffrey G, and Morgan P Miles. 1999. Corporate entrepreneurship and the pursuit of competitive advantage. *Entrepreneurship Theory and Practice* 23 (3):47-63.
- Crook, Clive. 2005. Special Report on Corporate Social Responsibility. *The Economist*, Jan 20.
- Dees, J. Gregory. 1998. The Meaning of 'Social Entrepreneurship'. Boston, MA: Harvard Business School. Comments and suggestions contributed from the Social Entrepreneurship Funders Working Group.
- Elkington, John, and Pamela Hartigan. 2008. *The power of unreasonable people: how social entrepreneurs create markets that change the world*. Boston, Mass.: Harvard Business School Press.
- Emerson, Jed. 2000. The nature of returns: a social capital markets inquiry into elements of investment and the blended value proposition. Working Paper, Division of Research, Harvard Business School, Boston, MA.
- . 2003. The blending value proposition: Integrating social and financial returns. *California Management Review* 45 (4).
- . 2006. *Blended Value Investing: Capital Opportunities for Social and Environmental Impact*. World Economic Forum March 2006 [cited July 1st 2006]. Available from http://www.weforum.org/pdf/Initiatives/Blended_Value_Report_2006.pdf.

- Emerson, Jed, and Sheila Bonini. 2004. *The Blended Value Map: Tracking the Intersects and Opportunities of Economic, Social and Environmental Value Creation*. www.blendedvalue.org 2003 [cited October 15 2004]. Available from <http://www.blendedvalue.org/Papers/97.aspx>.
- Googins, Bradley K., Philip H. Mirvis, and Steven A. Rochlin. 2007. *Beyond "good company": next generation corporate citizenship*. New York, NY: Palgrave Macmillan.
- Googins, Bradley K., and Steven A. Rochlin, eds. 2006. *Corporate Citizenship: Top to Bottom*. Westport, CT: Praeger.
- Hart, Stuart. 2005. *Capitalism at the Crossroads: the unlimited business opportunities in serving the world's most difficult problems*. Upper Saddle River, NJ: Wharton School Publishing.
- Kanter, Rosabeth Moss. 1999. From Spare Change to Real Change: The Social Sector as Beta Site for Business Innovation. *Harvard Business Review*:122-132.
- Light, Paul C. 2007. *The Search for Social Entrepreneurship*. Washington, D.C: The Brookings Institution Press.
- Márquez, Patricia, Ezequiel Reficco, and Gabriel Berger, eds. forthcoming. *Socially Inclusive Business: Engaging the poor through market initiatives in Iberoamerica*. Cambridge, MA: Harvard University, David Rockefeller Center for Latin American Studies, distributed by Harvard University Press.
- Martin, Roger L., and Sally Osberg. Spring 2007. Social Entrepreneurship: The Case for Definition. *Stanford Social Innovation Review*.
- Nicholls, Alex. 2006. *Social entrepreneurship: new models of sustainable social change*. Oxford; New York: Oxford University Press.
- Paine, Lynn Sharp. 2003. *Value shift: why companies must merge social and financial imperatives to achieve superior performance*. 1st ed. New York: McGraw-Hill.
- Prahalad, C. K. 2005. *The Fortune at the Bottom of the Pyramid: Eradicating Poverty through Profits*. Upper Saddle River, NJ: Wharton School Publishing.
- Rangan, Kasturi, John Quelch, Gustavo Herrero, and Brooke Barton, eds. 2007. *Business Solutions for the Global Poor: Creating Social and Economic Value*. San Francisco, CA: Jossey-Bass.
- Schumpeter, Joseph Alois. 1912. *Theorie der wirtschaftlichen entwicklung*. Leipzig,: Duncker & Humblot.
- . 1934. *The theory of economic development*. Cambridge, MA: Harvard University Press.
- . 1942. *Capitalism, socialism, and democracy*. New York, London,: Harper & Brothers.
- Stevenson, Howard, and D. E. Gumpert. 1985. The Heart of Entrepreneurship. *Harvard Business Review*.
- Stevenson, Howard H. 1983. A perspective on entrepreneurship. Working Paper, Division of Research, Harvard Business School, Boston, MA.
- Thompson, John, Geoff Alvy, and Ann Lees. 2000. Social entrepreneurship - a new look at the people and the potential. *Management Decision* 38 (5):348-338.
- Visser, Wayne, Dirk Matten, Manfred Pohl, Nick Tolhurst, Katja Böhmer, Aron Ghebremariam, Judith Hennigfeld, and Sandra S. Huble. 2007. *The A to Z of corporate social responsibility: a complete reference guide to concepts, codes and organisations*. Chichester, England ; Hoboken, NJ: John Wiley & Sons.
- Zadek, Simon. 2001. *The civil corporation: the new economy of corporate citizenship*. London ; Sterling, VA: Earthscan.
- . 2004. The Path to Corporate Responsibility. *Harvard Business Review*.