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Letter from the Editor

This issue of the *International Journal of Not-for-Profit Law* takes a look at the changing legal environment confronting civil society organizations in South Africa, Indonesia, and Canada.

Ricardo Wyngaard, a longtime adviser to not-for-profit organizations, examines the interaction between the not-for-profit sector and the government in South Africa, particularly the de-registration orders (subsequently withdrawn) affecting more than 23,000 organizations in late 2012 and early 2013. Civil society organizations also face challenges in Indonesia, according to **Eryanto Nugroho** of the Indonesian Centre for Law and Policy Studies (Pusat Studi Hukum dan Kebijakan Indonesia). Existing law strictly controls Indonesia's civil society organizations, sometimes in arbitrary ways, and a proposed revision fails to fully alleviate the problems. Next, we provide an overview and analysis of recent Canadian efforts to harmonize the laws regulating not-for-profit corporations with those regulating for-profit corporations. The author, **Terrance S. Carter**, is managing partner of Carters Professional Corporation as well as counsel to Fasken Martineau DuMoulin LLP on charitable matters.

We feature four additional articles, too. **Dominique Jakob**, a professor of private law and director of the Center for Foundation Law at the University of Zurich (UZH), and **Peter Picht**, an academic assistant at UZH, consider legal issues that may arise when a foundation board makes investments based in part on notions of social responsibility. Next, **Henry Otieno Ochido** posits explanations for Kenyans' meager donations to NGOs, which must rely on foreign funding instead, in light of the fact that Kenyans generously devote time and resources to addressing local needs through the tradition of Harambee. The author is Head of Operations, Compliance and Research at the NGOs Coordination Board in Nairobi, Kenya. In the following article, **Firdoos Dar**, a Ph.D. Scholar in Central Asian Studies at the University of Kashmir (India), examines the role played by NGOs in Tajikistan and some of the historical and cultural factors that have shaped it. Finally, **Byambajav Dalaibuyan**, a Ph.D. candidate at Japan's Hokkaido University, demonstrates how the tool of social network analysis can shed light on the nature and extent of interactions among NGOs, based on a case study in Mongolia.

As always, our gratitude goes out to the authors of our articles for sharing their expertise.

Stephen Bates

Editor

International Journal of Not-for-Profit Law

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Changing Legal Environments for Civil Society Organizations

The South African NPO Crisis: Time to Join Hands

Ricardo G. Wyngaard¹

1. Introduction

This article comments on the recent large-scale de-registrations of South African nonprofit organizations and suggests practical steps on the way forward.

More than 85,000 nonprofit organizations were registered in terms of the Nonprofit Organisations Act (NPO Act) at the end of March 2012. From October 2012 until January 2013 more than 23,000 organizations were de-registered by the Directorate for Nonprofit Organisations, which falls under the auspices of the Department of Social Development. In addition, more than 35,000 organizations were marked as “*non-compliant*.” In contrast, during the 2011 financial year only 468 organizations were de-registered.² All organizations were, in the wake of a public outcry, reinstated and reflected as re-registered during February 2013. Organizations have been given a six-month period to become compliant.³

Registration in terms of the NPO Act is, although voluntary, usually a requirement to access donor funding, including state funding. The implication is that “de-registered” or “non-compliant” organizations risked losing their donor funding. Many non-profit organizations in South Africa are dependent on donor funding. This posed a significant risk for many of the vulnerable beneficiaries being served by these organizations.

2. The South African nonprofit sector

The South African non-profit sector plays a significant role helping the South African government to fulfill its constitutional mandate. The South African Constitution has entrenched a number of socioeconomic rights in its Bill of Rights. These rights are aimed, as stated in the preamble, at improving the quality of life of all citizens and freeing the potential of each person. The socioeconomic rights would be out of reach for most South Africans without the presence of a vibrant nonprofit sector. The South African government has, in its National Development Plan, conceded: “*All provinces rely heavily on not-for-profit organisations to deliver services.*”⁴ The National Development Plan further states: “*In social welfare services, the state has adopted a*

¹ Ricardo G. Wyngaard has provided legal advice, training, and assistance to the nonprofit sector since 2000. He has participated in a number of legislative reform and research initiatives on nonprofit legislation and is currently running a solo law practice focusing on nonprofit law and governance. For more information please visit: www.nonprofitlawyer.co.za

² The State of South African Registered Nonprofit Organisations issued in terms of the Nonprofit Organisations Act 71 of 1997 – April 2011 – published by the Department of Social Development, Report from the National NPO Database – Page 6.

³ Joint media statement by Minister Bathabile Dlamini and the Ministerial Task Team on Non-Profit Organisations (NPOs), Jan. 31, 2013, available at: www.dsd.gov.za

⁴ Page 334 of National Development Plan.

partnership model of service provision and relies mainly on non-governmental welfare organisations to provide professional social services.”

This partnership model is taken on in the context that the South African nonprofit sector consists mainly of smaller informal/voluntary organizations. Voluntary associations represented 95 percent of the organizations registered in terms of the NPO Act during the 2011 financial year.⁵ The Department of Social Development concludes in its 2011 report: “*For the community based organisations, registration not only adds to their credibility in the eyes of donors and community, but also sets a basis for the way in which they are run. The NPO registration therefore sets a much-needed basis for organisations to run their affairs effectively and accountably.*”⁶

The above context gave rise to the promulgation of the NPO Act.

3. Brief context to the NPO Act

The NPO Act came into operation on September 1, 1998. The Act was aimed at providing a supportive regulatory system for (predominantly) smaller emerging organizations. According to its preamble, the NPO Act should “*provide for an environment in which nonprofit organisations can flourish.*” Section 2 of the NPO Act provides that its objects are: “*to encourage and support nonprofit organisations in their contribution to meeting the diverse needs of the population of the Republic by, amongst other, creating an environment in which nonprofit organisations can flourish*” [emphasis added].

The NPO Act has five chapters. Two chapters are important for purposes of this article, namely: *Chapter 2*, entitled *Creation of Enabling Environment*, and *Chapter 3*, entitled *Registration of Nonprofit Organisations*. Section 3 which falls under Chapter 2 is, in my view, one of the most significant sections in the NPO Act. It reads:

3. State’s responsibility to nonprofit organisations. *Within the limits prescribed by law, every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions.*

This section is unprecedented within the international context and captures the state’s commitment to promote, support, and enhance the capacity of nonprofit organizations to perform their functions.

The NPO Act also makes provision for the establishment of a Directorate for Nonprofit Organisations which is responsible for, amongst others, facilitating the process for developing and implementing policy and determining and implementing programs, including programs to ensure that the standard of governance within nonprofit organizations is maintained and improved. The Directorate is also responsible for facilitating the development and implementation of multi-sectoral and multi-disciplinary programs.

The NPO Directorate has, with limited resources, embarked on a number of initiatives to support and encourage nonprofit organizations. It has, for example, conducted a number of research studies, implemented capacity-building initiatives, and provided an online registration

⁵ The State of South African Registered Nonprofit Organisations – Page 6.

⁶ Ibid.

and reporting facility for registered organizations. More recently the Directorate partnered with Ricardo Wyngaard Attorneys and others, with the financial support of the International Center for Not-for-Profit Law, to produce a training video on how to register and report in terms of the NPO Act.⁷

Chapter 3 of the NPO Act deals mainly with the registration and reporting requirements and cancellations of registration. Section 22 of the NPO Act provides for appeals against the cancellation of registrations. The process of registering organizations has seemingly taken up much of the NPO Directorate's time and energy.

The need for the NPO Act is perhaps best summarized in a quotation from a conference held in Johannesburg in September 1996 entitled *Enabling frameworks for civil society in southern and eastern Africa*. On the issue of self-regulation the report concluded: "*Finally, and emanating more from a South African point of view, self-regulation could be seen as a bit of a luxury. In other words, there are empowered NGOs – what one could call progressive organisations – which have the ability, capacity and willingness to regulate themselves. But one should consider whether, in terms of the history of South African civil society, this was not just a luxury for a certain small grouping, and whether there should have been a supportive regulatory system for smaller emerging organisations.*"⁸

The NPO Act has been enacted to provide a supportive regulatory system for smaller organizations. If this is so, it raises the question why so many organizations (including the smaller ones) got either de-registered or deemed non-compliant.

4. Registration and de-registration in terms of the NPO Act

Registration in terms of the NPO Act has become increasingly important for voluntary associations which are established in terms of common law. Without a registration certificate a voluntary association in South Africa would find it virtually impossible to open a bank account. Other nonprofit legal entities do not require registration in terms of the NPO Act to open a bank account as they are able to offer other forms of incorporation certificates. Registration in terms of the NPO Act is therefore essential for voluntary associations. The process to register in terms of the NPO Act is usually met with delays.

Once registered, the director for NPOs can de-register NPOs that are registered in terms of the Act if such NPOs have not complied with:

- a. a material provision of its founding document;
- b. a condition or term of any benefit or allowance conferred on it by the Minister of Social Development in terms of the Act; or
- c. its reporting obligations in terms of the Act.

The NPO Act requires that the director for NPOs must send a compliance notice in the prescribed form to a registered NPO if such organization has not complied with its obligations in terms of the Act. This notice must, *first*, be in writing; *second*, notify the NPO of the compliance steps required; and, *third*, inform the NPO that it has one month from the date of the notice to

⁷ This video is available at: <http://www.youtube.com/watch?v=yX3YK6MiLcw&feature=youtu.be>

⁸ Circle of Power - An enabling framework for civil society in Southern Africa, edited by Owen Stuurman and Riaan de Villiers, p. 152.

comply. It seems that some organizations claimed not to have received the non-compliance notice and only became aware of the de-registered or non-compliant status after having read reports in the media.

The Department of Social Development released a media statement dated January 31, 2013,⁹ in which it stated, amongst others, that:

- a. The de-registration are linked to the failure by NPOs to submit financial and narrative reports; and
- b. The Department has complied with the provisions of the NPO Act and issued non-compliance notices before having de-registered organisations.

I suspect that many de-registered organizations have either been non-compliant or dormant. Some may have failed to update their changed contact details with the NPO Directorate. This may have resulted in non-compliant notices being sent to wrong addresses. The NPO Act compels the director for NPOs to de-register an organization that has not complied with the non-compliance notice. The director may extend the period for compliance on good cause shown by the organization. No further discretion is given to the director for NPOs. Some organizations have however claimed that their reports were submitted in a timely manner and were able to offer proof of that.

Compliance with the NPO Act is a prerequisite for continued registration. However, the requirement to comply with the NPO Act does not stop with registered NPOs.

5. The other side of non-compliance

Registered NPOs are not the only ones that have supposedly been non-compliant in terms of the NPO Act. Both the Minister for Social Development and the Directorate for Nonprofit Organisations have failed to comply with the provisions of the NPO Act. Examples of non-compliance include failure by:

1. The NPO Directorate to register new organizations within a two-month period, as required in terms of the Act;
2. The Minister of Social Development to appoint the Arbitration Panel as required in terms of the Act. This raises particular concerns given the magnitude of de-registrations;
3. The state to properly resource the NPO Directorate to implement its mandate in terms of the NPO Act;
4. The NPO Director, as alleged by some organizations, to issue a notice of non-compliance before de-registration – at least in some instances; and
5. The Department of Social Development to warn organizations through a public campaign of the imminent de-registration. This is not a legal requirement, but should have been done given the large-scale de-registrations.

The large-scale de-registrations should not have taken place without the appointment of a fully functional Arbitration Panel. The absence of the Arbitration Panel effectively eliminates the right of de-registered organizations to dispute their de-registration. This conduct is simply not consistent with the NPO Act's theme of encouragement and support for nonprofit organizations.

⁹ Available at: <http://www.dsd.gov.za/>

The Department of Social Development has since been advised by a ministerial task team, consisting of key stakeholders, appointed by the Minister of Social Development. As a result, in a media statement dated January 31, 2013,¹⁰ the Department of Social Development committed, amongst others, to:

- Appoint the Panel of Arbitrators;
- Improve communication with registered organizations to ensure that organizations in the NPO database are aware of their registration status and compliance requirements;
- Work together with stakeholders to improve communication between the department and the sector; and
- Strengthen its own internal capacity to respond more adequately and effectively to needs of the NPO sector as a key development partner.

It is doubtful whether the media statement itself would ease the concerns of the South African non-profit sector. This is because of the presence of a controversial policy document published by the Department of Social Development prior to the mass de-registrations.

6. The Policy Framework on Nonprofit Organisations Law

The Department of Social Development hosted the South African Nonprofit Organisation Summit (the Summit) August 15-17, 2012, in Johannesburg. At the Summit the Department circulated a document entitled *Policy Framework on Nonprofit Organisations Law* (the Policy).

The Policy stated: “*The objective of the review is to ensure that the new regulatory framework is appropriate to the legal and socio-economy contexts of South Africa as a constitutional democracy and an open society.*” The aim of the review is “*to enhance the existing enabling environment for the nonprofit organisations to flourish and protect the sector from abuse as well as minimize undue disruptions to many of the positive contributions.*”

The Policy proposes, amongst others, the establishment of a new entity to be called *The South African Nonprofit Organisations Regulatory Authority* (SANPORA). It is envisaged that SANPORA will fulfill a different role from that which the NPO Directorate is currently fulfilling. SANPORA would, according to the Policy, be responsible for:

- a. Registering organizations: It will register NPOs and will introduce an electronic registration process.
- b. Examining organizations: It will “*have at least the right to examine books, records and activities of nonprofit organisations. To further ensure compliance, all reporting organisations must be subjected to random and selective audit by the supervisory organ.*”
- c. Issuing sanctions: It will be responsible for issuing sanctions against noncompliant organizations. The Policy states that “*it is appropriate to have special sanctions for violations peculiar to nonprofit organisations.*”
- d. Promoting compliance and enforcing punitive measures: SANPORA should “*act swiftly and effectively to ensure compliance, prevent wrongdoing and enforce punitive measures.*”

¹⁰ Available at: <http://www.dsd.gov.za/>

- e. Providing guidance: SANPORA will also provide advice and guidance to non-compliant organizations and educate office-bearers about their duties and facilitate access to accredited training programs on governance.
- f. Enabling blacklisting of organizations: It will, through the provision of public access to information, “enable the ‘blacklisting’ of organisations that have been involved in unscrupulous practices to be known and to be dealt with accordingly so as to protect the sector and avoid prejudicial generalisation of the sector.”

Foreign organizations operating in South Africa have also been targeted by the Policy. In this regard the Policy states: “A simple process that allows foreign organisations to be registered and maintained in South Africa must be developed, while providing for recourse in cases of misconduct and winding up, particularly with respect to liabilities for debts, the duties and responsibilities of the foreign office bearers and inter group transactions. Foreign nonprofit organisations must equally be subjected to the same requirements and obligations as that of any registered nonprofit organisation. However, registration for foreign organisations must be compulsory considering the risk of money laundering and financing of terrorist activities.”

The underlying theme of the Policy is in stark contrast to that of the NPO Act. The need for enforcement has seemingly overshadowed the need to *encourage and support* nonprofit organizations. The Department’s conduct has also been more consistent with its policy proposal. It acted more swiftly to ensure compliance as opposed to providing advice and guidance to “non-compliant” organizations.

The Policy and the subsequent large-scale de-registrations do not speak of a supportive regulatory system for smaller organizations. Having a database of registered nonprofit organizations that are non-compliant is also not appropriate and would cause a breakdown in public confidence. From the media reports I gather that the increased attention by the NPO Directorate on non-compliance is because of the concerns raised by the Auditor-General which is responsible for auditing state departments.

Compliance is no doubt necessary. However, regulation and support must go hand in hand within the South African context. Focusing only on compliance and regulation without providing the required support to smaller organizations would simply result in the alienation of the largest section of South Africa’s non-profit sector.

This does not hold true only for the state. Sadly, South African civil society organizations have, with the recent introduction of governance codes, increased the burden of regulation on smaller organizations without offering the required supporting framework.

7. Civil Society governance codes

The plight of smaller organizations does not stop with the Department of Social Development. The non-profit sector itself has to play a more supportive role with regards to smaller non-profit organizations. A number of membership and intermediary organizations in South Africa are providing capacity-building support for smaller organizations. However, more needs to be done.

The introduction of two governance codes in South Africa—the King III Code of Corporate Governance, initiated by the Institute of Directors of Southern Africa (the IOD), and the Independent Code, initiated by the Working Group—have become increasingly important for the South African non-profit sector. Both the IOD and the Working Group have contested the

space to offer a solution to improve governance standards for non-profit organizations. Both their codes set governance standards to which organizations should adhere, and both claim suitability for all South African non-profit organizations. The Institute of Directors subsequently released Practice Notes as a guide to the application of King III for nonprofit organizations.

Regrettably, both these codes will remain largely irrelevant for most of the smaller organizations. Policies and processes suggested by these codes that should supposedly be in place for nonprofits include:

- conflicts of interest policies,
- induction programmes,
- formal succession plans,
- annual evaluations,
- remuneration policies,
- risk policies and plans,
- disaster recovery plans,
- information security management systems, and
- integrated reports.

These policies and processes are no doubt valuable and may ultimately improve governance practices. However, smaller organizations would simply not have the capacity and resources to implement the noble standards of governance without the necessary support. In the absence of the required support, smaller organizations would eventually find themselves non-compliant.

The *to-do lists* that culminate from the both the King III practice notes and the Independent Codes could perhaps be implemented by bigger, more sophisticated organizations. Smaller organizations will require more than *to-do lists*. A more active intervention is required to appropriately contribute towards capacitating smaller organizations on various governance aspects. The nonprofit sector also has its role to play in this regard.

8. Way forward

The South African Nonprofit Organisations Act is extraordinary in capturing the state's commitment to and support for nonprofit organizations. The implementation has, however, not been consistent with the noble objectives contained in the NPO Act. The current controversy presents the country with another opportunity to deal meaningfully with the key challenges facing the South African nonprofit sector.

The government simply cannot deal with these challenges on its own. This has been foreseen by the legislature when it inserted as one of the objectives of the NPO Act to “*promote a spirit of co-operation and shared responsibility within government, donors and amongst other interested persons in their dealings with nonprofit organisations.*”

Steps the government should consider within the next six months include:

1. Withdrawing (or at least seriously reviewing) its *Policy Framework on Nonprofit Organisations Law*. The Policy does not set the tone for a spirit of cooperation. It will simply cast suspicion over the actions of the South African government.

2. Increasing resources to the Directorate for Nonprofit Organisations to effectively execute its responsibilities. This recommendation is not new. An Assessment of the NPO Act, as commissioned by the Department of Social Development, found in 2005 that the resources and capacity for the NPO Act were *severely lacking*.¹¹ The Assessment found: *“The financial resources allocated for the implementation of the Act are insignificant when compared to the size, scope and vibrancy of the NPO sector on the one hand, and the complexity of the NPO Act on the other.”*¹² Changes that were introduced since then have not been sufficient as the Department still needs to strengthen its internal capacity to respond to the needs of the nonprofit sector.
3. Collaborating more effectively with other state departments and key civil society stakeholders to extend the reach and impact of the Department. In its 2012 Annual Report,¹³ the Department states that a total of 32 capacity-building workshops were held for 1,323 NPOs and 144 provincial officials. It further states that a total of 210 community-based organizations and 152 community development practitioners were trained. I have no doubt that more organizations can be reached through collaborations with other departments and civil society organizations.
4. Reviewing the reporting requirements for registered nonprofit organizations. Currently all nonprofit organizations are subjected to the same reporting requirements. For smaller organizations the reporting requirements may be onerous and intimidating. This recommendation is also not new; the Impact Assessment made the following comments:

*“The reporting requirements as stipulated in S17, S18 and S19 of the Act are particularly difficult for many (especially the smaller, less capacitated organisations) NPOs to comply with. The Act expects NPOs to cover the cost of financial reporting, whether it relates to proper auditing of statements or merely certification by an accounting officer. This requirement does not take into account that many organisations operate with little or no money resources.”*¹⁴
5. Appointing an advisory or technical committee as provided in terms of the NPO Act. The Minister of Social Development is given the discretion in terms of section 10 of the NPO Act to appoint any advisory or technical committee in order to achieve the objects of the Act. The presence of sound advisory or technical committees could perhaps have avoided the controversy around the large-scale de-registrations. It would also provide a platform for more interactive engagement between the state and civil society.

9. Conclusion

To avoid jeopardizing implementation of the National Development Plan, the South African government and civil society organizations must work together to attend to the needs of the smaller organizations. Both players will have to *act swiftly and effectively* to ensure that appropriate attention and support are given to community-based organizations.

¹¹ Available at: www.dsd.gov.za/NPO (on page 109 of Assessment).

¹² Ibid.

¹³ Available at: www.dsd.gov.za/NPO (on page 98 of Annual Report).

¹⁴ Available at: www.dsd.gov.za/NPO (on page 73 of Assessment).

Changing Legal Environments for Civil Society Organizations

Bill on Societal Organizations (*RUU Ormas*) and Freedom of Association in Indonesia

Eryanto Nugroho¹

In the Indonesian National Legislation Program for 2010-2014, at least five bills are closely related to the legal environment for civil society in Indonesia. Those bills include (1) Bill on the revision of the Law on Societal Organizations (RUU tentang Perubahan atas UU No.8/1985 tentang Organisasi Kemasyarakatan), (2) Bill on Associations (RUU tentang Perkumpulan), (3) Bill on the second revision of the Law on Foundations (RUU tentang Perubahan Kedua atas UU No.16/2001 tentang Yayasan), (4) Bill on NGOs (RUU tentang Lembaga Swadaya Masyarakat), and (5) Bill on Protection of Human Rights Defenders (RUU tentang Perlindungan terhadap Pembela HAM).

Since February 2011, discussions about societal organizations have related to violent actions against members of Ahmadiyah, a minority Muslim sect in Pandeglang (West Java) and also against Christian churches in Temanggung (Central Java). Responding to the situation, President Susilo Bambang Yudhoyono gave instructions to dissolve the groups engaged in violence and causing unrest in society. Although the President's instruction has never been implemented, it creates a problematic situation. According to the Law No. 8 of 1985 on Societal Organizations, the government can dissolve a societal organization without seeking a court order. The possibility that government may act to dissolve organizations directly poses a substantial threat to the freedom of association in Indonesia.

Freedom of association is guaranteed by the 1945 Constitution. Since 1998, Indonesia has been undergoing a democratic transition process after 32 years of Soeharto's "New Order" authoritarian government. From 1998–2004, the pro-reform groups held enough bargaining power to create progressive changes. Nonetheless, more efforts are needed to preserve and improve the legal environment in protecting the freedom of association.

This article will describe the legal framework related to the societal organization, the context of the revision process, and how it will affect freedom of association in Indonesia.

A. Background

There are various terms used to refer to a civil society organization (CSO) in Indonesia. Under Soeharto's New Order regime, Indonesian CSOs used the name "*Lembaga Swadaya Masyarakat* (LSM)" which means "self-reliant community development institution."² The term

¹ Pusat Studi Hukum dan Kebijakan Indonesia (PSHK), Indonesian Centre for Law and Policy Studies.

This article was written for the research fellowship program conducted by the International Center for Not-for-Profit Law (ICNL) and European Center for Not-for Profit Law (ECNL) in Budapest, Hungary, November 2011. An update on subsequent developments appears at the end. The research fellowship was made possible with the support of the Swedish International Development Cooperation Agency.

² Rustam Ibrahim, "Civil Society Mapping in ASEAN Countries: Indonesia," Concept Paper prepared for Friedrich-Ebert-Stiftung (FES), 2011.

“non-governmental organization” or “NGO” was not generally used, as it could be interpreted by the regime to mean “anti-government organization.”³ At that time, CSOs were given no room by the regime to express arguments opposing the government or to challenge government policy. Extra-legal measures, such as kidnappings and tortures, were also used by the regime, targeting those who actively challenged the government.⁴

The term “LSM” is still commonly used today in practice. As alternatives, some organizations now prefer to use “*Organisasi Non-Pemerintah (Ornop)*”, which is a direct translation of NGO, or “*Organisasi Masyarakat Sipil (OMS)*,” which is a translation of Civil Society Organization.⁵

After the fall of the New Order regime in 1998, Indonesia underwent four rounds of constitutional amendments from 1999 to 2002, in order to ensure better protection for civil liberties and the political rights of citizens. As a result, there is now clear protection for the freedom of association (article 28) and freedom of expression (article 28E).⁶ Indonesia also ratified the International Covenant on Civil and Political Rights (ICCPR) through Law No. 12 of 2005 regarding the Ratification of the International Covenant on Civil and Political Rights (ICCPR) on October 28, 2005. Taken together, these are significant improvements in the legal framework for CSOs, since previously, in the New Order regime, the legal framework was not conducive for CSOs to conduct public policy advocacy.⁷

Through certain laws and regulations, the government has recognized the importance and contributions of civil society. For example, since 2008, the Income Tax Law has made available tax deductions for donations in support of disaster rehabilitation, research and development, social infrastructure construction costs,⁸ education, and sports.⁹

After the 1998 change of regime, the number of CSOs in Indonesia has increased considerably. Precise data relating to the number of CSOs in the New Order regime is not available.¹⁰ A survey conducted by the Local Assessment Team facilitated by PPAATK

³ Ibid.

⁴ Bivitri Susanti, “NGO Law Monitor: Indonesia,” <http://www.icnl.org/knowledge/ngolawmonitor/indonesia.htm>.

⁵ There is a perspective that the term “Lembaga Swadaya Masyarakat (LSM)” shows the hegemony of the state towards the civil society element. The term “Organisasi Non Pemerintah (ORNOP)” was seen as a counter-discourse which is used intentionally as an effort to deconstruct the hegemonic discourse. See M. M. Billah, “Perkembangan Ornop di Indonesia” (Seminar proceeding of SMERU, August 15, 2000), p.4.

⁶ Article 28: The liberties of association and assembly, the freedom of thought expressed verbally or in writing and similar rights, are to be determined by law.

Article 28E, section (3): Each person has the right to freely associate, assemble, and express his opinions.

⁷ At that time, there were not many CSOs active in conducting public policy advocacy.

⁸ The phrase “social infrastructure construction cost” is a translation of “Biaya Pembangunan Infrastruktur Sosial.” It is defined in Article 1(e) of Government Regulation No.93/2010 as costs that are used to build non-profit public infrastructure (e.g., religious buildings, health clinics, art and culture buildings, etc.).

⁹ See Income Tax Law year 2008, further regulated by Government Regulation No.93 Year 2010.

¹⁰ CSOs in Indonesia are increasing in quantity and improving in quality. The number of CSOs has increased from 3,255 in 1985, to 8,720 in 1990, and 13,400 in 2000. See interview with Dr. Kastorius Sinaga, quoted from Info Bisnis Magazine, Edition 96/Year VI/September 2001, p. 20.

(Indonesian Financial Transaction Reports and Analysis Center) and the Charity Commission for England and Wales in 2010 shows that there are more than 20,000 registered CSOs in Indonesia.¹¹

Table 1
Numbers of CSOs and Relevant Ministries in Indonesia¹²

No	Type	Numbers of Organization	Registered to Ministry	Role of the Ministry
1	Foundation	21,301	Ministry of Law and Human Rights	Registration
2	Incorporated association	268	Ministry of Law and Human Rights	Registration
3	International organization	130	Ministry of Foreign Affairs	Registration and supervision
4	Societal Organization	16,098	Ministry of Home Affairs	Registration and supervision
5	Religion-based organization	2,425	Ministry of Religion Affairs	Registration and supervision
6	Consumer protection organization ¹³	183	Ministry of Trade	Registration and Supervision
7	Organization conducting social activities	31,474	Ministry of Social Affairs	Registration, licensing, capacity building
8	Labor union	11,786	Ministry of Manpower and Transmigration	Registration, licensing, capacity building
9	Organizations working on Disaster Management	62	National Body for Disaster Management (BNPB)	Registration

In the Indonesian National Legislation Program (2010-2014), there are at least five bills that are closely related to the legal environment for civil society in Indonesia. Those bills include (1) Bill on the revision of the Law on Societal Organizations (*RUU tentang Perubahan atas UU No.8/1985 tentang Organisasi Kemasyarakatan*);¹⁴ (2) Bill on Associations (*RUU tentang*

¹¹ See Local Assessment Team (2010), "Domestic Review on NPO Sector in Indonesia." This report is prepared for the Domestic Review on NPO Sector in Indonesia facilitated by PPATK (Indonesian Financial Transaction Reports and Analysis Center) and the Charity Commission for England and Wales.

¹² Each ministry manages its own database, so that there is a great possibility that the data relating to CSOs is overlapping across ministries.

¹³ Lembaga Perlindungan Konsumen Swadaya Masyarakat (LPKSM).

¹⁴ Listed number 193 in the National Legislation Program year 2009-2014. In the last draft provided by the parliament in the public hearing in June 8, 2011, the titled was changed to *RUU Organisasi Masyarakat* (Bill on Society Organization). It is not a draft revision as planned in the National Legislation Program, but rather a new law which will revoke the existing law.

Perkumpulan);¹⁵ (3) Bill on the second revision of the Law on Foundations (*RUU tentang Perubahan Kedua atas UU No.16/2001 tentang Yayasan*);¹⁶ (4) Bill on NGOs (*RUU tentang Lembaga Swadaya Masyarakat*);¹⁷ and (5) Bill on Protection of Human Rights Defenders (*RUU tentang Perlindungan terhadap Pembela HAM*).¹⁸ The Parliament has placed the Bill on the revision of the Law on Societal Organizations on its priority list for 2011.¹⁹ The draft bill is intended to revise the existing draconian law, the Law on Societal Organizations No. 8 (1985).

Law No. 8 (1985) was enacted to control and restrict CSOs in Indonesia. One of the main concepts of the law is the “single pot” concept (*Konsep Wadah Tunggal*),²⁰ which seeks to compel organizations that share similarities based on activity, profession, function, and religion to be organized as a single organization.²¹ In addition, Law No. 8 (1985) gives the government authority to suspend and dissolve a societal organization without due process of law. The existence of such a draconian law creates fundamental problems for government-CSO relations.

On August 30, 2010, the Parliament conducted a joint meeting with the government to respond to a series of violent activities relating to societal organizations. The meeting was attended by Parliamentary leadership; the Coordinating Minister of Politics, Law, and Human Rights; the Minister of Interior; the Head of Police; the Attorney General, and the Head of Intelligence. One key result of the meeting was the commitment to push the revision of the Law on Societal Organizations (*RUU tentang Perubahan atas UU No.8/1985 tentang Organisasi Kemasyarakatan*). The commitment was further demonstrated when the Bill on the revision of the Law on Societal Organizations (Revision Bill) was placed on the Parliament’s Priority Legislation for the years 2011 and 2012.

In February 2011, the discourse about the Law and the Revision Bill focused on the violent actions taken against members of Ahmadiyah, a minority Muslim sect, in Pandeglang (West Java), and also against Christian churches in Temanggung (Central Java). Responding to the situation, President Susilo Bambang Yudhoyono gave instruction to dissolve groups engaged in violence and causing unrest in society. Although never implemented, the President’s instruction creates a problematic situation, since it is based on Law No. 8 (1985) on Societal Organizations, which was introduced by the New Order Regime to stifle civil society.

More recently, the government has relied on Law No. 8 (1985) on Societal Organizations in condemning Greenpeace Indonesia. Government officials, parliamentary members, and some interest groups, such as the Islamic Defenders Front (FPI) and the Betawi Brotherhood Forum (FBR), have accused Greenpeace of being an illegal entity because it is not registered as a societal organization, as required by Law No. 8 (1985).

¹⁵ Listed number 228 in the National Legislation Program year 2010-2014.

¹⁶ Listed number 244 in the National Legislation Program year 2010-2014.

¹⁷ Listed number 128 in the National Legislation Program year 2010-2014.

¹⁸ Listed number 156 in the National Legislation Program year 2010-2014.

¹⁹ On October 3, 2011, the Parliament established a Special Committee (Panitia Khusus) for the Bill on Societal Organizations and the plans were originally to finalize the bill by May 2012.

²⁰ See Article 8 Law No.8 Year 1985 on Societal Organization and the elucidation.

²¹ In the elucidation of Article 8, the law gave examples of Komite Nasional Pemuda Indonesia (KNPI) for youth organization, and Himpunan Kerukunan Tani Indonesia (HKTI) for peasants’ organization.

In defense, Greenpeace Indonesia clarified that it is registered as an association with legal entity status, regulated by the Dutch Colonial State Gazette, *Staatsblad* 1870/64, under the authority of the Ministry of Law and Human Rights (MLHR). Greenpeace was registered with the MLHR and declared a legal entity by the Ministry in 2009.²² Greenpeace claimed that the government accusations are political in nature and triggered by the fact that Greenpeace launched a global campaign against Asia Pulp and Paper in June 2011 by exposing evidence of forest destruction.²³

This article will describe the legal framework relating to societal organizations, the context of the revision process, and how it will affect the freedom of association in Indonesia. This article will use the term “societal organization” as a translation of “Organisasi Kemasyarakatan” or “Ormas.” (Some sources translate “Ormas” as “Community Organization.”) Elsewhere, “Ormas” is mistranslated as “mass organization.”)

B. Legal Framework for CSOs in Indonesia

Article 28 and Article 28E section 3 of the Indonesian Constitution guarantee the freedom of association:

Article 28: The liberties of association and assembly, the freedom of thought expressed verbally or in writing, and similar rights are to be determined by law.

Article 28E, Section 3: Each person has the right to freely associate, assemble, and express his opinions.

While there are a range of laws and regulations governing CSOs,²⁴ this article will focus on the framework legislation relating to associations and foundations, two key organizational forms for CSOs in Indonesia, as important context for understanding the place of the societal organization. This article will not focus on other types of legal entities, such as labor unions,²⁵ cooperatives,²⁶ or political parties.²⁷

Foundations are regulated by Law No. 16 of 2001, as amended by Law No. 28 of 2004. Associations are still regulated under *Staatsblad* 1870-64 (Dutch Colonial State Gazette) on Associations with Legal Person Status (*Rechtspersoonlijkheid van Vereenigingen*).²⁸

The foundation in Indonesia is defined as a non-membership legal entity. It is established by designating the assets of the founders to fulfill a specific objective in the social, religious, or humanitarian fields.²⁹ The foundation attains legal entity status after the deed of establishment is submitted to and approved by the Ministry of Law and Human Rights. The application is made

²² Ministry of Law and Human Rights Decision, Number. AHU- 128.AH.01.06 year 2009.

²³ Greenpeace website.

²⁴ For detailed legal framework with list of relevant laws, see Bivitri Susanti, “NGO Law Monitor: Indonesia,” <http://www.icnl.org/knowledge/ngolawmonitor/indonesia.htm>.

²⁵ Regulated under Law No.21 Year 2000 on Labor Union.

²⁶ Regulated under Law No.25 Year 1992 on Cooperative.

²⁷ Regulated under Law No.2 Year 2011 on revision of Law No.2 Year 2008 on Political Parties.

²⁸ The Indonesian legal system is rooted in the Dutch colonial era. Since independence was gained in 1945, many of the outdated Dutch laws have been replaced. However, some Dutch laws remain in place.

²⁹ See Article 1 Law on Foundations.

through a public notary, and the public notary is obligated to submit the application to the Ministry within 10 days from the time the deed of establishment is signed.³⁰ The minimum amount of assets at the time of the establishment is 10 million Indonesian Rupiah (IDR) for foundations with Indonesian citizens as founders, or 100 million IDR for foundations founded by foreign persons or foreign persons together with Indonesian citizens.³¹

The Ministry must approve or reject the application within 30 days from the time the complete application is received. In case of rejection, the Ministry must inform the applicant in writing of the grounds. In case input from a relevant government institution is needed, the review process can be extended up to a maximum of 37 days from the time of the application.³² A foundation officially becomes a legal entity once the Ministry approves the request. It is the Ministry's obligation to publish the approved deed of establishment in the Supplement to the State Gazette within 14 days from the date of approval.

It is not easy to understand the timeline of the establishment process provided in the Law on Foundations, but the following attempts to outline the process more clearly:

Table 2

A. Registration of a Foundation, where input from another institution is *not* needed:

Steps	Days	Legal Basis
Deed of Establishment, prepared by Public Notary	1	Article 9
Public Notary must submit the written petition to the Ministry	No later than 10 days from the signing of the Deed of Establishment	Article 11(3)
Deadline for approval/rejection by the Ministry	Within 30 days of receiving written petition	Article 12(2)

³⁰ The honorarium of the public notary is regulated under Article law 34 Government Regulation No. 63 of 2008 on the Implementation of Law on Foundations, and Article 36 Law No.30 Year 2004 on Notary. In practice, the honorarium amounts to approximately 3–5 million IDR.

³¹ See Article 6 Government Regulation No. 63 of 2008 on the Implementation of Law on Foundations.

³² See Article 11 and Article 12 Law on Foundations. In case consideration from other relevant institutions is needed, the Ministry must send the request to the relevant institution within 7 days from the time the complete application documents is received. The relevant institution must respond to the request within 14 days after such request from the Ministry is received. The Ministry must respond (approval or rejection) to the applicant within 14 days after consideration from the relevant institution is received. In case the relevant institution does not respond, the Ministry is obligated to respond to the applicant within 30 days from the time the request for consideration is sent to the relevant institution.

B. Registration of a Foundation, where input from relevant government institution is needed:

Steps	Day	Legal Basis
Deed of Establishment, prepared by Public Notary	1	Article 9
Public Notary must submit the written petition to the Ministry	No later than 10 days from the signing of the Deed of Establishment	Article 11(3)
Minister seeks input from relevant government institution	No later than 7 days after the petition submitted by the Notary	Article 11(4)
The relevant government institution must provide input	No later than 14 days after receiving request from the Minister	Article 11(5)
Approval from the Minister, giving the legal entity status to the Foundation	No later than 14 days from the time the response of the government institution is received by the Minister. In case there is no response from the government institution, no later than 30 days from the time the request is sent.	Article 12(3), 12(4)

A foundation is not allowed to conduct economic activities directly. A foundation can only engage in economic activities to support the attainment of its objectives by establishing a separate business enterprise (provided that the activities are in accordance with the foundation's statutory purposes),³³ or by participating as a shareholder in another business enterprise (provided that the shareholding does not exceed 25 percent of the total value of the foundation's assets).³⁴

The law requires three governing organs in a foundation: the governing board (*Pembina*), supervisory board (*Pengawas*), and executive board (*Pengurus*).³⁵ A foundation is not allowed to distribute to these governing bodies the profit from any business enterprise that the foundation establishes or in which the foundation is a shareholder. Members of the three organs of a foundation also may not serve as board members, managers, or supervisors in any business enterprise that the foundation establishes or in which it invests.

³³ The business activities defined here have a broad scope, including the fields of human rights, arts, sports, consumer protection, education, environment, health, and science. See Elucidation of Article 8 Law on Foundations.

³⁴ See Article 3 and Article 7 Law on Foundations.

³⁵ See Article 2 Law on Foundations.

Regarding financial transparency and accountability, a foundation must publish an abridged version of its annual report on an announcement board in its office. Foundations receiving donations (from the state, foreign parties, or other third parties) in the amount of 500 million IDR or more, or that possess assets (other than endowed assets) of over 20 billion IDR, must be audited by a public accountant and have an abridged version of their financial report published in an Indonesian-language daily newspaper.³⁶

The dissolution of a foundation may occur for three reasons: (1) the time period of its existence, as defined in its governing statute, has expired; (2) the purposes of the foundation have been achieved or not achieved; or (3) a final and binding court decision is issued dissolving the foundation, on the grounds of violating public order, not being able to pay its debt after being declared bankrupt by the court, or lacking sufficient assets to pay the debt after the bankruptcy declaration is revoked.³⁷

While the law and regulations governing foundations in Indonesia are comprehensive and up to date, the same is not the case for associations. As mentioned previously, associations are still regulated under *Staatsblad* 1870-64, which was enacted in 1870. It consists only of 11 articles³⁸ addressing the legal entity status of the incorporated association, dissolution, treatment of remaining assets after liquidation, and limitations for ordinary associations.

Unlike the foundation, the association is a membership-based organization. There are two types of associations in Indonesia, the incorporated association (with legal entity status) and the ordinary association (without legal entity status). Legal entity status is granted by the *Directeur van Justitie* (now the Ministry of Law and Human Rights), following approval of the statutory purposes.³⁹ Rejection of an application by the Ministry may only occur on the basis of the public interest and must be accompanied with reasons.⁴⁰ It is not clearly stated in the *Staatsblad* whether or not the reasons provided should be in written form.

Associations may be dissolved voluntarily or involuntarily. Voluntary dissolution is based on the agreement of its members, the expiration of its existence as defined in its governing statute, or accomplishment of its purposes. Involuntary dissolution may result when the Government⁴¹ revokes the association's legal entity status for violation of public order. The District Attorney may file a case in civil court to revoke the legal entity status of an association when it violates its approved statutory purposes.⁴² The liquidation process is then conducted by the State Receiver (*Balai Harta Peninggalan*), and the remaining assets after liquidation can be

³⁶ See Article 52 Law on Foundations.

³⁷ See Article 62 Law on Foundations.

³⁸ Compare with Law on Foundations, which consists of 73 Articles.

³⁹ See Article 1 and Article 2, *Staatsblad* 1870-64. Statutory purposes contains the objectives, basic values, working environment, and other provisions of the associations.

⁴⁰ See Article 3, *Staatsblad* 1870-64.

⁴¹ The *Staatsblad* 1870-64 describe as Governor General ("Gubernur Jenderal"). See Article 5, *Staatsblad* 1870-64.

⁴² See Article 6, *Staatsblad* 1870-64.

distributed to the association's members or to others who have the rights, proportionally based on their contribution.⁴³

Regarding ordinary associations, the *Staatsblad* 1870-64 states that such associations cannot conduct activities as a legal entity (legal person). Any actions undertaken by an ordinary association will be considered as the actions of the individual member of the association.⁴⁴ Further governance of ordinary associations is regulated internally, through bylaws, as well as through other general civil law provisions, especially Article 1653 and Article 1654 Indonesian Civil Code.⁴⁵

The fact that associations are still regulated under a colonial-era law has a practical impact on civil society in Indonesia. As revealed in Table 1 above, there are 21,301 foundations and only 268 incorporated associations. This unusual imbalance results, at least in part, from the lack of knowledge and information about the *Staatsblad* 1870-64, including among the public notaries in various regions in Indonesia.

In the early 1990s, a draft law was prepared by the Ministry of Law and Human Rights (the Ministry of Justice at that time), entitled "Bill on Foundations and Associations." In 2001, however, due to the influence of the IMF Letter of Intent, the draft law on Foundations was separated and enacted as Law No. 16 (2001) on Foundations.⁴⁶ The new Law targeted ex-President Soeharto's foundations, which were suspected as vehicles for corruption. The impact of the Law, however, was far broader, since there are thousands of foundations in Indonesia.

In addition to the foundation and association, Indonesian law includes the "societal organization" (*Organisasi Kemasyarakatan* or *Ormas*). The societal organization, introduced by the Law No. 8 (1985) for political reasons, is not a legal entity form, but rather a status for CSOs that are registered with the Ministry of Home Affairs. Organizations registered will receive a registration acknowledgment known as "*Surat Keterangan Terdaftar (SKT)*" or "Letter of Registration" issued by the Ministry of Home Affairs, Directorate General of National Unity and Politics (*Direktorat Jenderal Kesatuan Bangsa dan Politik*). This article will proceed to consider societal organizations under this law more deeply.

⁴³ See Article 7, *Staatsblad* 1870-64.

⁴⁴ See Article 8, *Staatsblad* 1870-64.

⁴⁵ See Article 9, *Staatsblad* 1870-64. Article 1653 and Article 1654 of the Indonesian Civil Code relates to Legal Entities:

Article 1653: *In addition to an actual partnership, the law shall also acknowledge associations of individuals as legal entities, whether they are established by public authority or acknowledged as such, or whether they are permitted as lawful, or whether they are established with a specific objective, provided that they do not violate the law or proper order.*

Article 1654: *All established legal entities shall be, even as private individuals, authorized to perform civil acts, without prejudice to the public ordinances, in which such authority may be amended, restricted or rendered subject to certain formalities.*

⁴⁶ Letter of Intent dated January 20, 2000, Memorandum of Economic and Financial Policies Medium-Term Strategy and Policies for 1999/2000 and 2000, Chapter IV, Structural Reform, Article 32. See www.imf.org. It stated, "...The Ministry of Law and Legislation will form a working group to make policy recommendations and to draft legislation on foundations to be submitted to Parliament by end-April 2000. The legislation will require foundations to file public statement of activities, including audited accounts."

C. Law No. 8 (1985) on Societal Organizations

Law No. 8 (1985) on Societal Organizations was conceived and enacted during Soeharto's New Order regime. The original Bill on Societal Organizations was included in a legislative package called "Package of Bills on Politics" (*Paket Undang-Undang Politik*), together with four other bills: the Bill on General Elections; the Bill on People's Consultative Assembly, House of Representatives, and Regional House of Representatives; the Bill on Political Parties; and the Bill on Referendum.

Discussion in Parliament began on June 23, 1984, and continued until May 25, 1985. The Bill on Societal Organizations was envisioned not to enable CSOs, but to restrict them. Behind the Bill lay the strong motivation to promote political stability.

1. Legislative History of 1985 Law

The need to develop the Bill on Societal Organizations was articulated in the Decree of People's Consultative Assembly No.II/MPR/1983 on State Policy Guidelines (*TAP MPR No.II/MPR/1983 Tentang Garis-garis Besar Haluan Negara*), Chapter IV on Politic, letter g and letter h.

In addition, the importance of political stability was emphasized by President Soeharto in his State Address on August 16, 1983:

*... Efforts to improve and structure the societal organization should be put in the framework of guaranteeing the sustainability of Pancasila, national stability, and national development, as implementation of Pancasila. All of this influencing the spirit and direction as shown by State Policy Guideline....*⁴⁷

In the first meeting of the Special Committee for the Bill on Societal Organizations (April 22, 1985), the Chairman of the Committee, Mr. Suhardiman from *Fraksi Karya Pembangunan*,⁴⁸ reminded the Committee about the importance of this law. The Chairman urged members of the Committee toward "not acting as politician, but more as statesman." Furthermore, the Chairman made reference to the statement of Commander of Armed Forces (*Panglima Angkatan Bersenjata*) on April 17, 1985, that there were efforts by people to disturb the deliberation on this Bill.

In the early discussions on the Bill, the Chairman identified six main problems: the title of the law, supervision, suspension and dissolution, the relation between religions and *Pancasila*,⁴⁹ elucidation of Article 1 regarding the definition of "societal organization," and elucidation of Article 2 regarding the basic principles of societal organizations. Each of these topics was intensely debated.

⁴⁷ See State Address, free translation.

⁴⁸ The ruling party.

⁴⁹ *Pancasila* is Indonesian state fundamental norm created in 1945, which consist of five ("*panca*") principles ("*sila*"), as follows: (1) belief in the one and only God; (2) just and civilized humanity; (3) the unity of Indonesia; (4) democracy lead by wisdom in the unanimity arising out of deliberations amongst representatives; and (5) social justice for all people of Indonesia. See http://www.indonesianembassy.org.uk/aboutIndonesia/indonesia_facts.html.

a. Discussion on Definition and Scope of Societal Organization

In the early draft of the Bill on Societal Organizations being discussed in the Parliament in 1985, the Bill excluded other types of organizations or associations regulated under separate laws. The draft Bill, in the Elucidation of Article 1, stated:

*“... organization or association regulated under separated laws is not included in the definition of Societal Organization in this law.”*⁵⁰

This position, however, was not accepted following discussion in the Special Committee. Instead, the Elucidation of Article 1 was revised to state that any organization or association, which is established voluntarily by Indonesian citizens, is included in the definition of a societal organization. The law only excludes organizations established by the Government, such as the Boy Scouts (*Praja Muda Karana* or *Pramuka*), Civil Servant Organization (*Korps Pegawai Republik Indonesia* or *Korpri*), and organizations working in economic activities (*cooperatives, limited liability corporation, etc.*).

This broad definition of societal organization will later become problematic in the implementation of the law. The definition embraces all types of organizations, whether with or without legal entity status, including foundations and associations. For those with legal entity status, registration as a societal organization serves little or no purpose. It seems to amount to a kind of special status, though it is accompanied by no benefits. Indeed, the concept of social organization makes sense only as a tool of state control.

b. Discussion on Single Basic Principle (*Asas Tunggal*) of *Pancasila*

The relationship between religion and *Pancasila* is controversial and sensitive. Article 2(1) of the 1985 draft bill states: “Societal organizations uphold the one and only basic principle, *Pancasila*.” Implementation of this requirement (known as *Asas Tunggal*, the single basic principle) may be problematic for faith-based organizations.

Regarding this issue, President Soeharto gave his explanation in his State Address in 1983 as follows:

“... regarding the field of religion and belief in God, we still strongly hold to the Pancasila, Indonesian Constitution 1945, Manual on Understanding and Implementing Pancasila (Pedoman Penghayatan dan Pengamalan Pancasila), and State Policy Guideline (Garis-Garis Besar Haluan Negara) year 1983. Pancasila is not religion. Pancasila also will not and could not replace religion. We will not make Pancasila as religion. It is also impossible to make religion as Pancasila...”

This idea of *Asas Tunggal* was rejected mostly by Islamic-based organizations, since most of these organizations considered Islam as their basic principle. In Parliament, the Islamic political faction, known as *Fraksi Persatuan Pembangunan*, defended the interests of these Islamic organizations during discussions on the Bill.⁵¹

Following the enactment of the Law, this provision proved problematic and was used as a repressive measure against some CSOs. For example, on December 10, 1987, the Ministry of Home Affairs dissolved the Indonesian Islamic Student (*Pelajar Islam Indonesia* or PII), the

⁵⁰ Elucidation of Article 1 from the early draft bill submitted by the government to the parliament in 1985.

⁵¹ Masukin hasil pansus, masukan FPP ke pasal 2.

biggest student organization in Indonesia, which had been established in 1947,⁵² and the Marhaenis Youth Movement (*Gerakan Pemuda Marhaenis* or GPM).⁵³ The Ministry of Home Affairs argued that both organizations were dissolved because they failed to comply with Law No. 8 (1985) on Societal Organizations.⁵⁴ PII held Islam as its basic principle, and GPM held Marhaenism⁵⁵ as its basic principle.

c. Discussion on Suspension and Dissolution

The dissolution of PII, GPM, and other organizations after the enactment of the Law was somehow predictable. From the 1980s until reform in 1998, there were four factions (political grouping called “Fraksi”) in the Parliament: *Fraksi Persatuan Pembangunan* (F-PP or Faction of United Development), *Fraksi Partai Demokrasi Indonesia* (F-PDI or Faction of the Indonesian Democracy Party), *Fraksi Karya Pembangunan* (F-KP or Faction of Functional Development), and *Fraksi Angkatan Bersenjata* (F-ABRI or Faction of the Armed Forces). During the discussion in the Special Committee, F-PP had challenged the provision allowing the government to dissolve an organization without due process of law. F-PP argued that Indonesia is a rule-of-law state where such measures as suspension and dissolution should be based on court decisions.

This argument, however, was not accepted. F-PDI indicated that it would support suspension and dissolution being conducted by the government, provided that government dissolution is followed by consideration of the Supreme Court. F-ABRI, the military faction in the Parliament, argued that this Law on Societal Organizations was considered as *Lex Specialis* and therefore could authorize the government to dissolve an organization without going to court. The end result of these discussions, as reflected in the Law on Societal Organizations, was that the government can dissolve organizations directly, without court involvement, with the exception of national-level organizations, where consideration of the Supreme Court is also needed.

2. Problematic Provisions of Law No. 8 (1985)

The Law on Societal Organizations was finally enacted on June 17, 1985. All organizations were given two years to comply with the new Law. As of June 17, 1987, the government, based on Article 15, had authority to dissolve organizations that were not complying. Thus, the government was able to move to dissolve PII and GPM, as indicated above.

This section will highlight two key problems with the Law: the controlling focus of the Law, and the arbitrary mechanism for suspension and dissolution.

⁵² mempunyai 1.080 cabang di 26 provinsi dan 4,5 juta anggota, see <http://majalah.tempointeraktif.com/id/arsip/1987/08/01/NAS/mbm.19870801.NAS29687.id.html>.

⁵³ Pelajar Islam Indonesia was dissolved by Decree of Ministry of Home Affairs No.120/1987. Gerakan Pemuda Marhaenis was dissolved by Decree of Ministry of Home Affairs No.121/1987.

See <http://ip52-214.cbn.net.id/id/arsip/1988/03/19/KL/mbm.19880319.KL26644.id.html>; <http://majalah.tempointeraktif.com/id/arsip/1988/02/06/NAS/mbm.19880206.NAS26288.id.html>.

⁵⁴ The deadline for such compliance was June 17, 1987, under Law No.8 Year 1985.

⁵⁵ Marhaenism is the populist ideology of Indonesia’s first President, Soekarno.

a. Provisions with the Intent to Control

The intent to control CSOs is reflected in Articles 1, 2, and 8 of Law on Societal Organizations.

Article 1 defines “societal organization” in broad terms, which include all organizations except for the Boy Scouts (*Praja Muda Karana* or *Pramuka*), Civil Servant Organization (*Korps Pegawai Republik Indonesia* or *Korpri*), and organizations working in economic activities (cooperatives, limited liability corporations, etc.). In practice, the Ministry of Home Affairs also includes foundations within the definition of societal organizations. This is reflected in the Directory of Societal Organizations,⁵⁶ published annually by the Ministry. This inclusive regulatory approach creates confusion and inconsistency. The foundation is clearly defined by the Law on Foundations as a non-membership organization, while the societal organization is defined as a membership-based organization.⁵⁷

Article 2 requires that the single basic principle (*Asas Tunggal*) of *Pancasila* be upheld by societal organizations. The government, based on Article 15, can dissolve organizations that violate this requirement.

Article 8 imposes the Single-Pot Concept (*Konsep Wadah Tunggal*), which seeks to ensure that organizations that share similarities based on activity, profession, function, or religion be organized as one organization.⁵⁸ The concept was intended as a means of clustering related organizations and ultimately as a way of controlling CSOs in Indonesia.

b. Provisions on Suspension and Dissolution

The Law provides nine grounds for suspending or dissolving a societal organization, including the following:

1. The societal organization does not uphold *Pancasila* as the one and only basic principle of the organization.⁵⁹
2. The societal organization’s mission statement is not in the framework of achieving the national objectives as stated in the preamble of the 1945 Indonesian Constitution.⁶⁰
3. The societal organization fails to put the basic principle of *Pancasila* and its mission statement in its bylaws.⁶¹
4. The societal organization fails to have bylaws, does not implement the *Pancasila* and 1945 Indonesian Constitution, and does not preserve the unity of the nation.⁶²

⁵⁶ See Directory of Societal Organizations, <http://www.depdagri.go.id/basis-data/2011/01/17/direktori-organisasi-kemasyarakatan>.

⁵⁷ See Chapter IV of Law No.8 on Societal Organization, on Membership and Administration. Also see Chapter III on Functions, Rights, and Obligations.

⁵⁸ In the elucidation of Article 8, the law gave examples of Komite Nasional Pemuda Indonesia (KNPI) for youth organization, and Himpunan Kerukunan Tani Indonesia (HKTI) for peasants’ organization.

⁵⁹ Article 2 and Article 15, Law No.8 Year 1985 on Societal Organizations.

⁶⁰ Article 3 and Article 15, Law No.8 Year 1985 on Societal Organizations.

⁶¹ Article 4 and Article 15, Law No.8 Year 1985 on Societal Organizations.

5. The societal organization disturbs the public order.⁶³
6. The societal organization receives foreign support without approval from the Government.⁶⁴
7. The societal organization gives support to a foreign party that can harm the interest of the nation.⁶⁵
8. The societal organization is considered to be promoting the ideology of Communism, Marxism-Leninism, or another ideology that is against *Pancasila* and the 1945 Indonesian Constitution.⁶⁶
9. The societal organization does not comply with the Law No. 8 (1985) on Societal Organizations after two years of its enforcement (June 17, 1987).⁶⁷

The suspension and dissolution of societal organizations is further regulated by Government Regulation No. 18 of 1986 on the Implementation of Law No. 8 of 1985 regarding Societal Organizations. Before suspending a societal organization, the government must send a written warning at least twice within 10 days to the administrator, local administrator, or central administrator of the organization. If there is no response from the organization within one month, the government must summon the administrator. If the administrator does not appear, or if the societal organization continues its illegal activities, the government can suspend the organization, after receiving consideration and advice from the Supreme Court (for national-level organizations) or other relevant institution appointed by the Ministry of Home Affairs (for organizations at the provincial or city level). The organization and the public will be informed of the suspension. The government may consider revoking the suspension if the organization ceases its illegal activities, admits its wrongdoing, or replaces its administrator. If the organization continues its illegal activity, the government can dissolve it.

As mentioned above, the government can also dissolve organizations that fail to comply with the Law after June 18, 1987. In this case, the government will first give a written warning. If the organization does not comply within three months, the Government can dissolve it, after receiving consideration and advice from the Supreme Court (for national-level organizations) or other competent institutions (for organizations at the provincial or city level). The organization and the public will be informed of the dissolution.

None of these procedural mechanisms was applied in the dissolution of PII or GPM in 1987. Neither organization even received the decree of the Ministry regarding the dissolution. Feisal Tamin, Head of Public Relations of the Ministry, explained that there was no need to inform these two organizations, since their existence was no longer acknowledged by the government.⁶⁸

⁶² Article 7 and Article 15, Law No.8 Year 1985 on Societal Organizations.

⁶³ Article 13(a), Law No.8 Year 1985 on Societal Organizations.

⁶⁴ Article 13(b), Law No.8 Year 1985 on Societal Organizations.

⁶⁵ Article 13(c), Law No.8 Year 1985 on Societal Organizations.

⁶⁶ Article 16, Law No.8 Year 1985 on Societal Organizations.

⁶⁷ Article 18 and Article 15, Law No.8 Year 1985 on Societal Organizations.

⁶⁸ See <http://ip52-214.cbn.net.id/id/arsip/1988/03/19/KL/mbm.19880319.KL26644.id.html>.

Any societal organizations dissolved for promoting Communism, Marxism-Leninism, or any other ideology against *Pancasila* and the 1945 Indonesian Constitution is declared to be a “banned organization” (*organisasi terlarang*). A written decision will be communicated to the organization and announced to the public.

3. Recent Developments

On April 4, 1986, the Government issued Government Regulation No. 18 of 1986 on the Implementation of Law No. 8 of 1985 regarding Societal Organizations. Furthermore, the Ministry of Home Affairs also promulgated Ministry of Home Affairs Regulation No. 5 of 1986 on the Scope and Notification Procedure to the Government and the Sign and Logo of the Societal Organizations (October 1, 1986) and Instruction from the Minister of Home Affairs No. 8 of 1990 on Non-Governmental Organization Supervision (March 19, 1990).

After the fall of Soeharto’s regime, this set of laws and regulatory measures was practically not enforced. However, the existence of these laws and regulations served to threaten the freedom of CSOs in Indonesia.

In 2006-2007, the Ministry of Home Affairs started to prepare a draft bill to revise the 1985 Law. The Ministry stated that it had changed its perspective and also admitted that the 1985 Law on Societal Organizations is no longer suitable for a democratic era. The Ministry of Home Affairs was successful in placing the bill on the National Legislation Program for 2008. The bill, however, was never discussed by the Parliament.

Subsequently, the Ministry started to discuss further implementing regulations for the Law.⁶⁹ The Ministry of Home Affairs (MoHA) then issued Ministry of Home Affairs Regulation No. 38 of 2008 on the Obtainment and Granting Societal Organization Donations From and To Foreign Entities (August 15, 2008) and Ministry of Home Affairs Regulation No. 15 of 2009 on Guidelines on Cooperation between the Ministry of Home Affairs and Foreign Non-Governmental Organizations (March 4, 2009).

MoHA Regulation No. 38 (2008) provides a detailed reporting procedure for societal organizations in obtaining and disbursing donations from and to foreign parties. Societal organizations must secure approval from the government to receive grants from a foreign party or provide grants to a foreign party.⁷⁰ Societal organizations receiving foreign support without government approval are subject to suspension or dissolution.⁷¹

MoHA Regulation No. 15 (2009) outlines the procedure of cooperation between the MoHA and the foreign NGO. Among other requirements, the foreign NGO must be registered in its home country, have a representative office in Indonesia, and secure approval from the Government of Indonesia.

⁶⁹ This is somehow inconsistent with the statement admitting that the law is no longer suitable for democratic era.

⁷⁰ To be eligible to provide grants to or receive grants from a foreign party, societal organizations must be registered with MoHA, another government body, or local government (Articles 7 and 33(1)). A social organization that receives a grant from a foreign party, or provides a grant to a foreign party, is obligated to report the project plan to the Minister of Home Affairs (Articles 10, 18, 35).

⁷¹ Article 13(b), Law No. 8 (1985) on Societal Organizations.

As a response to a series of violent actions carried out by societal organizations,⁷² a joint meeting was held in Parliament on August 30, 2010, attended by leaders of the House of Representatives; the Attorney General; the Head of Intelligence Agency; the Chief of Police; the Minister of Politics, Law, and Security; the Minister of Home Affairs; the Minister of Religious Affairs; and the Minister of Law and Human Rights. At the meeting it was agreed to review the Law on Societal Organizations. Consequently, the Bill on Societal Organizations was included among the 2011 national legislative priorities.

D. Bill on Societal Organizations 2011

In analyzing the new Bill on Societal Organizations, this article will refer to the published draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011. On October 3, 2011, the Parliament established a Special Committee (*Panitia Khusus*) for the Bill on Societal Organizations. The Special Committee was planning to finalize the Bill by May 2012, but did not manage to do so.

On May 30, 2012, the Special Committee conducted a meeting with the Government. It was agreed to establish a Working Committee to further discuss the Bill. The Chief of the Special Committee, Mr. Abdul Maliq Harmain, mentioned the date of July 12, 2012, as the new time frame for discussion of the Bill in the Plenary Session.

1. Brief Overview

The draft Bill consists of 19 chapters, with a total of 54 Articles. The structure of the draft Bill is as follows:

- Chapter I: General Provision (Article 1);
- Chapter II: Principle, Identification, Characteristics (Article 2 – Article 4);
- Chapter III: Objectives, Function, and Scope (Article 5 – Article 7);
- Chapter IV: Establishment of Societal Organizations (Article 8 – Article 14);
- Chapter V: Registration (Article 15 – Article 18);
- Chapter VI: Rights and Obligations (Article 19 – Article 20);
- Chapter VII: Organization, Domicile, and Board of Executive (Article 21 – 27);
- Chapter VIII: Membership (Article 28 – Article 29);
- Chapter IX: Decision of Organization (Article 30);
- Chapter X: Articles of Association / Bylaws of Societal Organization (Article 31 – Article 32);
- Chapter XI: Finance (Article 33 – Article 34);

⁷² One of them was a street brawl involving members of the Forum Betawi Rempug (Betawi Brotherhood Forum) over the weekend in early August 2010. After the incident, the police brought together the leaders of the societal organizations involved, Pemuda Pancasila, Forum Betawi Rempug, Kembang Latar, and Forkabi, to reconcile their differences.

Chapter XII: Business Enterprise of Societal Organizations (Article 35);
Chapter XIII: Empowerment of Societal Organizations (Article 36 – Article 38);
Chapter XIV: Foreign Social Organizations (Article 39 – Article 40);
Chapter XV: Supervision (Article 41 – Article 43);
Chapter XVI: Dispute Settlement of Organization (Article 44 – Article 45);
Chapter XVII: Prohibition (Article 46);
Chapter XVIII: Sanctions (Article 47 – Article 50); and
Chapter XIX: Concluding Provisions (Article 51 – Article 54).

The draft Bill defines “societal organization” as an organization that is voluntarily established by Indonesian citizens, on the basis of common objectives, interests, and activities, to participate in development in order to achieve the objectives of the state. The draft Bill also regulates the foreign societal organization, which is defined as a nonprofit organization that is established by foreigners as a foreign legal entity and that conducts activity in Indonesia.⁷³

One or more Indonesian citizens may establish a societal organization.⁷⁴ A societal organization may take the form of an organization with legal entity status (e.g., a foundation or association), or an organization without legal entity status (e.g., an ordinary association).⁷⁵ Organizations seeking legal entity status (as an association or foundation) may undergo registration as a societal organization simultaneously.⁷⁶

Ordinary associations (unincorporated associations) must inform the government or local government of their existence in writing.⁷⁷ The government then will issue an acknowledgment of receipt letter (*surat tanda terima pemberitahuan keberadaan organisasi*).⁷⁸ In addition, ordinary associations must register with the government. The government then will issue a Letter of Registered Organization (*Surat Keterangan Terdaftar*).⁷⁹ The Ministry of Home Affairs,

⁷³ See Article 1 draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011

⁷⁴ See Article 8 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁷⁵ See Article 9 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁷⁶ See Article 15 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁷⁷ See Article 14(1) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁷⁸ See Article 14(2) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁷⁹ Article 16(1) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011. The issuance of such letter is already implemented by Ministry of Home Affairs based on Law No.8 Year 1985 on Societal Organization. “Surat Keterangan Terdaftar (SKT)” or “Letter of Registered Organization” with the existing law is issued by Ministry of Home Affairs, Directorate General of National Unity and Politics (Direktorat Jenderal Kesatuan Bangsa dan Politik)

Governor, or Mayor will issue this letter for organizations working at the national level, provincial level, and regency/city level, respectively.⁸⁰

A foreign societal organization, in order to operate in Indonesia, must originate from a country with diplomatic relations with Indonesia; must be established as a legal entity in its country of origin; must have an operational license from the Ministry of Foreign Affairs; must submit such license to the Ministry of Home Affairs; and must, in implementing its activity, cooperate with or involve one or more Indonesian societal organizations.⁸¹

The permissible scope of activity for societal organizations includes, among others, the following fields: religion and belief, law, social activities, economy, health, education, human resources, strengthening *Pancasila* democracy, women's empowerment, environment and natural resources, youth, sports, professions, hobbies, and arts and culture.⁸² In order to fulfill the needs of the organization, a societal organization with legal entity status may establish business enterprises.⁸³

Notably, the draft Bill does not mandate the Single Principle (*Asas Tunggal*) of *Pancasila*. The draft Bill only states that the principle(s) of a societal organization must not conflict with *Pancasila* and the 1945 Constitution. A societal organization may therefore adopt another specific identity which reflects its intention and aspiration and does not conflict with *Pancasila* or the Constitution.⁸⁴

The draft Bill also adopts a less rigid approach toward the Single-Pot Concept (*Konsep Wadah Tunggal*), which is emphasized in the existing Law No. 8 (1985) on Societal Organizations. Specifically, the draft Bill states that to optimize its role and function, a societal organization *may* integrate itself into an umbrella organization.⁸⁵

The draft Bill requires that a societal organization make its activity and financial report accessible to the public.⁸⁶ The public is entitled to give support or make objections/complaints regarding the existence or activity of a societal organization. Public support may come in the form of a reward, program, donation, or operational support. The objections/complaints shall be submitted to the government or local government, depending on the territorial scope of the

⁸⁰ Article 16(3) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸¹ See Article 39 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸² See Article 7(2) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸³ See Article 35 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸⁴ See Article 2 and Article 3 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸⁵ See Article 13 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸⁶ See Article 42 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

societal organization. The government then will promote settlement through the mechanism of mediation and conciliation.⁸⁷

Permissible sources of financing for societal organizations include membership fees, public donations, grants/donations from foreigners or foreign institutions, business income, and other donation/business that is legal under the law. A societal organization receiving a grant or donation from a foreign party must seek approval from the government.⁸⁸

The underlying legal entity status (for societal organizations established by organizations with legal entity status) or the Letter of Registered Organization (for ordinary associations) may be revoked by issuing institutions, if the organization is using a name, symbol or sign which is similar to the flag or the State's symbol of the Republic of Indonesia, the Government's symbol, the state symbol of other countries or international institutions, the symbol of a separatist movement or banned organization, the symbol of another societal organization, or the symbol of political parties.⁸⁹

The government may suspend a societal organization temporarily (for a maximum of 90 days)⁹⁰ after a written warning, where the organization is conducting activity that conflicts with the Constitution and prevailing laws and regulations; endangers the unity and safety of the State; spreads hostility among ethnic groups, religions, races, etc.; undermines the unity of the State; disturbs public order; engages in violent action; or damages public facilities.⁹¹

Within 30 days after the temporary suspension is issued, the government or local government may submit a petition for permanent suspension to the District Court (for provincial/city level organizations) or the Supreme Court (for national-level organizations). The District or Supreme Court must issue a decision no later than 30 days from the date of the petition. In case the temporarily suspended organization commits another violation, the District/Supreme Court may dissolve the organization.⁹²

The government may also suspend the activity of a societal organization after issuing three warnings (occurring within a maximum period of 60 days), where the organization receives from or provides to a foreign party any kind of support which is against the law; conducts

⁸⁷ See Article 43 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸⁸ See Article 34(2) draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁸⁹ See Article 46(1) and Article 47(2) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁹⁰ The District Court or Supreme Court will make the decision for permanent suspension. See Article 48(3) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁹¹ See Article 46(2) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁹² See Article 48 of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

fundraising for the interest of a political party or campaign for a political position; or receives support (money, goods, or services) from any kind of party without a clear identity.⁹³

Finally, the Court may dissolve a societal organization that follows, develops, and promotes Communism or Marxism-Leninism. The board of the executive of such an organization, if convicted, can be sentenced to 15 to 20 years in prison.⁹⁴

2. Problems

The primary problem does not spring from the specific provisions and details of the Bill, but from the concept of the Bill itself. As described previously, the societal organization was originally conceived for political reasons during Soeharto's regime in order to control CSOs in Indonesia. Three issues deserve highlighting.

First, the concept of "societal organization" amounts to a special status for organizations that brings no benefits. The laws in many countries provide for a special status for CSOs – a public benefit or charitable status, for example – but with this status come fiscal privileges, usually in the form of tax exemptions. The Bill on Societal Organizations envisions no privileges or benefits. Instead, the Bill seems to rest on the original premise of control.

Second, the Bill, if enacted, would create a kind of second-tier registration system. The Bill envisions that a societal organization may take the form of an organization with legal entity status, such as a foundation or association. Although the foundation and association may undergo registration as a societal organization simultaneously in the process of seeking the underlying legal entity status, the meaning of having the status of a societal organization is unclear.

The Special Committee in the Parliament currently has the opportunity to improve the legal framework. The immediate priority should be on the Bill on Associations, which has a valid legal basis and is already listed in the National Legislation Program 2010-2014, number 228. With an enabling Law on Foundations (for non-membership organizations) and Law on Associations (for membership organizations), there would be no need to regulate the civic sector through the Bill on Societal Organizations. A broadly sweeping and highly politicized legal status, as represented by the societal organization, is clearly not suitable for a democratic country like Indonesia.

Third, the Bill on Societal Organizations envisions the continuing authority of the Ministry of Home Affairs (MoHA), and the Directorate General of National Unity and Politics (*Direktorat Jenderal Kesatuan Bangsa dan Politik*) in particular. The approach of the MoHA, and especially the Directorate General of National Unity and Politics, is always grounded in the perspective of politics and security. Such a regulatory approach is not likely to lead to a healthy and strong civic sector in Indonesia. By contrast, in many civil law countries, it is the Ministry of Justice or the court system that is made responsible for the registration and supervision of CSOs.

Indonesia needs a more enabling legal framework to strengthen the CSO sector. Instead of vesting regulatory authority with the MoHA, it would be better to assign the Ministry of Law

⁹³ See Article 49(1) of draft Bill provided by the Parliament (dated May 30, 2011) in the series of public hearings conducted in June 2011.

⁹⁴ See Article 107(c, d, e) of Law Number 27 of 1999 on Amendment of Criminal Code in relation with Crime Against State Security.

and Human Rights to handle the registration of foundations and associations. Relevant sectoral ministries, such as the Ministry of Social Affairs, Ministry of Education, or Ministry of Religious Affairs can use their regulatory roles to further support and facilitate the activities of foundations and associations.

E. Strategic Recommendations

This section provides two phases of strategic recommendations: short-term and long-term recommendations.

1. Short-term Recommendations (June – July or end of 2012)

The Special Committee for the Bill on Societal Organizations in the Parliament originally scheduled the discussion of the Bill to run from January 26 until May 22, 2012, but did not manage to complete the discussion during that time frame.

On May 30, 2012, the Special Committee conducted a meeting with the Government. It was agreed to establish a Working Committee to further discuss the Bill. The Chief of the Special Committee, Mr. Abdul Maliq Harmain, mentioned the date of July 12, 2012, as the new time frame for the discussion of the Bill in the Plenary Session. There is a substantial possibility, however, that the targeted schedule will again not be met.

The short-term recommendations are based on that schedule, seeking to make input into the parliamentary process.

1.1. Recommendations for CSOs

There is a need to raise awareness of the Bill and its implications throughout the CSO sector in Indonesia. One of the lessons learned in conducting advocacy work for the Foundation Law in 2000 is that most CSOs are narrowly focused on their core issues (issues related directly to their own mission) and often tend to ignore issues related to the underlying legal framework (legal entity status, taxation, etc).

The lack of understanding regarding the Bill on Societal Organizations and the legal framework for CSOs in Indonesia weakens the public pressure against the Bill. Some CSOs and members of the public support the Bill because they believe it will solve the problems caused by organizations promoting hatred and violence. In fact, the Criminal Code of Indonesia is more than sufficient to support law enforcement and to respond to violent activities. The Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana – KUHP*) already covers violent offenses conducted by a principal criminal actor, or one who aids, abets, or commands a crime, or one who publicly promotes hatred against a group of people. The real problem is the lack of political will on the part of law enforcement agencies, including the police, to enforce the law against such individuals.

A constructive response to the Bill would be for CSOs to participate in and contribute to the ongoing process in the Parliament, by sharing their views on the Bill and supporting a more enabling legal framework for CSOs. CSOs could also request a hearing with each political faction to discuss the Bill. In order to provide constructive input, however, CSOs need enhanced capacity and access to effective advocacy materials, credible references, comparative international studies, etc.

The recommendations are (1) to raise awareness among CSOs of the Bill on Societal Organizations and its implications throughout the CSO sector in Indonesia; and (2) to empower

CSOs to participate in the Parliamentary process, through access to effective advocacy materials, comparative expertise, etc.

1.2. Recommendations for the Special Committee in the Parliament

The Special Committee needs to understand the legislative history of the Bill on Societal Organizations and understand that civil society is an important sector in a democratic country. Ideally, the Special Committee should not proceed with the Bill. However, it may not be realistic to expect the Committee to withdraw the Bill, since the Bill is already being discussed (special committee established, budget allocated, etc). One potential solution is for the Special Committee to shift its focus from the Bill on Societal Organizations to the Bill on Associations. As mentioned previously, the Bill on Association is already listed number 228 in the National Legislation Program 2010-2014. The challenge of this strategy is that for the Bill on Associations, the relevant ministry is the Ministry of Law and Human Rights, not the Ministry of Home Affairs. It would be politically difficult for the Special Committee to shift the focus from one Bill to another, because it would mean a shift in liaising with a different ministry.

The recommendations for the Special Committee are (1) to study the legislative history of the Bill on Societal Organizations and the importance of civil society to Indonesia; and/or (2) to withdraw the Bill on Societal Organizations from consideration and shift its focus to the Bill on Associations.

1.3. Recommendation for the Ministry of Law and Human Rights

Since 1994, the Ministry of Law and Human Rights has been discussing the Bill on Associations. As explained previously, the draft Bill sprang from a unified draft law entitled “Bill on Foundation and Association.” In 2001, because of the influence of the IMF, a separate bill on foundations was prepared and enacted as the Law on Foundations.

The enactment of a new Law on Associations is a crucial step toward strengthening the legal framework for associations. To achieve this, the Ministry of Law and Human Rights must be more active in promoting the Bill on Associations. The Ministry of Law must coordinate with the Ministry of Home Affairs to establish a conducive legal framework for CSOs in Indonesia. The challenge is that in practice, so-called “sector-ego” may prevent a ministry from “disturbing” another ministry’s program. The discussion of the Bill on Associations will surely overlap with the discussion of the Bill on Societal Organization since both Bills relate to membership-based organizations.

The recommendation is for the Ministry of Law to promote the Bill on Associations to the public, to other ministries, and to the Parliament.

2. Long-term Recommendations (2012 – 2014)

2.1 Recommendations for CSOs

Government arguments supporting increased regulation of CSOs in Indonesia relate to accountability and transparency, especially concerning foreign funding. CSOs need to improve their ability to demonstrate accountability and transparency. More generally, CSOs need to be more proactive in managing governmental and public perceptions, rather than responding to government-led initiatives.

CSOs need greater awareness of their rights and opportunities under the legal framework. For example, CSOs should be more aware of taxation issues and the availability of tax

incentives. Tax deductions for donations to support disaster rehabilitation, research and development, improved infrastructure, education facility, and sports have been available since 2008.

CSOs need to be more involved in the lawmaking process. As mentioned earlier, the Indonesian National Legislation Program for 2010-2014 includes at least five bills closely related to the legal environment for civil society in Indonesia. CSOs need to be prepared to engage in research, advocacy, parliamentary lobbying, and public campaigning related to the discussion process of these bills.

2.2. Recommendations for the Government and Parliament

The Government and Parliament need to adopt a more enabling approach toward CSOs in Indonesia. The approach should be to facilitate and improve the quality of the legal environment, not to limit and repress civil society. CSOs play a crucial role in a democratic country.

It is important for Indonesia to improve the legal framework. The general framework should be based on the Foundation Law (for non-membership organizations) and the Association Law (for membership-based organizations). The Law on Societal Organizations should be revoked, not revised.

Data from the Ministry of Law and Human Rights reveals the existence of 21,301 registered foundations and 268 incorporated associations. This data reflects a serious problem in the field. There are undoubtedly more than 21,301 foundations and 268 incorporated associations in Indonesia; this reveals not only a problem of registration or an incomplete database, but also a problem of the effectiveness of law. It also clearly reflects an imbalance between the number of foundations and the number of associations.

The Ministry of Law and Human Rights has established 12 “Law Centers” in some provinces (Banda Aceh, Ternate, Yogyakarta, Banten, Pekanbaru, Medan, West Java, Central Java, East Java, Padang, Nusa Tenggara Timur, and Jambi). These law centers could be a good vehicle to connect various CSOs in the regions to the Ministry of Law in Jakarta. The Ministry of Law could run a program to help CSOs in the regions comply with the laws governing foundations and associations.

The Ministry of Law and Human Rights also needs to build proper database for CSOs. The Ministry of Law should have an accessible and reliable database for information on foundations and associations established in Indonesia.

Furthermore, the Government and Parliament should engage in more strategic partnership with CSOs. This should include open communication and improved relations with the CSO sector.

Update

The discussion of the draft bill is still going on. In the closing speech of the First Session of House of Representatives 2012-2013, the House Speaker Marzuki Ali said that the Bill on Societal Organization is one of 29 priority bills that will have an extended period of discussion. The bill has now entered the first phase of deliberation.

In the draft bill dated November 2012, there are some important changes compared to the 2011 draft bill.

The 2012 draft bill creates three categories for Foreign Societal Organizations: (1) Ormas with foreign legal entity, (2) Ormas founded by foreign citizens, and (3) Ormas founded jointly by Indonesian citizens and foreign citizens.

Receiving international funds will impose additional obligations, such as reporting the use of the foreign funding to the Government/Local Government.

The Government or Local Government, depending on the “level” of the Ormas, could issue a Warning Letter (*Surat Peringatan*) to an Ormas that violates the obligations listed in Article 20⁹⁵ or the prohibition listed in Article 50(1).⁹⁶ The Warning Letter would ordinarily be issued in three phases of: first, second, and third warning.

However, the Government or Local Government could directly issue the third Warning Letter (*Surat Peringatan Ketiga*) if the Ormas violated article 50(2), 50(3), or 50(4), which list prohibited activities as follows:

- a. conduct activity that conflicts with the 1945 Constitution of the Republic of Indonesia and prevailing laws and regulation;
- b. conduct activity that endangers the unity and safety of the Unitary State of the Republic of Indonesia;
- c. spread hostility between ethnic groups, religious groups, or racial groups;
- d. commit blasphemy towards the acknowledged religion in Indonesia;
- e. disrupt the unity of the state;
- f. conduct activity that is harsh, disturbs the public order, or damages public facilities;
- g. receive from or give to a foreign party any form of aid that conflicts with the prevailing laws and regulations;
- h. gather fund for the interests of a political party;
- i. receive aid in form of money, goods, or services from any party without a clear identity;

⁹⁵ Article 20 of the Bill on Societal Organizations stated that a Societal Organization shall have the following duties:

- a. implement activity in accordance with the objectives of organization;
- b. maintain the unity of Unitary State of the Republic of Indonesia;
- c. maintain the values of religious, cultural, moral, ethical, moral norms, and to be useful within the society;
- d. maintain public order and create peacefulness within society;
- e. conduct financial management in a transparent and accountable manner; and
- f. participate in the achievement of the objectives of the State.

⁹⁶ Article 50 (1) stated that a Social Organization is prohibited from using a name, symbol, or picture sign which is similar to:

- a. the flag or State’s emblem of the Republic of Indonesia;
- b. the State’s emblems or Government’s emblem;
- c. the name, flag, or State’s emblem of other countries or international bodies or institutions;
- d. the name, flag, or organization symbol of separatism movement or forbidden organizations;
- e. in its basis or entirety, the name, symbol, or picture sign of a Social Organization or other political parties.

- j. follow, develop, and spread teaching or ideology that conflicts with Pancasila.

The Warning Letter could lead to Temporary Suspension by the Government/Local Government, with a later ruling by the Supreme Court/District Court; and Dissolution, decided by the Supreme Court/District Court.

Changing Legal Environments for Civil Society Organizations

What's New in the Governance of Canadian Not-for-Profit Corporations?

Terrance S. Carter*

A. Introduction

The purpose of this article is to provide a brief overview of the new federal and Ontario not-for-profit (“NFP”) corporation legislation. The *Canada Not-for-profit Corporations Act*¹ (“CNCA”) and the Ontario *Not-for-Profit Corporations Act, 2010*² (“ONCA”) (collectively referred to as “NFP legislation”) have been modeled on reformed for-profit corporate statutes that were developed during the 1970s and 1980s, such as the *Canada Business Corporations Act*³ (“CBCA”) and the *Ontario Business Corporations Act*⁴ (“OBCA”). Such modeling has resulted in comprehensive and organized rules and provisions applicable to NFP corporations that are similar to those found in for-profit legislation. This move towards harmonization of for-profit and NFP legislation not only permits the interpretation of NFP legislation through analogy to already settled cases regarding for-profit legislation, but also brings clarity to some areas where none existed before with regard to NFP legislation.

By way of background, the CNCA was enacted by Parliament and received Royal Assent on June 23, 2009. Until relatively recently, federal NFP corporations only had to be concerned with Part II of the *Canada Corporations Act*⁵ (“CCA”), which regulated the incorporation and governance of federal non-share capital corporations. Since the CNCA was proclaimed in force on October 17, 2011, existing federal NFP corporations governed by the CCA will now have three years from the date of proclamation (i.e. until October 14, 2014) to continue under the

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¹ S.C. 2009, c. 23 [“CNCA”].

² S.O. 2010, c. 15 [“ONCA”].

³ R.S.C., 1985, c. C-44 [“CBCA”].

⁴ R.S.O. 1990, c. B.16 [“OBCA”].

⁵ R.S.C. 1970, c. C-32 [“CCA”].

CNCA. Until then, Part II of the CCA will continue to apply to those corporations that have not yet continued under the CNCA.

With regard to Ontario corporations, the Ontario *Corporations Act*⁶ (“OCA”) had not been substantively amended since 1953. Bill 65, *An Act to revise the law in respect of not-for-profit corporations, 2010*, was introduced on May 12, 2010 to replace Part II of the OCA with the ONCA, and received Royal Assent on October 25, 2010. The ONCA is now expected to take effect on July 1, 2013.⁷ Once the ONCA takes effect, existing NFP corporations will have three years to amend their constating documents to conform with the ONCA. At the end of that period of time, any documents which are inconsistent with provisions of the ONCA and which have not been amended will be deemed to be amended to conform with the ONCA.⁸

The following is a selective summary of some of the more important aspects of both the CNCA and ONCA.

B. Incorporation

Under the CNCA and ONCA, incorporation will be “as of right,” similar to the mechanisms used in the CBCA and OBCA, respectively. One or more individuals or corporations may incorporate a NFP corporation under either statute by filing articles of incorporation.⁹ The CNCA requires that the articles be accompanied by notices of registered office and of the first directors.¹⁰ The ONCA requires that the articles must be accompanied by “any other prescribed documents or information with the Director in accordance with the regulations.”¹¹ However, no regulations have been released to date under the ONCA. Upon receipt of the articles of incorporation, a certificate of incorporation will be issued.¹² In comparison, incorporation has been subject to the discretion of the applicable Minister under the CCA and OCA. Federal and Ontario NFP corporations will no longer set out their “objects” in letters patent, but instead will set out their “purposes” in the articles of incorporation.¹³ NFP corporations in both jurisdictions will have the capacity, rights, powers, and privileges of a natural person.¹⁴ As well, the doctrine of *ultra vires* will no longer apply to either federal or Ontario NFP corporations. This means that if a corporation acts outside of its purposes, the acts will still be valid. Under both statutes, NFP corporations will not be required to file bylaws at the time of incorporation, although they will be required to do so within a certain period of time

⁶ R.S.O. 1990, c. C.38 [“OCA”].

⁷ Online: Ontario Ministry of Consumer Services, http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx. For ease of reference, the author discusses both the CNCA and ONCA in the present tense notwithstanding the pending proclamation of the ONCA.

⁸ For more information, see Kate Lazier, “Transition to Under the Ontario Not-For-Profit Corporations Act” (paper presented to the Ontario Bar Association, June 7, 2011).

⁹ CNCA, *supra* note 1, s. 6(1) and ONCA, *supra* note 2, s. 7(1).

¹⁰ CNCA, *supra* note 1, s. 8.

¹¹ ONCA, *supra* note 2, s. 7(1).

¹² CNCA, *supra* note 1, s. 8-9 and ONCA, s. 9(1).

¹³ *Ibid.*, CNCA, s. 7(1)(f) and ONCA, s. 8(1).

¹⁴ *Ibid.*, CNCA, s. 16(1) and ONCA, s. 15(1).

under the provisions of the CNCA and ONCA (twelve months under the CNCA¹⁵ and a time to be prescribed under the ONCA).

C. Types of Corporations

One of the prominent characteristics of the new NFP legislation is the categorization of different types of corporations and the different provisions that apply to these categorizations. The different types of corporations and provisions that apply are outlined below.

1. CNCA¹⁶

Under the CNCA, corporations are categorized into two types: soliciting corporations and non-soliciting corporations. A soliciting corporation is defined in subsection 2(5.1) of the CNCA, with the relevant time periods and prescribed monetary amounts set out in section 16 of the *Canada Not-for-profit Corporations Regulations*.¹⁷ A corporation becomes a soliciting corporation if, in a fiscal year, the corporation receives more than \$10,000 in gross annual revenue, directly or indirectly, from public sources, namely:¹⁸

(a) requests for donations or gifts from a person who does not fall into any of the following categories:

- members, directors, officers, or employees of the corporation at the time of the request for donation or gifts;
- legal or common law spouse of the above list of persons; or
- children, parents, brothers, sisters, grandparents, uncles, aunts, nephews, or nieces of the above list of persons;

(b) grants or other similar financial assistance received from the federal or a provincial or a municipal government, or agencies of such government; or

(c) donations or gifts received from a soliciting corporation.

A corporation that does not meet the definition for a soliciting corporation is a non-soliciting corporation.

Depending on whether a corporation is a soliciting or non-soliciting one, the distinction will affect its governance structure, e.g., the size of the board and the dissolution clause to be included in the articles; the composition of the board to be set out in the bylaws; whether a unanimous member agreement may be utilized and what provisions are to be included in the agreement; and whether financial statements will need to be filed with Corporations Canada.¹⁹ As such, it is essential to determine the categorization of the corporation.

¹⁵ *Ibid.*, CNCA, s. 153 and *Canada Not-for-profit Corporations Regulations*, S.O.R./2011-223 [“CNCR”].

¹⁶ See Theresa L. M. Man, “The Practical Impact of the Canada Not-for-Profit Corporations Act” (paper presented to the Intensive Short Course on Legal and Risk Management for Charities and Not-for-Profit Organizations, October 5, 2011) at 7-8.

¹⁷ CNCR, *supra* note 15.

¹⁸ CNCA, *supra* note 1, s. 2(5.1) and CNCR, s. 16

¹⁹ The details regarding the governance structure of each type of corporation have been omitted from this paper. For more information, see Man, *supra* note 16.

2. **ONCA**²⁰

Under the ONCA, corporations are divided into two categories: public benefit corporations (“PBCs”) and non-PBCs.²¹ There are two subcategories of PBCs: charitable corporations; and non-charitable corporations that receive more than \$10,000 in a financial year from specific public sources.²² All ONCA corporations that do not fall into any of these criteria are non-PBCs.

A charitable corporation is a corporation that is incorporated for the relief of poverty, the advancement of education, the advancement of religion, or other charitable purposes.²³ It is important to note that whether or not the corporation is a registered charity is irrelevant in deciding whether it is a PBC. The ONCA provides a special exemption of certain members’ remedies to religious corporations. The term “religious corporation” is not defined in the ONCA. Presumably religious corporations are established for the advancement of religion and, therefore, would be charitable corporations.

A non-charitable corporation is a corporation that does not meet the definition of a charitable corporation referred to above.²⁴ Those non-charitable corporations that receive more than \$10,000 in a financial year from any of the following sources will be considered PBCs: (i) donations or gifts from persons that are not members, directors, officers, or employees of the corporation; or (ii) grants or similar financial assistance from the federal, provincial, or municipal government or government agency.²⁵

Generally, higher standards are applied to PBCs because of the public source of their funding. The public interest requires that corporations that receive public funds be subject to tighter regulation and have greater transparency in their operations than those that do not receive public funding. It is important to bear this rationale in mind when attempting to grapple with the different treatment of the categories of corporations under the ONCA.

D. Number of Directors and Elections

1. **CNCA**²⁶

All CNCA corporations, except for soliciting corporations, must have a minimum of one director. Soliciting corporations must have a minimum of three directors, and at least two of the directors must not be officers or employees of the corporation or its affiliates.²⁷ It is necessary to specify in the articles a fixed number of directors, or a minimum and a maximum number of directors.²⁸ When a minimum and a maximum number of directors are chosen, the precise

²⁰ See Terrance S. Carter and Theresa L. M. Man, “The Nuts and Bolts of the Ontario Not-for-Profit Corporations Act, 2010,” *Charity Law Bulletin* No. 262 (September 30, 2011) at 3-4.

²¹ For more information on the special features of PBCs, see *ibid.*, Carter and Man.

²² ONCA, *supra* note 2, s. 1(1).

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See Man, *supra* note 16 at 17.

²⁷ CNCA, *supra* note 1, s. 125.

²⁸ *Ibid.*, s. 7(1)(d).

number of directors to be elected may be determined from time to time by “ordinary resolution” of the members. The members may also delegate this power to the directors.²⁹ An “ordinary resolution” is a resolution passed by a majority of the votes cast on that resolution.³⁰

Under the CNCA, directors may be elected by the members, or, if the articles of the corporation so provide, a certain portion of the directors may be appointed by the directors.³¹ Directors must be individuals who are at least 18 years of age and neither are bankrupt nor have been declared incapable. Unless the bylaws or articles state otherwise, there is no requirement in the ONCA that a director be a member of the corporation.³² There is no express provision for *ex-officio* directors. A director ceases to hold office when he or she dies, resigns, is removed, becomes a bankrupt, or has been declared incapable.³³ Members may remove a director by ordinary resolution at a special meeting. Where a director was elected by a class or group of members that has the exclusive right to elect the director, only that class or group may remove the director by ordinary resolution.³⁴

2. ONCA³⁵

All ONCA corporations must have a minimum of three directors.³⁶ For a PBC, not more than one-third of its directors may be employees of the corporation or of any of its affiliates.³⁷ ONCA corporations may provide in their articles a fixed number of directors; or minimum and maximum numbers of directors.³⁸ The members may amend the articles to increase or decrease the number of directors, or the minimum or maximum number of directors, but a decrease cannot shorten the term of an incumbent director.³⁹ All directors must be at least 18 years old, not incapable, and not bankrupt. Unless the bylaws provide otherwise, there is no requirement that a director be a member of the corporation.⁴⁰

Members may elect and remove directors (except for *ex-officio* directors) by ordinary resolution.⁴¹ Directors may only be elected for a term provided for in the bylaws, up to a maximum of four years.⁴² However, if a class or group of members has the exclusive right to

²⁹ *Ibid.*, s. 133(3).

³⁰ *Ibid.*, s. 2(1).

³¹ *Ibid.*, s. 128. The total number of appointed director must not exceed one-third of the number of directors elected at the previous annual meeting of members. Appointed directors hold office for a term no later than the close of the next annual meeting of members.

³² *Ibid.*, s. 126.

³³ *Ibid.*, 129.

³⁴ *Ibid.*, s. 130(2).

³⁵ See Carter and Man, *supra* note 19 at 7.

³⁶ ONCA, *supra* note 2, s. 22(1).

³⁷ *Ibid.*, s. 23(3).

³⁸ *Ibid.*, s. 22(2).

³⁹ *Ibid.*, s. 30(1).

⁴⁰ *Ibid.*, s. 23.

⁴¹ *Ibid.*, s. 24(1) and s. 26(1).

⁴² *Ibid.*, s. 24(1).

elect a director, then only an ordinary resolution by that class or group of members may remove the director.⁴³ The directors may appoint additional directors to hold office until the next annual members' meeting, up to a maximum of one-third of the number of directors elected at the last annual members' meeting.⁴⁴ The bylaws of a corporation may provide for *ex-officio* directors.⁴⁵

E. Duties and Due Diligence Defense of Directors and Officers

1. CNCA⁴⁶

Directors and officers are required to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances.⁴⁷ These duties are judged on an objective standard of care. In other words, in determining whether a director or officer has breached his or her duty to the corporation, the court will test the person's actions against those of a reasonably prudent person. This standard is lower than the common law subjective standard of care, assessing a person's actions against what may reasonably be expected from a person of his or her knowledge and experience.

As well, directors and officers are required to comply with the CNCA and its regulations, the articles, the bylaws, and any unanimous member agreement.⁴⁸ Directors (but not officers) are subject to additional duties under the CNCA. For example, directors must be informed about the corporation's activities and ensure the lawfulness of the articles and the purpose of the corporation.⁴⁹

In meeting their duties, directors and officers would not be liable if they have exercised the care, diligence, and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on reports prepared by professionals. Directors (but not officers) may also rely on the corporation's financial statements prepared by the corporation's public accountant.⁵⁰

2. ONCA⁵¹

The ONCA provides that every director and officer has a duty to act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances, which, like the CNCA, reflects an objective as opposed to a subjective standard of care.⁵² The ONCA also provides directors with a reasonable due diligence defense. This

⁴³ *Ibid.*, s. 26(2).

⁴⁴ *Ibid.*, s. 24(7).

⁴⁵ *Ibid.*, s. 23(4).

⁴⁶ See Man, *supra* note 16 at 22.

⁴⁷ CNCA, *supra* note 1, s. 148(1).

⁴⁸ *Ibid.*, s. 148(2).

⁴⁹ *Ibid.*, s. 148(3).

⁵⁰ *Ibid.*, s.149 and s. 150.

⁵¹ See Carter and Man, *supra* note 19 at 8

⁵² ONCA, *supra* note 2, s. 43(1).

defense applies where a director has exercised the care, diligence, and skill that a reasonably prudent person would have exercised in comparable circumstances.⁵³ However, in spite of requests by the NFP sector, the ONCA does not contain a partial liability shield similar to that which is found under the Saskatchewan *Non-profit Corporations Act, 1995*,⁵⁴ that would otherwise limit the liability of directors or officers for non-pecuniary and pecuniary losses stemming from acts or omissions of the corporation or of any of its directors, officers, employees, or agents.

F. Financial Review and Disclosure

1. CNCA⁵⁵

The level of financial review under the CNCA depends upon the subcategory of corporation. All soliciting corporations and non-soliciting corporations are further divided into designated corporations and non-designated corporations, depending on their income.

For soliciting corporations, a corporation receiving \$50,000 or less in gross annual revenues for its last fiscal year is considered to be a designated corporation, and a corporation receiving income in excess of this level is considered to be a non-designated corporation.⁵⁶

- Members of a designated soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting.⁵⁷ In that case, the public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead.⁵⁸ It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution.⁵⁹ In that case, a compilation of the financial statements would be sufficient.
- All non-designated soliciting corporations must appoint a public accountant. In terms of the level of review required, it will depend on the income of the corporation. Those corporations that receive more than \$50,000 and up to \$250,000 in gross annual revenues for the last fiscal year must have the public accountant conduct an audit, but their members can pass a special resolution to require a review engagement instead. Those corporations that receive more than \$250,000 in gross annual revenues for the last fiscal year must have the public accountant conduct an audit, and it is not permissible for their members to require a review engagement instead.⁶⁰

⁵³ *Ibid.*, s. 44.

⁵⁴ See s. 112.1(1) of Saskatchewan's *Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2.

⁵⁵ See Man, *supra* note 16 at 12-13.

⁵⁶ CNCA, *supra* note 1, s. 179 and CNCR, *supra* note 15, s. 80(1).

⁵⁷ *Ibid.*, s. 181.

⁵⁸ *Ibid.*, s. 188.

⁵⁹ *Ibid.*, s. 182.

⁶⁰ *Ibid.*, s. 189 and CNCR, *supra* note 15, s. 84.

For non-soliciting corporations, a corporation receiving \$1 million or less in gross annual revenues for its last fiscal year is a designated corporation and a corporation receiving income in excess of this level is a non-designated corporation.⁶¹

- Members of a designated non-soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting. In that case, the public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead. It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution. In that case, a compilation of the financial statements would be sufficient.
- All non-designated non-soliciting corporations must appoint a public accountant. The public accountant must conduct an audit and it is not permissible for their members to require a review engagement instead.

2. *ONCA*⁶²

The general rule under the ONCA is that at each annual meeting, the members are required to appoint by “ordinary resolution” an auditor to audit the annual financial statements.⁶³ However, if a PBC’s annual revenue is more than \$100,000 and less than \$500,000 in a financial year, its members may approve by “extraordinary resolution”⁶⁴ to have a review engagement in lieu of an audit. If a PBC’s annual revenue for a financial year is \$100,000 or less, then its members may approve by extraordinary resolution to dispense with the appointment of the auditor and not have an audit or review engagement.⁶⁵ These two alternatives are not available to a PBC that has \$500,000 or more in annual revenue. An extraordinary resolution is valid only until the next annual meeting of members, which means that the approval of such dispensation must be done on an annual basis.⁶⁶

The monetary thresholds for dispensing with financial review are less onerous for non-PBCs. If a non-PBC’s annual revenue is more than \$500,000 in a financial year, then its members may approve by extraordinary resolution to have a review engagement in lieu of an audit. If a non-PBC’s annual revenue is \$500,000 or less in a financial year, its members may decide by extraordinary resolution not to appoint an auditor and to dispense with an audit or a review engagement.⁶⁷ It should be noted that the ONCA expressly provides that the monetary

⁶¹ *Ibid.*, s. 179 and CNCR, s. 80(2).

⁶² See Carter and Man, *supra* note 19, 4-5.

⁶³ ONCA, *supra* note 2, s. 68(1). An “ordinary resolution” is a resolution that (a) is submitted to a meeting of the members and passed at the meeting, with or without amendment, by at least a majority of the votes cast, or (b) consented to by each member entitled to vote at a meeting of the members or the member’s attorney.

⁶⁴ An “extraordinary resolution” means a resolution that is (a) submitted to a special meeting of the members of a corporation duly called for the purpose of considering the resolution and passed at the meeting, with or without amendment, by at least 80 per cent of the votes cast, or (b) consented to by each member of the corporation entitled to vote at a meeting of the members or the member’s attorney.

⁶⁵ ONCA, *supra* note 2, s. 76(1).

⁶⁶ *Ibid.*, s. 76(3)-76(4).

⁶⁷ *Ibid.*, s. 76(2).

thresholds for dispensing with financial review in relation to both PBCs and non-PBCs may be amended by regulations.

G. Members' Rights

1. CNCA

The CNCA provides a wide array of rights available to members of CNCA corporations, many of which did not exist under the CCA. Where only one class or group of members exists, all of the members of the corporation have the right to vote at any meeting of members.⁶⁸ Where the articles provide for two or more classes or groups of members, then the articles must provide the members of at least one class or group with the right to vote at a meeting of members.⁶⁹ Further, all members are entitled to one vote at a meeting of members unless the articles state otherwise.⁷⁰ Unless stated otherwise in the articles or bylaws, the rights of a member cease to exist upon the termination of membership.⁷¹

Members possess the traditional rights to elect and to remove directors.⁷² Amongst their new rights, voting members may make proposals⁷³ or, if they possess 5 percent of the votes, requisition a meeting of members.⁷⁴ It should be noted that *all* members are entitled to vote as a separate class or group on certain amendments to the articles or bylaws⁷⁵ and fundamental changes (e.g., changing the member rights for a certain class or group).⁷⁶

Separate class or group voting may pose some concern to corporations that have multiple membership classes or groups. In this regard, where there is more than one class or group of members, each class or group of members is entitled to vote separately as a class or group to approve certain changes affecting their class or group of membership by special resolution (regardless of whether the class or group of members otherwise has the right to vote). As such, each class or group of members (including non-voting members) will have a *de facto* veto right.

With regards to member discipline and the termination of membership, there are default rules in the CNCA regarding the termination of membership and members' rights which apply unless stated otherwise in the articles or bylaws.⁷⁷ The articles or bylaws may provide directors, members, or any committee of directors or members the power to terminate membership or discipline members. If the articles or bylaws provide for such a disciplinary power, then they must also set out the circumstances and manner in which the power may be exercised.⁷⁸ The CNCA does not set out any minimum procedural threshold, though the case law suggests that

⁶⁸ CNCA *supra* note 1, s. 154(3)

⁶⁹ *Ibid.*, s. 154(4).

⁷⁰ *Ibid.*, s. 154(5).

⁷¹ *Ibid.*, s. 157.

⁷² *Ibid.*, s. s. 128(3) and s. 130.

⁷³ *Ibid.*, s. 163.

⁷⁴ *Ibid.*, s. 167 and CNCR, *supra* note 15, s. 72(1) .

⁷⁵ *Ibid.*, s. 197 and s. 199.

⁷⁶ See s. 206(4), s. 212(4), s. 212(5), s. 214 (5) and s. 214(6) of the CNCA.

⁷⁷ CNCA, *supra* note 1, s. 156 and s. 157.

⁷⁸ *Ibid.*, s. 158.

organizations have the duty of fairness, including advising the affected member about the case and the process, and providing him or her an opportunity to be heard.⁷⁹

2. ONCA

Like the CNCA, the ONCA contains an expanded set of rights for members and provides similar requirements regarding the distribution of voting rights among the classes or groups of members. Where there is only one class or group of members, all members of that class or group must have the right to vote at a meeting of members.⁸⁰ At least one class or group of members must have the right to vote at a meeting of members where multiple classes of members exist.⁸¹ Unless the articles provide otherwise, each member is entitled to one vote at a meeting of members.⁸² The rights of a member cease upon the termination of membership.⁸³

Under the ONCA, all members have the right to elect⁸⁴ and remove the directors,⁸⁵ but only the voting members may make proposals,⁸⁶ or if they possess 10 percent of the votes that may be cast at a meeting of members, requisition a meeting of members.⁸⁷ Similar to the CNCA, the ONCA poses the concern of each class or group of members wielding a *de facto* veto right in the event that certain amendments to the articles or bylaws and fundamental changes are desired due to the explicit requirement for separate class or group voting under those circumstances.⁸⁸

Unless stated otherwise in the articles or bylaws, the ONCA sets out default rules concerning the termination of membership and members' rights which apply unless stated otherwise in the articles or bylaws.⁸⁹ Where the power to terminate membership or discipline members is accorded to the directors, the members, or any committee of directors or members in the articles or bylaws, the same must also set out the circumstances and manner in which that power must be exercised. However, unlike the CNCA, the ONCA explicitly requires that any disciplinary action or termination of membership be done in "good faith and in a fair and reasonable manner." The ONCA considers a procedure to be "fair and reasonable" if 15 days' notice with reasons is provided to the member regarding the proposed disciplinary action or termination, and the member is given an opportunity to respond.⁹⁰

⁷⁹ See Jane Burke-Robertson, "Countdown to the Canada Not-For-Profit Corporations Act Practice Tip #4: Discipline of Members and New Remedies Under CNCA," *Charity Law Bulletin* No. 213 (May 27, 2010), online: Carters Professional Corporation, <http://www.carters.ca/pub/bulletin/charity/2010/chylb213.pdf>.

⁸⁰ ONCA, *supra* note 2, s. 48(4).

⁸¹ *Ibid.*, s. 48(5).

⁸² *Ibid.*, s. 48(6).

⁸³ *Ibid.*, s. 50(2).

⁸⁴ *Ibid.*, s. 24(1).

⁸⁵ *Ibid.*, s. 26.

⁸⁶ *Ibid.*, s. 56(1).

⁸⁷ *Ibid.*, s. 60(1).

⁸⁸ *Ibid.*, s. 103 and s. 105.

⁸⁹ *Ibid.*, s. 50(1).

⁹⁰ *Ibid.*, s. 51(2)-(3).

H. Members' Remedies

1. CNCA⁹¹

The CNCA provides three major remedies for members, none of which were available under the CCA. First, a member may apply to a court for an order granting it leave to bring a derivative action in the name of and on behalf of the corporation, or to intervene in an action to which the corporation is party.⁹² The complainant must satisfy the court that it is bringing the derivative action in good faith and that the action is in the interests of the corporation.⁹³ This remedy is not available to religious corporations where the decision of the directors in question is based on a tenet of faith held by the members of the corporation, and it was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation.⁹⁴

Second, a member may use the oppression remedy on the basis that any act or omission of the corporation, the conduct of the activities or affairs of the corporation, or the exercise of the powers of the directors or officers of the corporation is oppressive or unfairly prejudicial or unfairly disregards the interests of the member.⁹⁵ The court may make any order it thinks fit, including compliance, restraining, and compensation orders. This remedy is not available with a religious corporation for similar grounds of faith-based defense against a derivative action explained above.⁹⁶

Third, a member may apply for a compliance or restraining order to direct the corporation or any director, officer, employee, agent or mandatary, public accountant, trustee, receiver, receiver-manager, sequestrator or liquidator, or corporation to comply with the CNCA, the regulations, the corporation's articles, bylaws, or a unanimous member agreement, or restraining any person from acting in breach of them.⁹⁷

Aside from these three major remedies, there are various other remedies that can be used to enforce specific rights enumerated in the CNCA. For example, if a corporation fails to comply with the requirements regarding the holding of annual members' meetings, then an interested person may apply for an order for the liquidation and dissolution of the corporation. A member may apply for an order to liquidate and dissolve a corporation if: the corporation oppressed the member; a unanimous member agreement entitles the member to demand dissolution upon the occurrence of a condition precedent; or it is considered just and equitable to do so.⁹⁸ An additional remedy is available for a member who is aggrieved by a corporation's refusal to include his or her proposal by applying for a court order to restrain the holding of the meeting at which the proposal is sought to be presented.⁹⁹

⁹¹ See Man, *supra* note 16 at 28-29.

⁹² CNCA, *supra* note 1, s. 251 and s. 252.

⁹³ *Ibid.*, s. 251(1)-(2).

⁹⁴ *Ibid.*, s. 251(3).

⁹⁵ *Ibid.*, s. 253.

⁹⁶ *Ibid.*, s. 253(2).

⁹⁷ *Ibid.*, s. 259.

⁹⁸ *Ibid.*, s. 224.

⁹⁹ *Ibid.*, s. 163(9).

2. ONCA¹⁰⁰

There are four major remedies available to members under the ONCA, none of which were previously available under the OCA. First, a complainant¹⁰¹ or a creditor may apply for a compliance or restraining order where the corporation or its directors and officers fail to comply with the duties set out in the ONCA, the regulations, or the articles or bylaws of the corporation.¹⁰² Unlike the CNCA, the ONCA expressly allows a member who claims to be aggrieved because they were disciplined or because their membership was terminated to apply for such an order.¹⁰³

Second, where the name of a person is alleged to be or has been wrongly inputted or removed from the registers or records of the corporation, a director, officer, member, or debt obligation holder of the corporation or any aggrieved person may apply for a court order that the registers or records be rectified.¹⁰⁴

There are two other major remedies provided for in the ONCA, the availability of which is restricted to particular categories of corporations. A dissent and appraisal remedy is only available to members of non-PBCs to dissent to resolutions on fundamental changes.¹⁰⁵ The other remedy is the right of a complainant to seek a court order to commence a derivative action,¹⁰⁶ which is only available in relation to non-religious corporations.¹⁰⁷

There are additional remedies that are available to members to enforce specific rights, many of which are also found in the CNCA. Specifically, the ONCA permits a member to apply for an order to wind-up a corporation under certain circumstances, such as oppressive conduct by corporation against a member.¹⁰⁸ As well, an aggrieved member whose proposal is refused by the corporation may apply to a court to restrain the holding of a meeting at which the member's proposal is sought to be presented.¹⁰⁹

I. Liquidation and Dissolution

1. CNCA

There are multiple ways by which the liquidation and dissolution of a NFP corporation under the CNCA may occur.

¹⁰⁰ See Carter and Man, *supra* note 19 at 10.

¹⁰¹ Section 182 of the ONCA defines a “complainant” as including former and present members, directors, officers of the corporation or any of its affiliates, and any person who “in the discretion of the court, is a proper person to make an application.”

¹⁰² ONCA, *supra* note 2, s. 191.

¹⁰³ *Ibid.*, s. 51(5).

¹⁰⁴ *Ibid.*, s. 186(1).

¹⁰⁵ *Ibid.*, 187.

¹⁰⁶ *Ibid.*, s. 183(1).

¹⁰⁷ *Ibid.*, s. 183(3).

¹⁰⁸ *Ibid.*, s. 136 and s. 137.

¹⁰⁹ *Ibid.*, s. 56(9).

First, a corporation may be dissolved before commencing any activities. Specifically, where no memberships have been issued as yet, the directors may resolve to dissolve the corporation at any time. Where memberships have been issued, a special resolution of all the members, including those not entitled to vote, can dissolve the corporation.¹¹⁰

Second, the directors or a member entitled to vote at annual meetings may propose the voluntary liquidation and dissolution of the corporation.¹¹¹

Third, the Director may dissolve a corporation for a number of reasons, including failure to commence its activities or to send any fee, notice, or other document required by the CNCA.¹¹²

A fourth way is for the Director or any interested person to apply for a court order to dissolve the corporation for failing to hold annual meetings within the prescribed time period; contravention of specific provisions of the CNCA; or the procurement of any certificate under the CNCA by misrepresentation.¹¹³

As discussed above, the CNCA also permits members to apply for a court order for the liquidation and dissolution for the corporation where the corporation oppressed the member; a unanimous member agreement entitles the member to demand dissolution upon the occurrence of a condition precedent; or it is considered just and equitable to do so.

2. ONCA

The ONCA sets out separate rules and procedures for both the voluntary and court-ordered liquidation and dissolution of a NFP corporation. To voluntarily wind up a NFP corporation under the ONCA, the members may require the corporation to do so by special resolution at a meeting of the members. At that meeting, the members must appoint a liquidator to wind up the corporation's activities and distribute its property.¹¹⁴ In the alternative, a committee of members (referred to as inspectors) can be delegated the power to appoint the liquidator or enter into an arrangement with the corporation's creditors with respect to the powers to be exercised by the liquidator and the manner in which they are to be exercised.¹¹⁵

As mentioned above, a court-ordered winding up of a NFP corporation under the ONCA may occur where: the corporation or its directors have unfairly prejudiced or unfairly disregarded the interests of a member; court supervision of a voluntary winding up is necessary; or the members by special resolution authorize a court application to wind up the corporation.¹¹⁶ Under these circumstances, the court may appoint the liquidator as well as remove its appointee.¹¹⁷

¹¹⁰ CNCA, *supra* note 1, s. 220.

¹¹¹ *Ibid.*, s. 221.

¹¹² *Ibid.*, s. 222.

¹¹³ *Ibid.*, s. 223.

¹¹⁴ ONCA, *supra* note 2, s. 123.

¹¹⁵ *Ibid.*, s. 124(1).

¹¹⁶ *Ibid.*, s. 136.

¹¹⁷ *Ibid.*, s. 139-140.

Upon the activities and affairs of the corporation being fully wound up, the court may order that the corporation be dissolved.¹¹⁸ The alternative to a court-ordered dissolution is a voluntary dissolution that is authorized by a special resolution of the members at a meeting called for that purpose or by the consent of all voting members.¹¹⁹

The ONCA imposes mandatory provisions regarding the distribution of property in relation to PBCs. If a PBC is a charitable corporation it must distribute the remaining property to a charitable corporation with similar purposes to its own, a government, or a government agency upon being liquidated. If a PBC is a non-charitable corporation, then it must distribute its remaining property to another PBC with similar purposes to its own, a government, or a government agency. Non-PBCs must distribute their remaining property in accordance with their articles or, if there are no relevant provisions in the articles, then rateably to members according to their rights and interests in the corporation.¹²⁰

J. Continuation Under the CNCA and Transition Under the ONCA

1. CNCA

Since the CNCA was proclaimed in force on October 17, 2011, existing CCA corporations have until October 14, 2014, to continue under the CNCA, failing which they may be dissolved by the Director.¹²¹ Until then, the CCA will continue to apply to those corporations that have not yet continued under the CNCA. Upon the issuance of the certificate of continuance, the CCA will cease to apply to them.

Because the rules under the CNCA are very different from the rules under the CCA, what needs to be set out in the articles and bylaws under the CNCA is also different from what would be currently set out in the letters patent, supplementary letters patent, and bylaws for CCA corporations. This difference means that the transition process is not simply a matter of transposing the provisions of the letters patent and supplementary letters patent into the articles and using the same bylaws. Instead, careful consideration needs to be given to the various mandatory, optional, and default provisions contained within the CNCA when drafting articles of continuance and new bylaws. However, the details of those considerations are beyond the scope of this article.

2. ONCA

As mentioned previously, the ONCA is now expected to take effect on July 1, 2013. Once the ONCA comes into force, existing NFP corporations will have three years to amend their constating documents to conform with the ONCA. At the end of that period of time, any documents that have not been amended will be deemed to be amended to conform with the ONCA, although the corporation will not cease to exist at the end of this period, as is the case under the CNCA. Although there is no requirement to transition under the ONCA, the deemed amendment provision will no doubt result in considerable confusion concerning which provisions of the constating documents are valid after the expiration of the three-year grace period.

¹¹⁸ *Ibid.*, s. 147(1).

¹¹⁹ *Ibid.*, s. 166.

¹²⁰ ONCA, *supra* note 2, s. 150(1)(b).

¹²¹ CNCA, *supra* note 1, s. 297(5).

While there is no express requirement for Part III corporations under the OCA to be transitioned under the ONCA, it is advisable for them to do so, since Part III of the OCA will be repealed upon the proclamation of the ONCA.¹²²

In order to transition under the ONCA from the OCA, a Part III OCA corporation must follow the process provided for in the ONCA in order to obtain articles of amendment. In this regard, the members of a Part III OCA corporation who are entitled to vote at annual meetings may, if authorized by the corporation's charter (e.g., letters patent, supplementary letters patent¹²³), authorize the directors by special resolution to apply for articles of amendment under the ONCA.

K. Conclusion

This brief overview of selective aspects of the CNCA and ONCA illustrates the significant changes involving the new legislative framework concerning NFP corporations. The modeling of the new NFP legislation on preexisting for-profit legislation will provide valuable opportunities for interpretation by analogy between them. An interesting debate may ensue concerning whether the CNCA or the ONCA is the better corporate statute to incorporate under. No matter the outcome of that debate, it will be important for corporate lawyers to become familiar with both of these important statutory developments involving NFP corporations.

¹²² ONCA, *supra* note 2, s. 211.

¹²³ *Ibid.*, ss. 115(1).

Article

Responsible Investments by Foundations from a Legal Perspective

Dominique Jakob and Peter Picht¹

I. Introduction

1. A promising and challenging new pattern

The management of foundation assets may, at first guess, promise little fascination: The foundation is assigned a certain capital stock by the founder; this capital stock is then invested very conservatively in, say, public bonds; and the return on this investment – constant and limited as it is – is used by the foundation board to further the foundation purpose. (In this article we will not and cannot engage in a technical definition and delineation of the financial and legal meaning of terms like “asset” and “return” with regard to the foundation sector. Cf., e.g., Fritz 2009, n. 443 et seq.) Yet even if this “conservative” pattern may hitherto have been a correct description of the typical foundation asset handling, it nowadays is losing its descriptive force as realities in the foundation sector begin to change.

Among many other new or increasingly used foundation patterns, there is one that focuses on a specific way to invest the foundation assets, thereby changing our ideas on which role the foundation asset should play in a foundation entity. “Purpose-related investment,” as we may call the pattern, seeks to further a foundation’s purpose by the asset investment itself, not only by the spending of the return on investment. If the specific purpose is to finance investments that fulfill sustainability criteria, we may speak of “sustainable and responsible investments” (SRI).

The potential of this new approach is indeed considerable, as it can, in a certain sense, exponentiate the purpose-realizing power of a foundation: In addition to the revenues from the foundation’s capital stock, the capital stock itself can be used to further the foundation’s purposes. Given the fact that it is the essential duty and trait of a foundation to further its purpose, one may even – at least at first guess – think that purpose-related investing foundations are “the better foundations,” as they further their respective purpose more intensely.

However, the new investment pattern, and in particular the SRIs, can also cause new challenges and problems. Two major examples of these challenges lie in the more technical and economic field of asset management and in the legal field of foundation law requirements for foundation asset investments. As for the asset management dimension, an investment must, in order to qualify as an SRI, fulfill criteria which can vary from one area of SRI to another and which can be very demanding. As SRIs are a relatively new class of investments, the market for

¹ Dominique Jakob is a professor of private law and director of the Center for Foundation Law at the University of Zurich (UZH). Peter Picht is academic assistant at the University of Zurich. Due to our main field of practice, the article is written mainly from a Swiss/German/Lichtenstein (foundation law) perspective, yet its principles can be transferred to other jurisdictions as well. The paper is based on a lecture held by the first mentioned author at the “Lisdar Congress on Sustainable Development and Responsible Investing,” 2-4 May 2012.

them is not as developed, well-structured, and well-evaluated as the markets for conventional investments. And SRIs often tend to present greater risks for the investor than conventional investments, e.g. because they are offered by recently established market players or because they are situated in developing countries. As for the legal dimension, the avoidance of risks and losses is directly linked to the problematic foundation law aspects of SRIs. The board of a foundation is obliged to realize the foundation purpose as best it can by spending the return on the foundation asset on purpose-realizing measures. The board therefore, in principle, has to manage the foundation asset in a way that is low-risk and yields high and steady returns. Can SRIs indeed fulfill these requirements?

These economic and legal challenges can only be solved by gaining a precise understanding on what the term “SRI” means, by having recourse to the general principles for the asset management of foundations, and by adapting them to the particularities of sustainable investments. As we will now take a quick look at these core aspects for SRI, two model cases shall help us to understand and apply the relevant legal principles, which are quite complex.

2. Model cases

Let’s imagine two foundations, one facing an *ex ante* and one facing an *ex post* problem related to SRI. A hospital foundation has been given a conventional (i.e., not directly SRI-related) purpose that *inter alia* consists of providing the financial basis for a particular hospital. The board of this foundation considers engaging in an SR investment and would like to know whether it is allowed to do so and what limits it has to observe. This precaution appears to be justified, as a failure of the investment could have disastrous consequences for the foundation: In a worst-case scenario, the hospital (which depends on the financial support of the foundation) would have to be closed down, with all of the employees losing their jobs. In this case, the supervising authority may replace the board and the board members may face liability charges.

A solar foundation, by contrast, has (among other purpose elements) an SRI-related purpose element, namely to advance the use of solar energy. In the pursuit of this purpose, the foundation board has invested in solar field-projects in the Middle East. This investment is risky but it also promises a considerable return on investment. Unfortunately, the investment fails completely due to political disturbances and mismanagement. Now, the foundation board is worried whether it has committed a violation of foundation law.

II. Disambiguation: “Sustainable investment” – What does that mean?

1. Definition of sustainability

Sustainability is one of the most frequently used terms in general and the most popular concept in current social discourse and environmental thinking. Astonishingly, there seems to be no common definition (allegedly, there are more than three hundred definitions; cf. Bonevac 2010, p. 84). It rather appears that the buzzword used by many to evoke so much is so vague as to be virtually meaningless.

The term *sustainable development* emerged in the World Conservation Strategy of 1980 (International Union for Conservation of Nature and Natural Resources 1980) and gained wide recognition when the Brundtland Commission formulated the concept that sustainable development “meets the needs of the present without compromising the ability of future generations to meet their own needs” (World Commission on Environment and Development [informally: Brundtland Commission] 1988, n. 27). Since there are limits to the environment’s

ability to meet these needs, environmental capacity must be preserved in order to satisfy the needs of future generations. The Brundtland statement is the most popular definition of sustainability and still commonly used today.

From an economic point of view, sustainability is understood as the preservation of capital, maximizing the flow of income that could be generated from a given stock of assets or capital while at least maintaining them (Bonevac 2010, pp. 90 et seq.; Pearce and Atkinson 1998, p. 253). Generally three kinds of capital are distinguished: economic (man-made) capital, social (human) capital, and environmental (natural) capital. (The last is sometimes criticized as unquantifiable, but despite the fact that there may be no “right” way to value a forest or a river, it is likely to be wrong to give it no value at all [Hawken, Lovins and Lovins 2010, p. 321]. The ambiguity is that the definition of *natural capital* is as imprecise as *sustainability* is [Norton 2005, p. 310].) To answer the crucial question about possible substitution between the different forms of capital, the concept of weak and strong sustainability has been developed (Daly and Cobb Jr. 1989, pp. 72 et seq.). Weak sustainability counts only welfare and allows unlimited substitution, in particular human-built capital to be substituted for wealth in the form of natural assets. Strong sustainability, in contrast, specifies limits on substitution, requiring that both humanly created and natural capital must be maintained intact separately.

The various definitions and concepts do not sufficiently clarify specific parameters for modeling and measuring sustainability. Besides, it must be kept in mind that a system can only be known to be sustainable *after* there has been time to observe whether a prediction concerning the sustainability of a system holds true (Costanza and Patten 1995, p. 194). Summarizing, the lowest common denominator of the various definitions of sustainability is likely to comprise the elements of future natural capital and economic activities. It seems, thus, that the most appropriate concept of *sustainability* and *sustainable development* is that of a “dialogue of values,” comprising social goals (e.g. justice, participation, and equality), ecological goals (including biodiversity preservation and ecosystem resilience), and economic goals (including growth, efficiency, and material welfare) (Blewitt 2008, p. 27).

2. Sustainable Investments

Sustainability definitions do not provide suggestions about how to implement sustainability within an enterprise or association. Therefore, it is useful to approach the matter by asking fundamental questions regarding economic success in combination with social and environmental responsibility. For example: Do business activities promote sustainable economic health for the company and the global community? Is business conducted in a manner that contributes to the well-being of employees and the global community? Are business operations managed in a way that is protective for the environment? (Blackburn 2007, pp. 22 et seq.). The most widely used framework for sustainability reporting are the Global Reporting Initiative (GRI) guidelines (cf. Ligteringen 2009; see also: <https://www.globalreporting.org>), which present reporting principles and key indicators to measure sustainability performance (Blewitt 2008, pp. 184 et seq.). G3 guidelines, GRI’s latest version, encompass economic elements (e.g. wages and benefits, labor productivity, and investments in training), environmental topics (impacts of processes, products, and services on air, water, land, biodiversity, and human health) as well as social matters (workplace health and safety, employee retention, labor rights, human rights, wages, and working conditions).

Based on the same parameters, the concept of sustainable and responsible investment (SRI) takes into account the long-term economic, environmental, and social risks and opportunities by excluding investments that violate basic international norms or by integrating environmental, social, and governance (ESG) factors in investment analysis and company engagement (Imbert and Knoepfel 2011, p. 10). SRI includes numerous investment approaches.² Positive screening identifies companies whose activities relate to defined industries and/or are best performers on some indicators, whereas negative screening avoids businesses that fail to pass a defined threshold or belong to sectors perceived as having a negative impact on the environment (Imbert and Knoepfel 2011, p. 15). In both cases, selection may be done by excluding or by actively choosing companies with good/bad performance regarding environmental, social, and governance factors. Accordingly, the investment horizon is limited to the companies that have been selected whilst investment decisions are based on traditional financial considerations. ESG factors are also used to determine sustainability performance of companies in relation to and comparison with their competitors (best in class). However, only sustainability leaders meeting also the financial requirements set by the fund manager are selected for investments.

No division between ESG analysis and financial analysis exists when investing directly in companies that create solutions for ESG challenges (e.g. water scarcity) or avoid the consequences of such issues (ESG-integrated investment) (Imbert and Knoepfel 2011, p. 15). In this approach, ESG factors are analyzed alongside traditional company fundamentals, representing an additional set of criteria for investment decisions. Being willing to relax expectations for risk-adjusted financial returns in exchange for substantial and tangible social impacts, investors may also actively provide capital to enterprises that contribute to defined social goals (impact investment).

Eventually, based on a purely financial investment decision, investors can also work directly with companies they are investing in by implementing ESG goals, participating in shareholder resolutions, or reserving the right to disinvest from nonresponsive companies through responsible engagement overlay and active ownership (Fritz 2009, p. 175; Imbert and Knoepfel 2011, p. 15).

III. General principles for investing foundation assets

1. The foundation asset and its management as a core element of the foundation organism

The legal assessment of our topic has to start from the specific role of the foundation asset in the fundamental structure of a foundation. The foundation is a legal entity established by separating assets from the founder and dedicating them to a specific purpose according to the founder's will. The founder, however, maintains in principle no influence on the asset, but depends on the proper execution of his will by the foundation board. Hence, in this structure, the foundation asset is a necessary element, not least because it provides the means to realize the foundation purpose and the will of the founder (Jakob 2006, pp. 61 et seq.). It follows from this link between foundation purpose and foundation asset that the foundation board is by no means

² One important example shall be at least named here: "venture philanthropy" is a foundation concept that has gained much prominence in the recent years; venture philanthropy foundations can be seen, the term being interpreted accordingly, as a particular type of SRI foundation. On venture philanthropy, see Schöenberg 2010.

completely free in the use it makes of the foundation asset. Rather, the management and use of the foundation asset and of its returns have to be oriented towards the realization of the foundation purpose and follow the statutory provisions the founder may have provided (see Jakob 2012, Art. 83 n. 7; Jakob 2006, p. 62). Of course, the foundation board has a certain degree of discretion when it comes to the details of foundation management. This discretion forms part of the so-called autonomy the foundation and its board are endowed with. But autonomy and discretion end where either binding prescriptions are made by the law or the foundation statutes, or where the management and use of the foundation asset deviate from the orientation towards the foundation purpose and the will of the founder (for the concept of foundation autonomy and for its limits, see Jakob 2006, pp. 204 et seq.). If this border is crossed, the actions of the foundation board violate foundation law, can cause the intervention of supervisory authorities, and may inflict liability on the board members.³

2. State of the art: Many open questions

But what are the precise principles and duties that follow from this fundamental relation of asset and purpose, discretion, and binding prerequisites? A synoptic examination of the Swiss, the German, and the Austrian jurisdictions shows that the answer to this question seems far from complete, though some parameters have been sketched from different sides. To name only a few important positions, the Swiss Federal Court, having regarded the application of a couple of legal prescriptions (Art. 49 et seq. BVV 2; Art. 71 BVG; Art. 84 Al. 2 ZGB), regularly holds that the asset management of a foundation needs to be primarily guided by five principles: return, liquidity, asset preservation, diversification of investments, and the avoidance of risks (BGE 124 III 97 E. 2; 108 II 352 E. 5a). These criteria refer more to the *results* of investment decisions and may be seen as part of a result-driven approach. In contrast to this approach the Swiss Foundation Code is an important example of a process-driven approach, which focuses more on the process of decision-making in investment measures.⁴

The process of decision-making also constitutes the focus of another important legal institute, the so-called Business Judgment Rule. This rule was mainly established in the United States, and it is not yet commonly applied in Swiss foundation law. But the experts in Liechtenstein foundation law will know the rule well, as it has been applied, by the Liechtenstein High Court, to Liechtenstein foundations (cf. Beschluss OGH of January 8, 2004, 10 HG 2002.58-39, *LES 2005*, pp. 174 and 178). Furthermore, the Liechtenstein Foundation Law Reform in 2009 has codified the Rule in Article 182 PGR (Jakob 2009, n. 348 et seq.). In its essence, the Business Judgment Rule states that board members cannot be held liable for a decision, even if the decision turns out to be detrimental to the foundation, if the board fulfilled some essential decision making-requirements (Block, Barton and Radin 1998, p. 41). Summarily speaking, these requirements are: (1) The decision in question must constitute a conscious

³ This article does not extensively address liability issues. However, it must be clear to every foundation board member that a violation of the duties that result from foundation law, foundation statutes, and the will of the founder can pose liability risks. The principles and duties explained in this article are therefore of high relevance for liability issues, too.

⁴ The Swiss Foundation Code is a self-regulatory and recommendatory code of conduct (mainly) for grant-making foundations. The Code was initiated by "SwissFoundations," the Association of Swiss grant-making Foundations, and its first edition was published in 2005 (2nd edition 2009). For the process-driven approach of the Code, see e.g. "Finances," recommendations 2 et seq., pp. 47 et seq. For a detailed commentary on the Code, see Sprecher, Egger and Janssen 2009.

business decision, i.e. the board must have decided in business-related matters and with a certain margin of discretion; (2) the board must act with due care, i.e. (among other factors) on a well-informed basis; (3) the board must be disinterested and independent, that is to say it must not act in its own personal interest or in the interest of third persons, at least if these interests contradict the interest of the institution that the board represents; and (4) the board is obliged to act in good faith, with the vague concept of “good faith” meaning that the board’s actions must be driven by the best interest of its institution and not by other interests. Whether it should be asked, in addition to these criteria, if the board’s actions constitute an abuse of discretion, is discussed controversially (see Block, Barton and Radin 1998, pp. 85 et seq.). The application of these criteria in assessing a decision does shift, in a certain sense, the focus from the content of the decision to the process of the decision-making – therefore, a certain proximity between this approach and the aforementioned process-driven approach is evident.⁵

Yet these different parameters, and many more academic statements that cannot be mentioned here, have not, for the time being, coalesced into a comprehensive and coherent set of legal rules for the management of foundation assets. And a great number of questions still remain open altogether. This uncertainty is, of course, not very satisfactory for a foundation board that needs to act *today*. To provide at least a basic orientation, we will try to extract some cornerstone legal principles which condition the present legal situation and which will certainly remain of high importance throughout the further development of this area of law. This article, of course, cannot explain or even name all of these cornerstone principles. It will therefore limit itself to highlighting a few that might be particularly relevant.

3. Cornerstone principles

a) Discretion and binding prerequisites – due exertion of discretion

In foundation asset management, the foundation board has, as in every other area of action, to carefully determine where it possesses a margin of discretion and where there exist binding prerequisites, deriving from (mainly) foundation law or from the foundation statutes.

Whereas binding obligations are simply to be effectuated, discretionary decisions demand a considerable degree of care. This is because *discretion* does not mean that the foundation board is free to decide and do whatever it feels disposed to. Rather, the due exertion of discretion is a four-step process (cf. for details of the process Jakob 2012; for examples from the Swiss jurisdiction BGE 100 Ib 132 E. 3; 111 II 97 E. 3): At first, the board has to determine, with regard to a certain issue, the existence of a margin of discretion and the outer limits of this margin which are set by binding legal or statutory prerequisites. Secondly, the board has to assemble the aspects which are relevant for the decision on the issue; and the board has to sort out the aspects which must *not* be considered when making the decision. Although the relevant and irrelevant aspects do, of course, depend very much on the particular issue to decide, some typical aspects are relevant or irrelevant to most decisions. For instance, a typically relevant aspect is the will of the founder; a typically irrelevant aspect is the set of advantages that a board member could draw personally from a particular decision. Once all relevant aspects are sorted, the board has, thirdly, to consider these aspects by weighing up the pros and cons for the

⁵ This paper will not address the differences and relations that exist, in the US jurisdiction, between the Business Judgment Rule and the so-called Prudent Investor Rule, a parallel set of criteria that is applied to the management of trust assets.

different possible ways to decide. And lastly, the board has to take and implement a decision that reflects the result of the consideration process

In the process of gathering the relevant information for a discretionary decision, external expert knowledge comes into play: Because foundation board members will often not possess that knowledge or will at least (rightly) wish to receive some external feedback on their investment decisions, the board will consult external financial advisors. This step is not only understandable, it is also often mandatory for taking due care in the investment decision process (Sprecher, Egger and Janssen 2009, pp. 110 et seq.; Friedrich 2012, pp. 185 et seq., 198 et seq.). Yet, external advisors need to remain what they are – *advisors*. At least with regard to fundamental asset-management decisions, the foundation board is not allowed to delegate the decision to its advisors, and the discretion of the advisors must not replace the foundation board's own discretion.

These rules to be followed for a due consideration process are of very high importance to the management of foundation assets. This is because foundation boards typically possess a margin of discretion with regard to many asset management issues, at least as far as the details of these issues are concerned. And the rules are of high importance to the board members themselves, because if the board fails to follow these steps in exercising its discretion, it might violate foundation law and the board members may be held liable.

b) Two levels of guiding aspects

When it comes to the aspects that are relevant for foundation asset management, and consequently for the due exertion of discretion in this field, two levels of guiding elements can be discerned and may be called “foundation level” and “investment level.”

On the foundation level, we can locate the aspects that derive from fundamental principles of foundation law and from the structure of the foundation. Two core elements of these aspects are the foundation purpose and detailed investment directives made by the founder in the statutory documents of the foundation (Jakob 2006, pp. 61 et seq.; Fritz 2012, pp. 133 et seq.). The foundation purpose can imply targets for the return and for the liquidity that the asset management needs to generate (Sprecher, Egger and Janssen 2009, pp. 105 et seq.). The fact that the asset management is obliged to meet the requirements set by the foundation purpose follows from the foundation law principle that the life and actions of a foundation have to be oriented towards the realization of its purpose; this principle constitutes itself a foundation law aspect on the foundation level. If, for instance, the purpose of a hospital foundation is the maintenance of a hospital, the assets of that foundation needs to be invested in a way that yields current returns high enough to cover the running costs of that hospital. Besides setting the foundation purpose, the founder can make more detailed instructions how to invest and use the foundation capital. For instance, the founder can determine whether a foundation shall preserve its capital stock eternally or whether the foundation can consume its capital stock with the consequence that the foundation is intended to be of a limited duration (Jakob 2006, pp. 58 et seq.). Or, to give another instance, the founder of a foundation may stipulate in the foundation statutes that the foundation capital is to be invested, to a certain extent, in stocks of *local* undertakings.

On the investment level, we can localize general investment principles that apply, in principle, to the management of any assets, not only the assets of a foundation. One example is the principle of investment diversification (cf. Friedrich 2012, pp. 178 et seq.). If, for instance, our hospital foundation must invest twenty percent of its capital in the stocks of local

undertakings, the foundation might be well advised to invest five percent of its capital in each of the four local companies that qualify, rather than investing the entire twenty percent in a single company.

Distinguishing these two levels of guiding aspects for the foundation asset management is not only of a descriptive value. The model also helps to clarify the relation between the aspects assigned to the different levels: As the foundation board is bound to realize the foundation purpose and the relevant will of the founder, the foundation level takes precedence over the investment level. The aspects on the foundation level influence and can even override the aspects on the investment level. In our hospital foundation example, the foundation board can diversify twenty percent of its capital among the stocks of only four companies because these are the relevant local companies and the foundation statutes oblige the board to invest this part of the asset locally; here, the foundation level has influenced the investment-level aspect of investment diversification. And even insofar as the stocks of non-local companies would promise more attractive returns at an acceptable risk, the investment limitation deriving from the foundation level overrides the investment level and prevents the foundation board from diversifying the investment into the stocks of these non-local companies.

Yet the relation between foundation level and investment level is not only that of a one-way dominance. To a certain degree, the investment level can also influence the foundation level. If, for instance, our hospital foundation needs to replace a costly medical instrument in order to continue realizing its foundation purpose, investment-level aspects may lead the foundation board to postpone that replacement until the local companies pay their annual dividends instead of selling stocks at an unfavorable moment.

c) An important example: The taking of risks

The rules on how to manage assets are numerous and complex. We have already referred to the five investment principles that are so prominent in the ruling of the Swiss Federal Court. These principles are important, but they are certainly not the only relevant aspects on the investment level. This article cannot try to draw a complete picture of the relevant aspects and their interconnection. Nonetheless, we would like to point out an example that is of particular interest to most foundation boards: This is the right, or maybe even the obligation, of foundation boards to take risks in the investment of the foundation capital.

It should be considered a truism that every return in the capital markets corresponds to a certain risk – the higher the return, usually, the greater the risk. Yet in the investment policy of foundations, this truism often has seemed to be forgotten, at least in the past. Foundations have been believed to be limited to treasury bonds or comparably gilt-edged fixed-interest investments. But inflation periods, national bankruptcies, or the breakdown of seemingly rock-solid banks have painfully proven that these investments also carry risks – as we are now rediscovering. Due to these experiences and with regard to the principles of modern portfolio theory, the Swiss academic literature (Krauss 2010, pp. 58 et seq.) as well as in the ruling of Swiss Courts (BGE 99 Ib 255 E. 3) now recognize that foundations can and even should take appropriate risks when investing the foundation capital – although this recognition is not yet reflected in the investment behavior of all foundations.

Although the question of what is appropriate in this context is complicated, two core elements would have to be the structure of the particular foundation (foundation level) and the techniques of modern portfolio management (investment level) (Moses, Singleton and Marshall

III 2004, pp. 167 et seq.). If, for example, the foundation purpose allows for planning payouts a long time in advance, the foundation can typically engage in investments like stocks which bear considerable risks in the short run but promise a very good risk-return-ratio in the long run. And portfolio-management instruments, like the combination of investments with different risk profiles or the use of collective-investment vehicles (Aalberts and Poon 1996, p. 59), can help to make this structure-adapted taking of risks successful.

IV. Particularities of SRIs

The general principles for the management of foundation assets are of direct relevance to SRIs by foundations. This assertion may seem self-evident, but it is nonetheless important to keep it in mind. Although SRIs, with their often positive ecological and social effects, constitute a promising field for foundation activities, they are, from a foundation law perspective, not automatically approvable. If an investment violates foundation law principles, this violation does not become excusable just because the investment is an SRI. Hence it is important not to decide on SRI activities without taking general foundation law and investment principles into consideration.

1. Statutory basis for SRI

The relevance of the foundation purpose and of detailed statutory precepts for the asset management of a foundation suggests distinguishing foundations with a statutory basis for SRI from foundations without such a basis. From this distinction results a threefold categorization: (1) foundations with SRI as a purpose element; (2) foundations whose statutes, including the relevant will of the founder, address SRI activities without making them part of the foundation purpose; and (3) foundations whose statutes, including the relevant will of the founder, do not mention SRI activities.

a) Foundations with SRI as a purpose element

For the first group of foundations, engaging in SRIs means to directly realize the foundation purpose. The SRI activity is therefore not only possible but mandatory. However, doubts may arise, for instance, whether the obligation to invest SR only applies to the returns of the foundation's capital stock or also to the initial capital stock itself. The answer to this question can only be found by interpreting the statutes and the will of the founder. It might however be possible to state the general assumption that the capital stock of a foundation with an SRI purpose may not be invested in a way that clearly contradicts the SRI values. In any case, the SRI purpose must, like any foundation purpose, be realized lastingly and in the best possible way by the foundation board. An SRI purpose is by no means a *carte blanche* to waste the foundation capital in idealistic but unduly risky investment ventures. Expert investment knowledge and advice is therefore just as necessary for an SRI-purpose foundation as for any other foundation.

b) Foundations with statutes addressing SRI otherwise

For the second group of foundations, much depends on the way the SRI issue is addressed by the foundation statutes and the will of the founder. We focus here on what may be the most relevant situation: where the foundation board is obliged, by the statutes and the will of the founder, to realize a foundation purpose which does not include an SRI element, by using the returns of an SR-invested foundation asset. In such a case, much depends on how detailed the investment precepts are which are made by the founder in the statutes with regard to the SRI aspect. If the foundation board is told very precisely how to invest, not much margin of

discretion is left, and in principle the foundation board cannot be blamed for unsatisfactory returns which prevent a more intense realization of the foundation purpose. If, by contrast, the foundation board has greater discretion over how to execute SRIs, the two-level structure analyzed earlier comes into play. Under this structure, the foundation purpose, in principle, takes priority over the investment-level aspects. The foundation board must structure the SRIs in a way that best serves the foundation purpose, even if environmental, social, and governance (ESG) factors advocate a different investment structure.

c) Foundations without a statutory basis for SRI

For the third group of foundations, it is not self-evident that the foundation board is allowed to invest SR. Usually, however, the interpretation of the foundation statutes and the will of the founder does not forbid the board from investing along SR aspects. Even so, as SRI has no distinct statutory basis, no negative impact on the realization of the foundation purpose can be justified by SRI particularities. Therefore, if a conventional investment offers a better risk-return-ratio than an SRI, the foundation board of such a foundation may have to opt for the conventional investment.

2. The role of GRI guidelines, ESG parameters, and other decision-guiding aspects

If a foundation board is allowed or obliged to invest SR, it has to make sure that its investments are indeed SR. Here, the aforementioned environmental, social, and governance (ESG) parameters and Global Reporting Initiative guidelines come into play. They help to determine whether an investment is SR; hence, they are major aspects in the foundation board's exertion of discretion over which investments to choose. Reversely, the exertion of discretion may be flawed if the board does not take ESG parameters and GRI guidelines into consideration. In consequence, ESG parameters and GRI guidelines can be of relevance for the due investment activity of the foundation board, as a kind of SRI "soft law" (De Jonge 2008, pp. 103 et seq.; Sulkowski, Parashar and Wei 2008, p. 788). SR-investing foundation boards should therefore build up internal or external expert knowledge on these soft-law parameters. Yet, those parameters are only soft law (i.e. they do not have the same binding character as legal prescriptions set by a state or a similar legal entity), and they are set outside the foundation. In consequence, they cannot supersede sustainability parameters prescribed by the foundation statutes or the will of the founder. In the first instance, it is for the founder to say which investments he considers SRI; if he does not, then external SRI soft law can fill the gap.

Another aspect that can be decisive for the investment policy is the foundation's nature as capital preserving or capital consuming. As we have mentioned, the founder can allow for the foundation asset to be consumed in the process of purpose realization. If a foundation has such a capital-consuming structure and, in addition, an SRI purpose, the foundation board may even engage in SR investments that cannot be expected to return the invested capital.

3. Appropriate investment approach

As we have seen, SRI includes various investment approaches. Positive and negative screening, integrated investment, and active ownership can constitute valuable investment approaches for foundations. Yet the investment approach must be adapted to the structure and the possibilities of the foundation. Not all foundations possess the resources to engage in all kind of investments, particularly when it comes to demanding concepts like active ownership. If the foundation board chooses an investment approach that is too ambitious, the excessive demands

for time, manpower, and other resources may hinder the purpose realization of the foundation, and the board's decision may therefore be flawed.

But it is not only the foundation structure that preordains the appropriate investment approach. The foundation board must also, within the boundaries of foundation law and the foundation statutes, seek to establish working structures that foster the success of the foundation's SRIs. With regard to the particularities of the SRI sector, GRI-expert advisors or specialized committees within the foundation board may be instruments in these working structures.

Again: SRIs are a relatively new class of investments. The market for them is not as well-developed, well-structured, and well-evaluated as the markets for conventional investments. And SRIs often tend to present greater risks for the investor than conventional investments, e.g. because they are offered by recently established market players or because they are situated in developing countries. Asset management with regard to SRIs must therefore – not least for the avoidance of liability – employ a considerable degree of care and specific knowledge in order to make sure that the investments chosen are indeed SRI and that unnecessary risks and losses are avoided.

4. The foundation-planning perspective

Whether and how a foundation can invest SR is not only a question of the *ex post* interpretation of its statutes and the will of its founder. From the *ex ante* perspective of a prospective founder, the SRI activities of a future foundation become a question of foundation planning. From this *ex ante* perspective, the foundation statutes and the will of the founder are the crucial determinants for a sustainability orientation of the foundation. Although not many founders in the past addressed a possible SRI dimension of their foundations, this picture seems to be changing. It is for the protagonists of the sustainability approach to make the most of this new receptiveness by informing and supporting possible founders on sustainability matters.

Today's founders who wish to construct their foundation with an SRI dimension have to consider manifold legal, economic, and factual aspects. Although it is impossible to provide a comprehensive guide to planning an SR-investing foundation here, we would like at least to point out three maxims that are vital in the construction of any foundation, including an SR-investing one: First, a founder should seek expert advice. Here, this includes expert advice not only on foundation law but also on SRI aspects. Second, a founder should be explicit and clear in the fundamental precepts for the foundation. If you want your foundation to invest SR, then say so! And third, a founder should show a degree of humility with regard to the future. You will not be able to foresee the investment conditions and details of the situation of your foundation ten, twenty, or even hundred years from now; so, if you predefine investments in every detail, you may do your foundation more harm than good.

V. Resulting remarks on the model cases

Trying to apply the results of this article on our model cases we can, with regard to the "hospital foundation," assume that the foundation board is most probably allowed to invest SR. Yet, referring to the aforementioned classification of foundations with regard to their statutory basis for SR-investments, the foundation is part of the third group of foundations as it has no distinct statutory basis for SRI. Accordingly, the foundation board is probably allowed to invest SR, but it must (in principle) not accept underperformance in investment parameters (return, risk,

liquidity) stemming from the SR character of its investments. When deciding on whether and how to invest SR, the board will have to exert its discretion very thoroughly. The board must seek expert advice and construe the management of the investment appropriately. Exercising this level of care will not be easy, but if the board manages to show due care, it probably cannot be held liable for a possible failure of the investment.

Because of its SRI-related purpose element, our solar foundation falls in the first category of foundations in the statutory SRI-basis matrix. To choose a solar field-investment, therefore, does not in itself violate foundation law or the foundation statutes. But the foundation board may have unduly exerted its discretion, and thereby violated foundation law, by choosing a solar investment field that presents an inappropriate risk-return ratio. As the foundation is not intended to be a consuming foundation, the board has to secure the long-term realization of the foundation purpose. The chosen solar field-investment may not fulfill this obligation as it creates a great risk of severe financial losses and thereby endangers the entire foundation. Furthermore, insofar as the foundation board could have prevented the mismanagement, it has probably violated its obligation to carefully implement its investment decisions.

VI. Summary

1. General summary

As we have seen, the interaction of general foundation law and general investment principles with the particularities of SR investments is a complex but unavoidable topic for foundations that want to invest or have invested sustainably. Although the academic discussion has not yet consolidated towards a comprehensive and coherent set of legal rules for the management of foundation assets, some cornerstone principles” can guide foundation boards in assessing sustainable investments.

This assessment must start from the fact that the foundation assets are a core element of the foundation structure, because it provides the means to realize the foundation purpose and the will of the founder. Although the foundation board has a certain margin of autonomy and discretion, this margin ends where either binding prescripts are made by the law or the foundation statutes, or where the management and use of the foundation assets deviate from the orientation towards the foundation purpose and the will of the founder.

In order to exercise its discretion properly, the foundation board must follow a four-step process of (1) determining the margin of discretion, (2) assembling the relevant and sorting out the irrelevant aspects for the decision to be taken, (3) weighing the relevant aspects, and (4) taking and implementing a decision that reflects the result of the consideration process. These rules for a due consideration process are of very high importance to the management of foundation assets, not least because foundation boards typically exercise a margin of discretion with regard to many asset-management issues.

The aspects which are typically relevant for foundation asset management, in particular when it comes to the due exertion of discretion, can be separated into two categories. On the foundation level, we can locate the aspects that derive from fundamental principles of foundation law and from the structure of the foundation. On the investment level are general investment principles that apply – in principle – to the management of any asset, not only the foundation asset. This model helps to clarify the relation between the aspects assigned to the different levels: As the foundation board is bound to realize the foundation purpose and the relevant will of the

founder, the foundation level takes, in principle, precedence over the investment level. One example of the interaction of the two levels is the principle that foundations can and even should take appropriate risks when investing the foundation capital; core elements for determining which risks are appropriate are the structure of the foundation (foundation level) and the techniques of modern portfolio management (investment level).

Applying these general principles to SR-investing foundations and having regard to the statutory basis for an SRI, it seems necessary to distinguish three types of foundations: For the first group of foundations, whose purpose contains an SRI element, engaging in SRIs directly realizes the foundation purpose. The SRI activity is therefore not only possible, but mandatory. Yet the SRI purpose must be realized lastingly and in the best possible way, and not through idealistic but highly risky investments. For the second group of foundations, whose statutes, including the relevant will of the founder, address SRI activities without making them part of the foundation purpose, much depends on the way the SRI issue is addressed. If, for example, the foundation board has a large margin of discretion over how to execute SRIs, the two-level structure of relevant asset management aspects comes into play. According to this structure, the foundation board must conceive the SRIs in a way that best serves the foundation purpose, even if ESG factors advocate a different investment policy. For the third group of foundations, whose statutes do not mention SRI activities, it is not self-evident that the foundation board is allowed to invest SR. Even if an interpretation of the statutes and the will of the founder shows that the foundation can invest SR, no negative impact on the realization of the foundation purpose can be justified by SRI particularities.

If a foundation board is allowed or obliged to invest SR, then soft law, such as the ESG parameters and GRI guidelines, can help to determine whether an investment is SR. In consequence, this soft law is a major aspect of the foundation board's exertion of discretion over which investments to choose. Among the different SRI approaches, the board has to choose an approach adapted to the characteristics and the resources of the foundation. And the board has to establish working structures that foster the success of the foundation's SRIs. As SRIs are a relatively new class of investments that tends to present greater risks than many conventional investments, asset management with regard to SRIs must employ a considerable degree of care and specific knowledge in order to ensure that the investments chosen qualify as SRI and that unnecessary risks and losses are avoided.

From the *ex ante* perspective of a prospective founder, the SRI activities of a future foundation become a question of foundation planning. The foundation statutes and the will of the founder are the crucial determinants for a sustainability orientation of the foundation. In shaping the SRI dimension, the founder should observe – among many other relevant elements – the fundamental maxims of (1) seeking expert advice, including over SRI matters, (2) clearly prescribing the SRI policy, whilst (3) forbearing from regulating each and every detail of future SR investments.

These cornerstones of SR-oriented asset management for foundations will have to be elaborated in the future. Nonetheless, three “Charta”-principles may serve as a starting point for further discussions on the issue.

2. Elements of an SRI Charta for foundations

(1) The SRI activity of a foundation must take into consideration the fundamental principles that follow, on the foundation level, from foundation law as well as from the statutes

of the foundation. Moreover, it must respect, on the investment level, the general rules of asset management. In principle, the foundation level takes priority over the investment level.

(2) Foundations with SRI as their purpose are, like all foundations, bound to realize that purpose as best possible. The SRI activity of other foundations depends on whether and how the foundation statutes conceive a specific (SR-) investment strategy; in any case, the SRI activity must be shaped in a way that does not hinder the optimal realization of the foundation purpose.

(3) Foundations shall apply due care in taking and implementing their investment decisions. This includes, in particular, the foundation board's duty to abide by the rules of a due exertion of discretion. SRI decisions shall, as part of a due exertion of discretion, take into consideration commonly accepted guidelines and criteria on how to determine the SR character of an investment. The SRI approach must be adapted to the structure and the possibilities of the foundation.

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Article

My Brother's Keeper: Challenges in Gifting in the Kenyan Context

Henry Otieno Ochido¹

NGOs in Kenya are largely unsustainable and dependent on northern donors to support their activities. Support from local donors for their activities is almost nonexistent, despite the fact that Kenya has a longstanding tradition of social giving and mutual help. Almost all communities have a term to define the concept of mutual help.² Collective action is often pursued as a strategy to access resources critical to the livelihoods of vulnerable families. Traditionally, women formed informal associations in order to assist each other, for instance in labor-saving activities.

It is generally agreed that the tradition known as Harambee has its grounding in Kenyan society, particularly the principles of self-help and cooperative work. Harambee was popularized by the late first President of Kenya, Jomo Kenyatta, who used it as a rallying call and a tool for mobilizing Kenyans to raise resources to help develop the young nation. Kenyans have participated actively in Harambee, thereby promoting its cardinal values of mutual assistance, joint effort, mutual responsibility, and community self-reliance. Through Harambee, numerous schools, health centers, cattle dips, and even roads have been constructed.

Traditionally, then, giving in the Kenyan context has taken the form of mutual help. In the absence of a welfare state, the citizen has often assumed responsibility for providing support to needy relatives and neighbors. Indeed, the typical Kenyan worker supports not only members of their nuclear family but a string of members of the extended family as well. To illustrate the foregoing, remittances by Kenyans in the Diaspora to relatives back home are the third largest source of hard currency, after horticulture and tea exports. In 2008, total remittances were \$611.2 million.³

Yet despite Kenyans' obvious capacity to mobilize resources and their clear willingness to give to those who are vulnerable, anti-poverty NGOs, which serve as conduits for funds from givers to recipients, have been unable to tap into this generosity.

Why have NGOs in Kenya been unable to take advantage of this tradition and mobilize resources locally to fund their activities? Concurrently, why do Kenyans appear to lack the same level of enthusiasm for NGOs that they have for Harambee projects and mutual-benefit organizations?

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² Njuguna and Valdivia in *Motivation for Collective Action: A Case Study of Western Kenya*.

³ Reuters, Monday, 23 March 2009.

Do Kenyans lack appreciation for the work of NGOs? This cannot be the case, considering that vast areas of Kenya—for instance, the Northern part of the country, where government presence in terms of providing basic services is almost nonexistent—depend on NGOs to provide services such as health and education. It is estimated that NGOs contribute upwards of US \$1 billion annually to the Kenyan economy.⁴

However, most of this money is generated from foreign donors. A study by the NGOs Coordination Board⁵ showed that 99% of funding by NGOs came from western donors, with an insignificant percentage being raised from local donations. On the other hand, research by the Institute of Development Studies of the University of Nairobi⁶ indicates that mutual-benefit organizations, such as welfare organizations, and self-help groups, were relatively stable financially, funded mostly by resources mobilized from members.

What, then, explains Kenyans' low interest in making donations to NGOs? It is our contention that the problem reflects two factors.

First, NGOs have failed to integrate the traditional culture of mutual giving, which is usually both financial and non-financial, in their fundraising. Traditional giving is not necessarily based on the rich giving to the poor. Gifting in the traditional context and even through Harambee is flexible. It allows even those who are disadvantaged to participate, such as through providing labor and voluntary services. Giving then becomes both a vertical and a horizontal process. In the western model, by contrast, giving is mostly vertical: the better-endowed give to the poor.

Second, NGOs fall short on accountability. In their governance, decision-making, and accountability, NGOs are essentially private organizations. When local communities have no opportunity to participate in the management of an NGO, it can seem untrustworthy. In mutual-benefit organizations, by contrast, the decision-making process is more open and even egalitarian. The accountability systems in these organizations are generally drawn from traditional values consisting of religious beliefs, taboos,⁷ and peer pressure. NGOs do not have the same pressures to account for their resources, because they do not draw from these traditional accountability systems and because they are generally beholden to third-party donors.

NGO accountability in Kenya can fall short not just under traditional social systems, but also under the common law model. While NGOs do not feel compelled to account to local communities due to their private nature, at the same time they fail to reconcile their private voluntary and public benefit status, particularly its requirement that they observe the highest standards of probity through self-regulation and continuous demonstration of public benefit. They have tended to focus on their responsibility to the donor and not their responsibility to the recipient of the aid.

⁴ Source: NGOs Coordination Board.

⁵ The NGOs Coordination Board is the government regulator for NGOs in Kenya.

⁶ Karuti Kanyinga and Winnie Mutulah, *The Non Profit Sector in Kenya :What We Know and What We Don't Know*.

⁷ Here is an example of one taboo: In many Kenyan communities, it is believed that misusing money collected for the vulnerable, such as orphans and widows, can lead to personal misfortune.

NGOs in Kenya are defined as public benefit institutions based on the common law.⁸ The fundraising model adopted by NGOs is therefore drawn from the common law, in which donors largely give anonymously through an intermediary in a relationship overseen by a government regulator. This form is the hallmark of charitable giving for public benefit. It works well in the west, but it remains to a large extent foreign to the Kenyan experience. As has been stated, the culture of giving in Kenya relies on mutual help. This culture has spawned thousands of mutual benefit organizations, ranging from women merry-go-round groups⁹ to welfare societies and funeral committees. The NGO form is therefore far removed from Kenyans' experience. Indeed, the fact that NGOs in Kenya largely depend on gifts given anonymously by donors in faraway countries has tended to alienate them from the communities that they seek to serve and, in turn, has made the communities feel absolved from a sense of responsibility to support the NGOs.

What, then, can Kenyan NGOs do to attract funding from Kenyans and reduce their dependency on foreign donors? It is fairly obvious that they must find a way of integrating the two modes of giving: first, the longstanding Kenyan mode, based on mutual help, with accountability resting on traditional value systems; and, second, the common law model, based on vicarious giving for the public benefit, with accountability resting on the state through legislation and codes of conduct. NGOs particularly have to incorporate traditional accountability mechanisms into their governance if they hope to win the trust of communities and therefore potential donors.

Further, the state can spur public giving through tax incentives and other forms of inducement. The Kenyan government, for instance, in 2007 enacted the Income Tax (charitable donations) Regulations 2007. The Regulations provide for individuals and organizations to deduct any cash donations to charitable organizations from their income tax. While this is a step in the right direction, few people have taken advantage of the provision, seemingly because public awareness of it is low. It is apparent that NGOs, as potential beneficiaries of the provision, would wish to take a leading role in promoting it.

An obvious challenge will be convincing the giving public that the state can be trusted to mediate the gift relationship through regulation. In a nation where the state is generally associated with the betrayal of the public trust, and where agencies are continually engulfed in financial scandals, this will be a hard sell.

The situation is not helped by the fact that public benefit organizations (PBOs) in Kenya are currently registered under a number of regulatory regimes implemented by different organizations: the NGOs Coordination Act 1990, Societies Act 1998, Companies Act 1959, and Trustees Act 1981. Of these organizations, only the NGOs Board has the capacity to regulate PBOs. In effect, then, PBOs registered under the other laws can largely escape regulation. Moreover, the NGOs Board's capacity to regulate is compromised by a weak legal and regulatory framework as well as insufficient financial and technical capacities.

Nonetheless, the NGOs Coordination Board is currently engaged in an ambitious program to improve the legislative and enabling framework for NGOs, with a view to not only

⁸ Non-Governmental Organisations Act 1990.

⁹ Merry-go-rounds are a popular method of mobilizing resources. Members contribute a specific amount of money at regular intervals. They work in a cyclical manner, with a different member receiving the money raised at each cycle, until everyone has benefited.

strengthening compliance but enhancing public trust as well. Part of this process will involve an ongoing review of the legal framework. It is essential to have a modern law that incorporates best practices in the regulation of NGOs and empowers the Board to take proactive measures as necessary to protect NGO assets and the public from abuse. All public benefit organizations should be brought under one legal framework to ensure effective regulation.

Even so, winning public trust, which is a critical ingredient in promoting charitable giving, will take time. It can only be hoped that the measures being taken by the NGOs Board as well as the wider public sector reforms being undertaken by the Kenyan Government will have positive effects on public trust.

In the final analysis, however, ultimate responsibility for public giving in Kenya rests with NGOs themselves. They must comply with the law; adapt their fundraising to integrate traditional giving and accountability mechanisms; and reconcile themselves to the fact that, though they might be privately run organizations, they are expected to demonstrate a public benefit and submit to official oversight.

Article

The Role of NGOs in Independent Tajikistan

Firdoos Dar¹

Over the past three decades, world politics has changed significantly, with many nonstate actors providing alternative support for development. The fall of Soviet Union has fundamentally altered the conditions for the emergence of nongovernmental organizations (NGOs) in Central Asia in general and Tajikistan in particular. This article analyzes the role of NGOs in the sociopolitical development of Tajikistan. It discusses the NGOs, their emergence, and their role in democratization. It also considers the relationship between NGOs and the state.

Introduction

The end of Cold War and the hastening of the globalization process have created opportunities for nongovernmental organization (NGO) activity on a global level. Over the last three decades, the pace and involvement of NGOs have attained new heights.

The growing role of NGOs in Central Asia makes it necessary to evaluate their nature, types, and procedures. A more comprehensive approach is needed, one that goes beyond traditional analyses based on the interactions between nation-states. This article assesses the impact of the NGO sector on the sociopolitical fabric of Tajikistan as a case study with potential applicability to the rest of Central Asia. It considers the longstanding communal, self-help approach in Tajikistan; the status of organizations under communism; the loosening of restrictions and the growing impact of Western NGOs after the emergence of Central Asian republics in 1991; the contrast between these NGOs' liberal approach and the traditional, communal approach; the government's stance toward NGOs; and future challenges.

Traditional Communal Societies

At the outset, it is appropriate to provide a brief overview of the traditional communal societies² of Tajikistan, which form an important part of the present-day NGO sector. Traditional organizations like *hashar*, *Shariki*, *Avlod*, *Mashvarat*, *Mahalla* (neighborhood) *Councils*,

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² In the Central Asian context, communal societies should not be understood as opposed to the state, but rather in positive terms, in the context of the ideas and practices through which cooperation and trust are established in social life. Thus communal civil societies were less concerned with state-society relations, and the ability of citizens to resist amoral and power-hungry political elites, than with relations within society as well as community solidarity, self-help, and trust. The main aim of this civil society was to ensure that all members of the group had the means for survival. Based on informal mechanisms—family ties, friendship or good neighborliness—civil society organized to offer services, community infrastructure, and other essentials. Communal civil society could be located in “families, communities, friendship networks, solidarity, workplace ties, voluntarism, spontaneous groups and movements.” Paul Dekker and Andries van den Broek, *Civil Society in Comparative Perspective: Involvement in Voluntary Associations in North America and Western Europe*, *Voluntas*, vol. 9, no. 1, 1998, p. 13.

Jamoat, *Gup*, and *Gashtak* (gatherings)³ have a long history in Tajikistan.⁴ Tajikistan trust and solidarity networks were primarily built around kinship ties. In these communal societies, individuals were able to join other like-minded people in groups based around particular interests (merchants' guilds, for example) in order to support one another and perhaps work to promote the interests of the group. Through these kinship-based groups, individuals were able to address, express, and defend their common interests.

In Tajik society, the dominant institution of power was the *Avlod* (clan). For generations, this *Avlod* system provided survival, autonomy, and adaptability to its members, bolstering traditionalism and sustainability. The *Avlod* extended its membership through marriage. Today, the *Avlod* continues to provide assistance to obtain housing, employment, marriage partners, and certain political influence.⁵

Other forms of mutual help with roots in the pre-Soviet era were what would now be called rotating savings groups, centered on smaller family or neighborhood groups. These would not necessarily be based on cash, however; they could be more of an opportunity for social gatherings. In Uzbek, these institutions are called "gaps," from the verb "to talk," while in Tajik they are known as *gashtak* or "taking in turn or a turn." Traditionally, these were held among men, who would invite other group members to their homes or to teahouses for a meal or entertainment.⁶

In addition, pre-Soviet era *mahallas* (neighborhood councils) developed in urban areas as relatively independent associations of citizens. They brought people living on the same territory together on a voluntary basis. *Mahallas* were self-governing, and members gathered regularly to exchange information, decide community problems, provide support for life-cycle rituals, and define public opinion in neighborhood mosques and teahouses (*Chaihana*).

Also, *Shura Aksakal*, a territorial unit similar to that of neighborhood or the council of elders, has for a long time served as an organizing principle of community life in Tajik society.

Hashar represent a voluntary sort of labor for implementing projects in Tajikistan. Their work is guided by cultural traditions at both the local and national levels.⁷ Their role in adjudicating domestic and community disputes and the respect they command locally suggest an ability to take an objective stance and to draw on years of experience when deciding what is best for their community.

³ In *Gashtak*, women organize gatherings. They play an important role in the interchange of information and represent an effective way of involving women in public life. They can play a key role in stabilizing the social relations in Tajik society. Yusufbekov Yusuff, Babajanov Rustam, and Kuntuvdiy Natalya, *Civil Society Development in Tajikistan* (Dushanbe, 2007), http://www.akdn.org/publications/civil_society_tajikistan_development.pdf, p. 18.

⁴ Yusufbekov Yusuff, Babajanov Rustam, and Kuntuvdiy Natalya, *Civil Society Development in Tajikistan* (Dushanbe, 2007), http://www.akdn.org/publications/civil_society_tajikistan_development.pdf, p. 18.

⁵ Marlies Glasius, David Lewis, and Hakan Seckinelgin, *Exploring civil society: political and cultural contexts* (New York, 2004), p. 131.

⁶ Janice Giffen, Lucy Earle, and Charles Buxton, *The Development of Civil Society in Central Asia* (INTRAC), p. 67.

⁷ S. Frederick Starr, Baktybek Beshimov, and Inomjon I. Bobokulo, *Ferghana Valley: The Heart of Central Asia* (New York: M.E. Sharpe, 2011), p. 288.

Tajik Organizations Under Communism

In the Soviet era, a wide array of political, professional, cultural, and social institutions existed, dominated and controlled by the Communist Party-state apparatus.⁸ The Pioneers' League was set up in 1922 as a voluntary community organization of children and teenagers, aged ten to fifteen. By end of the 1970s there were 23 million members of the Pioneers' League across the Soviet Union. On leaving the Pioneers' League, ambitious young people would join the Leninist Young Communist League, more commonly known as the *Komsomol*.

The women's councils were also an integral part of the Soviet system of social organization, which operated through branches organized hierarchically from the republic level down. These committees worked under the guidance of the Party to foster civic activity and ensure the communist future of the constituent republics. They were primarily involved in moral education and the organization of cultural events, as well as ensuring adequate working conditions and living standards for women, and encouraging women to become involved in the Supreme Soviet (parliament) and government structures so as to fulfill quotas.

Other organizations existed, too. There were scientific associations of teachers, surgeons, architects, miners, inventors, and innovators. These associations worked under Party guidance and control. The Red Cross, managed from Moscow, had branches throughout all the Soviet republics. In *subbotniki*, people would provide labor on their days off (from *subбота*, Saturday). Introduced in the 1920s, this was an important mechanism for organizing communal work through local Party people.⁹

Although many people believe that the Soviet regime eliminated all traces of traditional or religious associational life, it did not. Alongside the Soviet forms of associations linked to the state, other, less visible organizations existed, such as parent associations, as well as bodies focused on the needs of particular sections of society, such as pensioners, veterans, and women.

In Soviet Tajikistan, the traditions of community-based voluntary action (*hashar*) aided those who were in need (*sadaqa*); these traditions were largely maintained in rural areas. *Mahallas*, or neighborhood councils, were reincarnated in the *kolkhoz*, where they provided some services, maintained local infrastructure, and resolved community disputes.¹⁰ At times, the communal civil society organizations worked with state; in Tajikistan's history, the organizations rarely opposed the state. The Soviet authorities, however hostile they were towards traditionalism, did not succeed in eliminating local traditions of self-help and community action, but rather reinforced them through their emphasis on voluntary work as part of the Soviet citizen's consciousness.¹¹

⁸ Under the Soviets, of course, a number of associations or groups existed which in democratic countries would qualify as constituting a civil society, but they remained largely under the close control of the Communist Party, despite being labeled voluntary (*dobrovolnyi*). Elements outside that sphere included concepts of Islam. Sally N. Cummings, *Oil Transition and Security in Central Asia* (London, 2003), p. 87.

⁹ Janice Giffen, Lucy Earle, and Charles Buxton, *The Development of Civil Society in Central Asia* (INTRAC), pp. 71-73.

¹⁰ Sabine Freizer, Neo-liberal and communal civil society in Tajikistan: merging or dividing in the postwar period, *Central Asian Survey* (September 2005) 24(3), p. 5.

¹¹ Ina Zharkevich, *The Role of Civil Society in Promoting Political Accountability in Fragile States: The Case of Tajikistan* (INTRAC, 2010), <http://www.intrac.org/data/files/resources/682/The-Role-of-Civil-Society-in-Promoting-Political-Accountability-in-Fragile-States.pdf>, p. 7.

In the 1990s, during the more liberal atmosphere of the perestroika period, some sociopolitical movements began to appear, and a few independent parties were even granted official registration.¹² For most of this period, though, there were no NGOs in the real sense of the term. At that time, civil society's emergence was linked to the empowerment of dissident opposition movements that sought to terminate the region's socialist/communist experiment. Civil society was equated with enemies of the Communist State.¹³ Governments often repressed NGOs, pushing their leaders into jail or towards emigration. Neoliberal civil society was thus primarily perceived as a political project, with activists engaging in lobbying and advocacy.

Besides this state hostility, NGOs in Tajikistan faced additional hurdles. For example, they did not have an adequate legislative base to support their activities. They often operated in a legal vacuum; normative acts were unclear and often contradicted each other.¹⁴ Also, civil war and resistance from political forces were highly unfavorable to the development of independent initiatives. Finally, to the extent that one existed at all, the government-NGO relation was uncoordinated.

The Rise of NGOs

From the mid-1990s, NGOs gradually took root despite a deep economic and social crisis, with strong support from Western donors. By the end of the 1990s, relations between civil society and government had advanced, while the Western/World Bank agenda remained dominant in development issues. USAID, Swiss Development Cooperation, Counterpart International, Aga Khan Foundation (AKF), INTRAC, and IREX have made use of both the liberal and the communal models for improving Tajik society.¹⁵

These NGOs began by doing purely humanitarian work during the civil war period, with scant involvement in politics. In early 1993, the Tajik government welcomed U.S. engagement in humanitarian and related activities, but remained suspicious of any activity with a potential political agenda. The U.S. government's democratization program remained confined to uncontroversial issues such as the rule of law,¹⁶ with activities that included training courses for judges and lawyers. U.S.-sponsored democracy and governance programs were implemented in Tajikistan, although the government continued to monitor NGOs.¹⁷

But with time, the realization set in that civil society could contribute to democratic consolidation by stabilizing expectations and social bargaining. As changes swept the region,

¹² Aymn Sajoo, *Civil society in the Muslim world: contemporary perspectives* (London, 2002), p.172.

¹³ Baken Babajanian, Sabine Freizer, and Daniel Stevens, Introduction: Civil society in Central Asia and the Caucasus, *Central Asian Survey*, 2005, vol. 24, no. 3, p. 211.

¹⁴ Muatar Khaidarova, The Third Sector in Tajikistan: Building a Legislative Base, <http://www.docstoc.com/docs/50682377/NGO-Law-in-Tajikistan-Problems-and-Perspectives>, p. 4.

¹⁵ Charles Buxton, NGO networks in Central Asia and global civil society: potentials and limitations, *Central Asian Survey*, 28: 1, p. 7.

¹⁶ Donnacha Ó Beacháin, *The colour revolutions in the former Soviet republics: Successes and failures* (UK: Taylor & Francis, 2010), p. 198.

¹⁷ NGOs came under increased pressure in the wake of the Tulip Revolution in Kyrgyzstan when the Tajik ministry of foreign affairs distributed a letter on 13 April 2005 to NGOs and local government offices requiring them to provide notification of all meetings, training courses, and seminars. Donnacha Ó Beacháin, *The colour revolutions in the former Soviet republics: successes and failures* (UK: Taylor & Francis, 2010), p. 184.

citizens in independent organizations were empowered to open a dialogue with the government to protect their interests. Ironically, the highest level of democratic mobilization occurred in Tajikistan, despite the fact that it was often than considered the most traditional state in terms of religion.¹⁸ Above all, with the acceptance of the first Constitution of Independent Tajikistan in 1994 and the signing of the General Peace Accord in 1997, the process of introducing international standards in political, economic, and social reforms became more active, particularly the introduction of international legal norms.

NGO Law in Tajikistan

The government of Tajikistan now encourages the formation of NGOs. The law has evolved over time. Since 1996, the International Center for Not-for-Profit Law has been carrying out programs in Central Asia and the Caucasus, helping governments to formulate law dealing with NGOs.

A law on Public Associations was adopted in 1991. At that time it covered both NGOs and other parties. But the diversity of NGOs meant that they could not be regulated by a single law. In 1998, new laws were introduced that differentiated their activities. The laws provide certain tax exemptions and registration fees.¹⁹ Under the amended law, establishing an NGO requires three founder members along with the charter and other supporting documentation. The legislative process, which makes NGOs operational in a disciplined way, is mirrored through the legislation.²⁰ The law regulates the creation, activity, reorganization, and liquidation of various forms of NGOs in Tajikistan, and thereby establishes a strong legal base for NGOs.

This includes “the right to create, and to participate in the creation on a voluntary basis of public associations for the protection of common interests and the achievement of general purposes, the right of free access to existing public associations, or to abstain from entering into them and to voluntarily and freely leave public associations.” It should also be stressed that this law defines a public association as “a voluntary, self-management and non-commercial formation, which is created by citizens’ and legal persons’ initiative and on the basis of generality of interests for the realization of general purposes, as specified in the charter of the public association.”

Among the improvements in the law are:

- The minimum number of founders required was reduced from ten to three.
- Associations are considered registered as soon as a decision is made in favor of their creation, their statutes are approved, and management and supervisory bodies are set up.

¹⁸ Pauline Jones Luong, *The transformation of Central Asia: states and societies from Soviet rule to independence* (U.S.: Cornell University Press, 2004), p. 16.

¹⁹ Aryn B. Sajoo, *Civil society in Muslim world: Contemporary perspective* (London, 2004), pp. 173-174.

²⁰ Law of 1998 on Public Associations is the principal act. It was adopted in 1990 and amended in 1992 and 1998. This provides a legal space for a public organization as a self-governed, not-for-profit association, including political parties, trade unions, and other social organizations, but not commercial organizations. For a long time after Tajikistan gained its independence in 1991, NGOs functioned on the basis of the 1990 Law on Public Associations in the Tajik Soviet Socialist Republic.

- The rights of NGOs were expanded. These include the right to participate in the decision-making process of state bodies; the right to protect their legal interests and those of their stakeholders and other citizens in a court of law; and the right to make legislative initiatives on various public issues.²¹

In Tajikistan, ICNL helped the government in drafting new tax codes.²² Tajik NGOs, along with international organizations, began to lobby the working group drafting a Civil Code to include the concept of “non-commercial organisation.” They were successful: the first part of the Civil Code, passed in May 1999, includes a definition of non-commercial organizations as organizations that do not aim to derive profit and do not distribute the profit they receive among the founders and members. The Code also includes the basic organizational-legal forms of noncommercial organizations: consumer cooperatives, religious and public organizations, public funds (foundations), institutions, and associations (unions).

The Law on Public Associations of 2007 required all local and international NGOs to re-register by the end of year and subjected NGOs that work with foreign organization to additional scrutiny. Many NGOs were unable or chose not to re-register, reducing their ranks from 3,700 to 1,400. The law has been praised for benefits it introduced. The report of AKF assesses the environment of Tajikistan as conducive to the development of NGOs, stating that while the laws might be not exemplary, in practice NGOs can choose their areas of work.

On May 19, 2009, the President signed the new Law on State Registration of Legal Entities and Individual Entrepreneurs. The Law envisions two channels of state registration for NGOs. Public associations are registered with the Ministry of Justice, in accordance with the Law on Public Associations. Other noncommercial organizations (including public foundations as well as unions and institutes) are registered with the local tax authorities. Registration with the local tax authorities is both simpler and subject to less discretion than registration with the Ministry of Justice. Indeed, requiring public associations (and political parties) to undergo the complex registration procedure with the Ministry of Justice distinguishes these forms from all other legal entities, including for-profit businesses and all other types of NGOs. The amended form of law on public associations of 2010 required registration of the branch and representatives offices of foreign public associations and non-commercial organizations with the Ministry of Justice, a more burdensome registration.²³

The Tax Code has also changed in its treatment of NGOs. The Tax Code that came into force in January 2005 included the concepts of “charitable organisation,” “charitable activity,” “grant,” humanitarian assistance, and a list of activities that can be considered charitable. This was the result of a series of meetings and proposals made by NGOs to the working group responsible for drafting the Tax Code.

²¹ Yusufbekov Yusuff, Babajanov Rustam, and Kuntuvdiy Natalya, *Civil Society Development in Tajikistan, Dushanbe 2007*, p. 22, http://www.akdn.org/publications/civil_society_tajikistan_development.pdf

²² Tigran Martirosyan, Silvia Marette, and Paul H. Nitze, *Scholar's Guide to Washington D.C. for Central Asia and the Caucasus Studies: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan*, M.E. Sharpe, NY, 2005, p. 32.

²³ Alexander Cooley, *Great Games, Local Rules: The New Great Power Contest in Central Asia*, Oxford University Press, 2012, p. 181.

In 2011, the Governments of Tajikistan initiated to adopt a revised Tax Code and created a working group from the state ministries and NGOs to develop the draft. Proposals for a new draft Tax Code of the civil society organizations took place on December 26, 2011, in Dushanbe. The roundtable was organized by ICNL, in Tajikistan, with the financial support of the U.S. Agency for International Development (USAID), “Legal Support for Civil Society Organization in Central Asia.” At the roundtable, representatives of civil society organizations were given the opportunity to familiarize themselves with the new concept of tax policy in Tajikistan for the medium term, to discuss problematic issues of taxation, as well as to prepare suggestions to improve the draft Tax Code and make them available to a government working group. The new Tax Code was adopted in September 2012.

The effects of the changes to Tajik law can be gauged by the rising number of NGOs. ICNL estimated that a total of 1,241 NGOs were registered in Tajikistan in 2002, compared with 33 groups in 1993.²⁴ According to the Ministry of Justice, as of January 1, 2012, 2,500 public associations were registered in Tajikistan, an increase of close to 200 since the end of 2010. This number does not include Public Foundations and Associations (unions) of legal entities as NGOs, as from 2009 they are not registering in the Ministry of Justice. Approximately 600 to 800 of these NGOs are active. According to the Mountain Societies Development Support Program (MSDSP), the number of village organizations and associations also increased, by 10 percent and 15 percent respectively.²⁵

NGO Activities in Tajikistan

From the mid-1990s until today, the NGO became the most prevalent form of neoliberal civil society to develop. NGOs began to address a wide range of issues, including human rights, women’s leadership, elections monitoring, environmental protection, education, micro-credit, microeconomic development, health, and family planning. While much of the state-run welfare system and infrastructure began to crumble, NGOs took over many of the functions previously reserved for government.²⁶

Women have increasingly found an alternative voice in the politics of Tajikistan through participation in NGOs. Tajik government has also acknowledged their potential contribution in women empowerment. Since 2005, the Tajik Governments have provided grants to NGOs working with women and women entrepreneurs through the state Committee on Women and Family issues. These NGOs are playing a key role in mobilizing women in Tajikistan by rendering services for solving problems related to gender. For instance, the European Commission’s ongoing projects in Tajikistan, “Organizing Women Support Services” and

²⁴ Freizer, Sabine', Neo-liberal and Communal Civil Society in Tajikistan: Merging or Dividing in the Postwar Period, *Central Asian Survey*, 2005, 24: 3, p. 4.

²⁵ The 2011 CSO Sustainability Index for Central and Eastern Europe and Eurasia 15th Anniversary Edition, by United States Agency for International Development, Bureau for Europe and Eurasia, Office of Democracy, Governance and Social Transition, p. 206, http://transition.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/reports/2011/2011CSOSI_Index_complete.pdf#page=205.

²⁶ Baken Babajanian, Sabine Freizer, and Daniel Stevens, Introduction: Civil society in Central Asia and the Caucasus, *Central Asian Survey*, 2005, vol. 24, no. 5, p. 211.

“Education for Each Girl,” are proving helpful.²⁷ The government adopted the “National Plan of Action” to increase status and role of women in Tajikistan from 1998 to 2005.²⁸

The 2005 elections reflect these efforts. Out of 195 candidates, 32 were women. Altogether, 11 women were elected, representing over 18 percent of the lower house.²⁹ In the parliamentary elections in 2010, 15 women out of 73 candidates (21 percent), who were registered under party lists, competed for the mandate out of 22 possible mandates. In 41 single-mandate constituencies, the 129 candidates included 17 women (13 percent). There were 13 women (20.6 percent) among 63 elected candidates. Seven women were elected in single-mandate constituencies and six women were elected under party lists. All elected women were from the PDP.³⁰

NGOs are working for the betterment of women in number of other ways. These NGOs are engaging in women education, increasing their participation in the political process of country and giving them knowledge about rights, election and leadership.³¹ Jane Falkingham gives information about 53 indigenous NGOs devoted to women’s issues, such as Union of Women in Tajikistan, Women in Development Bureau, Women of Science of Tajikistan, Women’s Initiatives, Open Asia, and League of Woman Lawyers. These NGOs encourage Tajik women to think in new ways about gender and about efforts to improve their position.³²

There is now a growing awareness among both policymakers and NGOs that gender-based violence is a problem that needs to be addressed before progress towards equality can be achieved. In response to this a number of NGOs are active in this area and the National Plan for the Advancement of Women has the prevention of all forms of violence. Tajik nongovernment organizations held a roundtable at which they renewed demands for more effective action against domestic violence. Participants said it was urgent to adopt a bill that would help the country fulfill the UN Convention on the Elimination of All Forms of Discrimination against Women³³

²⁷ European Union Gender Watch, A Gender Analysis of European Union Development of Instruments and Policies in Tajikistan, representing Central Asia, http://www.ngonet.dk/Files/Filer/KN/Ressourcer/EU_GenderWatch_Tajikistan.pdf, p. 24.

²⁸ Adrain Karatnycky, Alexander J. Motyl, and Amand Schenetzler, *Nations in Transit, 2002: Civil Society, Democracy and Markets in East Central Europe and the Newly Independent States*, U.S.A, 2002, p. 377.

²⁹ Marina Safarova, EU Gender Watch, A Gender Analysis of EU Development of Instruments and Policies in Tajikistan Representing Central Asia, Dushanbe, 2007, http://www.ngonet.dk/Files/Filer/KN/Ressourcer/EU_GenderWatch_Tajikistan.pdf, p. 7.

³⁰ Abdughani Mamadazimov, Cand. Sc. Alla Kuvatova, Political Party Regulations and Women’s Participation in Political Life in Tajikistan, Dushanbe, November 2011, p. 82, <http://www.osce.org/odihr/87108>

³¹ Women’s Organizations and Their Use of information and communication technologies in the Caucasus and Central Asian Region: An exploratory Assessment, United Nations New York 2001. <http://www.unescap.org/esid/gad/issues/ict/Women&ICT-Pub.pdf>

³² Christa Hämmerle, Gender Politics in Central Asia: Historical Perspectives and Current Living Conditions of Women, vol. 18 of *L’Homme Schriften. Reihe zur Feministischen Geschichtswissenschaft*, Böhlau, Verlag Köln, Weimar, Germany, 2008, p. 66.

³³ The Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the UN General Assembly on December 18, 1979, and entered into force on September 3, 1981. Tajikistan ratified the convention on June 29, 1993. Under the Convention, states are required every four years to report on the measures taken and the difficulties in the implementation of the Convention to the Committee on the Elimination of All Forms of Discrimination Against Women. This reporting allows the Committee to assess the achievements of the participating countries and helps them to meet their obligations.

(CEDAW) and the International Covenant on Civil and Political Rights (ICCPR). Tajikistan is a signatory to both.³⁴ A coalition of public associations “from legal equality to actual equality” has started preparations for the second alternative report on the implementation of the requirements of Tajikistan Convention on the Elimination of All Forms of Discrimination Against Women.³⁵ On July 28, 2011, the United Nations Women Office in Tajikistan hosted national public hearings with stakeholders on the draft law on domestic violence, which has been under discussion for many years. At the hearing, participants raised concerns about the growing number of domestic violence cases in Tajikistan, and stated their plan to submit recommendations to further strengthen the law, according to news reports.³⁶ The public hearings were opened with the presentation on the current situation in Tajikistan with regards to the domestic violence and analysis of the draft law worked out by the coalition From Equality De-Jure to Equality De-Facto. Access to Justice for Victims of Violence took place on the same day in Khujand, initiated by the branch of the Human Rights Center public association in Khujand under the support of the Swiss Cooperation Office and Helvetas.³⁷

The NGO sustainability index is a summary of seven variables: a country’s legal environment, organizational potential, financial status, advocacy, service-delivery level, infrastructure, and public institutes’ image. In Tajikistan, local governments increased their monitoring of the NGOs’ work. Registration remains problematic in Tajikistan, too. Organizational capacity declined slightly in 2011. In Tajikistan, donors are pushing CSOs to evaluate their operations and become more results-oriented. State social orders, or government procurement of social services, are gradually increasing, but the procedures are not transparent and promote the establishment of GONGOs. CSOs in Tajikistan reported stronger dialogue and cooperation with national and local governments in 2011. For example, strong lobbying efforts by CSOs convinced the Tax Committee, a government agency, to withhold implementation of new tax provisions for CSOs until the end of 2011. Tajikistan has improved its sustainability dramatically, moving from the lower ends of Sustainability Impeded to the middle of the Sustainability Evolving category.³⁸

Today NGOs have contributed to the solution of many social problems, and what is especially important, they play a vital role in the defense of human rights. They are also becoming an effective instrument for establishing stability and peace in the republic and for maximum involvement of citizens in the process of democratization. Their active lobbying led to the signing in May 1996 of the Agreement on Establishments of Peace and Social Accord between the President, Government, Parliament, public associations, and political parties, which has now been extended indefinitely. The Social Council set up by the agreement is a

³⁴ <http://www.wluml.org/ar/node/4350>

³⁵ <http://news.tj/ru/news/npo-gotovyat-alternativnyi-doklad-o-vypolnenii-konventsii-o-likvidatsii-vsekh-form-diskriminats>

³⁶ <http://www.hrw.org/world-report-2012/world-report-2012-tajikistan>, p. 5.

³⁷ See Asia Plus, July 30, 2011, <http://news.tj/en/news/national-public-hearings-held-discuss-draft-law-domestic-violence>.

³⁸ The 2011 CSO Sustainability Index for Central and Eastern Europe and Eurasia 15th Anniversary Edition, by United States Agency for International Development, Bureau for Europe and Eurasia, Office of Democracy, Governance and Social Transition, p. 197, http://transition.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/reports/2011/2011CSOSI_Index_complete.pdf#page=205

representative, expert-consultative and coordinating body. It should be pointed out that the Council was the first and only such body in Central Asia at that time which regulated partnership-based relations between the state and NGOs. Counterpart International provided local NGOs, including women's organizations, with grants and training on a competitive basis. It is currently seeking donor support for the establishment of a permanent NGO internet resource center to be located in Dushanbe. It also maintains a regional NGO database and CANGO electronic information network.

Many NGOs in Tajikistan work to improve the conflict-prevention capability of the region and of the individual governments. The impact on the preventive capability has, however, been low and uncoordinated between organizations and states. The low impact is due to the lack of political will on the part of governments to be coordinated by foreign NGOs and the possible reduction of their sovereign rights. The Tajik state is uncomfortable with fully independent NGOs in the region, and in all states there are restrictions on the freedom of such organizations. It is crucial to strengthen the states and governments before the NGOs can have a positive impact on the conflict-prevention capability in the region, as NGOs are today considered to be more of a threat than a positive force. This is because the primary actors in security issues and conflict prevention in Central Asia remain states and governments, not individuals and NGOs.

There is no doubt that NGOs are critical for the survival and well-being of people in delivering social services in Tajikistan and filling in the gaps in those areas where the state lacks the capacity to act. However, concern remains as to whether these efforts contribute to breaking the cycle of poverty, increasing the capacity of the state to deliver services, influence the decision-making process at the national level, or debate about the future of the state.

The observation shows that in post-conflict situations, civil society can positively contribute to the process of state-building and policy formulation rather than merely performing humanitarian work. Civil society organizations in Tajikistan have increasingly engaged in dialogue with authorities and state institutions at different levels. They are trying to influence the norms and practices of the legal system as well as to monitor and improve the delivery of social services provided by the state. They have attempted to change existing legislation and norms within the state institutions. Civil society organizations are likely to make durable and sustainable contributions to the social life of the country, besides their potential of improving political accountability. The only prerequisite is to implement initiatives in coordination rather than confrontation with authorities.³⁹ NGOs in Tajikistan are now in a position to exert pressure on the government to modify the laws.

NGOs are monitoring the record of the government on its human rights obligations and holding it accountable for shortcomings in international forums. They broke new ground by submitting alternative reports on the government's progress in fulfilling its obligations under human rights conventions. With the support of UNIFEM and SDC, a coalition of NGOs in 2006 drafted an alternative report to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁰ This report identified areas of concern not covered in the official national report. In addition, an alternative report was drafted by civil society for the United Nations

³⁹ Ina Zharkevich, *The Role of Civil Society in Promoting Political Accountability in Fragile States: The Case of Tajikistan*, INTRAC, 2010, p. 44.

⁴⁰ Civil Society and Human Development in Tajikistan, http://cfapp1-docs-public.undp.org/eo/evaldocs1/adr/eo_doc_597030542.pdf, p. 25.

Committee Against Torture. With the facilitation of the World Organization Against Torture, coalitions of NGOs working in human rights were brought together in a series of meetings which included international organizations and government authorities.

Much NGO activity has focused on elections. More than half a million dollars was funneled through the American NGOs such as IFES, NDI, and IREX in an election-related grant program particularly targeted at women and first-time voters. One supported NGO in the Kulob region, Elim, administered a small grant to educate women voters through a project entitled "Vote and Win." This is not an easy job in the field in Tajikistan, where news media are sparse: In many areas, such as Rasht valley, there are no newspapers, only a few Russian TV channels and the state-owned *Televizioni tojikison*. As per the OSCE reports, TV channels downplayed election events while devoting major coverage to the president. To work in local administration, one must have permission from the foreign ministry. Tajik NGOs are not specifically allowed to be national (local) observers in elections. Before the last parliamentary elections, the Coalition of NGOs for Fair Elections, comprising more than 15 organizations, established a working group to amend the national laws to allow for the possibility of local election observers. A recent and positive development has been the registration of candidates who are members of NGOs. These candidates ran for the *Majlisi Namoyandagon* as well as for regional, town, and district majlises. Ten of them were members of the NGO Coalition.⁴¹ The Office of Organization for Security and Co-operation in Europe assists Tajikistan in modernizing its electoral legislation and procedures. It helps Tajikistan in a number of fields like local government, elections, and legal awareness, too.⁴²

NGOs also promoted good governance through public service reforms, civil service and administrative reforms, and greater transparency of public administration. In 2008-2009, an NGO called Rights and Prosperity carried out research aimed at increasing the accountability and transparency of public administration, which focused on the use of complaints (appeals) mechanisms by citizens from vulnerable groups.⁴³ The most common complaints received by government officials regarded land, water, energy supply, and privatization. In addition, NGOs improved transparency and rationalization of public budget management as well as effectiveness of policy planning.⁴⁴ NGOs have worked in Tajikistan to advance OSCE goals, including "Strengthening democracy and management through increasing the participation of women in politics" and "The role of local self-governance authorities in the democratization of society."⁴⁵ The Mountain Societies Development Support Programme (MSDSP), a program of the Aga Khan Foundation (AKF), works to strengthen governance and civil society in Tajikistan's rural communities.⁴⁶ It is also supporting and improving the educational system of Tajikistan.

⁴¹ Dr. Abdughani Mamadazimov, Cand. Sc. Alla Kuvatova, Political Party Regulations and Women's Participation in Political Life in Tajikistan, Dushanbe, November 2011, p. 40, <http://www.osce.org/odihr/87108>.

⁴² <http://www.osce.org/tajikistan/43669>, p. 2.

⁴³ Ina Zharkevich, *The Role of Civil Society in Promoting Political Accountability in Fragile States: The Case of Tajikistan*, INTRAC, 2010, p. 32.

⁴⁴ Marina Safarova, *EU Gender Watch: A Gender Analysis*, Dushanbe, 2007, p. 29.

⁴⁵ Kuntuvdyi N., Ulmasov R. Development of Civic Education in Tajikistan: Problems and Prospects; Peaceful Development Academy, 2007, pp. 48-49. The project's target groups were heads of *mahallas* (small area within a village) and heads of women councils in *mahallas*. In total, the project covered 19 *mahallas* of the different districts. Participants were taught the main principles of the democratic state.

⁴⁶ http://www.akdn.org/tajikistan_civil.asp, p. 3.

Initially, its focus was on providing textbooks and supplies to schools. The foundation went on to provide scholarships to students as well as training to teachers and school administration. It has worked closely with the Tajik government to assist them in framing educational policies.⁴⁷

NGOs have been instrumental in other activities as well. NGOs such as the League of Women Lawyers and Women of Science of Tajikistan continue to highlight the issues of violence against women. In 2006, the Swiss Cooperation Office in Tajikistan provided free legal aid for poor and marginalized individuals and groups in partnership with such NGOs as Madadgor, Human Rights Centre (in Dushanbe, Khujand, and Isfara), and League of Women Lawyers. NGOs also encouraged support for democratic institutions and fostered the development of civil society and media. Judicial reforms that seek to bring the judiciary in line with international practices are emerging in Tajikistan, too. The Association of Judges of the Republic of Tajikistan (AJRT) is supporting advocacy aimed at promoting judicial reform and furthering judicial independence.⁴⁸ The NGO community has also sought enhancement of the rule of law and equal access to justice, among other things.

It should be noted, finally, that NGOs themselves have changed. Tajik NGOs have exhibited growing professionalism. Transparency and internal governance have improved. A growing number of NGOs are releasing annual reports, for example. Resource centers established by NGOs are also proving effective in Tajikistan.⁴⁹

Government Perception of NGOs

The relationship between NGOs and the state is crucial for fostering civil society. The government of Tajikistan has increasingly recognized the productive partnership between the state and NGOs. In the earlier years of *Rakhmon* regime, civil society organizations were not seen as partners; rather, the state saw them only as performers of services in the areas where the state could not deliver. The Tajik Peace Process brought together a number of international partners who were able to coordinate their efforts to support the end of civil war in Tajikistan. The International Committee for Red Cross played a significant role in helping to implement the agreement on the exchange of prisoners of war and detainees.⁵⁰ The Aga Khan Foundation made major contributions in alleviating the humanitarian crisis, particularly in the eastern part of Tajikistan. Recent developments reflect increasing recognition of the potential role of civil society not only in humanitarian areas but also in the process of policy formulation, institution building, and improving the system of law. NGOs are helping reduce the gulf between the state and the citizen.

On the whole, the Tajik Government has responded positively. In one Decree, the President seeks cooperation of the NGO sector for the welfare of Tajik society. Recently, the government of Tajikistan has been devoting considerable attention to NGOs, considering them to be potentially important factors in the democratization of society. The government

⁴⁷ http://www.akdn.org/tajikistan_education.asp, p. 1.

⁴⁸ Marina Safarova, *EU Gender Watch: A Gender Analysis*, Dushanbe, 2007, p. 20.

⁴⁹ Adrian Karatnycky, Alexander J. Motyl, Amanda Schnetzer, *Nations in Transit, 2001: Civil Society, Democracy, and Markets in East Central Europe and the Newly Independent States*; USA, 2002, p. 366.

⁵⁰ Vladimir Goryayev, *Architecture of International Involvement in the Tajik Peace Process*, 2001, <http://www.c-r.org/our-work/accord/tajikistan/international-involvement.php>, p. 4.

representatives have noted that the poor legal system of Tajikistan has retarded the development and contributed to the weak level of cooperation between government and NGOs.⁵¹

As noted earlier, NGOs have worked to improve the representation of women in government. As a result of their campaigns, the government of Tajikistan during 1999 presidential elections issued decrees entitled *On Increasing the Role of Women in the Society*. Shortly after the President issued this decree, the number of women in both national and local governments increased remarkably.⁵² Pursuant to the decree, on April 2, 2011, the government of Tajikistan established 40 annual grants of the President to support and promote women's entrepreneurship in the amount of one million Somoni—about 210,000 USD—between 2011 and 2015. (Similarly, the Committee on Youth annually provides President's grants to youth NGOs in Tajikistan.) NGOs in Tajikistan have also sought to advance the civil, political, social, and economic rights of women. These NGOs have promoted women's participation in education and cultural activities.⁵³ They have also highlighted women's issues in the media. Their efforts have been instrumental in leading the Tajik government to adopt international conventions for the protection of children, women, and other classes of society.⁵⁴ Finally, NGOs have worked with the Tajik government to promote human rights.

Problems and Prospects of NGO Community in Tajikistan

Yet several problems remain unresolved. To begin with, local elites have the upper hand while running NGO-sponsored programs. Low levels of volunteerism, resource constraints, and weak ties are among the challenges to their organizational capacity in Tajikistan. Local NGOs are small and lack local funding. Many are poorly managed.

More broadly, Tajik NGOs are discouraged from undertaking political activities. The government maintains strict control over any NGO suspected of having a political agenda, despite the constitutional guarantee of freedom of association. Such an NGO must obtain a permit to hold public demonstrations or rallies, for example. Even when the permit is granted, authorities have in some cases carried out reprisals against organizers. In particular, the government tends to view as political opponents those NGOs devoted to human rights, especially the ones that have been vocal in criticizing the government's record.

For funding, many NGOs in Tajikistan still rely on foreign agencies and international organizations, which if stopped will disrupt the NGOs' activities. Thus, local agencies should

⁵¹ M. Holt Ruffin, Daniel Clarke Waugh, *Civil Society in Central Asia*, Washington, 1999, p. 366. By an order of Tajikistan president Emomali Rakhmonov on August 28, 1997, a seminar was held titled *Cooperation Between Government and Social Associations in Contemporary Condition*.

⁵² Alla Kuvatova, *Gender Issues in Tajikistan: Consequences and Impact of the Civil War*, http://graduateinstitute.ch/webdav/site/genre/shared/Genre_docs/2888_Actes2001/11-kuvatova.pdf. During the 2000 parliamentary election, eight women were elected to the new lower chamber of the Parliament, *Majlisi Namoyandagon*, compared to five women in the old *Majlisi Oli*. These women represent 13 percent of the total number of seats in the lower chamber compared to 3 percent in the old *Majlisi Oli*. *Id.*, p. 133.

⁵³ Jane Falkingham, *Women and Gender Relations in Tajikistan*, 2000, p. 132.

⁵⁴ In 2005 Tajikistan adopted a law on Gender Equality and Equal Rights for Men and Women. The law defines its purpose as "ensuring equal rights for men and women in the social, political, and cultural spheres, and in any other sphere in order to eliminate discrimination on the basis of sex." *Violence Is Not a Family Affair: Women Face Abuse In Tajikistan*, Amnesty International, London, 2009, p. 41.

come forward to finance them. In addition, there is a need for better coordination of technical assistance and resources between NGOs and donors.

Foreign funding introduces a second complication: legal restrictions. Foreign organizations must inform the government in advance about projects they are going to conduct in Tajikistan. The government has made efforts to control the interaction between local entities and foreign funders. These steps are justified, it is said, not only to make a proper assessment of aid but also to ensure that funds are not used for any biased mobilization. Some of the NGOs most active in criticizing the government's human rights record have received foreign funds and have been operated by foreign personnel. Similar restrictions exist in many parts of the developing world.⁵⁵

In sum, the NGO sector in Tajikistan has attempted to go beyond the social or humanitarian sphere and impact the legal framework of the state, in order to build a system of political accountability. Whether the legal and political environment is favorable for the development of civil society is debatable. Nonetheless, promotion of democratization is the most important priority of NGOs in Tajikistan. They have acted as potential intermediaries between the population and decision-makers. Although the government continues to monitor politically active NGOs closely, acceptance of them has grown. They have pledged to enhance the ability of the government to contribute fully to the development of civil society and respect for human rights and fundamental freedoms.⁵⁶

⁵⁵ Steve W. Witt, *Changing Roles of NGOs in the Creation, Storage, and Dissemination of Information in Developing Countries*, Netherlands, 2006, p. 99.

⁵⁶ NGOs in the Caucasus and Central Asia: Development and Co-operation with the Organization for Security and Conference in Europe (Warsaw: ODIHR, 2000), <http://www.osce.org/odihr/16686>, p. 4.

Article

A Network Approach to NGO Development: Women's NGOs in Mongolia

Byambajav Dalaibuyan¹

Introduction

Even though the network metaphor is widely used by civil society scholars and activists, there has been surprisingly little research on the actual structural configuration of interactions and transactions among NGOs, especially in transitional countries.² Few would disagree with the idea that the institutional core of civil society is overlapping networks of NGOs, associations, and grassroots groups, especially in a sense that they articulate and channel different interests and concerns and facilitate public campaigns. Major civil society theorists have argued that horizontal networks of communication and collaboration are essential for vibrant civil society. NGOs themselves have acknowledged the importance of networks between them as they provide opportunities for NGOs to share information and material resources. Grant makers have often supported NGOs' coalition building efforts as well. One reason is to prevent project duplication and to scale up the impact of their assistance.

What are the net results of these ideas and practices? What kinds of networks actually exist in the NGO sectors? How can we measure them?

This article presents results of a social network survey of women's NGOs in Mongolia, which was conducted during the spring of 2010. The main objective of the survey was to understand the structural properties of collaborative interactions among women's NGOs.³ Among Mongolian NGOs, women's organizations have been most active to form and join networks among NGOs, which have taken different forms, such as umbrella organizations and issue-specific coalitions, since the 1990s. We present the main findings of social network analysis (SNA) and discuss its broader implications for NGO development.⁴

Women's NGOs in Mongolia

Women's NGOs have been so visible and active that some write of "matriarchal civil society" in Mongolia.⁵ As in other post-Soviet countries, Western-style NGOs established and

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² Petrova, Tsveta, and Sidney Tarrow. 2007. "Transactional and Participatory Activism in the Emerging European Polity: The Puzzle of East Central Europe." *Comparative Political Studies* 40(1).

³ In this article, women's NGOs include NGOs that deal with "women's issues": women's rights and well-being in society, community, and family.

⁴ For more on the application of SNA, see Helmut Anheier and Hagai Katz. 2005. "Network Approaches to Global Civil Society," in Helmut Anheier, Marlies Glasius and Mary Kaldor (eds.). *Global Civil Society* 2004/5. London: Sage.

⁵ Fish, M. Steven. 1998. "Mongolia: Democracy Without Prerequisites." *Journal of Democracy* 9 (3). p.137

led by women have been the leading force in the Mongolian NGO sector. The “feminization” of the NGO leadership was determined by a set of interrelated factors. First, the collapse of state socialism and the subsequent radical changes in the country left many educated, middle-aged women in unfavorable working conditions. In addition, political struggles through male-dominant political parties did not allow women to access power centers in government and business. For some women, civic organizations presented a promising opportunity. Second, women have traditionally had an interest in and “responsibility” over social problems, like education, health, and children’s issues, that attracted special attention from donor organizations. The resonance of the concerns of women’s NGOs with donor priorities provided them an opportunity to receive continued technical and material assistance, which allowed some NGOs to have a relatively stable organizational capacity.

The first NGOs formed in the early 1990s in Mongolia were women’s NGOs. Their roots were in the newly formed opposition political parties. Unlike in other transitional countries, the former communist party, the Mongolian People’s Revolutionary Party (MPRP), won two consecutive elections in 1990 and 1992. Most female leaders of the newly emerged political parties were not able enter formal politics. Connectedly, some leading female members of the opposition parties formed the first NGOs in Mongolia.

The Mongolian Women’s Federation, a former socialist-era organization, has retained considerable influence. The federation kept its former ties to the MPRP. Until recently, the leaders of the federation were the leading female members of the MPRP. Unlike the NGOs formed after 1990, the federation had local member committees in all provinces and dozens of other member organizations.

Women’s NGOs have pioneered in efforts to create formal NGO networks. In 1995, the Mongolian Women’s Coalition was established, consisting from 15 NGOs. One of the main objectives of the coalition was to support female candidates participating in the parliamentary election. The Coalition was reorganized in 2000 as the National Network of Women’s NGOs, and adopted a more formal structure with a president, two vice presidents, and five standing committees, with member NGOs obliged to pay an annual membership fee.⁶ The activity of the network was managed by the member NGOs on a rotating basis. In 2007, the network was restructured again, and it established its first regular coordinating organization. The network, an acronym of which is MONFEMNET, claims that it is “open to any civil society organization that is committed to gender justice, human rights and freedoms, and democracy.”

As a survey of women’s NGOs conducted in 2003 shows, the network was seen as an effective effort to coordinate overlapping activities and have a substantial impact on gender politics and public attitudes.⁷ The network has contributed to some important public campaigns over the past decade, such as establishment of the National Council for Gender Equality, increasing the number of women candidates in the 1996 parliamentary elections through promoting quota methods, and lobbying the Law on Domestic Violence.⁸

⁶ This structural change was in accordance with the membership regulation of the International Women’s Council.

⁷ MFOS (Mongolian Foundation for Open Society). 2003. *Feasibility Study for the Transformation of the Women's Program of MFOS*. Ulaanbaatar.

⁸ Helen Jones. 2006. “Working together: local and global imperatives for women in Mongolia.” *Asia Europe Journal*. 4 (3).

The network has also encountered difficulties. Until recently, it did not have a coordinating body that operated on regular basis. The loose network of NGOs had rarely been mobilized when external funding opportunities available were available. It had been unable to create inclusive, coordinated, and collective action.⁹ Key factors that inhibited the effectiveness and legitimacy of formal networks among women's NGOs were posited by insiders as partisan polarization, animosity, and differences of views on feminism among NGOs.¹⁰

Mapping and measuring inter-NGO networks

NGOs can be connected to each other in different ways. In the case of NGOs in advanced Western democracies and transnational NGOs, for example, interlocking board memberships often serve as a basic measure of their interconnectedness. In the case of developing and transitional countries, this measure of connectedness may not work well because of the relatively small size of NGOs and the minimal role of board members. As better way to explore NGO networks in Mongolia, we examined collaborative interactions and transactions between NGOs, such as information sharing, joint project implementation, and pooling of resources.

We use two key measures that are commonly applied in SNA: network density and centralization.¹¹ The *density* of a network is the proportion of (a) the number of ties actually present in a network to (b) the number of possible ties in that network. It indicates the extent to which nodes (NGOs in our case) connect to each other. Dense networks may indicate high levels of social capital, fast information diffusion, and high capacity for collaboration. *Centralization* describes the extent to which a network is organized around particular focal points (leading NGOs in our case). The centralization of a network is the ratio of (a) the actual difference between the centrality of the most central point and that of all other points, and (b) the highest possible difference.¹² Centralization measures indicate the direction of interaction and flow in a network, and relative order and coordination. Relatively centralized networks are more likely to facilitate mobilization and generate collective action.

The combinations of these two measures produce four different patterns of networks among NGOs. As shown in Table 1, high density and high centralization of a network may embody clique-like communities, in which all nodes connect to each other. Extremely strong ideological and cultural affinities between member NGOs may result in such a pattern. In contrast, low density and low centralization reflects many "single doers" and a diverse, atomistic style of action. Low density and high centralization or a centralized but segmented network resembles a wheel-shape. It has one central NGO as a linking point between peripheral NGOs that are not directly connected to each other. We might find that some umbrella NGOs and NGO support centers serve as central actors among disconnected NGOs, while those NGOs contribute a considerably low level of investment to building ties with others. Last, decentralized, dense networks have several and sometimes competing leaders or centers of influence and considerably

⁹ MFOS, p. 19

¹⁰ T. Undarya and D.Enkhjargal. 2009. "The Field of Women's Organizing in Mongolia: Possibilities of a Feminist Movement." Report of a Qualitative Study Commissioned by the Mongolian Women's Fund (MONES). Ulaanbaatar

¹¹ Mario Diani. 2003. "'Leaders' or Brokers? Positions and Influence in Social Movement Networks." In *Social Movements and Networks, Relational Approaches to Collective Action*, edited by Mario Diani and Doug McAdam. Oxford: Oxford University Press.

¹² John P. Scott. 1992. *Social Network Analysis: Handbook*. London: Thousand Oaks. p. 93.

segmented sets of peripheral organizations. This pattern, which is also called “polycentric,” could be the most effective structure for NGO networks.

Figure 1. Four Potential Patterns of NGO Networks

		Density	
		High	Low
Centralization	High	dense, centralized	segmented, centralized
	Low	dense, decentralized	segmented, decentralized

Sampling and data collection

According to the Directory of Mongolian NGOs, there are 104 women’s NGOs. Of them, 73 had an address in Ulaanbaatar, which we define as the total population of women's NGOs. The core sample of women’s NGOs consists of the 27 NGOs in the Network of Mongolian Women’s NGOs (MONFEMNET) and the 14 NGOs in the Mongolian Women’s Federation. These two groups together represent the majority of women’s NGOs in Ulaanbaatar. We were able to reach 26 NGOs from this initial sample. We tried to include other NGOs that were not members of these two coalitions, too. Our sample comprised 30 women’s NGOs. We then excluded from analysis one new NGO (one year old) and three NGOs representing women’s organizations of political parties.

The questionnaires were filled out by representatives of the participant NGOs. Of them, 69 percent were NGO leaders or executives; the others were program officers and secretaries. Three of the research participants were men. For 73 percent of the research participants, the NGO was their primary occupation.

We asked respondents to list up to five nongovernmental organizations with which they have collaborated most closely in the past two years. Then we asked whether they have had the following types of interactions with the organizations they listed: personal ties, common values and attitude, pooling of resources, sharing core members, joint organization of public events, sharing information, and conducting joint projects.

Main findings

Organizational characteristics

Prior to discussing the results of SNA, we present organizational characteristics of women’s NGOs. There is little recent research that reports on the organizational capacities of Mongolian NGOs. Although our sample is modest and may not be generalizable to the NGO sector in Mongolia, it can well represent the field of women’s NGOs.

The mean annual budget of women’s NGOs is 72.2 million tugrik. However, it should be noted that most budgets fall between one million and six million tugrik, which means there are

relatively few big NGOs and many small ones. According to the survey, 92 percent of the NGOs have own office spaces, 96 percent have telephones, and all of them have email addresses. The mean age of NGOs is 12 years. About 63 percent have registered members.

Women's NGOs work on different issues, such as women's rights, health, empowerment, girls' rights, family, promoting women's business, and democracy and human rights in general. While some NGOs seem to have specific domains that they exclusively focus on, some have heterogeneous activity areas. The main forms of activity that women's NGOs undertake are organizing training sessions (mean score is 4.3 of 5.0), working with or via mass media (3.5), participating in international campaigns (3.1), initiating new policy documents (3.0), initiating or supporting petitions (2.7), and joining direct action or demonstrations (2.0).

Network properties

The density of the network of women's NGOs was 0.1262, which means 12 percent of all possible ties were present in the network (Figure 1). For the relatively small number of organizations working in a common field of activity, it indicates relatively low rates of interaction and flows. However, it in part contradicts a view that young, resource-scarce NGOs in transitional countries lack collaboration.

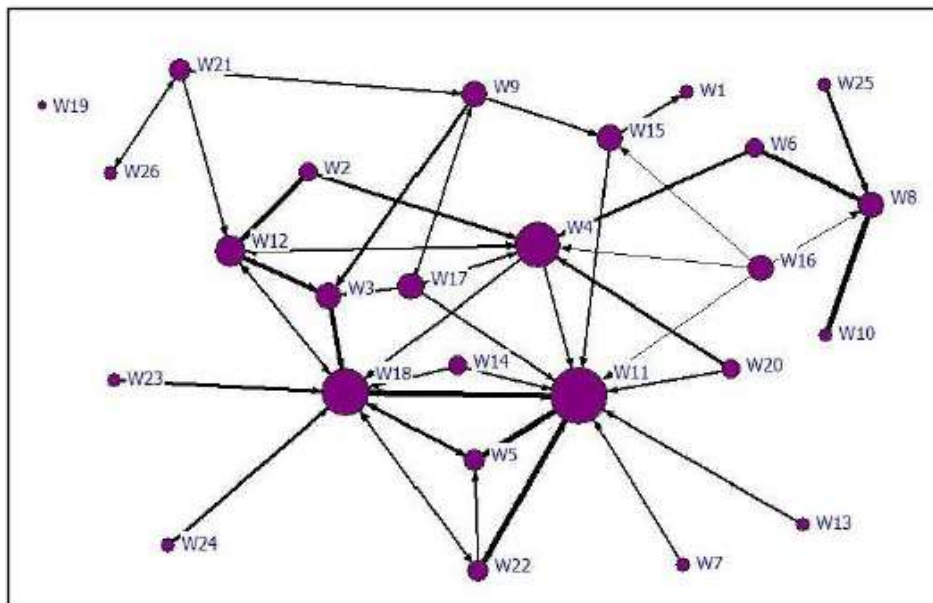


Figure 1. Network Map of Women's NGOs

Note: The size of nodes and thickness of lines represent degree centrality and strength. W19 is an isolate or a disconnected organization.

NGOs were asked what types of collaboration and flows have occurred between them and their partner organizations. Information exchange among NGOs and their joint organizing of public events each contributes much to the overall connectivity. In contrast, linkages between NGOs created through implementing personal ties, joint projects, and pooling of resources were minimal or essentially nonexistent (Table 1).

Table 1. Density of networks based on different ties

	Density (SD)
Values	0.0295 (0.1691)
Information	0.0426 (0.2020)
Resources	0.0109 (0.1036)
Events	0.0473 (0.2123)
Members	0.0109 (0.1036)
Projects	0.0357 (0.1854)
Personal ties	0.0062 (0.0785)

A measure of network centralization shows that the women's NGO network is organized around multiple focal nodes (Figure 1). The most focal node in the network is W11. As a focal node, W11 has an important role in the network, bridging some isolated organizations, such as W13. Multiple focal nodes in the women's NGO network imply that despite the fact that W11 is the most focal node in the network its absence in the network may not significantly fragment the entire network because there exists alternative focal nodes, such as W18 and W4.

Women's NGOs have their own specialized domains, such as reproductive health, gender education, human rights, family, and community development. Most of the efforts to initiate issue-specific networks and advocacy action have tended to occur among NGOs operating within the same domain. In a number of formal networks of NGOs, such as the Reproductive Health and Rights Network, the Child Rights and Safety Network, and the Anti-Sexual-Harassment Network, women's NGOs are actively involved alongside other NGOs. Furthermore, the majority of women's NGOs have ties to multiple transnational women's networks and coalitions, and some of them are members of the same organization.

Participation in civic events presents an additional opportunity for NGOs to forge ties with other organizations. It also may generate a sense of collective concern and an NGO community. It was found that the types of civic events that NGOs participate frequently are meetings/forums (81 percent), training seminars (81 percent), joint festivals/celebrations (69 percent), international meetings/forums (69 percent) and protest campaigns (23 percent).¹³

Conclusion and implications

Overall, women's NGOs in Mongolia constitute a decentralized and relatively dense network. This network shows potential for collective campaigns and effective coordination, though other factors need to be considered too. It should be borne in mind that networks are dynamic; maps reflect a specific time-frame.

The network map shows that the density of collaborative interaction is higher among some NGOs located in the center. This core group of NGOs (but not necessarily a coherent group) connect to each other by relatively many ties; NGOs in a periphery connect to those focal NGOs but not so well to their peers in the same position.

¹³ NGOs jointly celebrate some holidays, anniversaries, and special days, such as the Civil Society Day on January 31 in Mongolia.

The diversity of issue areas allows women's NGOs to have collaborative interactions with organizations in different issue areas. It has allowed some NGOs to gain public awareness and support. This is not necessarily the optimal organizational model, but the existence of such organizations benefits the sector as a whole.

SNA can be used in research on various aspects of the NGO sector. SNA provides a better assessment of the actual collaboration among different actors than a traditional survey. It has a potential to be easily incorporated in the knowledge and technique of donors, NGOs, and scholars.