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Letter from the Editor

In this issue, the *International Journal of Not-for-Profit Law* explores some of the moral and ethical aspects of aid and the institutions that provide it. **Elizabeth Griffin**, Professor and Executive Director of the Center for the Study of Human Rights at O.P. Jindal Global Law School, sets forth questions for human rights NGOs to consider in the course of formulating and evaluating their ethical responsibilities. Drawing on literature as well as philosophy, **Todd Breyfogle**, Director of Seminars for the Aspen Institute, reflects on the relationship among charity, reciprocity, and the moral law.

We also feature three additional articles. **Petr Jan Pajas**, a consultant in civil society affairs and an external lecturer at the Charles University in Prague, analyzes the status and the prospects for legislation on public benefit status in the Czech Republic. Legal practitioner **Fernando Mendez Powell** asks to what extent third sector broadcasters ought to be regulated differently from other broadcasters. Finally, **Gabrielle Gould**, a JD and MSFS student at Georgetown University, provides an overview of UN Special Rapporteur Maina Kiai's second thematic report.

We are grateful to the journal *Conversations on Philanthropy* for permission to reprint Todd Breyfogle's essay. As always, our gratitude also 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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Ethics, Morality, and Aid

The Ethical Responsibilities of Human Rights NGOs

Elizabeth Griffin¹

As the power of human rights NGOs (HRNGOs) increases, legitimate questions are being raised about their responsibilities. NGOs are not bound by international law. Nevertheless, HRNGOs have ethical responsibilities that flow from their mission and in turn from international human rights law. Key principles such as respect for human dignity, non-discrimination, and universality translate into specific responsibilities for HRNGOs. These responsibilities are the focus of this article. Development NGOs have examined how to better protect human dignity by applying rights-based approaches. As the HRNGO sector professionalizes, HRNGOs should follow suit and develop an approach based on human rights to human rights work.

I. Introduction²

Human rights nongovernmental organizations (HRNGOs) play a key role in protecting and promoting human rights around the world. Recognized as an integral part of domestic, regional, and international political, social, and legal landscapes, HRNGOs have been instrumental in promoting broad acceptance of the idea that every person has inalienable rights.

The increased numbers, geographical reach, and power of HRNGOs prompts legitimate questions about the responsibilities of these organizations. The great influence that some international HRNGOs have exerted, for example, in the field of human rights standard-setting has led some practitioners and academics to ask what responsibilities arise for HRNGOs working in this area.³ Others have questioned whether the methodologies used by HRNGOs could be improved to ensure greater respect for people, in particular the survivors of human rights violations.⁴ As HRNGOs continue to expand their spheres of influence, further examination of their ethical responsibilities is warranted.

¹ Elizabeth Griffin is Professor and Executive Director of the Center for the Study of Human Rights, O.P. Jindal Global Law School. Professor Griffin is also Fellow, Human Rights Centre, Essex University. This article is dedicated to the memory of my dear mentor and friend, Professor Kevin Boyle.

² Some of the research for this article was carried out by the author as part of a project of the now defunct International Council on Human Rights Policy (ICHRP) on the *Rights and Responsibilities of Human Rights Organisations*. The author wishes to thank William O'Neill and Prof. Joe Oloka-Onyango for their comments on previous drafts of the text and Millicent Williams for editing the text. The views expressed here are entirely the author's own.

³ Christine Chinkin & Alan Boyle, *The Making of International Law*, Chapter 4: NGOs and Treaty Making, (Oxford University Press, 2007): 57-74; Makau Mutua, Standard Setting: Human Rights Critique and Prognosis, *Human Rights Quarterly* Vol. 29 (2007): 547-630.

⁴ Barbara Bukovska, "Perpetrating Good: The Unintended Consequences of Human Rights Advocacy," *PILI Papers*, No. 3 (April 2008).

This article aims to identify some of the specific ethical responsibilities of HRNGOs. This article does not seek to duplicate the extensive general research that has already been carried out on NGO accountability.⁵ Rather, the aim is to identify and explore some of the particular responsibilities that arise for NGOs whose primary self-declared mission is the protection and promotion of *international human rights*.

The category of organizations that may be described as HRNGOs is of course extremely diverse and includes a large number of very different types of organizations.⁶ HRNGOs range from well-known, large, international HRNGOs including Human Rights First, Amnesty International and Human Rights Watch to small, grassroots, community-based associations. Academic centers or professional associations that have a self-declared human rights mission may also fall into the category of HRNGOs. HRNGOs vary significantly in their organizational structure, size, geographical reach, and substantive work. Notwithstanding these differences, this article argues that it is still possible to identify some core ethical responsibilities that are applicable to all HRNGOs.

The discussion commences with a short review of the debate surrounding NGO accountability. It then turns to examine some general principles governing responsibility. We ask, what is responsibility? To whom and for what are HRNGOs responsible? A distinction is drawn between those responsibilities related to organizational performance (performance-based responsibilities) and responsibilities that inhere from the human rights mission of an organization (mission-based responsibilities).

The final part of this article aims to identify some of the responsibilities that flow from the human rights mission of a HRNGO. Although HRNGOs are not formally bound by international law, international human rights laws and standards create a framework of principles that HRNGOs have an ethical duty to abide by. We examine some key principles, including respect for human rights, human dignity, equality, non-discrimination, and universality, and propose some specific responsibilities that these principles impose upon HRNGOs.

This discussion acknowledges that each HRNGO has its own particular set of responsibilities, which are determined by reference to factors such as the size of the organization, its key stakeholders, its structure, its mission, the types of activities it carries out, and the political context within which it works. This should not, however, absolve HRNGOs of their duty to regularly review their responsibilities, the principles that underlie them, and how they can be put into daily practice. Development NGOs have sought to improve respect for human dignity by applying approaches based on human rights to their work; HRNGOs should follow suit.

⁵ See, for example, Michael Edwards, "NGO Rights and Responsibilities: A New Deal for Global Governance" (Foreign Policy Center, 2000); Mary Kaldor, "Civil Society and Accountability," *Journal of Human Development*, Vol. 4, No. 1 (2003), and more generally the work of the One World Trust, www.oneworldtrust.org.

⁶ HRNGOs are broadly defined here as nongovernmental, nonprofit organizations that embrace shared human rights values in their mission statements. It is beyond the scope of this article to examine the responsibilities of inter-governmental organizations. However, much of the discussion is equally applicable to IGOs that have a human rights mandate.

II. The NGO responsibility debate

The NGO responsibility debate emerged in the 1990s, in response to a sharp increase in the size, funding, and power of the NGO sector.⁷ NGOs were accused of being mismanaged, unrepresentative, and even corrupt.⁸ Perceived failures within the humanitarian sector, notably during the 1994 Rwandan genocide, prompted humanitarian NGOs to take accountability more seriously than before.⁹ Most notably, a group of humanitarian NGOs created the Sphere Project,¹⁰ which in turn drafted the 2000 Humanitarian Charter and Minimum Standards in Disaster Response.¹¹ The Humanitarian Charter and Minimum Standards combine general ethical principles with precise technical standards for the delivery of services such as water as well as sanitation, health, and food aid, which have been widely endorsed by humanitarian NGOs.¹² The Humanitarian Accountability Project (HAP) was subsequently established as the focal point for information on good accountability practice.¹³

By contrast to other NGOs, HRNGOs have been far more reserved when it comes to discussing accountability and they have not proposed specific regulatory standards. Some have involved themselves in sector-wide accountability initiatives, including the HAP.¹⁴ Country-based generic NGO codes of conduct have also been endorsed by some HRNGOs, especially in countries whose governments have imposed harsh and unwarranted restrictions on NGOs.¹⁵ Generic country codes do not, however, address the specific responsibilities of NGOs engaged in human rights work. Some HRNGOs have signed the 2006 International Non-Governmental Organizations Accountability Charter (INGO Charter).¹⁶ The INGO Charter was drafted by and for a wide range of NGOs, including those that work on development, environmental protection,

⁷ Lisa Jordan and Peter van Tuijl (eds.), *NGO Accountability: Politics, Principles and Innovations* (Earthscan, 2006): 4.

⁸ See, for example, Editorial, *New York Times* (21 July 2003); Jeffery E. Garten, *Globalization Without Tears – A New Social Compact for CEOs* (Harvard Business School Press, 2002); Michael Edwards, “Make the Protesters Accountable,” *Financial Times* (19 June 2000).

⁹ Anges Callamard, “NGO Accountability and the Humanitarian Accountability Partnership: Towards a Transformative Agenda,” in Lisa Jordan and Peter van Tuijl (eds.) (2006): 183-194.

¹⁰ www.sphereproject.org.

¹¹ http://www.sphereproject.org/dmdocuments/handbook/hdbkpdf/hdbk_hc.pdf.

¹² <http://www.sphereproject.org/content/view/27/84/lang.english/>.

¹³ www.hapgeneva.org.

¹⁴ To view members of HAP, see <http://www.hapinternational.org/members.aspx>.

¹⁵ For example: Code of Conduct for NGOs in Bangladesh, www.asianphilanthropy.org/pdfs/conference/bangladesh1.pdf; Cambodia Code of Ethics for Social Development NGOs, www.ngoforum.org.kh/Development/Docs/ngo_2002/38.htm; Ethiopia, www.gdrc.org/ngo/codesofconduct/africa-code.html; Uganda National NGO Forum, www.ngoforum.or.ug/conduct/index.htm; South Africa Code of Ethics, www.sangoco.org.za/site/index.php?option=com_content&task=view&id=8&Itemid=30.

¹⁶ The INGO Charter was born out of an initiative by the International Advocacy Non-Governmental Organisations (IANGO) Workshop.

humanitarian response, and “other public goods.”¹⁷ Many of the INGO Charter’s principles are relevant to HRNGOs, but the Charter is not tailored to human rights work.¹⁸

The UN Office of the High Commissioner for Human Rights (OHCHR) was the first organization to commission codes of practice that specifically relate to human rights work. In 2008, Nottingham University (commissioned by OHCHR) published the “Statement of Ethical Commitments of Human Rights Professionals” and the “Guiding Principles for Human Rights Officers Working in Conflict and Post-conflict Environments.”¹⁹ The Commitments and Guiding Principles were part of a wider project, “Consolidating the Profession: The Human Rights Field Officer.” This project aims to develop and deliver high-quality training and capacity-building tools for human rights fieldwork.²⁰ OHCHR has also published a Training Manual on Human Rights Monitoring, which provides guidance on how to investigate and report on human rights violations.²¹ Within the NGO community, an online discussion forum on the accountability of HRNGOs was launched by the International Council on Human Rights Policy (ICHRP), but it was taken off the internet when this NGO closed down for financial reasons in February 2012. The ICHRP work and the online initiative did not in any case lead to a focused responsibility discussion within the HRNGO community.

HRNGOs have generally tended to piggyback onto accountability initiatives launched in other NGO sectors. Unlike their humanitarian counterparts, HRNGOs have not as yet developed sector-wide guidelines that address the particular responsibilities that arise from specific forms of human rights work. There are few guidelines that aim to promote best practice in specific areas of human rights work, such as standard setting, campaigning, strategic litigation, policy advice, fact-finding, and reporting.²² There is, however, no general code of conduct for human rights NGO work, nor is there an equivalent of HAP working to elaborate standards for HRNGOs. The question is, are codes of conduct and statements of principles useful in promoting responsible action by HRNGOs? Or should we seek alternative methods?

¹⁷ See INGO Charter, para.1.

¹⁸ Altogether, twenty-six INGOs have signed the INGO Charter and have at the same time agreed to publish their compliance records. Signatories include Amnesty International, OXFAM, Greenpeace, Transparency International, and Save the Children. To view the full list of signatories, see <http://www.ingoaccountabilitycharter.org/list-of-signatories>.

¹⁹

www.humanrightspersonals.org/images/guiding%20principles%20for%20human%20rights%20field%20officers.pdf.

²⁰ “Consolidating the Profession: The Human Rights Field Officer” is a research, training, and capacity-building project in support of enhanced delivery of services by human rights field operations. The project is informed by an overarching consideration that the Human Rights Field Officer (HRFO) is deployed to develop and enhance local human rights capacities and protections. It is convened and facilitated from within the University of Nottingham Human Rights Law Centre (HRLC).” <http://protectionline.org/links-2/human-rights-consultants/>. For more information, see www.humanrightspersonals.org.

²¹ <http://www.ohchr.org/Documents/Publications/training7Introen.pdf>.

²² Some NGOs have produced their own guidelines for specific types of human rights work. See, for example, *Amnesty International Fair Trial Manual*, <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>; *Norwegian Institute of Human Rights Manual on Human Rights Monitoring: For Human Rights Officers*, <http://www.humanrights.uio.no/nordem/manualen.html>; *Essex University Human Rights Centre Torture Reporting Handbook*, <http://www.essex.ac.uk/torturehandbook/handbook/index.htm>; *International Commission of Jurists Trial Observation Manual*, <http://www.hrea.org/erc/Library/monitoring/icj02.pdf>.

Some human rights defenders have argued that it is best to avoid public discussion of their responsibilities altogether. They point to legal, administrative, and other forms of harassment used against HRNGOs around the world.²³ It is argued that HRNGOs run specific risks in the course of their work that other types of NGOs do not face. In theory, international human rights law limits the scope of governments to interfere with, and regulate the affairs of NGOs.²⁴ In practice, however, there is a large gap between the legal protections and the daily experience of most HRNGOs.²⁵ The fear is that public discussion of accountability may provide excuses for governments to impose harsher regulations that silence critical HRNGO voices and restrict fundamental freedoms.²⁶

On the other hand, there are growing calls from within the human rights community, for HRNGOs to examine their responsibilities more closely.²⁷ Some have argued that the increased

²³ The reports of the UN Special Rapporteur on Human Rights Defenders provide a miserable catalog of the various tactics used by authorities around the world to silence unpopular NGOs. These tactics range from slur campaigns that spread discrediting information to the imposition of restrictive NGO laws; from judicial and administrative harassment to threats, abductions, and killings. Reports of the Special Rapporteur are available at <http://www2.ohchr.org/english/issues/defenders/index.htm>.

²⁴ The most relevant provisions of international human rights law are summarized here. Freedom of association is protected by Article 22(2), ICCPR; Article 11, African Charter; Article 16(2), American Convention. Freedom of assembly is protected by Article 21, ICCPR; Article 11, African Charter; Article 15, American Convention; Article 11, European Convention. Freedom of speech and expression is protected by Article 19, ICCPR; Article 9, African Charter; Article 13, American Convention. Freedom of information is protected by Article 9, African Charter; Article 13, American Convention; Article 10, European Convention. See also UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), GA resolution 53/144 (1999).

The only permissible restrictions to these rights are those “prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” Article 22(2), ICCPR (freedom of association). The restrictions on freedom of association in regional treaties are almost identical to Article 22(2) of the ICCPR. See Article 11, African Charter; Article 16(2), American Convention; Article 28, Arab Charter. Permissible restrictions of freedom of speech and expression are almost identical and are set out in Article 19, ICCPR; Article 9, African Charter; Article 13, American Convention; Article 32, Arab Charter. For permissible restrictions on freedom of information, see Article 9, African Charter; Article 13, American Convention; Article 10, European Convention; Article 32, Arab Charter. For permissible restrictions on freedom of assembly, see Article 21, ICCPR; Article 11, African Charter; Article 15, American Convention; Article 11, European Convention; Article 28, Arab Charter.

²⁵ A number of resources exist to assist governments and NGO regulatory bodies to assess whether regulatory measures comply with international law. See, for example, International Center for Not-for-Profit Law, *Checklist for Civil Society Organization Laws*, www.icnl.org/knowledge/pubs/NPOChecklist.pdf; Open Society Institute, *Guidelines for Laws Affecting Civic Society Organisations*, www.soros.org/resources/articles_publications/publications/lawguide_20040215. See also www.ngoregnet.org.

²⁶ This argument was put forward at a consultation meeting organized by the ICHRP in Washington in 2008 attended by human rights defenders from around the globe. The aim of the meeting was to discuss a draft report produced by the author on the “Rights and Responsibilities of Human Rights Organizations.” The draft report is available at http://www.ichrp.org/files/reports/67/119_report.pdf. The report was never published as a result of strong opposition expressed by some human rights defenders to a public discussion of the responsibilities of HRNGOs coupled with an overall lack of consensus about how to proceed with responsibility discussions.

²⁷ See, for example, Robert Charles Blitt, R., “Who Will Watch the Watchdogs? International Human Rights, Non-governmental Organizations, and the Case for Regulation,” *Buffalo Human Rights Law Review* 10 (2005): 261.

power of HRNGOs in the field of standard setting raises important questions about responsibilities.²⁸ Others have called for more representative behavior on the part of large Western-based international HRNGOs that, it is argued, dominate the global agenda at the expense of NGOs from the South.²⁹ Research has further highlighted that the methodologies of human rights work may have unintended negative consequences that undermine, rather than protect, the human dignity of the survivors of human rights violations and that this needs to be further examined.³⁰ Finally, in some countries it has been argued that NGO advocates are not political activists but rather in the “business of human rights,” which serves to advance the personal interests of the advocates themselves.³¹

The time has come to respond to criticisms such as these. Indeed, doing so represents a healthy sign of maturity in the human rights sector. Human rights work is no longer just a vocation, nor is it just a few good people doing worthy work. Human rights work is now a recognized career track. This is reflected by the large growth in undergraduate and postgraduate courses in the subject. As the profession expands, self-examination and reflection are necessary, useful, and healthy. Furthermore, it is in the strategic interests of HRNGOs to explore how they can best fulfill their mission, as it may well enhance their legitimacy, credibility, and effectiveness and help them defend themselves against malicious attacks.

III. What is responsibility?

NGOs have long talked about “accountability.” For the purposes of this discussion, however, the term “responsibility” is more appropriate, for two reasons: Firstly, there is no equivalent of the word “accountability” in some languages, including French and Spanish. Accountability may be translated as “explaining one’s actions,” “presenting accounts to someone,” or simply “responsibility.” Secondly, the concept of accountability is problematic even in English because it implies a one-to-one contractual or representational relationship with another person or body, along the lines of “I hire you, so you are accountable to me” or “I elect you, so you are accountable to me.” NGOs do not pretend to be directly “accountable” to the public in the way that governments are through electoral processes, or in the way that businesses are to their shareholders.³² NGOs are not “hired” by the people they protect. The concept of accountability, therefore, does not reflect the NGO experience.³³ The Oxford Dictionary defines responsibility as “having an obligation to do something, or having control over, or care for someone; being morally accountable for one’s behavior; being capable of being trusted; having to report and be answerable.”³⁴ This common definition of responsibility provides a useful

²⁸ Christine Chinkin & Alan Boyle (2007): 57-74.

²⁹ Makau Mutua (2007): 547-630.

³⁰ Barbara Bukovska (2008); Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal*, Vol. 42, Issue 1 (Winter 2001): 201–245.

³¹ Referring to the women’s movement in Uganda. Sylvia Tamale, “Law, Sexuality and Politics in Uganda,” in Makau Mutua, *Human Rights NGOs in East Africa* (Pennsylvania Studies in Human Rights Series, 2008): 66.

³² Paul Wapner, “Defending Accountability in NGOs,” *Chicago Journal of International Law*, Vol. 3, No.1, (Spring 2002): 200.

³³ The author wishes to thank Lisa Jordan (Ford Foundation) for sharing her analysis and insights on this area (telephone interview with author, 22 October 2007).

³⁴ Compact Oxford English Dictionary, www.askoxford.com.

starting point upon which a concept of HRNGO responsibility based on human rights may be constructed.

IV. To whom are HRNGOs responsible?

NGOs have a wide range of legal, ethical, and moral responsibilities towards those people who have a direct interest in their work—that is, their stakeholders or constituency. Stakeholders may be loosely defined as any individual, group, or body that can affect or be affected by the NGO. The primary stakeholders for HRNGOs are usually the people that they aim to represent, protect, or assist. Other important stakeholders include paid and voluntary staff, members of boards, councils or trustees, any supporters or members, and the wider NGO community.

Unlike many humanitarian NGOs, HRNGOs would not usually consider government as a formal stakeholder. A large number of HRNGOs retain strict independence from government as this is necessary to effectively promote state compliance with international law. Unless a HRNGO is funded by government, or works directly with governmental officials, it may not count government as a formal stakeholder. Another group that may not qualify as a full stakeholder for HRNGOs is the general public. In practical terms, public opinion and support are obviously extremely important for HRNGOs. Nevertheless, there is no obligation for NGOs to consult the public or represent widely held views. Freedom of association, expression, and speech, taken together mean that people are entitled to create NGOs and work on any issue that they like. This even applies to work on issues that are highly unpopular or offensive.³⁵ Indeed, an HRNGO often confronts entrenched hostility, discrimination, and prejudice.³⁶

The governing body of an NGO, whether it is a Board, Council, or Trustees, exists to provide organizational oversight. Governing bodies also have a responsibility themselves to be effective. Boards are often perceived to provide the answer to questions of NGO responsibility, but in reality they are often far less effective and engaged than they should be. In some cases this is because members lack skills, time, or expertise. In others it may be because the role of the Board has not been properly defined or explained, or because Board members are not sufficiently independent to exercise oversight. Problems may stem from the fact that the Board has been handpicked by the Director(s). The need to strengthen the capacity of governing bodies has been widely recognized; many resources address this aspect of NGO governance.³⁷

³⁵ For example, the European Court of Human Rights has underlined that freedom of expression is applicable not only to information and ideas that are popular or regarded as inoffensive, but also to those that “offend, shock and disturb.” *Vgt Verein Gegen Tierfabriken v. Switzerland*, App. No. 24699/94, 66 (28 June 2001). See also HRC General Comment 10, Freedom of Expression (29 June 1983).

³⁶ It has been pointed out that “many times (human rights work) is carried out by minor groups that must confront the hostility of both the regimes they are denouncing and of society at large. The significance of such politics rests precisely on its unrepresentative character, that is, in the refusal to abide to the predominant standards of an existing political culture that welcomed or tolerated human rights abuses.” Enrique Peruzzotti, *Civil Society, Representation and Accountability: Restating Current Debates on the Representativeness and Accountability of Civic Associations*, in Lisa Jordan and Peter Van Tuijl (eds.), (2006): 43-57.

³⁷ See, for example, Rajesh Tandon, *Board Games: Governance and Accountability in NGOs* in Michael Edwards and David Hulme, *Beyond the Magic Bullet: NGO Performance and Accountability in the Post-Cold War Era* (Kumarian Press Books on International Development, 1996): 53-64; Pat Bradshaw, Vic Murray, and Jacob Wolpin, “Do Nonprofit Boards Make a Difference: An Exploration of the Relationship among Board Structure, Process, and Effectiveness,” *Nonprofit and Voluntary Sector Quarterly*, Vol. 21, No.3 (Fall 1992): 227-249. See

Stakeholder mapping is not specific to HRNGOs; it is common across the NGO sector. Mapping and prioritizing stakeholders is the first step in the process of identifying the specific responsibilities of an NGO. It enables us to explore key questions, such as the following: To whom is the HRNGO primarily responsible? Which stakeholder has the most power over the organization? Which has least power? Whose voice is listened to when decisions are made? How can different views and needs be balanced and met? Who in fact “owns” or controls the organization? What, if any, are the broader political motivations for action on a particular issue or in a specific field?

V. What are HRNGOs responsible for?

HRNGOs are not formally bound by international human rights law. Nevertheless, international human rights standards create a framework of principles that guide their work. The following discussion draws a distinction between two general types of responsibilities: Firstly, we examine “performance based responsibilities”; that is those duties that relate to the practical workings of NGOs. Secondly, “mission-based responsibilities” of HRNGOs that flow from the human rights mission of the organization and in turn international human rights laws and standards.

A. Performance-based responsibilities³⁸

Performance-based responsibilities concern the practical workings of an NGO. Finances, people, and resources should be managed properly, with safeguards against corruption and illegal behavior in place. There is a duty not to waste money on ineffective projects or staff. Thus, performance-based responsibilities imply a strong need for good governance. Performance-related responsibilities can usually be demonstrated in reports, accounts, and independent audits.

Demonstrating performance may not always be easy or possible for HRNGOs. For example, in disabling political environments, demonstrating performance may be impossible because transparency and the disclosure of information by HRNGOs may ultimately put people or the NGO in danger. To illustrate, an NGO in Mexico provided donors with a list of people it had trained in workers’ rights. The list was made publicly available, and the companies concerned fired all the workers who had taken the training. By providing the donor with information, the NGO demonstrated fulfillment of performance-based responsibilities, but the effect was mission failure.³⁹ In other circumstances, however, HRNGOs should be transparent. When NGOs operate in an appropriate contextual space, they can openly account for their performance.⁴⁰ Many HRNGOs demonstrate responsible behavior in environments that are less

also the work of Boardsource, www.boardsource.org; the Board Mentoring Handbook, www.abcgta.ca/docs/BoardMentoringHandbook.pdf; Nonprofit Governance & Management Centre, www.governance.com.au.

³⁸ What are referred to here as performance-related responsibilities build upon definitions of “practical” accountability (Sue Cavill and M. Sohail (Khan), “Increasing Strategic Accountability: a Framework for International NGOs,” *Development in Practice*, Vol. 17, no. 2, (2007): 234); “procedural” accountability (Mary Kaldor (2003)); and “performance accountability” (Hugo Slim, *By What Authority? The Legality and Accountability of Non-governmental Organization*, ICHRP (January 2002)).

³⁹ Event notes, “Making Accountability Count: Citizens, NGOs and the State” (21 March 2007).

⁴⁰ The Special Rapporteur on Human Rights Defenders has highlighted the importance of ensuring and maintaining a “contextual space” within which NGOs can carry out their work. This space exists when government protects freedom of association in conjunction with other important rights such as peaceful assembly, expression,

than enabling, because they know that this enhances their legitimacy, reputation, and effectiveness.

Some discussions of NGO accountability tend to focus too heavily on performance-based responsibilities. This inevitably privileges the interests of more powerful stakeholders, in particular donors, over less powerful stakeholders, such as the people that the HRNGO represents.⁴¹ Performance discussions that seek “outputs” often overemphasize formal reporting and financial accounting, which fosters a tick-box mentality. Some forms of human rights work (e.g., awareness-raising) might not have tangible “outputs” or easily quantifiable results. It may be hard to measure performance where the overall goal of a particular action cannot realistically be achieved in the short term (e.g. the eradication of poverty). The commitment expressed to the overall goal of an action is often far more important than any tangible result.⁴² Even where a result can be shown, it may be difficult to attribute a cause to the result or to evaluate the contributions of different actors to achieving it.⁴³ Sometimes a more appropriate measure of responsibility is in the processes used to include people in NGO work, rather than the work itself.

B. Mission-based responsibilities⁴⁴

Mission-based responsibilities are ethical obligations that flow from the human rights mission and in turn from international human rights laws and standards. At the most basic level, a human rights mission requires an NGO to demonstrate respect for key principles of human rights. A human rights mission imposes a responsibility upon an HRNGO to act in a principled manner, informed first and foremost by the interests of those that they seek to protect or represent. Mission-based responsibilities are less easily measured than performance-based ones, because they are not about quantifiable outcomes. Rather, mission-based responsibilities are more closely related to the quality of the relationships that an HRNGO has with its key stakeholders and the legitimacy of the processes used in its daily work. For example, when an organization engages in campaigning, staying true to the human rights mission means not only pursuing the tangible goals of the campaign, but also conducting the campaign in a way that respects democratic principles and the people involved.⁴⁵

Mission- and performance-based responsibilities obviously overlap. Mission-based ones are distinct, however, in that they do not yield to the exigencies of a situation. Even in repressive political environments where transparency and the disclosure of information is impossible, HRNGOs can stay true to their missions by constant reference to human rights principles, self-examination, and self-improvement. Mission-based responsibilities do not incur reporting

speech, and the right to receive and impart information. See Report of the SRSG on Human Rights Defenders, UN.Doc. A/61/312 (2006): 92-96.

⁴¹ For an excellent analysis of the power dynamics involved, see Jem Bendell, *Debating NGO Accountability, UN-NGLS Development Dossier* (United Nations Non-Governmental Liaison Service, 2006).

⁴² For a useful discussion of the responsibility for processes, see Lisa Jordon, “Political Responsibility in Transnational NGO Advocacy,” *World Development*, Vol. 28, No. 12 (2000): 2051-2065.

⁴³ Sue Cavill and M. Sohail (Khan) (2007): 238.

⁴⁴ The category mission-related responsibilities is based upon concepts of “political” responsibility (Lisa Jordon (2000): 251-265); “strategic” accountability (Sue Cavill and M. Sohail (Khan) (2007): 238); or “moral” responsibilities (Mary Kaldor (2003)).

⁴⁵ Lisa Jordon (2003).

obligations or mandate specific forms of conduct. Nevertheless, they do impose specific ethical responsibilities. The remainder of this article attempts to identify some of these ethical responsibilities that flow from the principles of respect for human rights and dignity, equality and non-discrimination, and universality.

1. Respect for human rights

The legal regulation of NGOs is primarily the concern of the domestic law of the state in which it is registered and/or operates. We have already noted that HRNGOs are not bound by international human rights law. Unlike states, HRNGOs do not have the international legal personality required to be held liable for breaches of international law.⁴⁶ HRNGOs can, however, be reasonably expected to uphold the general public duties set out in international law.⁴⁷

The origins of individual duties under international human rights law are rooted in the International Bill of Rights.⁴⁸ The UN Declaration on Human Rights Defenders reaffirms the duties of everyone towards and within the community. More specifically, Article 11 of the Declaration states that “everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.” Thus, although not legally bound in the same way as states, individuals do have duties vis-à-vis human rights that are derived from international standards. Although human rights principles are relevant to many other organizations, HRNGOs occupy a unique position in that they promote principles such as participation, consultation, transparency, and fair representation in their daily work. It hardly needs saying that the self-proclaimed guardians of human rights are expected themselves to respect the principles they ask others to honor. In other words, they must practice what they preach.

2. Respect for human dignity

Respect for human dignity lies at the heart of any human rights mission. It does not always simply follow, however, that just because an NGO has a human rights mission, it will automatically respect human dignity in all its dealings. Above all, translating this principle into practice means taking positive action to prioritize the needs, views, and wishes of the people at the center of the mission. It further requires high standards of behavior towards workers, volunteers, and/or interns. The quality of an organization’s relationship with its key stakeholders and its workers is usually a good indicator of how effective an NGO has been in translating mission-based principles into daily work.

⁴⁶ Menno Tjeerd Kamminga, “The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?”, in Phillip Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press, 2005): 107.

⁴⁷ Article 29 of the UDHR states that “everyone has duties to the community in which alone the free and full development of his personality is possible.” The ICCPR and the ICESCR contain an identical sentence in para. 6 of their preambles: “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.” For further discussion, see ICHR, “Taking Duties Seriously: Individual Duties in International Human Rights Law, A Commentary” (1999).

⁴⁸ Articles 11 and 18, UN Declaration on Human Rights Defenders.

a. Respect for the people at the heart of the NGO's mission

Arguably, the primary responsibility of an HRNGO is to consciously prioritize the needs and interests of the people it aims to protect, act for, assist, or represent. Consultation with key stakeholders in the planning, implementation, and evaluation of projects is required to ensure that work responds to genuine human needs and that the NGO is effective. HRNGOs involved in advocacy, campaigning, and standard-setting often appear to represent large groups of people, such as all women in Asia or all persons with disabilities. HRNGOs that represent others know that they must take particular care to ensure that methodologies are in place to prevent misrepresentation.⁴⁹ Issues of representation and respect for human dignity also arise in publicity campaigns, interviews, and dissemination work. Respect for human dignity is shown where organizations ensure that their actions do not lead to further victimization or misrepresent of the survivors of human rights violations in their dissemination and fundraising work. Fact-finding and other methodologies can include processes that ensure that work is respectful and effective and that it does not sacrifice the individual in pursuit of a broader cause.⁵⁰ If an HRNGO provides services such as medical assistance, it must ensure that these services are professional and conform to relevant domestic laws.

Marginalized members of society, including those who have survived human rights violations, are usually the not powerful stakeholders. They lack power because they are usually not formally part of an HRNGO. They have no financial stake because they do not pay for NGO services. NGOs need to be aware of this power dynamic and constantly review the processes used to ensure consultation and inclusion. The responsibility to prioritize key stakeholders is often complicated, however, by the constant need to compete and secure funds. The fight to survive means that some NGOs end up inadvertently prioritizing their donor's agendas or administrative goals over the needs of the people they aim to serve.⁵¹ By earmarking funds for particular areas of work or making grants available only for their own priorities, some donors fuel this process by controlling NGO agendas. Some HRNGOs struggle to stay true to their mission and get caught up in a never-ending cycle of implementing donor-designed projects and responding to donor requests.⁵² The power that large donors exercise has given rise to growing calls for a deeper examination of donor responsibilities.⁵³ Many of the responsibilities identified in this article are equally applicable to donors with a human-rights mission.

Some NGOs believe that respect for key stakeholders is important enough to warrant written guidelines. For example, the Statement of Ethical Commitments of Human Rights

⁴⁹ For a good discussion of what has been referred to as "voice accountability," see Hugo Slim (2002).

⁵⁰ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004), 29; Makau Mutua (2001); and Barbara Bukovska (2008).

⁵¹ Sylvia Tamale (2009) notes in relation to Uganda that "I personally believe that the majority of mainstream women's NGOs are in many ways beholden to either the state or to donors": 67.

⁵² Research from Uganda demonstrates that foreign funded human rights NGOs tend to raise issues that are not applicable to the real situation of the communities in which they operate. Susan Dicklitch and Doreen Lwanga, "The Politics of Being Non-Political: Human Rights Organizations and the Creation of a Positive Human Rights Culture in Uganda," *Human Rights Quarterly* 25 (2003): 498.

⁵³ Jem Bendell and Phyllida Cox, "The Donor Accountability Agenda," in Lisa Jordan and Peter van Tuijl (2006): 109-126.

Professionals drafted for UN Human Rights Officers provides guidance in this area.⁵⁴ The Statement affirms that “the primary commitment is to the individuals, communities and peoples they serve” and that “in cases of professional dilemma or uncertainty this principle shall be the fundamental consideration.” The Statement also emphasizes the duty to respect participation of the most marginalized and vulnerable members of society in human rights work and activities.⁵⁵ Commitments such as these may provide a useful model for HRNGOs that wish to draft policies, practical guides, and/or codes of conduct. Above and beyond policy-making, these commitments provide guidance on best practice for HRNGOs.

HRNGOs that carry out academic research or policy or that pursue a broad political or legal goal may not directly represent anyone. This raises complex questions. How, for example, can an HRNGO that lobbies at the political level to combat impunity but does not work directly with individual survivors ensure its work is respectful of human dignity? Does an HRNGO of this kind have a responsibility to consult society at large to see if there is support for law enforcement measures to end impunity? If the HRNGO discovers that the majority of people oppose its call for criminal sanctions, and that there is greater support for truth and reconciliation processes, would the HRNGO have a responsibility to reevaluate its goals and its work? We have already seen that NGOs are not elected and do not pretend to be answerable to the general public. NGOs cannot, therefore, be said to have a responsibility to represent the views of society at large or even to solicit public views. But as a matter of good practice, many HRNGOs do seek some form of public consultation in order to ensure that they remain relevant, effective, and credible.

Questions for HRNGOs on key stakeholders include the following:

- Who are the people at the heart of your mission (your key stakeholders)?
- How do you ensure that your key stakeholders are represented fairly and respectfully?
- How do you manage different opinions among your key stakeholders and between different stakeholders? Which stakeholders have more and less power and influence on decisions?
- What challenges and dilemmas do you face when carrying out consultations? How do you ensure that your work is supported by your key stakeholders?
- To what extent are people involved in the design, implementation, and evaluation of specific projects and activities?
- How, if at all, are various groups of people portrayed in your fundraising campaigns and dissemination activities?
- How does your NGO gauge public opinion? To what extent do the views of the public have an impact upon your work?
- Could your methodologies be improved to provide greater respect for human dignity? If so, how?

⁵⁴ http://www.humanrightsprofessionals.org/index.php?option=com_content&task=view&id=51.

⁵⁵

b. Responsibilities towards NGO staff, volunteers, and interns

“The Human Rights community enforces a sense of martyrdom in the defenders...fight others rights without caring about yours... what a contradiction.”⁵⁶

HRNGOs survive on the work of their staff, volunteers, members, supporters, and interns. Workers may sacrifice higher salaries, greater job security, and better benefits to work for an organization whose human rights mission they believe in. HRNGOs are in many respects no different from other types of organizations, in that they are obliged to treat their workers fairly and respect their rights. They are distinctive, however, in that their mission clearly imposes an ethical responsibility upon them to respect their workers' employment rights. HRNGOs promote nondiscrimination, equality, transparency, and accountability; they need to respect these principles vis-à-vis their own employees, volunteers, and interns. It would, for example, be a glaring contradiction for an HRNGO that works to protect labor rights in Asia to exploit, underpay, or mistreat its own workers.

Many of the specific duties to paid employees are set out in local employment laws, which govern issues such as health and safety, sick leave, minimum pay, holidays, maternity leave, and protection from discrimination and unfair dismissal. In many countries, however, local employment laws fall short of international standards, such that NGO workers lack fully enforceable employment rights. In some countries, NGO workers are denied the right to form or join unions, which further prevents workers from claiming their rights. The human rights sector is largely supported by short-term contract workers, many of whom have little or no job security. A permanent job is often the exception rather than the norm for human rights workers. HRNGOs that issue temporary and short-term contracts often avoid paying for employee benefits such as health care, pensions, and sick leave. In a sector based upon respect for human rights, it is, therefore, common for human rights workers to lack full employment rights and job security.

Volunteers and interns may have no formal entitlement to labor rights at all. The informality of the intern and volunteer system has left the area largely unregulated and open to abuse. The engagement of some volunteers and interns may be so informal that they are working illegally, in fact, because their NGO did not get them a work visa. There sometimes seems to be an unacknowledged assumption that interns and volunteers are amply rewarded with experience, training, and contacts. In reality, however, many students, interns, and volunteers complain that they are assigned menial tasks, that they do not receive the promised training or professional development, or that they are even treated “like slaves.” Surely this is not acceptable in a sector that is supposed to be based upon respect for human dignity?

The working culture of many HRNGOs is often informal and overly personalized. This sometimes means that sensitive complaints of discrimination and sexual harassment are dealt with inappropriately or ignored altogether. Although larger, professional NGOs have created systems for dealing with serious complaints, many NGOs have not implemented the necessary procedures. In many cases, for example, the female survivor of sexual harassment is pushed out

⁵⁶ Comment from a young human rights professional in response to a post by the author on her personal Facebook page: “I find it astonishing that some human rights organisations and academic institutions teaching human rights still manage to avoid providing their employees with basic employment rights.” Both comments were posted in December 2010 and are on file with the author.

of the organization while the male perpetrator retains his job. Just like any other organization, HRNGOs are vulnerable to corruption, sexual harassment, and discrimination. The real test is how they deal with such issues. Failing to do so in a fair and transparent manner can tarnish the reputation of an HRNGO and the sector as a whole and it goes without saying that it contradicts the human rights mission of an NGO.

The nature of human rights work is often distressing. Workers face physical and psychological risks, especially in conflict situations or when working with survivors of human rights violations. Yet young professionals are sometimes sent to the field with little or no training. Security guidelines and emergency evacuation procedures for those working in conflicts are often absent. Debriefings and free access to professional services to prevent and treat stress, burnout, and post-traumatic stress disorder are rare. The working culture gives little or no opportunity for workers to express their widely shared feelings of burnout and disillusionment.

Now that human rights work is a recognized career track, there is fierce competition for jobs among people leaving university with doctoral, masters, and undergraduate degrees in human rights. Many young professionals feel that they have no choice but to tolerate harsh working conditions; they may be made to feel that it is part and parcel of doing noble work for the sake of humanity.⁵⁷ Workers, particularly volunteers or interns, may be reluctant to complain about conditions, for fear that they will be made to feel that they are selfishly undermining valuable work and diverting attention from the real issues.⁵⁸ Some fear that they will not advance in their careers if they make waves. It may also be that those who do complain are labeled troublemakers, passed over for promotions, denied permanent contracts, subjected to harassment, or pushed out of the organization. What we need to address is whether our culture of doing good is undermining respect for workers and their human rights.

Some NGOs have adopted internal policies that guarantee staff fair treatment, in keeping with sector-wide codes. One example from the humanitarian sector is the People in Aid Code of Best Practice in the Management and Support of Aid Personnel.⁵⁹ This code contains principles related to human resources, training, support, health, safety, security, and well-being. The INGO Charter also contains useful wording on the protection of NGO workers in its sections on human resources, bribery and corruption, respect for sexual integrity, and whistleblowers.⁶⁰ While codes of conduct do not provide an instant solution to the range of challenges set out above, they can be useful in ensuring that NGOs implement and monitor necessary policies. Policies and codes of conduct may also encourage HRNGOs to open themselves to external evaluation and to dismiss staff who hinder efficiency or engage in misconduct.

Questions for HRNGOs on staff, volunteers, and, interns include the following:

- What voice do paid staff, interns and volunteers have in decision making processes within your HRNGO?

⁵⁷ Interview with human rights worker based in Geneva, October 2007 (notes on file with author).

⁵⁸ Speaking more generally, David Kennedy has noted that time spent fleshing out critical reflections of the human rights movement is occasionally seen as “time lost to the project of using human rights for emancipation.” David Kennedy (2004): 3.

⁵⁹ <http://www.peopleinaid.org/pool/files/code/code-en.pdf>.

⁶⁰ <http://www.ingoaccountabilitycharter.org/wpcms/wp-content/uploads/ingo-accountability-charter-eng.pdf>.

- Are staff, volunteers and interns protected by local employment laws? If not, why not?
- Could staff, volunteers and interns be treated better? If so, in what ways?
- What is staff moral like within you NGO? Could management do more to improve working conditions and moral?
- Does your NGO have a policy on sexual harassment? If not, why not?
- Has your NGO had to deal with internal complaints about sexual harassment? If it has, do you believe that your NGO has dealt with these complaints in a fair and transparent manner?
- Does your NGO provide training and professional development to staff, interns and volunteers? If not, why not?
- If your NGO works with the survivors of human rights violations, what kinds of training and support are personnel offered to ensure that they interact appropriately and protected from stress and burn out?
- Has the NGO you work for endorsed a code of conduct? Would you support it doing so? Would you support the development of a sector wide code of conduct?

3. Equality and nondiscrimination

Equality and nondiscrimination set demanding tests for HRNGOs in the areas of good governance, personnel management, and interactions with their key stakeholders. In addition to the responsibilities outlined above, HRNGOs have a formal duty to implement safeguards to protect staff members, volunteers, supporters, and survivors from discrimination based on such factors as race, age, color, sex, disability, sexual orientation, language, religion, political or other opinion, or national or social origin. Gender-based pay differentials that still exist in some NGOs must be eliminated.⁶¹ Corruption, patronage, and privileges for friends and family also fall afoul of the prohibition against discrimination. Policies and procedures should be in place to guard against malpractice, to protect whistleblowers, and to ensure that complaints are dealt with in a fair and transparent manner.

Many NGOs express their formal commitment to nondiscrimination by signing sector-wide codes of conducts or implementing internal policies.⁶² Nondiscrimination clauses in internal policies and codes of conduct usually address how an NGO treats people, in particular key stakeholders. However, questions about equality and nondiscrimination arise not only in interactions with stakeholders but also in relation to substantive human rights work, in particular issue selection by NGOs.

⁶¹ Syndicat interprofessionnel de travailleuses et travailleurs, Geneva Based Non-Governmental Organisations, Labour Rights (2006): 4.

⁶² The INGO Charter states that “we value, respect and seek to encourage diversity, and seek to be impartial and non-discriminatory in all our activities. To this end, each organization will have policies that promote diversity, gender equity and balance, impartiality and non-discrimination in all our activities, both internal and external.” www.ingoaccountabilitycharter.org.

The principle of nondiscrimination flows from core building blocks of human rights: all individuals are entitled to enjoy a full range of civil, economic, political, social, and cultural rights; and each person's rights are equally important. The principle of nondiscrimination does not necessarily imply, however, that HRNGOs have a responsibility to carry out substantive work on each and every human right, or that they must protect every person. NGOs have limited resources and must make strategic decisions about which issues, human rights, people, cases, and countries they will focus on. Decisions will be justified by reference to various factors including the NGO's mandate, available resources and expertise, the urgency or seriousness of a given case, the interests of powerful stakeholders, donor priorities, and the potential impact of the work.

Given the nature of the work and the resource constraints, an HRNGO would not ordinarily commit discrimination by selecting and prioritizing issues or groups of people to focus on. Nevertheless, HRNGOs still can face tough ethical questions. Let us take the example of a small HRNGO that has a mission to "protect human rights at the domestic level," which works in a country where violence against women is rampant. Under pressure from donors, this HRNGO commits all of its resources to a two-year campaign to close down the American detention camp at Guantanamo Bay and secure the release of five nationals held there. How, if at all can the HRNGO justify its focus on the Guantanamo Bay detainees, given the broader human rights picture within the country? By not addressing women's rights, do issues of discrimination arise? What level of justification, if any, would this HRNGO need to provide to critics, including women stakeholders and women's HRNGOs? How could the choices made by the HRNGO be justified to advocates of women's rights?

Or consider an HRNGO that works in a country where consensual homosexual behavior is punishable by death. Given the foregoing discussion, we may presume that it is legitimate for an HRNGO to choose not to work on gay rights because, for example, it does not have enough resources. Would it, however, constitute discrimination if an HRNGO refused to work on this issue because some members of the Board do not believe that human rights extend to consensual homosexual behavior, in light of domestic law? How, if at all, could this HRNGO justify its decision in that situation? Would issues of discrimination arise if this NGO also refused to express solidarity with NGOs that do work to protect gay rights? Given the key mission-based principles, would it be legitimate for an HRNGO to refuse to support a call by a coalition of NGOs to abolish the death penalty for homosexual behavior? Does the principle of nondiscrimination imply a duty to recognize gay rights as human rights? And if it does, what does this imply in practice for HRNGOs?

Arguably, larger and wealthier international HRNGOs have increased responsibilities when it comes to issue selection, because they have more power and resources for working on a wider range of issues. This is not of course a new debate. Historically, a number of international HRNGOs have had to justify their choices under pressure from internal and external stakeholders. Both Amnesty International and Human Rights Watch have had to explain why they chose not to work on the realization of economic, social, and cultural rights.⁶³ Though issue selection is inevitable and usually legitimate, HRNGOs have a responsibility to reflect on the choices they make and their consequences. HRNGOs need to be able to explain and justify, in

⁶³ Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26 (2004), 63-73.

particular to those who lose out, why they prioritize certain rights and groups of people over others. HRNGOs need to consciously reflect on the positions they take and the rights they defend. A human rights-based approach to HRNGO work implies that decisions should reflect the mission, the interests of key stakeholders, and above all fundamental principles of human rights.

Questions for HRNGOs on nondiscrimination and issue selection include the following:

- Does your NGO have policies in place to protect against discrimination in the workplace? If not, why not?
- Has your NGO signed a code of conduct that includes a nondiscrimination clause?
- Which rights does your HRNGO prioritize?
- Which groups in society does your NGO prioritize?
- Which rights are personally the most important to you? How, if at all, does your own concept of rights affect your work?
- How does your NGO select the issues it works on? Which factors have the greatest influence? The likelihood of making an impact? The wishes of key stakeholders? The severity of the violations? Consultation with other HRNGOs? Preferences of the Board? Financial considerations?
- Could the process of issue selection within your NGO be more participatory and democratic? If so, how?
- Who wins and who loses as a result of issue selection by your HRNGO? How, if at all, do you justify your choices to those who lose out?
- Do you think that your NGO has chosen the human rights issues that deserve the most attention in the geographical area that you work?

4. Universality

HRNGOs hold, as a fundamental principle, that every human being has rights regardless of any personal factor, including status or position in society. The majority of HRNGOs also support the idea that international human rights are universal values that cut across cultures, regions, and political divides. The claim that human rights are universal has long been the subject of academic debate.⁶⁴ In practice, however, a small group of Western-based international HRNGOs have been accused of setting the global human rights agenda without properly consulting with, or incorporating voices from, the South.⁶⁵ This criticism has intensified recently as some international HRNGOs have managed to exert a strong influence on human rights standard-setting process.⁶⁶ A number of commentators have noted that international HRNGOs with permanent offices in Geneva or New York, or those that regularly work with regional and

⁶⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003); Amartya Sen, *Human Rights and Asian Values* (Carnegie Council on Ethics and International Affairs, 1997).

⁶⁵ Makau Mutua (2007): 591.

⁶⁶ Christine Chinkin and Alan Boyle (2007).

international organizations, exert a consistent, direct, and powerful influence on processes of treaty negotiation which NGOs in the South cannot emulate.⁶⁷ This is because HRNGOs in the South lack the money, communications, language skills, and networks to participate at the same level.⁶⁸

Some NGOs have implemented guidelines that aim to address the inequality between international and national organizations, including formal sets of principles to improve these relationships. For example, principles drafted and agreed to by the British Overseas NGOs for Development (BOND) (a network of 340 UK-based development organizations) state that “when working with organizations in the south, [members] believe in co-operation on the basis of shared values and vision. They believe that both parties should learn from each other’s values, experience and approaches, and that this should lead to increasingly close partnerships for change. They recognize that such partnership is often not based on equal degrees of power in the relationship; that usually greater power rests with the northern party; but that the partnership should be based on an equal commitment to shared goals and that inequality of power should be redressed by both parties through practical action.”⁶⁹

Similarly at an intergovernmental level, the 2008 Guiding Principles for Human Rights Field Officers (HRFO), produced for the UN Office of the High Commissioner for Human Rights, directly address the issue of local custom and universality.⁷⁰ The Guiding Principles state that “although much of human rights is considered customary and universal, debate continues on its local application, for example in the context of some traditional practices. HRFO need to work closely with local partners to ensure the spirit of international human rights law is applied while recognizing local cultural specificity consistent with this law. Local partners help HRFOs identify how best to reconcile respect for local practices while upholding the universality of human rights regardless of culture, religion or region.”⁷¹

Notwithstanding such guidelines, HRNGOs are somewhat behind the curve in expressing commitments to universality. A further issue is whether such public expressions, in the form of codes of conduct or otherwise, promote best practices in reality.

Questions for HRNGOs on universality include the following:

- What does universality of human rights mean to you and to your HRNGO?
- How, if at all, does your HRNGO promote the principle of universality?
- Are the people who work for your HRNGO drawn from a diverse range of backgrounds? If not, why not?

⁶⁷ ICHRP (2006): 67.

⁶⁸ For an analysis of the dominant role played by some INGOs in the drafting of the UN Disability Convention, see Janet Lord, “Mirror, Mirror on the Wall: Voice Accountability and NGOs in Human Rights Standard Setting,” *Seton Hall Journal of Diplomacy and International Relations*, Vol. V, No.2 (2004): 93-110.

⁶⁹ www.bond.org.uk/aboutus/principles.html.

⁷⁰ www.bond.org.uk/aboutus/principles.html

⁷¹ www.humanrightspersonals.org/images/guiding%20principles%20for%20human%20rights%20field%20officers.pdf.

- How successful are the partnerships that your HRNGO has with INGOs or local NGOs?
- To what extent do you consult with local NGOs when working on specific countries? Could the processes used be improved? If so, how?

VI. Conclusion

HRNGOs represent an increasingly powerful force at the international, regional and national levels. As the sector continues to expand and professionalize, it is legitimate, healthy, and strategic for HRNGOs to examine their ethical and practical responsibilities. This article reviewed some of the responsibilities of HRNGOs. It focused on identifying concrete responsibilities that flow from some of the key principles of human rights that are central to the mission of HRNGOs. The discussion highlighted how the principles of respect for human rights and dignity, equality, and nondiscrimination and universality impose a range of specific responsibilities upon human rights NGOs.

The aim of this article was not to provide an exhaustive list of the responsibilities of HRNGOs, for this requires further discussion - primarily by HRNGs themselves. Nor was the purpose of this article to suggest a one-size-fits-all response to the responsibilities of HRNGOs. Rather, the aim of this article was to prompt further much needed discussion by HRNGOs about how to carry out legitimate, effective and responsible human rights work. One of the many victories of the human rights community has been to successfully highlight the benefits of a human rights-based approach to humanitarian and development work.⁷² Now it is time for us to discuss a human rights-based approach to our own work and to seek tangible ways to translate human rights principles that flow from our mission into daily practice.

⁷² Peter Van Tuijl, "Entering the Global Dealing Room: Reflections on a Rights Based Framework for NGOs in International Development," *Third World Quarterly*, Vol. 21, No. 4 (August 2000): 617-626.

Ethics, Morality, and Aid

Charity, Reciprocity, and the Moral Law

Todd Breyfogle¹

In her classic novel *Death Comes for the Archbishop*, Willa Cather provides a short but rich scene which helps crystallize the tensions underlying the relationship among charity, reciprocity, and the moral law (1990). The setting is the New Mexico territory in the middle of the 19th century. Father Joseph arrives at a remote *ranchito* riding his broken-down mare. He's greeted by the patron, Manuel Lujon, who affords him all the hospitality due a stranger and, indeed, the hospitality due a priest visiting a faithful clan of believers. On the day before Father Joseph's departure, after an evening of marriages and feasting, Manuel takes Father Joseph for a tour of his corral, where he displays his two prize, cream-colored mules, Contento and Angelico. Father Joseph swings up on Contento's back and parades around, lamenting that his own lame mare will never see him through the miles to his final destination. Thoughtfully and, we are led to believe, somewhat reluctantly, Manuel offers the mule to the priest as a gift. "You have made my house right with Heaven," he tells Father Joseph, "and you charge me very little. I will do something very nice for you; I will give you Contento for a present, and I hope to be particularly remembered in your prayers" (61).

We have the picture here of an apparently simple gift, but one whose contours prove to be complex. Father Joseph has, in some sense, cleverly asked for the mule. Manuel, for his part, cares genuinely for the well-being of Joseph, who has performed his sacramental duties with joy and generosity of spirit. Both men have acted in the spirit of charity—*caritas*, self-giving love. Neither sees the gift in the spirit of reciprocity—Manuel is not responding to a sense of being in debt, and Joseph makes no moral claim in his playful yet serious intimation that the mule might make a suitable substitute for his nag. And yet the gift might be seen to contain a hint of duress and exchange—Manuel parts with the mare with circumspect happiness, but asks to be remembered in the priest's prayers. Cather continues: "Springing to the ground, Father [Joseph] threw his arms about his host. 'Manuelito!' he cried, 'for this darling mule I think I could almost pray you into Heaven!' The Mexican laughed, too, and warmly returned the embrace. Arm-in-arm they went in to begin the baptisms" (61).

The scene ends with friends on equal footing embracing each other in the spirit of freedom—a gift has been freely offered and freely accepted. Any reservations on Manuel's part

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are eclipsed by the joy of his new friend's pleasure and well-being. The mule is not a payment for past or future prayers; Joseph's prayers are not recompense for the mule. In this, both he who gives and he who receives would seem to stand outside a logic of gift-giving which often has unspoken within it a legal notion of proportional justice.

The Logic of Reciprocity

There is—for perhaps every gift—an unspoken expectation of reciprocity, a sense that a gift (if only a gift of thanks) must be given in return, proportionate to the original gift (von Mises 1962, 75-77; see also Mauss 1967; Godbout and Caille 1998).² This expectation obtains sometimes on the part of the giver, sometimes on the part of the recipient; very often it is an expectation shared (if not explicitly acknowledged) by both parties. My aim is to consider this underlying juridical notion of proportionality, concerning not the legal code of charitable giving but rather the moral law and logic of reciprocity and the nature of the gift itself. These issues relate significantly, if indirectly, to the possibilities of a culture of philanthropy in a free market, and specifically to the beliefs most conducive to a truly philanthropic society. Does the logic of the gift permit the giving of a gift without the expectation of something in return, or does every gift ultimately reduce itself to the logic of exchange? That is, can there ever be a wholly free gift, or are all human relations inescapably implicated in what Marx called the “naked cash nexus”? How do we separate, both psychologically and morally, a gift for the good of another from the possibility that we are really giving for selfish (or primarily self-interested) motives?³

Let us return to our New Mexican *rancho*. All is well between Joseph and Manuel until the following morning, the morning of Joseph's departure. Manuel finds Joseph in the barnyard, “leading the two mules about and smoothing their fawn-coloured flanks, but his face was not the cheerful countenance of yesterday” (Cather 1990, 61). Joseph insists that he cannot accept the gift of such a beautiful mule while his bishop rides a common hack. A troubled Manuel offers Joseph the pick of his horses, but Joseph declines, saying that he will work hard to buy the pair. Manuel looks around the barnyard for an avenue of escape, but he sees his position clearly. Reluctantly, he gives both the mules to Father Joseph, who cries, “You will be all the happier for that, Manuelito.... Every time you think of these mules, you will feel pride in your good deed” (63). Manuel watches “disconsolately” as Joseph departs with the mules. “He felt he had been worried out of his mules, and yet he bore no resentment. He did not doubt Father Joseph's devotedness, nor his singleness of purpose.... He believed he would be proud of the fact that they [Joseph and the Bishop] rode Contento and Angelica. Father [Joseph] had forced his hand, but he was rather glad of it” (63).

Are the mules still a gift, either in the manner in which they were given or in the spirit in which they were received? Joseph does not ask for the mules with a sense of entitlement, but would it be entirely fair to say that he has only his bishop's and Manuel's interests at heart?

² Ludwig von Mises suggests that in exchange, each gives the less valuable for the more valuable. In this example, by contrast, Manuel gives what is most valuable in ignorance of what he will receive.

³ The true valence of one's motives is always difficult to assess, and one can have an interest in being disinterested. T. S. Eliot underscores the problematic character of even the noblest of actions when his Beckett, in *Murder in the Cathedral*, exclaims, “The last temptation is the greatest treason: To do the right deed for the wrong reason” (1963, 44). For a further exploration of the relationship between selfishness and self-interest in a theological vein, see C. S. Lewis (2001). Dostoevsky's *The Idiot* (2003) portrays the conventional absurdity of purely selfless action.

Manuel is clearly bullied into relinquishing the mules, and yet he bears no resentment, nor does he seem concerned about any costs or penalties should he quite reasonably refuse Joseph's request. Are we to assume that the spirit of charity has overcome too prideful an attachment to these two lovely beasts? Or has Manuel in effect purchased both a putative spiritual reward and social approbation, the pride of knowing that the clerics will be riding *his* prize mules? What obligations, if any, do Manuel and Joseph now owe each other, or is there no presumed reciprocity beyond a continuing good will?⁴

Aristotle, Kant, Smith

Aristotle might be inclined to praise Manuel's action as generosity or even as magnanimity. For Aristotle, generosity is a virtue of character concerning material wealth. The generous man is moderate toward wealth insofar as he is willing to part with it in giving it to others, in his judgment of the goodness of the person to whom he is giving it, and in giving neither too much nor too little. He receives honor for this virtue of character and rejoices in acting in concert with the good. One might also see Manuel's gift as an act of Aristotelian magnanimity. It is a great deed reflective of a greatness of soul conducted nonetheless with a moderate sense of pride. Although giving two mules instead of one might be an unusual gift—even for a wealthy *ranchero*—Manuel's offering is not excessive, indiscriminate, or vulgar, and he takes pleasure in the giving. There is something fine and beautiful in how Manuel is portrayed, and he would seem to meet Aristotle's criteria of generosity and magnanimity (*Nicomachean Ethics*, V.4:1119b20-1125a).⁵

There is one Aristotelian criterion, however, which is not met. The logic of generosity and magnanimity in Aristotle's account presupposes the superiority of the giver and inferiority of the recipient. It is, for Aristotle, better to give than to receive, but this is because the receipt of a gift carries with it an implicit, if not explicit, judgment of being in need or suffering a lack or deficiency (1124b10-20).⁶ There is no hint of superiority or inferiority in Cather's portrayal of Manuel and Joseph. Indeed, their relationship, however recently formed, resembles more closely the equality of exchange which characterizes Aristotle's account of friendship. In this, Aristotle would seem to recognize a transcendence of the cycle of exchange and obligation in the relations

⁴ It is worth noting from the outset the cultural context of gift-giving. In Arab culture, I am told, admiring an object obliges the owner to give the object as a gift. In Indian culture, the recipient's response of gratitude for a gift is seen as redundant, even strange, since the giver is already grateful for the occasion the recipient has afforded in being the object of his giving. Manuel's gift may coincide with the first of Maimonides' eight levels of charity (1972, *Mishneh Torah, Laws of Charity*, 10:7-14: 135-138).

⁵ Manuel's action would seem not to satisfy the demands of magnificence, which is generosity publicly displayed and for a public good; a gift to the cathedral fund might, however, be so termed.

⁶ See also Aquinas, *Summa Theologica*, 2a2ae Q27 art.1, where Aquinas reaffirms that loving is more proper to charity than being loved, though to be loved is also praiseworthy insofar as one is lovable. It is worth noting that the modern culture of individualism accentuates this sense of the inferiority of the recipient. Prizing as we do individual autonomy and self-sufficiency, being the recipient of a gift is often experienced as an insult of sorts, a reduction of dignity in being the object of paternal care, a recognition or creation of tacit inequality. Yet the inability or unwillingness to freely receive a gift may be as corrosive of human relations as the inability or unwillingness to give a gift. That is, modern autonomous individuals would do well to learn how to receive a gift gracefully and with joy. To receive a gift in such spirit, however, would require a revision of our dearly held embrace of autonomy as well as a recognition that there can be non-oppressive relationships of inequality. As givers and receivers we become more human.

which obtain between friends. That is, the fullest expression of giving is that which obtains between friends.

Aristotle follows his account of the virtues of character with a discussion of justice. His approach is not initially in terms of the classical Greek definition—rendering unto each what is due—but rather from its status as a virtue: What sort of mean is justice? What are the extremes between which justice is an intermediate? He acknowledges from the outset the difference between what is lawful and what is fair: both the lawful and the fair person will be just, but one can be unfair without violating the law. Yet neither category—fairness or lawfulness—would seem to apply to the giving-receiving we see with Manuel and Joseph. To use the terms of justice to understand Cather’s scene would be to engage in a category mistake.

Aristotle’s fruitful differentiation of four kinds of justice—distributive, corrective, proportional, and political—gives us a foothold for thinking about the relationship between what is charitable and what is just. As Aristotle understands them, the four kinds of justice aim at the distribution of goods to effect equality; the corrective or proportional rectification or restoration of goods; and the political actions of ruling and being ruled. Charity as reflected in the relationship between Joseph and Manuel would seem to have no part of any of these. It does bear some resemblance, however, to a notion of justice as proportionate reciprocity. Reciprocal justice pertains to the proportional equality which should obtain in relationships of exchange where the relative values are incommensurable. That is, reciprocity in exchange requires a numerical equality facilitated by money, for all items of exchange must be reducible to an intermediate value. “Reciprocity that is proportionate rather than equal, holds people together,” Aristotle says in *Nicomachean Ethics* V.5, “for a city is maintained by proportionate reciprocity.” This bond finds its strength in the presumption that there will be “a return of benefits received,” for “when someone has been gracious to us, we must do a service for him in return, and also ourselves take the lead in being gracious again” (2000, 74).

How are we to understand the intermediate value of the exchange between Manuel and Joseph, if it is to be understood as an exchange at all? Presumably we could determine a price per prayer (either as a unit price or as a function of labor) and draw some equivalent with respect to the market price of cream-colored mules in mid-19th-century territorial New Mexico. But this would seem to be beside the point. In Aristotelian terms, Manuel’s gift to Joseph is an act of virtue and so intelligible under principles of general justice, but not amenable to the principles of specific justice. Aristotle gives a nod in this direction with what is effectively a footnote (*Nicomachean Ethics* V.8) on the relation between decency and justice. In the same way that what is decent is just by subsuming the category of justice, so by extension one might view generosity as opening more widely than justice, transcending the category without being inconsistent with it.⁷ That is, justice is fulfilled and transcended insofar as the very ground of justice is transformed.

In contrast to this Aristotelian approach, what if we were to view Manuel’s gift from the perspective of Kantian duty? There is nothing in Joseph’s suggestion that Manuel has a duty—spiritual or ecclesiastical—to give the mules, nor does Manuel see his actions in terms of duty, even a duty of reciprocity for the good that Joseph has performed on the *rancho* (acts which, properly speaking, are the duties of a priest). Manuel’s joy in giving would disqualify his gift as

⁷ In a section on alms in Chapter 1 of *The Gift*, Mauss notes that the Arabic *sadaka* and Hebrew *zedaka* originally meant justice exclusively, but later came to mean alms.

a disinterested act. Further, one is left with some discomfort at the prospect of making Manuel's gift a principle of universal law (See Kant, *Foundations of the Metaphysics of Morals*, preface and Section I). It would seem unfair to enjoin—either through positive law or some principle of universal moral law—all people to give their prize possessions to a newfound, if worthy, friend. Moreover, the extreme particularity of the circumstances of Manuel's gift would seem to preclude universal generalization. Manuel's offer is prepared by his sense of gratitude at the accidental and rare arrival of a priest at his remote *ranchito*, reinforced by the personal and mutual goodwill that develops between them, and spurred by Joseph's unselfconscious appreciation of something that Manuel too loves and deems beautiful. That is, the gift is highly particularized in time, place, personality, and circumstance. If any one of countless variables were to change, the nature of the gift in Cather's portrayal would be compromised.

What if we were to view Manuel's gift in terms of Adam Smith's theorizing about moral sentiments? Again, we do not see in Cather's portrayal of Manuel any calculation of costs and benefits, nor do we have a hint that he is making his decision in accordance with the view of an impartial spectator, either human or divine (See Smith 1982, II.ii.2 and VI.i). Manuel will not be known where Joseph and his bishop are riding the mules, there is no advertisement from which he would derive public esteem, nor will he receive a tax deduction for his gift. Though these ancillary benefits might accrue, they do not seem to lie at the essence of his gift. And although Manuel is hopeful of Joseph's prayers, the anticipation of God observing him favorably for his gift does not figure in Manuel's reflections. His pride in his gift is not inconsistent with the notion of an impartial spectator, but the validation of his action seems to derive from something other than social (or even spiritual) approbation.

Beyond Human Categories

We can certainly account for Manuel's gift in Aristotelian, Kantian, and Smithian terms, but individually and collectively those accounts seem not to capture the entirety of what transpires in the scene Cather has given us. Manuel's gesture (that very word is significant) is an act of charity implicated in a web of reciprocity which defies theorization, and it neither responds to nor can form the basis of a moral law. It is an act of virtue, of a character formed by habit, but it is not a response to duty or to an imagined judgment of the merit of the act.⁸ Both the gift of the mules and their receipt is spontaneous and free. The exchange of mules and gratitude entails no obligation beyond that of good will (of which prayer is a special function). And although there is no explicit obligation, the two are obliged to one another in love. There is, properly speaking, a philanthropy defined not by the gift but of which the gift is itself a feature. The gift both expresses and extends in a new and special way a preexisting affection and good will. There is an expansion of their friendship, and as Aristotle says, "when men are friends they have no need of justice, while when they are just they need friendship as well, and the truest form of justice is thought to be a friendly quality" (2009, 142). The gift displaces us from the normal categories of human moral relations.

Aquinas addresses the failure of human categories fully to account for the nature of the gift by recognizing its dual valence: in terms of the virtue of charity and under the aspect of grace. True to his Aristotelian roots, Aquinas considers charity as a human virtue, embedded in benevolence and friendship. True to his Augustinian roots, he also sees that any good can be

⁸ The highly particularized character of the gift recalls Aristotle's definition of virtue: to do the right thing in the right way to the right person at the right time and for the right reason.

simultaneously referred to nature and to God. For Aquinas, it is consistent with human nature to give of oneself. But the good of charity is grounded in God's goodness. That is to say, the capacity of humans to give is both natural and divine. The completion of the human act of giving is super-human and requires a super-natural gift, of which God is both the source and the example (*Summa Theologica*, 2a2aeQ27 art. 2, 3, 8). For Aquinas, to give truly is a kind of excess, a spilling over of love, having both its source and intelligibility in God. Thus Aquinas recognizes an overlap between a human and a divine logic of giving—an anthropological understanding of what it means to give and a theological one. A gift understood in terms of human virtue is not less meritorious, but it would seem to be less complete.

The distinction between the anthropological and theological understandings of a gift underlies a difficulty in contemporary phenomenology taken up by Jacques Derrida and Jean-Luc Marion. Derrida lays out a fundamental problem with respect to the very possibility of a gift. Leaving to one side the interesting and significant technical issues of phenomenology in his account, Derrida's argument is this: the moment either the giver or the recipient is conscious of the gift as such—i.e., *as a gift*—it ceases to be a gift. That is, the moment of self-conscious recognition cancels out the event of giving, and implicates it irretrievably in the logic of economy and exchange, of credit and debt. As a giver, I take credit in the currency of *amour propre* and am conscious of deserving some recognition of thanks, either from the recipient or from some third party.⁹ As a recipient, I am conscious of being under some obligation to the giver, owing a debt of gratitude and, perhaps, responsible for some kind of reciprocal gift, however proportionate to my means. Where Aristotle saw bonds of benevolence, Derrida sees the handcuffs of the cycle of exchange whose moral currency can never find an equilibrium. Derrida does not—at least as a philosophical matter—deny the possibility of the gift in an absolute sense, but he does render highly problematic the possibility of anyone being in a position to observe the gift, insofar as the giver and recipient are ignorant of it. In the end, Derrida's account is a phenomenological transposition of the Kantian approach, recast as a problem of knowledge and self-awareness (Derrida 1994; 2008).

Jean-Luc Marion, by contrast, insists upon at least one participant's consciousness of the gift, but offers two putative ways out of the economy of exchange: anonymity and immaterial gifts. Where the giver or recipient is unknown, Marion argues, the horizon of exchange recedes to a vanishing point. Further, he says, we have many examples of immaterial gifts—gifts where no thing or object is given, but rather gifts of time, love, authority, and trust, for example. We clearly value immaterial gifts, but can we put an exchange value on them? Yes, Marion suggests (like Derrida), but in so doing we destroy their character as gifts. Marion continues:

The gift does not always imply that something is given. Now this remains true, not only in daily life, but in the most important and meaningful experiences of human life. We know that, to some extent, if the gift is really unique, makes a real difference, cannot be

⁹ One might see taxable deductions for charitable giving as a kind of third-party recognition. Making a charitable donation primarily for a tax deduction would seem to implicate the gift in the cycle of exchange; taking advantage of a tax deduction as a secondary benefit would seem to be incidental and therefore less implicated in the horizon of exchange. To refuse to take a tax deduction to maintain a supposed purity of the gift as a gift seems to me a sensible but not strictly necessary position. One could argue, on the contrary, that taking a tax deduction as a secondary benefit simply reduces transaction costs, leaving more funds for use or distribution. On this argument, a system of taxation might provide deductions as an incentive for greater philanthropy in the hope of facilitating social conditions more conducive to acts of charity.

repeated, then in such a case, the gift does not appear as something that could shift from one owner to another owner. Each genuine gift happens without any objective counterpart. When we give ourselves, our life, our time, when we give our word, not only do we give no *thing*, but we give much more. Here is my point: We can describe the gift outside of the horizon of economy in such a way that new phenomenological rules appear. For instance, the gift or the given phenomenon has no cause and does not need any. It would sound absurd to ask what is the cause of the gift, precisely because givenness implies the unexpected, the unforeseeable and the pure surge of novelty. And also the gift cannot be repeated as *the* same gift. So we discover with the gift, and to let it display its visibility according to its own logic, we have an experience of a kind of phenomenon that cannot be described anymore as an object or as a being.

(1999, 63-64, italics in original. See also Marion and Carlson 1998).

Several points are worth highlighting. First, the gift is a unique event in time and place which cannot be transferred or valued according to the traditional rules of economic exchange. Second, the gift has the character of spontaneity—it is free precisely because it emerges outside of a system of causality; it is not in its origin a reciprocating act. Third, it cannot be repeated, which is to say that by definition it cannot be systematized or taken to scale.

At stake in the debate between Derrida and Marion is the status of *grace*—the divine possibility of an absolutely free gift. Can the possibility of a free gift transcend the limits of law? Rather, as Hannah Arendt puts it, “Caritas fulfills the law, because to caritas the law is no longer a command; it is grace itself” (1996, 91). Or, in the words of St. Augustine: *Lex libertatis, lex caritatis est*. “The law of liberty is the law of love.” The freedom of the gift thus understood transcends and so fulfills a legal, juridical notion of reciprocity, allowing an account of human giving which enriches the dignity of both the giver and the recipient. How relations are understood shifts from what Augustine called the *libido dominandi*, possessive desire, to the expansion of love beyond desire. Only in giving do we learn to possess lovingly. Just as the gift is spontaneous and therefore free in its origin, so too it is free in its acceptance—neither the act of giving nor the act of receiving includes an expectation of causal consequence; the gift is not intended to produce a result. It is not an exchange, nor is it intended to produce change—it is absolutely free.

And yet, change does occur. When we give, when we receive, we are changed—unpredictably. We are changed most by gifts that are unattended, unexpected by giver and recipient alike. Part of this change is the experience of being outside the horizon of economy altogether, the experience of being free with a super-natural logic of causality in which each act of giving or receiving ushers in something radically new and unpredictable. The currency of this new economy is love, and the conditions it produces are those of human flourishing.¹⁰

¹⁰ John Locke, in the *Second Treatise*, makes it clear that he is ambivalent about money as a durable medium of exchange. Bartering makes goods liable to spoilage, but in so doing imposes a natural limitation on the desire for them. Money, by contrast, is a surrogate for the goods themselves, and is therefore an abstraction not subject to natural limitation when treated as an end in itself. The gift given and received by Manuel and Joseph is a concrete surrogate for the love they share (1980).

Transcending Exchange

In Cather's story, what is really being given? Manuel is only incidentally giving Joseph the mules. He is in essence, rather, giving a good that he loves and so gives a part of himself, enlarging his soul by parting with a beloved possession in favor of an overflowing of love which cannot be possessed. It is right that Manuel is attached to his mules. Were they not valuable to him, they would not have had the same value as a gift. In giving up the mules, he actually comes to possess them more perfectly. Joseph receives the mules, but in fact he receives the overflow of Manuel's love; in being the occasion of Manuel's expansion of love, Joseph is not made inferior but is equally expanded in his graceful receipt. What occurs is not an exchange but a creation, a refusal of a zero-sum horizon of economy.¹¹ As such, it is something of a miracle—something super-added to our common life that is not subject to the laws of human necessity and indeed might be at odds with those laws altogether.¹² “But if love can be measured by nothing other than itself,” writes Hans Urs von Balthasar in a profoundly Augustinian vein, “then love appears as formless, transcending all creaturely determinateness and precisely for this reason is a threat to it” (2004, 125).

The gift which yields a miracle changes us. Cather herself puts it this way, in a passage just before that in which Joseph stumbles across the mules at Manuel's *rancho*:

“Where there is great love there are always miracles,” he [the bishop] said at length. “One might almost say that an apparition is human vision corrected by divine love. I do not see you as you really are, Joseph; I see you through my affection for you. The Miracles of the Church seem to me to rest not so much upon faces or voices or healing power coming suddenly near to us from afar off, but upon our perceptions being made finer, so that for a moment our eyes can see and our ears can hear what is there about us always.”

(1990, 50).

The miracle, for Cather, is a refinement of our perception, the enriching of our sensibility, an enlargement of our humanity, a recognition of the dignity of giver and receiver beside which the beauty of any cream-colored pair of mules cannot compare.

What are the implications of this account for philanthropy? The nature of the gift is best preserved when it is understood outside the causal cycle of reciprocity and the dictates of the moral law. This causal cycle would seem to include a sense of obligation (or *noblesse oblige*) to spend one's money well, and from a sense of trying to accomplish some anticipated good. This causal cycle can readily be seen at work when philanthropy seeks to borrow forms of accountability either from government, by employing bureaucratic rules and procedures, or from business, by seeking to quantify returns on investment. Similarly, it would seem that in such a causal cycle recipients would not only come to expect being given to but would also come to have no shame or sense of inferiority in receiving. The desire to alleviate potential shame for the

¹¹ Implicit, further, is a revision of our customary notion of property. In 17th- and 18th-century English, “property” and “propriety” were largely interchangeable terms, though propriety carries its sense of the *how* of an exchange rather than just the *what*. The valence of the latter term underscores an important element of what Manuel possesses—the *how* of his gift recalibrates the very nature of his ownership of the mules.

¹² Cf. Aeschylus, *Prometheus Bound* (one of the earliest occurrences of “philanthropy”), where the gift of fire is also an act of rebellion (1961).

recipient may also be what is at work in some efforts of philanthropy to move responsibility for “charitable” activity into the social welfare state or, alternatively, to insist that the market can wholly fulfill the demands of moral reciprocity through commercial exchange.

Anonymity, whether of giver or recipient, would seem to be one way of breaking the cycle of exchange and expectation, of credit and debt, and both bureaucratic social welfare provision and the flow of goods through market production and consumption can afford anonymity. At the same time, anonymity would seem to be at odds with another criterion of a gift in the fullest sense, namely particularity. If Manuel had given 1,000 pesos to the Mule Fund for Itinerant Priests, the same material object would have been achieved, but the nature of the gift would have been very different.

These two elements—standing outside the cycle of causality and embracing fully the particularity of time, place, and person—force us to think anew about two pressing issues in philanthropy: measurable impact and scale. One could measure Joseph’s new mobility, but how would one calculate the increase of love, both individually and socially, which is the essence of the gift of the mules? And if the essence of the gift is in large measure the particular bond of love between giver and recipient, how are we to think about taking effective giving to scale?

Perhaps this closing example will help reframe these practical questions. Several years ago a friend quit his high-level European job to start an after-school program in the worst ghetto of a major Eastern European capital city. The neighborhood around the school is a wreck, strewn with heroin syringes and garbage, plagued by unemployment and teen prostitution, and largely neglected by government and nonprofit institutions alike. Many of the state-sponsored classrooms do not function because of teachers’ laziness and administrative corruption, and the after-school program is, for many children, the only safe place for study and tutoring, and its staff members have become a surrogate family in a very real sense. When the program received coverage by a national television station, the CEO of a major bank phoned to offer the bank’s financial support. “When can you visit?” my friend asked. When the CEO replied that he was too busy to visit the ghetto, my friend thanked him for his concern, said he wasn’t interested in the bank’s money, and hung up. The CEO found time to visit, but the bank drew the line when my friend asked that funding be contingent upon bank officers volunteering regularly to tutor and play sports with the kids. My friend’s insistence on human participation is an implicit recognition of the economy of love. In this case at least, the bank’s financial support is a means, not an end, a condition for the far greater giving and receiving that occurs when human beings share the profound gifts of love, trust, resilience, and dignity.

There can be philanthropy without charity. And if this distinction has any value, we might say that philanthropy is measurable and scalable, but charity is not. Philanthropy can be the praiseworthy giving of one’s self and one’s means. Charity fosters the enlargement of the soul of the one who gives and the one who receives. Philanthropy aims to change others and their circumstances, and so operates in a material register. Charity, in having no aim other than itself, changes us, and so resounds in a spiritual register. Those whose souls are enlarged by charity are restored to themselves and to their communities.

Philanthropy can help establish the material conditions in which charity can flourish. Habits of philanthropy can nourish the soil in which seeds of charity may grow. But a truly good society will be full of miracles, in Cather’s sense, a society in which each of us grows in love by giving of ourselves, becoming, however incidentally, the beneficiaries of a new creation. Those

gifts are richest which are unattended, miracles of grace which shine with the beauty of the light of dawn.

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Article

Czech Senate Declines the Act on Public Benefit Status

Petr Jan Pajas¹

On September 12, 2013, the Senate of the Czech Parliament refused to ratify the Bill of Public Benefit Status. The Chamber of Deputies had adopted the bill on August 8, 2013, as one of the legal norms expected to come into force with the New Civil Code of the Czech Republic on January 1, 2014. This article provides details about why that happened and what it means for Czech civil society.

Attempts to develop a supportive legal environment for civil society organizations in the Czech Republic began long ago. The efforts to change a legal system distorted by 40 years of Communist Party rule started immediately after November 1989. The previous so-called socialist legal system was based upon the supervision of the Communist Party over all political and civic activities, including the appointment of persons to state and public administration offices; complete state ownership of industry, business, and services; and the imposed cooperative use of lands and animals in farms. Virtually any form of independent behavior was either directly banned or considered a suspicious attempt to overthrow the political system of the so-called people's democracy.

During the 1950s, the regime dissolved nearly all clubs, unions, and voluntary associations, including those with a century-long history, especially when they cultivated active participation of citizens in the life of society. When Nazi Germany occupied Czechoslovakia during World War II, essentially all Czech foundations were abolished and their property confiscated or transferred to German foundations. Even so, the Communists were so afraid of the remaining foundations' possible independence that they abolished all but one of those still remaining and confiscated their property. The property of foundations was never returned or compensated, even after November 1989.

When the Civic Forum took over political power and leading dissident Vaclav Havel became President of the Republic in November 1989, the reconstructed Czechoslovak Parliament began by abolishing those articles in the Constitution that provided exclusive power to the Communist Party of Czechoslovakia. Equal rights for all political parties were restored. Other laws transformed the Czechoslovak Federal Republic, as it was known then, into a liberal democracy. The first free democratic elections took place in June 1992. New laws also guaranteed human and political rights, such as the rights to assemble, associate, and petition, as well as the rights of minorities. As early as 1990, in addition, many laws regulating the economy and commerce were amended.

In 1992 it was decided to dissolve Czechoslovakia. The Czech Republic became a state on its own on January 1, 1993. The Constitution of the Czech Republic defined the new state as a parliamentary republic based upon three pillars of legislative, executive, and judicial powers, reflecting the role of the state as the guarantor of the freedom and security of its citizens within the rule of law. The new paradigm was reinforced by the addition of a list of basic human and civil rights as a constituent part of the Czech constitutional system, following the patterns of European continental law.

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However, even under the new legal environment, many basic laws from the previous political system remained in force. It was not possible to change all parts of the executive branch within a few months or even years. The government structure, the courts' structure, state security, the army, and most provisions for international relations remained unchanged, as did the basic civil code, criminal code, court procedures, and other laws and regulations relevant to the continuity of state powers and administration.

The transition from "people's democracy" to "liberal democracy" in the Czech Republic lasted much longer than anybody expected. Actually, this transformation is not finished even now, twenty years later.

There are some examples of how much time it took to implement the political structures presumed by the Constitution. In 1996, the Czech Parliament was completed following the first direct elections of the members of its upper chamber, the Senate. In 2003, the Highest Administrative Court started to operate. Only now, in 2013, are we witnessing a serious discussion about such issues as hierarchy in the court and prosecution offices as well as the role of the Constitutional Court.

In order to fulfill the requirements of membership in the European Union, the Czech Republic undertook a tremendous effort in legislation from 1997 to 2003 to accommodate the Czech laws with the *acquis communautaire* or EU Law. That included the introduction of a new administrative system, providing the fourteen regions and all municipalities of the Republic the status of self-governing territorial units. One condition for entering the EU was to adopt a law on state service. Unfortunately, the entry into force of Act No. 218/2002 Sb., on Service of State Administrators, was postponed several times. That is characteristic of the approach taken by some Czech politicians to such obligations, despite their promises every election period concerning the adoption of norms that could better guarantee the stability, transparency, and reliability of the state administration.

As for the legal environment for civil society organizations, Act No. 83/1990 Sb., on Association of Citizens, was approved in 1990. In a rather liberal way, it allowed for establishing associations as juridical persons based on the membership of citizens who want to achieve common interests, excluding entrepreneurial, religious, military, or political purposes, so long as they do not limit the rights and freedoms of other citizens or interfere with the governmental, defense, or security roles of the state.

However, it took until 1997 to develop a proper law on foundations as a legal form that can take care of property set aside by a private person for a purpose of public interest, without any ownership title to the property on the part of its founder, the persons forming its governing structure, or its employees. Basic principles implemented in Act No. 227/1997 Sb., on Foundations [with Endowments] and [Money Collecting] Funds, were formulated as early as 1991 under the then Czech and Slovak Federal Republic, then in the Czech Republic again in 1995 to be finalized during 1996-1997. Also in 1995, Act No. 248/1995 Sb., on Public Benefit Corporations, was enacted, which treats as juridical persons not-for-profit organizations without membership if they provide commonly beneficial services to the general public under well-defined and accessible conditions.

And, last but not least, in 2012, after more than fifteen years of drafting and debating, new legal norms re-codifying the whole civil code (Act No. 89/2012 Sb., the [New] Civil Code) and replacing the current commercial law (Act No 90/2012 Sb., On Commercial Corporations and Cooperatives) were finally adopted. These innovative norms freed of "socialist" heritage should enter into force on January 1, 2014. The nearly two-year term for entering into force was provided in order to allow citizens, juridical persons, the state and public administration, the judiciary, and others to adjust to the new

norms, terminology, procedures, and implementation rules. The time has also been used for development of legal norms and regulations accompanying the new codes.

The Government of a broad coalition of right-wing parties with a strong majority in the Chamber of Deputies (but since 2012 with a minority in the Senate) claimed that the two-year period should be sufficient for adapting to the new legal environment, with its regulation of the rights and obligations of both natural and juridical persons, issues of life and death, family life, heritage, and legally binding relations, as well as its procedures for decision making, care for property, and other issues of civil and commercial life. The period was also treated as sufficient to provide for adequate education and technical preparation of all affected by and involved in implementation and enforcement of the new norms. However, from the very beginning, many objections were expressed against the new paradigm. Some also objected that the change of the legal environment was too abrupt and too complex.

The New Civil Code brings important changes into the legal environment of juridical persons, including or even especially those forming organized civil society. Under the New Civil Code, juridical persons are divided into *Corporations* (those with members actively using their accorded rights and obligations – such as voluntary associations, trade unions, and commercial companies of all kinds), *Foundations* (those based on property assets endowed or given for concrete purposes, but without members or persons with ownership titles to the property assets), and *Institutes* (those established to develop activities socially or economically beneficial and accessible to everybody under well-defined conditions, also without members or persons with ownership titles to the organization's property). When it enters into force, the New Civil Code will abolish Act No. 83/1990 Sb., on Associating of Citizens, and replace it with a set of mostly default provisions regulating all phases of life of voluntary associations, including members' rights and obligations. Also, Act No. 248/1990 Sb., on Public Benefit Corporations will be formally abolished.

In order to simplify the changes, the New Civil Code enables existing associations of citizens to continue as they are, being considered automatically as voluntary associations established and governed under the New Civil Code. However, it also allows the existing associations to change their legal form into an *Institute* or a *Social Cooperative* (a special form of a corporation that systematically develops publicly beneficial activities supporting social cohesion, aimed at the social integration of handicapped persons and enabling their access to the labor market using local resources). This change may be accomplished within three years after the New Civil Code enters into force.

Moreover, early in 2013 the Parliament adopted Act No. 68/2013 Sb., on Transformation of Associations of Citizens into Public Benefit Corporations. By using it, existing associations were given a chance to change their legal form into public benefit corporations. These can no longer be established according to the New Civil Code, but may continue being regulated under the present laws or may change their legal form again and become *Institutes*, *Foundations*, or *Funds*.

While the New Civil Code has been drafted, discussed, reviewed, and debated, there has also been discussion of how to define public benefit as something that a juridical person should do in order to be eligible for certain benefits, like tax reduction, access to public financial sources, tax benefits for donors, and a preference in other matters.

Since the second half of the 1990s, a great deal of research at the international level has been supported by the International Center for Not-for-Profit Law (ICNL). The researchers have noted the importance in liberal democracies of defining what may be considered a publicly beneficial activity, including whether some overseeing authority or self-regulating entity ought to distinguish organizations operating in publicly beneficial manners from those operating mostly for the private interests of a closed

circle of persons. In December 1999, researchers and representatives of leading civil society organizations from thirteen countries in Europe and North America summarized the experience from several legal systems on the notion of Public Benefit Status.² ICNL later published this summary in the Model Law on Public Benefit Status.³

After many changes and amendments, the Czech New Civil Code includes a set of articles (§§ 146 - 150) concerning Public Benefit Status. A juridical person is eligible if it satisfies the following criteria: its incorporation documents show that it was established for the purpose of contributing to the common good; only natural persons of good character (not sentenced for willful criminal acts) may act on its behalf; its property has originated legally and fairly; and it uses its assets in an economically efficient manner for publicly beneficial purposes. Such juridical persons shall have the right to have their Public Benefit Status filed in the appropriate public register. With such a status registered, the juridical person can use it in connection with its name. The New Civil Code relegates the procedures for registering Public Benefit Status to a special law. Though unspoken, it follows that the tax and other laws shall provide benefits or preferential treatment to juridical persons with the Status and to those persons supporting them.

In 2009, at the initiative of legal experts from both civil society and government, the Governmental Substantive Design of the Bill on Public Benefit Status was drafted and approved. It was prepared under auspices of the Governmental Council for Non-Governmental and Not-for-Profit Organizations. The draft raised the possibility that any juridical person (and not only those established according to special laws regulating civil society organizations) should be eligible for Public Benefit Status and the attendant tax benefits and preferential treatment. The draft assumed that the registering court would ensure the validity of the claim by reviewing the juridical person's application and documents. In general terms, the draft described what should be considered a public benefit service or activity, how to apply for Public Benefit Status, and what kind of benefits the Status would confer. It also addressed the withdrawal of the Status when sought by the juridical person or when ordered by the court.

In 2010, following discussions within civil society organizations, the Government decided to withdraw the Design and ordered the Ministry of Justice to draft the special Bill on Public Benefit Status that would reflect the conclusions of previous debates.

The Ministry of Justice started work on the new draft in 2011. Starting in January 2012, it cooperated with civil society organizations. Some of the organizations operated under the umbrella of the Association of Publicly Beneficial Organizations, established in order to promote the idea of the Public Benefit Status. Others joined together as the Association of Non-Profit Organizations in order to oppose the idea; they favored retention of the current flatly offered tax and other benefits.

The draft of the Bill on Public Benefit Status was prepared in September 2012. After further debates and exchanges between the Ministry of Justice and the Ministry of Finance, the Czech Government approved it in March 2013. In April 2013 it was submitted to the Chamber of Deputies of the Czech Parliament, despite the fact that the exchange of opinions between the Ministry of Justice and the Ministry of Finance had failed to clarify the issue of tax benefits provided under the bill. By contrast,

² Piotr Gajewski: *Regulating public benefit organizations: Meeting of the Regional Drafting Group in Zakopane, Poland*, International Journal of Not-for-Profit Law, Volume 2, Issue 3, (available on <http://www.icnl.org>).

³ [Model Provisions for Laws Affecting Public Benefit Organizations](#), ICNL, 2001

the Bill of Changes of Tax Laws submitted by the Ministry of Finance leaves the tax benefits for associations, foundations, funds, and institutes largely unchanged. The one significant change in the proposed tax laws stipulates that only donations from natural and juridical persons that are given to juridical persons with Public Benefit Status shall be deductible from the tax base of the donor. The new tax regulation was supposed to enter into force on January 1, 2014, alongside the New Civil Code.

The Bill on Public Benefit Status was discussed in the Parliament Chamber of Deputies. Its adoption was not considered necessary, since according to the opinion of the opposition parties (Czech Social Democratic Party, Communist Party of Bohemia and Moravia, and Public Affairs Party), the New Civil Code should not enter into force so soon; instead, a much longer time should be left for courts, public administration, and citizens to become acquainted with it and to prepare technical norms. At the time of these discussions, only three to four months remained to absorb all the new provisions, amendments, and changes in more than forty such laws.

A second objection raised to the Bill on Public Benefit Status relates to the fact that it lists as a publicly beneficial activity “*professing religious faith and providing spiritual support*” (Article 5, Item z/ of the Bill). This happens to be a sensitive issue in the Czech Republic. During 2012–2013, the coalition Government (formed by the Civil Democratic Party, TOP09 Party, and a tiny Liberal Democratic Party) forced through the Parliament a law providing for restitution of the property and assets of registered churches and religious communities confiscated after the Communist Coup in February 1948. The law also provides for complete separation of the churches from the state within a thirty-year period of time. The law will cost a huge amount of money, representing about 1 per cent of the state budget for many years. Given this context, it is no surprise that a deputy from the Communist Party objected to the mentioned provision of the Bill. She asked: “*Is it not another gift of the State to the Churches? Is it necessary to have it in the Bill separately when charity activities are there explicitly mentioned under other items of Article 5?*” Actually, this was the only explicit objection to the list of 25 publicly beneficial activities in Article 5 of the Bill.

The deputies finally approved the Bill with a few amendments, making it perhaps a bit less friendly to civil society organizations but not as sharply oriented against them as some coalition representatives wished. The final vote was taken in the absence of 45 percent of deputies and thus with quorum of 60 (out of 200): 62 voted for and 43 against the Bill—a very tiny majority, indeed!

It should be noted that the Bill on Public Benefit Status as well as most of the other bills accompanying the New Civil Code were submitted to the Parliament during a deep governmental crisis. Prime Minister Nečas and the whole coalition Government had to resign due to abuse of the state security services and other conflicts of interest. At that time, the Chamber of Deputies was divided equally, so it was not clear whether a majority still supported the coalition. On August 16, 2013, the Chamber of Deputies by a majority of 140 members decided to propose that the President of the Republic dissolve the Chamber. President Zeman did so on August 28. With that, all the bills left as approved by the Chamber of Deputies went to the Senate, where they could be only confirmed as submitted or refused without any possibility of a corrective action.

The Senate of the Czech Parliament has a strong majority from the opposition. So it could have been expected that the bills dealing with the New Civil Code would be in jeopardy, given the steady opposition to it as well as the repeated requests to further postpone its entry into force.

The debate on the New Civil Code and some of the accompanying bills made it clear that the majority of the Senate would refuse to accept parts of the legislation. This included the package of

amendments and changes to the tax laws. Provisions dealing with the tax on dividends were especially criticized.

When the Senate started to deal with the bills on September 12, 2013, the above-mentioned expectations were met only partially. The Senate passed the main package of so-called technical amendments to more than forty laws, adopting the changes needed for general implementation of the New Civil Code. Similarly, it accepted laws changing the procedures of the courts and the manner of maintaining the public registers, as well as several other important laws for implementing the New Civil Code. However, the Senate refused both the tax package and the Bill on Public Benefit Status.

What were the main arguments mentioned in the Senate debate over the Bill on Public Benefit Status? First of all, as in the Chamber of Deputies, the issue of churches and religious communities arose—whether activities motivated by religion and faith should be deemed publicly beneficial. In a refinement to this argument, some contended that the list of activities considered publicly beneficial should not automatically include activities of certain types of juridical persons: not only churches and religious communities, but also trade unions and associations of employers (Article 5, Items z/ and zb/ of the Bill). Moreover, some argued that defining publicly beneficial activities would be especially difficult concerning voluntary units of firemen operating under the auspices of municipal self-governments; however, in general this would fit one of the items of Article 5 of the Bill.

The Bill was also subjected to new criticism in the Senate. Under the Bill, the juridical person should apply to the civil court for registration of Public Benefit Status. The court, due to another law on procedural rules, must issue its decision within fifteen days. If the decision is positive, the registering court must file the Public Benefit Status into the appropriate public register within five days. Some senators argued that 10,000 out of the Czech Republic's 100,000 civil society organizations could seek Public Benefit Status immediately. Such an avalanche of submissions could cause the collapse of the courts or at least a tendency to postpone their decisions by returning proposals as incomplete. This possibility was cited as a reason to refuse the Bill on Public Benefit Status. It was also argued that damage might result to civil society organizations, given the changes in tax laws (already refused in the immediately preceding vote of the Senate) according to which donors will have their donations subtracted from the tax base only when given to juridical persons with Public Benefit Status. The result, it was said, could be a chaotic situation lasting for months if not years.

Finally, according to some senators, refusal of the Bill would not necessarily complicate implementation of the New Civil Code. The new Government that would come into power after the extraordinary elections held on October 27-28, 2013, should prepare a revised version of the Bill, which could include a reasonable term during which the registration of Public Benefit Status would not affect access to donors' gifts and public administration grants or other possible fiscal and preferential benefits.

The current Czech Government of Mr. Rusnok, which replaced the former coalition Government, is acting as a provisional one, since it failed to obtain the vote of confidence from the Lower Chamber before that was dissolved. In the present situation, only two options remain for the Government: (1) to propose an extraordinary legal regulation of the Senate, by which some gaps in the legislative norms needed to allow the New Civil Code to enter into force may be covered without including controversial issues; or (2) to propose in the same manner a postponement of effectiveness of the New Civil Code for another term. But even if the Senate would accept such extraordinary measures when there is no active Chamber of Deputies, these measures would be valid only when confirmed by the new Chamber of Deputies on its first session after the elections. That might not happen before the end of 2013.

Thus, the Czech Republic is facing a situation of either chaos in its legal system after January 1, 2014, or a period of time when nothing will be known with certainty as regards the rights and obligations of persons with respect to the state authorities. The political crisis is one cause. Another cause, perhaps, is the previous Government's failure to work intensely enough on laws accompanying the New Civil Code and the Act on Commercial Corporations and Cooperatives. The result may be substantial amendments to the above-mentioned basic codes and all already approved accompanying laws, unless the new political representation assumes responsibility for improving the heavily damaged role of the state. Let us hope for the latter.

Regardless of developments during the remainder of 2013, the Senate's decision to refuse the Bill on Public Benefit Status is a loss of a unique opportunity to implement this needed legal norm. It was expected to bring about transparency and responsibility regarding the use of public resources in Czech civil society, where, unfortunately, some organizations continue to abuse the liberal rules and thereby distort the image of the not-for-profit sector. Remedying this unnecessary and ill-advised action of the Senate may take not months but years, during which civil society will be subjected to divisive disputes over the meaning of Public Benefit Status and over the likely effects of its introduction. Czech civil society should be concentrating on issues of self-sustainability, independence of state subsidies and benefits, enhancement of citizens' participation, and promotion of a civilized way of life; instead, it may return to the dark times of hatred, envy, and harsh competition for donors' support. Let us hope that this will not happen.

Article

Special Regulation for Third Sector Broadcasting: Is It Necessary?

Fernando Mendez Powell*

The third sector broadcasting movement has gained significant momentum in recent years. During the last decade, many countries provided legal recognition to the sector for the first time, and advocacy efforts to obtain such recognition in other jurisdictions are ongoing. However, with legal recognition for the sector also often comes special regulation for it. Special regulation can aid the development of the sector, but it can also, intentionally or not, hinder the effectiveness and viability of third sector broadcasters. While the justifications and rationales for the special regulation of commercial and public sector broadcasters have been amply discussed in academic literature, third sector broadcasting regulation is, in comparison, an understudied field. The present article looks at the different rationales under which the regulation of third sector broadcasting is justified and at some examples of restrictions commonly imposed upon third sector broadcasters. The goal is to assess whether special regulation for third sector broadcasting is necessary or desirable.

Introduction

Third sector broadcasting (TSB) has existed in some form in most countries in which broadcasting activity is not an exclusive monopoly of the State. However, the sector has traditionally suffered from lack of legal recognition of its condition as a separate sector.¹ The lack of legal acknowledgment of TSB as a distinct form of broadcasting has led to third sector broadcasters (TSBs) being subjected to regulation that has been designed with commercial or public sector broadcasters (PSBs) in mind and that is inappropriate for them. This has been identified as one of the main barriers impairing the development of the sector.² Fortunately, this situation has been improving in recent years, as during the last decade several countries have

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¹ See for example, Kern European Affairs, *The State of Community Media in the European Union*, prepared at the request of the Directorate-General for Internal Policies of the Union of the European Parliament, 2007; UNESCO Division for Freedom of Expression, Democracy and Peace Communication and Information Sector, *Legislation on Community Radio Broadcasting –Comparative Study of the Legislations of 13 Countries* (UNESCO, 2003).

² See UNESCO, *ibid.* at 106-107; UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al., *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade* (2010), Art. 7(b).

adopted specific legislation or regulation regarding TSB. Examples include Ireland (2001),³ the United Kingdom (2004),⁴ India (2006),⁵ Uruguay (2007),⁶ Argentina (2009),⁷ Chile (2010),⁸ and Spain (2010).⁹ In each of these jurisdictions, some broadcasters which could be considered TSBs had already been operating before the introduction of sector-specific legislation.

While special regulation designed with the needs of the sector in mind can greatly aid the development of TSB, such regulation can also have the effect of hindering the effectiveness and viability of TSBs if it unnecessarily restricts their activities.¹⁰ The goal of this article is to assess whether there are any reasons which justify applying to TSBs special regulation, beyond that regulation already applied to other broadcasters and to other entities in the nonprofit sector. For this purpose, the objectives commonly pursued through the general regulation of third sector organizations are contrasted with those pursued through special TSB regulation in order to determine whether there is an added value in having the latter or, on the contrary, whether imposing special restrictions to TSBs is redundant or even counterproductive.

The concept of TSB is introduced and explained in Section 1. Section 2 briefly details the rationales commonly used to justify special regulation of commercial and public sector broadcasters; it is followed by Section 3 which discusses the rationales for special TSB regulation and how they may overlap or differ from those of the general regulation of third sector organizations. In Section 4, some examples of the type of special regulations that can be imposed to TSBs in pursuance of the goals detailed in Section 3 are presented, and their relative merits are discussed. Section 5 comments on the negative impact that unnecessary restrictions can have on the effectiveness and viability of TSBs and consequently on the development of the sector; the other side of the coin, how adequate special regulation can actually be beneficial to the sector, is discussed in Section 6. The article concludes that some regulation of TSB is justified and desirable, but that care must be taken in policymaking as any unnecessary restrictions can have significant detrimental consequences for individual TSBs and for the sector as a whole.

1. What Is Third Sector Broadcasting?

The two best known sectors of broadcasting are the public sector and the commercial sector. The public sector is comprised of “official broadcasters,” which are under direct control of the government or a branch thereof;¹¹ and “public service broadcasters,” which are also created by the government but provided with legal and financial independence and a mandate

³ Ireland, Broadcasting Act 2001. (The act was later reformed by the Broadcasting Act 2009, which modified several dispositions regarding TSBs).

⁴ United Kingdom, Community Radio Order 2004 (later amended by the Community Radio [Amendment] Order 2010).

⁵ India, Policy Guidelines for Setting up Community Radio Stations (2006).

⁶ Uruguay, Community Broadcasting Law (2007).

⁷ Argentina, Law 26,522 regulating Audiovisual Communication Services (2009).

⁸ Chile, Law No. 20.433 Which Creates the Citizens Community Broadcasting Services (2010).

⁹ Spain, General Law 7 of Audiovisual Communication (2010).

¹⁰ Buckley, Steve, et al., *Broadcasting, Voice and Accountability, A Public Interest Approach to Policy, Law and Regulation* (World Bank Group, 2008) at 59.

¹¹ *Ibid.* at 36-37.

that makes them accountable to the public in general rather than to a specific governmental authority.¹² The commercial sector is comprised of broadcasters which are controlled by private parties and have profit-seeking as the primary purpose of their operations.

TSB is an umbrella term used to refer to forms of broadcasting which do not fit within the two categories described above. At the most basic, TSB can then be said to be all broadcasting which is not established by the State and which does not have the generation of profits as its main purpose. In this sense, the third sector is sometimes referred as the “private nonprofit”¹³ or the “non-commercial, non-public”¹⁴ sector. Licenses for TSB are often issued to organizations that fall within the realm of third sector or civil society. Different jurisdictions have different eligibility requirements, but examples of entities which often engage in TSB include community-based associations and cooperatives, charity organizations, religious institutions, and special interest groups representing students, youth, ethnic, LGBT, and seniors.¹⁵ In this relation, the 2010 Chilean law has been innovative in listing a large range of types of nonprofit organizations as eligible for TSB licenses, including trade unions and sports club.¹⁶

Broadcasting by educational institutions and indigenous communities is also often considered to fall within the third sector. There is a gray area in the cases of public educational institutions and indigenous communities, which are public law entities and therefore do not fall within the concept of “private, nonprofit.” However, broadcasting in which these types of entities are license holders is normally considered TSB if they are sufficiently independent from government control.¹⁷ The law of Georgia is notable for expressly establishing that TSB licenses can be issued to entities of public law.¹⁸

A term commonly associated with TSB is “community broadcasting.” Some use the label to refer to all forms of TSB. Others use it to refer specifically to a particular type of TSB, in which participation in the administration of the station and the production of content for it is open to all members of the intended audience, be it a geographic community or a community of interest.¹⁹ Terms such as “ethnic,” “indigenous,” “religious,” and “educational” broadcasting are sometimes used to refer to broadcasting activities by third sector groups which do not necessarily

¹² Discussed in depth in Rumphorst, Werner, *Model Public Service Broadcasting Law and Aspects of Regulating Commercial Broadcasting* (International Telecommunication Union, 1999).

¹³ See for example, Office of the OAS Special Rapporteur for Freedom of Expression, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, OAS Doc. OEA/Ser.L/V/II CIDH/RELE/INF. 3/09 (2009), para. 69.

¹⁴ See for example, Raboy, Marc, “Media and Democratization in the Information Society,” in Bruce Girard and Sean O. Siochru (eds.), *Communicating in the Information Society* (UNRISD, 2003) 101-119 at 102.

¹⁵ See Kern European Affairs, *supra* note 1.

¹⁶ Chile, *supra* note 8, Art. 9.

¹⁷ See, for example, *ibid.*; Baker, Edwin, *Priorities Review Staff Report on Radio* (Australian Government Publishing Service, 1974).

¹⁸ Georgia, Law on Broadcasting, N.780/23 (2004) Art. 2(m) (English translation available at www.gncc.ge/files/7050_3380_492233_mauwyebloba-eng.pdf).

¹⁹ See, for example, Buckley et al., *supra* note 10 at 212; UNESCO, *supra* note 1 at 5; Kern European Affairs, *supra* note 1 at iii.

follow the participatory model associated with community broadcasting under the narrower definition.²⁰ In fact, it has been suggested that acknowledging the differences between various forms of TSB and tailoring regulations and policies applicable to each according to its nature and needs can facilitate the development of the third sector as a whole and that of each of its subsectors.²¹

Providing a framework under which TSB can develop is an obligation under international human rights law. The access to broadcasting licenses cannot be restricted to organizations formed under laws designed for for-profit purposes; persons seeking to exercise their freedom of expression through the airwaves in pursuit of nonprofit goals should not be forced into legal forms inadequate for their purposes.²² Moreover, TSB has been demonstrated to be a valuable alternative to for-profit broadcasting. TSB helps reduce the abundant inequalities in access to outlets for the dissemination of information;²³ provide local broadcasting services in areas that are not of interest of commercial broadcasters;²⁴ provide broadcasting services in their own languages to minority groups where this is not attractive to the commercial sector or practical for the public sector;²⁵ and provide a greater diversity of information than is possible from the public and commercial sectors.²⁶ These are all reasons why policy makers should consider aiding the development of TSB in any way they can. However, it should never be considered that the primary role of TSB is to compensate for the deficiencies of the other two broadcasting sectors.²⁷ The right of persons to engage in broadcasting for nonprofit purposes is independent of the quality and diversity of the commercial and public services available. Among others, the OAS Special Rapporteur on Freedom of Expression has noted:

The different kinds of media (public and independent of the executive, private for-profit, and community or private non-profit) must be recognized and have equitable access to all available transmission technology.²⁸

Beyond the basic requirement of allowing third sector actors access to broadcasting licenses, the potential benefits of TSB makes it desirable to recognize TSBs as a separate class of broadcasters subject to a special framework which takes into account their special nature and purpose and which is aimed at aiding their development.²⁹ For example, while commercial

²⁰ See UNESCO, *supra* note 1 at 99-101.

²¹ *Id.*

²² OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 106.

²³ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, *Annual Report to the Human Rights Council*, UN Doc. A/HRC/11/4 (2009), para. 63.

²⁴ Day, Rosemary, *Community Radio in Ireland: Participation and Multi-Flow Communication* (Hampton Press, 2009) at 123.

²⁵ Fraser, Colin and Sonia Restrepo Estrada, *Community Radio Handbook* (UNESCO, 2001) at 18.

²⁶ *Id.*

²⁷ In fact it has been erroneously argued that a truly effective public service broadcasting system will make TSB unnecessary. See McChesney, Robert W., "The Mythology of Commercial Broadcasting and the Contemporary Crisis of Public Broadcasting" (paper presented at the Spry Memorial Lecture, Montreal, 2 December 1997).

²⁸ OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 69.

²⁹ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al., *Joint Declaration on Diversity in Broadcasting* (2007).

broadcasters can be required to pay license fees in proportion to the profits they can be expected to derive from the exclusive exploitation of radio frequencies, the nonprofit nature of TSBs means that access to frequencies should be free for them or that license fees should be limited to the recoup of the licensing authority's administrative costs.³⁰ Other examples of special regulations which can aid the development of the sector include simplified licensing procedures which do not require the assistance of legal or engineering experts that third sector organizations may be unable to afford,³¹ or even the omission of the license requirement altogether in areas where there is no competition for licenses.³² When special benefits of this type are granted to TSBs, they are also often accompanied by special restrictions on their activities, beyond those applied to commercial broadcasters. Before proceeding to analyze whether such special restrictions may be justified, it is convenient to consider the reasons why special regulation is applied to the other two sectors of broadcasting.

2. Why Is Broadcasting Regulated?

Except for those cases in which it is a complete State monopoly, broadcasting has always been subjected to some form of regulation. Rationales for such regulation include the spectrum scarcity which is considered to require limiting broadcasting activity to a few actors favored by licenses;³³ and the perceived pervasiveness of the medium which is considered to require applying to it higher standards in areas such as decency.³⁴ The validity or lack thereof of these rationales has been amply debated in academic literature.³⁵ It is not necessary to dwell on this topic, as the focus here is on those special regulations that apply only to TSBs, while matters such as decency standards should normally apply equally across all sectors of broadcasting.³⁶ However, contrasting the rationales for the regulation of commercial and public broadcasters with those used to justify special regulation of TSBs may prove useful.

2.1. Special Regulation of Commercial Broadcasters

Examples of regulations commonly applied to commercial broadcasters include special ownership and control concentration rules;³⁷ minimum quotas for desirable types of content such as nationally produced content or content aimed at children;³⁸ the obligation to provide coverage

³⁰ *Id.*

³¹ OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para 66.

³² See Canadian Radio-Television and Telecommunications Commission, *Exemption Order Respecting Certain Native Radio Undertakings*, Public Notice 1998-62.

³³ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

³⁴ See, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

³⁵ See, for example, Levi, Lili, "Book Review: Rationales and Rationalizations—Regulating the Electronic Media," 38(3) *Jurimetrics Journal of Law, Science and Technology* 515 (1998).

³⁶ In practice this is not always the case. PSBs and TSBs are sometimes subjected to more restrictive decency standards than commercial broadcasters are. The issue of decency standards falls outside the scope of this article.

³⁷ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al., *supra* note 29.

³⁸ See Eve Salomon, *Guidelines for Broadcasting Regulation*, prepared for the Commonwealth Broadcasting Association and UNESCO, Sections 8.11-8.15, available at <http://unesdoc.unesco.org/images/0018/001832/183285e.pdf>.

to certain matters of public interest;³⁹ and the obligation to provide variety of content.⁴⁰ It has been argued that applying special regulations of this type to commercial broadcasters is unfair and redundant when they are already subjected to the rules applicable to all businesses, such as anti-monopoly and consumer protection laws.⁴¹ However, commercial broadcasting regulations reflect a perception that general business laws are insufficient to protect the public interest.

Cultural goals, such as securing outlets for national or local artists, and social goals, such as securing for the population access to information and variety of content, are concerns not normally contemplated in devising general business laws. The special concentration rules in broadcasting serve a fundamentally different purpose than general anti-monopoly laws, which seek to prevent firms from attaining a dominant market position that would allow them to charge abusive prices. The goal of commercial broadcasting concentration rules is securing access to information from multiple viewpoints, rather than protecting consumers—who in commercial broadcasting are advertisers rather than the audience—from predatory pricing. As noted by Zlotlow: “[T]he most important element of economic regulation is completely absent from broadcast regulation. Broadcast regulation never dealt with regulating the rates consumers pay.”⁴²

Whether the concerns which motivate special commercial broadcasting regulation are valid and whether they justify the type of rules often imposed in their name are topics outside the scope of this article. However, what is clear is that the goals pursued by general business law and those pursued by commercial broadcasting regulation sufficiently differ from each other for redundancy between the two not to be a serious concern. As will be discussed in Section 3, the relation between the regulation of nonprofit organizations and TSB regulation presents a different situation, with greater overlap between the two.

2.2. Regulation of State (Public Service) Broadcasters

As noted in Section 1, public sector broadcasters are normally classified as “official” or “public service,” depending on their level of independence from other elements of the government. Because official broadcasters are under the direct control of the government (or a branch thereof), they are characterized by a lack of regulation.⁴³ Governments typically retain full discretion over content and administrative decisions of those broadcasters following the “official” model.

In contrast, public service broadcasters (PSBs) should be independent from government. For this reason, their administration normally lies with a special statutory body subject to a specific mandate. The ideal is not always fulfilled, but, if good practices are followed, the

³⁹ See Margarian, Gregory, “Substantive Media Regulation in Three Dimensions,” 76(4) *George Washington Law Review* 845 at 845 (2008).

⁴⁰ See European Court of Human Rights, *Demuth v. Switzerland*, Appl No. 38743/97, 5 November 2002.

⁴¹ Coase, Ronald, “The Federal Communications Commission,” 2 *Journal of Law and Economics* 1 at 16 (1959).

⁴² Zlotlow, David, “Broadcast License Auctions and the Demise of Public Interest Regulation,” 92(3) *California Law Review* 885 at 919 (2004).

⁴³ Buckley et al., *supra* note 10 at 36-37.

mandate itself or additional regulations must include provisions aimed at securing the independence of PSBs.⁴⁴

PSBs are sometimes expected to be independent not only from government but also from the influences that rule the commercial sector, and to provide a service that is distinct from that offered by commercial broadcasters.⁴⁵ When this is the case, special regulations may be imposed to PSBs, such as restrictions on the type of content they can broadcast, on the sale of airtime, and on the airing of advertisements.⁴⁶

Since the administrators of PSBs are normally special entities created only for that purpose, it is evident that a specific mandate and regulation are required for them to follow the desired policy goals. However, it is relevant to note the rationales that are normally behind the regulation of PSBs. Both of the concerns—securing independence from government and commercial influence, and securing the distinctiveness of their service—are also often behind the special regulations applied to TSBs, as discussed in the following section.

3. Rationales for Special Regulation of Third Sector Broadcasting

3.1. Preventing Unfair Gain

The first rationale for applying special regulation to TSB is to prevent license-holders from deriving unfair gain from their licenses.⁴⁷ If TSB licensees are favored with free access to the spectrum or with a less onerous licensing process because of their declared social and nonprofit purpose, then it is a legitimate goal to prevent TSB licenses from being used as a backdoor for commercial activity and profit-seeking. However, preventing more favorable regulation from being abused is one of the objectives most commonly pursued through the general regulation of nonprofit organizations.⁴⁸ If TSB licenses are restricted to nonprofit entities which are prohibited by law from having owners and from distributing profits to members,⁴⁹ then it is not clear that additional regulation is necessary to prevent TSB licensees from deriving unfair gains.

3.2. Protecting Commercial Broadcasters from Unfair Competition

Another rationale for the special regulation of TSBs is protecting commercial broadcasters from unfair competition from TSB licensees.⁵⁰ In the absence of special restrictions,

⁴⁴ See Committee of Ministers of the Council of Europe, *Recommendation to Member States on the Guarantee of the Independence of Public Service Broadcasting*, Recommendation R(96)10.

⁴⁵ Committee of Ministers of the Council of Europe, *Explanatory Memorandum to Recommendation R(96)(10)*, Guideline 6.

⁴⁶ *Ibid.*, Guideline 19, para. 63.

⁴⁷ See, for example, Australia Communications and Media Authority, *Community Broadcasting Not-for-Profit Guidelines* (2011).

⁴⁸ See, for example, Garton, Jonathan, *The Regulation of Organised Civil Society* (Hart Publishing, 2009) at 104; Phillips, Susan D. and Steven Rathgeb Smith, “Between Governance and Regulation: Evolving Government-Third Sector Relationships” in Susan D. Phillips and Steven Rathgeb Smith (eds.), *Governance and Regulation in the Third Sector International Perspectives* (Taylor & Francis, 2011), 1-37 at 10.

⁴⁹ See, for example, Committee of Ministers of the Council of Europe, *Recommendation to Member States on the Legal Status of Non-Governmental Organizations*, Recommendation CM/REC(2007)14, Art. 9.

⁵⁰ See, for example, Buckley et al., *supra* note 10 at 220; OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 112.

TSBs may end up in direct competition with commercial broadcasters for audiences and advertisers. If TSB licenses are issued under less onerous conditions than commercial ones, TSBs could be considered to have an unfair advantage over commercial broadcasters. As will be discussed in Section 4, TSBs are often subject to restrictions on the type of content they can broadcast and on the airing of advertisements in order to protect commercial broadcasters.

Competition between third sector and commercial actors is not unique to broadcasting. Nonprofit organizations may also compete with commercial ones in delivering services in other fields such as health and education; nonprofit organizations' ancillary trading activities for the purpose of fundraising likewise may lead to competition with commercial entities.⁵¹ Third sector organizations are sometimes restricted in their ability to trade and to engage in commercial activity if they benefit from rules which could give them an unfair advantage over commercial actors.⁵²

If there are specific policies aimed at supporting TSB, in addition to those aimed at supporting the third sector in general, then these may give TSBs additional competitive advantages over their commercial counterparts, in comparison to those nonprofit organizations trading in other fields may have over their commercial counterparts. Accordingly, some specific regulation for the protection of commercial broadcasters may be justified, but only if TSBs are also favored by special policies.

It is assumed that, as nonprofit services, TSBs are naturally inclined to broadcast content that is not normally found on commercial stations, or to broadcast to audiences which have been neglected by the commercial sector.⁵³ If this assumption is valid, then TSBs will not represent a threat to commercial broadcasters even in the absence of special restrictions. However, as discussed in Section 3.5, their nonprofit nature is not always considered sufficient to guarantee that their activities will significantly differ from those of commercial broadcasters.

3.3. Protecting the Independence of Third Sector Broadcasters

TSBs should be independent from government. It is a serious risk that less than well-intentioned governments may establish broadcasting outlets under their control and try to present them to the public as independent TSB outlets in order to increase their credibility. In this sense, special regulation may be necessary to protect TSBs from government influence.⁵⁴ Measures designed to secure independence from government are sometimes found in general regulations applied to nonprofit organizations.⁵⁵ However, the influential nature of the broadcasting activity and the fact that it is conducted using a public natural resource such as the radio spectrum may justify additional care being taken for protecting TSBs from government influence.

⁵¹ Garton, *supra* note 48 at 133.

⁵² *Ibid.* at 134.

⁵³ See, for example, Fraser and Restrepo Estrada, *supra* note 25 at 5; Meadows, Michael, et al., *Community Media Matters: An Audience Study of the Australian Community Broadcasting Sector* (Griffith University, 2007) at 33.

⁵⁴ OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 112.

⁵⁵ See, for example, Garton, *supra* note 48 at 103; Ford, Patrick, "Third Sector Regulation in Post-Devolution Scotland: Kilting the Charity Cuckoo," in Susan Phillips and Steven Rathgeb Smith (eds.), *Governance and Regulation in the Third Sector International Perspectives* (Taylor and Francis, 2011), 68-98

In addition to being independent from the government, TSBs are expected to be independent from other third parties.⁵⁶ Restricting licenses to nonprofit organizations should guarantee that TSB outlets will not have owners. However, third parties who provide financial support to TSBs may be able to exercise influence over them. This risk is not unique to TSBs, of course; any type of nonprofit organization may be undesirably influenced by donors, especially if it relies to a large degree on a single donor.⁵⁷

Regulations sometimes protect nonprofit organizations in general from undue influence from financial contributors, be they government or private.⁵⁸ Even so, it can be difficult to achieve the optimal balance that protects the independence of organizations without preventing them from receiving the financial support they need.⁵⁹ In this sense, special rules for TSBs will be desirable only if they are more effective than general ones in protecting their independence without diminishing their viability.

3.4. Securing the Representativeness of Third Sector Stations

TSBs are sometimes subjected to special regulation aimed at ensuring that they represent the whole community they are licensed to serve.⁶⁰ As will be explained in Section 4.6, this end can be pursued through special governance requirements for licensees or through content regulation requiring stations to offer programming catering to all interests within the community. The regulation of nonprofit organizations in general does not ordinarily pursue representativeness. While theoretically there is no limit to the number of nonprofit organizations that can be established, however, the number of TSB stations that can operate in a given area is limited by frequency scarcity. If the authorities determine that they can only allocate spectrum for a single TSB station in an area, then it may be reasonable to impose a representativeness requirement upon this station. Accordingly, special regulation to promote representativeness on the part of TSB stations may be justified under some circumstances.

3.5. Securing the Distinctiveness of the Third Sector Output

In international human rights law it has been recognized that persons have a right to receive diverse information and that States have a positive obligation to implement policies conducive to securing the availability of such information.⁶¹ It has been proven that developing a

⁵⁶Buckley, Steve, "Community Broadcasting: Good Practice in Policy, Law and Regulation" (paper presented at the UNESCO World Press Freedom Day, 2008); see also OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 108.

⁵⁷Garton, *supra* note 48 at 115.

⁵⁸Or, if not to protect them from influence, at least to secure transparency regarding the third parties who may exercise influence over them

⁵⁹See, for example, Anheir, Helmut K., Stefan Toepler and S. Wojciech Sokolowski, "The Implications of Government Funding for Non-Profit Organizations: Three Propositions," 10(3) *International Journal of Public Sector Management* 190 (1997).

⁶⁰See, for example, Australian Communications Media Authority, *Community Broadcasting Participation Guidelines* (2010).

⁶¹See, for example, Office of the OAS Special Rapporteur for Freedom of Expression, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, OAS Doc OEA/Ser.L/V/II CIDH/RELE/INF. 2/09 (2009), para. 226; African Commission on Human and People's Rights, Declaration of Principles of Freedom of Expression in Africa, ACHPR /Res.62(XXXII)02, Art. III; European Court of Human Rights, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, Application No. 38433/09, 7 June 2012.

third sector of broadcasting can contribute greatly to the diversity of content and information available to the population.⁶² Because they pursue different goals and are different in nature from commercial or State broadcasters, TSBs normally provide content that is neglected by the other two sectors.⁶³ However, regulation sometimes directly requires them to provide such distinct content. The distinctiveness of the content can be secured by imposing either positive content obligations or negative content restrictions. Promoting diversity in this fashion is a concern specific to media outlets, which general regulations for nonprofit organizations do not address.

The validity of such regulations is debatable. If individuals have a right to exercise their freedom of expression for noncommercial purposes, even if their expression duplicates what the commercial sector or the State sector is providing, then it would not seem appropriate to limit TSBs to broadcasting content neglected by the other sectors.⁶⁴ However, if a State decides to provide financial or technical assistance to TSBs with the goal of improving the diversity of information, then there may be some justification for requiring distinctiveness of output from TSBs.

This brief review of the rationales which commonly underlie TSB regulation shows significantly more overlap between the general regulation of nonprofit organizations and the regulation of TSBs than between the general regulation of businesses and the general regulation of commercial broadcasters. However, it also shows that general regulations applied to nonprofit organizations do not always cover all of a State's legitimate goals concerning TSBs. This indicates that special regulation of TSB may sometimes be justified. Even so, a regulation may be unnecessary or undesirable even though it pursues legitimate goals that are unique to TSBs. The next section discusses some examples of regulations commonly applied to TSBs in pursuance of such goals in order to assess their merits.

4. Examples of Special Regulations That May Be Applied to Third Sector Broadcasters

4.1. Restrictions on the Expenditure of Surplus Generated by Third Sector Broadcasting Stations

Although TSBs often face financial hardships, it is also possible for their operations to generate surpluses. Generating an operational surplus is not contrary to the nonprofit nature of TSBs; indeed, it is desirable, as it may allow a TSB station to attain financial independence from government or other parties.⁶⁵ TSBs, of course, should be prohibited from distributing any profits to members of the licensee organization, as this will be contrary to the third sector nature of the

⁶² See, for example, Committee of Ministers of the Council of Europe, *Declaration on the Role of Community Media in Promoting Social Cohesion and Intercultural Dialogue* (2009).

⁶³ Meadows, Michael, et al., *supra* note 53 at 33-34, 94-95; see also Fraser and Restrepo Estrada, *supra* note 25.

⁶⁴ See in this relation Art. 5 of the Committee of Ministers of the Council of Europe Recommendation to Member States on the Legal Status of Non-Governmental Organizations, *supra* note 49, which acknowledges that "NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them."

⁶⁵ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al., *supra* note 29; Forde, Susan, Michael Meadows and Kerrie Foxwell, *Culture Commitment Community: The Australian Community Radio Sector* (Griffith University, Australian Key Centre for Culture and Media Policy, 2002) at 110.

service.⁶⁶ As already noted, this principle should be covered by the general regulation of nonprofit organizations. However, special TSB regulation sometimes imposes additional limits on what stations are allowed to do with their surpluses.

South African legislation specifies that any surplus generated by a TSB station can only be used to benefit the community it serves.⁶⁷ In many other cases, stations are subject to narrower regulation that requires them to reinvest any surplus in the broadcasting service itself.⁶⁸ Restricting the use of surplus to reinvestment in the broadcast service goes beyond preventing unfair gain and seeks to secure the distinctiveness of the third sector's content. Under this restriction, TSBs must be ends in themselves; they cannot be used primarily as fundraising mechanisms for other nonprofit or charitable purposes. This should theoretically protect them from the temptation to maximize their income through providing programming similar to that of the commercial sector, contributing to the likelihood that TSBs will add to the diversity of content. Such a restriction can be justified where TSBs receive direct support and more favorable license conditions as part of a government's policy aimed at improving the diversity of information and content available to its population. Nonprofit organizations should ideally be given the option of applying for commercial broadcasting licenses where they have broadcasting initiatives incompatible with the restrictions in TSB licenses.

4.2. *Restrictions on the Selling of Airtime*

TSBs are often subjected to restrictions in relation to selling airtime to third parties.⁶⁹ Such restrictions protect commercial broadcasters from potentially unfair competition. In addition, there may be a concern that, if TSB stations are freely allowed to sell airtime, then they may be dominated by the same economic powers that dominate the commercial sector, to the detriment of diversity of content.⁷⁰ In spite of this, the practice of selling airtime is not per se incompatible with the third sector nature of a broadcasting service. When asked whether the sale of airtime was contrary to the nonprofit requirement of community radio stations, the Administrative Decisions Tribunal of New South Wales (Australia) concluded:

The fact that the Radio Station enters into contracts and collects money from members who wish to broadcast a radio program, does not mean that their activities are being carried on for profit.⁷¹

Selling airtime to other nonprofit groups can be a valuable source of income for a TSB station.⁷² In addition, allowing TSB stations to sell airtime to nonprofit organizations can allow nonprofit groups that lack the capacity to operate a broadcast station on their own to be able to exercise their freedom of expression through the airwaves. If airtime is completely devoted to nonprofit content, then there is no reason to think that the content will be less diverse than if a

⁶⁶ See Buckley, *supra* note 56.

⁶⁷ South Africa, Broadcasting Act 4 of 1999, Art. 32(5).

⁶⁸ See, for example, Uruguay, *supra* note 6, Art. 10; Australia Communications and Media Authority, *supra* note 47.

⁶⁹ See, for example, Australia, Broadcasting Services Act 1992, Sect. 87A.

⁷⁰ See Fraser and Restrepo Estrada, *supra* note 25 at 70; Kern European Affairs, *supra* note 1 at 33.

⁷¹ *Khan v Cumberland Community Radio Inc t/as 2CCR-FM* [2006] 222 NSWADT.

⁷² See Forde, Meadows and Foxwell, *supra* note 65 at 103.

single organization controlled it all. The potential detriment to the activities of commercial broadcasters is also lessened if TSB stations are limited to selling airtime to other nonprofit groups.

Allowing TSBs to sell airtime to commercial entities poses greater risks of unfair competition and homogeneous content. However, selling airtime to commercial entities can also allow TSBs to cross-subsidize their nonprofit content, potentially producing valuable programming that would not otherwise be possible. If they are required to reinvest any surplus in the broadcasting service, and if they are subjected to special content restrictions or quotas which secure the distinctiveness of their output,⁷³ then allowing TSBs to sell airtime to commercial entities can contribute to diversity of content. In order to lessen the potential detriment to commercial broadcasters, TSBs can be restricted on the amount of airtime they can sell to commercial entities without being outright prohibited, leaving the door open to a potentially valuable income source for TSBs.⁷⁴

For the reasons explained, some restrictions to the capacity of TSBs to sell airtime to third parties can be justified, but an absolute prohibition of the practice is neither necessary nor desirable, especially if other regulations already promote diverse content and guarantee that licensees will not derive unfair gain.

4.3. Restrictions on the Broadcast of Advertisements

Prohibiting or restricting the selling of airtime can keep TSBs from broadcasting paid commercial advertisements. However, regardless of whether the sale of airtime is regulated, TSBs are sometimes subjected to regulations concerning advertisements. These regulations can take the form of general prohibitions on broadcasting any type of announcements that seek to persuade audiences to engage in a given action, independently of whether the station receives remuneration.⁷⁵ A general prohibition of this kind can be detrimental to TSB stations, as it would inhibit them from self-promoting and from requesting donations from their listeners.⁷⁶ Moreover, this type of prohibition inhibits TSB stations from donating airtime to promote nonprofit community events and from aiding other third sector initiatives by airing spots in support of their campaigns.⁷⁷ The interest of protecting commercial broadcasters does not seem to justify such a broad prohibition, especially as TSBs can be valuable outlets for promoting nonprofit events and initiatives which cannot afford to advertise in the commercial media.

The airing of paid advertisements is a more delicate matter. Since paid advertisements are traditionally the main source of income for commercial broadcasters, concerns relating to unfair competition are the most sensitive here. Additionally, the perceived shortcomings of the commercial broadcasting sectors are usually blamed on its dependence on the advertising

⁷³ Quotas are discussed below in Section 4.5.

⁷⁴ See Australia, *supra* note 69.

⁷⁵ See, for example, Australian Broadcasting Tribunal, *Report to the Minister for Communications Public Broadcasting Sponsorship Announcements* (1986). (At the time this report was issued the label “public” was used in Australia to refer to TSB.)

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

industry.⁷⁸ Accordingly, policymakers often seek to shield TSBs from the influence of advertisers in order to ensure that they contribute to diversity by broadcasting content neglected by the commercial sector.⁷⁹ As already noted, the same rationale is often behind restrictions on PSBs' commercial activities.⁸⁰ However, TSBs often oppose blanket prohibitions on the broadcast of paid advertisements. The World Association of Community Broadcasters (AMARC), the main representative of the sector, has explained:

The clear non-profit purpose of these media is confused with the necessary obtaining of the money needed to support its operation.

Financing of a radio station through advertising is one of the most important methods of funds collection available, and its prohibition has become a restriction to the exercise of freedom of expression.⁸¹

The United Nations, Organization of American States, and African Commission on Human and Peoples' Rights special rapporteurs on freedom of expression, and the Organization for Security and Cooperation in Europe Representative on Freedom of the Media have expressed in a joint declaration that TSBs should be allowed to sell advertising.⁸² Access to advertising income may be essential for TSBs if other sources of funding are unavailable or insufficient, such as government grants and private donations.⁸³ Even where it is not essential for TSB's viability, allowing advertising is still desirable in order to prevent them from becoming reliant on a single source of funding, which could compromise their independence.⁸⁴

Restricting the use of any surplus to reinvestment in the service itself and regulating the content directly may be sufficient to ensure that a TSB provides distinctive content. That content, in turn, may keep them from being in direct competition with commercial broadcasters. However, if concern remains over protecting commercial broadcasters and shielding TSBs from advertisers' influence, paid advertisements can be regulated but not prohibited. For example, the amount of airtime TSBs can devote to advertisements can be limited; if commercial broadcasters are also subject to a limit, then a lower limit can be set for TSBs.⁸⁵ In the U.K., TSBs are allowed to freely broadcast advertisements, but in order to protect their independence, they can derive no more than half of their annual income from advertisements.⁸⁶ Chilean legislation authorizes

⁷⁸ See, for example, Thomas, Eric, "Canadian Broadcasting and Multiculturalism: Attempts to Accommodate Ethnic Minorities," 17(3) *Canadian Journal of Communication* (1992).

⁷⁹ See, for example, Canadian Radio-Television Commission, Decision 75-247 (1975) at 4.

⁸⁰ Discussed above in Section 2.2.

⁸¹ Gómez, Gustavo, Carolina Aguerre and Analía Eliades, *The Invisible Gags: New and Old Barriers to Diversity in Radio Broadcasting*, AMARC (2009).

⁸² UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al., supra note 29.

⁸³ Gómez, Aguerre and Eliades, supra note 81.

⁸⁴ Buckley, supra note 56: Price-Davies, Eryl and Jo Tacchi, *Community Radio in a Global Context: A Comparative Analysis* (Community Media Association, 2001) at 70.

⁸⁵ See, for example, Broadcasting Authority of Ireland, *Rules on Advertising and Teleshopping* (2010), Sects. 4.5 and 4.6.

⁸⁶ Ofcom, *Regulation of Community Radio Key Commitments Guidance on Changes to Key Commitments and Ensuring Compliance* (2010), Sect. 3.3.

TSBs to broadcast commercial announcements only if they relate to businesses or services in their service area, which allows TSBs to serve as outlets for smaller businesses which cannot afford to advertise in commercial broadcasters.⁸⁷

Another formula commonly used is to prohibit conventional advertisements but allow other type of commercial mentions. For example, TSBs can acknowledge donors without directly encouraging audiences to consume the products or services offered by them.⁸⁸ This form of restricted commercial mention is known as a “sponsorship” announcement.⁸⁹ Allowing sponsorship announcements but not advertisements is common in the regulation of both TSBs and PSBs. But such regulations may go too far. It is not clear that the protection of commercial broadcasters or the desire to promote diversity warrants them. At a minimum, exceptions should be made for advertisements promoting the TSB itself, paid advertisements from other nonprofit entities, and advertisement of nonprofit events. Additionally and as discussed below, paid advertising from the government should be allowed even if advertising from the commercial sector is restricted.

4.4. Restrictions on Government Funding

Many TSBs will require government funding in order to be able to deliver their services. Under international law, States may even have a positive obligation to support TSBs by certain groups, such as indigenous peoples or national minority groups. Such an obligation may arise if the group has been traditionally disadvantaged and discriminated against in relation to access to broadcasting outlets or to broadcasting services in its own language, and if the group’s size or socioeconomic situation means that commercial broadcasting services cannot viably address their needs.⁹⁰ As noted in Section 3.3, if TSBs become entirely dependent on government funding, then their independence can be compromised. The Organization of American States’ Special Rapporteur on Freedom of Expression has noted in relation to TSBs: “The law must include sufficient guarantees to prevent such media from becoming dependent on the State through government funding.”⁹¹

However, the independence of TSBs can be safeguarded without completely prohibiting them from accessing government funding. In the U.K. at one point, TSBs could not receive more than half of their income from government sources; this restriction has now been lifted.⁹² It is not clear whether a quantitative limit is always desirable, as some TSBs may warrant higher levels of government support.⁹³

⁸⁷ Chile, *supra* note 8, Art. 13.

⁸⁸ See Australian Broadcasting Tribunal, *supra* note 75.

⁸⁹ See Hitchens, Lesley, “The Role of Sponsorship Regulation in Non-Commercial Broadcasting,” 15(2) *Entertainment Law Review* 33 (2004).

⁹⁰ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, *Annual Report to the Human Rights Council*, UN Doc. A/HRC.4/14/23(2010), para. 66.

⁹¹ OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 108.

⁹² UK, Community Radio Order 2004 (as originally adopted), Sect. 5(2).

⁹³ See, for example, Australia, Aboriginal and Torre Strait Islander Commission, *Digital Dreaming: A National Review of Indigenous Media and Communications: Executive Summary* (1999) at 19.

Multiple mechanisms can be used to protect the independence of TSBs without closing the door to funding that may be essential for their viability. For example, a law can provide that a fixed percentage of the licensing fees obtained from commercial broadcasters will be distributed equally among TSBs.⁹⁴ TSBs can also be funded through a split of the PSB remit if there is one.⁹⁵ Such funding mechanisms protect the independence of a TSB, because the government cannot change the level of its support in order to reward or punish the TSB stations for their editorial line. Under another approach, used in Canada and Australia, governments issue grants to private nonprofit bodies controlled by representatives of broadcasting's third sector, and those independent bodies then distribute the funds to individual stations and TSB projects.⁹⁶ Delegating the distribution of funds to an independent nonprofit body reduces the risk of government interference with a TSB's editorial decisions.

Government advertisements can support TSBs, though this practice gives rise to the risk that the government will seek to influence broadcasters by abusing its discretion to decide where to place the advertisements.⁹⁷ In this regard, the OAS special rapporteur on freedom of expression has noted: "Steps should be taken to prevent government advertising from creating government dependency among the private audiovisual media, whether they are nonprofit or for profit."⁹⁸

Despite the potential for abuse, TSBs should be allowed to broadcast government advertisements. Not only can such advertising provide essential funding to TSBs; given their ability to reach audiences neglected by the mainstream media, the advertising can also contribute significantly to government campaigns that require community outreach, such as those concerning crime or disease prevention.⁹⁹ The OAS Rapporteur on Freedom of Expression has noted:

Discrimination in the distribution of advertising based on the model under which the media operate is unacceptable. In this respect, the exclusion of community or alternative broadcast media in the allocation of the advertising budget due to the mere fact that they operate under non-commercial criteria constitutes unacceptable discrimination under the American Convention.¹⁰⁰

⁹⁴ Kern European Affairs, *supra* note 1 at 31.

⁹⁵ *Id.*

⁹⁶ These bodies are, in Australia, the Community Broadcasting Foundation (information available at www.cbf.com.au); and, in Canada, the Community Radio Fund of Canada (information available at www.communityradiofund.org).

⁹⁷ See Office of the OAS Special Rapporteur on Freedom of Expression, *Principles on the Regulation of Government Advertising in the Inter-American System for the Protection of Human Rights* (2010), available at <http://www.oas.org/en/iachr/expression/topics/advertising.asp>.

⁹⁸ OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 132.

⁹⁹ See, for example, Parker, Terry and Praeger, Megan, "Commonwealth Local Government Forum Pacific Project" 11(1) *Commonwealth Journal of Local Governance* 137 at 142-143 (2008); National Broadcasting Commission (Nigeria), *Community Radio: An Essential Tool for Achieving the Government's Seven Point Agenda*, paper presented at "A Policy Dialogue on Community Radio in Nigeria," 2009; Committee of Ministers of the Council of Europe, *supra* note 62.

¹⁰⁰ OAS Special Rapporteur on Freedom of Expression, *supra* note 97, para. 54.

Although government advertising expenditures should reflect fair market principles,¹⁰¹ TSBs, especially those serving communities underserved by other media sectors, can be given special consideration, both to support the sector and to reach audiences not reached by other services. Threats to the independence of TSBs can be reduced by ensuring that they have access to alternative source of funding, such as commercial advertising, private donations, and nondiscretionary government grants.

4.5. Content Restrictions and Positive Content Obligations

TSBs are often subjected to content regulations in order to secure the distinctiveness of their output and to protect commercial broadcasters from unfair competition. TSBs are frequently licensed to serve a geographic community or a community of interest, such as a particular religious, ethnic or age group.¹⁰² Sometimes, TSBs are required to broadcast only content which is of interest to the community they are licensed to serve. For example, Indian regulations for TSBs specify that their programming “should be of immediate relevance to the community”¹⁰³ and prohibits them from broadcasting news or commenting on current affairs issues.¹⁰⁴ South African legislation establishes that TSBs must “[p]rovide a distinct broadcasting service dealing specifically with community issues which are not normally dealt with by the broadcasting service covering the same area.”¹⁰⁵ In some instances, TSBs are prohibited from rebroadcasting content from commercial broadcasters, from networking with them,¹⁰⁶ and even from networking with other TSBs.¹⁰⁷ AMARC has opposed this type of restriction.¹⁰⁸

Although TSBs should be expected to prioritize the needs of the communities they are licensed to serve, no legitimate interests warrant prohibiting them from providing programming of wider interest or from commenting on issues of general interest. In Australia, this has been recognized by a Federal Court, which concluded that the obligation of TSBs to provide content of interest to the community cannot be interpreted as a prohibition against broadcasting content that appeals to persons outside that community, because all communities share interests with the larger society they are part of.¹⁰⁹ Moreover, TSBs not only allow communities to provide programming for themselves; they can also allow disadvantaged communities to communicate

¹⁰¹ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al., *Joint Declaration on Freedom of Expression and the Administration of Justice, Commercialization and Freedom of Expression and Criminal Defamation* (2002).

¹⁰² See Buckley et al, supra note 10 at 212.

¹⁰³ India, supra note 5, Art. 5(i).

¹⁰⁴ Ibid., Art. 5(vi).

¹⁰⁵ South Africa, supra note 67, Art. 32(4)(a).

¹⁰⁶ See for example, Hungary, Act CLXXXV of 2010 on Media Services and Mass Media, Art. 64(2) (English translation available at www.euractiv.fr/sites/default/files/dokumentum.pdf).

¹⁰⁷ Chile, supra note 8, Art. 15.

¹⁰⁸ AMARC, Declaration of the Latin American and Caribbean Festival of Radioempassioned and Televisionaries, Art 10. available at http://na.amarc.org/?p=Declaration_of_the_Latin_American_and_Caribbean_Festival_of_Radioempassioned_and_Televisionaries.

¹⁰⁹ 3AW Southern Cross Radio Pty Ltd v Inner North East Community Radio Inc (1994) ATPR 41-313.

their views, interests, and concerns to the wider society.¹¹⁰ This is congruent with the goal of diversity of content, as the general population is likely to benefit from access to alternative point of views on matters of general concern.¹¹¹ The U.K. Community Radio Order establishes that community stations primarily serve their communities, but that they can also serve other members of the public.¹¹²

The legitimate interests of promoting diversity of content and protecting commercial broadcasters are better pursued by imposing positive content requirements than by prohibiting any content that other sectors are allowed to broadcast, which abridges the nonprofit actors' freedom of expression. For example, TSBs can be required to devote airtime to matters of local interest¹¹³ or to locally produced content.¹¹⁴ TSBs can also be required to devote airtime to national or local artists who may not find opportunities in the commercial media.¹¹⁵ When a station is licensed to serve a specific cultural or linguistic community, it can be required to devote airtime to programming related to that culture or in that language.¹¹⁶ In Canada, TSB radio stations are subject to quotas requiring the broadcast of music not commonly played on commercial stations.¹¹⁷ Italy imposes a quota requiring a particular amount of content to be produced by the station itself, which can be a less restrictive alternative to a ban on rebroadcasting content from other stations or on engaging in network broadcasting.¹¹⁸

Such positive content obligations are less detrimental to the freedom of expression of TSBs than are content restrictions. Positive content obligations can be justified when TSBs receive government support for the purpose of increasing diversity, serving local needs, or serving especially disadvantaged communities.

4.6. Governance and Representativeness Regulation

TSBs can be subjected to regulations in order to ensure that they represent the community they are licensed to serve. This regulation can take the form of requirements for the licensee's governance structure. For example, South African legislation requires that a TSB license holder "must be managed and controlled by a board which must be democratically elected, from

¹¹⁰ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, *supra* note 23, paras. 55 and 63.

¹¹¹ See Office of the OAS Special Rapporteur for Freedom of Expression, *A Hemispheric Agenda for the Defense of Freedom of Expression*, OAS Doc. OEA/Ser.L/V/II CIDH/RELE/INF. 4/09 (2009), para. 101.

¹¹² UK, *supra* note 92, Sect. 3(2).

¹¹³ Price-Davies and Tacchi, *supra* note 84 at 57-58.

¹¹⁴ See, for example, Canadian Radio-Television and Telecommunications Commission, *Campus and Community Radio Policy*, Broadcasting Regulatory Policy 2010-499, para. 50.

¹¹⁵ *Ibid.*, para 80; see also Hungary, *supra* note 106, Art. 66(4)(h).

¹¹⁶ See, for example, Canadian Radio-Television and Telecommunications Commission, *Ethnic Broadcasting Policy*, Public Notice 1999-117.

¹¹⁷ Canadian Radio-Television and Telecommunications Commission, *supra* note 114, para. 68.

¹¹⁸ Italy, Legislative Decree No. 44 of 15 March 2010 on the Implementation of Directive 2007/65/EC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, Art. 4 (English translation available at http://www.en.uni.lu/content/download/31290/371510/file/Italy_translation.pdf)

members of the community in the licensed geographic area.”¹¹⁹ In Australia, the licensing authority assesses the governance structure of applicants in order to determine whether they are representative of the community; factors include whether membership is accessible to the entirety of the community claimed to be represented, whether decision making policies (including those for programming) are transparent, and whether any provisions would make the applicant accountable to the community.¹²⁰

The regulation can also take the form of a requirement to allow community members to participate in the management of the station and in the production of content, and a prohibition against TSBs administrators’ arbitrarily excluding persons or groups from participation.¹²¹ TSBs can also be required to provide airtime to independent groups that are part of the community but not directly involved in the administration of the station. For example, TSBs in Uruguay are required to make airtime available for independent productions by community members and social groups in the service area.¹²² Requirements of this type can be justified if TSBs are granted access to spectrum for free or if their license fees are significantly less than those of commercial broadcasters.

5. How Overregulation Can Impair the Development of Third Sector Broadcasting

In the previous section it has been shown that circumstances may justify the imposition of special regulations on TSBs, including restrictions not applied to commercial broadcasters. However, excessive regulation can hinder the development of the sector. The OAS Special Rapporteur on Freedom of Expression has noted:

The mere legal recognition of access to a license is not enough to guarantee freedom of expression if there are discriminatory or arbitrary conditions on the use of licenses that severely limit the ability of the private nonprofit sectors to utilize the frequencies, as well as the general public’s right to receive the broadcasts. The right to freedom of expression recognized in Article 13 of the American Convention prohibits the placing of arbitrary or discriminatory limits on the use of community broadcast licenses.¹²³

The risk has been acknowledged by a Canadian Government Task Force on Broadcasting Policy, which concluded:

Too much control over community broadcasting would change its nature and perhaps stifle its spontaneity. It is nevertheless important to give community radio and television a statutory basis to allow it to fulfil the role for granting access to the system, a responsibility which the other two sectors, with other calls on their services have been unable to fulfil.¹²⁴

¹¹⁹ South Africa, *supra* note 67, Art. 32(3).

¹²⁰ Australia Communications and Media Authority, *Allocation of Community Radio Broadcasting Licences: Guide to Applying for a Licence Broadcasting Services Band* (2007).

¹²¹ See Australian Communications Media Authority, *supra* note 60.

¹²² Uruguay, *supra* note 6, Art. 4.

¹²³ OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 112.

¹²⁴ Canada, Task Force on Broadcasting Policy, *Report of the Task Force on Broadcasting Policy* (Ampersand Communications Services Inc., 1986) at 153.

Even the type of regulations characterized above as justifiable can threaten the viability and effectiveness of TSBs. For example, while diversity of funding is desirable, restricting the amount of funding that TSBs can receive from a single source can impede the development of the stations when funding is available only from the government or only from a single local or international private donor; local and national content requirements can pose a significant barrier to TSBs that require home country programming to serve communities of immigrant or refugees;¹²⁵ restrictions on rebroadcasting and networking can burden stations that lack the resources required to produce enough content for a full-time schedule;¹²⁶ and complicated governance regulations can hinder initiatives that cannot afford legal counsel.¹²⁷

For example, TSBs serving indigenous communities in remote areas of Canada and Australia were needlessly burdened by restrictions on the broadcast of advertisements.¹²⁸ Since these were areas underserved by commercial broadcasters, there was no risk of unfair competition, and the amount of advertising revenue that could be raised in these areas was too limited for unfair profiting to be a concern.¹²⁹ The obligations to keep track of airtime devoted to advertising and to report on this to the regulatory authorities were undesirable administrative burdens for stations with very limited resources.

These examples illustrate why even those regulations that are acceptable in principle should not be implemented without careful consideration of the context and the potential effect on the development of the sector. The danger of overregulation might be reduced by applying different regulation to different types of TSBs or by implementing a system of exceptions for some stations. Canada is the leading example of this practice, as it imposes lower national content quotas on ethnic broadcasters than on other TSBs.¹³⁰ TSBs servicing remote indigenous communities in Canada have also received exemptions from general rules that could affect their viability; this included an exemption from the advertisement restriction before this was eliminated for general TSB stations.¹³¹ Australia exempted remote indigenous television broadcasters from burdensome governance requirements applied to other third sector television services.¹³²

6. How Special Regulation Can Aid the Development of Third Sector Broadcasting

Despite the dangers of overregulation, special regulation is not invariably detrimental to the development of the sector, nor should it be seen as an evil to be withstood by TSBs as a *quid pro quo* for government support. Well-crafted regulation can actually aid the development of the

¹²⁵ See Canadian Radio-television and Telecommunications Commission, *supra* note 116.

¹²⁶ See Canadian Radio and Television Commission, *The Review of Community Radio*, Public Notice 1985-94, Sect. xi.

¹²⁷ See OAS Special Rapporteur for Freedom of Expression, *supra* note 13, para. 66.

¹²⁸ Australia, Productivity Commission, *Broadcasting*, report no. 11 (AusInfo, 2000) at 286; Canadian Radio and Television Commission, *Native Broadcasting Policy*, Public Notice 1990-89, Sect. 5.

¹²⁹ *Id.*

¹³⁰ Canadian Radio-Television and Telecommunications Commission, *supra* note 116.

¹³¹ Canadian Radio-Television and Telecommunications Commission, *supra* note 32.

¹³² Australia, Explanatory Memorandum to the Broadcasting Legislation Amendment Bill (No. 2) (2002) at 3.

sector. Financial and governance regulation, for example, can improve the credibility and image of the sector as a whole by ensuring that TSB licenses are not used for improper purposes; as a result, TSBs may be more likely to receive support from governments and communities. In addition, regulations can clarify society's expectations for TSBs. If these expectations are pre-established, funding systems can be implemented to provide government financial support to TSBs automatically if they comply with the applicable regulations and their license conditions. This can benefit TSBs greatly. If their funding is not dependent on an assessment of their social contribution made under unclear criteria, they can engage in longer-term planning.¹³³

Another potential benefit exists as well. If special regulations stipulate that TSBs must be nonprofit in nature, then access to TSB licenses can be separated from the requirement of incorporating as a nonprofit legal person. Although TSB licenses are generally limited to registered nonprofit legal entities, some governments, such as Uruguay and Ireland, allow groups of persons with nonprofit purposes to apply for TSB licenses without a legal incorporation requirement.¹³⁴ It is an unfortunate reality that the procedures for creating a nonprofit entity are often unduly burdensome. In these cases, allowing persons to establish TSB stations without going through such procedures can greatly aid the development of the sector.

Conclusion

Special regulation of TSBs can be justifiable and even advisable in certain contexts, even if the underlying concerns are already addressed by regulations applied to all nonprofit entities. Indeed, well-crafted regulation can actually aid the sector. However, excessive or unnecessary regulation can infringe upon nonprofit actors' freedom of expression and deprive populations from broadcasting services that could be of great value to them. Before applying any policies that may restrict the activities of TSBs, accordingly, the potential effect needs to be carefully considered, including whether any less restrictive measures could be equally effective in pursuing the same goals. Since different types of TSBs operate under very different realities, even within the same jurisdiction, one should also consider whether any regulations could prove too burdensome for a type of TSB and whether exempting them from the general rules could advance the public interest.

¹³³ TSBs' inability to engage in long-term planning due to unpredictability of their government funding is often cited as one of the main barriers to the development of the sector. See, for example, Murphy, Kenneth, et al., *Cross-National Comparative Analysis of Community Radio Funding Schemes* (Broadcasting Authority of Ireland, 2011).

¹³⁴ Ireland, Broadcasting Act 2009, Sect. 64; Uruguay, *supra* note 6, Art. 6.

Article

Maina Kiai's Second Thematic Report Focused on Foreign Funding Restrictions

Gabrielle Gould¹

On May 30, 2013, UN Special Rapporteur Maina Kiai presented his second thematic report to the United Nations Human Rights Council. The report focuses on the ability of civil society organizations (CSOs) to seek, secure, and utilize financial resources from international, foreign and domestic sources. The report also outlines practical guidelines to facilitate peaceful assemblies.

In this article, we provide a synopsis of the first section of the report dealing with access to resources. The synopsis is followed by an appendix of select statements presented by States during the clustered interactive dialogue as well as links to other relevant references.

Freedom of Association and Access to Resources

1. The Ability to Seek, Receive and Use Resources Is an Integral Part of the Freedom of Association

The UN Special Rapporteur states the general principle as follows:

The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.

Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, para. 8, U.N. Doc. A/HRC/23/39 (24 April 2013).

Moreover, he calls upon States:

To ensure that associations – registered and unregistered – can seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without prior authorization or other undue impediments, including from individuals; associations, foundations or other civil society organizations; foreign Governments and aid agencies; the private sector; the United Nations and other entities.

Id. para. 82(b).

The UN Special Rapporteur also addressed the impact of funding restraints on other fundamental rights and freedoms:

undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.

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Id. para. 9.

2. International Legal Basis

The UN Special Rapporteur cites established international norms reaffirming the ability of CSOs to access resources, including foreign funding. Among other examples, the UN Special Rapporteur references communication No. 1274/2004 of the Human Rights Committee, *Korneenko et al. v. Belarus*:

“The right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association” Accordingly, fundraising activities are protected under article 22 of the [International Covenant on Civil and Political Rights], and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with article 22.

Id. para. 16.²

The UN Special Rapporteur also references Article 6(f) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which:

explicitly refers to the freedom to access funding, stating that the right to freedom of thought, conscience, religion or belief shall include, inter alia, the freedom “to solicit and receive voluntary financial and other contributions from individuals and institutions.” *Id.* para. 15.

The report also notes that Human Rights Council resolution 22/6 calls on states to ensure that reporting requirements “do not discriminatorily impose restrictions on potential sources of funding.” *Id.* In addition, the UN Special Rapporteur references the UN Declaration on Human Rights Defenders, which states:

“everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration” *Id.* para. 17.

3. Definition of “Resources”

The UN Special Rapporteur adopts a broad definition of “resources,” stating:

The term “resources” encompasses a broad concept that includes financial transfers (e.g., donations, grants, contracts, sponsorships, social investments, etc.); loan guarantees and other forms of financial assistance from natural and legal persons; in-kind donations (e.g., contributions of goods, services, software and other forms of intellectual property, real property, etc.); material resources (e.g. office supplies, IT equipment, etc.); human

² Similarly:

The Committee on Economic, Social, and Cultural Rights highlighted this issue when it expressed “deep concern” with Egypt’s Law No. 153 of 1999, which “gives the Government control over the right of NGOs to manage their own activities, including seeking external funding.”

Id. para. 16.

resources (e.g. paid staff, volunteers, etc.); access to international assistance, solidarity; ability to travel and communicate without undue interference and the right to benefit from the protection of the State.

Id. para. 10.³

4. Examples of Problematic Constraints

Under Article 22(2) of the International Covenant on Civil and Political Rights:

no restrictions may be placed on the exercise of [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Id. para. 19.

Applying this standard, the UN Special Rapporteur identifies specific practices that violate international law:

Under international law, problematic constraints include, *inter alia*, outright prohibitions to access funding; requiring CSOs to obtain Government approval prior to receiving funding; requiring the transfer of funds to a centralized Government fund; banning or restricting foreign-funded CSOs from engaging in human rights or advocacy activities; stigmatizing or delegitimizing the work of foreign-funded CSOs by requiring them to be labeled as “foreign agents” or other pejorative terms; initiating audit or inspection campaigns to harass CSOs; and imposing criminal penalties on CSOs for failure to comply with the foregoing constraints on funding. The ability of CSOs to access funding and other resources from domestic, foreign and international sources is an integral part of the right to freedom of association, and these constraints violate article 22 of the International Covenant on Civil and Political Rights and other human rights instruments, including the International Covenant on Economic, Social and Cultural Rights.

Id. para. 20.

Common Justifications for Restricting Access to Resources

In his report, the UN Special Rapporteur examines four common arguments used by States to restrict the ability of CSOs to access funding.

1. Counter-Terrorism

The UN Special Rapporteur first addresses the commonly invoked justification that funding restrictions are necessary to fight terrorism and money laundering. Specifically, he states

³ Specifically:

The report covers financial resources provided by natural and legal persons, whether domestic, foreign or international, including individuals; associations, whether registered or unregistered; foundations; governments; corporations and international organizations (including United Nations funds and programmes).

Id. para. 11.

that it is a violation of international law for counterterrorism or “anti-extremism” measures “to be used as a pretext to constrain dissenting views or independent civil society.” *Id.* para. 23.

Citing the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Mr. Kiai continues:

[s]tates shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population. The onus is on the Government to prove that a threat to one of the grounds for limitation exists and that measures are taken to deal with the threat.

Id.

Mr. Kiai also highlights the concept of sectoral equity:

The Special Rapporteur also calls for sectoral equity, noting that commercial companies and other entities have been abused for terrorist purposes. He calls on States to avoid measures that disproportionately target or burden civil society organizations, such as imposing onerous vetting rules, procedures or other CSO-specific requirements not applied to the corporate sector write large.

Id. para. 24.

States often justify funding restrictions based on Financial Action Task Force (“FATF”) Recommendation 8, which “recommends that ‘countries review the adequacy of laws and regulations’ to ensure that nonprofit organizations are not abused for terrorist financing. *Id.* para. 25. However, Mr. Kiai clarifies that:

Recommendation 8 does not adequately take into account that States already have other means, such as financial surveillance and police cooperation, to effectively address the terrorism financing threat. Moreover, FATF fails to provide for specific measures to protect the civil society sector from undue restrictions to their right to freedom of association by States asserting that their measures are in compliance with FATF Recommendation 8. The Special Rapporteur insists on the need to combat terrorism, but he warns against the implementation of restrictive measures – such as FATF Recommendation 8 – which have been misused by States to violate international law.

Id.

2. State Sovereignty and Foreign Interference

States also assert that foreign funding restrictions are necessary to protect state sovereignty or traditional values against foreign interference. Indeed, in some countries, foreign funding of CSOs has been “deliberately depicted as a new form of imperialism or neo-colonialism.” *Id.* para. 27.

After citing problematic laws in Russia, Egypt, Ethiopia, and elsewhere, Mr. Kiai states:

The protection of State sovereignty is not listed as a legitimate interest in the Covenant. The Special Rapporteur emphasizes that States cannot refer to additional grounds, even those provided by domestic legislation, and cannot loosely interpret international obligations to restrict the right to freedom of association. In his view, such justification cannot reasonably be included under “the interests of national security or public safety” or even “public order”. Affirming that national security is threatened when an association

receives funding from foreign source is not only spurious and distorted, but also in contradiction with international human rights law.

Id. para. 30. The UN Special Rapporteur similarly observes:

It is paradoxical that some of the States stigmatizing foreign-funded associations in their own countries are receiving foreign funding themselves (in the forms of loans, financing or development assistance), often in substantially greater amounts than that flowing to CSOs in their own country.

Id. para. 29.

On a similar theme, the UN Special Rapporteur states:

Where domestic funding is scarce or unduly restricted, it is critical for associations to be free to rely on foreign assistance in order to carry out their activities. The Special Rapporteur recalls again that “governments must allow access by NGOs to foreign funding as a part of international cooperation to which civil society is entitled, to the same extent as Governments.”

Id. para. 34. Moreover:

Human Rights Council resolution 22/6 calls upon States to ensure that “that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto.”

Id. para. 31. The UN Special Rapporteur continues:

Protection of State sovereignty is not just an illegitimate excuse, but a fallacious pretext which does not meet the requirement of a “democratic society.” The expression “democratic society’ places the burden on States imposing restrictions to demonstrate that the limitations do not harm the principles of ‘pluralism, tolerance and broadmindedness.’”

Id. para. 32. Accordingly:

Associations, whether domestic- or foreign-funded, should therefore be free to promote their views – even minority and dissenting views, challenge governments about their human rights record or campaign for democratic reforms, without being accused of treason and other defamatory terms.

Id.

3. Transparency and Accountability

Governments sometimes assert that foreign funding restrictions are necessary to ensure greater transparency and accountability of civil society. In response, the UN Special Rapporteur states:

Combating fraud, embezzlement, corruption, money-laundering and other modes of trafficking is legitimate, and may qualify as being in the “interests of national security, public safety, or public order”. Nevertheless, it is not sufficient to simply pursue a legitimate interest, limitations need also to be prescribed by law and “be necessary” in a democratic society. In this regard, limitations must be proportionate to the interest to be protected and must be the least intrusive means to achieve the desired objective.

Id. para. 35.

The Special Rapporteur also cautions against the possible abuses of this justification:

The transparency and accountability argument has, in some other cases, been used to exert extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment. The Special Rapporteur warns against frequent, onerous and bureaucratic reporting requirements, which can eventually unduly obstruct the legitimate work carried out by associations. Controls need therefore to be fair, objective and non-discriminatory, and not be used as a pretext to silence critics.

Id. para. 38. He further advises States to address violations of legitimate restrictions in a manner that is proportional to the violation:

The Special Rapporteur is of the view that if an association fails to comply with its reporting obligations, such minor violation of the law should not lead to the closure of the association (e.g. Belarus) or criminal prosecution of its representative (e.g. Egypt); rather, the association should be requested to promptly rectify its situation. Only this approach corresponds to the spirit and the letter of freedom of association.

Id.

The Special Rapporteur cites examples of violations of international law which attempt to invoke the justification of promoting transparency and accountability:

For instance, the obligation for associations to route funding through state channels; to report on all funds received from foreign sources and how these are allocated or used (e.g. Kyrgyz Republic); to obtain authorization from the authorities to receive or use funds (e.g. Jordan, Sudan) all constitute human rights violations.

Id. para. 36.

4. Aid Effectiveness

States sometimes assert that aid effectiveness is a legitimate basis to impose foreign funding restrictions. In response:

the Special Rapporteur highlights that coordination of aid is not listed as a legitimate ground for restrictions under the Covenant.

Id. para. 40. Moreover, even if the restriction pursued a legitimate objective, it would not “comply with the requirements of ‘a democratic society’”:

In particular, deliberate misinterpretations by Governments of ownership or harmonization principles to require associations to align themselves with Governments’ priorities contradict one of the most important aspects of freedom of association, namely that individuals can freely associate for any legal purpose. Hence, Governments which restrict funding in the name of aid effectiveness violate the key democratic principles of “pluralism, tolerance and broadmindedness” and therefore unduly restrict freedom of association.

Id. para. 41.

Recognizing the important role of CSOs in pursuing development agendas, the Special Rapporteur calls for policies that strengthen, rather than restrict, civil society:

He believes that instead of aiming to limit the participation of civil society actors, aid effectiveness rather aims to provide all relevant stakeholders, including associations, with greater influence to contribute to, *inter alia*, poverty reduction, strengthening of democratic reforms and human rights promotion.

Id. para. 42.

The independence of the civil society sector, including in terms of access to funding, should therefore be guaranteed. In the context of ongoing discussions related to the post-2015 Millennium Development Goals, the Special Rapporteur believes that civil society involvement and contributions to development are paramount, and that States should exert all efforts to support, rather than inhibit, their work.

Id.

Conclusions and Recommendations

Based on this legal framework, the Special Rapporteur *inter alia* calls upon States:

to ensure that associations – registered and unregistered – can seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without prior authorization or other undue impediments, including from individuals; associations, foundations or other civil society organizations; foreign Governments and aid agencies; the private sector; the United Nations and other entities.

Id. para. 82(b);

to recognize that undue restrictions to funding, including percentage limits, is a violation of the right to freedom of association and of other human rights instruments, including the International Covenant on Economic, Social and Cultural Rights.

Id. para. 82(c);

to recognize that regulatory measures which compel recipients of foreign funding to adopt negative labels constitute undue impediments on the right to seek, receive and use funding.

Id. para. 82(d); and

to adopt measures to protect individuals and associations against defamation, disparagement, undue audits and other attacks in relation to funding they allegedly received.

Id. para. 82(e).

Appendix A

Selected States' Responses to the Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association

During the clustered interactive dialogue, States presented the following oral statements indicating their responses to the UN Special Rapporteur's report.

Sampling of States Endorsing the UN Special Rapporteur's Report

A number of States affirmed their support of the report. A few examples follow:

We fully concur with Mr. Kiai's statement that the ability to seek, receive and use resources, including financial resources, from domestic, foreign and international sources is an integral part of freedom of association and vital to an independent and dynamic society.

Oral Statement of the European Union.

You are very right in stating that the ability to seek, secure and use resources is essential to the existence of any association and that nothing in human rights law allows us to conclude that foreign funding is to be subjected to stricter rules than any other sources. Imposing excessive restrictions on funding of civil society organizations also means imposing excessive restrictions on freedom of association, unless of course the conditions clearly defined in Art. 22 of the ICCPR are met.

Oral Statement of the Czech Republic.

States should give particular consideration to the Special Rapporteur's statement that "freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources." The report further details the array of international commitments that reflect the importance of access to funding and resources for the full enjoyment of the freedom of association, including key paragraphs from the Council's resolution 22/6 on human rights defenders.

Oral Statement of the United States.

Mr. Kiai, we welcome the approach taken in your report to stress that States do not only have a positive obligation under international human rights law to actively protect peaceful assemblies, but also to facilitate the exercise of the right to peaceful assembly. The exercise of the right to freedom of association and peaceful assembly should not be subjected to unnecessary burdensome regulations such as prior government approvals or centralized channeling of funds.

Oral Statement of Austria.

A civil society with access to resources is an essential element of democratic growth.

Oral Statement of Paraguay.

Concerning the freedom of association, your report rightly points out that this is not only a legal authority of natural and moral entities, but equally the opportunity to seek, receive and utilize human, material, and financial resources from domestic but also foreign or international donors. In this regard, abusive restrictions imposed on methods of financing associations violate international law of human rights and impede the enjoyment of this fundamental freedom.

Oral Statement of France.

It is thus understandable Mr President that any measures we take as governments, which might infringe on these freedoms, should attract attention. And funding is one such issue, whether it is from domestic or foreign sources. Undue restrictions on funding of civil society can only incapacitate them, and democracy and the enjoyment of human rights will be poorer for it.

Oral Statement of Botswana.

We fully share your assessment that funding restrictions impeding the ability of associations to pursue their statutory activities constitute an interference with article 22 of ICCPR. Restrictions against receiving funding of foreign origin not only threaten associations' very existence, their public denouncing undermines gravely their credibility and legitimacy in the population. Slovakia subscribes and supports recommendations contained in the SR's report.

Oral Statement of Slovakia.

An important part of freedom of assembly and association is the right of civil society to receive resources from domestic, foreign and international sources. Still, the report recognizes that undue barriers to funding of associations are put in place. There is a negative trend to restrict access to foreign funding, visible in many different countries. [...] It must be clear, regardless of situation or context, that there is a strong need for a free and open civil society for democratic development.

Oral Statement of Sweden.

Sampling of States Challenging Aspects of the Report

Some States did not support the principles articulated by the Special Rapporteur. Many of these States instead focused on justifications for constraint. A few examples follow:

1. *Counter-Terrorism*

While we agree that access to resources is important for the vibrant functioning of civil society, we observe that Mr. Kiai does not seem to adequately take into account the negative impact of lack of or insufficient regulation of funding of associations on national security and counter-terrorism.

Oral Statement of Sri Lanka.

As we mentioned to the Special Rapporteur the foreign funding of national organizations should not be taken/considered in isolation from the overall political situation inside the country and the security challenges, instability and conflicts that threaten the most important rights, namely the right to life.

Oral Statement of Sudan.

The African Group considers that it is for each state in a sovereign and legitimate manner to define what constitutes a violation of its legislation with respect to human rights. [...] The Group would like simply to reiterate that it is the responsibility of governments to ensure that the origin and destination of funding to associations is not utilized for terrorist purposes or are oriented towards activities which encourage incitement to hatred and violence.

Oral Statement of Gabon on behalf of the African Group.

2. *State Sovereignty*

It is our firm belief that associations will play their role in the overall development of the country and advance their objectives, if and only if an environment for the growth of transparent, members based and members driven civil society groups in Ethiopia

providing for accountability and predictability is put in place. We are concerned that the abovementioned assertion by the special rapporteur undermines the principle of sovereignty which we have always been guided by.

Oral Statement of Ethiopia.

The report ignores the legitimacy of a sovereign state and portrays civil society organizations as an entity that can do no wrong... The Special Rapporteur's advocacy to allow civil society organizations access to foreign funding to the same extent as those of Governments under international cooperation is fundamentally flawed. Governments are legitimate representatives of the people with greater responsibility and obligations while civil society organizations are only a sub-section of the society with particular ideology and agenda. The proposition of the Special Rapporteur to give blanket legitimacy to civil society organizations for foreign funding is too detached from the complex reality under which states have to function balancing both their responsibility to protect while ensuring fundamental freedoms for their people.

Oral Statement of India. See also Oral Statement of Gabon on behalf of the African Group, supra.

3. *Transparency and Accountability*

The changes and amendments to the national legislation on NGOs have been made with a view of increasing transparency in this field... In that regard, these amendments should only disturb the associations operating in our country on a non-transparent basis.

Oral Statement of Azerbaijan. See also Oral Statement of Ethiopia, supra.

4. *Aid Effectiveness and Funding Control*

A clear distinction has to be made, however, between individuals and associations receiving funding, since they require different legal and regulatory frameworks to govern the flow of funds, in particular foreign funding. We agree with the principles of accountability, transparency, and integrity of the activities of civil society organisations and NGOs. However, this should not be limited to accountability to donors. National mechanisms to follow-up on activities of such entities, while respecting their independence have to be established and respected... However, the diversification of the venues of international cooperation and assistance to States towards the funding of civil society partners fragments and diverts the already limited resources available for international assistance. Hence, aid coordination is crucial for aid effectiveness.

Oral Statement of Egypt.

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