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LETTER FROM THE EDITOR

April 2004

Dear Readers

It is with great pride that I introduce the first issue of IJCSL to include a large number of student-written contributions. Publishing an issue that principally features student writing is consistent with the goals of ICCSL and its founders, Leon Irish and myself—we are both long-time legal educators in addition to being practitioners of comparative civil society law (CSL) for over twenty years. Our efforts to build the capacity of young lawyers, law students, and other practitioners with an interest in the policy environment for civil society include a commitment to publishing student articles, essays, country reports, case notes and comments, and book reviews. Thus, this issue contains work not only by IJCSL's own editorial staff, but also by others who are currently students or who were students at the time they wrote their contributions. We are hopeful that the availability of publishing opportunities will encourage students and new civil society and CSL practitioners to develop scholarship that enhances their knowledge of issues related to the fundamental freedoms that underpin civil society. By making such scholarship available to our readers, we hope to encourage a dialogue that will further intellectual interchange and lead to better understanding of CSL issues internationally.

The student works include the following major articles and case notes:

- An article by C.J. Albertie, who will graduate from the University of Michigan Law School this spring, on the legal environment for NPOs in the Russian Federation (C.J. is also a member of the IJCSL student editorial staff)
- An article by Stephen O'Connor, a student at the Columbus School of Law of the Catholic University of America, which features a discussion of the proposed Global Internet Freedom Act as a means to prevent closed societies from preventing full Internet access for their citizens
- A Case Note by Daniel Schneider—developed for Harvard's Kennedy School of Government—looks at the *Grootboom and Others v. the Republic of South Africa* case, an important effort to use public interest law to effectuate social and economic rights under South Africa's new constitution
- An article by Alta Schwartz, a candidate for a Masters' Degree in Public Policy at Georgia State University, which looks at the policy environment within which NPOs in Palestine must operate and how they can develop a more modern version of civil society within those constraints
- An article by Jia Xijin, who has recently finished her post-doctoral studies at Tsinghua University in Beijing and has begun teaching at the NPO Center there, on the way in which the notion of public goods or public benefit should affect the governance of foundations in China

LETTER FROM THE EDITOR

Other pieces by our student editors include:

- Bristol English's Case Note on the DAILY NEWS case in Zimbabwe
- Valere Fulwider's Comment on new developments with regard to accountability for US NPOs
- Matt Swartz's Case Comment on the US government's ongoing dispute with the global NPO Greenpeace
- Zaine Watson's Comment on the development of truth and reconciliation commissions around the world.

We commend to all our readers these very insightful pieces and encourage you not only to read them but also to send comments to the authors, whose e-mail addresses are included with each piece.

In addition to the student writings, we have also included country and regional updates focusing on the following themes:

- **Fiscal Matters:** The environment in Europe for cross-border giving (which is especially pertinent in view of the 1 May 2004 expansion of the EU)
- **Freedom of Expression:** Nepal
- **General Legal Framework:** Belgium, Canada, China, Japan, New Zealand, Scotland, and the UK
- **NPOs and Terrorism:** Recent developments with regard to the Financial Action Task Force (FATF) of the OECD
- **Relations between northern NPOs and indigenous civil society:** Mozambique

In addition, we include very interesting Letters to the Editor from our readers and Case Notes on recent cases in the United States.

Given the wealth of pieces and the wide range of coverage in this issue, I am sure that all readers will find something to capture their attention! And, we are interested to hear from readers with suggestions about coverage for future issues.

Finally, it is with both joy and sadness that we say farewell with this issue to Valere Fulwider and Matthew Swartz—co-Managing Editors—and Bristol English, and C.J. Albertie—Associate Editors—all of whom are graduating from law school in May 2004. Without their help—especially that of our first two co-Managing Editors, Val and Matt—we could never have produced this publication. So, farewell and Godspeed to each and every one of them!

In peace,

Karla W. Simon
Editor-in-Chief

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IJCSL EDITORIAL POLICY

April 2004

Dear Reader

CONTENT—IJCSL PUBLISHES ARTICLES ON A VARIETY OF TOPICS, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed do not necessarily reflect the views of IJCSL or its editorial staff.

STYLE—IJCSL PUBLISHES ARTICLES BY CONTRIBUTORS FROM AROUND THE WORLD. Therefore, IJCSL uses a flexible editorial policy regarding questions of style. Articles submitted by persons for whom the English language is native are edited based on the author's original syntax and spelling. Articles submitted by persons for whom the English language is not native are edited according to American English style. Occasionally, IJCSL publishes articles in languages other than English. In those instances, articles are published as submitted and IJCSL provides an English-language summary.

QUESTIONS & COMMENTS—IJCSL WELCOMES READERS' QUESTIONS & COMMENTS on items published in its pages. If you have a question or comment, please contact

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We look forward to hearing from you.

Thank you.

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2 INT. J. CIV. SOC. LAW *at* <http://www.law.cua.edu/Students/Orgs/IJCSL>

LETTERS TO THE EDITOR

CORPORATE-SPONSORED CHARITABLE FUNDS UPSET COMMUNITY FOUNDATIONS & UNITED WAYS, BUT MIGHT NOT BE A DIFFERENT BREED*

Dear Editor

For-profit companies are integral organizers of six of the top 400 charities in America. These six corporate-sponsored entities directly compete with the nation's community foundations and United Ways in raising charitable contributions from affluent and wealthy individuals. Labeled as "charitable funds," they had annual private donations totaling \$1.3 billion in 2002, and are sponsored by Fidelity Investments, the Vanguard Group, Charles Schwab (investments), among others.

These charitable funds have been set up to provide the corporations' customers with immediate income tax deductions equal to their total charitable contributions, while allowing grants to specific charities be paid out over many years. The funds make no attempt at advising donors as to whom to allocate their grant monies. And they draw their donors mainly from their investment client bases. So allocation costs are non-existent and fund raising costs are minimal. Who could object to this setup, which makes it so easy, tax beneficial and cost efficient for donors of charitable contributions?

Community foundations have been most outraged. Since their founding in the early 1900s, community foundations have organized in every major city and most smaller cities in the U.S. For their entire history, community foundations have provided similar tax havens for charitable contributions of the wealthy and affluent. The difference is that community foundations generally have staff who help donors decide which community needs to meet and which charities should get their grant monies. Jack Shakely, former CEO of the California Community Foundation, says, "Community foundations, bless them, can help money get to the unknown little groups doing wonderful work." And they accept contributions for their general funds which are allocated entirely by their staff (and board). All this staff effort makes their administrative expenses much higher than those of the six corporate-sponsored charitable funds. That's the rub!

Meanwhile, United Ways, which are increasingly seeking large individual donations, and relying less and less on employees' payroll deduction contributions at the workplace, will become as concerned as community foundations. Because United Ways historically have had major staff expenses – for both fund raising and making allocation decisions – their administrative costs are also much higher than those of the corporate-sponsored charitable funds.

Another criticism of the corporate-sponsored charitable funds is that they are not required to make any minimal annual grants payout, unlike private foundations, which legally have to pay out 5% of their assets yearly. But community foundations and United Ways are not required to make a minimal annual payout either. Another criticism of the corporate funds is that many donations they receive are appreciated stock, for which a donor can take current market value as his/her tax deduction, rather than the usually much lower purchase cost. However, appreciated stock can also be given to community foundations and United Ways with the same tax benefits for the donors.

So the crux of the problem with the corporate funds is that they principally make grants to established

* This Letter To The Editor originally appeared as a column entitled *Philanthropy in America #17: Corporate-Sponsored Charitable Funds upset Community Foundations and United Ways, but might not be a Different Breed*, PHILANTHROPY IN EUROPE, 2004. IJCSL is pleased to re-publish this column with the permission of Robert O. Bothwell and PHILANTHROPY IN EUROPE.

organizations to the neglect of newer and smaller ones. This is so because they spend almost nothing to advise donors about their grant making (which makes administrative costs extremely low), while community foundations and United Ways do spend a lot on staff costs (which ups their administrative costs). Well, having studied these latter institutions in depth, and observed their parsimonious contributions to new groups, or small, hardly known organizations, or any groups advocating for community change, I'm not sure that the corporate funds are such a breed apart from the community foundations and United Ways. The newer or smaller nonprofit organizations and advocacy groups get short shrift from all these grant makers.

The largest corporate-sponsored fund, Fidelity Investments Charitable Gift Fund, claims to have raised \$3 billion total since its inception (1992), from 30,000 donors, and to have made grants to 71,000 charities. More striking is that the Fidelity fund raised more private contributions, \$735 million, than any community foundation or United Way in 2002.

Does this mean that the corporate-sponsored charitable funds are now overtaking community foundations and United Ways in raising private contributions? No, far from it. In 2001 community foundations raised \$3.2 billion, and in 2001-02, United Ways raised \$4.2 billion just in annual campaign donations. Combined, this \$7.2 billion is over five times the \$1.3 billion in private donations raised by the top corporate-sponsored charitable funds.

Nevertheless, it took more than 650 community foundations and 1400 United Ways to raise the \$7.2 billion, while merely six corporate funds accounted for the \$1.3 billion. The United Ways were first organized over 100 years ago, and community foundations in the early 1900s. The first corporate fund is only 11 years old. The future is catching up rather quickly on the past. Who knows what will happen when Halliburton and Bechtel enter the field!

Sincerely

Robert O. Bothwell
Principal
Visions Realized

UNDESIRABLE RECOMMENDATIONS FOR PUBLIC CHARITABLE TRUSTS

Dear Editor

I wish to alert your attention to some recommendations proposed by the Maharashtra Law Commission (MLC) regarding public charitable trusts. The MLC, in its Report on the Bombay Public Trusts Act 1950, has offered some proposals that are a cause for concern. For instance, on page 13, Section 21.1.4, the MLC has advised that in addition to the instrument of trust, every public trust should have a constitution according to which the trust would be administered. This constitution would override the instrument of trust.

In addition, the MLC has advised that although the founders, or settlors of the trusts, should be permitted to appoint trustees, their number should be limited to ensure that the founders cannot control the trust. The MLC has further suggested that a provision be adopted in the constitution to provide that trustees should both be nominated and elected, but that the nominated members should always be a minority. Moreover, it has been recommended that trusts have fee-paying members (like societies).

On page 14, Section 21.2, the MLC proposes that pursuant to the Andhra Pradesh Charitable and Religious Institutions and Endowments Act of 1966, the government should appoint executive officers of important and wealthy trusts whose annual income exceeds Rs. 5 lakhs. These executive officers would be government officers and their rights and duties would be defined. They would be responsible to the trustees, beneficiaries, and the government.

In our view, having a constitution, or bylaws, may be desirable only in cases in which the trust deed is poorly drafted and/or is silent on key issues concerning the administration and governance of the trust. However, in situations in which the trust deed is properly drafted, having an additional constitution would be meaningless and superfluous. Furthermore, such a constitution must not override the instrument of trust, especially with regards to giving effect to the original intentions of the founders, or settlers, of the trust.

Finally, the surviving trustees of a trust should have the right to appoint new trustees. Periodic rotation of trustees and the invitation of new trustees when the terms of the older trustees concludes is a desirable practice and one that should be encouraged. However, any scheme of membership and election must be voluntary and not enforced on any trust. The proposal to appoint executive officers in ‘important and wealthy trusts whose annual income is above Rs. 5 lakhs’ is not only disagreeable, but also potentially dangerous. It should be staunchly opposed by all charitable trusts that value their freedom from government interference and control. This is an encroachment on the autonomy of trusts and possesses the dangerous potential of resulting in a tool for harassment and political control.

Sincerely

Noshir H. Dadrawala
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INFORMATION & COMMUNICATION TECHNOLOGIES FOR HUMAN-BASED DEVELOPMENT

Dear Editor

Although we know that knowledge, information, and communication are essential development tools, the World Summit on Information Society—which emphasizes the Millennium Development Goals¹—should recall the common resolve that information and communication technologies (ICT) are not only technological devices but also the main instruments for the development of human capacity.

What does this mean? And, what should we do next?

We must develop an international dialogue among diverse stakeholders—North and South—on ICT as the instrument to develop human capacity. We should do so with the hope that this dialogue will lead global society to make the benefits of ICT available to all people in order to promote human rights and

¹ The Millennium Development Goals are a set of logical and time-bound targets, including halving income poverty and hunger; achieving universal primary education; gender equality; reducing under-five mortality by two-thirds and maternal mortality by three-quarters; reversing the spread of HIV/AIDS; ensuring environmental sustainability; and developing a global partnership for development).

fundamental freedoms, including the right to development. To empower people and build human capacity in diverse sectors—government; civil society; the private sector—helps people reach a common understanding about using ICT to solve development challenges. And, we must develop partnership mechanisms, especially in the South, to re-iterate a global commitment to address the development challenges posed by the digital divide.

At the same time, and although participatory development is meant to involve many stakeholders and social groups, we must pay special attention to a particular social group: Youth. Young persons are the present and future ICT users and will be its innovators. Their experience is digital. Paying special attention to empowering young persons and their role in an information society is the logical effect of their unique experience with ICT.

Let us make a better world for all by recognizing the right to development, advocating a diverse international discussion that understands ICT as a means for developing human capacity, and empowering individuals by sharing ICT's benefits at local, national, regional, and international levels.

Sincerely

Zahra (Sahar) Maranlou*

* Zahra (Sahar) Maranlou is IJCSL Contributing Editor for the Middle East and North Africa. Interested readers may reach Ms. Maranlou by e-mail at smaranlou@hotmail.com.

ARTICLES

A SURVEY & CRITIQUE OF RUSSIAN LAW & ITS EFFECT ON NGOS

BY C.J. ALBERTIE*

INTRODUCTION

In the parlance of human rights lawyers and social activists in countries transitioning to democracy, “civil society is a necessary element of a vibrant democratic state.”¹ What exactly is civil society? The definition eludes scholars and practitioners alike in domestic and international law. No one definition satisfactorily applies to the myriad cultures and political schema in today’s global society. While the notion of civil society has yet to pass “through the forge of theoretical clarification or the sieve of public debate,”² one truth has emerged—the development and sustenance of a healthy civil society is essential for a democratic state. A democratic state exploits the features of civil society to its own advantage. A healthy civil society, consisting of individuals, communities and NGOs, is a strong force for representation and change in a democratic society. These actors advocate on behalf of women’s rights, human rights, the environment, the media, public health, and education, to name a few. They promote social, legal, and economic reform, perpetuating the democratic process by initiating public dialogue and the free exchange of ideas. Such active participation is an important element of a country ruled by law and justice.

This paper examines laws and their effects as concerns civil society in the Russian Federation (RF), specifically focusing on the nongovernmental sector.³ While the RF has overcome significant barriers to the development of civil society, current laws regulating the nongovernmental sector are vague and inconsistent, the effects of which hinder the ability of civil society to take root in the RF. The first section of this paper defines civil society and the freedoms essential to the creation and maintenance of a nongovernmental sector in the RF. The second section traces the history of civil society in Russia and describes its current state. The following two sections analyze the legal foundation for the development of civil society in the RF and how ensuing legislation has affected the creation and maintenance of non-governmental organizations (NGOs) in the RF.⁴ The fifth section offers concrete proposals for change, encouraging action by both the State Duma and the Constitutional Court.

* C.J. Albertie, departing IJCSL Associate Editor, is a third-year student at the University of Michigan Law School 2004. Interested readers may reach Ms. Albertie by e-mail at calberti@umich.edu. The author thanks Professor Elena Helmer for her valuable comments on this article.

¹ MICHAEL WALZER, *Introduction to TOWARD A GLOBAL CIVIL SOCIETY* 1, 1 (1995).

² P. Waterman, *Beyond Globalization and Developmentalism: Other Voices in World Politics* 27 DEV. CHANGE 165 (1996).

³ Civil society is defined in part by the active operation of trade unions, political parties, and religious groups. Trade unions played a significant social role in the U.S.S.R. I do not address trade unions in Soviet or contemporary Russian society, nor the federal laws on Political Parties and Religious Organizations. Rather, I focus on a narrower sub-set of nongovernmental organizations, public associations, and non-commercial organizations. For a full discussion of these types of NGOs, see *infra* notes 2–4, 9–1 and accompanying text.

⁴ I use the term “NGO” to define a voluntary, not-for-profit, nongovernmental organization. The Russian Federation (RF) distinguishes between public associations and non-commercial associations, both of which fall under the general definition of an NGO. In general, NGOs are: (1) *Organizations*, i.e., they have an institutional presence and structure; (2) *Private*, i.e., they are institutionally separate from the State; (3) *Not profit distributing*, i.e., they do not return profits to their managers or to a set of “owners”; (4) *Self-governing*, i.e., they are fundamentally in control of their own affairs; and (5) *Voluntary*, i.e., membership in them is not legally required and they attract some level of voluntary contribution of time or money. Lester M. Salamon & Helmut K. Anheier, *Civil Society in Comparative Perspective*, in *GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR* 1, 3 (1999), at <http://www.jhu.edu/~ccss/pubs/books/gcs/pdf/chapter1.pdf>. For in depth discussion on terms regarding the non-profit sector, see Anheier & Cunningham, *Internationalization of the Nonprofit Sector*, in *THE JOSSEY-BASS HANDBOOK OF NONPROFIT LEADERSHIP AND MANAGEMENT* (R.D. Herman & Associates, eds., 1994).

WHAT IS CIVIL SOCIETY?

Two intellectual traditions dominate the historical development of the notion of civil society: The Anglo-American tradition and the German tradition. The liberal Anglo-American tradition of John Locke and Adam Smith conceives of civil society as a “special nonstate sphere of the social organism.”¹ This tradition centers on the concept of individual freedom and “the self-regulating function of civil society as the most important repository of individual rights and freedoms, as a defense against state encroachment.”²

The German intellectual tradition materialized in the works of G.W.F. Hegel and Marx.³ Rather than focus on individual freedom as a means of safeguarding civil society, Marx envisioned the State as protector of the independence of civil society.⁴ The ideology stresses that “only the State, as the absolute spirit and universal political community, is capable of fulfilling the common interest.”⁵ This tradition blurs the line between State and society, eventually merging the two into one.⁶

While today the liberal tradition dominates global conceptions regarding civil society, no contemporary society exactly embodies either tradition. The German-Marx tradition historically dominated Russian consciousness of civil society, but has today strayed from its ideological roots; it is frequently accepted in Russia that civil society is a self-governing sphere, independent of the state.⁷

CIVIL SOCIETY & DEMOCRACY

A robust civil society is a necessary element of a vibrant democratic state.⁸ Freedoms associated with civil society—freedom of assembly and freedom of association—are “among the major cornerstones of democracy” and invariably related.⁹ Freedom of assembly is a prerequisite for the exercise of freedom of

¹ Zinaida T. Golenkova, *Civil Society in RF*, 40 *RUSSIAN SOC. SCI. REV.* 4, 6 (1999). This interpretation became the popular and accepted interpretation in Europe after Alexis de Tocqueville published the famous *DEMOCRACY IN AMERICA*. *Id.*

² *Id.*, at 7.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ “Civil society” in the Russian context alone has been defined as “the sphere of self-activating, self-governing social organization that are largely independent of control by the state.” Alfred Evans, *Recent Assessments of Social Organizations in RF*, 10 *DEMOKRATIZATSIYA* 322, 322 n.2; Marcia A. Weigle, *On the Road to the Civil Forum: State and Civil Society from Yeltsin to Putin*, 10 *DEMOKRATIZATSIYA* 117, 118 (2002) (“A society in which people are capable of self-organization on a variety of bases for the resolution of group and common problems [based on] a system of institutions and initiates independent of the state.” quoting *Obshchestvennaia palata Kemerovskoi oblasti-Institut formirovaniia grazhdanskogo obshchestva*, in *STANOVLENIE GRAZHDANSKOGO OBSHCHESTVA: VOZMOZHNOСТИ, PROBLEMY, PERSPEKTIVY (NA PRIMERE KUZBASSA)* 31 (V.A. Lebedev, ed.) (Kemerovo: Obshchestvennaia palata Kemerovskoi oblasti, Kuzbasskii Tsentri “Initsiativa,”) (1998).

⁸ WALZER, *supra* note 1. Indeed, discussion on the creation of a democratic federation of the European Union reflects the importance of a “freedom-valuing political culture...supported by a liberal associational structure of a civil society.” See Jurgen Habermas, *Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”* 1 *E.L.J.* 303, 306 (1995). In terms of the European Union, scholars agree that a European Federal state cannot exist as a democracy unless a “common political culture” emerges, consisting of “a civil society with interest associations; non-governmental organizations; citizens’ movements, etc.” *Id.*

⁹ Ólafur Einarsson, Opening speech of the Seminary organized by the Secretariat General of the Council of Europe in collaboration with the Ministry of Justice of Iceland on Freedom of Association (August 26, 1993), in *FREEDOM OF ASSOCIATION PROCEEDINGS* 6 (1994). Justice Harlan, speaking for the United States Supreme Court noted: It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (citing *N.A.A.C.P. v. ex rel. Patterson*, 357 U.S. 449, 460 (1958)); Evert Alkema, *Freedom of Associations and Civil Society in FREEDOM OF ASSOCIATION PROCEEDINGS, supra*, at 58 (“[The freedom of association] sometimes is not clearly distinguished from the right to assemble and connected with freedom of speech, religion or with the principle of equality.”).

association since “without regular meetings of an association its existence cannot become effective.”¹ Freedom of assembly also falls under the rubric of the freedom of expression.² The freedom to assemble applies to a wide range of circumstances: Demonstrations, sit-ins, public and private meetings.³

The right to freedom of association consists of “a general capacity of citizens to ‘join without interference by the States in associations to attain various ends.’”⁴ The reference to “various ends” to which associations strive indicates that the freedom of association is not equivalent to the general liberty to meet socially.⁵

These elementary rights manifest themselves in NGOs. “Civil society” is often used as a catchall term for NGOs and social movements.⁶ The term first emerged in the Charter of the United Nations.⁷ The term itself indicates that NGOs “keep their distance from officialdom” and “do things that governments will not, or cannot do.”⁸ The term is not confined to the United Nations framework, and is used by academics and domestic and international social activists to describe a wide range of entities, from hospitals and universities to human rights organizations.⁹ NGOs are independent of the government and generally associated with altruistic motives, such as the protection of human rights.¹⁰

CIVIL SOCIETY IN THE RUSSIAN FEDERATION

THE HISTORICAL DEVELOPMENT OF CIVIL SOCIETY IN THE RUSSIAN FEDERATION

As stated above, the German-Marx tradition proscribing state control of society has historically dominated the Russian communist ideology.¹¹ The state, via the communist party, regulated many aspects of social life, eliminating the need to create social groups addressing citizen concerns and interests.¹² Social activism and social organizations did not cease to exist, but was “channeled into existing party/state controlled organizations.”¹³

The absence of civil society in the U.S.S.R. negatively impacted the emergence of civil society in the RF.¹⁴ In many Central and Eastern European countries, a “parallel culture” consisting of institutions such as

¹ Einarsson, *supra* note 9, at 6; *See also* Sian Lewis-Anthony, *Freedom of association and political democracy: Case law of Article 11 or the European Convention on Human Rights*, in *FREEDOM OF ASSOCIATION PROCEEDINGS* *supra* note 9, at 32 (1993).

² *See, e.g., N.A.A.C.P. v. Alabama*, *supra* note 9; *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). These two cases deal with divulgence of names of members of the NAACP and the communist party.

³ Lewis-Anthony, *supra* note 1, at 34.

⁴ *Id.* at 38.

⁵ *Id.*

⁶ Rupert Taylor, *Interpreting Global Society*, 13 *VOLUNTAS* 339, 339 (2002).

⁷ Article 71 of the UN Charter states that the Economic and Social Council “may make suitable arrangement for consultation with nongovernmental organizations which are concerned with matters within its competence.” Charter of the United Nations, art. 71, available at <http://www.un.org/aboutun/charter/>.

⁸ *Sins of the Secular Missionaries*, *THE ECONOMIST*, Jan. 29, 2000.

⁹ Kerstin Martens, *Mission Impossible?: Defining Nongovernmental Organizations*, 13 *VOLUNTAS* 271, 271-272 (2002); Salamon & Anheier, *supra* note 4.

¹⁰ *But cf. Sins of the Secular Missionaries*, *supra* note 8. *The Economist* argues that NGOs are governmental puppets and resemble large corporations as they compete for contracts in the aid market and raise funds through sophisticated media campaigns and act as lobbyists. *Id.* For further discussion of nongovernmental organizations, see Martens, *supra* note **Error! Bookmark not defined.**

¹¹ Golenkova, *supra* note 1, at 9.

¹² Ivan Kurilla, *Civil activism without NGOs: The Communist Party as a Civil Society Substitute*, 10 *DEMOKRATIZATSIYA* 392, 394 (2002). Kurilla maintains the State regulated *all* aspects of social life. This paper avoids use of such strong language. Conversations with Russians who lived under the communist regime also maintain otherwise.

¹³ *Id.*

¹⁴ Richard Janda, *Something Wicked that Way Went: Law and the Habit of Communism*, 41 *MCGILL L.J.* 253, 253 (1995).

universities and publishing houses developed and operated next to, but separate from, the communist state society.¹ In these countries, the “parallel culture” foreshadowed a “general solution”² making possible “a redemption of the whole of civil society after the fall of communism.”³

The converse was true in RF.⁴ The “parallel culture” that developed in countries like Hungary and Poland centered on the “externally imposed lie of communism.”⁵ Russian history and consciousness prevented similar developments in Russia. Unlike Central and Eastern European longing for the pre-communist days of empire and democracy, the Russian pre-communist tradition was “a more distant and, indeed, unhappy memory.”⁶

Lack of a separate “parallel culture” does not mean that civil society was nonexistent in the U.S.S.R. The 1977 U.S.S.R. Constitution provided for the creation of social organizations and endowed the State with the responsibility of encouraging “the activity of cooperative and other social organizations in all spheres of the populace” such as the “development of mass physical culture and sport.”⁷ The communist party dominated the operation of these social organizations, and set up women’s organizations and educational boards.⁸ Independent and informal associations began to bud in the mid-1980s. Musicians, soccer fans, and literary enthusiasts formed organizations to pursue their common interests in 1986.⁹ Other joined together to focus on narrow local issues: The environment, historical monument protection, and investigation of the Stalin era crimes.¹⁰ Unlike the influence of similar groups in Central and Eastern Europe, these groups played, at best, a minimal role in the flowering of civil society in the RF.¹¹

CIVIL SOCIETY IN THE CONTEMPORARY RUSSIAN FEDERATION

Civil society in contemporary Russia suffers at the hands of a weak economy, in-existent governance structure, and lack of trust. Russian NGOs lack financial resources to operate. Large amounts of foreign aid flowed into RF during the transition to a free market economy. Yet, funding for the nonprofit sector continues to heavily depend on foreign sources of income and what funding is available from foreign sources is dwarfed by the needs for social services.¹² NGOs are governed by outmoded laws, some created

¹ *Id.* (citing *The Power of the Powerless*, in VACLAV HAVEL OR LIVING IN TRUTH 62, 100-101 (Jan Vladislav, ed., 1986)).

² *Id.* at 103.

³ Janda, *supra* note 14, at 265.

⁴ *Id.* at 266.

⁵ *Id.*

⁶ *Id.*

⁷ 1977 CONSTITUTION OF THE USSR at art. 24.

⁸ *Id.*

⁹ Ann Marie Kassler, *The Making of a Multiparty System*, INSTITUTE FOR THE STUDY OF CONFLICT, IDEOLOGY & POLICY (reviewing VERA TOLZ, THE USSR’S EMERGING MULTIPARTY SYSTEM (1990)), at <http://www.bu.edu/iscip/vol2/Kassler.html>; Vladimir Brovkin, *Revolution From Below: Informal Political Associations in RF 1988-1989*, 42 SOVIET STUD. 233 (1990).

¹⁰ Brovkin, *supra* note 9, at 234.

¹¹ Weigle *supra* note 7, at 6. Weigle explains that the expectation that an effective civil society could and would emerge in the years following the transition to a free market democracy in RF was unrealistic. She emphasizes that underdevelopment of a Russian civil society was not the reason either, noting the historical and contemporary obstacles to Russian activists and the process of democratic consolidation in RF, which was more peculiar than in other countries. *Id.* This shows that while civil society is necessary for a strong democracy, the existence of a strong civil society is not a necessary element for the creation or emergence of a new democracy.

¹² Randall J. Davis, *The Rebirth of the Nonprofit Sector in Post-communist Eastern Europe*, available at <http://www.civilsoc.org/resource/eenoprft.htm> (“Of the more than 7,000 active foundations in the U.S., only about 100 are seriously involved in grant-making to Eastern Europe, and a handful of those provide more than 90 per cent of the grants in the region.” (quoting S. Flaherty, *Philanthropy Without Borders: U.S. Private Foundation Activity in Eastern Europe*. 3 VOLUNTAS 335 (1992)); See also CIVIL SOCIETY INTERNATIONAL, *Problems, Progress and Possibilities: A Needs Assessment of Environmental NGOs in Central and Eastern Europe*, available at <http://www.rec.org/REC/PressReleases/NGOnneeds.html> (“The vast majority of NGOs (approximately 75 percent) are in an unstable, poor or very poor financial state, while nearly half of individual NGO annual budgets are less than \$1,000 per year. And keeping qualified staff on hand becomes a never-ending battle, given that most NGOs have no paid staff.”).

early as the 1940s.¹ As discussed below, more recent laws on NGOs have had an adverse impact on the sector. Further, the distrust cultivated during the communist era lingers in RF today and stands as a major obstacle to the creation of and participation in NGOs.²

LEGAL FOUNDATION FOR CIVIL SOCIETY IN THE RUSSIAN FEDERATION

The rights and obligations of NGOs are the single most important aspect of the promotion and sustainability of civil society in RF. Laws on the creation and regulation of NGOs function to establish: (1) the legal status of an NGO; (2) judicial recourse by an NGO can defend its rights; (3) rules that govern NGO activity in public life; (4) the registration procedures for NGOs at the federal level; (5) the framework by which NGOs interact with government officials; and (6) a template for related laws at the regional and local level.³

Legislation facilitating civilian participation in civil society is of corresponding importance. NGO-friendly legislation attracts necessary civilian participation in the nongovernmental sector, while an inadequate legal structure results in failed attempts at participation and functioning of organizations.⁴ This section specifically examines the Constitution of the RF, customary international law, the Law on Public Associations, and the Law on Non-Commercial Organizations.⁵

CONSTITUTION OF THE RUSSIAN FEDERATION

The RF Constitution confirms the internationally recognized importance of the freedom to association: “Everyone shall have the right to association, including the right to establish trade unions in order to protect one’s interest. Freedom of activity of public associations shall be guaranteed. No one may be forced to join or to maintain membership in any association.”⁶

NGOs operate pursuant to the Art. 30 right to association. The Constitution guarantees that NGOs are equal before the law and entitled to hold private property.⁷ They are constitutionally prohibited from engage in activity that aims at the alteration of the constitution or integrity of the RF.⁸ Members of NGOs are constitutionally protected from discrimination based on such membership. Russian citizens are granted equal protection of the law without regard to “affiliation with public associations.”⁹

INTERNATIONAL LAW

Generally recognized principles and norms of international law supplement the constitutional freedom to association.¹⁰ These principles and norms are constitutionally recognized and a guaranteed source of law

¹ Davis, *supra* note 12.

² *Id.*

³ Weigle, *supra* note 7, at 4.

⁴ A parallel may be drawn to the private sector. See, e.g., Karla W. Simon, *Privatization of Social and Cultural Services in Central and Eastern Europe: Comparative Experiences*, 13 B.U. INT’L L.J. 383 (1995).

⁵ 1993 CONSTITUTION OF THE RUSSIAN FEDERATION, CONSTITUTIONS OF THE WORLD, ratified Dec. 12, 1993 [hereinafter 1993 RF CONSTITUTION]; See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221, 222 [hereinafter ECHR]; Public Associations, RF Federal Act No. 82-FZ (1995), available at 1995 WL 9700070; On the Non-Commercial Organizations, RF Federal Act No. 7-FZ (1995), available at 1995 WL 9700225.

⁶ 1993 RF CONSTITUTION, *supra* note 5, at art. 30.

⁷ *Id.* at arts. 13(4), 36(1).

⁸ *Id.* at art. 13(5).

⁹ *Id.* at art. 19(2).

¹⁰ *Id.* at art. 17.

taking precedence over Russian domestic law.¹ If Russian law conflicts with an international treaty, of which Russia is a signatory, the rules of the international treaty shall apply.²

Preeminent international documents illustrate the freedom of association's firmly established place in the democratic tradition. Three major international documents, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR) are herein discussed in detail.³

The Universal Declaration, ICCPR, and ECHR each recognize the freedom of association. The UDHR grants everyone "the right to freedom of peaceful assembly and association."⁴ The ICCPR grants everyone "the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests"⁵ while the ECHR grants everyone "the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."⁶

The *travaux préparatoires* of the UDHR imply a preference for a wide concept of association.⁷ Neither the ICCPR nor the ECHR add much to the concept. Both grant both the freedom of association and the freedom to form and join trade unions. However, this is no reason to assume that this freedom is narrower than that laid down in the Universal Declaration.⁸ In the Universal Declaration, the right to form and join trade unions is separate and distinct from the right to association.⁹ The effect is the same: "[T]he right to freedom of association is the overall concept, with the right to form and join trade unions as an element of that concept, rather than as a separate distinct right for the purposes of [the ECHR]."¹⁰

CIVIL CODE—PART I

The Russian Civil Code supplements constitutional and international law in RF on NGOs.¹¹ The Section on Non-Commercial Organizations, defines the different types of non-commercial organizations, their legal rights, status, and duties.¹² Article 50 gives non-commercial organizations the right to be juridical persons.¹³ A juridical person in the form of a non-commercial organization may be a religious or social organization or association.¹⁴ As a juridical person, an NGO may assume debt, enter contract, receive tax benefits, and assume liability.

¹ *Id.*

² *Id.* Art. 15(4).

³ UDHR, *supra* note 5; ICCPR, *supra* note 5; ECHR, *supra* note 5.

⁴ UDHR, *supra* note 5, at art. 20.

⁵ ICCPR, *supra* note 5, at art. 22.

⁶ ECHR, *supra* note 5, at art. 11.

⁷ Alkema argues this is implied by the fact that during the drafting of the UDHR, an "almost all embracing enumeration of fields of activities was proposed. The suppression of that proposal, however, should not be seen as a rejection of the underlying idea but rather as a preference of the parties for an even wider concept of association." , Alkema, *supra* note 9, at 70.

⁸ *Id.* at 71.

⁹ Art. 20 of the UDHR recognizes the freedom of peaceful association while article 23(4) of the same document establishes the right to form and join trade unions. Compulsory membership of an organization is banned by article 20(2). However, as this is recognized in an article separate from the right to join trade unions, compulsory membership in trade unions is not prohibited under the UDHR. UDHR, *supra* note 5.

¹⁰ Alkema, *supra* note 22, at 73.

¹¹ CIVIL CODE OF THE RF PARTS I & II (William E. Butler, ed. 2d ed).

¹² *Id.*

¹³ *Id.* at art. 50(1).

¹⁴ *Id.* at art. 50(3).

RUSSIAN LEGISLATION & ITS ADVERSE EFFECTS

Many elements of the Russian legal system were overhauled to effectuate the transition to a free market democracy.¹ Throughout the first half of the 1990s, vestiges of the old system pervaded the judiciary and laws dating to the early days of Soviet RF regulated bureaucracy and many segments of the Russian legal system. In many respects, the RF has exorcised its communist past and fulfilled the goal of privatization and democratization. The enactment of the Law on Public Associations, the Law on Non-Commercial Organizations, as discussed below, is an example of this movement. Yet, the transition to democracy has not left the RF with a clear and consistent legal framework. Scrutiny of the laws and their (often unintended) effects illuminates the shortcomings.

LAW ON PUBLIC ASSOCIATIONS

The 1995 Law on Public Associations is the most important Russian legislation to date concerning NGOs.² A public association is a “voluntary, self-managed non-commercial formation created on the initiative of citizens associating on the basis of common interest for the realization of common goals.”³ The law reiterates the internationally recognized freedom of association and gives substance to the same constitutional right.⁴

The law is designed to regulate the relationship between government authorities and NGOs, specifically regulating the content of the freedom to association and state guarantees thereof, the status of NGOs, procedure for the establishment of NGOs, activity, re-organization and/or liquidation of NGOs.⁵ More specifically, the legislation operated to implement NGO registration. Pursuant to RF Civil Code Art. 51, “a legal entity must be registered with the department of justice (registering agencies) according to a procedure laid down in the law on the registration of legal entities.”⁶ Registration confers rights and privileges on NGOs, such as the right to own private property, operate a bank account and to hire and pay employees.⁷

The law formulated procedure for registration of new NGOs and re-registration of already existing organizations. Re-registration required all NGOs registered prior to the law’s 1995 enactment to resubmit their papers for registration by June 30, 1999;⁸ failure to re-register entailed threat of judicially imposed liquidation.⁹

¹ For example, the Constitution of 1977 provided for a judicial structure consisting of a Supreme Court of the USSR as the highest court of the country. See 1977 USSR CONSTITUTION at Chapter 20. The 1993 Russian Constitution responded to the need for a forum in which to bring constitutional grievances, a forum for general grievances and commercial disputes by construction a parallel judicial structure in which the Supreme Court, the Constitutional Court and Special Arbitration Court operate independent of each other. See 1993 RF CONSTITUTION, *supra* note 3, at arts. 118–129.

² Law on Public Associations, *supra* note 5.

³ LAW ON PUBLIC ASSOCIATIONS, *supra* note 5, at art. 5. Public associations are created for the purpose for promoting the rights and interests of citizens. *Id.* at art. 3.

⁴ *Id.* at art. 3.

⁵ Law on Public Associations, *supra* note 5, at art. 4; Weigle, *supra* note 7, at 4.

⁶ *Report on the Violations Committed in the Course of Registration and Re-Registration of Public Associations in the RF in 1999*, prepared by the Information Center of the Human Rights Movement and the Center for the Development of Democracy and Human Rights in December 1999–January 1999, 4 INT’L J. OF NOT-FOR-PROFIT LAW, available at http://www.icnl.org/journal/vol2iss4/ar_yuri1.htm [hereinafter *Registration and Re-Registration of Public Associations Report*].

Registration of NGOs not public associations, if not regulated by statute (such as the Law on Public Associations), is regulated by the Federal Law No. 129-FZ, “On State Registration of Legal Entities” which became effective on July 1, 2002.

⁷ Registration grants an NGO the rights of a legal person. Law on Public Associations, *supra* note 5 at art. 21.

⁸ John Squier, *Civil Society and the Challenge of RF Gosudarstvennost*, 10 DEMOKRATIZATSIYA 166, 171 (2002).

⁹ Law on Public Associations, *supra* note 5, at art. 26.

NGOs are categorized as all Russian, international, inter-regional, regional or local. Registration of each NGO is conducted at corresponding judicial agencies.¹ To register, an NGO must file multiple documents with the registering agency, including copies of the bylaws, information on the founders, and documents verifying the legal address of the NGO.²

Under the legislation, an NGO may be denied registration if its charter is incompatible with specified constitutional or statutory provisions.³ The constitution limits the scope of NGO activity, prohibiting establishment of NGOs whose “objectives or acts are aimed at a forcible change of the principles of the constitutional system or violation of the integrity of the RF.”⁴ Specific articles of the Law on Public Associations outline age and citizenship requirements for NGO members as well as specific bylaw requirements and registration procedure. Failure to abide by a statutory requirement is grounds for denial of registration.⁵

Registration may also be denied if legal papers for registration are incomplete, do not follow format, if an NGO of same name in same place already exists, if registration papers are false, or if the applicant NGO’s name offends public morals, ethnic, or religious feelings.⁶ The law explicitly states that denial “for reasons of inadvisability of its creation shall not be allowed.”⁷ Denial of State registration is to be accompanied by an explanatory statement and may be appealed in a court of law.⁸

LAW ON NON-COMMERCIAL ORGANIZATIONS

Passed the same year as the Law on Public Associations, the Law on Non-Commercial Organizations aims to regulate non-commercial organizations. The law states that it acts to determine the legal status, procedure for foundation, activity, reorganization, and liquidation of non-commercial organizations, property use, rights and duties, management, and possible forms of government support.⁹ A non-commercial organization is one that does not have profit making as a main purpose, nor distributes profit earned between members of the organization.¹⁰ The purpose of such an organization is to reach “social charitable, cultural, educational, scientific, and administrative purposes, protect health, develop physical

¹ Law on Public Associations, *supra* note 5, at art. 21.

² Specifically, the law requires that the applicant NGO submit the following documents:

- An application signed by members of the constantly operating governing body of the given public association, with an indication of the place of residence of each member;
- Two copies of the bylaws of the NGO;
- An abstract of the minutes of the founding congress (conference) or general meeting containing information on the creation of the NGO and its governing and auditing bodies and confirmation of its bylaws;
- Information about the founders of the NGO;
- A document on payment of the registration fee;
- A document on the granting of a legal address to the NGO;
- The minutes of the founding congresses (conferences) or general meetings of the structural division of international, all-Russia or inter-regional NGO;
- Where an NGO makes use of the personal name of a citizen or of symbols protected by RF legislation on the protection of intellectual property or copyright, documents confirming the authority for use thereof.

Law on Public Associations, *supra* note 5, at art. 21.

³ Law on Public Associations, *supra* note 5, at arts. 16, 19, 20, 21.

⁴ Law on Public Associations, *supra* note 5, at art. 16. *See also* 1993 RF CONSTITUTION, *supra* note 5, at art. 13.

⁵ Law on Public Associations, *supra* note 5, at art. 23.

⁶ *Id.* at art. 23.

⁷ *Id.*

⁸ *Id.*

⁹ Law on Non-Commercial Organizations, *supra* note 5, at art. 1.

¹⁰ Law on Non-Commercial Organizations, *supra* note 6, at arts. 2, 50(1), 50(3). The RF Civil Code defines a non-commercial organization as a legal entity that does not “aim at deriving a profit as a key objectives of their activities and do not distribute profits generated among their founders or participants.” RF Civil Code, *supra* note 11, at art. 51.

culture and sport, to satisfy the spiritual and other non-material needs of citizens, protect the rights, legal interests of citizens and organizations...and also in other purposes, directed to common good.”¹

The Law on Non-Commercial Organizations provides NGO management guidelines similar to those enumerated in the Law on Public Associations.² It requires an NGO create a charter and bylaws and establish a “supreme managerial organ.”³ This organ is concerned with governance of the NGO and may, *inter alia*, alter the charter of the non-commercial organization, approve annual reports, financial plans, and reorganize or dissolve the non-commercial organization.⁴

The guidelines on internal governance on NGOs in the RF were a response to public demands that NGOs act legally and ethically. The transition to a democratic free market society in the RF was fraught with corruption. The lack of an established NGO governance structure provided ample opportunity for fraud and deception in the early 1990s.⁵ Resultant tax fraud and other questionable business activities in the RF left citizens disillusioned and public confidence in NGOs plummeted.⁶ The need to establish credibility and legitimacy of NGOs in RF is vital for their survival.⁷ The Law on Non-Commercial Associations endeavored to establish such legitimacy.

EFFECT OF RE-REGISTRATION ON NON-GOVERNMENTAL ORGANIZATIONS

The re-registration provision of the Law on Public Associations has stifled the development of civil society in Russia. This section examines the negative effects of re-registration requirements on Russian NGOs.⁸

The effect of re-registration diverged substantially from the original purpose. The re-registration provision served to eliminate record of inactive NGOs, update administrative information on active groups, and determine individual NGO tax status.⁹ In effect, the re-registration provision operated to eliminate troublesome and undesirable organizations.¹⁰

Only a fraction of NGOs in existence before the 1995 passage of the Law on Public Associations succeeded in re-registering. Many Russian NGOs had in fact ceased operations and were ineligible for re-registration; these organizations constituted a large proportion of organizations that were not re-registered. Yet, the numbers are telling: In 1995, over 1,200 national and international organizations were registered. As of July 1, 1999, only 770 had successfully re-registered. 18,741 regional and inter-

¹ LAW ON NON-COMMERCIAL ORGANIZATIONS, *supra* note 6, at art. 2(2).

² LAW ON NON-COMMERCIAL ORGANIZATIONS, *supra* note 6, at art. 28.

³ *Id.* at art. 29.

⁴ *Id.* at art. 29(3). These, and the other abilities of the supreme organ listed in art. 29(3) are related to the exclusive competence of the supreme organ.

⁵ Daniel McGrory, *Civilizing the Russian Underground Economy: Requirements and Prospects for Establishing a Civil Economy in RF* 5 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 65 (1995).

⁶ *See, e.g.*, U. Desai, U. & K. Snavelly, K, Bulgaria’s Nonprofit Sector: The Search for Form, Purpose, and Legitimacy 6 *Voluntas* 23 (1995). Desai and Snavelly describe how the Bulgarian Sapio Foundation obtained tax free status as an NGO and then proceeded to import cigarettes and alcohol for profit. Realization of this fraud severely weakened the integrity of NGOs in Bulgaria. This phenomenon is not unique to Bulgaria. Similar corruption existed in the Czech Republic, Hungary, and RF.

⁷ *See* Davis, *supra* note 55. Continued skepticism will prevent NGOs from obtaining necessary financial resources for continued operations.

⁸ Both public associations and non-commercial organizations were subject to the re-registration provisions of the Law on Public Associations. *See* Law on Non-Commercial Organizations, *supra* note 5, at art. 3(1). (Registration of non-commercial organizations is carried out pursuant to the “legal established procedure” in the Law on Public Associations).

⁹ The re-registration provision aimed to eliminate “paper NGOs.” Weigle, *supra* note 7, at 5. Many NGOs set up between 1990 and 1995 were “mom and pop” type organizations that ceased to operate by 1995. Other organizations were used for fraudulent purposes. *Id.* *See also* Squier, *supra* note 8; footnotes 90–92 and accompanying text.

¹⁰ Squier, *supra* note 8, at 4.

regional NGOs were not re-registered, and only 549 out of 4,600 local Moscow NGOs had successfully re-registered by the deadline.¹

Russian authorities significantly manipulated re-registration standards and many NGOs were denied re-registration on grounds contrary to the Law on Public Associations.² Rather than examine NGOs based on established criteria in good faith, local officials allegedly conspired with the Department of Justice to “[use] the procedure of re-registration to get rid of ‘undesirable’ associations.”³ These “undesirable” NGOs generally consisted of those NGOs that worked to protect human rights or monitor the law enforcement conduct or government agencies and institutions.⁴ The Council of Europe noted the claims that officials were using re-registration to silence critical NGOs and called for the RF to register such NGOs.⁵

Russian law entitles NGOs to act on behalf of human rights. The Law on Public Associations states an NGO has the right “to represent and protect its rights and the legitimate interests of its own members and participants.”⁶ In addition, the Law on Non-Commercial Organizations defines a non-commercial organization as created to “protect the rights...of citizens and organizations.”⁷

However, many NGOs were refused re-registration unless they agreed to delete the phrase “protection of citizens’ rights” from their statutory goals and objectives.⁸ Officials argued that the RF Constitution prohibited NGOs from protecting citizens’ rights. The RF Constitution guarantees “[t]he state protection for the rights and freedoms of the human being and citizen”⁹ and protection of “rights and freedoms in a court of law.”¹⁰ Further, protection of “the rights and freedoms of the human being and the citizen” falls within joint jurisdiction of the RF and its subjects.¹¹ Registering officials interpreted these articles as excluding NGOs from the business of human rights. While they may *assist* in rights protection, they may not directly protect rights, as this is a function of the state.

This interpretation is unsound in the context of the whole of RF Law. Closer examination of the Law on Public Associations and the Law on Non-Commercial Organizations shows that NGOs are referred to as actually *protecting* human rights, not limited only to assisting in rights protection.

Many organizations were denied registration without explanation.¹² Those who did receive an explanation often found that registration had been denied on illegal grounds. An NGO denied registration is statutorily entitled to “a statement of the concrete provisions of RF legislation whose violation had an effect on the denial of state registration of the given association.”¹³ Those that were

¹ *Registration and Re-Registration of Public Associations Report*, *supra* note 6.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Problems of registration of non-governmental organizations dealing with human rights in the RF*, Doc. 8799, Parliamentary Assembly, July 8, 2000, available at

<http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2Fdoc00%2FE%2FDOC8799.htm>; *Honouring of Obligations and Commitments by the RF*, Doc. 9396, Parliamentary Assembly, March 26, 2002, available at

<http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2FDoc02%2FE%2FDOC9396.htm>.

⁶ Law on Public Associations, *supra* note 5, at art. 27.

⁷ Law on Non-Commercial Organizations, *supra* note 5, at art. 2(2).

⁸ *Registration and Re-registration of Public Associations Report*, *supra* note 6, at 4.

⁹ 1993 RF CONSTITUTION, *supra* note 5, at art. 45(1).

¹⁰ *Id.*, at art. 46(1).

¹¹ *Id.*, at art. 72(1)(b).

¹² *Registration and Re-registration of Public Associations Report*, *supra* note 6, at 4.

¹³ Law on Public Associations, *supra* note 5, at art. 23.

provided reasons for denial of registration were often given purely formal and illegal grounds for denial. For example, the “Union of Kuzbass Youth” in Kemerovo, after being denied re-registration invoked their statutory right of explanation for the denial. The Ministry stated “the font is too small” and “there are too many papers.”¹ Oftentimes, these arbitrary requirements based on minutia were not shared with the NGOs until it was too late for an organization to make requisite changes and resubmit their application.²

NGOs are statutorily entitled to appeal the agency decision.³ Indeed, many organizations chose to appeal their cases. Glasnost, the Environment and Human Rights Coalition, Krasnodar Territorial Human Rights Association, the Collegiate Association for the Research of the Principle (CARP), and a group of public associations from Obninsk all pursued their appeal, to no avail.⁴ NGOs found that the appeal as of right was in fact a hollow right. In the CARP case, the Supreme Court of the RF held that re-registration was rightly refused because: (1) CARP did not submit a document establishing the legal address of the association; and (2) the organization failed to meet the deadline for re-registration. In practice, when NGOs submitted their legal address pursuant to the law, the registering agency would often demand that the NGO provide a letter signed by the owner of the space where it had its legal address. NGOs often occupied property owned by municipalities who refused to sign such documents.⁵ Secondly, in this specific case, CARP submitted its application eight days before the July 1, 1999 deadline, but the Supreme Court reasoned that since Article 22 of the Law on Public Associations grants the Office of Registry one month to review the application for re-registration, CARP did not meet the deadline for re-registration.⁶

Lastly, NGOs are entitled to the freedom of association by both international law and the law of the RF. The registration and re-registration provision effectively denied the freedom of association to countless NGOs. Some commentators argue that the denial of countless re-registration does not violate the freedom of association. They argue that an organization is not entitled to a right to legal personality based on the freedom of association and that the freedom of association is not violated if an NGO is permitted to continue conducting its activities after it has been denied re-registration.⁷ This view fails to examine the effects of registration denial on an NGO. Registration confers legal status on an NGO, granting the right to own private property, operate a bank account, hire employees, receive tax-exempt status, and appear in court.⁸ Denial of registration directly affects the operation of an NGO, indirectly violating the freedom of association.

THE TAX CODE & ITS EFFECTS ON NON-GOVERNMENTAL ORGANIZATIONS’ ACTIVITY

The Tax Code of RF impedes the creation and survival of NGOs and civil society as a whole in the RF. While the text of the tax code does not hinder NGO development on its face, its effect is detrimental. Tax preferences are generally considered necessary to create a strong enabling environment for NGOs. ⁹

¹ *Registration and Re-Registration of Public Associations Report*, *supra* note 6, at 7.

² *Id.*

³ Law on Public Associations, *supra* note 5 at art. 23, (“Denial of state registration of a public association, and also avoidance of such registration may be appealed against in a court of law.”)

⁴ *Registration and Re-registration of Public Associations Report*, *supra* note 6; See also, Case No. 78-D01-21 of the Supreme Court of the RF, available at <http://www.religiousfreedom.com/whatsnew/russcarp.htm>.

⁵ *Registration and Re-registration of Public Associations Report*, *supra* note 6

⁶ Case No. 78-D01-21, *supra* note 4.

⁷ Lewis-Anthony, *supra* note 1, at 40. See also Application No 14233/88, *Lavisse v. France* Dec. 5.6.91, Human Rights Case Digest, Vol II Part 3, at 117. In *Lavisse*, the applicant was refused the right to register an association whose aims were to protect and promote surrogate motherhood. The refusal was on the ground that the incitement to desertion of children was a criminal defense. However, the association was not prevented from carrying on its activities; it was only deprived of legal personality

⁸ See *supra* text accompanying notes 58–59.

⁹ THE INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, *The Tax Treatment of Nongovernmental Organizations: A Survey of Best Practices from Around the World*, available at <http://www.icnl.org/gendocs/TAXPAPER.htm> [hereinafter *Tax Treatment of*

International best practice suggests that every NGO should be exempt from income tax on money or other items of value received from donors or governmental agencies (by grant or contract).¹ NGOs typically receive their revenue from donations, membership dues, and interest on investments and it is generally agreed that these items should not be taxed.²

In 1993, NGOs were not subject to income tax for grants received from foreign charities for “the implementation of specified-target programmes relating to their statutory activity.”³ However, receipt of such grants was to be “confirmed with a statement from a competent agency of the foreign state (with a certified translation into the Russian language,” to the effect that the given charitable organization has been duly registered under the law of that foreign state.”⁴ This law on its face exempted NGOs from income tax on foreign grants, but the bureaucratic hurdles obstructed tax-free gifts.

Since 2001, the Tax Code has been revised. While the 1991 Code taxed donations from domestic “enterprises and organization,”⁵ the reforms exempt NGOs from paying income tax on funds received as a gratuitous aid, grants, and donations for purpose-oriented activity (i.e., membership fees).⁶ Despite these changes, in 2001, the Russian government attempted to levy taxes on \$1.5 million in individual grants to NGOs by the Soros Foundation. The Russian government argued that the grants qualified as wages and attempted to impose a 35.9 percent tax on them.⁷ This caused the philanthropist to temporarily halt the grant to NGOs.

A 2002 tax code regulation listed government approved foreign and international grant makers and the types of foreign grants that would be tax exempt. The government’s list excludes many foundations that provide grants to Russian NGOs, including government entities.⁸ As a result, the Russian government may heavily tax grants received by NGOs in Russia receiving funding from organizations such as the Council of Europe.⁹

Perhaps more damaging to the development of civil society in the RF, the enumerated activities for which grants may be awarded include only “those intended to promote culture, improve the environment and advance scientific research or education.”¹⁰ The list conspicuously excludes social services and human rights protection. Over 50 percent of foreign grants are given towards social service and human rights aims.¹¹

Nongovernmental Organizations]. See also, INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, SURVEY OF TAX LAWS AFFECTING NGOS IN CEE, (2003, 2d ed.), available at <http://www.icnl.org/programs/cee/pubs/taxsurvey/TaxSurvey2nded-1.pdf> [hereinafter SURVEY OF TAX LAWS].

¹ *Id.*

² *The Tax Treatment of Nongovernmental Organizations*, *supra* note 9; SURVEY OF TAX LAWS, *supra* note 9.

³ Taxation of Grants from Foreign Charities. RF Ministry of Finance Letter No. 04-06-01, June 11, 1993, available at 1993 WL 10409580 [hereinafter Taxation Letter].

⁴ *Id.*

⁵ *Id.* See also RF Tax on Enterprise Profits Act (as amended on July 10, and 16, and on December 22, 1992). RF Act No. 2116-1, available at 1991 WL 3371424, at art. 2(6).

⁶ Natalia Bourtseva, *The Tax on Profits and its Impact on Not-for-Profit Organizations*, 4 INT’L J. NOT-FOR-PROFIT L. 1, available at http://www.icnl.org/journal/vol4iss1/cr_1.NIS.htm.

⁷ *Good Works*, THE ECONOMIST, March 24–30, 2001.

⁸ EUROPEAN FOUNDATION CENTRE, *Tax Reform Efforts Under Way in Russia* (April 2003), available at <http://www.efc.be/ftp/public/seal/E-SEAL8.pdf>.

⁹ *Rights Group Squeezed by Russian Tax Law*, WASHINGTON POST, January 26, 2003. For example, the Russian government is now able to tax roughly one quarter of the grants received by the Soldiers’ Mothers Committee which receives a majority of its funding from the Council of Europe and the German government. *Id.*

¹⁰ *Id.*

¹¹ *Tax Reform Efforts Under Way in Russia*, *supra* note 8; *Rights Group Squeezed by Russian Tax Law*, *supra* note 9.

Additionally, services provided by public and non-commercial organizations to indigent persons are treated as income to the beneficiaries for tax purposes.¹ Thus, an indigent person receiving medical or legal services from a NGO may be forced to pay income tax on the value of the services. Because the recipient pays income tax, the NGO may be treated as an employer of the indigent person and forced to contribute to the pension fund.² This is a clear disincentive for NGOs to perform services for indigent persons that may be treated as income.³

International best practice also suggests that “within reasonably generous limits, individuals and business entities should be entitled to an income tax deduction or credit with respect to donations made to [NGOs].” Income tax deductions and/or tax credits incentives both individuals and businesses to donate to charitable organizations. Further, individual philanthropy plays an important role in rooting NGOs within communities.⁴

Business enterprises in Russia may deduct contributions to NGOs for philanthropic purposes up to 5 percent of taxable profit.⁵ Individuals may deduct sums donated to NGOs from their annual taxable income.⁶ The law limits the amount of the deduction to a percentage of the taxpayer’s taxable income or tax base, but the limit is relatively low. With respect to individual donation, Russia could create incentives by raising the permissible amount of the donation.

The State Duma should repeal these provisions from the tax code and create laws that are conducive to NGOs and recipients of their services. The State Duma should model the creation of such laws after other tax provisions that create incentives for citizens and corporations to donate to public associations and non-commercial organizations.⁷

PROPOSALS FOR CHANGE

LEGISLATIVE REFORM

Vague statutory language contributes to negative manipulation of laws in the RF. Statutory language can be so vague and broad as to invite exploitation by officials and citizens alike. For example, the Law on Non-Commercial Organizations states NGO activity should be directed towards “socially useful goals.”⁸ A range of activity from the educational, charitable, and scientific purposes falls under this rubric.⁹ A

¹ *Tax Treatment of Nongovernmental Organizations*, *supra* note 9.

² *Id.*

³ Conversely, the United States tax law does not tax citizens on the voluntary performance of services by one person to another. Email from Douglas Kahn, Professor of Law, University of Michigan Law School to Christin J. Albertie, J.D. candidate, University of Michigan Law School, March 5, 2003. There is a tax compensation for services received when such services are received in exchange for property or services. For example, if a doctor and a lawyer exchange services, each are taxed on the value of the services received. In addition, a service provided by a NGO in the United States would probably not be taxed to the recipient. It could not be treated as a gift for tax purposes as the gift tax applies only to gifts of property. Furthermore, it is not likely that a NGO gift of property to an indigent person would be treated as taxable to the recipient since it is a type of transfer in which the transferor is not using societal resources in exchange for the transfer. *Id.*

⁴ SURVEY OF TAX LAWS, *supra* note 9, at 40.

⁵ Rules of Assessment and Payment into the Budget of enterprise profits tax, instruction no. 37u of the state tax service of the RF, §4.4.

⁶ On application of RF income tax on natural persons act, amendments and agenda of 12/23/94 and 01/27/95, cl. 14(a).

⁷ Tax incentives are not all that motivate businesspeople in RF to engage in charitable activities. In a sociological survey conducted by Interlegal on “Business and Charity in RF” Interlegal found that business people most often were motivated to give to charity by social responsibility, moral benefit and monetary profit. Further, non-incentives to contribute exist beyond the legal structure of charitable giving. Charitable giving is perceived as a type of penance in RF, accompanied by the attitude that if someone shares his or her money with another it must have been stolen. *See generally, Charity of Strangers?: Philanthropy in the Russian Commercial Sector*, available at <http://www.civilsoc.org/resource/chrtyst.html>.

⁸ Law on Non-Commercial Organizations, *supra* note 5, at art. 7.

⁹ *Id.* at art 2(2).

phrase this broad is provides officials the opportunity to interfere directly with the operations of an NGO by determining for themselves what is and is not a “socially useful goal.”¹

What is more, vague language may enable an NGO to function as a shield for illicit activity, specifically as a shield for terrorist groups. While no statutory provisions expressly provide for protection against government violations of the freedom of association, statutory provisions give the State the right to directly interfere with NGO affairs. The Law on Public Associations gives the Russian government the right to access managerial documents and the right to appoint government officials to participate in NGO functions, such as meetings.² The law does not require the government to obtain a court order or a search warrant before inspecting NGO documents or interfering in its activities.³

The State Duma should resolve the tension between the preservation of the freedom to association and the legitimate right of the government to assure NGO compliance with the law. It should define “socially useful goals” and restrict government ability to directly interfere with NGO activity. Vague statutory provisions combined with overreaching mandates for interference in NGO activity are, in effect, a throwback to state interference in all affairs.

JUDICIAL RECOURSE

Only the Constitutional Court of the RF can settle disparate interpretation of who is entitled to protect human rights in the RF. While the Russian Constitution indicates that “[r]ecognition of, respect for and protection of the rights and freedoms of the human being and the citizen shall be the duty of the state”⁴ it is unclear whether these freedoms are the duty of *only* the State to the exclusion of all other parties. The Law on Public Associations and the Law on Non-Commercial Organizations conflict with the official interpretation of this constitutional provision. The Constitutional Court should use its authority to resolve to resolve these interpretation discrepancies.⁵

Practical problems of standing and wealth inhibit swift resolution of the interpretation. The Constitutional Court may take a case referred by the President of the RF, the State Duma, one-fifth of the Federation Council, the Government of the RF, the Supreme Court, the Supreme Arbitration Court, and legislative and executive bodies RF subjects.⁶ It is unlikely that without public outcry any of the enumerated parties will refer this case to the Constitutional Court.

An individual or an NGO is also authorized to refer a case to the Constitutional Court, based on the Court’s jurisdiction over cases “about violation of constitutional rights and freedoms of citizens” and “the constitutionality of the law applied or due to be applied in a specific case in accordance with procedures established by federal law.”⁷ However, financial barriers often prevent an individual or an NGO from pursuing this type of case to the Constitutional Court. Even well funded NGOs are met with judicial resistance to hearing their claims. For example, the Jehovah’s Witnesses in Russia have been challenging the denial of their re-registration for over four years. After the Department of Justice refused to examine the application for re-registration three times, the Moscow Church of Jehovah’s Witness (MCJW) filed a civil complaint with Presnya Intermunicipal Court of Moscow in October 2000.⁸ The MCJW litigated in

¹ Squier, *supra* note 8, at 6.

² Law on Public Associations, *supra* note 6, at art. 38.

³ Squier, *supra* note 8, at 7.

⁴ 1993 RF CONSTITUTION, *supra* note 5, at art. 2.

⁵ The Constitutional court has the authority to “resolve cases about compliance with the Constitution of the RF [with] federal laws.” 1993 RF CONSTITUTION, *supra* note 5, at art. 125.

⁶ 1993 RF CONSTITUTION, *supra* note 5, at art. 125.

⁷ *Id.*

⁸ Chronology of efforts by the Moscow Community of Jehovah's Witnesses to secure re-registration under the 1997 Law on Religious Associations, available at <http://www.jw->

four courts, experienced five delayed hearings and three appeals, after which two courts upheld denial of re-registration, and rejected appeal of these decisions in December, 2001.¹ The MCJW is a well-funded international organization able to challenge this law in the Russian judiciary system. Smaller, local NGOs in Russia are not financially able to pursue litigation in multiple courts or pay for appeals.

The Russian judicial system lacks a tradition of looking to legislative history to interpret the statutory text. The judiciary should grant review of cases concerning the interpretation of text of the Law on Public Associations and the Law on Non-Commercial Organizations to contain official exploitation of the law. To the extent that it is available, the Supreme Court ought look to official statements of the State Duma and legislative theory in resolving the interpretation debate.

CONCLUSION

The RF has overcome significant barriers to the development of civil society. Yet, bureaucratic hurdles and official exploitation of registration and re-registration provisions have shut down multiple legitimate NGOs in the RF. Unclear statutory language allows for increased governmental interference in NGO activity. Furthermore, the Tax Code treatment of NGO activity obstructs meaningful NGO operation and discourages individual and corporate giving to NGOs. Thus, in contemporary Russian society, NGOs are subject to arbitrary government action, subject to excessive government interference in their affairs, and continue to lack financial resources and the ability to receive funds.

The State Duma must make clear the statutory language affecting NGOs and reformulate provisions of the Tax Code to reduce barriers of operation and create incentives for charitable giving. Judicial action must be taken to overcome the disparate effects of the registration and re-registration provisions built into the laws of the RF. Without meaningful action by these bodies, the development of civil society in the RF will remain superficial at best.

media.org/region/europe/russia/english/releases/religious_freedom/rus_e020212a.htm. This example addresses problems that arose out of the Law on Religious Associations. Though this paper does not discuss the Law on Religious Associations in detail, the problems are comparable to those that arose from the Law on Public Associations.

¹ Presnya Intermunicipal Court of Moscow, Kuzminki Intermunicipal Court of Moscow, Golovinsky Court, Moscow City Court, and the Butyrka Intermunicipal Court of Moscow.

THE GLOBAL INTERNET FREEDOM ACT: CAN A PROACTIVE UNITED STATES' INTERNET FREEDOM LAW FORESTALL CHINA'S ONE INTERNET, TWO SYSTEM POLICY?

BY STEPHEN O'CONNOR*

ABSTRACT. The technology for the Internet¹ originated in the United States, but the U.S. has not solely determined its global development. The technology may be uniform, but how nations deploy and monitor it varies widely. What is unclear is whether this new medium can be adapted to suit non-western authoritarian rulers, or whether by its very decentralized and democratic nature it will lead ineluctably to democratic revolutions in closed societies, or whether some middle road—authoritarian control but some flowering of freedom—will emerge.² Centralized authoritarian states have, with varying degrees of reluctance, introduced the Internet as a tool for economic modernization. These states have been creative in censoring the free flow of information, and limiting the ability of citizens to voice online dissent.³ The U.S., original promoter of the information superhighway, is weighing a response. Congress is considering Internet freedom legislation that will carry over to the online world traditional U.S. efforts to provide closed societies with uncensored information in order to encourage freedom of thought and expression around the world.

INTRODUCTION

The Global Internet Freedom Act (“GIFA” or “Act”) was introduced in the House by Representatives Christopher Cox (R-CA) and Tom Lantos (D-CA) on January 7, 2003, and was passed by the House on July 16, 2003.⁴ A nearly identical bill is in committee in the Senate, introduced by Senators Jon Kyl (R-AZ) and Ron Wyden (D-OR).⁵ The Act, with bipartisan support, looked likely to gain support in the fall of 2003. Since that time its fate is uncertain. The bill proposes to create an Office of Global Internet Freedom within the already-existing International Broadcasting Bureau (IBB) that would be authorized to “develop and deploy technologies to defeat Internet jamming and censorship.”⁶ Congressman Cox has stated that “with nearly 10% of the world’s population online, and more gaining access each day, the Internet stands to become the most powerful engine for democratization and free exchange of ideas ever invented.”⁷ The GIFA identifies eight countries “among others”,¹ but China is specifically mentioned as

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¹ The Internet has been described as “a network of networks.” *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997). It is a “giant network which interconnects innumerable smaller groups of linked computer networks.” *Id.* The Internet is an international system, allowing tens of millions of people to exchange information. See *id.* at 831. Information can be sent almost instantaneously to specific individuals, to a broader group of people, or to the world as a whole. See *id.*

² Already, geo-location technologies are enabling states to assert more control by identifying users within their physical borders, belying the often-touted notion that the online world is borderless. Matthew Fagin, Comment, *Regulating Speech Across Borders: Technology vs. Values*, 9 MICH. TELECOMM. TECH. L. REV. 395 (2003).

³ See generally Reporters Without Borders, “China Country Report 18.06.2003”, available at <http://www.rsf.fr> (last visited 9/29/03).

⁴ The GIFA is included in the Foreign Relations Authorization Act, H.R. 1950, 108th Cong. (1st Sess. 2003), available at <http://thomas.loc.gov>. The GIFA was originally introduced as H.R. 48, available at <http://thomas.loc.gov>. Section 524 of the Foreign Relations Authorization Act appropriates money for the establishment and operations of the Office of Global Internet Freedom under section 524(a) \$8,000,000 for the fiscal year 2004 and \$8,000,000 for the fiscal year 2005.

⁵ S. 1183, 108th Cong. (1st Sess. 2003), available at <http://thomas.loc.gov>.

⁶ *Id.* The House version would appropriate to the Office of Global Internet Freedom eight million dollars for each fiscal year 2004 and 2005. The Senate version would allocate thirty million for each year.

⁷ The House Policy Committee, Christopher Cox, Chairman, *Policy Statement: Tear Down This Firewall*, available at http://policy.house.gov/html/news_item.cfm?id=112 (last visited September 29, 2003).

the main target for un-jamming of Internet sites.² The Act has a limiting clause providing that “legitimate law enforcement aims” are exempt from U.S. anti-censorship efforts, providing the aims are “consistent with the United Nations Universal Declaration of Human Rights.”³ The GIFA thus is crafted with a loophole apparently to protect friendly governments from being targets of anti-censorship efforts for “legitimate law enforcement aims” that do not violate the U.N. Declaration provision above. The Internet has played a vital role during its initial life span as a resource for quick and generally bountiful information.⁴ In the U.S., the Internet has been called a “dramatic expansion of [the] marketplace of ideas”⁵ and has empowered millions in expressing themselves on in chat rooms and message boards. The limitations on free expression are being delineated here, too, and government regulation of the Internet is an obvious trend.⁶ As the U.S. struggles to balance national security needs and concern over offensive content with our tradition of tolerance for freedom of expression and association, what foreign policy should our government form regarding the decisions of other nations about censoring freedom in cyberspace? Can there be one Internet, two (or more) systems?⁷ The U.S. and China are steadily deepening their trade ties and are finding common ground in world security issues and in the globalizing economy. Both nations have publicly praised the Internet as a pathway to prosperity. As e-commerce increases globally, it is becoming apparent that real world law will have to be developed to address cyberspace. Content offensive to children, spam, and personal data privacy on the Internet are becoming heavily politicized issues, and it is a matter of time before this great platform for democracy becomes fully regulated in the free world. Chinese officials see the Internet as an opportunity for global economic expansion,⁸ yet have carefully introduced Internet infrastructure to limit access and “firewall” inflow of information.⁹

¹ The GIFA names the eight countries as: “The governments of Burma, Cuba, Laos, North Korea, the People’s Republic of China, Saudi Arabia, Syria, and Vietnam, among others, are taking active measures to keep their citizens from freely accessing the Internet and obtaining international political, religious, and economic news and information.” S. 1183, Section 2, Paragraph (5).

² S. 1183, Section 2, Paragraph (9): “The United States Government has thus far commenced only modest steps to fund and deploy technologies to defeat Internet censorship. As of January 2003, the Voice of America and Radio Free Asia have committed a total of \$1,000,000 for technology to counter Internet jamming by the People’s Republic of China. This technology, which has been successful in attracting 100,000 electronic hits per day from the People’s Republic of China, has been relied upon by Voice of America and Radio Free Asia to ensure access to their programming by citizens of the People’s Republic of China, but United States Government financial support for the technology has lapsed. In most other countries there is no meaningful United States support for Internet freedom.”

³ *Id.*, Section 4, Paragraph (c). The U.N. provision governing freedom of speech is in the Universal Declaration of Human Rights: “Everyone has the right to freedom of opinion expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights, art. 19, G.A. Res. 217 A(III) U.N. GAOR, 3d Sess., at 71, 74-75, U.N. Doc A/810 (1948), reprinted in *The Universal Declaration of Human Rights, The United States, and Amnesty International* (Amnesty International USA 1988).

⁴ To name but a few, users go to the Internet for topics such as safety (travellers regularly check updates on websites before visiting foreign countries) and health (the second most searched term on the Yahoo! Search engine recently was SARS). See Melody Peterson, *A Respiratory Illness: Cashing In*, THE NEW YORK TIMES, April 14, 2003 at §A p. 12. Safety and health are traditional areas of government oversight—see discussion of E-government initiatives by autocratic regimes in Part III of this Comment.

⁵ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997).

⁶ Matthew McMahon, *China’s Internet: A Technology of Freedom*, unpublished master’s thesis, available at <http://www.cyber.law.harvard.edu>. In 1992 there were four bills related to the Internet in Congress; in 2002 there were 4,000.

⁷ “One Country, Two Systems” has been an official Chinese slogan to describe the political relation between China and Hong Kong after its return in 1997 to the mainland.

⁸ “Jiang Zemin says E-Commerce Will Transform China,” Reuters, Beijing, Aug. 22, 2000, available at <http://www.insidechina.com/news.php3?id=191172>.

⁹ A firewall is “a system designed to prevent unauthorized access to or from a private network. Firewalls can be implemented in both hardware and software, or a combination of both. Firewalls are frequently used to prevent unauthorized Internet users from accessing private networks connected to the Internet, especially *intranets*. All messages entering or leaving the intranet pass through the firewall, which examines each message and blocks those that do not meet the specified security criteria.” See “firewall,” WEBOPEDIA: ONLINE SEARCH ENGINE AND DICTIONARY, www.webopedia.com. For a technical discussion of the development of the Internet in China, see Scott Feir, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China’s Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL’Y J. 361 (1997).

This paper will evaluate the policy goals of the GIFA as a measured response to the Chinese government's censorship of information on the Internet. Part I explores the current state of the Internet in China. Part II addresses the purposes of the GIFA, and explores the international Internet law ramifications of online activism. Part III analyzes the debate over different policies available to western governments to respond to web censorship in China. The paper concludes that the Global Internet Freedom Act is a limited response to a complex problem. If enacted, it will be successful in encouraging dissidents both outside and inside China, and will charge foreign corporations with responsibility to dissuade collaborations with the Chinese Internet censorship regime. Implications of U.S. unilateral attempts to extraterritorially regulate the Internet, however, raise a more fundamental problem of achieving cooperation and harmonization of cyberspace regulations that will require multilateral compromise, perhaps with an outcome of one Internet, two systems.

STATE OF THE INTERNET IN CHINA

China acceded to the World Trade Organization (WTO) in 2001,¹ and it has one of the fastest growing economies in the world. China has surpassed Japan as the second largest population of Internet users with at-home access,² and her massive population combined with her mere 5.5% level of Internet penetration of all households means that Internet growth potential there is greater than in both the U.S. and Japan. While more than half of the estimated 50-70 million Internet users in China log on from home, another 18% are estimated to log on at school and another 15% at Internet cafés.³ The digital divide,⁴ however is more extreme in China than in other countries, and skews these optimistic figures. More than two-thirds of Chinese net citizens (netizens) are male and under 30, about two-thirds have attended college, and they live predominantly in prosperous urban areas in China's eastern developed provinces.⁵ Further clouding these figures is that while Bulletin Board Services (BBS), e-mail, and search engines are the most popular uses of the Internet among Chinese users,⁶ some commentators have noted that BBS discussions in China are less a vehicle for engaging in public debate and more often are a forum for discussing apolitical topics,⁷ or, during crises, venting nationalist sentiments such as forceful reunification with Taiwan or demands for a larger international role for China.⁸ More than 40% percent of the Internet users log on from a public place.⁹ Also distorting China's Internet user statistics is that only

¹ Jiang-yu Wang, *The Internet and E-Commerce in China: Regulations, Judicial Views, and Government Policies*, 18 COMPUTER & INTERNET LAW. 12, 26 (2001).

² *China Is No. 2 in At-Home Net Access*, WALL ST. J., April 22, 2002, at A14. According to the article, 56.6 million Chinese had at-home access in 2002.

³ RAND Center for Asia-Pacific Policy, *You've Got Dissent* (Santa Monica, Calif.: RAND, 2002), p. 6, available at <http://www.rand.org/nsrd/capp/cyberstrategy.html> (last visited Sept 30, 2003). In Mandarin, Internet cafés are commonly known as "wang-ba," or netbars.

⁴ Digital divide is "a term used to describe the discrepancy between people who have access to and the resources to use new information and communication tools, such as the Internet, and people who do not have the resources and access to the technology. The term also describes the discrepancy between those who have the skills, knowledge and abilities to use the technologies and those who do not. The digital divide can exist between those living in rural areas and those living in urban areas, between the educated and uneducated, between economic classes, and on a global scale between more and less industrially developed nations." Webopedia: Online, www.webopedia.com.

⁵ *Id.* at 6. See also Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate between the Cyberspaces*, 4 INT'L J. COMM. L. & POL'Y 1 at 5 (2000). One report cites that as of 2000 only 14% of Chinese had ever heard of the Internet. *E-Commerce in China: Horse-Drawn Buggies on the Information Highway?* at Asiasource: a resource of the Asia Society (Dec. 30, 1999), at www.asiasource.org/news/at_mp_02.cfm?newsid=9740

⁶ Qiu, *Virtual Censorship in China: Keeping the Gate between the Cyberspaces*, at 7.

⁷ *Id.* at 9-10, observing that apolitical topics such as technology, economy, entertainment and sports dominate Chinese BBS discussions.

⁸ *You've Got Dissent*, p. 27. See also Lokman Tsui, *Internet in China: Big Mama Is Watching You*, p. 41 (M.A. Thesis, University of Leiden, 2001), available at <http://www.cyber.law.harvard.edu/filtering/china/resources.html> (last visited September 30, 2003).

⁹ Lokman Tsui, *Internet in China: Big Mama is Watching You*, p. 15.

slightly more than 20% of the information viewed by Chinese users is in language other than Chinese.¹ The “marketplace of ideas” is not yet a particularly robust one, and as a vehicle for democracy in China the Internet has yet to fulfill its potential.

DOT.COM ECONOMY & EFFECT ON CHINA’S WEB POLICIES

An important distinguishing feature between western netizens and Chinese is that the latter are not cash consumers with disposable incomes.² E-commerce is a negligible part of China’s economy: vendors and purchasers on an e-commerce site, for instance, do not have the option to settle with credit cards, but have to figure out how to conduct a transaction with cash.³ Business to business (B2B) promises to be more lucrative than the consumer (B2C) sector.⁴ The lion’s share of Chinese industry is state-owned, and the government is actively supporting these companies in creating e-commerce sites, while privately owned competitors are on hold in the bureaucratic maze that the government has created for regulating e-businesses.⁵ China’s securities companies opened for online trading in 1997.⁶ In 2001, online trading amounted to only 4% percent of China’s stock market transactions.⁷

Promising indicators do exist, however, for China’s e-business growth. China now leads the world in the number of wireless phone users, which indicates a wide interest in technological advances. Third and fourth generation technological advances will likely catapult e-trading toward capturing a much larger share of China’s securities market.⁸ The “informatization” campaigns are common themes in state propaganda—for example, Jiang Zemin’s much publicized quote that “none of the four modernizations would be possible without informatization.”⁹ China’s official embrace of the Internet as a vehicle for 21st Century prosperity is, despite positive indicators, still at odds with its 20th Century models for business.

FREEDOM OF SPEECH IN CHINA

While China’s citizens under her constitution enjoy freedom of speech,¹⁰ the government justifies censorship as a duty of the Communist Party in fulfilling its “leading role.”¹ China joined with the world’s

¹ *You’ve Got Dissent*, p. 7.

² Bruce Einhorn et al., *China’s Tangled Web: Will Beijing Ruin the Net by Trying to Control It?*, BUS. WK. INT’L, July 17, 2000, at 28. This article reports that only two million Chinese have disposable income of \$20,000 or more.

³ *Id.* But see Maris G. Martinsons, “*Electronic Commerce in China: Emerging Success Stories*,” INFORMATION AND MANAGEMENT 39 (2002), 571-579, at 573, available at www.elsevier.com/locate/dsw, observing that “well over 100 million Chinese now have a debit and/or credit card” and that “by early 2001, [Shanghai] had over 12 million credit/debit card holders,” but noting that “unlimited liability for credit card purchases and the lack of sales tax incentives for online purchases have limited their use.” The article cites the Dell corporate web site reporting that “Dell computer received less than 7% of its orders from China online versus about 40% of orders online in the rest of the world.” The author concludes that distinctive forms of e-commerce with Chinese characteristics have emerged, with e-businesses “using the Internet to create or extend a competitive advantage by building upon [their] core competencies.” *Id.*, p. 578.

⁴ Martinsons, p. 574.

⁵ Einhorn, *supra* Note 27. But see Martinsons, p. 578, noting that while the Government Online project represents an effort to lead by example and has improved Chinese government transparency, the websites of public ministries and agencies linked to www.gov.cn tend to fulfill a broadcast function, providing basic information and touting achievements rather than offering online services to Chinese citizens.

⁶ Haifeng Huang, “The Reality and Potential of Online Trading in China,” in *China’s Digital Dream* (Junhua Zhang and Martin Woessler, eds.), Bochum, Germany: The University Press, 2002, pp. 93-94.

⁷ *Id.* at 94.

⁸ *Id.* at 94.

⁹ Lokman Tsui, *supra* Note 25, p. 15. The four modernizations are Industry, Agriculture, Science, and Technology.

¹⁰ China’s Fourth Constitution was ratified in 1982, under the leadership of Deng Xiaoping. Article 35 of the Constitution of the People’s Republic of China, available at <http://www.oefre.unibe.ch/law/icl/ch00000.html>, provides: “Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration.” The Preamble to the 1982 Constitution effectively limits such freedoms, however, stating that all Chinese citizens and their activities must adhere to the “Four Basic Principles,” namely 1) keeping to the socialist road, 2) upholding Chinese Communist Party (CCP)

nations in declaring a Universal Declaration of Human Rights (UDHR) in 1945.² In 1966 the U.N. General Assembly adopted the International Bill of Human Rights (IBHR),³ which includes the UDHR and the International Covenant on Civil and Political Rights (ICCPR).⁴ Chinese culture has long emphasized the supremacy of the community in relation to the individual, and Confucian teachings are founded on the proper place of an individual in relation to the larger community. Socialist ideology idealizes a non-individualistic society, and Deng Xiaoping created a hybrid of traditional Marxist ideology into “socialism with Chinese characteristics.”⁵ Political commentators have frequently observed that since 1989 the central focus of the Chinese Communist Party’s (CCP’s) rule in China has been the preservation of its own authority and the achievement of economic prosperity. Mao Zedong thought (with its overlay of Deng Xiaoping thought) gives primacy to the economic and social rights of the working class, in contrast to the civil and political rights that western societies value as “fundamental to our concept of ordered liberty.”⁶

Another aspect of Chinese socialism is national integrity—the government has been very concerned with China’s image in the world as a growing power. The 1990s saw the return of Hong Kong and Macau to the Mainland. A ‘card’ that the government can play in political and trade negotiations with the U.S. is its demand for reunification with Taiwan. This issue stokes the potent nationalistic fervor of many ordinary Chinese.⁷ The issue of the preservation of China’s borders, with the consequent denial of sovereignty to Tibet, is also a fundamental position of the CCP. With these two issues, there is no latitude in voicing ideas that differ from the official policy of the government. The government also makes great efforts to shield its population from external information about these issues through censorship.⁸

Legal obstacles also confront a Chinese citizen who would make a claim that the government violated this constitutionally guaranteed freedom: the rule of law does not distinguish between “government” and the “law;” they are one and the same.⁹ No concept of judicial review exists in China, and there is no

leadership, 3) following Marxism-Leninism-Mao Zedong Thought and 4)submitting to the people’s democratic dictatorship. XXXX Human rights report “China: Freedom of Association Regulated Away, Human Rights in China, June 1999.

¹ Shauna Emmons, *Freedom of Speech in China: A Possibility or a Prohibition*, 23 LOY. L.A. INT’L & COMP. L. REV. 249, 269 (2001).

² Universal Declaration of Human Rights, art. 19, G.A. Res. 217 A(III) U.N. GAOR, 3d Sess., at 71, 74-75, U.N. Doc A/810 (1948), reprinted in *The Universal Declaration of Human Rights, The United States, and Amnesty International* (Amnesty International USA 1988).

³ International Bill of Human Rights, G.A. Res 217(A)(III) of 10, U.N. GAOR (1966), at 1; entered into effect March 23, 1976.

⁴ International Covenant on Civil and Political Rights, G.A. Res 2200, 21 U.N. GAOR Supp. (No. 16) at 21, U.N. Doc. A/6316 (1966). Entered into effect 1976. China signed the ICCPR in 1998, but has not yet ratified it.

⁵ Emmons, supra Note 35, at 269. Deng Xiaoping’s explained this phrase in December 1982:

[W]e must integrate the universal truth of Marxism with the concrete realities of China, blaze a path of our own and build socialism with Chinese characteristics.

China’s affairs should be run according to China’s specific conditions and by the Chinese people themselves.

Independence and self-reliance have always been and will always be their basic stand... We shall unswervingly follow a policy of opening to the outside world and increase our exchanges with foreign countries on the basis of equality and mutual benefit. At the same time, we shall keep clear heads, firmly resist corruption by decadent ideas from abroad and never permit the bourgeois way of life to spread in our country.

Opening Speech at the Twelfth National Congress of the Communist Party of China, available at

<http://english.peopledaily.com.cn/dengxp/vol3/text/c1010.html>.

⁶ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁷ The CCP uses cross-Straits relations as an international political bargaining chip: “Taiwan” currently is the “mantra” for Chinese officials in current dialogues with U.S. officials. U.S. Senator Bill Nelson recently testified before the U.S.-China Economic and Security Review Commission that “President Hu appeared to be an impressive gentleman, but interestingly, they all had their mantra, and the mantra was, “Taiwan, Taiwan, Taiwan,” when in fact we were there primarily for Korea.”

Testimony of U.S. Senator Bill Nelson, “SARS in China: Implications for Information Control, Internet Censorship, and the Economy: Hearing before the U.S.-China Economic and Security Review Commission, 108th Congress, June 5, 2003, p. 8, available at <http://www.uscc.gov>

⁸ Press Release, Reporters without Borders, Country Report: China, June 18, 2003, p. 8, available at http://www.rsf.fr/print.php3?id_article=7237 (last visited 9/27/2003).

⁹ Emmons, supra Note 35, at 275, quoting R.P. Peerenboom, *What’s Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29, at 33 (1993). Peerenboom quotes Mao’s observation that the law and the courts are

independent judiciary above the political process.¹ Judicial opinions are not widely circulated, generally only the outcomes of cases are reported.² There is no developed legal culture of asserting rights that have been violated; traditionally, “face-saving” has been more important in resolving disputes than vindication of right or wrong.³ The “ordered liberty” of China’s history has much to do with unity of policy, especially with regard to outside threats.

CENSORSHIP OF THE INTERNET: THE GREAT FIREWALL

The Chinese government censors every medium flowing across its national boundaries, from newspaper to VCD [video compact disk], from cassette tape to satellite TV, in order to keep Chinese people imagining themselves politically as nothing but sons and daughters in the socialist family of China.

—Jack Linchuan Qiu⁴

The mass medium of the Internet presents the Chinese authorities with a dilemma: how to encourage its economic potential and at the same time control its use as a platform for political dissent. It is notable that China allows a more free speech environment online than in the country’s traditional print and broadcast media.⁵ Although the online information is generally apolitical, it is “a significant improvement in comparison with the manipulated façade of the mass media.”⁶

The government’s response has been actively to promote the Internet and invest in telecom infrastructure, while placing significant restrictions on online political content and usage.⁷ The restrictions generally are of three types: 1) Content-control schemes, 2) self-censorship strategies, and 3) legal means via physical punishment.

CONTENT CONTROL

NEGATIVE FILTERING THROUGH SCREENING INCOMING INFORMATION

The government controls the content that is available to Chinese web users by setting up the infrastructure of the Internet in China. ChinaNet is the main backbone provider, and all Internet access providers (IAPs) must connect to it to access international websites—the infamous “Great Firewall of China.”⁸ A central gateway for requests for websites blocks requests for certain websites. It is not known what the exact list of blocked websites is, nor is it known who decides what websites are put on the list.⁹

“instruments with which one class oppresses another. As far as the hostile classes are concerned these are instruments of oppression. They are violent and certainly not benevolent things.” *Id.*

¹ *Id.* at 276, concluding that “the bottom line is that a genuine right to freedom of speech requires an independent body with the power to review laws that may abuse this right.” *Id.* Emmons cites Peerenboom, *supra* Note 43, at 34, observing that “In fact, according to the PRC’s Constitution, the “power to interpret and enforce the constitution” does not belong to the PRC’s judiciary or another independent agency, but rather belongs to the National People’s Congress (NPC). Because the NPC drafts and adopts the laws, however, “it seems unlikely that the standing committee would interpret any statute or amendment as inconsistent with the constitution or the basic principles of the statutes.” *Id.*

² *Id.* at 277.

³ *Id.* at 277. The film by Zhang Yimou, *Story of Qiu Jiu*, is a tour de force exploration of contemporary attitudes towards vindicating legal rights and “saving face.”

⁴ Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate between the Cyberspaces*, 4 INT’L J. COMM. L. & POL’Y 1, 16-17 (2000).

⁵ Shanthy Kalathil, *Dot.Com for Dictators*, 3/1/03 FOREIGN POLICY 42 (2003).

⁶ Qiu, *supra* Note 48, at 18.

⁷ Nina Hachigian, *The Internet and Power in One-Party East Asian States*, 25:3 THE WASHINGTON QUARTERLY 41, 47 (2002) available at <http://www.twq.com/summer02>.

⁸ *Id.* at 26.

⁹ *Id.* at 31.

The government can also block e-mail.¹ A user can easily evade a blocked e-mail account, however, simply by registering a new account.

POSITIVE FILTERING—A NATIONWIDE INTRANET

China's net consists of four separate intranets—they do not depend on access to the Internet outside.² Thus, one of the content-control goals of the authorities was to increase domestic website offerings, in Chinese language, on the intranets.³ The idea of a nationwide intranet with all-domestic programming appealed to the government, but according to one commentator, “failed miserably in capturing the public's interest.”⁴ The idea has been revived in official circles, however.⁵ China's own private and state-owned Internet providers (Sohu.com, Sina.com, Tom.com, for example) have generated an enormous body of information all in Mandarin Chinese using the mainland's simplified character style.⁶ Providing safe domestic content that satisfies Internet information consumers without their resorting to foreign sites with troubling content is a “positive filtering” mechanism that enhances the government's content control.

Although a self-contained middle kingdom completely insulated from barbarian influences is a continuous theme in Chinese history, it is an unlikely option for the current government, considering the economic and political benefits it derives from engaging with the outside world. This is particularly true for the current generation of Chinese who have grown accustomed to Western influences. The government's opening to foreign investment through such multilateral agreements as the WTO seem to be orienting China in a firm embrace of western capitalism. Positive filtering will be eclipsed in the long run by the exponential growth of ideas and information waiting outside the gate.

OTHER GOVERNMENT METHODS

While evading the blocks at the gateway is relatively simple through use of “proxy servers” and “mirror sites,”⁷ these proxy servers have also been blocked efficiently as well.⁸ The government can also trap unwary surfers by erecting “honey pots,” false proxy sites that instead track the user for later punishment.⁹

¹ RAND Center for Asia-Pacific Policy, *You've Got Dissent*, p.63

² Stephen J. Anderson, *China's Widening Web*, THE CHINA BUSINESS REVIEW, March-April 2000, available at <http://www.chinabusinessreview.com/0003/anderson.html>, reporting that the four intranets are CHINANET, CHINAGBN, UNINET, and CNCNET.

³ Clara Liang, *Red Light, Green Light: Has China Achieved Its Goals Through the 2000 Internet Regulations?* 34 VAND. J. TRANSNAT'L L. 1417, 1428 (2001).

⁴ Tsui, *Big Mama Is Watching You*, p. 32.

⁵ “China To Build Own ‘Superhighway’,” Associated Press, 8 January 2001.

⁶ Shanthi Kalathil, *Dot.com for Dictators*, 3/1/03 FOREIGN POLICY 42, available at www.ceip.org.

⁷ Id. at 33.

⁸ Hachigian, *The Internet and Power in One-Party East Asian States*, p. 48.

⁹ Greg Walton, *China's Golden Shield: Corporations and the Development of Surveillance Technology in the People's Republic of China*, p. 12, available at <http://www.ichrdd.ca/english/commdoc/publications/globalization/goldenShieldEng.html> (last visited September 29, 2003). See also Testimony of Ken Berman, Manager, Anti-Censorship Program, International Broadcasting Bureau, in “SARS in China: Implications for Information Control, Internet Censorship, and the Economy,” *Hearing before the U.S.-China Economic and Security Review Commission*, 108th Congress, June 5, 2003, p. 51:

Commissioner Wortzel: Can the Ministry of State Security or some security agency also then technically track that user and go after him for even having tried to access a prohibited site?

Mr. Berman: Yes, that is possible. They're known as honey pots. A site might be put up, users are attracted to it, that might have controversial information on it. Then the Ministry of State Security, the Ministry of Information Infrastructure—there's about 10 different bureaus that are responsible for this, and sometimes they do battle with each other—can in fact go and look to see who connected to that site. What they will learn is their IP address. That IP address might be in an Internet café, so then they'd have to correlate with the cameras that are on the wall in some Internet cafés. It might be someone's home. It depends on whether the true individual could be caught on what the specific address is. But yes, there is vulnerability there.

Commissioner Wortzel: And who makes the best software to allow that tracking back?

Mr. Berman: U.S. companies that work on firewalls and penetration testing...most people who do attacks go through a series of servers to mask their identity. The poor person in China would not have those kind of tools to mask their identity.”

The adaptability of the Internet, however, is one of its design features—since it was originally designed by the American government to ensure security of information networks during attempted enemy disruptions. Thus, in the cat-and-mouse blocking and evading game between the government and sophisticated users, time is probably on the side of the users. An Internet arms race could be won, however, by a government determined to control the content available to its citizens, willing to invest the resources to do it.¹

SELF-CENSORSHIP STRATEGIES

Besides technological solutions to content control of the online community through intranets or selective blocking of Internet sites, the Chinese government has other means as well.² “Virtual censorship” is a term that has used to describe the defensive policies of the government in controlling the Internet—virtual in that it is not *real* domination, but rather political restrictions imposed on cyberspace that interplay to create a climate of self-censorship and apathy.³

The restrictions include online monitoring by the Public Security Bureau (PSB), message eradication on BBS boards, cancellation of membership accounts, and even confiscation of computer equipment.⁴ Under Mao Zedong, one commentator notes, a censorship department was not explicitly needed as so much fear of reprisal was embedded in daily practices that it had become almost invisible.⁵ The desperate conditions of former times--struggling to survive occupied most ordinary Chinese for long periods in the face of shortages and arbitrary brutality--have receded, yet self-censoring attitudes still prevail thirty years after the passing of the Great Helmsman. The brutal government massacre of students on June 4th, 1989 in Beijing’s Tiananmen Square, it is true, has reinforced in ordinary people’s minds that the government will not tolerate opposition. The self-censorship also stems, however, from the Chinese government’s careful manipulation of the images of itself it allows to be created.

A large part of the self-censorship springs from the government’s own monopolization of news and infrastructure. The CCP has historically molded public opinion in its own favor, retaining an iron grip on the media.⁶ It is notable that in contrast with the U.S. and other western countries, the development of the Internet in China has been largely the work of the state.⁷ The idea of information available to the masses does not exist in the same way that we have assumed in the West. The masses in China are used to proclamations of the political and economic elites—for survival, it was just enough to “get the message.”⁸ In China, the CCP does not directly attract attention to itself on the web. Rather, it confines itself to traditional print and television, which listeners have grown accustomed to viewing to “get the message.” Compared with the new information on the web, with pop-up advertisements and foreign language offerings, it is often simpler to just pick out the political message in the comfortable environment of print medium than to sort through the blizzard of distracting political ideas that advertise themselves in an e-democracy.⁹

The Chinese government also uses the market for e-business as a method to force businesses to self-censor themselves.¹⁰ The businesses will adhere to the policy out of fear of being shut down. This applies to western companies attracted to the lucrative IT sector in China—they will play along in order to stay in

¹ Kalathil, *Dot.Com for Dictators*, p. 2.

² Tsui, *Big Mama Is Watching You*, at 27.

³ Qiu, *Virtual Censorship in China* at 9-10.

⁴ RAND Center for Asia-Pacific Policy, *You’ve Got Dissent*, p. 81.

⁵ McMahon, *supra* Note 13.

⁶ *Id.* at 23.

⁷ Kalathil and Boas, *Internet and State Control in Authoritarian Regimes*, p. 5.

⁸ McMahon, *supra* Note 67.

⁹ *Id.*

¹⁰ Tsui, *Big Mama is Watching You*, p. 42.

the good graces of the government. The U.S. has very relaxed export restrictions for IT, and China is able to import not just the software and technology, but also the expertise.¹ Because Internet Service Providers are held responsible for what is published on their domains, they have an incentive to scrutinize the content of their customers. One critic has described the regime of self-censorship as creating “private Panopticons,” in terms of Jeremy Bentham’s Panopticon, a building in which everyone could be surveilled at once.² The implications for the erosion of privacy via the Internet are, however, a much-covered area and beyond the present focus, which is limited to censorship of free expression.³

LEGAL METHODS TO CONTROL CONTENT

Human rights advocacy organizations have protested that online speakers and virtual organizers are being punished in the traditional “Leninist” ways of a totalitarian state.⁴ The government has an in-place apparatus of informers and surveillance that can locate and gain physical evidence against dissidents.⁵ China plans to replace current paper national identity cards with electronic cards containing the same basic identity information.⁶ The Ministry for Public Security (MPS) announced last year that by 2006 it would create a nationwide computerized database containing personal details and ID numbers for every adult in the country.⁷ This will undoubtedly aid in the integration of various PSB bureaus and enable more efficient monitoring of dissident activity to counteract “nationalization” of dissident movements.⁸

Monitoring devices known as “black boxes” have been installed on Chinese ISPs that track the content and activity of individual email accounts.⁹ The MPS is also reported to be developing a project that would detect and delete “unwanted” (i.e., filtered) emails without the recipient’s knowledge or consent.¹⁰ Chinese regulations warn that acts “harmful to social stability” and “compromising of state secrets” will be punished.¹¹ Because the nature of Internet regulations in China are so vague, or are tangled and overlapping, the government also has the option to arrest and seize suspects and their equipment for violations that the user might not have known he was making.¹² The international human rights advocacy

¹ *Id.*

² *Id.* at 44.

³ Certainly, Chinese traditional notions of privacy have developed differently than notions in the west. How the traditional Chinese concept of privacy is affected by the spread of the Internet is a topic that has not been frequently mentioned in studies of Chinese Internet policies.

⁴ RAND Center for Asia-Pacific Policy, *You’ve Got Dissent*, p. 49.

⁵ *Id.* at 49-50.

⁶ *China to Update National ID system with ‘Electronic Smartcards,’* SAN DIEGO UNION-TRIBUNE, Wednesday, August 13, 2003, Section A21.

⁷ Greg Walton, *China’s Golden Shield: Corporations and the Development of Surveillance Technology in the People’s Republic of China*, p. 12, available at <http://www.ichrdd.ca/english/commdoc/publications/globalization/goldenShieldEng.html> (last visited September 29, 2003). The following is an excerpt from the text:

In the past the Chinese government has kept a cumulative file (called the *dangan*) on every individual’s performance and attitudes from kindergarten, and throughout adult employment. This information will now be digitized and Chinese citizens will be issued new, second-generation identification cards that will contain their *dangan* on an embedded microchip. Currently, Chinese ID cards consist of a laminated paper card featuring a person’s name, photo, birthday and ID number. This paper card “is relatively easy to counterfeit,” said Qiu Xuexin, Director of the No. 1 Research Institute under the MPS, speaking recently at the Fourth International Fair of Smart Cards. Qiu added that by using sophisticated encryption it will be more difficult for unauthorized people to access government information in the new card. The second generation smart card is likely to be a “proximity card” – in other words it can be scanned instantly, from several feet away, without the subject necessarily being aware that he or she is being identified.

(Text cites http://www.smartcards-china.com/en/page_ehydt1.htm)

It is interesting to note that the immediately after 9/11 there was a serious discussion in Congress over requiring a U.S. national identity card.

⁸ RAND Center for Asia-Pacific Policy, *You’ve Got Dissent*, p. 56.

⁹ Walton, *China’s Golden Shield*, p. 12.

¹⁰ *Id.*, p. 12.

¹¹ *Id.* at 48.

¹² *Id.*

group Reporters Without Borders recently reported that at least 35 cyber-dissidents are in prison in China for posting “subversive” material on the Internet.¹ The laws of China, selectively and arbitrarily enforced as they are, “hang like a sword of Damocles over the heads of the citizenry.”² It appears that for every individual who chooses to speak out and is punished, many more will choose the path of caution and heed word-of-mouth cautionary tales and obey reflex self-censorship, and not speak at all.³

THE GLOBAL INTERNET FREEDOM ACT

The philosopher Arthur Koestler’s writings about the confrontation developing between the west and the U.S.S.R. under Stalin in 1946 have a current ring when it comes to China:

No political treaties and trade agreements can guarantee peace as long as this world remains psychologically divided into two worlds, with persecution-mania on one side, growing alarm on the other...Psychological armaments should be made an object of international negotiations and of political bargaining just as armaments in the air and on the sea...The measure of “psychological armament” is the extent to which a government obstructs the free exchange of information and ideas with the outside world. A country which builds a Maginot line of censorship from behind which it fires its propaganda salvoes is committing psychological aggression.⁴

Such a “house-divided-cannot-stand” mentality may seem overblown in relation to China’s Internet censorship regime, but the growth of the Internet has been so rapid and seismic that it is not difficult to imagine “two worlds,” one with Internet freedom and the other where the Internet serves the ruling party *à la* Orwell.

Since World War II, the Voice of America (VOA), a division of the International Broadcasting Bureau (IBB), has broadcast programs that give live news and information in over thirty languages to people in closed or war-torn societies.⁵ Since the 1940s the U.S. has deployed anti-jamming technologies to make VOA and other broadcasting like Radio Free Asia (RFA) available to the nations that block or jam transmissions. VOA and RFA have websites that permit “radio-streaming” in the event that the broadcast is jammed. For fiscal year 2002, the U.S. Congress appropriated \$147 million for VOA, including funds for radio and television, exclusive of transmission and other support activities.⁶

THE GOALS OF THE GLOBAL INTERNET FREEDOM ACT

The purpose of the GIFA will be to: (1) [a]dopt an effective and robust global Internet freedom policy; (2) to establish an office within the International Broadcasting Bureau with the sole mission of countering Internet jamming and blocking by repressive regimes; (3) to expedite the development and deployment of technology to protect Internet freedom around the world; (4) to authorize the commitment of a substantial portion of the United States international broadcasting resources to the continued development and implementation of technologies to counter the jamming of the Internet; (5) to utilize the expertise of the private sector in the development and implementation of such technologies, so that the many current technologies used commercially for securing business transactions and providing virtual meeting space can

¹ Press Release, Reporters Without Borders, *Annual China Report*, June 18, 2003, p. 3.

² Congressional-Executive Commission on China, Annual Report 2003, 108th Congress, October 2, 2003, p. 46, available at <http://www.ceccc.gov>

³ *Id.* at 46.

⁴ Arthur Koestler, editorial, Psychological Disarmament, *NEW YORK TIMES*, March 10, 1946, as quoted in Robert Conquest, *Reflections on a Ravaged Century* (Norton: New York, 2002), p. 156.

⁵ Fast Facts on Voice of America, at www.VOA.gov/index.cfm?sectionTitle=fast%20facts (last visited September 29, 2003).

⁶ *Id.*

be used to provide democracy and freedom; and (6) to bring to bear the pressure of the free world on repressive governments guilty of Internet censorship and the intimidation and persecution of their citizens who use the Internet.¹

If enacted in its present version as pending in the Senate, the GIFA could direct \$60 million over two years to the Office of Global Internet Freedom, a new office in the executive branch (under the IBB).² A Director will head the office “who shall develop and implement a comprehensive global strategy to combat state-sponsored and state-directed jamming of the Internet and persecution of those who use the Internet.”³ The Director would submit to Congress on March 1 following the date of enactment of this Act, and annually thereafter, ...a report on the status of state interference with Internet use and of efforts by the United States to counter such interference. [E]ach report required...shall (A) list the countries that pursue policies of Internet censorship, blocking, and other abuses; (B) provide information concerning the government agencies or quasi-governmental organizations that implement Internet censorship; and (C) describe with the greatest particularity practicable the technological means by which such blocking and other abuses are accomplished.⁴

The Director will have the discretion to fund private groups that actively support anti-censorship efforts in mainland China, including computer “hacktivists” who have taken up the technical challenge of defeating China’s censorship regime.⁵ The VOA has already paid one company called SafeWeb, which is a start-up funded by the C.I.A., to pilot the project to open up the VOA website to Chinese listeners. The company’s anti-censorship software, called Triangle Boy, was a success in that it drew 100,000 hits in China while it was operational. However, the company had to take down its proxy server when funding lapsed.⁶

PURPOSE OF THE ACT IS NOT TO PUNISH AMERICAN IT COMPANIES SELLING FILTERING TECHNOLOGY IN CHINA

While the purpose of a new Office of Global Internet Freedom is to fund attacks on Chinese web censorship, the GIFA does not go as far as to empower its Director to identify and punish American or other corporations that are colluding with the Chinese government in building the Internet censorship regime. In hearings in June of 2003 before the U.S.-China Economic and Security Commission on evaluating the impact of SARS on information control, internet censorship, and the economy, Representative Cox testified on the array of issues posed by vigorous Chinese efforts to control the free flow of information to the Chinese people, justifying the limited goals of the GIFA as an exercise in legislative restraint.⁷ Much of the technology needed for creating filters and firewalls is dual use

¹ S. 1183, 108th Cong. (1st Sess. 2003), available at <http://thomas.loc.gov>

² *Id.*, § 4 (b).

³ *Id.*, § 4 (a).

⁴ *Id.*, § 4 (d) (1)-(2).

⁵ Paul Mooney, *China’s Cyber Crackdown*, NEWSWEEK, December 16, 2002, at 26.

⁶ Murray Hiebert, *Hackers Fight China’s Internet Curbs*, WALL ST. J., November 6, 2002, at B11.

⁷ U.S.-China Economic and Security Review Commission, June 5, 2003, Report, p. 45. The following is an excerpt of the Representative Cox’s exchange with the Commission: Commissioner Wessel: [J]ust prior to your being here this morning, Commissioner Bryen raised a question which I would love to have your views on as well, which is, Mr. Berman indicated that some U.S. companies, their software, their hardware, their technology might be used to assist the Chinese in blocking Internet freedom. [T]here is always the argument that if we don’t provide, Cisco doesn’t provide the routers, that Germany, France, or someone else will do so, and that therefore we should do nothing about this. What do you think this Commission should be looking at as it relates to the U.S. companies potentially assisting the Chinese in blocking the Internet? Representative Cox: Well, it’s a perfectly legitimate avenue of inquiry. It’s an important question to ask. It’s also a classic example of the dual use problem. It’s very difficult to imagine technology of this sort, routers, switches, and so on, that don’t have perfectly legitimate uses. Some technology might neatly fall into the category of only pernicious use, but by far the lion’s share is going to put you smack dab in the middle of a gun control debate: Is it the gun or the guy who pulls the trigger? And is it possible to control this?

technology, applicable for censorship purposes but also necessary for expanding the speed and efficiency of the Chinese Internet. Punishing U.S. companies for profiting on Internet development in China will not take advantage of the leverage the Internet offers in opening Chinese citizens to pluralistic society. U.S. lawmakers are taking an approach of aggressive preemption of state control of the Internet, counting on the creativity of the medium itself to outflank authoritarian governments' efforts to harness it to strengthen their own powers.

SOME INTERNATIONAL INTERNET LAW IMPLICATIONS OF THE GLOBAL INTERNET

FREEDOM ACT

The GIFA would exploit the expertise of the private sector “so that the many current technologies used commercially for securing business transactions and providing virtual meeting space can be used to promote democracy and freedom.”¹ Statements in the press by Congressman Cox and other U.S. officials have suggested that the efforts of the proposed Office of Global Internet Freedom would go beyond creating safe speech havens for foreign Internet users to also allow funding the efforts of “hacktivists” (activists who use technology for political ends) to help Chinese netizens evade their government’s web censorship efforts.²

The GIFA is not new in that it is funding the type of “public information war” the United States has been conducting since WWII. However, the nature of the way in which information reaches its recipients is an untested area in international relations. Internet jamming and state-funded interference in another state’s Internet regulation is subject to no current international protocols, and as a medium the Internet has scarcely been judicially defined in its 10 years of widespread use. The literature on Internet regulation is growing.³

One interesting aspect of the legitimacy of the GIFA is whether hacktivism is subject to international legal action. One commentator has described how a cause of action may be brought under the Alien Tort

Indeed, that may be even more stark than the gun control debate, because so much of what we want to accomplish in China and other parts of the world is dependent on the spread of this kind of information. I think we have to look at technology first as our friend, technology as the source of all this new opportunity for people to have discourse, to cross borders with information, to share and so on, and then recognize that like all new advances in technology, it creates problems for people who would do the wrong thing—creates opportunities for them, problems for us.

And I think we need the cooperation of those who are in global trade, so that they can help us keep an eye on how their products are being used. And when you’ve been burned many, many times, when it’s no longer just a question of, gee, what might happen, but you know exactly what’s going to happen, then perhaps we can learn from that experience.

But what we have in mind with H.R. 48 is taking the world as we find it, as we know it, that you know people are going to be out there trying to use perhaps some of our own technology to create an intranet, to create a new enforcement tool for the police state, to deny people access. And with that as a given, can’t we take all of this technology, in which in many cases we are the world leaders, and use it aggressively to preempt that effort? [t]his is a cat and mouse game that’s going to go on for the rest of our life. So why not take the forces of good and marshal them, and just as we have for so long with traditional broadcasting sought to get the truth in, whether it was on little radios or later on television. Let’s see if we can’t stop Internet jamming and let people talk to each other. That’s the point.

¹ Id., Secion 3, Paragraph (5).

² Murray Hiebert, Hackers Fight China’s Internet Curbs, WALL ST. J., November 6, 2002, at B11. See also Jennifer S. Lee, *Grass-roots War against Government Web Blocks ‘Hacktivists’ Work for Free Flow of Information*, CHICAGO TRIBUNE, Monday, October 14, 2002, at 4.

³ See, e.g., Paul Schwartz, *Internet Privacy and the State*, 32 CONN L. REV. 815 (2000); Sean Selin, *Governing Cyberspace: The Need for an International Solution*, 32 GONZ L. REV. 365 (1996-1997); Omar Saleem, *The Establishment of a U.S. Federal Data Protection Agency to Define and Regulate Internet Privacy and Its Impact on U.S.-China Relations: Marco Polo Where Are You?*, 19 J. MARSHALL J. COMPUTER & INFO. L. 169 (Fall 2000).

Claims Act of 1789 for individuals that suppress human rights reports on the Internet.¹ Could a counter-claim for an injunction to anti-censorship efforts be brought for copyright infringement?²

In *Microsystems Software, Inc. v. Scandinavian Online AB*³ the U.S. District Court of Massachusetts ordered an injunction against hackers who had been responsible for online publication of code-breaking software. The case concerns two Swedish hackers who broke the “censorware” proprietary program of toy manufacturer Mattel that blocks purportedly offensive Web sites. The censorware has been popular with public libraries in the U.S. and parents who wished to screen their children’s online visits. Mattel Inc. sued the two hackers in Massachusetts, Microsystems home state. Attorneys argued that by reverse-engineering the program, the two hackers had devalued the company’s product and violated its copyright policy. The two men eventually agreed to settle, and sell the rights to their code-breaking program to Mattel for one Canadian dollar (to make the transfer of copyrights legally stick), and to accept an injunction that prevents them from distributing the “hack package” (code-breaking program). In Sweden, someone put up mirror sites with the hack package available as an exercise in the expression of free speech and “fair use.” Mattel, arguing that censorware is not a repression of speech because it is a private entity, not a government that created the program, sought to enjoin the mirror sites (others cropped up in several countries). The injunction against the mirror sites was granted. Judge Harrington declared:

[T]his case involves more than a complex and significant legal issue relating to copyright law. It raises a most profound societal issue, namely, who is to control the educational and intellectual nourishment of young children—the parents or the purveyors of pornography and the merchants of death and violence.

Ideas bear consequences, fruitful and also destructive. The pernicious idea that all men are not created equal is the philosophic basis which incited the degradations of slavery and the genocidal slaughter of the Holocaust.

Under our Constitution all have the right to disseminate even evil ideas and such ideas cannot by law be suppressed by the government. On the other hand, parents, in the exercise of their parental obligation to educate their young children, have the equal right to screen and, thus, prevent noxious and insidious ideas from corrupting their children’s fertile and formative minds.⁴

If one were to extrapolate the logic from Judge Harrington’s argument, with the U.S. as the purveyor of “pernicious ideas” and China as the cautious parent, funding hackers to expose Chinese citizens to messages their government doesn’t want them to hear is an immoral idea. The issue really rests on how party leaders choose to treat the masses: as “children,” to be educated by screening out noxious and insidious ideas, or as full participants in the worldwide movement since 1989 toward elected democratic government. The United States has dedicated significant resources since 1943 toward promoting the free flow of information around the world, and many nations, China included, in joining in promulgating The Universal Declaration of Human Rights have arguably committed their government to allow free speech “orally, in writing or in print.”⁵ U.S. interference in China’s Internet policy under the GIFA is not immoral since the action would be aimed at protecting an international fundamental human guarantee.

¹ Thomas Cochrane, Note, *The Law of Nations in Cyberspace: Fashioning a Cause of Action for the Suppression of Human Rights Reports on the Internet*, 4 MICH. TELECOMM. & TECH. L. REV. 157 (1998).

² See *Microsystems Software, Inc. v. Scandinavia Online AB*, 98 F.Supp.2d 74 (2000).

³ *Id.*

⁴ *Id.* at 74-75. See also Bernice Yeung, *Babes in Toyland: Two Hackers Piss Off Mattel and Spawn an Internet Imbroglia*, SF WEEKLY, Wednesday, May 17, 2000.

⁵ Universal Declaration of Human Rights, art. 19, *supra* Note 36.

HOW THE GIFA WILL IMPACT THE DEBATE ON U.S. INTERNET FREEDOM POLICY: INSTRUMENTALISTS “HANDS-ON” USE OF THE INTERNET BY THE STATE, A “HANDS-OFF” APPROACH THAT WILL RESULT IN GREATER FREEDOM, OR IS THERE A MIDDLE ROAD?

The literature concerning the Internet and censorship contains lively arguments in the debate over whether the Internet will naturally lead to an increase in civil liberties in all countries. The “instrumentalist” side of the debate argues that the Internet will be used by dictators to create an Orwellian society in which electronic surveillance and control pervade life ever more.¹ The instrumentalist view advocates a hard-line approach toward defeating Internet censorship. The deterministic side, on the other hand, argues that by its democratic, open, and anonymous nature, the Internet will lead to authoritarian states’ release on their grip of power,² and therefore any legislation that interferes with this predetermined process may do more harm than good, the thinking goes.

THE INTERNET AS “INSTRUMENT” OF THE STATE

STREAMLINING THROUGH E-GOVERNMENT

In the United States, supporters of Internet regulation, from anti-spamming laws to obscenity filtering, have invoked the public trust doctrine, claiming the Internet needs protection if it is to fulfill its promise of greater democracy.³ Shanthi Kalathil, a scholar at the Carnegie Endowment for International Peace, in arguing the instrumentalists’ view has stated that at least in the short to medium term, the spread of the Internet will benefit authoritarian regimes at the expense of dissidents and pro-democracy advocates.⁴ She observes: “China and other authoritarian regimes have responded effectively to the dissident challenge by implementing a combination of reactive measures, including blocking websites and jailing activists, and proactive policies, such as ...offering e-government services.” Kalathil argues that states by implementing e-government services can guide Internet development to serve their own goals, such as consolidating central authority through more efficient communication with remote provinces, and shedding monolithic state inefficiency.⁵ Such centralization might appear to be antithetical to democratization.⁶

The current cooperation of businesses with China’s Internet sector also suggests that the government is winning the battle for control over information. Foreign businesses, in addition to indigenous state and private sphere businesses, are complicit not only in acquiescing to government control, but also in shouldering the burden of that control. On August 1, 2002, three hundred businesses and academic institutions signed, “voluntarily,” a “public pledge on self-discipline for the Chinese Internet Industry.”⁷ Faced with the behemoth task of sorting through ever-increasing streams of information entering its gateway, the Chinese government has chosen through this pledging initiative to commandeer businesses and institutions on the internet with an offer they are basically unable to refuse: volunteer to filter content, or risk losing your license. Signatories to the voluntary pledge agree to investigate all websites to which they provide links. They must affirmatively block anything the Chinese Government would consider “harmful information,” and report those sites to Chinese authorities. The pledge commits the businesses and institutions to make “energetic efforts to carry forward the rich cultural tradition of the Chinese

¹ See generally Kalathil and Boas, *The Internet and State Control in Authoritarian Regimes*, available at www.ceip.org.

² Elaine M. Chen, *Global Internet Freedom: Can Censorship and Freedom Coexist?* 13 DEPAUL-LCA J. ART & ENT. L. 229 (2003).

³ Tom Yager, *Hands Off the Internet: Debate Rages Over the Government’s Role in Determining the Future of the Web*, Infoworld, www.infoworld.com, March 22, 2001.

⁴ *Id.* at 16.

⁵ Kalathil, *Dot.com for Dictators*, available at www.ceip.org.

⁶ *Id.* Kalathil argues, however, that expanding government Internet programs can also make regimes transparent. The very accessibility of the government, and the equality of a service provider to consumer relationship, would allow e-citizens to directly express their opinions of government quality.

⁷ Rights group warns Yahoo! on Chinese operations, THE HINDU, Sunday, August 11, 2002, available on Lexisnexis newssearch.

nation and the ethical norms of the socialist cultural civilisation" by adhering to all state industry regulations. Signatories pledge to "[refrain] from producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability."¹ While some Internet companies justify their active censorship by arguing that they further the cause of free expression simply by their presence in China,² Kenneth Roth, Executive Director of U.S.-based Human Rights Watch, criticizes this collaborationist mentality: "[I]f a powerful industry leader such as Yahoo! submits so readily to official censorship requests, it sells short the potential of this new medium to break Beijing's grasp on the free flow of information."³

THE IMPACT OF PENDING U.S. ANTI-JAMMING LEGISLATION ON THE INSTRUMENTALIST VIEW: THE GLOBAL INTERNET FREEDOM ACT

Is there a hidden opportunity for liberalization and democratization in authoritarian Internet plans? Some, like Shanthi Kalathil at the Carnegie Endowment for Peace, in explaining the instrumentalist approach choose to focus not on the *means* of censorship, but rather on the potential result of eventual transparency and citizen contentment.⁴ She has posited that democracy is better sought by tolerating authoritarian censorship of powerful media such as the Internet, with a more transparent and pro-citizen government.

If Kalathil's supposition is correct, then the current attitude of the U.S. government may be counterproductive in forcing an "arms race" in Internet blocking technology, when the same funds could be used to foster computer literacy programs or promote e-business in the Chinese consumer sector through technology on secured transactions. The prevailing view of China in Washington, however, is as a strategic competitor. Committing funds to foster internal infrastructure and education in China, no matter how theoretically advisable, is not a political possibility.

DETERMINIST VIEW: E-DEMOCRACY WILL PREVAIL?

Nina Hachigian makes a cogent case for the determinist side when she argues that the control over information through Internet activism will shift inexorably to networked citizens, leading to "potential seismic changes."⁵ China's growing middle class, prosperous, educated, and wired, will demand political participation. With the convergence of wireless, broadband, and the Internet, democratists may have an unstoppable weapon in their battle for civil liberties. The scenario of a widespread government crackdown on burgeoning speech could provoke a crisis that might prove a motivating factor in political reform.

VISION OF E-UTOPIA

The use of the Internet as a tool to liberate closed societies has many advocates. Internet philosopher and theorist Howard Rheingold has written that

[T]he political significance of CMC (Computer Mediated Communication) lies in its capacity to challenge the existing political hierarchy's monopoly on powerful communications media, and perhaps revitalize citizen-based democracy... The vision of a

¹ *Id.*

² *Id.*

³ *Id.*

⁴ Kalathil, Dot.com for dictators.

⁵ Nina Hachigian, "China's Cyber-Strategy,"

citizen-designed, citizen-controlled worldwide communications network is a version of technological utopianism that could be called the vision of the ‘electronic agora’.¹

Communities on the Internet are growing and forming their own versions of good behavior and government. A fundamental tenet of these communities is that no one should suppress the viewpoint of a fellow netizen. The remark that “the Internet interprets censorship and routes around it” has been frequently noted.² Interactivity is also an essential component of the Internet, so constant that it becomes almost invisible.³ An additional key feature of the Internet is that it has the ability to explode information onto every user.⁴ The gathering and compiling capabilities of the Internet are such that the flow of information in circulation increases at an exponential rate. Deliberative democracy is based on debate, and is ideally suited to a vast electronic forum. Several critics have noted, however, that the Internet, like democracy, is a product of Western values—and as such might present challenges to nonwestern societies like China that have struggled to preserve different fundamental values.⁵

While BBS’s in China host millions of Chinese expressing themselves (though on politically non-sensitive subjects), some commentators argue that this period of ferment is akin to previous CCP intellectual movements, such as the Hundred Flowers Movement of 1957, in which Mao Zedong introduced a movement to “let a hundred flowers bloom and a hundred schools of thought contend.”⁶ Potentially, they argue, the authorities are using the Internet to create a dragnet for dissidents. The fundamental reorientation of the Chinese economy toward the West and its enthusiasm for developing a consumer society, including e-business, suggests a more permanent readjustment in Chinese attitudes towards things Western.

THE GLOBAL INTERNET FREEDOM ACT: IMPACT ON E-DETERMINIST VIEW

The GIFA promises to “utilize the private sector in the development and implementation of [counter-jamming] technologies, so that the many current technologies used commercially for securing business transactions and providing virtual meeting space can be used to provide democracy and freedom.”⁷ Even if these technologies included aggressive U.S. funding of private hactivist efforts,⁸ the Chinese government can devote vastly greater resources to repair its firewalls and contain and monitor its citizens’ activities. These technologies at present receive paltry funding; even with the GIFA enacted the funding of the Office of Global Internet Freedom would scarcely pose a serious threat to Beijing’s censorship regime. Yet it is the aggregate effect of such measures as the GIFA that can influence development of freedom in China, much the same aggregate effects that some commentators of the Soviet Union’s collapse have attributed to the growth of freedom there.⁹ The medium’s protean nature, in and of itself, makes it an important tool to counterattack and defeat censorship efforts. Electronic mail is also a powerful distributive device, and one that, completely non-uniform, is very difficult to selectively suppress.

The question for both the instrumentalist hardline and the e-Determinist softline approach is: what is the critical threshold of unfettered speech needed to reform the Chinese state from within? The Global Internet Freedom Act is attempting to probe that threshold.

¹ Howard Rheingold, “Visionaries and Convergences: an Accidental History of the Net,” in *The Virtual Community: Surfing the Internet*, available at <http://www.well.com/user/hlr/vcbook/vcbook3.html>.

² D. Gillmor, “*Internet Will Find Way around China’s Censorship*,” *siliconvalley.com*, San Jose Mercury News, November 21, 2001.

³ McMahon, “China’s Internet: A Technology of Freedom?” p. 13.

⁴ Jason Lacharite, *Electronic Decentralisation in China: a Critical Analysis of Internet Filtering Policies in the People’s Republic of China*, 37 AUSTRALIAN JOURNAL OF POLITICAL SCIENCE 333, at 4.

⁵ McMahon, *supra* Note, at 17.

⁶ *Id.* at 23.

⁷ S. 1183 § 3, ¶ 5.

⁸ Murray Hiebert, *supra* Note 99.

⁹ Scholars have identified western influences such as material wealth, rock and roll and music videos, religion, and travel as important components of the breakdown of authoritarian rule in the Soviet Union.

MIDDLE ROAD: CAN CENSORSHIP & FREEDOM COEXIST?

The proponents of the Global Internet Freedom Act believe that the bill signals a continuing commitment by the U.S. to maintain efforts to open China to the free exchange of information and ideas.¹ The bill's advocates call it imperative to capitalize on the medium's leveling quality in encouraging Chinese citizens to disobey their own national laws. This theory is a strand of the interventionist line of thought that has dominated Washington since 9/11, and perhaps before.

Yet this criticism of Chinese Internet policy assumes that Chinese citizens want the government's hands lifted off the flow of information available to citizens to access to and contribute to. China's citizens may prefer to follow the model of Singapore, which exercises even tighter control over Internet forums, if it will mean economic benefits in the short term. Singapore, a wealthy semiauthoritarian city-state, enjoys among the world's highest Internet penetration rates, and boasts a globally respected Internet and Communication Technologies industry.² Singapore has an eCitizen program that is aimed at enhancing government responsiveness and quality of life.³ The ruling People's Action Party keeps a tight regulatory control on opposition viewpoints critical of the government, and uses "inducements" such as defamation suits to silence politically threatening speech.⁴ The established media participates in self-censorship, espousing uncritical views of the government but interested in truthful reporting, since citizens could turn to foreign media if media cover-ups were condoned as in China.⁵

BRIEF FLOWERING OF THE CHINESE PRESS DURING THE SARS CRISIS

Signals that China might be moving toward a truthful but government-friendly press reporting à la Singapore began at the height of the SARS epidemic in late spring of last year.⁶ Hu Jintao, China's new president and Party chief, and Wen Jiabao, the new premier, criticized those responsible for the media cover-up and encouraged free reporting about the disease's spread. Journalists, but not citizens, began to measure and report the true extent of the outbreak. Drastic changes were seen overnight, with numbers of new cases and deaths published daily in the newspapers, on the radio, and on television. Hu Jintao was seen on television visiting hospitals, shopping centers and homes in the cities of Guangzhou, Shenzhen, and Beijing, and saying how worried he was about the outbreak.⁷ The brief censorship thaw proved fleeting, however, as the epidemic evaporated—the government had viewed the unrest caused by SARS—a force beyond their control—and reinstated firm control.⁸ Officials in charge of propaganda began to rein in those whom they believed had gone too far in honest reporting of the outbreak; several newspapers were ordered to close, while some were warned for interviewing a military doctor who wrote to the western media to reveal the true state of the SARS outbreak, for reporting a major corruption case in Shanghai, or discussing any "sensitive" topics, such as political reform and Tibet independence.⁹ People who used SMS short messaging texts on cell phones were also prosecuted.¹⁰

¹ Luciana Lopez, *Anti-jamming Bill Faces Stiff Obstacles; Opponents Call it Unenforceable*, THE WASHINGTON TIMES, Monday, November 4, 2002, quoting an unidentified congressional source.

² Kalathil, *Dot.com for Dictators*, available at www.ceip.org.

³ www.eCitizen.gov.sg

⁴ Kalathil, *Dot.com for Dictators*, supra Note, available at www.ceip.org.

⁵ *Id.*

⁶ Zhang Huchen, Statement to the Commission, Congressional-Executive Commission on China, September 22, 2003, available at www.cecc.gov.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ SMS was the medium for the first reports to spread in the fall of 2002: "There is a fatal flu in Guangzhou." China had more cell phone owners than any other country by 2002.

THE GLOBAL INTERNET FREEDOM ACT: IMPACT ON A MIDDLE ROAD APPROACH

A China that held on to one-party rule but that corrected human rights abuses and permitted free speech would be an extraordinary but welcome result. The GIFA, by authorizing interference with another sovereign country's enforcement of its domestic laws, opens the U.S. to accusations of cultural arrogance and hegemonic philosophy. If an Internet "arms race" were to develop between the U.S. and China, the Chinese government could gain more political legitimacy at home by stoking nationalist fervor and depicting censorship policies as a way to protect the economic successes that China is undeniably achieving. The U.S. interference efforts could, however, succeed in stirring Chinese cyber-dissidents to develop an indigenous movement to fight authoritarian control of the Internet, which resonates with our own American past of developing a democratic society by throwing off imperial domination.

CONCLUSION: THE GLOBAL INTERNET FREEDOM ACT IS RESPONSIBLE ADVOCACY FOR THE SHAPING OF INTERNATIONAL LAW ON THE INTERNET

Benefits from the passage of the GIFA outweigh the risks of potential loss of business partnerships with China, of alienating ordinary Chinese by interfering with sovereign laws, and of contributing to an Information Cold War. As the originators of the technology, the U.S. should stay true to the promise that the Internet originally heralded: true democracy and a government more responsive to its constituents. At the moment, there is no sign of global consensus on what freedom of speech means. In China, freedom of speech is subordinate to her leaders' modernization and unification goals. The long-term interest of the U.S., however, is to ensure the free flow of information in the process of globalization. The citizens of China have a vested interest in foreign countries' actively abetting free speech and fair access to information via the Internet, even if the result is a fracturing of the unity of the totalitarian state. China will never reverse on the road it has taken in embracing "informatization." Greater transparency will eventually result from its first steps on that road. International efforts should be conducted toward attempting to regulate the most egregious types of offensive information on the Internet, such as bomb-making sites and child pornography sites. The impetus the U.S. has gained in generating greater global democracy rights, however, should not be lost through authoritarian government usurpation of a key technology.

**THE CONSTITUTIONAL RIGHT TO HOUSING IN SOUTH AFRICA:
*THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA V. IRENE GROOTBOOM***

BY DANIEL SCHNEIDER*

In May 2000, the Constitutional Court of South Africa, the nation's highest court, was faced with a decision that could potentially change the lives of millions of the country's poorest citizens. The case before the Court stemmed from the situation of the family of Irene Grootboom and 150 neighboring families. These 900 people were among the poorest residents of a town called Wallacedene. Twenty miles north of wealthy and modern Cape Town, Irene Grootboom and her neighbors did not live in a formal town that could be found on any map but, rather, in an informal settlement that, like thousands of other settlements in South Africa, millions of the country's poorest people called home. Such informal settlements were really shantytowns, made up of hastily constructed ramshackle structures densely packed together. Almost all these shacks lacked electricity, running water and even basic sanitation. Diseases such as tuberculosis and HIV/AIDS were common in the settlements, and unemployment often ran over 50 percent. Informal settlements and shantytowns dotted the landscape of South Africa, particularly along highways and in or around the large cities to which people had moved, mostly from rural areas, looking for work that few would find.

When an influx of new residents in 1998 made conditions at their settlement even worse, Irene Grootboom and many of her neighbors—who eventually became known as the Grootboom community—sought to build new homes on adjacent property. Unfortunately, the nearby piece of land to which they moved was privately-owned. Their subsequent eviction, and the way in which it was carried out, sparked a series of events which ultimately brought them and their plight before the Constitutional Court. There, it would be up to the eleven justices of the Court to interpret the terms of South Africa's 1996 constitution which, among its numerous provisions, included two specific sections, contained in the Bill of Rights, guaranteeing everyone the right of access to adequate housing and guaranteeing children the right to shelter. It would be up to the Court to interpret these two constitutional rights, specifically as they related to the Grootboom community. Did they mean that the South African government, struggling to provide basic services and confronted with an overwhelming AIDS epidemic, had an obligation to provide some sort of housing for families who lived in shantytowns? If so, what type of housing was the government obliged to provide?

HOUSING CONDITIONS IN SOUTH AFRICA

After a successful and peaceful transition from apartheid to democratic government, South Africa confronted a number of persistent and serious social problems. Among them was an acute shortage of affordable and decent housing for the county's poorest citizens who lived in appalling conditions. According to the 1996 census, 1,049,686 South African households lived in either informal dwellings/shacks or informal or squatter settlements. (In 2001, South Africa had 10.7 million households,

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and a population of 43 million).¹ More than 3 million households—almost 30 percent—had no electricity.² About 1 million households had no access to flush toilets, pit latrines or bucket latrines.³ Eight million people had no access to clean water.⁴ By 2000, about 220,000 homes needed to be built each year just to keep pace with South Africa’s growing population.⁵

Wallacedene lay on the edge of the Oostenburg municipal area, which itself was on the eastern fringe of the Cape Metro (i.e. the Cape Town metropolitan area) in the Western Cape province. Wallacedene and the other informal settlements in which so many South Africans lived were largely the product of apartheid’s system of influx control that limited African (i.e. black) occupation of urban areas. In 1954, the Western Cape government adopted the “coloured labour preference policy,” which excluded African people in order to give preference to the coloured (i.e. mixed race) community. As a result, in 1962 provision for family housing for Africans in the Cape peninsula was frozen, and in 1968 this freeze was extended to other areas in the Western Cape. Nonetheless, because of what the Constitutional Court called “colonial dispossession,” and a racial distribution of land in rural areas that made African farming increasingly difficult, Africans continued to move into the Western Cape seeking work. Because formal housing was limited, a huge number of people moved into informal settlements throughout the Cape peninsula. According to the Court, a cycle emerged of “untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.” The living conditions in which the Grootboom community found itself were a product of these policies, and the 900 members of the community were only the smallest tip of the iceberg of the current housing crisis.

Goodman Notjohn Lefefe was a typical resident of the Grootboom community. He lived in a two-room shack which he shared with his wife and four young children. The walls of the shack were made of cardboard and were nailed to the occasional two by four forming a simple frame for the house. The roof consisted of corrugated tin sheets and the floor was a tarpaulin covering the packed sand beneath. The shack, like the other 150 shacks in the community, was hastily built on the sports field of a neighboring shantytown. The cardboard, tin roof and tarpaulin offered some protection from the rain, wind and sand, but when the autumn and winter rains and wind came the room flooded, the wind pierced through the walls and the rain leaked through the roof. The bedroom was about seven feet square, and the entire family slept in one bed. Adjacent to the bedroom was a smaller room, also built by Mr. Lufefe, made from the same materials. Here, Mr. Lufefe cooked for his family. Because there was neither electricity nor running water, he cooked, like almost everyone else, with paraffin. Fires were a major hazard, and because the shacks were built so close to one another, in some cases actually touching to form continuous rows of wood and cardboard structures, a fire in one shack would quickly engulf other homes.

Besides the cramped and squalid quarters, the other thing one noticed in Wallacedene were the flies. As Mr. Lufefe spoke, his eight month old daughter slept beside him. A swarm of flies buzzed around and every so often landed on her forehead, but she remained undisturbed. The interviewer interrupted the conversation to point to the flies, and Mr. Lufefe casually shooed them away. The garbage dump lay not far away, and when the wind changed direction the stench became very strong. The sanitation service, such as it was, came infrequently. The dump was sometimes used as a communal—and open—outhouse, for only ten of the twenty communal toilets the government installed for the 900 residents were working. In

¹ “The Economist,” February 24, 2001, “A Survey of South Africa.”

² Ibid.

³ Newsletter of the South African Human Rights Commission, Vol. 2, No. 4, December 2000.

⁴ “The Economist,” February 24, 2001, “A Survey of South Africa.”

⁵ *South Africa Yearbook 1999*, 6th Edition, Government Communication and Information System, Pretoria, page 369.

such close quarters, tuberculosis and cholera were significant health problems, as well as HIV/AIDS. By 2000, one in nine South Africans, and one in four adults (or 4.7 million people), were HIV-positive.¹

According to a 1997 study, about 25 percent of Wallacedene households had no income at all, and more than two thirds earned less than 500 rand per month (about \$65 at the February 2001 exchange rate).² Children constituted about half the population, and all of them lived in shacks. The residents had no water, sewage or refuse removal services, and only five percent of the shacks had electricity.³

Ironically, the area surrounding Wallacedene was one of picture postcard beauty, with verdant and well-tended fields surrounded by jagged mountains. South Africa's famous wine growing region was nearby—much of the seasonal work done by Wallacedene residents, such as Mr. Lufefe's wife, was picking grapes—and beautiful beaches were no further than a thirty minute drive.

THE SOUTH AFRICAN CONSTITUTION

To understand how Ms. Grootboom's and Mr. Lufefe's housing situation became the subject of a lawsuit concerning constitutional rights, one must first turn to South Africa's new constitution, which took effect in 1996. Drafted during lengthy negotiations and modeled in part on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the South African constitution provided for both "negative" rights and "positive" rights. Negative rights (also sometimes referred to as first generation rights) concerned civil and political matters, such as freedom of speech, religion, and the press, and were intended to place limits on state authority and thereby protect individuals from the power of the state. Positive rights (also sometimes referred to as social and economic rights, or second generation rights), on the other hand, were constitutional responsibilities the state had agreed to undertake on behalf of individuals or groups, such as providing health care, education, housing, food, an adequate standard of living and even leisure and vacation. They were not merely a license for the government to act in certain areas, but seemed to constitute an obligation for the state to act in certain areas.

Among human rights experts and advocates, there was profound disagreement regarding the status of economic, social and cultural rights relative to civil and political rights, a disagreement that was reflected during the drafting of the South African constitution. At one end of the spectrum was the view that positive rights were superior to civil and political rights in a hierarchy of values. What good was the right to free speech and to vote, so the reasoning went, if one was starving, homeless and illiterate? The opposing view was that civil and political rights were the only legitimate form of rights, and that socio-economic rights undermined individual freedom, interfered with free markets by justifying massive state intervention in the economy, and provided an excuse to ignore or even violate civil and political rights.⁴ Formally, most countries appeared to regard the two sets of rights equally. As of March 2000, 144 countries were parties to the ICCPR and 142 countries parties to the ICESCR. But in practice, few nations had taken legislative or other steps to realize socio-economic rights, or provided means for

¹ *The New York Times*, March 21, 2001, p. A8.

² All dollar figures are given at the February 2001 dollar-Rand exchange rate.

³ These figures come from a December 1997 needs assessment of the Wallacedene community compiled on behalf of the municipality.

⁴ Authoritarian governments have often used the argument that socio-economic rights should have priority over civil and political rights to rebut complaints from democratic countries that they engaged in human rights violations. For example, for many years China had been able to block a vote on United States sponsored resolutions at the United Nations Commission on Human Rights critical of China's human rights abuses. The reason for China's success in preventing votes on these resolutions was that it "has the support of many developing nations that agree with its assertion that, for less developed countries, priority should be given to economic rights and to rights of sovereignty—that is, noninterference in a country's internal affairs.. *The New York Times*, "A Lost Vote for Human Rights," by Merle Goldman, May 6, 2001, Section 4, p. 15.

individuals or groups to redress alleged violations of these rights¹ Largely for this reason, then, the *Grootboom* case was an international oddity, a rare example of a country that had not only incorporated socio-economic rights into its constitution but had seen these rights form the basis of a prominent lawsuit against the government.

A primary reason few countries had taken steps to enforce socio-economic rights was that they exacted a huge price on the public treasury. While the cost to the government of protecting free speech, for instance, was essentially zero, providing health care for every citizen, for instance, was bound to entail substantial costs. And socio-economic rights raised further complex questions: how much health care (or housing or education) did the constitution demand? Was the extent of the right dependent on how much public funding was available, rising and falling with the level of national income? Were people in wealthy countries, such as Canada, entitled to more of a positive right than people in developing countries, such as South Africa? Surely few would have suggested that poor people were entitled to less free speech than wealthy people. Could socio-economic rights then be considered fundamental and universal?

The relevant constitutional provisions: The Grootboom community claimed that the government's housing policies violated two constitutional provisions, section 26, regarding the right to access to adequate housing, and section 28, regarding the right of children to shelter. Both provisions were part of South Africa's Bill of Rights, and while there was some overlap between them, there were also significant differences. Section 26 provided:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 28 provided, in relevant part:

- (1) Every child has the right—...
 - (c) to basic nutrition, shelter, basic health care services and social services.

There were obvious differences between these provisions. Section 26 applied to “everyone” while section 28 applied to “children.” Section 26 referred to “adequate housing,” section 28 to “shelter.” The difference between “adequate housing” and “shelter” was unclear for nowhere did the constitution define these words. Furthermore, the right to shelter under section 28 appeared to be an unlimited right to the extent that it was not restricted by the state's “available resources,” as was sections 26's right to access to adequate housing. And the absence of language regarding the “progressive realisation of [the] right” seemed to confer an immediacy on section 28's right of children to shelter not present in section 26's right of everyone to access to adequate housing.²

¹ Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford, Oxford University Press, 2000), p. 237-38.

² The right to access to adequate housing and the right to shelter should be seen in the context of other positive rights guaranteed by the South African constitution. Section 24, for example, guarantees everyone the right “to an environment that is not harmful to their health or well-being;” section 27 granted everyone the right to access “to health care services, including reproductive health care,” “sufficient food and water,” and “social security, including ... appropriate social assistance;” section 29 guaranteed everyone the right to a “basic education, including adult basic education;” and section 30 provided that everyone had the right to “use the language and to participate in the cultural life of their choice.”

The justiciability of social and economic rights: The inclusion of social and economic rights in South Africa's constitution did not necessarily mean that such rights would be justiciable. The questions remained whether South Africa's courts would order remedies for violations of these rights and were capable of ensuring that their orders would be obeyed. In many countries, socio-economic rights were meant to be only aspirational, and not legally enforceable. India's constitution, for example, contained what are called "directive principles of state policy," which were meant to be distinct from the "fundamental" (i.e. civil and political) rights that were also part of the constitution. These directive principles provided that public policy should be directed so that all citizens "have the right to an adequate means of livelihood," that material resources be distributed "as best to subserve the common good," that the health of workers was not abused, and that children were given opportunities "to develop in a healthy manner and in conditions of freedom and dignity." Another section, however, stated that the "provisions contained [in the directive principles] shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." Such "directive principles" were also contained in the constitutions of countries as diverse as Ireland, Papua New Guinea and Nigeria.¹

During the drafting of the South African constitution, there was some debate about whether social and economic rights should be included in the constitution and, if so, whether they were intended to be directive principles or justiciable. According to Sandra Liebenburg, by the conclusion of the drafting process it had "clearly" become the intent of the drafters that social and economic rights be justiciable. The idea of Directive Principles, she said, was "explicitly rejected." Besides the experience of apartheid, there were several reasons why the Constitutional Assembly adopted this view. There was, said Liebenburg, the "idealistic" reason: the drafter's rejected any notion of a hierarchy of rights. There was also the "instrumental" reason: if only civil and political rights were included, along with the right to private property, some believed the Bill of Rights could be used by the rich and powerful to protect their rights at the expense of the poor and powerless. Finally, it was thought that socio-economic rights provisions would assist future governments in redistributing resources to the poor.

In September 1996, the Constitutional Court gave its tentative opinion as to the justiciability of socio-economic rights in its Judgment on the Certification of the South African Constitution.² The Court there stated that social and economic rights are, "at least to some extent," justiciable. But what these rights meant in the real world would have to await a case where the Court would need to interpret what remained mere words.

Soobramoney vs. Minister of Health: The Constitutional Court's first opportunity to rule in a case requiring the interpretation of a social or economic right was the case of *Soobramoney vs. Minister of Health*, decided in November 1997. The appellant was a 41-year old diabetic man, suffering from heart disease and kidney failure. He was in the final stages of chronic renal failure, yet his life could be prolonged with regular renal dialysis. Because of a limited number of dialysis machines, the policy of the state hospital from which he sought treatment was that only patients suffering from acute renal failure, which could be treated and remedied by dialysis, were given automatic access to renal dialysis. Patients such as the

¹ Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford, Oxford University Press, 2000), p. 283.

² The certification process was the result of a compromise formulated during the transition period from apartheid to democracy between the white South African government and the liberation movements, particularly the African National Congress. Under the compromise, the Constitutional Court would determine whether the new constitution, to be drafted by a legislature elected by all South Africans, complied with certain guidelines, called Constitutional Principles, agreed upon in advance by the negotiating parties. Unless the Constitutional Court certified that the constitution's provisions complied with the Constitutional Principles, the Constitution would "not be of any force and effect." During the certification process, objections were raised to the socio-economic rights provisions of the constitution. It was in responding to these objections that the Court issued its tentative opinion as to their justiciability.

appellant, who were suffering from chronic and irreversible renal failure, were not automatically admitted to the renal program.

The appellant could not afford treatment at a private hospital, and sought a judicial order directing the state hospital to provide treatment. His application was dismissed, and he tried to appeal to the Constitutional Court, basing his claims on sections 11 and 27(3) of the Constitution. Section 11 provided that “[e]veryone has the right to life,” section 27(3) that “[n]o one may be refused emergency medical treatment.” In its opinion dismissing the appeal, the Court noted that the constitutional provisions regarding access to housing, health care, food, water and social security were “dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources...an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”

Addressing the important issue of the relationship between the judiciary and other branches of government, the Court noted that the funding and spending choices regarding health care services “involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.”

According to Geoff Budlender, when *Soobramoney* was decided many lawyers interpreted it to mean the Court viewed socio-economic rights to be merely aspirational.¹

OVERVIEW OF SOUTH AFRICA’S HOUSING POLICY & BUDGET

South Africa’s national Housing Act, enacted in 1997, provided a framework designed to establish the responsibilities and functions of each sphere of government regarding housing. The housing policy targeted low-income people regardless of race. While most of the funding for housing programs came from the national government, responsibility for implementation was generally given to the provinces which, in turn, assigned implementation of certain functions to local government. The Housing Act defined “housing development” as “the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities” so that all citizens and permanent residents will, over time, have access to permanent residential structures and “potable water, adequate sanitary facilities and domestic energy supply. . .” According to the Constitutional Court, the main thrust of the government’s housing development policy was to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements...The definition of housing development as well as the general principles that are set out do not contemplate the provision of housing that falls short of the definition of housing development in the Act. In other words there is no express provision to facilitate temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition.

Besides national legislation and programs, provinces and other spheres of government enacted and implemented housing laws. For example, in June 1999, recognizing that many residents of the Cape Metro were living in conditions requiring government action different from that encompassed by the national Housing Act, the Cape Metro adopted a program called the “Accelerated Managed Land

¹ Writer interview with Geoff Budlender, February 28, 2001.

Settlement Programme” (AMLSP). This program differed from the national housing program in that it was designed “to assist the metropolitan local councils to manage the settlement of families in crisis.” Its main objective was the rapid release of land for families in crisis, with the progressive upgrading of services.

From 1998-99 to 2000-01, the percentage of the total national budget devoted to housing declined from 2.2 percent to 1.7 percent.¹ By contrast, the percentage of the budget allocated to health and education remained about the same over this time (13 percent to 13.3 percent and 21.6 percent to 20.8 percent, respectively) while defense spending increased from 4.9 percent of the budget to 5.6 percent.²

HOW THE GROOTBOOM CASE DEVELOPED

Like many residents of the Grootboom community, Nomhle Phenduka came to Wallacedene from the more crowded Eastern Cape province to look for work. She arrived in 1998 and found work in the fields, earning one hundred rand per week (about \$13). With additional arrivals, the informal settlement at Wallacedene became increasingly crowded and living conditions further deteriorated. About 900 people moved to an adjacent vacant piece of land, which they eventually called “New Rust.” In her affidavit to the High Court, Irene Grootboom described the living conditions at Wallacedene and the reasons so many moved the short distance to “New Rust:”

My family and I lived with my sister and her husband who have three children. We lived in a small shack, which was approximately 20 square metres in size. The living conditions for me and my common law husband and our child became increasingly unsatisfactory in that the limited space which we had allowed for no privacy. The further applicants...lived with their extended families and in many instances there were three or four families living in structures similar to the one of my sister. Certain applicants lived in an area in Wallacedene that had a water table problem resulting in the areas around such structures always being waterlogged. This situation was not suitable for the health of them and their 20 children and asthma, flu and other illnesses were common...[W]ith the influx of more families to Wallacedene on a weekly to monthly basis . . . overcrowding, disease and pollution escalated. In and during September 1998 a number of applicants including myself decided to move to the vacant land [“New Rust”]...We were very pleased with this move in that we at least had some privacy...[O]ver a period of approximately two months about one hundred to one hundred and fifty families settled at “New Rust.” The name “New Rust” was given because we all saw it as a place where we could have peace and privacy, and it represented a new beginning for us all.

Unfortunately for the Grootboom community, the vacant field to which they had relocated (named Klein Begin, or Small Beginning) was privately owned and, coincidentally, slated for low cost housing development. Not everyone, however, accepted the Grootboom community’s explanation that they moved to “New Rust” because of worsening conditions at Wallacedene. Lionel Esterhuizen, Deputy Director of Settlement and Management, at the Western Cape’s Department of Planning, Local Governance and Housing, said “our information” was that the Grootboom community heard about the planned development and “they went to settle on that property in an effort to get preference or to be housed in the process.” This tactic, known as “queue jumping,” happened quite often, claimed Esterhuizen.³ Whatever the reason, the owners of Klein Begin initiated eviction proceedings under a law which authorized a landlord to evict individuals so long as reasonable steps were taken to provide alternative accommodations. On December 8, 1998, the Grootboom community, which did not have legal counsel, was ordered to vacate New Rust by December 21. After several delays, in April 1999 the

¹ In real terms, the amount allocated to housing in 1998-99 was 4.626 billion rand (about \$600,779,220). In 2000-01, the amount was 4.075 billion rand (about \$529,220,779).

² *South African Yearbook 2000-01*, 7th Edition, Government Communication and Information System, Pretoria.

³ Writer interview with Lionel Esterhuizen, February 15, 2001.

community members attended an eviction proceeding at the Kuilsriver Magistrate's Court. Because they were unrepresented, the magistrate contacted a local attorney, Julian Apollos, and asked him if he would represent the 900 members of the Grootboom community facing eviction.

Apollos met his new clients for the first time outside of the Magistrate's Court. Because of their number—about 100 had arrived for a hearing—he suggested they establish a committee he could consult with to learn the facts of the case. Irene Grootboom was one member of this committee, as was Lucky Gwaza, a 38 year-old man who became a community leader. Apollos told the committee that there was little he could do to prevent the eviction and that all he could do was negotiate for alternative accommodation. “All they wanted,” said Apollos, “was a piece of land where they could have security of tenure, where they could have access to water and basic sanitation and in that way see if they couldn't be incorporated into the large housing program in the country.”¹ His request during negotiations was simple. We were looking for a “vacant piece of land where we could then clearly identify each person's portion in terms of a roughly prepared subdivision which could then at the end of the day be converted to more permanent facilities once the budget allowed for them.” While the request was straightforward, a solution was more complex. The previous year, the municipality of Oostenburg had conducted a study showing no land was available in which to place the Grootboom community.

The eviction. On May 18, 1999, “at the beginning of the cold, windy and rainy Cape winter,” as the Constitutional Court described it, sheriffs and police arrived at the “New Rust” shantytown while many of the residents were at work to evict the tenants from their shacks. The municipality paid for the eviction, a fact that probably was of no help to them in later litigation. The eviction was a surprise to most of the residents, who believed that negotiations for other accommodations were still taking place. Nohmle Phenduka recalled the eviction:

The time they bulldoze it, I was not there—at work in the farms. When they come back later, I find my house is not there and, also, my clothes inside. There's nothing for me. And then we come back here on the sports field. We make a big scene.²

In the words of the Constitutional Court, the eviction was “done prematurely and inhumanely: reminiscent of apartheid-style evictions.” Many people returned from work to find their homes bulldozed and their possessions burned. Salvaging what they could, the Grootboom community moved to the nearby Wallacedene sports field, using plastic sheeting to try to protect themselves from the winter rains. The day after the eviction, Apollos wrote to the municipality describing the living conditions of his clients and requesting the municipality provide temporary accommodations. The municipality replied about ten days later, stating that it had supplied food and shelter at the Wallacedene community hall, and had approached the Western Cape government for assistance. Because the community hall could only house eighty people, and because he was generally unsatisfied with the municipality's response, on May 31, 1999—thirteen days after the eviction—Apollos filed an “urgent” application with the Cape of Good Hope High Court.³

The High Court. On May 31, 1999, Apollos, joined by two advocates,⁴ Alain Musikanth and Ismael Jamie, filed their “urgent” application in the Cape of Good Hope High Court on behalf of the

¹ Writer interview with Julian Apollos, February 12, 2001.

² Writer interview with Nohmle Phenduka, February 13, 2001.

³ An urgent application was a legal proceeding in which the party filing the motion (the applicant) did not have to provide as much notice to the opposing party (the respondent) as in typical court applications.

⁴ South Africa's legal system had two types of lawyers, attorneys and advocates, a distinction corresponding to that made in England between solicitors and barristers. Clients generally first consulted an attorney if they had a legal problem. If the matter was complex, or was headed for litigation, the attorney would then “instruct” – or brief – an advocate. Generally, advocates were lawyers who furnished legal opinions and specialized in litigation. Assisted by attorneys, advocates argued cases in South Africa's

Grootboom community, now known as the applicants (i.e. plaintiffs). The applicants consisted of 390 adults and 510 children, of whom 276 were younger than eight years old. The lawyers decided to bring suit against all levels of government (known as the respondents, i.e. defendants): The Oostenburg municipality, the Cape Metropolitan Council, the Western Cape Province, the National Housing Board, and the Republic of South Africa. The three lawyers thought their stronger argument rested upon section 28, reasoning that the plight of children would elicit greater sympathy from the court. But there was a problem with section 28—it only pertained to the rights of children, and was not the basis for relief for the adults. Yet they hoped that in interpreting the right of children to shelter, the court would not ignore the parents. According to Apollos, “We, I think, rather cleverly thought if we use the kids as pawns we will ultimately get to the extension of the rights as far as the parents are concerned as well.”

Before argument, the Grootboom community’s lawyers asked the court to conduct an inspection of the sports field. On June 4, 1999 the court issued its interim order. Pending a final determination of the application, temporary accommodation would be provided to all the children and to one parent of each child requiring supervision. The rest of the community remained on the sports field, pending the High Court’s decision.

On December 17, 1999, in an opinion written by Judge Dennis Davis, the High Court issued its opinion. Under section 28 the Grootboom children were entitled to be provided with shelter “by the appropriate organ or department of state,” and that “parents are entitled to be accommodated with their children” in the shelter. The court did provide some specificity as to the nature of the shelter required: “tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.” As to section 26, however, the court held that the applicants failed to make out a case for housing, and noted that the government had produced clear evidence that a “rational” housing program had been initiated at all levels of government. The opinion interpreted *Soobramoney* as cautioning “against an excessively generous approach to [socio-economic] rights” and as emphasizing the “need for deference to the legislature and the executive in these matters.”

The Constitutional Court. The government’s attorneys advised their clients to appeal the decision to the Constitutional Court. “The judgment had too much of a great import on the way resources were being spent in the province. They needed some finality. They needed to know . . . whether they would have to reallocate budgets,” explained Nazrene Bawa, one of the advocates for the government.¹ But having been vindicated on their section 26 claim, the government only appealed the section 28 ruling. (The Grootboom community lawyers decided not to cross-appeal on section 26). The Constitutional Court agreed to hear the case.

After leave to appeal had been granted by the Constitutional Court, the South African Human Rights Commission² and the Community Law Centre (CLC) of the University of the Western Cape applied to the Court to be admitted as *amici curiae* (“friends of the court”), allowing them to present arguments to the Court. After the Court granted the application, the CLC and the Human Rights Commission asked the Legal Resources Centre, a public interest law firm based in Johannesburg, to argue the case on their behalf as *amici*. Geoff Budlender, of the Legal Resources Centre, wrote the *amici* brief and appeared before the Court for oral argument. Unlike the briefs of the government and the Grootboom community,

upper courts: the various High Courts, the Supreme Court of Appeal and the Constitutional Court. Advocates represented any party to a case, private or public, including the national and provincial governments in litigation before the higher courts.

¹ Writer interview with Nazrene Bawa, February 11, 2001.

² The South African Human Rights Commission (HRC) was created by the constitution to promote and protect human rights in South Africa and monitor and assess their observance. Although an independent governmental organization, the HRC was funded by the Department of Justice and each year, pursuant to section 184(3) of the constitution, it required relevant organs of the state to provide it with information on “measures they have taken towards the realisation” of the constitution’s socio-economic rights. The HRC would then submit a report to Parliament.

Budlender's brief focused on section 26, which neither of the parties had appealed. His written and oral arguments were to have a significant impact on the Court's opinion.

The eleven justices of the Constitutional Court heard oral argument from May 11–13, 2000.¹ The government was prepared to argue about the meaning of section 28. But as Nazrene Bawa recalled, when oral argument commenced “we immediately realized...the Court was not interested in section 28. They wanted section 26.” The government's lead advocate therefore had to argue section 26 “on his feet.”

THE ARGUMENTS BEFORE THE COURT

In both their oral and written arguments to the Constitutional Court, the parties raised a number of issues that were both unique to the facts of the Grootboom case and were typical of the kinds of issues raised in any dispute concerning socio-economic rights.

(i) Justiciability: The government argued that while the right of access to housing was not aspirational, it was imperfectly justiciable. In their briefs, neither the Grootboom attorneys nor *amici* addressed the issue of justiciability, perhaps believing that the question had been settled during the certification proceedings.

(ii) International Law: On several occasions the Grootboom lawyers relied upon international authority to bolster their claims. For example, the *amici* argued that because South Africa does not have a “comprehensive and well-established jurisprudence on the meaning of the rights” involved in this case, it “becomes all the more necessary to obtain guidance from international law and agreements, and authoritative materials which explain them.” Such guidance could be found in the ICESCR, “clearly” the model for the socio-economic rights of the South African constitution. The *amici* also asserted that Comment 3 of the UN Committee on Social and Economic Rights required “the prioritisation of the needs of vulnerable members of society, and social groups living in unfavourable conditions,” and that focusing on the most vulnerable was the “appropriate approach” to interpreting the term “progressive realisation.”²

(iii) Civil and Political Rights versus Socio-economic Rights: The *amici's* brief began with a justification for elevating socio-economic rights, at least for the poor, above traditional political rights. Quoting a 1988 *Ottawa Law Review* article, the brief stated:

It is important to realize that the traditional distinction between classical and social rights is one which operates in fact to discriminate against the poor. To be in a position to complain about state interference with rights, one has to exercise and enjoy them. But . . . without access to adequate food, housing, income and medical care, it is impossible to benefit from many of the more traditional human rights guarantees. The observation also bears repeating that there is a significant difference between the judicial intervention called for by the rich and by the poor: “where the wealthy invariably want the courts to strike down actions the other branches have taken, the disadvantaged often ask the courts to take actions the other branches have decided not to take.”

¹ At the commencement of oral argument, the government offered to address some of the conditions in which the Grootboom community was living, not as a concession to their arguments but, as the Court described, “in the interests of humanity and pragmatism.” The Western Cape Province and the Oostenburg Municipality offered to provide the community with temporary accommodation on the Wallacedene sports field until they could be housed pursuant to housing programs available to the local authority. “Temporary accommodation” meant a marked off site, provision for temporary, waterproof structures, basic sanitation and water and refuse services. The community accepted the offer. But four months after this offer was made, the Grootboom community attorneys filed an urgent application with the Constitutional Court claiming that the government had failed to comply with the terms of its offer. Just before the matter was set for argument, the Court drafted an order that the municipality provide certain rudimentary services.

² The Committee on Economic, Social and Cultural Rights was established by the UN in 1987 to monitor compliance of state parties with their obligations under the ICESCR. Based on reports that the parties periodically filed, the Committee, which consisted of eighteen independent experts, adopted “concluding observations” and “general comments.”

(iv) Deference to the Legislature and Executive: One of the major objections in principle to socio-economic rights is that the legislative and executive branches, and not the courts, should make policy and budgetary choices concerning the provision for social and economic programs. In the Grootboom litigation, this issue became a dispute over the degree of deference courts should accord to the legislative and executive branches in designing, funding and implementing the government's housing programs.

When preparing the government's brief for the High Court, Nazrene Bawa thought that all "we had to put up was a case for justification [of the government's housing policy] and that was it." Her optimism was based upon the government's existing housing program, to which she expected the courts to show considerable deference. "The state was not shirking its responsibilities. There was just an insufficient amount of resources to go around to do everything at the same time. That's what made us think that the court would rule in our favor." Accordingly, the government noted its well-organized housing plan and tried to demonstrate that its housing policy was reasonable. So long as the government authorities could demonstrate a plan or program designed to give effect to the right to housing, the attorneys reasoned, courts should not second guess a program that was rationally conceived and implemented.

Deference was also a concern of Geoff Budlender.¹ In particular, he was concerned that under the High Court's reasoning, the government merely had to show the existence of a program concerning implementation of that right. He was also worried that since the language of the other socio-economic rights in the constitution was essentially the same as the language of section 26, the precedent of the High Court's decision reached beyond the right to housing. Not surprisingly, Budlender had a different view than the High Court on the issue of deference and quoted a General Comment of the UN Committee on Economic, Social and Cultural Rights to support his view:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competencies of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

In determining the degree of deference to be accorded by the judiciary, the *amici* suggested courts should consider several factors. One was the nature of the interest. *Amici* argued that the right to housing or shelter is a "fundamental" interest; the more fundamental the interest affected, the less deference courts should give legislatures. Another factor was the vulnerability of the group affected. Children had "no vote, and no voice;" the poor were "marginalized" and powerless. The *amici* quoted the legal scholar John Hart Ely; those whose rights need particular protection by the courts are "those groups in society to whose needs and wishes elected officials have no apparent interest in attending." Another consideration was the complexity of the issues. Here, the best argument *amici* could put forth was that the government had not provided information showing the cost of implementation of the right to housing, as interpreted by the High Court, and "it has a duty to provide this information if it wishes the Court to show deference on this ground." Another consideration was the source of the rule or decision. *Amici* argued that in this case legislation was not being reviewed, but rather a decision "made by an unidentified person, at an unidentified time, through an unidentified process, not to provide shelter or other basic housing to children and other homeless people in need." All these factors, *amici* concluded—with the possible

¹ His concern was well grounded. In its opinion, the High Court accepted at least to some extent the government's deference argument. The opinion stated that *Soobramoney* emphasized "the need for deference to the legislature and the executive in these matters." The court quoted Constitutional Court Justice Albie Sachs' concurring opinion in that case: "Unfortunately the resources are limited and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonizing choices that have to be made."

exception of complexity—militated towards less rather than more judicial deference to the government’s housing policy.

The *amici* distinguished the Grootboom situation from that in *Soobramoney*. In this instance, they contended, it seemed likely that there was a failure to do anything, an omission by default. By contrast, the medical decision in *Soobramoney* was a considered policy decision involving a thoughtful balancing of interests, and it was clear who made the decision and how and why it was made.

(v) Cost: Because the government tried to take advantage of the presumed cost of giving effect to the High Court’s ruling—“the entire housing budget would be swallowed not only by the provision of temporary shelter...but also by the maintenance of these shelters and the services required to be provided”—the *amici* devoted considerable effort to rebutting cost as a relevant factor. Their first response was that the government neither knew nor had taken the trouble to determine the cost of implementing the High Court’s order. They also claimed that cost and budgetary restraints were only relevant to the question of remedy and were not a guide to interpreting the right of children to shelter. In any case, the relief the High Court ordered was “anything but extravagant, and was at the lower end of the spectrum of possible meanings.”

(vi) Government’s Efforts to Address the Housing Crisis: *Amici* contended that the government’s housing program—which they referred to as a “one size fits all” approach because it sought to meet the housing needs of all who were inadequately housed—was unconstitutional because it did not give special attention to the rights of children, and failed to distinguish between “shelter” and “adequate housing,” focusing all of its efforts on the latter. They also argued that the government’s program was flawed because it discriminated against people classified as “African” who had to wait on a housing waiting list from which, until 1994, they were excluded because of their race. The program was also irrational in that length of time on a waiting list, rather than priority, was used to determine priority for housing.

Nazrene Bawa was unconcerned, from a legal point of view, that the government’s policy was tilted toward longer-term housing needs at the expense of short-term and emergency housing needs. “It was a question of how we needed to rationally and reasonably ascertain how we were going to divide limited resources to provide housing and shelter. The hardest problem to take care of is the short-term problem, because you don’t want hundreds and thousands of short-term shelters to be mushrooming throughout the country, because you don’t want all your resources to be directed to a second year of short-term problems. Now this sounds really harsh, unsympathetic and insensitive to those who sleep under the stars and don’t have any shelter, because you’re talking about the difference between a . . . house that’s going to stand for twenty years and one that’s basically just looking for a cover from the elements. How do you balance those needs?”

CONCLUSION

There were essentially four possible outcomes of the *Grootboom* case. First, the Constitutional Court could reject the community’s claims by ruling that socio-economic rights were not legally enforceable and were, as in India, aspirational only. Second, the Court could decide that the constitution’s rights to housing and shelter, and by implication other socio-economic rights, were justiciable but give almost complete deference to the government’s housing policies and in effect deny any relief to the Grootboom community. Third, the Court could find that the government’s housing policies violated the constitutional rights of the Grootboom community and order the government to remedy the situation, but not specify the nature of the remedy, particularly what the government had to do to give effect to the right to housing and when they had to do it. Fourth, the Court could find that the government’s housing policies violated the constitutional rights of the Grootboom community and then go on to describe in detail the type of housing the government had to provide, to whom, and by when.

In the summer of 2000, after oral argument was presented, the Grootboom community, the lawyers, the housing authorities, and human rights advocates in South Africa and beyond awaited the Constitutional Court's decision with a mixture of hopefulness, uncertainty and anxiety.

**THE CONSTITUTIONAL RIGHT TO HOUSING IN SOUTH AFRICA:
*THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA VS. IRENE GROOTBOOM***

SEQUEL

On October 4, 2000, five months after hearing oral argument, the South African Constitutional Court handed down its unanimous opinion in the case of *The Government of the Republic of South Africa vs. Irene Grootboom and others*. The Court interpreted neither section 26 of the constitution, pertaining to the right to access to adequate housing, nor section 28, pertaining to the right of children to shelter, as entitling the Grootboom community to housing upon demand. However, the Court held that section 26 obliged the state "to devise and implement a coherent, co-ordinated programme" designed to satisfy its section 26 obligations. The opinion did not specify what these obligations were, but stated that the program adopted and in force in the Cape Metro fell short of these obligations in that it did not provide any relief for those desperately in need of access to housing. The Court ordered that the state's housing program must include reasonable measures "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations." The order suggested that reasonable measures would include those "contemplated" by the Accelerated Managed Land Settlement Program, which was adopted in June 1999 by the Cape Metro government to rapidly make land available to families in crisis, and then to progressively upgrade services. The Court also ordered the Human Rights Commission (HRC) to monitor and, if necessary, report to the Court on the state's efforts to comply with its section 26 obligations.

As to the section 28 claim, the Court held that the High Court erred in ruling that the state was obliged to provide shelter to the Grootboom community children and, through them, their parents. The Court was concerned that children could become steppingstones to housing for their parents instead of being valued for who they were.

SPECIFIC ISSUES

The Court's opinion addressed several of the specific issues raised by the parties at oral argument and in their briefs.

Justiciability: The Constitutional Court rejected the government's claim that the right to access to housing was imperfectly justiciable, and stated that the issue of justiciability had been put beyond question by the text of the Constitution and the certification judgment. "The question," the Court stated, "is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis."

International Law: As to the relevance of international law in resolving the issues before it, the Constitutional Court suggested that even international treaties to which South Africa was not a party could be a guide in interpreting the constitution. For example, the Court noted that the phrase "progressive realisation of the right," used in section 26 and other socio-economic rights provisions of the South African constitution, was derived from international law, and Article 2.1 of the ICESCR in particular. The Court agreed with the meaning given to this phrase by the UN Committee on Economic, Social and Cultural Rights: "to move as expeditiously and effectively as possible." In addition, because the brief for *amici* argued that the ICESCR was significant in understanding the socio-economic rights of

South Africa's constitution, the Court compared the Covenant's housing provision to section 26, and highlighted two differences: the ICESCR provided for a "right to adequate housing;" section 26 provided for the "right of access to adequate housing." The Covenant obliged parties to take "appropriate" steps, which had to include legislation; section 26 mandated that the South African state take "reasonable" legislative and other measures. The Court also took note of a section of the 1990 Report of the UN Committee on Economic, Social and Cultural Rights, which it interpreted to mean that parties to the Covenant were required to fulfill a minimum core obligation by achieving a minimum essential level of socio-economic rights, including the right to adequate housing. However, the Court pointed out that the Comment did not precisely specify what the minimum core was and the justices did not take the opportunity to offer its own definition of the term.

Civil and Political Rights versus Socio-economic rights: The Constitutional Court did not adopt *amici's* view that socio-economic rights should be placed above civil and political rights, but instead recognized the interconnectedness between the two sets of rights. "There can be no doubt," the opinion stated, "that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential." The inclusion in the Constitution of socio-economic rights, the Court said, must be understood as the product of apartheid, and of a society with great disparities of wealth, with millions living in great poverty, high unemployment and inadequate social security.

PERCEPTIONS & RESPONSES

Because of the vagueness of the Constitutional Court's opinion, there was both disagreement and uncertainty about what it meant, particularly concerning three fundamental questions. First, what exactly was the remedy the Court ordered? Second, who was to provide this remedy? Third, who was to receive this remedy?

What was the remedy? There was substantial disagreement and uncertainty among the lawyers, the Grootboom community and various government officials concerning the remedy the Court actually ordered. Specifically, what type of housing did the Court have in mind for those who lived in crisis situations or intolerable conditions? The divergence of opinions was striking. Magdalene May and her family probably had the sturdiest accommodations of any residents of the Grootboom community. With her husband and three children, they lived in an old trailer her husband's boss lent them. They had neither running water nor electricity. As a result of the Court's ruling, she believed her family was entitled to a four or five room house, made of stone or bricks, with corrugated sheet roofing. There would be running water, a toilet and electricity.¹ Bulelway Mabodla, who lived in a two-room shack with her husband and two children, said the government was required to build a brick house, which "must have some doors and windows and some water, and a toilet, and overhead must be the roof [made of metal sheets], and the floor must be" made of cement. There would be running water and electricity.² Goodman Notjohn Lufefe believed the government had to provide him and his family with a four-room brick house with a corrugated tin roof, windows, a toilet and running water.³ Nomhle Phenduka described a similar house she believed the municipality was required to build for her family: four rooms, brick walls, sheet roof, electricity, running water and a toilet.⁴ Lucky Gwaza, the community leader, said the opinion meant the government had to provide each household with a small brick house,

¹ Writer interview with Magdalene May, February 13, 2001.

² Writer interview with Bulelway Mabodla, February 13, 2001.

³ Writer interview with Goodman Notjohn Lufefe, February 13, 2001.

⁴ Writer interview with Nomhle Phenduka, February 13, 2001.

about four rooms, with sheet roofing, a cement floor, running water, a toilet and electricity. When asked where he got the idea for such a house, he replied the houses the government had built for a neighboring community, Scottsdale.¹

Other people who had been involved in the *Grootboom* case offered different, and more rudimentary, descriptions of the remedy the Court ordered. Their lawyer throughout the case, Julian Apollos, thought his clients had to be given “minimal privacy,” by which he meant a house of about 20 square meters consisting of one room for parents, another for their children and a small dining and lounge area. There would be running water, “ablution facilities,” and electricity. His model was based upon the housing that has been constructed under the government’s Reconstruction and Development Program.² Alain Musikanth, another of the community’s attorneys, described a more rudimentary structure: “I would imagine a tent or tarpaulin and corrugated iron roof and/or walls, sufficient basic materials to withstand the elements but not necessarily as permanent as brick and mortar.” The community must also have access to toilets and running water, but not their own toilet and running water.³ Nazrene Bawa, one of the government’s attorneys, described something even more basic: communal access to water and toilets, and protection from the elements. Asked to specify what protection from the elements meant, she replied, “It’s a million dollar question, that one. We don’t want you living in a site whereby you are soaked to the bone by the rain and the wind to the point of where your children get ill. . .A roof [means] a variety of things from whatever the state can provide at a given time. . .Probably zinc, not cardboard” is minimally required.⁴

Richard Thatcher, Director, Framework Legislation, at the national Department of Housing, believed the Court order required at least a permanent and complete shelter from the elements, although it need not be constructed of bricks and mortar. A slab floor, perhaps of poured concrete, would be sufficient. There had to be refuse removal and sewage disposal and running water for approximately every six houses, although electricity was not required.⁵ In the opinion of Charlotte McClain, the HRC’s Commissioner of Social and Economic Rights, the core content of the right to housing consisted of rudimentary shelter, a sheet metal roof, a concrete base, communal running water, communal toilets and electricity.⁶

Justice Goldstone did not think it was the Court’s role to provide greater specificity as to what was required. “That’s not the business of the Court. . .We haven’t given any direction as to how it could be done. And we haven’t talked about houses. It may not be a house. It may be a temporary accommodation. . . It just seems that it’s inappropriate for a court to get involved in the nitty gritty, firstly, on any interpretation of separation of powers. It’s not the work of the Court. And secondly, we don’t have that sort of information, nor should we.”⁷ But to Judge Davis of the High Court, the lack of guidance from the Constitutional Court created problems not only for the executive branch but also the courts because “when the next case comes, what am I supposed to do?”⁸

Because the Court ordered the Human Rights Commission to monitor the state’s efforts to comply with its sections 26 obligations,⁹ the Commission certainly had a primary role in determining what the remedy actually would be. Monitoring compliance would be difficult inasmuch as “the order is not clear as to what the Court believes must happen, how the Court believes the rights have to be realized,” said Victor

¹ Writer interview with Lucky Gwaza, February 13, 2001.

² Writer interview with Julian Apollos, February 14, 2001.

³ Writer interview with Alain Musikanth, February 15, 2001.

⁴ Writer interview with Nazrene Bawa, February 11, 2001.

⁵ Writer interview with Richard Thatcher, February 15, 2001.

⁶ Writer interview with Charlotte McClain, February 28, 2001.

⁷ Writer interview with Justice Richard Goldstone, February 11, 2001.

⁸ Writer interview with Judge Dennis Davis, February 15, 2001.

⁹ The HRC’s authority to perform this function came from section 184(1)(c) of the Constitution, which stated that the Commission must “monitor and assess the observance of human rights in the Republic.”

Southwell, Provincial Coordinator of the HRC in Cape Town.¹ He believed the order was “deliberately vague,” but at a minimum compliance would be along the lines of the Accelerated Managed Land Settlement Program. Despite the lack of guidance from the Court, the HRC planned to formulate compliance criteria and then present them to the housing authorities. Southwell hoped that through negotiation, the HRC and housing authorities would agree on the criteria.

While the Court’s order was certainly vague—“deliberately” according to Southwell, and “wisely,” according to Thatcher—it was clear that it was directed to those in most “desperate need.” Although Southwell expected the HRC to help determine who those people were, because the Commission’s resources were so limited its role in this regard would probably be largely “reactive.” The Commission would need to be “alerted” to a situation in which the need was be great, he said, and then it could investigate. Southwell was unable to even venture a guess as to how many people in the Western Cape were in desperate need, but the numbers were certainly substantial. “I would think that the people who are living in the squatter camps around the airport are in as desperate a situation as the Grootboom community, and we are talking about tens of thousands of people there.”

Who was to provide the remedy? One of the most important features of the Constitutional Court’s order is that it was directed to the “state,” and specified neither the government department nor the sphere of government—national, provincial or local—that was subject to the order to “devise and implement ... a comprehensive and coordinated programme.” Nonetheless, the opinion and order required a response, of some kind, from the housing authorities.

Soon after the decision was handed down, a small in-house task team at the national Department of Housing was created to prepare an internal report on the meaning of *Grootboom*. The Task Team preliminarily concluded that there was a need for new laws and regulations to deal with people like the Grootboom community, namely those who had been affected by dire emergencies, such as floods, and those who were totally destitute and without any shelter. The existing laws did not provide for such people.

According to Thatcher, the Court wisely refrained from pointing a finger at the housing departments, whether national, provincial or local. The finger was pointed at the state, not a particular department, and any solution would need to be shared among all levels of government and the various ministries. Indeed, he expected that the task team would meet with other departments of government as well as officials from the local and municipal levels of government.

Thatcher expected that providing for people living in emergency situations would require reallocating existing budgets. In fact, a certain percentage of those budgets would have to be set aside for those living in emergency situations. As for the Grootboom community itself, the task team did not draft a plan concerning their predicament. A solution to their problem, Thatcher said, was primarily the responsibility of the municipality.

In contrast to Richard Thatcher, Lionel Esterhuizen of the Western Cape Department of Planning, Local Government and Housing believed that the *Grootboom* judgment did not require the housing authorities to change their practices and priorities. “I think we have a sound system in terms of housing,” he said. The Court order confirmed “what we believe our obligations and our responsibilities are in terms of the Constitution. That is to provide housing on a progressive scale ... You have to do it ... according to our resources available to us at a given time, and we do it progressively.”² He did believe, however, that as a

¹ Writer interview with Victor Southwell, February 12, 2001

² Writer interview with Lionel Esterhuizen, February 15, 2001.

result of the opinion his department would have to realign its priorities, perhaps by “fast tracking areas like Wallacedene.”

Esterhuizen did not believe that any party emerged victorious in the *Grootboom* case. The community, he believed, still had to get itself on a waiting list for housing, otherwise people would be encouraged to invade property in order to get priority treatment from the local housing authorities. “The moment we give priority to the Grootboom people,” he said, “then the rest of Wallacedene will go into a riot because they were sitting there and they weren’t given the same treatment. So that is why our position was that we can’t, under no [sic] circumstances can we give priority in the sense that we will make land available, we will give money for services and so on to the Grootboom people in isolation. . . . T]hey have to become part of the Wallacedene community as a whole.” Esterhuizen said that in the Cape Metro area about 220,000 families required some kind of housing assistance. Nevertheless, the budget allocation for housing from the national government to the Western Cape was to be reduced in the fiscal year beginning April 1, 2001 from 350 million rand (about \$45.5 million, at the February 2001 exchange rate) to somewhere under 300 million rand because housing needs were greater elsewhere.

Who was to receive the remedy? Neither the Court’s opinion nor order mentioned any form of relief to be specifically provided to the Grootboom community. A legitimate question, therefore, was whether the government needed to do anything at all for the Grootboom community in order to comply with the order? Justice Goldstone believed that the government could comply with the order without addressing the needs of the Grootboom community. He explained that “unfortunately, it happens not infrequently in constitutional cases that people who come to court end up winning their case and getting no relief.” But it may be that, as Judge Davis and Alain Musikanth believed, the Court order did not mention the Grootboom community because, in the Court’s view the agreement announced at oral argument provided the residents with everything to which they were constitutionally entitled.

While the opinion did refer to people living in crisis situations or intolerable conditions, it did not identify those people or describe the conditions that would amount to a crisis. Determining which people lived in crisis situations would be difficult. Because many homeless people, said Thatcher, had their “ears close to the ground,” they could determine when a certain piece of land had been earmarked for future residential development for the poor. They could then move onto that land, that is, jump the queue. The land to which they had relocated would probably have better services since drainage, water, electricity and roads would have been provided in anticipation of future development. Those who were queue jumpers, said Thatcher, should not be included in the definition of people living in “dire emergencies.” (Unlike Esterhuizen, Thatcher did not think the Grootboom community jumped the queue).

CONSEQUENCES OF THE *GROOTBOOM* OPINION.

The *Grootboom* opinion had significant consequences for the Grootboom community—at least as far as their expectations had been affected—the housing authorities, and the HRC. But the opinion also had consequences for at least three other groups: government social service agencies, public interest lawyers, and those in other countries concerned with socio-economic rights.

Justice Goldstone thought the opinion sent a message to decision makers in the housing, health care, social security and other social service agencies to devote a certain percentage of their budgets to South Africa’s poorest. As to the actual implications the decision would have on social service agencies, Judge Davis offered a cautious assessment. “Well, it depends on whether they take these rights seriously or not. If, for example, they’re held accountable to these judgments, then in my view it’s going to have a very significant bearing on it. . . .and I think a good bearing. It means they’re either going to have to ask for more money from the Minister of Finance. They might not get it and they’re going to have to spend their money more efficiently. So this has a disciplining effect, a kind of framework-type effect on government.”

Nazrene Bawa believed the judgment would resonate throughout the government. Sometimes “the Court makes rulings which effect one department, and another department won’t even be aware of it. [But *Grootboom*] is the one decision that everybody is aware of.”

The judgment may have offered significant encouragement to public interest lawyers. Justice Goldstone believed it would encourage public interest lawyers representing the poor to bring additional lawsuits, and viewed the decision as signaling an opportunity to “imaginative lawyers” that the area of socio-economic rights “can and should be taken further.” He hoped the “Legal Resources Centre and the Human Rights Commission and generally civil rights lawyers are going to run with it. I think we’re giving them the ball.” Alain Musikanth believed that the opinion “provides fertile ground for further litigation” for NGOs and legal activists. Judge Davis, however, worried that there are “too few public law agencies doing this sort of stuff.”

Any impact the *Grootboom* opinion has on socio-economic rights advocates in other countries may not be felt for years. But in the months after the opinion was handed down, Nazrene Bawa received fifteen requests from all over the world for the judgment and various papers filed in connection with the case. “It’s one of a kind,” she said. “In my own research, I haven’t encountered a similar decision in any of the Commonwealth of foreign jurisprudence, despite having spent weeks searching when we did our preparation for this case.” Justice Goldstone thought the case would have a wide impact because of its uniqueness. It “is the first building block in creating a jurisprudence of socio-economic rights.” He was confident the opinion would be influential in other countries, including India, Namibia, developing and European countries, whose constitutions included socio-economic rights provisions. “There’s more and more interest in comparative constitutional law. . . The South African decisions are being looked at and used and commented upon more and more.”

CONCLUSION

The *Grootboom* case is about more than socio-economic rights. It is about a country with limited financial resources attempting to make a transition from an authoritarian form of government to a democratic government responsive to the needs of all its citizens. Justice Goldstone put the matter well: “One of the concerns I have is the huge cost of running a democracy. It’s a very expensive form of government, as South Africa is learning. I don’t think there are that many developing countries, certainly not in Africa, who will be able to afford all the democratic institutions that we are having to support in this country.” After the Constitutional Court’s announced its decision, the *Grootboom* community thought the battle had been won. They believed they would receive the fruits of their victory soon, in a matter of months. They would surely be disappointed, for even if they obtained some type of improved housing from the government it would take more than a few months for them to get it and they would certainly not receive the type of house they were expecting. Many difficult decisions and choices lay ahead, and those decisions would be made by elected politicians and unelected civil servants acting under severe budgetary constraints, with numerous urgent social problems competing for attention, and with what guidance they could discern from the *Grootboom* opinion.

THE LEADERSHIP ROLE OF PALESTINIAN NON-GOVERNMENTAL ORGANIZATIONS: MANAGING CHAOS, CREATING CIVIL SOCIETY¹

BY ALTA SCHWARTZ*

INTRODUCTION

“If the people will lead, the leaders will follow.” This cliché appropriately describes the evolution and present condition of Palestinian Non-Governmental Organizations (PNGOs). This paper draws on meetings with eighteen PNGO leaders,² interviews with two American Palestinian nonprofit leaders in America, journal articles, books, and PNGO and official Palestinian National Authority (PNA) websites to trace the history of PNGOs, outlines the current situation, and presents suggestions for PNGO improvements and future research.

THE PALESTINIAN CONTEXT

The evolution of PNGOs is an interesting case study due to the unique political history of the region. Despite a succession of conquering empires, historical Palestine often existed under a state of natural law governing much of the civil society. Although the Ottoman Empire ruled the area currently known as Israel and the Palestinian Territories for centuries, this area maintained a relative degree of local autonomy. After the fall of the Ottomans during World War I, the Arab population expected (and was promised) the establishment of an Arab nation. Instead the British maintained rule during the Mandate

¹ The author offers the following references:

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http://www.pchrgaza.org/files/Reports/English/medical_1.htm [March 8, 2004]

The Palestinian Initiative for the Promotion of Global Dialogue and Democracy (MIFTA). [Online]

<http://www.pcbs.org/urgent/israeli/htm> [March 5, 2004].

The Palestinian National Authority (PNA). (2003) [Online] Available:

<http://www.pna.org/> and http://www.mongoa.gov.ps/info/law1_2000.html [December 7, 2003].

The Palestinian NGO Project. (2003) [Online] Available: <http://www.pngo-project.org/> [December 8, 2003].

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Tessler, Mark. *A History of the Israeli-Palestinian Conflict*. Bloomington and Indianapolis, Indiana: Indiana University Press, 1994.

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² Delegation of the Fellowship of Reconciliation (FOR), August 5-17, 2003. The delegation met with Israeli, Palestinian, and joint Israeli-Palestinian organizations. This paper draws only upon meetings with PNGO leaders, although it should be noted that cooperation with Israeli NGOs is part of the context of PNGO leadership. For more information on the delegations, please visit <http://www.forusa.org/Programs/IPB/default.html>.

period (1922–1948),¹ until the declaration of the state of Israel in 1948. Thus, historic Palestine was characterized by a system most closely resembling one of natural law, with the possible exceptions of parts of the British mandate period and some areas of the West Bank and Gaza Strip (WBGs)² following the establishment of the PNA in 1994.

Similar to most Arab societies in the region, Palestinians are a tribal society. Even today, Israeli Palestinians still rely in part upon *sulha*, Palestinian conflict resolution, to resolve many personal disputes, although they are also subject to the Israeli judicial system:

“The roots of *sulha* are very old...*Sulha* is still valid today...under tribal law it was the only court making whatever rulings were needed. Today it does not replace the civil or criminal law of the state, but is employed in addition to their rulings. However, most *sulha* cases are handled independent of these courts.”³

Palestinian society, therefore, lacked a tradition of institutionalized self-determination or official organization at a national level. The region passed from occupation by the Ottomans, to the British, and then to the Israelis (except in the WBGs). During the British Mandate period, Palestinian organizations began to form for the provision of civil services. When the British pulled out, Palestinian areas outside of Israel’s official territory were in a kind of “no man’s land,” partially under the auspices of the Jordanian (in the West Bank) and Egyptian (in Gaza) governments, but receiving most social services from the United Nations Relief and Works Agency (UNRWA), which was established in 1949. Many refugees were created in 1948 and 1967, a large percentage of which reside to this day in refugee camps in the WBGs, Lebanon, Jordan, and Syria. Many others have settled in countries around the world, but still retain ties to their homeland.

From the end of the British Mandate until the occupation of all of WBGs in 1967, Palestinians in this “no man’s land” lived under natural law; that is to say that “Palestinians were in a state of natural law because no contract bound them to any authority that actually exercised any control over them.”⁴ Indeed, the Palestinian Liberation Organization (PLO), the only organization that claimed to speak with national authority for the Palestinian people, existed in exile from its inception in 1964 until Israel allowed it entrance to the WBGs in 1994. Due to this state of natural law, PNGOs did not have an official regulatory mechanism until 2000, when the PNA ratified the NGO Registration Law.

PNGOs have always existed in an environment with numerous Palestinian, Arab, and other international NGO relationships. UNRWA was one of the first, largest, and most important international agencies to deal with the Palestinian refugee issue. Within this environment, PNGOs sprang up to address the needs of their communities; they formed associations, such as the PNGO Network, the Union of Charitable Societies, and others to coordinate efforts among individual organizations and between sectors. This coordination is a highly important function due to the multiplicity of organizations performing the same or similar functions. Factors contributing to this duplication of effort include differences of opinion (such as religious versus secular) and difficulty of movement within and between areas of the WBGs.

¹ Tessler, Mark. p. 128 and p. 258. In July 1922 the League of Nations formally established the Mandate for Palestine. In February 1947, Britain relinquished control of Palestine to the United Nations. The state of Israel was declared in May 1948.

² The WBGs refers to the Palestinian Territories. Defined by the 1967 War, they are the internationally recognized borders of the Palestinian Territories, also known as the Occupied Territories.

³ Jabbour, p. 26. This statement refers specifically to practices in Shefa-Amer, which is an Israeli Arab town, not in the “no man’s land” of the WBGs. Israeli Palestinians, those who reside within the Green Line (1967 borders) are citizens of Israel, and are subject to the Israeli law system.

⁴ Heacock, p. 54

Aside from their long history of assisting the Palestinian people with everyday needs, PNGOs took a dramatic leadership role during the first Intifada (1987–1993)¹. Truly grass roots, this popular and unexpected uprising surprised both Israeli and PLO leadership. Intifada leadership was highly decentralized (a tactic used to counter Israeli efforts to control the uprising), using new and existing community organizations and PNGOs as a part of its infrastructure.

“The backbone of the scheme was a network of “popular committees”—groups that saw a need in society and organized to meet it. Embedded in every village and refugee camp, they would work independently to procure the food and provide the social services necessary to exist... In 1988 existing committees... were put on alert and new ones were created by the hundreds to respond to crisis conditions...”²

The establishment of the PNA within WBSG in 1994 altered the environment of PNGOs; for the first time, they were subject to a regulatory power. Most of the PNA leadership emerged from the exiled leadership, and tended to be more traditional and patriarchal in style. Naturally, a somewhat adversarial relationship developed between the PNA and PNGOs. This situation came to a head with the NGO Law, finally passed in 2000. Originally proposed in May 1995, the PNA attempted at first to use the PNGO Law to cement their position of power; they tried to weed out competition from their political adversaries, such as HAMAS³, by asking PNGO leaders personal questions about their political affiliations and that of their families.⁴ However, PNGO societies and associations resisted this inappropriate use of political power, and the revised version that passed in 2000 was more democratic and favorable to PNGOs than the original.⁴ Nevertheless, tensions remain, as PNA President Yasser Arafat continues to avoid sharing power and responsibility with Palestinian political parties and PNGOs.

Today, there are an estimated 2,000 PNGOs in the WBSG, not all of which are registered.⁵ Assuming a Palestinian population of 3,634,495⁶ in the WBSG, there is approximately 1 PNGO per 1,817 Palestinians. These organizations are serving a community in a time of dire circumstances as virtually every aspect of Palestinian society is in crisis. The Palestinian economy, in decline since the mid 90's, now suffers complete chaos due to the second Intifada (September, 2000-present)—estimated losses to the Palestinian economy from September 2000 to April 2002 are \$8, 269 million. Under these circumstances, the need for PNGO services has never been greater.

MEETINGS & INTERVIEWS WITH PNGO/NONPROFIT LEADERS

The leaders with whom our delegation met ranged in age from their early thirties to early fifties. Many had advanced degrees, and all had considerable leadership experience with PNGOs. Most of these organizations follow professional nonprofit leadership standards, with boards and strategic plans. Although the PNGO leaders with whom our delegation met belonged to various sectors, many common themes and challenges emerged: the unpredictability of life under occupation, the concurrent needs to build civil (and political) society while providing services, the importance of cooperation and coordination of PNGOs internally and with the international community, and the difficulties of receiving critical international funding.

¹ Tessler, p.677.

² Ackerman and DuVall, p.411

³ Tessler, p. 694. Acronym for the Islamic Resistance Movement, established in 1988.

⁴ NGO Law 2002, Ministry of NGOs Affairs, PNA, available at http://www.mongoa.gov.ps/info/law1_2000.html (Last visited March 15, 2004).

⁵ Samir Moukaddam (Director of the Middle East Peace Education Program of the American Friends Service Committee) was quoted this figure at a human rights seminar (at the Carter Center, in November 2003) by Marwan Barghouti, of the Union of Palestinian Medical Relief Committees and the Palestinian National Initiative.

⁶ Projected, 2003. Source: http://www.passia.org/index_pfacts.htm.

THE NECESSITY FOR FLEXIBILITY & ABILITY TO “MANAGE” THE CHAOS CREATED BY THE SECOND INTIFADA & THE ISRAELI OCCUPATION OF THE WBGS

The Occupation and the effects of the second Intifada completely disrupt every aspect of Palestinian life and society. I use the term “managing” chaos because Palestinians feel little ability to control their circumstances; this is part of the environment, a way of life in the WBGS. For the sake of brevity, the following are two of the most common and difficult issues PNGO leadership reported managing on a daily basis:

Restriction of movement: Sometimes complete, often unpredictable, restriction of movement includes curfews,¹ temporary and permanent road blocks, check points, and now the Separation Barrier. It is important to note that restriction of movement is both between Israeli and Palestinian areas and within the Palestinian areas themselves. The consequences for PNGOs are serious and include the acute interruption of education and extreme difficulty of receiving health care.² PNGOs are themselves directly impacted and their activities limited as a consequence of dwindling resources and high employee absenteeism that results from the prevention of employees and volunteers from traveling even short distances to work. Thus, many PNGO leaders are forced to work from home, conducting business by phone and the internet when possible. Furthermore, restrictions on movement are unpredictable, which complicates planning. Manal Abdallah, of the Palestinian Working Women Society for Development (PWWSD), observed, “We don’t make just one plan anymore, we always have a back-up or alternative.”

Collective punishment: This refers to the practice of punishing an entire community for the crimes of individuals. For PNGOs, this can result in curfews and the destruction or confiscation of funds, office equipment, files, or other property essential to the work or the organization. Community and PNGO leadership can also become targets of Israeli investigation, sometimes resulting in interrogation or detention. Many clients served by PNGOs are victims of collective punishment, such as the destruction of homes and agricultural land.

PNGO LEADERSHIP ASPIRES TO CREATE CIVIL & SOCIETY, HOPING TO FORM THE FOUNDATION OF A PALESTINIAN STATE BASED ON INTERNATIONAL LAW & HUMAN RIGHTS

Each PNGO leader the delegation met expressed that his/her role was not merely service delivery, but also building the infrastructure for a democratic Palestinian state. PNGO leaders explained that they could no longer wait for the end of the Occupation or the establishment of an official Palestinian state. The goal of women’s organizations had an extra dimension; they emphasized that they were building a Palestinian state based upon international human rights standards, including women’s rights. According to Ms. Abdallah (PWWSD), after the first Intifada, women’s PNGOs found that they had to work on both “social and political levels” at the same time in order to create a legal basis from which to fight traditional misogynistic practices, such as honor killings. In the words of Ms. Abdallah, “Women were very prominent in the first Intifada, but then were pushed aside. We have learned our lesson.” Female leaders were told not to fight for equal rights with men at the same time they were fighting the Occupation, and were promised legal gender equality once the Palestinian state was created. Rula Abu Dahou, founder of Addameer (Prisoners Support and Human Rights Association) cited traditional Palestinian culture and

¹ Curfews can be as short as part of a day, or can be as harsh as almost complete restriction to homes for weeks at a time. One of the most severe curfews, in Nablus, lasted approximately six weeks.

² Dr. Tawfiq Nasser, Chief Executive Officer of the Augusta Victoria Hospital in East Jerusalem, explained that in order to bring patients to the hospital for dialysis treatment during a closure, he contacted a high ranking Israeli official and threatened to inform the media should his patients’ health decline due to the her refusal to let the patients through a checkpoint. His strategy worked, and the patients were admitted.

competition within and between PNA political parties as two main reasons for the lack of women's leadership in Palestinian politics.

COOPERATION & COORDINATION BETWEEN PNGOS, AND WITH ISRAELI & INTERNATIONAL NGOS, IS ESSENTIAL

As mentioned previously, there are many reasons that necessitate a duplication of effort for PNGOs. Leaders with whom we spoke emphasized that both for practical and motivational reasons, it was important that PNGOs not feel isolated. Many said that while some coordination exists, more is needed. The PNA's newly formed Department of Institutional Cooperation and Coordination in the Ministry of NGO hopes to address this dilemma, but the current violence and power dynamics impede its effectiveness.

Each organization deals with the situation differently, depending upon relationships and resources available. Dr. Nasser of the Augusta Victoria Hospital offered an excellent example of how cooperation with Israeli NGOs might be improved: Palestinian doctors often have more experience than Israeli doctors in treating acute traumas, but Israeli doctors have greater expertise and resources in other areas. Through a program funded by the Harvard Medical Center, doctors from Augusta Victoria and Hadassah hospitals meet to learn from each other. Dr. Nasser observed, "Once you [strip away] the politics, there is real and genuine concern for the work."

THE DIFFICULTY (& NECESSITY) OF RECEIVING FUNDING FROM ABROAD

There are three major reasons for funding difficulties. First, with the creation of the PNA, many foreign donors revoked their financial support of PNGOs in favor of direct support to the PNA. Unfortunately, the PNA lacked the civil society experience (this was heretofore a revolutionary organization) and the will to cooperate fully with PNGOs that possessed vital knowledge, capacity, and expertise. Therefore, much of the funding was not used to its maximum potential. Furthermore, many Palestinians and experts on the subject maintain that President Arafat used some of the money to reward his supporters.¹

Second, since the second Intifada, America's "War on Terrorism," and the wars in Afghanistan and Iraq, many donors (Arab Americans in particular) are reluctant to donate to PNGOs.² The image of Palestinians as terrorists or linked to Saddam Hussein, while not representative of the majority of Palestinian people, actively discourages donors.

Third, some PNGO leaders refuse to accept aid from official American sources due to requirements that they sign documents renouncing "Palestinian terrorism." They cite different or selective interpretations of the word "terrorism" by American officials and their opinion that these documents ignore the existence of Israeli terrorism.³ These three issues center on the accountability of funded organizations to their donors and the lack of a transparent institutionalized infrastructure for utilizing civil and humanitarian funds.

¹ MideastWeb, Middle East Web Log. *Ami Isseroff*. "Is the Palestinian Authority self destructing?" 03/06/04, available at <http://www.mideastweb.org/log/archives/00000216.htm> (last visited March 15, 200)].

² This information comes from many PNGO leaders in Palestine, American Palestinian leaders, and my own personal experience.

³ Palestinian use of the term "Israeli terrorism" usually refers to the Israeli practice of collective punishment, torture, and other human rights abuses that are illegal according to international law.

DIASPORA PALESTINIAN NONPROFITS & ASSOCIATIONS

Another interesting characteristic of PNGOs is that they often receive support from the large Palestinian population living abroad¹ through pro-Palestinian nonprofit organizations, many of which are based in America. I spoke with two leaders of these organizations, Sami Mashney, of the American Friends for Palestine (A4FP) and Rani El Hajjar, of the Atlanta Palestine Solidarity (APS). Both individuals are active in Palestinian and social justice issues, participate in other organizations, and recently founded organizations of their own. When asked, “Why create your organization here in America, rather than support a PNGO in Palestine?” each responded that America’s influence is the key to solving the Israeli-Palestinian conflict due to American foreign aid to Israel and U.S. political influence. Their goal, therefore, is to advocate on behalf of the Palestinian people to affect change in American public opinion, increase Arab American participation in American private and public institutions, and ultimately to affect U.S. policy.

The A4FP is a new umbrella organization, coordinating fifteen or more pro-Palestinian organizations in southern California, whose mission is, “the advancement of the welfare and unity of the Palestinian people and their friends.” The board is currently being formed, the by-laws are complete, and next year they will hire staff members. Mashney, an attorney and vice-president of AF4P, believes that Palestinians, and Arabs in general, lack effective leadership because, “most grew up where they don’t trust the government, and peaceful political participation is not possible, [so] everyone wants to be a leader.” The leadership style of Mashney is both charismatic and democratic. He believes that all leaders must be good public speakers and communicators, but also values logic, planning, and action; stating:

“We can curse the dark all we want, but it won’t change anything. We must sit down, draw our blueprints, strategize, make decisions including some mistakes, correct our mistakes while keeping moving on, until we reach the goal.”

Emphasizing that emotions must be held in check so that progress may be made, he proposes to model Palestinian American leadership on what he considers to be a highly successful model, that of the American Israel Public Affairs Committee (AIPAC). Personally, he prefers to delegate authority and responsibility, but does not hesitate to get “hands on” when it becomes evident that it is necessary to do so.

The APS is a unique organization, even for the grassroots world. Rani El Hajjar, one of the founding members, explained that approximately two years ago several Atlanta community members came together with the idea of creating an organization to advocate for the Palestinian people. There is no board of directors, and no technical “structure,” but there are twenty-two active members, many of whom meet on a weekly basis over dinner. There is no hierarchy, but all members are driven toward a common goal and make decisions by consensus.

When problems arise among the leadership, they work through them together rather than allowing the group to become divided. El Hajjar cited two examples that could easily have paralyzed or collapsed any organization: one incident involved a comment that upset a member, and the other a heated disagreement about whether or not APS should officially endorse a one or two state solution.² In the case of the comment, they used this as “an opportunity to educate” and realized that as a social justice

¹ Approximately 4.7 million Palestinians lived in diaspora in 2002, according to the “*Statistical Abstract of Palestine, No. 4*,” issued by the Palestinian Central Bureau of Statistics, available at http://www.pcbs.org/english/press_r/abs04/abs04.htm (Last visited March 15, 2004).

² A one state solution refers to a bi-national state in the entire area of the current Israeli state and WBGS, where Israelis and Palestinians would live together as equals. A two-state solution refers to the creation of a Palestinian state in the WBGS, generally assumed to be along the 1967 borders. This is a volatile and emotional issue for both Israelis and Palestinians.

organization they were connected to this type of issue as well. As for the dilemma of a one or two state solution, there was no consensus, therefore, the group decided not to endorse either, but to support the decision of the majority of Palestinians and Israelis.

APS is, without a doubt, a rare example of a successful¹ nonprofit organization. Lacking a formal leadership structure, the group makes decisions by consensus. Although its mission addresses highly controversial and emotional subjects, they solve difficult problems collectively without creating internal divisions. El Hajjar identified several factors contributing to the success of the group: group members are socially tight knit, are relatively small in number, and are all driven by a common goal, which they perceive as essential to the survival of the Palestinian people. According to El Hajjar, “this is not something people do to put on their resumes.”

While the committee contains many talented and well-educated members, there does not appear to be anyone with “formal” nonprofit or organizational training. El Hajjar described the leadership style as driven, both for himself and the committee as a whole. He rejected the idea that leadership was trait based in favor of it being a learned skill; the committee indeed has many members who are seasoned activists and community leaders with great passion and knowledge about the issues APS addresses.

When asked about future leadership, El Hajjar noted that there might be changes ahead for APS. Some members are advocating for a more traditionally structured committee with a designated leader. There is also concern for recruitment, both in number and diversity of ethnicity, gender, and skill sets. The committee is actively recruiting youth, women, Palestinians (currently a minority on the committee), and members with important skill sets or access to resources by holding events in new venues and creating new types of programming to attract these groups. While these are sound goals to pursue, there is a danger of upsetting the delicate chemistry of the committee, which appears to be an integral part of its success.

BUILDING PALESTINIAN CIVIL SOCIETY: NEW DEVELOPMENTS, SUGGESTIONS FOR PNGO IMPROVEMENTS & FUTURE RESEARCH

It is clear that the PNGO community remains active and continues to exert tremendous effort in the provision of human services and the democratic reform of Palestinian civil and governmental society. However, competing dynamics characterize Palestinian political and social arenas as various elements vie for supremacy. Competition between the PNA, PNGOs, and “extremist” organizations such as the military wing of HAMAS, creates a lack of political and social stability. This virtual chaos is heightened by almost complete Israeli military occupation of WBGS, precipitated by the outbreak of the second Intifada, and the resulting cycle of violence plaguing both Palestinian and Israeli societies. As the Israeli administration attempts to sideline President Arafat, the fledgling political infrastructure has all but collapsed. Although this provides an opportunity for PNGO influence to grow, it also leaves a power vacuum readily filled by militant organizations that use the desperation of the Palestinian population to gain popularity.

Chaos and lack of transparency and infrastructure in the Palestinian political/civil environment are conditions that foster corruption. Corruption occurs in all societies, at all levels—official, civil, and private; PNGOs are no exception. In 2003, a major scandal erupted concerning the Palestinian Society for the Protection of Human Rights and the Environment (LAW), which allegedly misappropriated 40% (\$4 million) of its funds from Western donors.² Iain Guest, Coordinator of the Advocacy Project,¹ notes

¹ This small, marginally funded group manages to hold two events each week: a vigil in front of the Israeli Consulate and a committee meeting. They have also organized or contributed to many large and well-attended public educational or advocacy events.

² Ian Guest, “*Commentary: Funding Scandal Shakes Confidence in Palestinian Civil Society.*” 04/03 [Online] Newsletters, Publications, The Advocacy Project, available at http://www.advocacynet.org/pr_view_4.html (last visited March 13, 2004).

that not only does this threaten PNGOs with a funding crisis, but that it increases Palestinian suspicion that the mission of these once “grassroots” organizations has been influenced and distorted by Western political interests.

RECENT PNGO INITIATIVES

Despite the aforementioned setbacks, several recent developments bode well for increased professionalization and effectiveness of PNGOs and signal the potential for their contribution to the democratization of Palestinian society. In the last few years, initiatives have begun which emphasize democratization, transparency, accountability, and cooperation between the PNA and PNGOs.

Prior to the LAW corruption scandal, the PNA created the Ministerial Committee on Reform to work with PNGOs to confront corruption. In addition to bringing government and PNGO leaders together, the Committee began several outreach projects, including a web site, programs on radio and television, and articles in Palestinian periodicals. The Committee cites travel restrictions imposed by Israel as a major obstacle. As with much of the PNA’s web site, this page does not appear to be updated regularly.

More impressive is the newly created Coalition for Accountability and Integrity (AMAN), a coalition of six PNGOs. Hosted by the Palestinian Initiative for the Promotion of Global Dialogue and Democracy (MIFTAH) and funded by the United Nations Development Programme, the purpose of AMAN is to:

[establish] CSOs as a credible force to monitor systems of accountability and transparency...through the building of vital partnerships across a broad spectrum of institutions and individuals for the public, private, and civil society sectors that will be engaged to educate, advise and stimulate progress towards good governance.²

A central component of this mission, the National Action Plan Against Corruption, targets four areas for improvement: governance, civil society, cross-sectoral, and networking. AMAN leadership acknowledges the difficulty of accomplishing this mission in the context of military occupation and a dysfunctional political system, including feeble judicial and political systems vulnerable to corruption, and a media lacking freedom of speech.

Progress is also taking place through the PNGO Project,³ born of a “four-way partnership” between the World Bank, The Welfare Association Consortium⁴ (WAC), PNGOs, and the PNA. The Project, created in 1997 to “assist Palestinian non governmental organizations in providing needed services to the poor, the marginalized and the disadvantaged in the West Bank and Gaza,” is managed by the WAC and implemented in several phases by the Project Management Organization, a committee of the WAC.

A PNGO Project report released in 2001⁵ presented significant observations about the condition of PNGOs. At the time, it reported 881 registered PNGOs, almost 30% of which were created after 1993. Most of these new institutions adopted modern styles of administration, such as boards of trustees and

¹ An American nonprofit founded in 1998, the Advocacy Project supports nonprofits around the world. About Us, The Advocacy Project, available at <http://www.advocacynet.org/mission.html> (last visited March 15, 2004).

² United Nations Development Programme, Programme of Assistance to the Palestinian People, the Coalition for Accountability and Integrity. Available at <http://www.papp.undp.org/governance/aman.htm> (last visited March 8, 2004).

³ Project Management Organization, Welfare Association Consortium for the Management of the Palestinian NGO Project “*Activities Report 2001-2003*.” The Palestinian NGO Project—Publications. Available at <http://www.pngo-project.org/resources/resources.html> (last visited March 15, 2004).

⁴ Comprised of the Welfare Association, the British Council, and the Charities Aid Foundation.

⁵ Palestine Economic Policy Research Institute. “*Mapping of Palestinian Non-Governmental Organizations in the West Bank and Gaza*” The Palestinian NGO Project—Publications, Available at <http://www.pngo-project.org/resources/mapping.html> (last visited March 15, 2004).

administrative boards, which enhanced their effectiveness. However, the great majority of PNGOs still lack clear vision, planning, and focused goals and services, resulting in general institutional weakness and inability to reach their goals. Furthermore, the study found that the distribution and quality of PNGOs was highest in the urban areas in the West Bank, although Gaza and the rural areas had the greatest need. Among the recommendations were building institutional capacity, especially in planning and record keeping, greater specialization, creativity, and diversification of programs.

The most recent Activities Report,¹ released in 2003, outlines Project activities, successes, and makes several important recommendations. Phase I (1997-2000) of the PNGO Project exceeded its goal of implementing 150 projects by an impressive 38%. Phase II incorporates lessons learned from Phase I, including expanding the Board to further empower PNGOs, better mechanisms for monitoring project outcomes and impacts, and reforming the use of “Block Grants” into “Partnership Grants” which address the disparity between large and small PNGO institutional capacity by creating relationships between the two.

The PNGO Project is unique in many respects. The Project simultaneously addresses both immediate and future needs with creative programs that are tailored specifically for the communities it serves. Notably,

[it] represents a departure from the World Bank’s standard policy of disbursing aid directly to governments and serves as a model for the decentralization of development efforts through the strengthening of civil society organizations. Nongovernmental organizations have increasingly been relied upon as better placed than governments in carrying out poverty alleviation projects.²

The ultimate goal of the PNGO Project is to empower Palestinian civil society. Utilizing efficient strategic thinking, Phase II of the Project focuses on long-term outcomes. It aims to strengthen the capacity of PNGOs, focusing on quality, impact, and sustainability through the Grants Program and the Sector Support Program. The approach is organic, concerned primarily with addressing the needs identified by communities themselves, which not only increases effectiveness of programs, but also community involvement and ownership of PNGO work. Through professional workshops, increased emphasis on networking, and a great attention to inclusiveness, the PNGO Project builds community, PNGO, and sector leadership. At the highest levels, it encourages the sector to professionalize, engage in best practices, and ultimately pro-active involvement with the PNA in government policies concerning PNGOs.

The recent establishment of the Center for Palestine Research and Studies (CPRS) ensures the collection of statistical data and a new emphasis on analysis and scrutiny, and promises the possibility of greater resources from the international community. One recent study of PNGOs and democratization, published in 2001, draws on survey data taken prior to the second Intifada. This study upholds the positive, but weak, contribution of PNGOs³ toward democratization, their competitive relationship with the PNA, and the need for legal oversight and reforms. Kassis points to the lack of free media, credible justice system, and gender equality as impediments toward democratization. At the time of the survey, 23% of Palestinian adults were active with PNGOs. These participants tended to be “from a middle-income and well-educated...between the ages of 23 and 48...supporters of the “nationalist” trend...and leftists.”⁴

¹ See footnote 23.

² See footnote 23, “*Activities Report 2001-2003*”, p. 11.

³ Kassis calls PNGOs Civil Society Organizations, (CSOs), defining them as NGOs that exclude political, religious, or family organizations.

⁴ Kassis, p.41

A FAILURE OF POLITICAL LEADERSHIP?

Palestinian and Israeli NGOs have long proposed ideas about how to establish peace. In the past two years, two highly innovative joint Palestinian-Israeli initiatives emerged to offer a peaceful solution to this complicated and long-standing conflict, signaling a loss of confidence in elected leadership.¹ At the diplomatic level, the Geneva Accord was “officially” unveiled at a ceremony in Geneva, Switzerland in October 2003. This unofficial accord emerged from the frustration of Yasser-Abed Rabo² and Yossi Bellin³, two of the main Palestinian and Israeli negotiators of the failed Taba negotiations in 2000. Abed-Rabo and Bellin, neither of whom hold current political posts, continued to meet with the support of the Swiss government, the Carter Center, and other non-official Palestinian and Israeli leaders. Based on the theory that political considerations would always prevent Palestinians and Israelis from signing and implementing a comprehensive peace plan, Abed-Rabo and Bellin hoped that public debate and opinion generated by the Geneva Accords would dissipate this dynamic, which is so easily manipulated by extreme elements on both sides. Although the proposal was rejected by Israel, it was looked upon favorably by the PNA, and has been much debated in official, expert, and grassroots circles.

The OneVoice⁴ initiative is a grassroots equivalent to the Geneva Accords, also attempting to circumvent traditional diplomatic negotiations perceived to be ineffective. The brainchild of Daniel Lubetzky, an entrepreneur and founder of the Peaceworks Foundation, OneVoice was publicly launched in February 2004, during celebrity Jason Alexander’s trip to the region. Based on survey data indicating that the majority of Palestinians and Israelis are “moderate” and “able to reach an honorable compromise on all key issues,”⁵ his ambitious project plans to employ a variety of traditional and technological methods to allow 90% of both societies to help formulate and vote for suggestions for a comprehensive solution. Lubetzky enlisted the help and support of dignitaries, community leaders, NGOs, experts, and celebrities. If this project succeeds in achieving a solution accepted by 90% of Palestinians and Israelis, politicians would be under significant pressure to adopt these measures. In addition to contributing to the peace-making discourse, it is quite possible that this initiative will also add to the democratization of Palestinian society.

CONCLUSION

One issue the PNGO Project does not address specifically is the need for Palestinian access to mental health and cancer treatment. These were two areas in health care that the leaders with whom the delegation met emphasized were the most neglected; currently, there is no substantial treatment for cancer in the WBGS. Salah Abdul Shafi of the Gaza Community Mental Health Programme emphasized that virtually all Palestinians are mentally traumatized due to the Occupation, with children suffering the greatest traumas. He explained that,

This is a generation that glorifies death. They suffer on-going trauma. We need the cooperation of all players in political and civil society, we need political stability...The [mental and physical] health problems of the Palestinians have a strong linkage to the social, political, and human rights situation.

¹ An AMAN poll (May, 2002) showed positive opinion of the PA leadership, ministries, and security forces below 41%, compared to 72% for CSOs.

Available at http://www.aman-palestine.org/opinion_polls.htm (last visited March 8, 2004).

² Former Minister of Education, PNA

³ Former Minister of Justice, Israel

⁴ Available at <http://www.silentnolonger.org> (last visited March 13, 2003).

⁵ Available at <http://www.silentnolonger.org/wps/portal/.cmd/cs/.ce/155/.s/401/.r/1> (last visited March 13, 2004).

One complicating factor is that, even if adequate services were available, seeking mental healthcare is highly taboo in traditional Palestinian culture.

Other issues inhibiting the operation of PNGOs are reduced mobility, danger of violence, and destruction of Palestinian infrastructure caused by Israeli military activity. The Palestinian Center for Human Rights (PCHR) accuses “Israeli occupation forces [of attacking] Palestinian medical personnel and ambulances...[and shelling] a number of medical centers.”¹ This report urges International NGOs (INGOs) such as the World Health Organization to assist based upon international law and human rights. MIFTAH also documents that the Israeli military forces caused a great amount of destruction to the Palestinian Central Bureau of Statistics on December 6, 2001, accusing the Israelis of “attempt[ing] to destroy the core of the Palestinian nation-building process...”²

This paper provides many examples illustrating the central role PNGOs and INGOs play in transitioning Palestinian society from a state of natural law to democratic society. While the significance of these organizations is generally accepted, complete consensus on PNGOs’ actual impact does not exist. Ian Guest, Coordinator of the Advocacy Project, maintains that PNGOs should assist the PNA with efforts to reform and end the conflict, but that the ultimate responsibility for providing security for Palestinians and negotiating with Israel and the international community for Palestinian statehood must remain with the PNA. Additionally, Kassis’ report describes a “weak” relationship between PNGOs and democratization in the years leading up to the second Intifada.

However, several important advances have taken place since this study that strengthen the capacity and effectiveness of PNGOs in building civil society. A poll conducted by AMAN in May 2002 indicates a strong desire for democracy, with 89% of Palestinians preferring a democratic political system.³ With perseverance and continued support from INGOs and the international community, PNGOs will continue to make great contributions to the development of Palestinian civil society. Greater accountability mechanisms, notably through international pressure brought to bear on both official and non-official organizations, will ensure the progression of PNGO effectiveness in supporting Palestinian civil society. Regardless of the reality, PNGOs clearly see themselves as a vital part of the nation-building process:

The Palestinian people are committed to fostering civil society in the Palestinian territories, with an unwavering commitment to democratic institution-building. The roles of Palestinian governmental and non-governmental institutions in shaping Palestinian civil society is a central element of development in the Palestinian territories that must not be hampered...⁴

¹ “Palestinian Medical Personnel: Between Fire and Their Work,” April 2001, available at <http://www.pchrgaza.org/files/Reports/English/medical1.htm> (last visited March 9, 2004).

² “Israeli Aggression Targets Palestinian Civil Society Institutions,” available at <http://www.pcbs.org/urgent/israeli.htm> (last visited March 5, 2004).

³ AMAN, available at http://www.aman-palestine.org/opinion_polls.htm (last visited March 8, 2004).

⁴ See footnote 36.

PROPERTY RIGHTS IN PUBLIC GOODS & THE GOVERNANCE OF FOUNDATIONS¹

BY JIA XIJIN*

ABSTRACT. The role of foundations in providing modern public welfare services has received more and more attention in the past few years; recently the problem of management and supervision of foundations has been the focus of much of the discussion. Questions have been raised, such as: Who is responsible for the assets of the commonweal—also known as public goods? How can the supervisory management of such assets be carried out? The core problems touched on by such questions concern 1) the property rights of foundations and other legal forms that hold assets associated with providing public goods; and 2) the manner in which such institutions are governed. This article analyzes the legal status of the foundation juridical person set up under civil law and the system of charitable trusts set up under the Anglo-American (common) law. It points out that the basis of the property rights of foundations is a social donation at the establishment of the foundation as well as public good assets obtained in the form of tax preferences. Therefore, the property rights in public goods assets are a special form of property rights, which are called “Social Property Rights.” This article analyses the character of such property rights and the multi-faceted forms of responsibility that attach

¹ The author offers the following references:

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to them. It points out that “public responsibility” is the governing core of a foundation’s oversight with regard to assets that it holds that produce public goods. Thus, the chief governance principles for foundations are independent operations and social supervision for the public welfare; these principles should underlie the construction of the policy environment and the relevant law and regulations.

INTRODUCTION

Not-for-profit organizations (NPOs) carry out unique actions regarding public benefit in social life or in the field of mutual benefit because of their characteristics of being non-government and not-for-profit. They are an important mechanism that can make up for “market failure” and “government failure” in some situations. At the same time, the revenue sources for NPOs are not like those of enterprises (where the revenue comes from market operations), nor like that of the government (where the revenue comes from taxes). For NPOs the sources of revenue may well include the general public, tax benefits, or donations from wealthy people, and may include all of them. This means that their organizational form encompasses formal means of access to a variety of fund-raising mechanisms and thus must be carefully scrutinized. The question of “who is going to be responsible for this” is presented to the people or other sources from whom an NPO seeks to raise its funds. The question is very obvious for a foundation that raises its funds through public appeals. For example, the operations of the All-China Youth Development Foundation (YDF) (reported by Southern Weekend and Hong Kong Populace Newspaper in March 2003), which collected RMB 2 billion through Project Hope in 13 years, received much public attention. At the same time the issues discussed with respect to the regulation of YDF have also attracted the attention of the people to the operations of the foundation sector as a whole as well as to the operations of the state supervision and management mechanisms.

The questions raised in this context include the following: How can public appeals for assets needed to provide public goods be appropriately operated? Who owns the capital raised in this manner and who controls how it is to be used? How can the public goods nature of the assets raised in public appeals be ensured and supervised? In approaching these questions this paper will analyze the basis of property rights in public goods assets (“social property rights”), beginning with the law on foundations. This will make it possible to make relevant policy suggestions for the construction of a framework legal system that emphasizes public responsibility and a rational governance structure for foundations.

LEGAL STATUS OF FOUNDATION IN DIFFERENT LEGAL SYSTEMS

The structure of foundations can be traced back to the era of Plato and his Academy, which he established in about 387 BC. The purpose of the Academy was to educate men to become appropriate political leaders for the world of that time. At his death Plato bequeathed the Academy and the farmland surrounding it to his nephew, and he stipulated that the property must continue to provide benefits for adherents of Platonism.¹ Later on the tradition of management of assets for the benefit of other people and of using donations was developed and evolved. During these developments the difficulty of the management of donations for public benefit was consistently recognized as a problem. In 1601, Britain passed “Statute of Charitable Uses” laying out the mechanics of the charitable trust or foundation, which was to operate as a means to transfer private donations to the realization of public interests.²

Foundations play multiple roles in modern society. In terms of their recognition by the legal systems in which they are established, there are two general types of legal forms: the foundation juridical person in

¹ Editor’s note: Plato’s Academy flourished until 529 AD when it was closed down by the Christian Emperor Justinian who claimed it was a pagan establishment. Having survived for 900 years it is the longest surviving institution of higher learning.

² “Working authority directory of foundation,” translated by Sun Yun, published by Machinery Publishing House, in 2002.

civil law¹ and the charitable (or public benefit) trust under Anglo-American law. The foundation juridical person and the association juridical person² are private legal persons in civil law, and the legal rules governing them are found in the Civil Code.³ In some countries (e.g., Japan and China) there are special laws regulating private schools and medical institutions, which might otherwise be foundations under the Civil Code. In Anglo-American law, there is no difference between public law and private law as there is in civil law, and there is also no difference between the legal forms of association and foundation. An organization that performs the functions a foundation performs in civil law usually adopts the form of a charitable trust⁴ or a not-for-profit company or corporation⁵; some are also unincorporated associations.

Generally speaking, the foundation juridical person is more systematic than the charitable trust in common law; it appears to be more appropriate for large-scale and more consistent public utility activities. Japanese legal scholars think the charitable trust is a distortion of or a simple type of foundation juridical person.⁶ But whether the NPO takes the form of a foundation juridical person or of a charitable trust, each type of entity has the fundamental characteristic of a foundation—it is based on the existence of capital, and its internal governance system is fundamentally different from that of a membership organization. There are unique and detailed legal proceedings and stipulations for the establishment of foundation, setting its capital, its operational management, and its supervising mechanism. Table 1 shows the difference between foundation juridical person and the juridical association by taking the rules in the Taiwan area as the example.⁷

Table 1 Compare of legal status between juridical association and foundational juridical person

	Foundation juridical person	Juridical association
Existence base of organization	Property	Members of organization (person)
Structure of institution	According to the charter	General assembly as the highest institution
Corporate entity	Self-regulating juridical person but subject to state control	Self-regulating juridical person
Obtain of qualification of juridical person	System of permission	Public registration
Purpose and character of organization	Can't be modified voluntarily	Flexibility for voluntary modifications
Relationship between incorporator/promotor and juridical person	Contributor gives up rights to property	Right of associates
Termination of juridical	Contributor has no right to	2/3 of associates must vote to

¹ A juridical person formed for the special purpose of aggregating property, which endows it with legal personality in civil law.

² A juridical person set up based on having associates (people who are members).

³ In some countries special rules applicable to foundation legal persons are found in the Civil Code, while in others the distinct legal rules are found in special laws.

⁴ A trust is a property relationship based on trust property. The settlor transfers the ownership of the entrusted property to the trustee, who manages it for the benefit of the beneficiary(ies). A charitable or public benefit trust is a trust set up with the purpose of providing for public benefit or for creating public goods. It possesses the same characteristics as a private trust, but the beneficiary(ies) must comprise a charitable class and may not be named persons.

⁵ We know that the English word “corporation” is sometimes translated into Chinese as “company”, “league,” or “juridical person” in different situations. Therefore, in Chinese, when we use the word “not-for-profit company”, the meaning of “company” is not the same as an “enterprise”, but a statement of the existing form of the juridical person as well as its not-for-profit character. A government agency, an enterprise, and a not-for-profit organization all can be registered using the “company” legal form.

⁶ “Rule and development—legal environment” compiled by Suli, GeYunsong etc. Hangzhou: Zhejiang People Publishing House

⁷ “Management strategy of the third sector and its social reference” compiled by Jiang Ming Xiu, Taibei: Zhisheng Culture Career Corp. Ltd, in 2000, 226 to 227.

person	terminate	terminate
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At present, the management and registration of foundations in China mainly relies on “Rules for Management of Foundations” issued by the State Council in 1988.¹ Under these rules, foundations are defined as “non-governmental and non-profit institutions which are established and operated through voluntary donations made by domestic and foreign social associations, other organizations and individuals.” In addition, foundations are defined as belonging to the group of juridical persons known as social organizations. This structure places the foundation’s basis on its capital and the basis of the social group (association) on its members (people). However, by placing foundations within the same legal management system as exists for associations, a good many undefined and unsuited rules may apply to the management of the foundation’s capital. The rules for associations are short of specific and suitable criterion for the problems of management and supervision of significant assets, operations with respect to capital, and the ratio of expenses for asset management, etc.

These problems were remedied to some extent by subsequent legislation. The “Donations Law of Public Utility of the PRC” issued in 1999 worked out rules for the use of donated property and its management. In 2001 China issued “Fiduciary or Trust Law of the PRC,” chapter six of which contains rules for “public trusts.” But these meaning of the rules is unclear and they do not link reference the rules on the management of foundations. This group of rules is inadequate to form a *system* for supervision and management of the public goods assets of a foundation. The current laws of China thus create lacunae and confusion with regard to “social property rights.”²

BASIC ANALYSIS OF THE PROPERTY RIGHTS OF FOUNDATIONS

Whether a foundation adopts the form of foundation juridical person or is implemented through a public benefit trust, it is based essentially upon donated assets, which have been contributed for the purpose of realizing public goods. The foundation and public benefit trust may be different in the form of law, they both are dependent upon separate of actions of three parties -- the donor, the donee, and the beneficiary (ies) (or the settlor, the assignee, and the beneficiary (ies). Given this fact, one must analyze the following questions: Who owns the assets? Who is responsible for the operation of the assets and their management? To whom are the assets attributed, both from the standpoint of law and economics? What character do the assets possess? These questions are very important for management supervision of the foundation.

First, from the concept of the law, in the system of civil law, the foundation becomes a juridical person as a result of the act of the donation.³ Its legal attribute is that the property right is transferred to the donee when the donation happens. The donee becomes the owner of the assets and carries on the capability of occupancy, usage, access to the earnings, and other rights of control. The intention of the donee is reflected through the donative intent,⁴ and the donee must use earnings of the assets for the purpose of realizing the public benefit purposes of the foundation. The donative intent fails if the complete implementation of the purposes fails. Thus, some regard the donation of public goods assets as imposing additional obligations on a donee.⁵

¹ Editor’s note – the new regulations on Registration of Foundations were issued in 2004 and are discussed in this issue of IJCSL.

² The original legal articles can be found at the web site of : [http:// www.mca.gov.cn/lindex.html](http://www.mca.gov.cn/lindex.html)

³ In traditional civil law, donation means the means of collecting funds for the purpose of setting up the foundation juridical person. Modern civil law also regards public goods assets also as being bestowed through earnings on the assets, tax benefits accorded them and volunteer efforts for the foundation.

⁴ The donation rule at least includes: purpose of juridical person, management method of donated property, and property organization.

⁵ “Legal theory analysis of donation action of commonweal ” Zhe Jiang publication, written by Wu Yong Min, Zhu Xiao in 2001

In the trust system, under the laws in Britain and the US, and to a lesser extent in Japan and South Korea, it is generally considered that the ownership of trust property is transferred on the date when the trust is set up. That means that the assignee (trustee) obtains ownership of the property as of that date. But the assignee only possesses the capability of occupancy, management, and protecting the trust property; the earnings on the trust property belong to the beneficiary. The trustee cannot use the trust property for his/her own interest, and it must protect the trust property for the benefit of the beneficiary (ies).

The trust system of Britain and US brings the problem of separation of ownership of the public goods assets between legal title and beneficial title into the tradition of “one object, one right” in the system of civil law. Because one of the important parts of ownership, the right to the earnings, belongs to the beneficiary, none of the three involved parties -- the settlor, the trustee, and the beneficiary -- possesses the complete ownership of the trust assets. As a result, there has been a dispute in the Chinese academic community studying NPOs about for whether there is in fact a transfer of the ownership of trust assets and, if so, when it occurs and to whom.

The various positions are as follows. First, following a legal argument, it is said that ownership of trust assets follows the transfer, at the time of the establishment of the trust; thus, the trustee becomes the new owner of the property. Second, it is said that the ownership of the trust property does not transfer; thus, after the establishment of the trust, the ownership of the trust property still belongs to the settlor. Third, using the language of property rights, it is said that the ownership of the trust property belongs to beneficiary. Fourth, similar to the recognition of dual aspects of ownership in the common law, it is sometimes considered that the trustee is the “nominal” owner of the trust property, while the beneficiary is the “actual” owner. Fifth, by using the legal terminology of the common law, it is said that the trustee has “legal” title of the trust property while the beneficiary has “equitable” or “beneficial” title. Corresponding to the property rights and financial liabilities in the system of civil law, this leads to the imposition of obligations on the trustee to accomplish the trust purposes, to manage the property for the benefit of the beneficiary, and to disburse the earnings on the trust property in the same manner. Sixth, using the language of conditionality, it is said that after the establishment of the trust, the property held in trust is entirely independent of the separate property rights of the settlor, the trustee, and the beneficiary. Nevertheless, before the conditions are established, the property belongs to the trustee, while after the conditions are established, the property belongs to the beneficiary. The PRC “Law of Trusts” entirely fails to resolve the issues raised here.¹

On the other hand, it is clear that no matter how ownership (or the imposition of legal obligations) is denominated by the law, the ownership of economic resources in law and the ownership in fact are not always the same. Economists have thus introduced the concept of property rights according to which, in the economic sense, there is more than one category of ownership of property. Economics differentiates between the real owners and the financial claimants in the meaning of the law. Although the definition of property rights in economics has multiple meanings, generally speaking it does not imply a single ownership interest, but rather a group of rights, including right of occupancy, the right of usage, the right to the earnings, the right of control, etc. In order to further clarify the character of the property rights of a foundation, we must first begin with the legal relationship at the time of the establishment of the foundation, that is at the time the principal part of the donation of the public goods assets and analyze the right and obligation of each relevant person from that point in time.

The establishment of foundation juridical person is based on the “donation rule” in accordance with the will of donor. For example, the steps generally followed in the establishment of a foundation in Taiwan

¹ “Comment on the legal relationships of public benefit trusts” in Newspaper of the Institute of Financial Studies of Hangzhou, written by Zhangli, in 2002

are as follows: determine the donative intent of the donor—organize the board of directors—collect the funds—bring forward the application to the institution in charge—go to the court to transact the registration of the juridical person. The relevant persons in interest include the donor, the donee, and the beneficiary of the public goods. Among these interested parties, the donor usually would be an individual, an enterprises, a family, the public of a particular community, etc. The foundation is the donee, and the beneficiary is the general public or a special group of the public that is in need (and not a named group of individuals). In addition, except for an operating foundation,¹ the purpose of most foundations is managing the property it holds so as to perform the purposes for which it was established.

Comparing the trust form with the foundation form. Trusts: The public benefit trust is similar to the above type of foundation, but the trust system has certain other strict requirements – there must be a trust agreement, which specifies the following four characteristics:²

- that the legal ownership is separate from the beneficial rights;
- the independence of the property of the trust;
- the limited responsibility of the trustee; and
- the continuity in perpetuity of the trust.

The public benefit trust continues with the necessary application of the principle of *cy pres* (“as similar as possible”), but it does not terminate because of the change of the trustee.

Taking the charitable or public benefit trust system of common law as the example, we can state the relationship of rights and obligations among each interest relevant to foundations.³

The rights and obligations of the donor:

The rights of the donor (the donor mainly has a right of supervision after the trust is established)

The right of requiring the trustee to implement the trust.

The right to learn the truth: the donor has the right to know about the management and operations of the trust, the income situation of the property of the trust, and s/he may consult with the relevant accountant and have access to the documents related to the property of the trust, and may ask the trustee to give an explanation of developments with regard to the trust property.

The right of adjustment: when for an unexpected reason the management of the trust property is inconsistent with the realization of the purpose of the trust or when the management would result in the trust’s falling short of meeting the needs of the intended beneficiary, the donor has the right to ask the trustee to adjust the managing method.

The right of rescission: if the trustee breaches the purpose of entrust by invading the trust assets of by violating sound management principles, the donor has the right to apply for rescission of the trust or for the dismissal of the trustee; the donor may request the court to order the trustee requires to compensate the trust for any losses occasioned by his/her inappropriate management of the trust corpus.

The right of objection: when the responsibility of the trustee terminates, the trustee should present a report on the management of the trust property on behalf of the beneficiary, and the donor has a right to bring forward an objection.

The obligations of the donor:

¹ Some of these may be called sport foundations, which is a more complex entity than the foundation in Chinese law. They are different in each country; in the US, they include not more than 6% of the total number of foundations, while in Taiwan, they comprise the largest number of foundations.

² “Differentiation and analysis of some concept of entrust” in Commercial Research, written by Zhang Yue, 2002

³ “Comment on the legal relationships of public benefit trusts” in Newspaper of the Institute of Financial Studies of Hangzhou, written by Zhangli, in 2002.

The obligation of transferring entrusted property to the trustee.
The obligation to pay the trustee for services provided according to the law or to make provisions for such payment in the trust instrument.

Rights and obligation of the trustee:

Rights of the trustee:

The right of accepting the trust property after the establishment of trust.
The right of being paid for services according to the trust instrument or the law.

Obligations of the trustee:

The obligation to manage and deal with the trust property according to the terms of the trust instrument.

The obligation of loyalty to the beneficiary and the purposes of the trust. Unless there is an additional stipulation to that effect in the trust instrument, the trustee cannot make use of trust property to make a payment to him/herself.

The obligation of managing the trust property in accordance with the rules of prudence.

The obligation of managing the trust property in his/her personal capacity.

The obligation of setting up books and records for the trust assets and earnings.

The obligation of informing the beneficiary (ies) of the management of the trust property.

The obligation of protecting the trust property.

The obligation of delivering the appropriate sums to the beneficiary (ies).

Any trustee of a public benefit/charitable/public goods trust must have established him/herself as having an irreproachable reputation within the field of charity/public good.

Rights and obligations of the beneficiary:

the beneficiary of a private trust can possess normal rights of a trust beneficiary (e.g., the right to learn the truth about the management of the trust; the right to an accounting, etc.). But the beneficiary (ies) of a public benefit or public goods trust are indeterminate, so there is no person who can exercise such rights on behalf of the beneficiary (ies) of a public goods trust.

Comparing the trust form with foundation form. Foundations: In this section we analyze important components of the property rights of foundation: the right of possession (ownership in the law), the right of usage (including management and operations), the right of transfer, the right of income, etc. In general these rights can be summed up according to the following five characteristics:

First, there is no owner who possesses the complete property right.¹ We have analyzed above that the relevant persons with interests — the donor/founder, the trustee (donee), and the beneficiary (ies) — and we know that none of the three parties can be the complete owner of the property rights of a foundation. Among them, we need to emphasize that the concept of endowment is relevant to the trust funds of public goods. During the process of creating a public benefit or charitable trust, the donor voluntarily uses this sum of money for the creation of public goods, at the same time enjoying relevant tax preferences and other favorable policies. But when foundation is set up, this endowment amount has already been deducted from the income tax and it no longer possesses the character of a private asset. The donor has disengaged him/herself from the assets contributed to the foundation.

¹ Because the foundation set up by a public goods donation and the public benefit trust are basically the same in terms of the character of the property rights, in this analysis we will sometimes use the term “public benefit trust” along with “donor,” “trustee,” and “beneficiary” to represent the three parties.

Secondly, the problem of defining the ownership interests cannot be ignored. The essence of ownership can be regarded as the residual rights to claim and control an asset.¹ The governing core of the company set up as a separate juridical person is the matching of residual right of claim and residual right of control. In China state-owned enterprises and big companies also have a problem defining their property rights, but not because of a separation of ownership and usage. For such entities the legal ownership and the beneficial ownership are in the same hands; thus the residual right of claim and residual right of control are matched. As such, the ownership of state-owned enterprises in the theory is transparent. Only where there is a separation between ownership and usage can a situation be created where the actual property rights are undefined.

When it comes to foundations, the ownership interests are separated, as we have seen above. Zhou Qi Ren therefore calls a foundation “an agent without a final donor”, and says that this relationship leads to the stimulation of what he calls “nation rents”.² To him the key of the definitional difficulty regarding the property right of foundations is the separation of the residual right of claim and from the right of control. The regular practice in the Anglo-American law system is to allow a reversion of ownership to the trustee of a charitable trust. This is true because the donor has automatically relinquished his/her ownership interest when transferring the asset to the trust. Because they are an undesignated group, the beneficiaries cannot possess the equities of ownership on their own. Therefore, this kind of situation possesses rationality within the meaning of legal principles. But he says that there remain certain economic or factual discontinuities with regard to the actual status of the ownership interests. Because the trustee does possess the right of the residual claim, how do we ensure the preservation of the endowment created by a social donation?

Third, how do we deal with the controlled property? The foundation as trustee possesses the right of management, operations, etc. with respect to the endowment, but this is not the sum of all ownership interests because the rights of foundations with respect to their endowments are limited. In America it is called “limited executory discretion,” which implies a limited scope of discretion to operate and to invade the endowment within the terms dictated by the trust instrument. But these actions must not breach the trust and they must be carried out to the extent they are consistent with the realization of the main purpose of the trust established on creation of the foundation. Thus, it can be understood that the foundation possesses the residual control rights in the property, but only consistent with the terms of the instrument under which it was created.

Fourth, there is no transfer right or freedom in the hands of the trustees, the founder/donor or the beneficiary (ies). As soon as the foundation assumes the management of the endowment, the property cannot be removed from its control – it is said to be under public benefit control in perpetuity. It is possible under certain stipulations of law, such as a special change in circumstances or the failure of the trust, that there may be a transfer of the assets under the doctrine of *cy pres* (“as similar as possible”) to another public benefit organization with similar purposes.

Fifth, the rights of beneficiary (ies) are indefinite. Analyzing the meaning of public goods or public benefit trust, the beneficiary rights should be held by a group that includes all possible beneficiaries. This is clearly a part of the principle of beneficial ownership of charitable trusts. In actuality, it implies a certain random nature of the interests, because the beneficiaries are not named. Therefore it is important to establish a watchdog agency for charitable or public benefit trusts. This agency can carry out the

¹ The residual right of requisition means the right of balance requirement (profit) after deducting of all fixed contract payment (cost, salary and interest etc) to the enterprise relative to income right of the contract. The residual right of requisition can be got after the fixed contract is paid and is uncertain, maybe it is the negative value. Thereby the residual right of requisition of enterprise is also the undertaker of risk. The residual control right is active control right that is not stipulated in the contract.

² “Property rights and the Changing System,” compiled by Zhou Qi Ren and published by the Social Scientific Publishing House in 2002.

supervision of the management of public goods trusts on behalf of the beneficiary (ies). It can also investigate possible trustee breaches of trust purposes, and punish such breaches by collecting damages for the benefit of the beneficiary. The trust watchdog has the right to begin a legal action on behalf of the beneficiary(ies) or on its own behalf. The system of having a trust watchdog thus establishes the principle of allowing legal actions to be brought for the purpose of remedying the wrongs done by trustees. But the watchdog itself is only an agent, and it therefore does not entirely resolve the problem of finding a mechanism for the realization of the beneficial rights by the beneficiaries themselves.

To sum up, the establishment of a public goods foundation brings into being multiple relationships of trust rights -- ownership, usage, and beneficial right -- that separate the residual control right from the residual right of claim. The trustee possesses the residual control right within the scope of the foundation statute. The principle part of the residual right of claim is held by the beneficiaries, who are indeterminate, and it is therefore impossible for them to effectuate their rights, even with a trust watchdog. Therefore, for the purpose of discussing the management of foundations so that they can effectively ensure the realization of their responsibilities for public goods assets, we bring forward the concept of “social property right.”

ESTABLISHING THE GOVERNANCE MODE OF FOUNDATIONS BASED ON THE CONCEPT OF “SOCIAL PROPERTY RIGHT”

Using the concept of “social property right” to express the character of a foundation creates a new analysis of the property rights of an organization established for public benefit. It exposes two underlying characteristics of foundation property rights: 1) the separation of beneficial right and control right creates an absence of true ownership; and 2) there are limits in using property rights to ensure that the interests of the beneficiary are met. The feature of public goods property introduces the core question of how to best organize the governance mode of foundations: the separation between the beneficial right and the control right makes it difficult to ascertain what the foundation is responsible for and to whom. In the following discussion we continue to analyze the relevant principles applicable to foundations and their external and internal governance. They include the following six aspects:

Founder/donor: the property right of the donor transfers completely when the trust or foundation is set up; the donor releases all his/her rights in the asset. Therefore the donor cannot disturb the operations of foundation, but s/he possesses certain rights as the founder of the foundation/trust, such as the right of supervision. Accordingly, the foundation has the responsibility to implement trust management according to the terms set up by the donor in the trust instrument. At the same time, the foundation has the responsibility to implement the right to information of the donor and it must assume the responsibility of reporting to the donor.

Beneficiary: that is, all the possible beneficiaries in the scope of the public benefit trust possess residual right of claim. Nevertheless because the members of the beneficial class are not named, this is essentially a fiction. But the foundation has an obligation to realize their rights according to stipulations of the trust instrument.

Actual beneficial interest: this is the entitlement to actual earned income among the members of the beneficial class. The foundation has the responsibility to make the earning of adequate income a top priority.¹

The trust endowment comes to some extent from the nation or the government of a region and, as such, from the public at large: the donor/founder of a public benefit trust enjoys favorable tax policies at the

¹ “Rule and development---the legal environment of the third sector,” compiled by Su Li and Ge Yunsong. Hangzhou: Zhejiang people’s publishing house. 1999, 172.

national and local levels. In that sense also the assets become part of the social capital. Therefore the foundation also has an obligation to carry out its work with a regard to the public policies of the government and the taxpayers.

Government approvals: when the beneficial action of a public benefit trust or foundation is undertaken, it obtains the approval of local government; therefore the foundation has responsibility to abide by local law and the rules applicable to program activities of the foundation.

Internal staff of foundation: the foundation as an organization also has the responsibility to carry out proper internal governance, in part to ensure that it carries out the trust effectively.

In the above, we analyzed foundation governance using the interest principle as relevant to determining its character. The base of a foundation's existence is the acceptance of social assets and public goods assets in the form of tax benefits. The precondition for a foundation is that it must work out how it will realize the promise of the non-distribution principle and be obedient to the goals and purposes for which it was established. The purpose of its existence is to fully realize the tenet of providing for the common good; in other words, the foundation possesses public responsibility.¹ The complex credit-responsibility relationships of the foundation are stipulated by the instrument that creates it and the promises (tenets) it contains. The core of the governance of a foundation is the realization of its underlying tenets; that is to work for the benefit of the public, and to realize its goals for the benefit of each relevant person of interest, including the society at large. Therefore accountability and social supervision are indeed the root of governance mechanisms of foundations. To add more details, we can say that it mainly includes the following two principles:

Independent operations principle. The independent operations of a foundation give the trustees abundant rights of control over what it does; but the trustees must act consistently with the trust instrument. This is also an important invigorating mechanism that allows foundations to pursue the notions of the public good envisioned by their founders.

Social supervision principle: the supervision of the management of foundations must ensure that they are operated for the benefit of the relevant persons with interests in them. Thus, social supervision is at the core of foundation supervision. The chief principle of social supervision is that what management does is to open the public. As a not-for-profit organization, receiving considerable tax and other benefits, a foundation has no right to possess its own "enterprise secrets." It must open its information on accounts, activities, and management to the society at large. The public responsibility to provide public information includes four aspects:

- accounting responsibility, that is the responsibility of proper use of its assets;
- process responsibility, that is proper activities and working programs;
- project responsibility, that is to be responsible for the benefit that are available to the public; and
- the responsibility of right to the preferences, that is the pertinence and adequacy of serving the objects established by the donor.²

Working out the public responsibility of a foundation should include two forms, passive open and active open. The former means any member of the public has a right to ask and require access to relevant data, including detailed financial statements of the organization. The latter means each foundation should issue the above important information in the form of a brief report that is available in the public media. The

¹ In a modern country, the government and its officers are regarded as possessing the responsibility (accountability) to the people, thereby covering all kinds of public responsibility of public institutions.

² < Self-discipline and heteronomous --individual study of third department's supervising mechanism> compiled by Zhou Zhi Ren and Chen Qing Yun. Hangzhou: Zhejiang People's Publishing House, 1999, 33.

extent of the information that needs to be issued and varies a little according to the scale of the organization's operations: the larger the organization is, the more information must be made available to the public.

Based on different interests relevant to the beneficiaries of a foundation, its supervising mechanism mainly includes six aspects:

Administration. The relevant department of local government or the taxation department that implements the supervision of business, financial, and human affairs. Sometimes it includes juridical supervision, such as in Taiwan, where the court possesses the supervising responsibility of the property of a foundation juridical person; the court may change or dismiss a foundation director and may also terminate the juridical person.

Supervision of board of directors. The directors are the important component in the governance structure of a foundation and they have the first layer of responsibility to prevent organizational misconduct and abuse of the favorable policies available to foundations. The Board of Directors can be regarded as the spokespersons for the residual right of claims of the beneficiary.

Trust supervisory system. The nominal beneficiaries themselves cannot work out the requirements or implement the supervision themselves. The watchdog implements the supervision of the foundation for maintaining the rights and interests of the beneficiaries and is the spokesperson for the nominal beneficial rights.

Civil evaluation and self-supervising organizations. For example, in America many self-supervising institutes are themselves not-for-profit organizations. They may provide donors with services and help them implement the supervision of the donee organization or its projects, to ensure that the usage of the funds does not depart from the will of the donor. Independent evaluation by these institutes plays an important role in the supervision of foundation in the US.

Society or the public at large. Because of the nominal character of the beneficiary principle, the implementing supervision of by the administration, the directors, and the watchdog agency is not enough. The social/public supervision is the important guarantee mechanism for the realization of the social responsibility of a foundation. This type of supervision means that all of the public enjoys the right of supervision, and this makes each person who cares about the organization or who has a doubt about it able to examine and supervise it. Once a problem is found, it is going to be punished strictly, according to the law, but this sort of mechanism provides for strong self-discipline within a not-for-profit organization. Therefore, this supervision has a low cost of operation and can be efficiently implemented. Good social efficiency plays the role that a formal supervising mechanism institute cannot. Under such a scheme, the foundation has the responsibility to explain its tenets, its projects, to list the members of the board of directors and the principal staff, in an article placed in a local newspaper each year. In addition, the public can ask for the report forms that are used to file annual reports with the government institution, and these include explanations of the financial situation, the income situation, the senior management personal, etc.

News media. The independent news media and the supervision of public opinion expressed through them are also the important mode of supervision and they help the public exercise its supervisory role.

ENVIRONMENT OF LEGAL POLICY OF FOUNDATION & SYSTEM CONSTRUCTION

Setting up best governance mechanism for foundations requires the creation of basic legal policy and a structural environment. The following discussion brings forward five suggestions for such a legal environment.

First, confirm the corporate entity of foundation. The classifying system for not-for-profit organizations should regard public benefit and beneficiaries as basic standards. Public benefit or public goods organizations can further be divided into associations of people, operational organizations based on assets, such as foundations as well as the public service and welfare organizations based on the asset (at present, in the legal system these are called “civil non-enterprise units”). It is not proper to treat a foundation as a part of the group of juridical associations. Thus, the proper establishment of the corporate entity of the foundation depends on the revising and perfecting of the civil law. The juridical person chapter in “General principles of civil law” (GPCL or *Minfa*), issued in 1986 only includes four types of organizations -- enterprises, state agencies, institutions, and social organizations; this restricts the nature of foundations. In addition, the GDCL has a strong flavor of the old planned economic system and it no longer reflects the structure of Chinese society, which accepts multiple social organizations. A new Civil Code is being drafted, and it is hoped that it will clarify the legal status of foundations, in order to solidify their governance structures.

Secondly, the management system for all not-for-profit organizations must be perfected. In the first place, the Rules for Managing Foundations set out in 1988 stipulate that the People’s Bank of China should be involved in the establishment and management of foundations. Under those rules a foundation also had to be registered and issued a license by the civil administration. That has now been changed in the 2004 Regulations, but there is still work to be done to make the regulations for foundations more consistent with their nature.

Thirdly, the tax policies for not-for-profit organizations should be strengthened. At present, China does not have a serious tax policy for not-for-profit organizations. In 1999, the “Announcement on Income Tax Problems of Foundations” was issued by the State Tax Office to describe the application of the enterprise income tax to foundations. As to the tax preferences for donors, in 1999 the State Council issued the regulation on “Donations for Public Benefit, “ which permits natural persons, and juridical persons to enjoy relevant preferences with respect to donations for public benefit purposes. But the tax policy for not-for-profit organizations in China is still not specific, not concrete, and not systematic. In the revenue laws, there should be special definitions of not-for-profit organizations and of public benefit organization; some detailed rules with respect to taxes of various types, whose contents should be definitely described.

Fourth, the social supervising mechanism for NPOs should be strengthened. How to ensure the public benefit character of not-for-profit organizations is a problem that is faced not only by China, but by the entire world. According to the management regulations in China, social organizations and civil non-enterprise units are subject to a dual supervising system of management by the organ of registration and by the business unit in charge. Their financial situation is reported through annual reports, followed by examination. Their resource and assets have been derived from national donation or social donation and they accept supervision by their auditing organ. In fact, however, although the annual examination of these entities consumes a lot of time and talent, it is very difficult for the limited staff to conduct really effective audits when they are faced with thousands of NPOs, conducting activities in all kinds of fields. While the evidence of self-interested transactions has not often been found, we think that annual examinations may not be enough to judge the character of the not-for-profit and public benefit nature of all NPOs. From the international experience, each country has different supervision system, but that experience also suggests that social supervision is one mechanism that cannot be replaced. China must

introduce social supervision mechanisms for NPOs, especially for the management of public goods foundations.

Fifth, establishing independent financial and auditing systems for NPOs is a precondition for implementing effective supervision and management. NPOs, including foundations, are different from government agencies and enterprises; as such the financial systems for government and enterprises cannot be applied entirely to NPOs. For example, profit calculations, accounting items, and evaluation standards relevant to the government and enterprises may not be relevant to NPOs. Thus new accounting and financial systems should be established so that we can make evaluations and supervision of NPOs with concrete standards and references.

Comparing these principles with the events surrounding the YDF mentioned at the beginning of the article, let's analyze the meaning of a framework construction under the law for foundations. When this event was exposed in the media, it led to a crisis for foundations -- and all NPOs -- because it called their credibility into question. Putting aside the dispute about whether YDF did in fact breach its responsibilities and the public trust, there are nonetheless some detailed questions that need to be asked. In fact, the problem of creating a new system of supervision of the public goods assets held within foundations is important for us to pay attention to and think about.

First, it is inevitable that there will be some events that involve breach of responsibilities and public trust so long as there is a lack of a feasible legal framework for foundations. In fact, because the legal status of foundation is not definite and proper (e.g., treating them as if they are associations), we are still short of effective and feasible rules for their management and supervision, in particular rules applicable to their endowments.¹ Being recognized and evaluated properly should be the guarantee of the optimum operations of foundations. The failure of the law to meet their needs and to guarantee them proper social recognition makes "playing edge ball" a popular phenomenon in the operations of foundations. The more they behave this way, the more difficult it becomes to recognize and stop inappropriate behavior.

Secondly, the lack of a social supervision mechanism itself is a harm to the social public trust of foundations. Even as the events surrounding YDF suggest, whether it in fact disobeyed the law and how serious its lapse may have been, the questions surrounding it and the media exposure all brought a serious challenge to social public trust of foundations in general. The public has almost no other evidence to judge how the operations of the foundation were carried out, and it seems as if one black box has suddenly been opened. People find there are many different things inside than they imagined; it is easy to have a strong feel of "being cheated" in such a case. The social supervision is supposed to play a role in making the box "transparent." It gives each person who cares about the organization or has questions the right to carry through examination and supervision of it.

The events surrounding YDF aroused people's attention to the operational systems of foundations. But those events have not provided any answers they have only succeeded in raising relevant questions about the problem facing foundations. It is clear from this event and the analysis it has provoked that only by strengthening the construction of the legal management for foundations and by perfecting the social supervision of them will we be able to protect the public goods assets they hold. If we can do that we will guarantee a proper role for foundations as the operational core of the not-for-profit sector in China.

¹ Editor's note – the extent to which the new foundation regulations address these problems is discussed in the short article by Carl Minzner, also in this issue of IJCSL.

CASE NOTES

AT PLAY IN THE JOINTS OF THE FIRST AMENDMENT'S RELIGION CLAUSES: *LOCKE V. DAVEY*,¹ THE FREE EXERCISE CLAUSE & STATE FUNDING OF EDUCATION

BY D.L.R.F. DI PIAZZA*

“[W]e have long said that ‘there is room for play in the joints’ between [the Establishment Clause and the Free Exercise Clause]... The state’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places relatively minor burdens on Promise Scholars. If any room exists between the two Religion Clauses, it must be here.”²

On 25 February 2004 the United States Supreme Court held that Washington State’s Promise Scholarship Program—a state program offering scholarships for college education but excluding the pursuit of a “degree in theology”³—did not violate the Free Exercise Clause of the First Amendment to the Constitution of the United States.

BACKGROUND

The State of Washington created the “Promise Scholarship Program” to help fund post-secondary education of academically successful and financially challenged students. To qualify for a Promise Scholarship, a student must: Graduate in the top 15 percent of that student’s graduating class; have a cumulative score of 1,200 or better on the Scholastic Achievement Test I or 27 or better on the American College Test; and have family income of less than 135 percent of Washington State’s median. A student may use Promise Scholarship funds at any “eligible postsecondary institution,” including private and religiously affiliated institutions, and for “any educational expense.” However, the Promise Scholarship Program will not fund “any student who is pursuing a degree in theology.”⁴

Joshua Davey won a Promise Scholarship and attended Northwest College, a private college affiliated with the Assemblies of God—a Christian Pentecostal denomination. Mr. Davey chose to pursue degrees in “pastoral ministries and business management/administration.” As required by law, Northwest College’s financial aid administrator asked Mr. Davey to sign a document certifying that he was not pursuing a “devotional theology degree.” Mr. Davey refused and, therefore, did not receive Promise Scholarship Program funds.

Mr. Davey sued in the federal District Court for the Western District of Washington, alleging the State’s refusal to extend the Promise Scholarship Program violated the First Amendment and the Equal Protection clause of the Fourteenth Amendment. The District Court rejected Mr. Davey’s claim. The United States Court of Appeals for the Ninth Circuit reversed the District Court’s decision, declaring the Promise Scholarship unconstitutional. The Ninth Circuit decision said Washington State’s actions “singled out religion for unfavorable treatment” and that the state’s concern not to establish religion was insufficiently “compelling.”

¹ See *Locke v. Davey*, No. 02–1315 slip op. (U.S. 25 February 2004), available at <http://www.supremecourtus.gov/opinions/03slipopinion.html>.

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² See *Locke*, slip op. at 12.

³ See *Locke*, slip op. at 2. See also Wash. Rev. Code § 28B.10.814 (1997) (“No aid shall be awarded to any student who is pursuing a degree in theology.”)

⁴ *Id.*

DECISION

Reversing the Ninth Circuit, the issue facing the Supreme Court was whether the state of Washington could deny scholarship funds to students pursuing a degree in devotional theology without violating the Free Exercise Clause of the First Amendment.

The majority opinion written by Chief Justice William H. Rehnquist addresses that two aspects of the argument that the Washington State statute creating the Promise Scholarship Program discriminates against religion: First, Mr. Davey's contention the Court should declare the state statute creating the Promise Scholarship Program unconstitutional because it is not "facially neutral" with respect to religion; second, the majority's understanding of part of Justice Scalia's dissent that argues that, if the state created a scholarship to fund all secular professions, the state must also fund training for religious professions.

PRESUMPTIVE UNCONSTITUTIONALITY REJECTED

Mr. Davey, relying on *Lukumi Babablu Aye, Inc. v. Hialeah*,¹ argued that the Promise Scholarship Program's explicit refusal to fund the study of "devotional theology" is not "facially neutral" and is therefore presumed unconstitutional. To overcome this presumption, the state would have to show it had a "compelling" end and used "narrowly tailored" means to achieve that end.²

The Court rejected this argument, distinguishing *Lukumi*'s facts. Calling the "State's disfavor of religion (if it can be called that)...of a far milder kind,"³ the Court noted that, in *Lukumi*, the city of Hialeah criminalized animal slaughter occurring during religious observance. In creating the Promise Scholarship Program, Washington State did not criminalize religious behavior; deny religious persons' ability to participate in political community affairs; or force students to choose between religious belief and public benefit. "The State has merely chosen not to fund a distinct category of instruction."⁴ As a result, the Court refused to extend *Lukumi*'s precedent to cover the facts in *Locke*.

WHAT'S GOOD FOR THE GOOSE? EQUAL PROTECTION REJECTED

The majority decision uses one aspect of Justice Scalia's dissent to refine its reasoning. According to the majority opinion, Justice Scalia argued that "[b]ecause the Promise Scholarship Program funds training for all secular professions...the State must also fund training for religious professions."⁵ The majority opinion rejects this view for two related reasons: First, the Court found the history and role of religion to be unique; second, and related, the Court argued that the state's decision not to fund "devotional theology" results from an "historic and substantial state interest" and not "anything that suggests animus toward religion."

Where Justice Scalia argued for an equality of station, the Court used historical example to argue religion and state's approach to it is unique—"in favor of free exercise but opposed to establishment."⁶ Washington State's decision not to fund a religious activity is the result of this history and not the result of animus toward religion.

¹ See *Locke*, No. 02-1315, slip op. at 4, 6. This argument relies on *Church of Lukumi Babalu, Inc. v. Hialeah*, 508 U.S. 520 (1993). It is the argument the Ninth Circuit used to reverse the District Court in *Locke*.

² *Id.*

³ See *Locke*, No. 02-1315, slip op. at 6.

⁴ See *Locke*, No. 02-1315, slip op. at 7.

⁵ See *Locke*, No. 02-1315, slip op. at 7. See also *Locke*, No. 02-1315, slip. op. at 2 (Scalia, J., dissenting).

⁶ See *Locke*, No. 02-1315, slip op. at 7.

According to the Court, Thomas Jefferson, James Madison, Supreme Court precedent, histories of religion in America—all point to a trend in popular and political thought, as well as state action, that has objected to using taxpayer money to fund religious activities “[s]ince the founding of our country.” “[E]arly state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars.” Moreover, the Court pointed out, the Promise Scholarship Program includes religion in so far as it allows students to attend accredited private, religiously affiliated colleges and even allows students to take courses in theology. What the Promise Scholarship Program forbids is pursuing a “devotional theology” degree, training for the ministry—what the Court terms “an essentially religious endeavor.”¹ Thus, whether framed as a matter of freedom of conscience or statecraft, the Court argued that American history explains that the state’s decision not to fund religious activity is based in a legitimate interest to separate Church from State and is not an effort to discriminate against religion. “The state’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places relatively minor burdens on Promise Scholars. If any room exists between the two Religion Clauses, it must be here.”²

DISSENT³

Justice Scalia’s dissent explores precedent relating to religious discrimination, the problem of discrimination, and how each works in this case. According to Justice Scalia’s dissent, the case law on the subject of discrimination based on religion—like discrimination based on race or gender—is clear: The state may not create a public benefit and exclude individuals from receiving that benefit because of religion. Once the State creates a public benefit, that benefit becomes the benchmark against which all subsequent discrimination is judged. In *Locke*, the State of Washington created the Promise Scholarship Program to fund any person so long as they met academic and economic requirements. The State then excluded a specific field of study—devotional theology—because that field is religious. The State’s actions therefore violate the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Justice Scalia reviews basic law of discrimination and religion, arguing that the *Lukumi* line of cases applies in *Locke*. Any law burdening religious practice is subject to strict scrutiny; the minimum requirement for legal neutrality is that laws do not discriminate on their face; if the action at issue discriminates against religion *qua* religion, the action automatically fails strict scrutiny; and, “formal neutrality” is a “necessary condition of Free Exercise.” In creating the Promise Scholarship Program, Washington State discriminated against religion without sufficient—which is to say “compelling”—justification. The State’s creation of a general scholarship fund—a general public benefit—which does not fund religious education, at a minimum, lacks “formal neutrality” and, more likely, is explicit discrimination, rendering the program presumptively unconstitutional.

When the State makes a public benefit generally available, that benefit becomes the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.⁴

Justice Scalia declared insufficient the state’s interest to discriminate against religion—and the Court’s means to assess that interest. The references the majority made to historical interests to separate the state

¹ See *Locke*, slip op. at 7.

² See *Locke*, slip op. at 12.

³ There are two dissents: One by Justice Scalia; one by Justice Thomas. As Justice Thomas explains: “I join Justice Scalia’s dissenting opinion. I write separately to note that, in my view, the study of theology does not necessarily implicate religious devotion or faith... Assuming that the State denies Promise Scholarships only to students who pursue a degree in devotional theology, I believe that Justice Scalia’s application of our precedents is correct.” See *Locke*, slip op. at 1–2 (Thomas, J., dissenting).

⁴ See *Locke*, slip op. at 2 (Scalia, J., dissenting.)

from funding religion “involved not the inclusion of religious ministers in public benefits programs like the one at issue here, but law that singled them out for financial aid.”¹ “One can concede the Framers’ hostility to funding the clergy *specifically* [emphasis original], but that says nothing about whether the clergy had to be excluded from benefits the State made available to all.”²

As for the Court’s idea that a “play in the joints” is judicial means by which to test religious discrimination, Justice Scalia is openly skeptical. “Even if ‘play in the joints’ were a valid legal principle, surely it would apply only when it was a close call...but an even-handed Promise Scholarship Program is not [a close call].”³ The Court is charged to enforce equality “in hard cases as well as easy ones,” Justice Scalia writes.⁴ And, even though it is clear Mr. Davey could establish the economic harm of having to forgo a State-conferred financial benefit in exchange for practicing his faith, the Court should not require or sort among degrees of harm. The Court does not do this sorting elsewhere and “[t]he indignity of being singled out for special burdens on the basis of one’s religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial.”⁵ What the Court does with its rationale is to legitimate a “philosophical preference...[that] has no logical limit.”⁶ “Let there be no doubt: This case is about discrimination against a religious minority.”⁷

CONCLUSION

The Court in *Locke* held that Washington State may create a general educational scholarship program which does not fund the pursuit of a degree in theology without violating the Free Exercise Clause of the First Amendment to the United States’ Constitution. The Court argued that Washington State may choose not to fund theological study because the First Amendment’s Religion Clauses provide room—‘play,’ in the Court’s words—in which a state may act concerning religion in a way neither prohibited nor commanded by those clauses.

It is interesting to note the implication this case may have for the issue of school vouchers and state funding of religious education—a state activity upheld under the First Amendment’s Establishment Clause,⁸ but not tested under the Free Exercise Clause. Each Free Exercise rationale in *Locke* is, at least in theory, equally applicable to a state school voucher program that would fund religious studies. The Court in *Locke* argues only that the Free Exercise clause allows Washington State *not* to fund religious studies—“The State has merely chosen not to fund a distinct category of instruction.”⁹ The State’s decision is valid because it has an “historic and substantial.” interest not to fund religious education.¹⁰ But, the Court also notes and seems to approve of the degree to which the Promise Scholarship Program includes religious institutions and the study of religion.¹¹ This last aspect of the Court’s reasoning, in particular, appears to mesh nicely with Justice Scalia’s argument that, where a State creates a general public benefit, the State cannot discriminate against religion,¹² and Justice Thomas’s refinement that there is a distinction between studying theology and religious devotion.¹³ Thus, it would seem there is play in the joints of the Court’s decision in *Locke*.

¹ See *Locke*, slip op. at 2 (Scalia, J., dissenting.)

² See *Locke*, slip op. at 3 (Scalia, J., dissenting.)

³ See *Locke*, slip op. at 4 (Scalia, J., dissenting.)

⁴ *Id.*

⁵ See *Locke*, slip op. at 6 (Scalia, J., dissenting.)

⁶ See *Locke*, slip op. at 5 (Scalia, J., dissenting.)

⁷ See *Locke*, slip op. at 9 (Scalia, J., dissenting.)

⁸ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁹ See *Locke*, slip op. at 7.

¹⁰ See *Locke*, slip op. at 11.

¹¹ See *Locke*, slip op. at 10–11. “[W]e believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits.”

¹² See *Locke*, slip op. at 17 (Scalia, J. dissenting).

¹³ See *Locke*, slip op. at 1 (Thomas, J. dissenting).

BUSH ADMINISTRATION CONFRONTS GREENPEACE

MATTHEW SWARTZ*

Friday 12 April 2002 started normally for Greenpeace and its activists off the coast of Florida. Greenpeace was going to protest illegal logging by boarding the APL Jade, a Brazilian cargo ship Greenpeace believed was carrying Amazonian mahogany, and displaying a banner reading “President Bush, Stop Illegal Logging.”¹ Both Brazil and the United Nations (UN) prohibit the export of mahogany from the Amazon—Brazil through a national moratorium and the UN through the Convention on International Trade in Endangered Species (CITE), a convention that the United States (US) has signed.²

As Greenpeace boats approached the APL Jade, two protestors boarded the APL Jade and displayed the banner. Eventually, the APL Jade’s crew subdued the protestors and called the US Coast Guard. US Federal prosecutors charged the protestors with a felony for interfering with the US Coast Guard and a misdemeanor for boarding the ship.³ After pleading “No Contest,” a US federal judge fined the protestors and sentenced them to time-served.⁴

Non-violent civil disobedience is standard practice for the Greenpeace organization, and many other NPOs seeking a public forum to address hot-topic issues in their area;⁵ the US government’s response, 15 months after charging the activists, was not standard practice.

In an unprecedented move, the US Department of Justice got a federal grand jury indictment charging the organization with conspiracy.⁶ If convicted, Greenpeace faces a maximum penalty of five years’ probation and US\$10,000 in fines. A conviction could also cause Greenpeace to lose its tax-exempt status under US law.⁷

The charges stem from an 1872 US law prohibiting “sailor mongering”—boarding vessels before arrival.⁸ Greenpeace counters that the statute was meant to prevent alcohol sellers and prostitutes from soliciting sailors before their ship could dock.

In response to the US government’s allegations, Greenpeace argues that the statute wrongly violates the organization’s rights to free speech and non-violent criticism. Greenpeace claims that it was drawing attention to illegal mahogany importation and that their actions resulted from concern over the violation

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¹ It was later determined that the Jade was, in fact, carrying illegal mahogany. See U.S. TAKES A HARD LINE ON GREENPEACE,” available at <http://msnbc.msn.com/id/3475218/>.

² U.S. TAKES A HARD LINE ON GREENPEACE,” available at <http://msnbc.msn.com/id/3475218/>.

³ *Greenpeace Prosecuted Under Antiquated Law*, THE MIAMI HERALD, Oct. 30, 2003, available at <http://www.miami.com/mld/miamiherald/news/opinion/7137961.html>.

⁴ *Id.*

⁵ See Letter of U.S. Senator Patrick Leahy, available at http://www.greenpeaceusa.org/bin/view.fpl/16961/article/1056/cms_article/1056.html, stating that “many other advocacy groups’ members engage in civil disobedience...”(hereinafter Leahy Letter).

⁶ The text of the indictment is available at <http://www.usdoj.gov/usao/fls/Greenpeace.html>. In pertinent part, it alleges that Greenpeace conspired with its members and employees with the intent of placing activists aboard the APL Jade to display signs protesting the importation of mahogany.

⁷ U.S. TAKES A HARD LINE ON GREENPEACE,” available at <http://msnbc.msn.com/id/3475218/>.

⁸ The law is 18 U.S.C. §2279 and specifically provides that: “Whoever, not being in the United States service, and not being duly authorized by law for the purpose, goes on board any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, shall be fined under this title or imprisoned not more than six months, or both.” *Id.* Further, until now, the act has only been cited in two cases since its passage over a century ago. AMICUS BRIEF OF THE ACLU OF FLORIDA AND PEOPLE FOR THE AMERICAN WAY FOUNDATION, at 6. Available at http://www.greenpeaceusa.org/bin/view.fpl/16847/cms_category/149.html. (hereinafter Brief of ACLU).

of international treaties. John Paccacantando, the Greenpeace's Executive Director, has compared the US government's case to those arising from the McCarthy era.¹

A diverse group of NPOs—including the National Resources Defense Council (NRDC), the National Association for the Advancement of Colored People (NAACP), the American Friends Service Committee and the People for the American Way—has come to support Greenpeace and is petitioning the court for *Amicus Curiae*² status in the case to protest the US government's action. Another alleged problem with this prosecution is the apparent lack of case law. NRDC, for example, has pointed out that there is no case on record of the US prosecuting an advocacy organization for its member's civil disobedience.³

With the help of these groups, Greenpeace has filed a counter claim. The suit alleges that the US government has selectively prosecuted Greenpeace in violation of the Equal Protection Clause of the United States Constitution.⁴ Greenpeace argues that the US government is singling out Greenpeace because it is critical of the Bush Administration.⁵

To prove a selective prosecution claim, Greenpeace must show that the “prosecutorial decision or policy...had a discriminatory effect and...was motivated by a discriminatory purpose.”⁶ In its motion, Greenpeace bases its allegation on two facts: No other organization has been prosecuted for the civil disobedience of its members; government prosecution is in retribution for Greenpeace's opposition to President Bush.⁷ The majority of the *amici* briefs focuses on these two facts as the prospect of being prosecuted for members' acts scares NPOs.

Senator Patrick Leahy is an ardent Greenpeace supporter. In a letter to US Attorney General John Ashcroft, Senator Leahy argued that

[the prosecution of] public interest organizations sends a strong message to other advocacy groups that the actions of their members could jeopardize their tax-exempt status and lead to government oversight of their activities, which could have a chilling effect of free speech and activism of all kinds.⁸

Senator Leahy also called upon Ashcroft to review the case.⁹

Senator Leahy, however, may only be stating what is obvious to NPOs: Prosecutions like this could affect what otherwise would be independent organizational policy decisions. Many NPOs fear that, ultimately, the US government will choose to pursue these types of prosecutions anytime a group publicly disagrees

¹ See “U.S. TAKES A HARD LINE ON GREENPEACE,” available at <http://msnbc.msn.com/id/3475218/>.

² *Amicus Curiae* status literally means “friend of the Court” and is a term of art within the U.S. judiciary. Essentially, the status allows groups who have an interest in the outcome of a case, but who are not direct parties to the case, to file briefs supporting a specific outcome. The purpose of the brief is to “educate” the court about specific issues that directly affect the outcome of the case.

³ Brief of Amicus Curiae National Resources Defense Council, Inc. at 3. Available at http://www.greenpeaceusa.org/bin/view.fpl/16847/cms_category/149.html.

⁴ See Greenpeace Motion for Discovery on Claim of Selective Prosecution and Incorporated Memorandum of Law, pg. 6 (hereinafter Greenpeace Motion). Available at http://www.greenpeaceusa.org/bin/view.fpl/16847/cms_category/149.html. Essentially, Greenpeace is claiming that the Government has singled them out because of their stance against the current U.S. Administration.

⁵ *Id.* In fact, the Organization claims that the retaliatory nature of the prosecution is in direct violation of its Fifth Amendment rights because of its arbitrary nature. *Id.*

⁶ Greenpeace Brief at 6.

⁷ In fact, in its motion for discovery Greenpeace lists the dates and locations of its protests over the Bush Administration. See Greenpeace Motion, pg. 11.

⁸ Leahy Letter, pg. 2.

⁹ *Id.*

with the current administration. Creating this type of accountability could undermine NPO effectiveness and even lead to the revocation of tax-exempt status for groups that refuse to follow the status quo.

The American Civil Liberties Union (ACLU) of Florida and the American Way Foundation, in their *amicus* brief, have done the best job of phrasing this issue by including a dialogue between Frank J. Marine of the US Department of Justice (DOJ) and a US House of Representatives subcommittee. In response to the question of whether DOJ has ever gone after an advocacy group, Mr. Marine responded, “we [DOJ] don’t go after groups[,] we go after people who commit criminal conduct.”¹

The ACLU points out that civil disobedience has a long history in the United States and has been part of every major social movement.² And, this fact explains why the government has not prosecuted an organization for the actions of its members.³ The ACLU argues that state action designed to retaliate against and chill political expression violates the First Amendment⁴ by using government prosecution to intimidate Greenpeace and deter it from exercising its right to free speech.⁵ Moreover, the current prosecution, if allowed to continue, could unnecessarily chill all NPO expression.⁶

As this article goes to print, Judge Adalberto Jordan has granted Greenpeace’s request for a jury trial.⁷ Further, although refusing to grant Greenpeace’s Motion to Dismiss the indictment, Judge Jordan “expressed doubts about the Justice Department’s ability to prevail against Greenpeace’s claim that the criminal statute involved is unfairly vague, stating ‘[I]t is not a good sign when the government resorts to defining a phrase by repeating the phrase itself.’”⁸ The case is set for trial in May 2004.

¹ Brief of ACLU at 1.

² The ACLU brief cites Supreme Court language that recognizes that the freedom to engage in association for the advancement of ideals and beliefs is inseparable from liberty. See Brief of ACLU at 11 (*citing NAACP v. Alabama*, 357 U.S. 449 (1958)).

³ *Id.*

⁴ *Id.* at 13.

⁵ *Id.* at 12.

⁶ *Id.* at 13.

⁷ See http://www.greenpeace.org/international_en/news/details?item_id=456178. The Judge granted this motion on April 15, 2004.

⁸ *Id.*

THE DAILY NEWS OF ZIMBABWE

BY BRYSTOL ENGLISH*

Zimbabwe's media crisis continues in the series of cases between the Associated Newspapers of Zimbabwe (ANZ) and the government, namely, the Media and Information Commission (MIC). The litigation arises from the 2000 Access to Information and Privacy Act (AIPPA) of Zimbabwe initiated by Mugabe's administration. The ANZ argues that the Act is a vice to hold down the ANZ's ability to publish its two opposition newspapers, the Daily News and the Daily News Sunday. The courts have made several critical decisions, some conflicting, between February and March. The decisions are and will be a reflection of today's questionable rule of law and democracy in Zimbabwe and perhaps an indication of what the future holds.

Immediately following the ruling allowing the Daily News to recommence publication on 22 January after a December court ruling ordered a police occupation of the premises and seizure of publication, the Supreme Court, in a 4-1 decision, overturned the earlier ruling and decided on 5 February that the ANZ must be registered by the MIC. As a result, the Daily News stopped publishing on 6 February. The Court also maintained its position that refused to hear the plea of unconstitutionality because the ANZ had approached the court with "dirty hands."¹ The ANZ and the Independent Journalist Association of Zimbabwe (IJAZ) challenged the constitutionality of the AIPPA requiring the reporters to be accredited and that the statute makes it a criminal offense for a reporter to publish without accreditation. IJAZ argues that the accreditation and registration provisions of AIPPA should be of a voluntary nature in the request for identification as before the enactment of AIPPA.²

Following the 5 February Supreme Court decision concerning the constitutionality of AIPPA, the Daily News applied for clarification on whether the paper was permitted to publish notwithstanding its failure to be registered by the MIC. On 17 February the High Court declined to issue a judgment concerning the issue until the paper's application for accreditation was approved or denied. In turn, the Supreme Court postponed its ruling on the paper's fate until 3 March pending finalization of all other proceedings, leaving uncertainty of the paper's status. Despite the paper's urging the court to follow the law that permits journalists to continue operations pending the application process of a submitted application for accreditation, the court, seeing no urgency in the issue, advised them to follow the normal procedures of the court.³

Foreseeably, the MIC rejected the ANZ's attempt to register and receive accreditation with the Commission.⁴ This waging war over media rights being fought in the courtrooms and the subsequent holdings pronounced by Zimbabwean judges will make the difference of how the country is perceived and treated by the international community. Illustratively, the European union renewed sanctions on 23 February not only against Mugabe in his role in oppressing the media and opposition, but also against the head of the MIC for his responsibility in closing down operations and intimidated opposition papers such as the Daily news. The sanctions also speak to the EU's concern of the AIPPA's degradation of the freedom of association and assembly.⁵

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¹ See "Clean Hands? Thou Hath Blood on Your Hands: A Critique of the Supreme Court Judgment in ANZ Case," IJCSL Vol. I Issue 4 (October 2003), available at

[http://law.cua.edu/Students/Orgs/IJCSL//Volume%20I%20Issue%204%20\(October%202003\)%20\(Updated\).pdf](http://law.cua.edu/Students/Orgs/IJCSL//Volume%20I%20Issue%204%20(October%202003)%20(Updated).pdf).

² See <http://news.bbc.co.uk/1/hi/world/africa/3462563.stm>.

³ See <http://www.mg.co.za/Content/13.asp?ao=31429>.

⁴ See <http://allafrica.com/stories/200402230694.html>.

⁵ See <http://www.cnn.com/2004/WORLD/africa/02/23/eu.zimbabwe.reut/index.html>.

Resulting from the court's advisement not to operate pending finalization of litigation, the ANZ has been forced to downsize its journalist and staff positions from approximately 300 to a core group of 50. The continuing litigation and stay of publishing means that the Daily News, once with a readership of 900,000, can no longer afford salaries for its workers. Also as a result of the upholding of the AIPPA, some journalist are reluctant to continue working as criminal penalties will insist.¹

On 3 March the Supreme Court reserved judgment in a consolidated case brought by the ANZ and the MIC. The case comprised the issues of constitutionality of AIPPA and the Administrative Court's jurisdiction to order and enforce its judgment that the MIC register the ANZ. Despite its previous "dirty hands" position and the fact that the ANZ had attempted to comply with last September's court order to register with the MIC before challenging the constitutionality of the AIPPA, the Court heard the ANZ's arguments against constitutionality after the counsel for the government conceded that ANZ had complied with the law.² The counsel was also unsure that the powers of the Information Minister were not excessive in the eyes of justice and unable to confidently defend the government's position to the Court. The Court also challenged the level of fairness to be obtained by the Commission which does not operate independent of government influence; particularly, under AIPPA, the Information Minister, an interested party of the government, is permitted to suspend, prosecute and dismiss members of the MIC on a misconduct charge by the Minister. Noting that the Minister is also responsible for the definition of misconduct, the Court chided the impossibility of a consistent legal definition. The Court also proffered that the regulated body for journalists should be independent of government and commercial influence.³ The Supreme Courts aforementioned challenges, questioning, and suggestions of government independence are monumental from the previous months positions. If the legal positions are followed through here, Zimbabwe may be in the grips of change.

¹ See <http://sg.news.yahoo.com/040223/1/3i90u.html>.

² See <http://allafrica.com/stories/200403040163.html>.

³ See <http://allafrica.com/stories/200403050222.html>.

COUNTRY REPORTS

INTERNATIONAL

SECTION ON NON-PROFIT ORGANIZATIONS FROM THE REPORT ON MONEY LAUNDERING & TERRORIST FINANCING TYPOLOGIES 2003–2004

BY THE FINANCIAL ACTION TASK FORCE*

EDITOR'S NOTE: This section of the above-referenced report focuses on the role of Not-for-Profit Organizations (NPOs) in terrorist financing, and it includes a number of examples of how NPOs may be used to provide access to funds for terror operations. It is reproduced here to ensure that it is widely distributed among the readers of IJCSL.

II NON-PROFIT ORGANISATIONS & LINKS TO TERRORIST FINANCING

29. The FATF examined the role of non-profit organisations (NPOs) as part of its last typologies exercise (2002-2003). At that time, it was able to make some preliminary findings on the nature of the risk to the sector. In order to expand on this work, NPOs and potential for misuse for terrorist financing purposes was selected once again and became the second workshop topic for this year's exercise. As indicated in the introduction, all three workshops had additional preparation before the experts meeting. The preparation for the NPO workshop, however, was the most extensive of the three workshops, consisting of several small meetings of experts and numerous exchanges of analyses and position papers. For this reason, the NPO workshop was able to obtain a greater degree of detail in its findings which are then reflected in this report.

30. While some countries have relatively extensive experience with terrorism financing through NPOs, other countries clearly have a more limited experience. Only some of the material provided as part of this year's exercise described cases of *proven* terrorist financing. Much of the material therefore related to *suspected* or *possible* terrorist financing — many cases involved investigations that were still ongoing — while a few of the cases dealt with other possible forms of misuse of NPOs.

31. Most countries share the concern over the difficulties in detecting terrorist financing through misuse of NPOs. It is generally acknowledged that such organisations play a crucial social and financial support role in all societies, and obviously this role is not called into question. Nevertheless, the sheer volume of funds and other assets held by the NPO sector means that the diversion of even a very small percentage of these funds to support terrorism would constitute a grave problem. Therefore, the limited knowledge about the extent to which terrorists may be exploiting the sector should be considered a matter of serious concern for the whole international community.

32. NPOs possess many characteristics that are particularly vulnerable to misuse for terrorist financing. They enjoy the public trust, have access to considerable sources of funds, and are often cash-intensive. Furthermore, some of these organisations have a global presence that provides a framework for national and international operations and financial transactions, often within or near those areas that are most exposed to terrorist activity. Finally, depending on the country and legal form of the NPO, they are often subject to little or no regulation (for example, registration, record keeping, reporting and monitoring) or have few obstacles to their creation (for example, there may be no skills or starting capital required, no background checks necessary for employees, etc.).

Typologies

* The full report is available at http://www1.oecd.org/fatf/pdf/TY2004_en.PDF

33. The case examples presented during this year's typologies exercise appeared to show that NPOs can be misused in a variety of ways and for different purposes within the framework of terrorism financing. First of all, NPOs can be used by terrorists and terrorist organisations to raise funds, as was the case for many of the larger NPOs that had their assets frozen on the basis of the UN Security Council Resolution 1373 (2001). Often – but not always – these organisations have applied for and received a formal charitable or tax exempt status. Moreover, some of these organisations were reported to have used rather aggressive fund raising techniques, sometimes seeking donations from the public at large, and in other instances focusing on certain target groups, particularly within specific ethnic or religious communities.

34. A number of the experts noted the importance of *informal cash collection* in many ethnic or religious communities and the difficulties in accurately monitoring those funds. Although it is most likely that the vast majority of these funds are raised and used for entirely legitimate charitable purposes, the obvious potential for abuse is nevertheless problematic. The existence or pretence of cash collections can also facilitate the integration of the proceeds of criminal activities carried out by terrorist groups into the “legal financial system”. These funds are then represented as legitimate charitable cash collections for an NPO, and the process is thus a form of money laundering for terrorist purposes.

Case 5: Raising of funds through an NPO

A registered charity, ostensibly involved in child welfare, used video tapes depicting religious "freedom fighters" in action in various countries, together with graphic images of atrocities perpetrated against members of that religion. The tapes contained an appeal to send donations to a post office box number to help in the "struggle". These tapes were apparently widely distributed around religious establishments throughout the region. The same post office box number was associated with a further appeal in magazines which published articles by well known extremists.

35. NPOs can also be used by terrorists *to move funds*. In this case, terrorists exploit the fact that financial transactions which effectively transfer funds from one geographic location to another — often across national borders — are regarded as the normal business of certain types of foundations and charities. In some instances, the legal form and ostensible purpose of the NPO seem to have been chosen carefully in order to avoid regulation and monitoring (for example, cultural associations established in some countries by indigenous ethnic communities). A few apparently related case examples were cited by several delegations whereby networks of related foundations in different countries are established within a particular ethnic community and then seem to function as a framework for illegal alternative money remittances. Although it is not clear whether any of these schemes are directly related to terrorist financing, the structure of the networks is interesting because of its unusual characteristics and potential for abuse. The examples also show that there can be little to distinguish between transfers within or among NPOs and the provision of illegal money remittance services. These “alternative money remitters” make use of NPO bank accounts to collect cash deposits and settle the accounts with their overseas contacts. In some cases, these transactions were considered suspicious by the competent authorities because of the incongruity between the amounts handled and the modest living conditions of the particular community that provides financial support to the NPO in question.

Case 6: An NPO is used to transfer money to suspected terrorists

An FIU in Country A obtained updated information from the United Nations Security Council consolidated list of designated persons and entities. One of the organisations on the list conducted its operations under different variations of the same name in a number of countries. It was described as a tax-exempt NPO for which the stated purpose was to conduct humanitarian relief projects throughout the world. Among the multiple locations provided UN list for branches of this organisation, several of the addresses were in Country A. The FIU received a suspicious transaction report on the NPO listed at one of the addresses indicated by the UN list. The report indicated bank accounts and three individuals with controlling interest on the address in Country A. One of the individuals (Mr. A) had an address that

matched one of the addresses indicated on the UN list, and the other two individuals had addresses in two different countries. A search by the FIU revealed that the Mr. A was linked to these organisations, as well as to four other international NPOs. Reports received by the FIU detail multiple wire transfers sent from locations of concern to the branches of the above-mentioned charity and to Mr. A.

Case 7: NPOs used to make illegal transfers

An on-going criminal investigation into a network of foundations (at least 215 NPOs) established by the members of a particular immigrant community revealed that the network was transferring large sums of money regularly to a few accounts in another country. Suspicious transaction reports from the banks were triggered by the unusually high amount of the transactions in comparison with the stated purpose and activities of the foundations. After an initial analysis, it became clear that one of the beneficiaries of the transactions carried out by these organizations was a company contained in the UN Security Council list of designated persons. The FIU forwarded the case for further investigation by law enforcement agencies. Although the stated purpose of these foundations was charitable, the size and frequency of the transfers (both through regular bank accounts and by using money transfer services) were difficult to explain. Over a 3 year period, the 35 NPOs sent over USD 160 million overseas. The network consisted of a sizable number of foundations spread throughout the country, with a concentration in cities with a large presence of the same immigrant community. The ongoing criminal investigation concluded that the NPOs were most likely a cover for an alternative remittance system. Although it is still too early to draw a clear conclusion about the source and destination of the funds of this network, there is at least the possibility that the funds were raised within this immigrant community with the deliberate intent to support terrorist acts.

36. Finally, NPOs can also be used to *provide direct logistical support* to terrorists or *serve as a cover for their operations*. This type of terrorist misuse is particularly evident among those NPOs that have several branches operating in multiple jurisdictions.

Case 8: Senior members of an NPO use the organisation to fund terrorism

An NPO was registered in Country X as a tax-exempt charity whose stated purpose is to conduct humanitarian relief projects throughout the world. Although the NPO was incorporated in Country X, it operated in various locations using slightly different names. Financial and business records were seized from the NPO's head office and the homes of the NPO's chief executive officer and a member of its board of directors. On the same date, Country X issued an order blocking the NPO's assets and records pending further investigation. Eleven months later, Country X submitted the NPO to the UN for designation under relevant UN Security Council resolutions for its support of a terrorist organisation. Country X convicted the chief executive officer of the NPO for fraud and organised crime related offences for diverting more than USD 315,000 of charitable donations to terrorist organisations. Prior to these actions, there is evidence that the NPO had provided both direct and indirect financial support terrorist organisations.

Categories of misuse

37. An important conclusion from this year's work on NPOs is that various categories of these organisations have different sets of risk profiles and thus vary in the types of unusual characteristics that may be detected and used in identifying terrorist financing. It is important, for example, to distinguish between NPOs that officially register as charities and then use their status to tap into a broader base of funding and those NPOs that perform a less visible function, sometimes avoiding registration or tax exemption altogether. Often these unregistered NPOs obtain their funds from or provide services for certain ethnic communities. Such NPOs may be more commonly known as cultural associations or associations or foundations with community-related activities rather than as charities.

38. A distinction can also be made between NPOs that operate internationally and those that have a local function. There is a common misperception that NPOs can only be misused in an international context by raising funds in donor countries and then sending these funds abroad to terrorist groups in third countries. Although internationally active NPOs may be more vulnerable to misuse, terrorist financing may also occur within NPOs that operate exclusively within national boundaries. Countries that have an internal terrorist problem clearly have experience with NPOs operating within their borders that have been misused for the financing of local terrorist groups. A related misconception is that the misuse of NPOs by terrorists is exclusively related to religious extremism.

39. Another distinction that can be made relates to the differing degrees of complicity between an NPO and its donors. While in most of the relevant cases considered by the experts this year involved corrupt or complicit management of the NPO as a contributing if not primary reason for the link with terrorist financing, there are also reported examples of largely innocent NPOs that were exploited by a few infiltrators who were able to siphon off or divert the funds of the organisation. Moreover, an innocent NPO could also be the victim of an unrelated recipient organisation or related branch office.

There are even cases of bogus fund raising, where the name of existing and unwitting NPO was used as a cover for illegal fund-raising.

Detecting terrorist financing in the NPO sector

40. Given the typologies discussed above, the experts came to the conclusion that the method with the best chance of success for detecting possible terrorist financing links to NPOs is through intelligence or police work, which builds on links with other NPOs (operational, financial or through common management and personnel) or through connections to individuals that are already suspected of terrorist or terrorist financing activities. In some cases, the directors or managers of the NPO may already have a history of extremism or even a criminal or terrorism-related record. In other cases, links may be established with well-known terrorist organisations or with other NPOs that are already on the various lists of designated persons or entities maintained by the United Nations or individual countries. Public concerns and tips about the possible involvement of NPOs in questionable activities can also play a role in detecting possible misuse.

41. The reporting of suspicious unusual transactions by financial institutions and the subsequent analysis by FIUs or law enforcement also play an important role in bringing certain cases of suspected terrorist abuse of NPOs to the surface. In some countries, suspicious transaction reports related to unusual NPO-activity have actually led to the initiation of an investigation, while in other cases the reporting system and FIU-analysis have contributed to the development of further leads in ongoing investigations.

42. The monitoring activities of supervisory or tax authorities responsible for NPO oversight do not appear to have identified any initial leads into terrorist financing cases within the charitable sector. However, these authorities have sometimes played an important role in developing relevant leads by being able to ask further questions or inspect entities and/or share information with law enforcement agencies.

43. The experts agreed that each of these detection mechanisms had a complimentary function that could be pursued or enhanced collectively. This diversity of possible detection mechanisms and information sources regarding potential terrorist abuse of charities underscores the importance of constructing effective information-sharing arrangements both within and among government authorities.

Warning indicators

44. Besides the links to suspected terrorists, terrorist organisations or other suspect NPOs, the experts also identified a number of individual unusual characteristics or “red flags” in the case examples considered

during this year's typologies exercise. Some of these unusual characteristics could be particularly helpful for financial institutions; others may be more useful for supervisory or investigative authorities.

Specific financial characteristics:

- _ Incongruities between apparent sources and amount of funds raised or moved such as situations in which large amounts of funds are apparently raised within communities that have a very modest standard of living.
- _ A mismatch between the pattern and size of financial transactions on the one hand and the stated purpose and activity of the NPO on the other, for example (as mentioned above) a cultural association that after ten years of existence opens a bank account for handling the proceeds of a music festival and deposits a disproportionately large amount of money into the account.
- _ A sudden increase in the frequency and amounts of financial transactions for the account of an NPO or the inverse, that is, the NPO appears to hold funds in its account for a very long period.
- _ Large and unexplained cash transactions by NPOs.
- _ The absence of contributions from donors located within the country of origin of the NPO.

Other characteristics:

- _ The existence of foreign directors, particularly in combination with large outgoing transactions to the country of origin of such directors and especially if destination is a high-risk jurisdiction.
- _ The existence of a large number of NPOs with unexplained links: for example, several NPOs transfer money to each other or share the same address, same managers or personnel; or a large number of NPOs are related to the same community and use the services of the same gatekeeper.
- _ NPOs with little substance, that is, in relation to their stated purpose and financial flows, or else they appear to have little or no staff, suitable offices or telephone number.
- _ Operations in or transactions to or from high-risk jurisdictions could of course also be considered as a reason for higher scrutiny by financial institutions. It could also serve as a criterion for initiating increased attention by supervisory or other competent authorities.

Policy implications

Different oversight systems and approaches

45. The consensus among those experts involved both in this year's typologies exercise and specifically in the NPO workshop was that additional measures will likely need to be developed to reduce the vulnerabilities of NPO to misuse for terrorist financing purposes. The extent and the nature of such measures remain to be defined, however. In part, the lack of clear direction in this area reflects the fact that there are great differences among countries in how they oversee and ensure transparency within the NPO sector. Some countries, for example, have a long-standing tradition of active government oversight of NPOs, while other countries put more emphasis on criminal investigation and detailed record-keeping requirements. Still other countries have implemented far-reaching regulatory systems that include detailed record keeping and reporting requirements, external auditors, licensing, the mandatory use of authorised bank accounts, permits for international transactions, and detailed customer due diligence requirements for banks (with regard to NPOs).

46. The differences in approach among countries appear to be mostly related to different philosophies with regard to the role of government in the regulation of charities and other types of NPOs. Some countries believe that the protection of donors is a legitimate reason for comprehensive government regulation and supervision of NPOs. Others believe that protection of donors is primarily the responsibility of those who contribute to NPOs, thus it is private watchdog organisations, etc., which are responsible for this oversight.

47. Many countries have some kind of regulation and oversight of those NPOs that have been granted a full or partial tax-exempt status by fiscal authorities. In certain countries, these authorities may even play

an important and active role in the oversight of such organisations. For example, the fiscal authorities may require detailed annual reports from each registered NPO and then make this information publicly available upon request. In other countries, government regulation and oversight is mainly geared towards protecting the integrity of certain types of legal entities, which have a specific license to handle large amounts of charitable funds.

48. Finally, there is of course another reason to increase regulatory oversight of the NPO sector, namely to prevent criminal abuse, not only for terrorism financing, but also for money laundering and fraud. No matter which approach is taken, most countries still appear to have significant loopholes in their systems. The experts identified a number of important constraints that might prevent jurisdictions from effectively reducing the threat posed by terrorist financing or other criminal misuse of the NPO sector.

49. Most countries can only dedicate a limited part of its resources to the regulation and oversight of the NPO sector, which in some cases consists of hundreds of thousands of organisations that handle a significant percentage of the GDP of a country. This observation is particularly true for many of the recipient or developing countries, where NPOs of all sizes, often community-based, play a particularly crucial role in the economy. Sometimes the NPO-sector in those countries has a larger economic weight and importance than the public sector.

50. In most countries, a large percentage (up to 90%) of the total number of NPOs consists of very small organisations. For these smaller NPOs, it can be difficult to carry a substantial administrative burden that would be required for complying with detailed government regulation. Even for larger organisations, there are limits to what can be considered a reasonable compliance burden, since the resources of NPOs are by their very nature scarce in relation to the often essential services they provide. Furthermore, some countries have certain legal or even constitutional provisions that prevent or limit the imposition of regulatory requirements on certain categories of NPOs. Examples of such provisions are the freedom of association or the special status of religion-based organisations.

Conclusions and issues for follow up

51. There was a consensus among the experts of this year's typologies exercise that, whatever approach is taken, government regulation or oversight should have a risk-based character. Any oversight regime (whether a genuine regulator or tax authorities) should have a targeted function and focus on areas of high risk. An argument was made by some experts that an oversight function may be more useful in developing a terrorist financing lead in the early stages of investigation when there is not yet sufficient ground for a criminal investigation, rather than in generating independent leads. Others believed that government oversight could also have a clear preventative and lead-generating function by requiring enhanced scrutiny on certain high-risk categories of NPOs. In any event, it was recognised that having the authority and means to follow up on the suspicious or unusual characteristics of an NPO before there is sufficient grounds for initiating a criminal investigation is perhaps one of the most crucial elements of an effective system to combat misuse of the NPO sector.

52. Regardless of the approach taken to oversee of NPOs, many countries may nevertheless continues to have certain exceptions or loopholes in their systems that limit any reduction in the vulnerability of the sector as a whole. For example, some countries may be unable to monitor NPOs that do not register for tax-exempt status, religious organisations or NPOs established in certain other unregulated legal forms. There is thus a need to examine how vulnerable these parts of the NPO sector are to terrorist financing or other forms of misuse and then to identify alternative solutions to guarantee transparency and access, when necessary, to competent authorities. A solution mentioned by one country was to require NPOs to register with fiscal authorities in order to open a bank account.

53. In order to generate and develop leads, the experts considered it important to further develop or enhance mechanisms and gateways for sharing information both nationally and internationally. To facilitate co-operation on the national level, there was considerable support for the idea of creating “national task forces” of law enforcement agencies, intelligence and security services, FIU personnel, NPO supervisors and tax authorities. Such task forces could: (i) examine and assess the risk of terrorist financing in the NPO sector; (ii) recommend appropriate development or enhancement of an effective yet reasonable oversight mechanism to combat this risk, and (iii) share information on potential or suspected terrorist financing activity occurring in the sector.

54. For international information exchange and co-ordination, the experts emphasised the importance of proactive and rapid information exchange between counterpart and non-counterpart agencies (that is, not only between FIUs, for example, but also between FIUs and regulatory or law enforcement agencies). The type of information exchange would be as a complement to more formal exchanges of information, in particular if there are strong indications of internationally active groups and possible links with specific NPOs overseas. International organisations that can compare different national databases could also play a very useful role.

55. Particular attention should also be paid to removing the obstacles for tracing and verifying the use of NPO resources in third countries (overseas operations or overseas connections). This is especially problematic in distressed or conflict areas. To address this problem, a number of ideas were discussed, including: (i) the need for closer co-operation between the authorities of donor and recipient countries; (ii) the possibility of co-ordinating and sharing information resulting from occasional field audits overseas; (iii) the possibility of channelling funds through explicitly authorized and monitored local organisations; (iv) the development of a template for reliable procedures for international transactions and operations (examining the procedures of the larger and more established NPOs in each donor jurisdiction and in each recipient jurisdiction); (v) the possibility of reversing the burden of proof in certain instances (NPOs in donor countries proving that their overseas operations and transactions, also through local NPOs, are conducted in accordance with their stated purpose and by-laws), and (vi) requiring NPOs to receive licenses associated with enhanced due diligence requirements before authorising operations in certain high risk conflict or terrorist areas or jurisdictions. While none of these ideas was intended to relieve the recipient jurisdiction from all responsibility associated with overseeing the NPO sector, each proposal offers a means of enhancing protection of the NPO sector by imposing additional obligations on the donor jurisdiction or NPO. This could also help to provide sufficient protection against misuse of resources in geographical areas where there is relatively little government control particularly in conflict areas.

56. Further work needs to be done in order to make optimal use of the system for reporting suspicious or unusual transactions as a means of detecting possible misuse of NPOs. Further work also needs to be done on the red flags as well as on best practices for customer due diligence in relation to NPOs. Finally, it is important that countries engage in discussions with their NPO sector to ensure mutual understanding and co-operation in the fight against terrorism financing. It is also essential that countries make optimal use of the available knowledge and expertise in the NPO sector to determine which measures and requirements are feasible and effective and which best practices can be identified.

COMMENT: CRIMINAL TRIBUNALS & TRUTH & RECONCILIATION COMMISSIONS CONSIDERED

BY ZAINE E. WATSON*

On analyzing the history of the “*ad hoc* war crimes tribunal” and the “Truth and Reconciliation Commission” (TRC), it would seem that history is doomed to repeat itself. Since World War II, the international community has tried different methods to address human rights abuses and other violations of international humanitarian law. And, the need to address this problem has not subsided.¹ In the last decade alone, *ad hoc* war crimes tribunals and TRCs have been established to deal with atrocities in Chile, Ecuador, Peru, Rwanda, Sierra Leone, South Africa, and Yugoslavia.² The recent establishment of the International Criminal Court (ICC) seems to indicate the twin senses that these atrocities are becoming more prevalent and that the perpetrators escape punishment.³ This Comment assess three means to establish guilt and accountability, discover truth and promote reconciliation—or some combination of each—by using an international criminal tribunal, a TRC or, in the special case of Sierra Leone, both institutions simultaneously.

NUREMBURG & THE USE OF *AD HOC* WAR CRIMES TRIBUNALS

The use of an *ad hoc* war crimes tribunal to hold persons individually accountable developed after World War II with creation of the International Military Tribunal at Nuremberg. The Nuremberg Charter recognized as punishable crimes against peace, war crimes, and crimes against humanity.⁴ The principles the Nuremberg Tribunal established recognized that individuals could be held criminally responsible for acts during war and that heads of state could be held accountable if these crimes were committed under their rule.⁵ The Nuremberg Tribunal paved the way for future tribunals and commissions: It marked the beginning of holding individuals criminally responsible under international law for committing crimes against humanity and human rights abuses; and it proved to be a catalyst for the development of international human rights law.⁶

While there have been TRCs between World War II and the early 1990s,⁷ the first *ad hoc* war crimes tribunal since Nuremberg were set up to investigate atrocities committed in Yugoslavia and Rwanda.

YUGOSLAVIA

In 1993 the United Nations’ Security Council—responding to public outrage at news of mass killings, ethnic cleansing, rape, and genocide committed in former Yugoslavia during the Balkan wars—¹ created

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¹ See e.g., Priscilla B. Hayner, *Fifteen Truth Commissions—1974–1994: A Comparative Study*, 16 Hum. Rts. Q. 597 (1994).

² Please note that this list is not exhaustive.

³ Detailed information about the ICC, including the Rome Statute and other ICC documents, can be found at <http://www.un.org/law/icc/general/overview.htm>, <http://www.un.org/law/icc/index.html>, and <http://www.icc-cpi.int/php/index.php>. The United Nations General Assembly convened a conference in Rome in 1998 to adopt a convention for the establishment of an international criminal court. The goals of the ICC include deferring future war criminals, to achieve justice for all, to end impunity, to help end conflicts, and to take over when national criminal justice institutions are unwilling or unable to act, and to help end the deficiencies of *ad hoc* tribunals.

⁴ Principles of the Nuremberg Tribunal, taken from the *Report of the International Law Commission Covering its Second Session, 5 June–29 July 1950*, Document A/1316, pp. 11–14, available at <http://deoxy.org/wc/wc-nurem.htm>.

⁵ *Id.*

⁶ Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L. J. 707 at 713 (1999).

⁷ Hayner, *supra* note 1.

the International Criminal Tribunal for the Former Yugoslavia (ICTY). The UN Security Council empowered ICTY to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”² The UN Security Council also empowered ICTY to help to render justice to the victims, deter future crimes, and contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.³ The ICTY is an ongoing tribunal and there is no set deadline for when the ICTY will complete its work.⁴

ICTY functions like a normal court. The statute establishing the ICTY creates a “Chambers,” consisting of Trial Chambers and Appeals Chambers, and a “Prosecution.”⁵ The Office of the Prosecutor directs investigations.⁶ The statute also enumerates the rules and procedures that the tribunal follows,⁷ and that protect victims, witnesses,⁸ and the accused.⁹

Since its inception, and despite resistance from members of the former Yugoslavian government, ICTY has handed down nearly 100 indictments,¹⁰ completed 35 trials,¹¹ and sentenced nearly 30 individuals. While ICTY has been criticized,¹² the work of the ICTY has mostly been deemed a success and an influence on future commissions, and it continues to investigate and prosecute as necessary.

RWANDA

The UN Security Council created the International Criminal Tribunal for Rwanda (ICTR) because of public outrage concerning atrocities committed in Rwanda in 1994. In the space of 100 days, 800,000 Tutsis and Hutus were killed by the Hutu majority¹³—nearly 21,000 were killed in one town alone.¹⁴ These killings led the Rwandan government to ask the United Nations to create an *ad hoc* war crimes tribunal. UN Security Council Resolution 955 created ICTR to prosecute “persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.”¹⁵ The resolution also speaks of deterring future crimes and contributing to national reconciliation and maintaining peace.¹⁶

ICTR has been considered successful thus far. It is the first international tribunal to convict an individual for the crime of genocide; and it is the first tribunal to convict a head of state for genocide.¹⁷ ICTR has

¹ Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 103 at 104 (1997). Note, however, that the statute establishing the ICTY does not mention genocide.

² S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/Res/872 at Art. 1 (1993).

³ *See generally Id.*

⁴ *Id.*

⁵ *Id.* at Art. 11.

⁶ *Id.* at Art. 18.

⁷ *Id.* at Art. 15.

⁸ *Id.* at Art. 22.

⁹ *Id.* at Art. 21.

¹⁰ *The ICTY at a Glance*, at <http://www.un.org/icty/glance/index.htm>. Note that Slobodan Milosevic is one of those currently on trial along with other high profile former government officials.

¹¹ *Id.*

¹² This topic will be discussed more fully below.

¹³ Chris McGreal, *It's so difficult to live with what we know*, *THE GUARDIAN*, March 29, 2004, at <http://www.guardian.co.uk/rwanda/story/0,14451,1183895,00.html>.

¹⁴ *Id.*

¹⁵ S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

¹⁶ *Id.*

¹⁷ Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 *FLETCHER F. WORLD AFF.* 21 at 25 (2002). Former Rwandan Prime Minister Jean Kambanda was tried and sentenced to life in prison. Note that the ICTR operates with the same framework as the ICTY.

arrested over 50 people since it began in 1995 and has conducted several trials.¹ ICTR has said it hopes to conclude its activities by 2008.²

CAMBODIA

Cambodia and the United Nations agreed in June 2003 to create an *ad hoc* war crimes tribunal to prosecute the surviving Khmer Rouge leaders, who are blamed for the deaths of nearly two million persons during their reign during the 1970s.³ The tribunal has not been established because the Cambodian parliament has not ratified the agreement.⁴ And, as the July 2003 elections produced no clear winner, Cambodia has lacked a working government.⁵ The UN and Cambodia have said they hope to start the tribunal later this year or sometime in 2005.⁶

IRAQ

Iraqi leaders recently announced the set-up of a tribunal to prosecute former dictator Saddam Hussein and any members of his Baathist party or regime who are charged.⁷ While this tribunal is not an international body and will use Iraqi criminal law, it will take into account the Geneva Convention and will draw from the experiences of the ICTR.⁸ Many criticized the tribunal immediately, as the announcement of a tribunal came from the Iraqi National Congress, a political party, rather than the provisional Iraqi government.⁹ They say that by politicizing the tribunal, the tribunal looks like a vengeful act with the winner punishing the loser.¹⁰ There is also concern that the tribunal will not involve outside experts in war crimes and crimes against humanity, and that this type of decision will affect future war crimes tribunals.¹¹

THE USE OF TRUTH & RECONCILIATION COMMISSIONS

TRCs differ from *ad hoc* war crimes tribunals. TRCs focus on the investigatory process and exist to determine the actual human rights abuses rather than hold individuals legally accountable.¹² TRCs are often established when a country is focused on the future and transitioning to a democracy rather than assigning blame.¹³ Their work often culminates with the release of a final report detailing findings and a reconciliation plan.¹⁴

¹ The ICTR web site has complete information on arrests and convictions. See *The Tribunal at a Glance*, at <http://www.ictor.org/ENGLISH/factsheets/1.htm>.

² Press Release, International Criminal Tribunal for Rwanda, ICTR Registrar Seeks Support of African Community, (May 9, 2003), at <http://www.ictor.org/ENGLISH/PRESSREL/2003/343.htm>.

³ See *Top UN official confident of progress in Khmer Rouge trial preparations*, AGENCE FRANCE PRESS, March 10, 2004, available at LEXIS, CURNWS file.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Iraqi tribunal formed*, THE SAN FRANCISCO EXAMINER, Apr. 21, 2004, at http://www.examiner.com/templates/print.cfm?storyname=042104b_tribunal.

⁸ *Id.*

⁹ Robert Collier, "Human rights shortcomings" in Hussein tribunal, THE SAN FRANCISCO CHRONICLE, Apr. 22, 2004, at A13.

¹⁰ *Id.*

¹¹ *Id.*

¹² Mark Vasallo, *Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador*, 33 U. MIAMI INTER-AM. L. REV. 153 at 155 (2002).

¹³ *Id.* at 157.

¹⁴ *Id.*

SOUTH AFRICA

The South Africa Truth and Reconciliation Commission¹ is perhaps the best example of a TRC. It did not seek to point blame for certain events (even if it was able to do just that) but rather wanted to determine what happened over a set period of time and to reconcile the nation.²

The South African parliament, which was democratically elected in the post-Apartheid era, passed the Promotion of National Unity and Reconciliation Act of 1995.³ The act established the TRC to investigate crimes committed during Apartheid—from 1960 until 1994, when Nelson Mandela came into power.⁴ Specifically, the act “provide[d] for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed,”⁵ granted amnesty for those individuals who made a full disclosure, gave victims an opportunity to share their stories, and hoped to help deter future human rights violations.⁶ The act also empowered the TRC to take “measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights.”⁷

The South Africa TRC was concerned with three main ends: Human rights violations; amnesty; and rehabilitation and reparations.⁸ And, it was given extraordinary means to achieve these ends,⁹ including quasi-judicial powers, the powers of search and seizure, and the power to grant amnesty.¹⁰ Most TRCs are concerned only with investigations rather than accountability. Hearings began in 1996 under the guidance of Archbishop Desmond Tutu, and the TRC released its final report in 1998. During those two years, the TRC heard testimony from over 20,000 victims of apartheid and received thousands of amnesty applications.¹¹ The TRC’s final report listed and condemned the actions of many responsible parties, including the South African state itself and political parties. The TRC also implicated predominant political leaders, including former President P.W. Botha.¹²

PERU

The Peruvian government created a TRC to investigate human rights abuses from 1980 to 2000.¹³ Peru’s TRC published its final report August 2003. The report concluded that 69,000 individuals had either died or been disappeared during the 20 years under investigation.¹⁴ Peru’s TRC held rebel groups and

¹ Hereinafter the South Africa TRC.

² See Brandon Hamber, *Dealing with the Past: Rights and Reasons: Challenges for Truth Recover in South Africa and Northern Ireland*, 26 *FORDHAM INTL. L.J.* 1074 at 1077.

³ The Promotion of National Unity and Reconciliation Act of 1995, No. 34 of 1995 (hereinafter “The Act”), available at <http://www.doj.gov.za/trc/legal/act9534.htm>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* See also The Committees of the TRC, at <http://www.doj.gov.za/trc/trccom.htm>.

⁹ Marianne Geula, *South Africa’s Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 *B.U. INT’L L.J.* 57 at 67 (2000).

¹⁰ *Id.*

¹¹ Hamber, *supra* note 40 at 1075.

¹² Geula, *supra* note 47. See also Truth Report: Key Points, at http://news.bbc.co.uk/1/hi/special_report/1998/10/98/truth_and_reconciliation/204015.stm.

¹³ Juan Forero, *69,000 Died or Disappeared in Peru Conflict, Panel Reports*, N.Y. *TIMES*, August 28, 2003, at <http://www.nytimes.com/2003/08/28/international/americas/28CND-PERU.html?ei=5070&en=399c84c7f3e7cd3b&ex=1081310400&pagewanted=all&position=>.

¹⁴ *Id.* See also <http://www.cverdad.org.pe/ingles/ifinal/index.php> for the Spanish text of the Final Report.

three previous governments responsible and noted that most of the victims were indigenous peoples from rural areas.¹

After the report was released, President Alejandro Toledo called for those responsible to face justice and announced a reparation plan.² He also said the “reconciliation must include acknowledgment of the ‘excruciating reality of the social exclusion of millions of fellow countrymen.’”³ President Toledo recently announced the government would spend \$800 million over the next few years on public works “in the areas most hurt by the fighting.”⁴ However, individual reparations will not be offered.⁵

THE SPECIAL CASE OF SIERRA LEONE

Sierra Leone is unique: It has used both an *ad hoc* war crimes tribunal and a TRC. Both entities were set up to address the abuses that occurred during the civil war during the 1990s and part of 2000.⁶ The Revolutionary United Front (RUF) rebelled against the government and proceeded to kill and injure hundreds of thousands of civilians before coming to an agreement with the government.⁷ Several peace agreements followed that failed to establish long-term peace. In 2000, the UN Security Council then passed a resolution establishing the Special Court of Sierra Leone.⁸

Sierra Leone’s Special Court is much like ICTY and ICTR in that it is an *ad hoc* war crimes tribunal created to try war criminals and alleged violators of international humanitarian law. Despite the fact that atrocities were committed as early as 1991, the Special Court only has jurisdiction over crimes committed from 1996. It was thought to be too much of a burden for the Special Court to extend the jurisdiction as far back as 1991.⁹ The Special Court became operational in 2002 as has so far indicted 11 people.¹⁰

Sierra Leone’s TRC is the result of the Lome Peace Accords in 1999. It is charged to create an impartial record of the abuses, to address impunity, to address the needs of victims, to promote healing and reconciliation, and to deter future atrocities from taking place.¹¹ While the main function of the Special Court is to prosecute and hold individuals accountable for war crimes, the “primary function of the TRC in Sierra Leone is to provide healing to both victims and perpetrators, as well as average Sierra Leoneans who were directly involved in the conflict.”¹² Thus, though the Special Court cannot prosecute all those persons responsible for the atrocities committed as far back in 1991 it would appear the TRC can help lend closure by giving victims a voice by investigating any abuses and violations of international humanitarian law. However, the Special Court and the TRC cannot act independent of each other but

¹ Toledo apologizes to Peruvians for era of political violence, CHANNEL NEWSASIA, November 22, 2003, available at LEXIS, CURNWS file.

² *Id.*

³ *Id.*

⁴ Peru president proposes reparation plan, MILWAUKEE JOURNAL SENTINEL, November 23, 2003, at 27A.

⁵ *Id.*

⁶ Laura R. Hall & Nahal Kazemi, *Recent Development: Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT’L L.J. 287 at 288 (2003).

⁷ *Id.*

⁸ *Id.* and S.C. Res. 1315, U.N. SCOR, 54th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000).

⁹ Michael P. Scharf, *ASIL Insights: The Special Court for Sierra Leone*, October 2000, available at http://www.asil.org/insights/insigh53.htm#N_4_.

¹⁰ For a complete information surrounding the Special Court’s activities, please see <http://www.sc-sl.org>.

¹¹ See generally Peace Agreement between the Government of Sierra Leone and the Rebel United Front of Sierra Leone, July 7, 1999, available at <http://www.sierra-leone.org/lomeaccord.html> and the web site for the Sierra Leone TRC at <http://www.sierra-leone.org/trc-trcforsierreone.html>.

¹² Hall & Kazemi, *supra* note 58 at 290.

should instead work together to obtain common goals such as stabilizing Sierra Leona and ensuring accountability.¹

COMPARING *AD HOC* WAR CRIMES TRIBUNALS & TRCS

Ad hoc war crimes tribunals and TRCs seek to establish truth, deter the future commission of the crimes that necessitated creating a tribunal, and promote some measure of reconciliation. The two fundamental differences between the *ad hoc* war crimes tribunal and the TRC are, first, the entity's ability—and the interests of the particular country—to assess criminal guilt and punish individuals and, second, the focus on reconciliation. *Ad hoc* war crimes tribunals use a rule of law in a court-like setting to establish facts and assess and impose legal accountability. For example, the charter creating ICTY empowers that tribunal to: Find truth; individualize guilt; hold individuals accountable; and deter future commission of similar crimes.² Deterrence is achieved through trial and punishment according to a rule of law—a familiar modern approach to criminal behavior. To the extent the *ad hoc* war crimes tribunal creates it, reconciliation is a by-product of this legal process.

TRCs seek to establish truth—perhaps multiple and competing truths—and promote reconciliation. Generally speaking, TRCs are not empowered to hold individuals legally accountable.³ South Africa's TRC sought to establish truth and promote reconciliation through narrative, confession and forgiveness—a model perhaps more dependent on the presence of Bishop Desmond Tutu, combined with the simultaneous desire to move South Africa forward and sense truth would not come out otherwise. South Africa's TRC sought to paint as complete picture as possible of what happened during the Apartheid era, deter the future commission of similar crimes, and promote reconciliation by making known numerous—even competing—stories of what happened in South Africa.⁴

Ad hoc war crimes tribunals are satisfied when individual perpetrators are held responsible for their actions and there is a sense of justice. However, these tribunals face many obstacles—conceptual and practical—and are often criticized. To succeed in imposing accountability and creating a sense of justice, *ad hoc* war crimes tribunals need state cooperation; the government in question must respond to requests for information and respond to indictments and produce suspects.⁵ Co-operation is often complicated by the fact that the accused are still in power or retain some measure of power in their home country. The accused may escape prosecution by hiding out or ignoring indictments. Thus, who these tribunals hold accountable is a problem. Individuals are held accountable but in numbers surely smaller in comparison to the crimes committed.⁶ For instance, ICTY has handed down approximately 100 indictments concerning the commission of mass atrocities in which many more were no doubt involved.⁷ Moreover, these tribunals create trial records using rules of evidence and procedure. But, again, the record is dependent on who is investigated and tried.⁸

While there are many criticisms of *ad hoc* war crimes tribunals, their focus on trial, punishment, and deterrence is their main advantage. “[U]pgrading humanitarian laws from empty words to enforceable

¹ Abdul Tejan-Cole, *Note from the Field: The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE H.R. & DEV. L.J. 139 at 159 (2003).

² Franca Baroni, *The International Criminal Tribunal for the Former Yugoslavia and Its Mission to Restore Peace*, 12 PACE INT'L L. REV. 233 at 237-248 (2000).

³ Geula, *supra* note 47. The South Africa TRC actually had quasi-judicial powers.

⁴ *Id.*

⁵ Jodi Thorp, *Welcome Ex-Dictators, Torturers, and Tyrants: Comparative Approaches to Handling Ex-Dictators and Past Human Rights Abuses*, 37 GONZ. L. REV. 167 at 180-181(2002).

⁶ Vasallo, *supra* note 36 at 160.

⁷ *The ICTY at a Glance*, *supra* note 17.

⁸ Thorp, *supra* note 69 at 181. Other, more practical, obstacles include budgetary concerns and the speed of the prosecutions.

behavioral standards,”¹ *ad hoc* war crimes tribunals help impose human rights norms and hold out the reality of punishment as a known and reliable deterrent.

TRCs are often lauded as best for victims and society. TRCs seek to reconcile a country, providing answers for victims by offering victims a venue to tell their stories and perpetrators the opportunity to gain absolution without risk of government-imposed punishment in exchange for confessing their role in past atrocities. TRCs focus on the overall picture. Victims and witnesses testify without specific legal/procedural strictures. Thus, the TRC can evaluate a broader range of evidence.²

Victims value TRCs not because of what TRCs find but because of what they acknowledge.³ So, for example, South Africa’s TRC was deemed a success because the country now had an answer to “why” as well as “how” and “who.”⁴ States typically favor TRCs because states can implement them at their will and tailor them to fit the needs of the country at that time.

However, TRCs face problems either in creation or once they exist. As with *ad hoc* war crimes tribunals, co-operation is a crucial element. The country in question has to want, support, and comply with a TRC. Otherwise, TRCs may not have the authority or resources sufficient to conduct a thorough investigation.⁵ And, on the completion of their work, the public may not have access to the report. Moreover, the government must be willing to act on TRC’s recommendations on how to create a better society for the people.⁶

CONCLUSION

The three models examined have advantages and disadvantages. And unfortunately, for the international community as a whole and for societies ravaged by internal strife, no consensus exists on which approach is best. While Sierra Leone’s seems ideal and has gained international attention, it remains to be seen whether that model actually works. South Africa’s TRC also was effective, in part because it could investigate as a TRC and it had quasi-judicial powers—and, in part, because it had Bishop Tutu. But, the South African model is not the norm for TRCs. At the same time, ICTR is considered successful because it was the first time a head of state was prosecuted for genocide and held accountable for the actions taken while he was in office. Regardless of the means chosen, it is important that states and the international community are engaged in means to seek answers, help victims heal, hold individuals accountable, and acknowledge that these types of human rights abuses are not acceptable.

¹ Baroni, *supra* note 66 at 245-247.

² Vasallo, *supra* note 36 at 159-160.

³ *Id.* at 158.

⁴ Hamber, *supra* note 40 at 1077.

⁵ Vasallo, *supra* note 36 at 161.

⁶ *Id.*

ASIA

CHINA

NEW CHINESE REGULATIONS ON FOUNDATIONS

BY CARL MINZNER*

INTRODUCTION

The “Regulations on the Management of Foundations” (*Jijinhui Guanli Tiaoli*) (hereafter “Regulations”), adopted by the State Council of the People’s Republic of China in March and effective on June 1, 2004, are the first comprehensive national rules on the subject to be issued in over 15 years.

A brief review of the Regulations reveals a comprehensive administrative regime for foundations, particularly in comparison with the prior 1988 rules. In addition, comparing the Regulations with analogous ones governing social organizations (SOs) and non-governmental, non-commercial enterprises (NGNCEs) sheds light on the continuing evolution of the Chinese government regulation of civil society.

COMPREHENSIVE REGULATIONS

The Regulations replace the “Rules on the Management of Foundations,” (*Jinjinhui Guanli Banfa*) (hereafter “Rules”), a set of extremely short and vague national guidelines passed in 1988.¹ Notably, the Rules lacked details as to categories of foundations, disclosure requirements, and relevant governance structures. In contrast, the Regulations establish a comprehensive regulatory environment including all of these elements.

The Regulations provide differing rules for national and local foundations. They also distinguish between those engaged in public fund-raising (public foundations) and those which are not (private foundations). In a key change, the new Regulations explicitly apply to the local representative offices of foreign foundations in China, as well as mainland Chinese foundations.² Prior regulations had not delineated specific rules for foreign foundations operating in China, whose activities often fell into an unclear regulatory zone as a result.

The application of the Regulations to representative offices of foreign foundations also represents a significant departure from analogous rules governing other elements of Chinese civil society such as SOs and NGNCEs. Rules governing these latter entities do not specifically describe a regulatory system for

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¹ *Jinjinhui Guanli Banfa* [Rules on the Management of Foundations] (issued September 27, 1988), available at http://www.law-lib.com/law/law_view.asp?id=5267.

² *Jijinhui Guanli Tiaoli* [Regulations on the Management of Foundations] (issued March 8, 2004), arts. 6, 13, available at http://www.law-lib.com/law/law_view.asp?id=82549. These include foundations established in Hong Kong, Macau, and Taiwan. *Id.* art. 46.

non-governmental organizations in China composed of non-Chinese nationals.¹ In practice, the Chinese government has tended to manage such organizations on a case-by-case basis.²

According to both foreign experts and Chinese Ministry of Civil Affairs (MOCA) officials, this change reflects an attempt on the part of the Chinese government to place foreign and domestic foundations on an equal footing in the wake of China's entry into the World Trade Organization.³ It also may represent a simple acknowledgment of the need to create formal controls to govern foreign foundations funneling funds to Chinese organizations.

REGULATORY AUTHORITY—MINISTRY OF CIVIL AFFAIRS (MOCA)

The Regulations give MOCA's national office responsibility for the registration of all national public foundations, all representative offices of foreign foundations, and all foundations which plan to have a legal representative who is not a resident of mainland China (*neidi jumin*).⁴ Provincial-level MOCA offices are charged with handling the registration of both private and public foundations with a local scope.⁵

MOCA may discipline foundations or representative offices that fail to comply with the registration and other requirements discussed below. Punitive measures include warnings and cancellation of registration.⁶

MOCA's assumption of control over foundations also reflects an effort to simplify regulatory authority. The 1988 rules vested authority for registration, supervision, and disciplinary measures jointly with the People's Bank of China as well as MOCA.⁷ Reports from Chinese sources suggest this resulted in substantial practical difficulties, particularly after the withdrawal of the People's Bank of China in 1999 from the active management of foundation activities.⁸ Vesting ultimate regulatory authority with MOCA resolves this issue. It also harmonizes the treatment of foundations with that of MOCA-regulated SOs and NGNCEs, suggesting government recognition of their shared civil society characteristics.

¹ See *Shehui Tuanti Dengji Guanli Tiaoli* [Regulations on the Registration and Management of Social Organizations] issued September 25, 1998, available at http://www.law-lib.com/law/law_view.asp?id=399, and *Minban Fei Qiye Danwei Dengji Guanli Zanxing Tiaoli* [Temporary Regulations on the Registration and Management of Non-Governmental, Non-Commercial Enterprises] issued November 6, 1998, available at http://www.law-lib.com/law/law_view.asp?id=404.

² See *Minzheng Bu Shetuan Guanli Si Guanyu Riben Ren Zai Jing Chengli Riben Ren Huishi De Dafu* [Response of the Social Organization Management Division of the Ministry of Civil Affairs (MOCA) Regarding the Establishment of a Japanese Social Organization in Beijing] issued February 20, 1990, available at http://www.law-lib.com/law/law_view.asp?id=51469, stating that MOCA will "maintain contact" with organizations consisting of non-Chinese nationals operating "publicly", will not "actively" seek to make contact with organizations which are "not yet operating publicly" as long as they respect relevant Chinese laws. Such organizations are to be informed that they cannot yet register as social organizations, but that relevant regulations are in the process of being drafted. *Id.*

³ See Congressional-Executive Commission on China Roundtable, To Serve The People: NGO's and the Development of Civil Society in China, 24 March 2003, pp 17-18, comments by Karla Simon and Qjusha Ma, available at www.cecc.gov. See also *Minzheng Bu Fu Buzhang Jiesshi 'Jijinhui Guanli Tiaoli'* [Vice Minister of Ministry of Civil Affairs Explains 'Regulations on the Management of Foundations'], ZHONGGUO WANG [CHINANET], March 18, 2004, available at <http://202.130.245.40/chinese/2004/Mar/519938.htm>.

⁴ Regulations, *supra* note 2, art. 6. This language allowing for individuals who are not residents of mainland China to serve as legal representatives for foundations is less sweeping than it might seem at first blush. Article 23 specifies that only mainland Chinese residents may serve as legal representatives for public foundations and private foundations established with money from mainland China.

⁵ Special treatment exists for extremely large private foundations, both national and local. Those with initial capital over 20 million yuan may apply to MOCA's national office to manage the registration process. *Id.*, art. 6. For private foundations under this size but which seek to have a national scope, the Regulations appear to require that individual provincial-level MOCA offices are responsible for registration. An alternative, perhaps more reasonable, interpretation is that the 20 million yuan figure may be MOCA's minimum capital requirement for establishing a national private foundation.

⁶ *Id.* arts. 34, 41, 42.

⁷ Rules, *supra* note 1, arts. 10-13.

⁸ See Vice Minister of Ministry of Civil Affairs Explains 'Regulations on the Management of Foundations', *supra* note 5.

SPONSOR ORGANIZATION REQUIREMENT

The removal of the People's Bank of China from the regulatory chain of command also eliminates industry supervision (*hangye guanli*) of foundation activity.¹ Perhaps as a countermeasure, as well as to harmonize treatment of foundations with that of other civil society organizations, the Regulations import the sponsor organization (*yewu zhuguan bumen*) requirement from the SO and NGNCE regulations to the foundation context.

The sponsor organization requirement enables the Chinese government to maintain an additional check over the activities of civil society organs. Sponsor organizations must agree to support initial registration of the foundation, approve any changes to the foundation's charter, assist with the annual review, and generally ensure that foundation activities comply with law and regulation.² State Council and provincial-level governments designate approved sponsor organizations for foundations.³ Sponsors approved under similar regulations for social organizations include party committees, government offices, and mass organizations such as the Women's Federation.⁴

The sponsor organization requirement *explicitly* applies to representative offices of foreign foundations as well, creating a new challenge for foreign organizations seeking to operate in China. However, the Regulations allow "relevant" State Council organs to serve as sponsor organizations for foreign organizations. They further designate MOCA's national office as the registration organ responsible for the representative offices of foreign foundations. As a result, the extent to which the operations of foreign foundations in China will be affected remains unclear.⁵ In practice, MOCA's national office may simply decide to combine the sponsor and registration requirements for representative offices of foreign foundations into a single procedure.

According to Chinese news reports, early drafts of the regulations prepared last year by MOCA lacked any requirement of a sponsor organization. These drafts were apparently rejected by the Legal Affairs Office of the State Council, which insisted on the inclusion of the sponsor organization language. If true, this suggests that opposition to loosening government control over Chinese civil society is originating from a reasonably high level in the Chinese bureaucracy.⁶

¹ Chinese organizations and individuals are often subject to "dual management" (*shuangchong guanli*), both from a government body in charge of registration as well as an industry body possessing some powers of supervision and discipline. One example is Chinese lawyers, managed and supervised by both the Ministry of Justice as well as bar associations. See ZHONGHUA RENMIN GONGHEGUO LUSHI FA [Lawyers Law of the People's Republic of China] (adopted May 17, 1996, amended December 29, 2001) ch. 2, 3, and 5, available at http://www.law-lib.com/law/law_view.asp?id=16820.

² Regulations, *supra* note 3, arts. 9(5), 13(5), and 35.

³ This is a slight change from the regulatory schemes governing SOs and NGNCEs, which allow county or higher level governments to approve sponsor organizations. Heightened concern over corruption may be one explanation.

⁴ *Guanyu Chongxin Queran Shehui Tuanti Yewu Zhuguan Danwei De You Guan Wenti De Tongzhi*, MOCA Notice Concerning Problems of Reconfirmation of Social Organization Sponsor Organizations (issued February 23, 2001), available at <http://www.cango.org/cnindex/fagui/016.htm>.

⁵ Regulations, *supra* note 3, art. 7. Not unusually for Chinese regulations, the language is slightly imprecise, and amenable to two definitions of sponsor organizations: 1) "organizations authorized by the State Council or by its relevant bureaus" or 2) "relevant bureaus of the State Council or organizations authorized by the State Council". The first definition would seem to exclude government ministries of the State Council from serving as sponsor organizations, while the second does not. For textual support for the principle that MOCA may act as a sponsor organization, see Regulations on SOs, art. 6, and Temporary Regulations on NGNCEs, art.5, *supra* note 3, whose language is the template for the Regulations discussed here. Both of these clearly authorize State Council ministries such as MOCA to serve as sponsor organizations.

⁶ *Shei Zuai Le Zhongguo Furen Chengwei Cishan Jia* [Who Is Stopping China's Wealthy From Becoming Philanthropists?], 21 *SHIJI JINGJI BAODAO* [21st Century Economic Herald], March 1, 2004, available at <http://www.nanfangdaily.com.cn/jj/20040301/jd/200403010070.asp>.

NO “TYPE-LOCALITY” LIMITS

Corresponding Chinese rules governing SOs and NGNCEs expressly direct Chinese authorities to refuse registration to organizations whose field of work overlaps with, or is similar to, a preexisting organization in the same administrative area.¹ This allows, for example, only one stamp-collecting club per province or township to register officially.

Although the Regulations require foundations to be engaged in activities for the public good, and that they detail the scope of their activities in their organizational charter, no such “type-locality” limitation exists. Given that the Regulations expressly import the restrictive sponsor organization requirement from the SO and NGNCE regulations, this absence is intriguing. The difference may reflect some degree of political compromise between differing conceptions of how Chinese civil society should evolve.

STRUCTURAL REQUIREMENTS

The Regulations also delineate the governance structure for foundations. Foundations must have a board composed of five to twenty-five directors. Terms of office may not exceed five years, although reelection is permitted. No more than one-third of the directors may receive monetary compensation for their service.² For private foundations established with private funds, no more than one-third of the directors may be close relatives.³

Boards must meet twice a year, requiring a two-thirds quorum to open the meeting. Decisions of the board generally require a simple majority to take effect. Exceptions requiring a two-thirds majority include: revisions to the foundation’s charter, election or impeachment of the chair, vice chair, or secretary-general, mergers or divisions of the foundation, and important fund-raising or investment activities specified in the foundation’s charter.⁴

Foundations must also establish an audit committee, with terms for members of identical length to those of the directors. Audit committees may raise questions and make suggestions to the board of directors, and they must report on relevant issues to the registration organs, sponsor organizations, and tax authorities.⁵

The above requirements apply only to local foundations, rather than representative offices of foreign foundations.

CAPITAL REQUIREMENTS

The Regulations significantly increase capital requirements for registering a foundation. The 1988 rules required 100 thousand yuan.⁶ In contrast, the new Regulations demand a minimum of 2 million yuan for local foundations that do not engage in public fundraising, and 8 million yuan for national foundations that do.⁷ No such restrictions are placed on representative offices of foreign foundations.

MINIMUM SPENDING REQUIREMENTS

¹ Regulations on SOs, art. 13(2), Temporary Regulations on NGNCEs, art. 11(3), *supra* note 3.

² Regulations, *supra* note 2, art. 20.

³ *Id.*

⁴ *Id.* art. 21.

⁵ Regulations, *supra* note 2, art. 20-24.

⁶ Rules, *supra* note 1, art. 3(2).

⁷ Regulations, *supra* note 2, art. 8(2).

Perhaps to ensure that foundation funds are quickly used for the public good, the Regulations establish minimum spending requirements for foundations. Expenditures of public foundations for the purposes described in their charter must be at least 70% of the prior year's total revenue. Private foundations must use at 8% of the prior year's capital for similar purposes.¹

RELAXATION OF RESTRICTIONS ON ADMINISTRATIVE EXPENSES

The 1988 regulations limited administrative expenses to the interest on the foundation's principal.² According to news reports, this often created significant practical difficulties for local foundations without large, perpetual endowments.³ In contrast, the new Regulations adopt a more flexible approach to administrative costs and salaries, limiting them to 10% of total expenses.⁴ This requirement applies only to local foundations, rather than the representative offices of foreign foundations.

BAN ON FOREIGN REPRESENTATIVE OFFICES SOLICITING CONTRIBUTIONS IN CHINA

Article 25 of the new Regulations explicitly bars representative offices of foreign foundations from “organizing fund-raising (or) accepting contributions in China.” If taken literally, this could create problems for the staff of foreign foundations engaged in fundraising activities directed at foreign governments and organizations, but conducted in China.⁵

TAX BENEFITS

The Regulations permit foundations, donors, and grant recipients to enjoy tax benefits granted by other laws and regulations.⁶ According to MOCA officials, these include tax exemptions for office rental properties and interest earned on foundation principal, as well as tax deductions for corporate or individual donations.⁷

ANNUAL REPORT & DISCLOSURE REQUIREMENTS

The Regulations apply identical annual reporting requirements to domestic foundations and representative offices of foreign foundations. These requirements go into greater detail than the 1988 regulations, specifying that the annual reports must include a financial accounting, an auditor's report, and details on fundraising, contributions, grant activities, and any changes in personnel or organizational structure.⁸

¹ *Id.* art. 29.

² Rules, *supra* note 1, art. 9.

³ *Zhongguo Jijinhui You Wang Weixin, Guanli Wu Zhang Ke Xun Daozhi Muqian Kunjing* [China's Foundations Have Hope For Reform, Lack of Management Regulations Have Led to Current Situation], 21 *SHIJI JINGJI BAODAO* [21st Century Economic Herald], August 31, 2003, available at <http://finance.sina.com.cn/g/20030831/1010427737.shtml>.

⁴ Regulations, *supra* note 2, art. 29.

⁵ *Id.* art. 25. However, statements on the MOCA website characterize this clause as preventing foreign foundations from soliciting contributions from the public (*gongzhong*) in mainland China. See *Tiaoli Yunxu Waiguoren Zai Zhongguo Jianli Jijinhui, Ye Yunxu Jingwai Jijinhui Zai Jingnei Sheli Daibiao Jigou*, [Regulations Permit Foreigners To Establish Foundations in China, Also Permit Foreign Foundations To Establish Representative Offices in Mainland China], MINISTRY OF CIVIL AFFAIRS WEBSITE, available at <http://www.mca.gov.cn/redian/jjh6.htm> (visited April 27, 2004) This would suggest a less restrictive stance.

⁶ *Id.* art. 26.

⁷ See *Minzheng Bu Jiu 'Jijinhui Guanli Tiaoli' Xiangguan Zhengce He Wenti Jinxing Jieda* [MOCA Explains Policies and Problems Related to the 'Regulations on the Management of Foundations'], MINISTRY OF CIVIL AFFAIRS WEBSITE, March 29, 2004, available at <http://www.mca.gov.cn/news/content/recent/2004329142251.html>.

⁸ Regulations, *supra* note 2, art. 36

As with the corresponding regulations on SOs and NGNCEs, the Regulations require foundations and representative offices to first submit their annual reports to their sponsor organizations for review and approval, prior to delivering them to MOCA. However, the Regulations also add a new disclosure requirement, that annual reports also be published in designated media outlets to allow for “popular supervision” of foundation activities.¹

CONCLUSION

The decision of the Chinese government to import elements such as sponsorship and exclusive MOCA control into the new regulatory framework for foundations suggests a desire to harmonize their treatment with that of SOs and NGNCEs. It also strongly suggests that Beijing perceives these organizations as all belonging to a common constellation of civil society organizations under firm government control. However, the Regulations contain striking differences with analogous regimes, such as the absence of “type-locality” restrictions and the imposition of new and quite clear registration regulations for foreign representative offices. These changes remind the careful observer that the Chinese government view of civil society and how it should be managed is still very much a work in progress.

¹ *Id.* art. 38.

JAPAN

NEW LEGAL REFORM EFFORTS RECEIVE MIXED WELCOME

BY JAPAN CENTER FOR INTERNATIONAL EXCHANGE*

Several noteworthy shifts have been taking place within the legal environment surrounding Japan's nonprofit sector recently, with important implications for the sector's future growth. Over the past five years, starting with the 1998 Law to Promote Specified Nonprofit Activities (the "NPO Law"), various legislative actions and reforms have succeeded in establishing a foundation for the growth of newly emerging nonprofit organizations (NPOs) in Japan. At the same time, a series of administrative reforms, underway since late 2000, has triggered efforts to reevaluate the basic legal framework governing the traditional types of civil society organizations. Although the two tides of reforms ultimately are heading toward the same goal, the sector's future remains uncertain. Both efforts face many issues and challenges and will require close attention. One focus of reforms involves "public interest corporations" (*koeki hojin*), which are incorporated under Article 34 of the 1898 Civil Code, while another involves NPOs that are incorporated under the provisions of the 1998 NPO Law.

Public interest corporations, numbering approximately 26,000, are defined as incorporated associations and foundations that provide services for the public good and without a profit motive. Their fields of activity include health, employment and labor, education, and arts and culture, among others. In order to be incorporated as a public interest corporation, an organization must undergo a lengthy and complicated approval process. Approval is given at the discretion of the appropriate national or local government agency with jurisdiction over that organization's field of activities.

There are now roughly 14,000 NPOs incorporated under the 1998 law. NPOs in this category are those involved in specifically designated activities, including health and welfare, social education, NPO support, and community development. Under the NPO Law, incorporation is based solely on a set of objective criteria (authentication process) rather than on an approval process involving the discretion of government agencies. Because the incorporation process is simpler, there has been a rapid proliferation of this type of NPO.

However, while the NPO Law represented a significant step toward creating a more enabling environment for nonprofit activities in Japan, there were several aspects of the system that called for reevaluation. As a result, important amendments were made recently—both to the NPO Law and to tax measures concerning NPOs—that further strengthened the framework supporting NPO activities. These are outlined in the following article. Also, as described in the article on page three, these amendments have been accompanied by a reevaluation of the legal framework for public interest corporations in response to widespread calls for reform. The resulting proposal has become the source of much debate within the nonprofit sector, as the potential impact has broad and uncertain implications not just for public interest corporations but for the sector as a whole.

AMENDMENTS TO THE NPO LAW & TAX BILL BRING INCREASED FLEXIBILITY TO NONPROFITS

In December 2002, amendments were made to the NPO Law and the tax bill affecting NPOs to address specific issues that have hampered the growth of Japan's nonprofit sector. The Law involved several noteworthy changes aimed at promoting greater flexibility in the implementation of nonprofit activities,

* This article first appeared in the Issue 8 of JCIE's *Civil Society Monitor* (December 2003), and is published here with permission. The article indicates that "the sections on the amendments to the NPO Law and the NPO tax bill draw heavily on two NPO-related references published in 2003 by C's (the Coalition for Legislation to Support Citizens' Organizations).

specifically with regard to the newer category of NPOs. A supplementary provision in the original law had stipulated the re-evaluation of the specified nonprofit corporation system within three years.

NPOs played an active part in the amendment process through a liaison council set up in June 1999. The council worked closely with the nonpartisan Parliamentary Caucus on NPOs, which was formed in August 1999. The council submitted an amendment proposal to the Caucus and held public forums throughout Japan to provide the opportunity for legislators to hear local opinions on reforms to the taxation and incorporation systems for NPOs and NGOs. The main amendments that resulted from this process, which were approved in December 2002, and came into effect on May 1, 2003, are as follows (see the full text of the amended NPO Law):

- The expansion of the authorized fields of nonprofit activity from 12 to 17 to allow a greater range of nonprofit organizations to be incorporated under the NPO Law. The following five fields were added: information technology; science and technology, economic revitalization, job training and employment and consumer protection.
- The repeal of the provision regarding budget adherence to allow greater flexibility in nonprofit operations. The accounting-related clause (Article 27.i) stating that all revenues and expenditures must be based on an initial budget was removed, reflecting a dismissal of the notion that “good governance” implies that organizations must adhere strictly to the budget they establish at the beginning of the fiscal year. NPOs in Japan now have increased flexibility to respond to urgent concerns in their field of activity that may arise after the start of the fiscal year.
- The strengthening of measures to prevent criminal organizations from becoming incorporated or from extending their influence from within incorporated NPOs.
- The simplification of the application process. The original law required the submission of 16 types of documents in the application process, but the amendment has condensed these categories into 11, resulting in a more streamlined incorporation process.

AMENDMENTS TO THE TAX MEASURES FOR NPOS

Along with these amendments to the NPO Law, the tax bill applying to the newer category of NPOs also underwent revision in response to sharp criticism of various aspects that ran contrary to the bill’s original purpose of enabling NPOs to become eligible for tax-deductible status. The original tax legislation, passed in March 2001, marked an important development for the nonprofit sector in that it set objective criteria for according tax-deductible status to NPOs, thereby establishing a much more concrete basis for eligibility than the subjective evaluations by supervising government authorities that public interest corporations must undergo.

However, it soon became clear that the provisions that determined eligibility for tax-deductible status for NPOs were overly restrictive and that the application process was cumbersome and confusing. In fact, after more than one year, only 10 NPOs had been authorized to receive this tax privilege, representing an authorization rate of 0.1percent. This led to rising criticism of the system from various quarters—including the Cabinet Office and various ministries as well as NPOs themselves. The NPO liaison council led efforts within the sector to urge the related government agencies and legislators to move forward with the reform process. As a result of this process, the following amendments were approved in December 2002, and came into effect on April 1, 2003.

- Various aspects of the “public support test,” which stipulates that more than one-third of an organization’s total revenues must come from donations and grants, were relaxed. For example, the one-third minimum is being lowered to one-fifth for a trial period of three years.

- The condition requiring NPOs to conduct their activities in more than one municipality in order to become eligible for tax deductibility has been removed. This amendment has made it possible for small-scale community-based nonprofits to obtain tax-deductible status.
- The requirement stipulating that NPOs approved for tax deductibility must submit advance notification to the National Tax Administration Agency before making overseas remittances or taking money abroad has been amended. Now, notification is only required for amounts exceeding ¥2 million. (Amounts equaling ¥2 million or less can be reported to the agency at the end of the fiscal year.)
- The unique type of tax-exempt donation (*minashi kifukin*) already recognized in the public interest corporation system is now applicable to NPOs. Up to 20 percent of an NPO's taxable income from profit-making activities that is used toward nonprofit activities will be treated as this type of donation. The extent of the impact that these legal amendments will have on the nonprofit sector has yet to be seen. In order to evaluate their effectiveness, it will be important to monitor the increase in the number of NPOs with tax-deductible status over FY2003.

PROPOSED REFORMS OF PUBLIC INTEREST CORPORATIONS SPARK HEATED DEBATE

A major issue currently facing the nonprofit sector is a proposal that has been evolving since mid-2002 to significantly reform the legal framework surrounding public interest organizations in Japan. Unlike the two NPO-related legal revisions approved in December 2002, which have been welcomed as positive steps toward enabling the sector's growth, the discussion of reforms related to public interest corporations has generated feelings of confusion and uncertainty. These feelings are linked to concerns that the reforms proposed by the government may not necessarily result in a supportive framework for the development of the nonprofit sector. As a result, a heated debate has developed among members of the nonprofit sector, the bureaucracy, and the Diet.

The most controversial element of the proposals is a possible move to abolish the current favorable tax treatment of public interest corporations in what would amount to a tradeoff for a reform that would eliminate government involvement in the incorporation process. Essentially, the proposed reform may result in the abolishment of the current system of automatically awarding corporate-tax exemption to an organization once it has been established as a public interest organization. Instead, incorporation and favorable tax treatment would be treated as two separate issues, and it is possible that under the new plan only certain authorized incorporated entities would be exempt from corporate tax.

FACTORS LEADING TO THE REFORM PROCESS

The reform of the public interest corporation system has been a subject of discussion for many years within Japan's nonprofit sector. The system is based on the Civil Code, which was established more than 100 years ago, and has received criticism for putting up various obstacles to the sector's development. These obstacles include heavy government control, which has led to many public interest corporations essentially serving merely as subcontractors for government agencies. Critics also have pointed out the inconsistency in the provisions governing the various types of nonprofit corporations that have evolved over the past century. Another issue is the lack of objective criteria in the incorporation process and in determining eligibility for receiving tax-deductible contributions. Japanese nonprofit leaders have long been calling for a reform of the public interest corporation system, but criticism of the system has come from the Japanese public as well. One complaint concerns the preferential tax treatment given to public interest corporations operating in competition with private businesses and to those that carry out activities for common profit rather than for public interest. The repeated reports of misconduct in recent years, involving politically tied donations, kickbacks, and embellished accounting, have also led to criticism of the inefficiencies and lack of transparency in their operations.

All of these factors prompted the government to reevaluate the public interest corporation system as part of its large-scale administrative reforms. The reform efforts initially focused on restructuring only those public interest corporations closely connected to the government. However, a series of major scandals has forced the government to expand its scope and reconsider the entire system.

OUTLINE OF PROPOSED REFORMS

In March 2002, the government began discussions on a series of reforms to the legal framework of public interest corporations. The initial scheme was announced later that summer and advisory councils consisting of scholars and practitioners were formed to examine both the incorporation system and tax system for public interest corporations. The discussions have yet to produce a clear path for reform. However, an outline of the basic reform guidelines was passed as a Cabinet resolution in June 2003 and can be summed up as follows:

- Revise the Civil Code to create a new legal framework for “nonprofit corporations” (*hieiri hojin*). The current public interest corporations would be placed under this new category of nonprofit corporations.
- Simplify the legal process for incorporation by basing it on standard criteria. Similar to the establishment of for-profit corporations, the new system would allow organizations to simply register as incorporated entities if they meet certain criteria set by law, thus enabling incorporation without the approval of government agencies.
- Consider abolishing the favorable tax treatment that automatically accompanies incorporated status. As such, the nonprofit corporations would have to qualify under the system described below in order to receive tax exemption.
- Introduce a system of awarding tax-exempt status to select nonprofit corporations that are considered to contribute greatly to the public interest and to society. How this will be carried out has yet to be determined. Items under consideration include the establishment of clear and objective criteria to determine eligibility for tax-exempt status and the feasibility of an independent entity to make the judgment.

IMPLICATIONS & REACTIONS

The government is striving to pass a bill before the end of FY2005 with the above guidelines. These reform efforts are notable for their basic approach of positioning and promoting the nonprofit sector as an important member within Japan’s socioeconomic system based on its ability to respond flexibly and actively to new social issues that are not being sufficiently addressed by the government or private sectors. This stance represents a major shift in direction for the government, which until now has supported tighter regulation of public interest corporations. However, in the past several months, these guidelines have prompted strong protests from the nonprofit sector.

The tax system has emerged as the most contentious point, as the reform proposal departs sharply from the current system in practice, which is based on the principle that nonprofit corporations should not be taxed. Currently, public interest corporations are subject to a reduced corporate tax rate of 22 percent only on income from profit-generating activities. All other income is tax-exempt. The proposed revision calls for the application of a uniform 30 percent corporate tax rate—the same as that of for-profit corporations—on all income. This implies that, if the evaluation system for awarding tax exemption is extremely strict, many nonprofit corporations will face paying taxes on all income including contributions, membership dues, and grants, which had been tax-exempt until now.

Many have raised strong objections to this proposed change, asserting that for such a measure to be established without first specifying the basis for determining eligibility for tax-exempt status would be

equivalent to starting a game without first stating the rules. There is also concern that a heavier tax burden will lead to financial difficulty for many public interest corporations. Another source of concern is the uncertainty regarding whether the “independent entity” that will be appointed to evaluate eligibility for tax-exempt status will truly be an institution independent of the government or whether it ultimately will be a government-related organization or one of the ministries. It is feared that, in the latter case, the measure will simply lead to further strengthening of government control.

Moreover, the tax exemption issue is being treated as separate from the issue of allowing contributions to nonprofit corporations to be tax deductible. Nonprofit corporations may therefore have to undergo a third layer of approval—in addition to those for incorporation and tax-exempt status—in order to obtain the necessary status to receive tax-deductible donations. This potential triple layer of authorizations is widely seen as excessive. While the government’s proposal to take away preferential tax treatment and impose taxes on public interest corporations can be explained by a desire to increase tax revenue and to forestall abuses of the tax system, it is highly debatable whether the imposition of taxes would actually help to reduce cases of misconduct.

Another point of concern is the potential implication for other nonprofits. At this point in time, the government’s reform proposal is directed solely at public interest corporations, but it is anticipated that the focus soon will be expanded to include NPOs and mutual benefit nonprofits (*chukan hojin*). The impact may even extend to social welfare, educational, and other nonprofit institutions in the future, which would change the entire legal framework of the nonprofit sector.

After a brief interlude due to the November general elections, the debate on these reforms has been reignited through the initiation of a second round of discussions. In fall 2003, the government re-launched two advisory councils initially formed in mid-2002 on the incorporation and tax systems, with several new members. (New appointments to the incorporation-system advisory council include JCIE’s Managing Director, Hideko Katsumata.) The councils will submit recommendations to the government in the fall of 2004, based on which more concrete reform guidelines will be drafted. In the meantime, civil society organizations are launching initiatives to enhance internal governance, public disclosure, and peer evaluation with the goal of addressing the challenges facing the nonprofit sector and bringing about positive reforms that lead to a more flexible and enabling operating environment

NEW ZEALAND

NEW ZEALAND CHARITIES COMMISSION LEGISLATION: AN NGO PERSPECTIVE

BY PATRICK HANLEY*

On 23 March 2004 the New Zealand government introduced the Charities Bill into Parliament. The Bill provides for the establishment of a Charities Commission with responsibility for the registration,

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reporting, and monitoring of registered charities. The Commission will also have an education and support role, including provision of policy advice and support for research activities.

The Bill is currently before the Social Services Select Committee. The Select Committee will receive public submissions on the Bill until June 3rd. The Bill is expected to be reported back to Parliament late in September and the Commission is likely to be in operation by the end of this year.

In April 2003 ANGOA (the Association of Non Governmental Organisations of Aotearoa) established a programme to facilitate discussion and analysis of the proposed Charities Commission and associated legislation within the community and voluntary sector. This programme includes independent policy analysis, a working group drawn from charitable and community sector organizations, and a national workshop series currently underway.

The Charities Commission Working Group, established by ANGOA, has produced a briefing paper on the Charities Bill, and this is being widely distributed throughout the sector via the national workshop series. In this paper I will draw on the comments of the ANGOA Working Group and feedback from several workshops which have recently been held regarding the sector's perception of the Bill. However, some background information may be useful as a basis for understanding current developments in New Zealand.

There are an estimated thirty to thirty five thousand charitable organizations in New Zealand, a sizeable number within a population of four million people. These organizations are eligible for tax exempt and charitable donee status via a one-off application to the Inland Revenue Department (IRD). Once an organization is deemed by IRD to meet the charitable purposes test, as set out in tax legislation, it retains that status forever. There are no further reporting requirements and no monitoring of the activities of these organizations.

There is no registration of charities as such and therefore little information exists in New Zealand regarding the number, size, activities and financial position of charitable organizations.

The benefits of charitable status are limited to tax exemption on charitable activities and a maximum of \$600.00 tax rebate on charitable donations. Charitable organizations which rely on donations from the public have for years attempted to convince successive governments to increase the level of tax rebates. The response from government has been to argue that there is insufficient information upon which to determine the impact on the tax system of a more generous rebate scheme.

For the past 15 years both government and some charitable organizations have focused on the tax treatment of charities as the most critical issue. However, as the ANGOA Charities Working Group has recognized, the issues arising out of the Charities Bill need to be appreciated in a much wider context when assessing the provisions of the Bill.

The Working Group identified five key principles widely held within the community and voluntary sector, including charitable organizations as the basis for assessing the Bill.

These principles are:

1. The sector seeks to maintain and enhance **accountability** to the public of New Zealand who donate their time and money in support of the sector.
2. There is a need to uphold the **independence and values** of the sector as distinct from government and the private sector.

3. There is a need to increase our **knowledge and understanding** of the many thousands of organizations that make up the charitable sector.
4. There is a need to work effectively with government to advance the interests of our communities.
5. There is a need to better reflect the nature and culture of New Zealand society today, in matters affecting the community and voluntary sector.

Accountability

At present there is no registration of charitable organizations and therefore the public of New Zealand does not have access to any authoritative source for information about these organizations. The Bill states at Clause 20 that “the purpose of the register is to enable a member of the public to determine whether an entity is registered as a charitable entity... and obtain information concerning the nature, activities, and purpose of charitable entities...” (for the full text of the Charities Bill and related information see www.charities.govt.nz)

This provision is widely supported within the sector. Members of the public will have access via the Commission’s web site and by other means to information supplied at the time of registration and subsequently contained in annual reports.

However registration will be voluntary. Therefore there is a concern that not all organizations will choose to register and that there will be some confusion within the public as to the distinction between a registered charity and a charity.

Accountability to the public will also be enhanced by provision of a unique registration number, which will be required to be displayed on all materials written on behalf of the charitable organization (Clause. 23)

Organisations that are not registered but which hold themselves out to be registered charities will be subject to fines of up to \$30,000.

Other offences are also set out in the Bill (Clauses 46 – 58), which provides the Commission with the ability to enforce these accountability requirements. These offences incur penalties for which governance volunteers – trustees, board members and committee members -- are liable, not the organization. Furthermore the organization cannot insure or indemnify trustees and board members against these penalties (Clause 66).

While it is appreciated that the Commission must have “teeth,” there is a fear that these penalties represent a new risk for governance volunteers and may result in making it even more difficult to recruit board members and trustees.

The Bill goes a long way towards enhancing accountability to the public, but the voluntary nature of registration may create problems in terms of comprehensive coverage of the sector and confusion as between registered and un-registered charities. In addition the penalties may result in unintended difficulties for voluntary organizations.

Independence and values of the sector

From a sector perspective it would be desirable to have a Commission which was entirely independent of government. Self-regulation would be the ideal means of reflecting the independence of the sector but this is recognized as being impractical. The current situation in which the Inland Revenue Department

determines which organizations qualify as charities is entirely unsatisfactory. Therefore the establishment of a Charities Commission as a “crown entity,” independent of government departments and with its own Board and able to appoint its own staff, represents an acceptable compromise. Further the Bill (Clause 88) safeguards the independence of the Commission when making decisions regarding individual organizations’ applications for registration and continued qualification as a registered charity.

As a Crown entity the Charities Commission will be required to carry out government policy. Clauses 84-86 provide for the Minister to give direction to the Commission. However these powers are restricted to a very formal process that requires that such directions are notified to Parliament and will therefore be subject to public scrutiny.

The concern from the sector is that while Ministers may not interfere in the decisions of the Commission with respect to individual organizations, government may direct that, as a matter of policy, classes of activities for example advocacy or environmental campaigns, be excluded from consideration as charitable purposes.

This uncertainty regarding the independence of the Commission is compounded by the fact that the Bill does not provide a definition of charity. Clause 4 provides that charitable purpose relates to “the relief of poverty, the advancement of education or religion or any other matter beneficial to the community.” These are the same provisions as currently apply in respect of the Income Tax Act. Should the Commission decide for example that organizations whose purposes relate to the protection of the environment qualify as charities, the government could direct the Commission to exclude, as a matter of policy, such activities, thus undermining the independence of the Commission.

A further concern relates to the membership of the Commission. The Commission will have 5-7 members appointed by the Minister. Charitable organizations may nominate members to the Commission but the Minister makes the appointments. Therefore the members of the Commission will be responsible ultimately to government. There is a further concern that the Commission membership may not reflect the values of the sector if its members are not drawn substantially from people with a broad experience of and commitment to the sector and its values.

Knowledge of the Sector

The registration of charities, as provided for in the Bill, will greatly improve the knowledge and understanding of the charitable sector in New Zealand. Organizations will also be required to provide annual returns to the Commission. Therefore these provisions are widely supported by the sector.

The information to be supplied will include descriptions of the objectives of the organization and the activities in which the organizations engage in order to achieve these objectives. As this information will be reported on an annual basis and be publicly available, it will provide invaluable information for the public, the community and voluntary sector, and government.

The functions of the Commission include policy advice and the promotion of research. With the Commission collecting information via the registration and reporting functions, policy and research development regarding the community and voluntary sector will be greatly enhanced.

The fact however that registration will be voluntary raises questions as to how comprehensive coverage by way of registration will be. Organisations which do not register will not be entitled to tax exempt status nor charitable donee status. These are the primary advantages associated with registration. However, there are many organizations which do not rely on donations from the public and whose incomes would

not be taxable any way. If a large number of organizations choose not to register the desired increase in knowledge and understanding of the sector will be significantly limited.

Relationship with Government

The relationship between government and the community and voluntary sector reached a very low point in the 1990's. This resulted from government restructuring, which was perceived as having serious negative consequences both for the sector and for the communities served by the sector.

The current Labour-led government, elected in 1999, set out to restore more effective relationships with the sector influenced in particular by the UK compact. Since 1999 government has undertaken a number of initiatives including the establishment of the first Minister Responsible for the Community and Voluntary Sector, several working groups, the publication of a "Statement of Government Intentions for an improved Community-Government Relationship" and the establishment of an Office of the Community and Voluntary Sector.

When the Charities Bill had its First Reading in Parliament the responsible Minister the Honourable Margaret Wilson stated:

"Creating a registration system will help foster a culture of philanthropy and giving in this country by increasing the public's trust and confidence in charitable organisations."

Thus the Bill is seen by government as further support for the community and voluntary sector. (for the full text of the Minister's speech see www.beehive.govt.nz)

It should be noted that over the past two years, as the policies underpinning this legislation have been developed, government has sought to include the views of the community and voluntary sector by means of a working party followed by a reference group and finally a Charities Commission Establishment Group with membership of each of these bodies being drawn from the community and voluntary sector.

However there remains concern within the sector that the functions of the Commission are unduly weighted towards its regulatory functions and lack sufficient provision for support and advice to the community sector.

For example the functions of the Commission (Clause 10) include an education and support role but this is limited to enabling organizations to meet "their regulatory duties and obligations". The sector believes the Commission ought to have a role in supporting organizations in areas such as improving governance and best practice.

Another example is in respect of the policy role of the Commission. Again, it is tasked with the responsibility to provide policy advice to government but not to the community and voluntary sector.

On balance therefore, the proposed Commission may serve to enhance the relationship between government and the sector. However for it to be effective it will need to have a more balanced role, with less of a focus on its regulatory functions than is apparent from an examination of the current Bill.

Relevance

The fifth principle raised by the ANGOA Working Group relates to the need for charities related legislation to better reflect circumstances in New Zealand in 2004.

As in other common law countries the interpretation of the definition of charities has been much discussed. The Charities Bill however makes no attempt to address the issues related to the interpretation of the definition of charity or charitable purpose. Rather the government decided to simply transfer the current provisions in the Income Tax Act to the Charities Bill. There is no basis within the Bill to determine whether or not the Commission will attempt to broaden and modernize the interpretation of charity to better suit current social and cultural conditions in New Zealand, with one notable exception.

The interpretation of charitable purpose has always excluded family trusts. The basis for this has been what is referred to as “blood tie relationships”. Where an entity is established to distribute benefits to persons related by blood, the entity is excluded as a charity as such an entity failed to meet the public benefit test. In New Zealand this blood tie test has generally excluded Maori organizations, many of which are established by kin-based groups but which deliver substantial public services. In Clause 4 of the charities Bill the blood tie provision is modified so that Maori organizations are much more likely to qualify as charities. This provision is widely welcomed within the charitable and wider community sector.

Further concern has been raised from within the sector regarding the costs to the sector of the establishment of the Charities Commission. There are fears that the Commission will become a bureaucratic and costly burden on the sector.

There is concern that the Bill does not set out specifically what information will be required for the purposes of registration and annual reporting. The Bill does not define what financial reports will be required. The Bill does not indicate what the costs of registration and annual fees will be. All of this information will be set out in regulations which will accompany the Bill but which will not be drafted until after the Bill is passed.

However the Cabinet has determined that “the Commission will recover the cost of its registry and operational expenses through its registration and annual return fees.” (Cabinet Committee on Government Expenditure and Administration, 23 June 2003, ref EXG (03) 38).

The Commission is therefore to be funded by the charitable sector based on the costs it incurs in carrying out its functions. However as it is impossible to estimate how many organizations will register, what information will be required, how much it will cost to process the registrations and annual returns there is no way to determine the compliance costs and the level of fees to be paid. The lack of attention in the legislation to these very practical matters is not at all helpful in promoting the benefits of the proposed Charities Commission.

LATIN AMERICAN & THE CARIBBEAN

BRAZIL

VOLUNTEER ACT AMENDED

BY DANIELA PAIS COSTA*

In October 2003, the Brazilian Volunteer Act (Law n. 9608/98) was amended by Law n. 10.748. The new act created the Federal Government's First Job Program and introduced the possibility of payment for volunteer work.

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The Program aims to promote the insertion of unemployed young people aged 16 to 24 into the job market. The employers must register with Program, at which point they will receive economics subsidies proportional to the number of jobs created. The new law also allows not-for-profit organizations to register with the Program.

Under the Brazilian Volunteer Act, the volunteer was able to be reimbursed for all expenses that the volunteer incurred in doing the work. However, the new Act provides for payment of US \$50 (62 percent of the Brazilian minimum wage) to young people from 16 to 24 years old that work “voluntarily” for the not-for-profit organization and:

- are from families with a monthly budget of half the minimum salary,
- come from the prison system, or
- are at risk of unemployment.

Despite the merits of the Program, the new Act ignores the key characteristics of the volunteer work. Specifically, the new Act ignores that volunteer work:

- is done freely, without coercion,
- benefits the community as well as the volunteer, and most important of all
- is undertaken for reasons other than financial gain.

The Brazilian Volunteer Act was a victory for the Brazilian third sector. It has now been changed to make the Federal Government's First Job Program possible, and represents a step backwards.

NORTH AMERICA

CANADA

BUDGET PROPOSES TO MAKE MAJOR REVISIONS IN THE LAW AFFECTING CHARITIES & NPOS

BY IJCSL STAFF*

Canadian lawyers and NPO leaders were quite happily surprised that the new Budget Plan, announced by the Finance Minister in March, intends to make several substantive changes in the tax rules affecting NPOs in Canada. In addition, the government has committed itself to

- spending \$6 million over the next two years for the Voluntary Sector Initiative (VSI);
- creating a new Not-for-Profit Corporation form, which should make it easier for Canadian NPOs to become incorporated;
- viewing the “social economy” as a budget priority; and
- discussing the possible creation of a bank for the charitable sector, which would give it access to borrowing of funds not possible under current circumstances.

* IJCSL is grateful to the Miller Thomson law firm and their lawyers Arthur B.C. Drache, QC, Susan Manwaring, Rachel Blumenfeld, Hugh Kelly, QC, and Robert Hayhoe for insightful analysis that contributed a good deal to this Country Report. The Miller Thomson analysis can be found in a special edition of the Miller Thomson Charities and Not-for-Profit Newsletter (hereafter Miller Thomson Newsletter) at <http://www.millertomson.ca/issue.asp?NL=10&Year=2004&Season=15>.

The details of the Budget Plan and the implementation of these ideas are both still a bit vague, but the following is a description of the main changes proposed in the tax framework as well as some of the other proposals.

INTERMEDIATE SANCTIONS

In its analysis of the various needs of the third sector in Canada, the Joint Regulatory Table (JRT) of the VSI recommended a through-going approach to the use of “intermediate sanctions” as a means to address the failures of NPOs to meet their filing, reporting, and other obligations. The discussion of the proposals in the report of the JRT -- *Strengthening Canada’s Charitable Sector: Regulatory Reform*¹ -- can be found at http://www.vsi-isbc.ca/eng/regulations/pdf/final_report_chapter6.pdf.

The list of new penalties (“intermediate” sanctions in the sense that they do not involve revocation of charity status) can be found in the March 2004 Budget at Table A9.3 – these penalties are short of the penalty of revocation of charity status, which remains available and is discussed below.

TAX OR PENALTY

INFRACTION	FIRST INFRACTION	REPEAT INFRACTION (REPEATED ACTS OR OMISSIONS WILL INCREASE THE PROBABILITY OF REVOCAATION)
Late filing of annual information return	\$500 penalty	\$500 penalty
Issuing of receipts with incomplete information	5% penalty on the eligible amount stated on the receipt	10% penalty on the eligible amount stated on the receipt
Failure to comply with certain verification and enforcement sections of the <i>Income Tax Act</i> (230 to 2315), eg. keeping proper books and records	Suspension of tax-receipting privileges	Suspension of tax-receipting privileges
Charitable organization or public foundation carrying on an unrelated business	5% tax on gross unrelated business revenue earned in a taxation year	100% tax on gross unrelated business revenue earned in a taxation year and suspension of tax-receipting privileges
Private foundation carrying on any business	5% tax on gross business revenue earned in a taxation year	100% tax on gross business revenue earned in a taxation year, and suspension of tax-receipting privileges
Foundation acquires control of a corporation	5% tax on dividends paid to the charity by the corporation	100% tax on dividends paid to the charity by the corporation

¹ As reported in the April 2004 issue of the IJCSL Newsletter, the Budget proposals have picked up 72 of 75 of the VSI recommendations, which is an extraordinary development in the annals of sector-government relations anywhere in the world!

Undue personal benefit provided by a charity to any person. For example, a transfer to a person who does not deal at arm's length with the charity or who is the beneficiary of a transfer because of a special relationship with a donor or a charity	105% tax on the amount of undue benefit	110% tax on the amount of undue benefit and suspension of tax receiving privileges
A gift that is restricted under subsections 149.1(2), (3) or (4) of the Act (a gift other than to a qualified donee)	105% tax on the amount of the gift	110% tax on the amount of the gift
Issuing receipts in a taxation year for eligible amounts that in total exceed \$20,000, if there is no gift or if the receipt or if the receipt contains false information	Suspension of tax-receiving privileges and 125% tax on the eligible amount stated on the receipt	Suspension of tax-receiving privileges and 125% tax on the eligible amount stated on the receipt
Delaying expenditure of amounts on charitable activities through the transfer of funds to another registered charity	The charities involved are jointly and severally, or solely, liable for the amounts so transferred plus a 10% tax on those amounts	The charities involved are jointly and severally, or solely, liable for the amounts so transferred plus a 10% tax on those amounts

CHARITY APPEALS

Under current law the only decisions with regard to charities that can be appealed to the Federal Court of Appeal are decisions not to register charities, to revoke their registration, or to give them a designation in their registration with which they disagree (e.g., private foundation, charitable organization). This process is a costly one.

The Budget, consistent with imposing new penalties for various infractions, proposes to establish a new appeals regime for the lesser penalties, while retaining the Federal Court of Appeal process for registration declinations and revocations. The appeals process will be made more accessible and affordable for registered charities and unsuccessful applicants by creating an impartial internal reconsideration process within Canada Revenue Agency (CRA) for matters affecting charities, and by allowing for appeals of taxes and intermediate penalties to be made to the Tax Court of Canada. This will put charities on an equal footing with other taxpayers and reduce costs. For further description of the proposed new appeals process, see Annex 9 to the Budget at <http://www.fin.gc.ca/budget04/bp/bpa9ae.htm#Proposed>.

According to Susan Manwaring, writing in the Miller Thomson Newsletter,

The new administrative appeal provisions are welcome and will afford charities an opportunity to work with CRA and question actions of CRA where the decisions reached are, in the entity's view, unsatisfactory. It is somewhat unfortunate that the registration and revocation appeals will continue to go to the Federal Court of Appeal because such actions are cost prohibitive to most organizations and because the Federal Court of Appeal in resolving these appeals deals only with file documents instead of new evidence.

It remains to be seen whether the actual legislation that is enacted will follow the suggestions made by Ms Manwaring.¹

OTHER PROCEDURAL CHANGES

The proposals include the retention of the ability of the Minister of National Revenue to revoke the registration of a charity. Currently, a charity that has had its registration revoked has one year from the date of that revocation to divest itself of its assets—to registered charities or other qualified donees. The balance of the net assets of a revoked charity, after this divestiture, must be transferred to the Crown as a revocation tax. The budget proposes that a particular charity whose registration has been revoked will be able to transfer assets only to registered charities, and only where those charities satisfy the conditions of the new eligible donee definition contained in the proposals. In addition, in order to collect the revocation tax, the law will be amended to provide that it will be assessed in the Notice of Intended Revocation issued by the Minister of National Revenue. The assessment will be based on information received as a result of an audit or from the latest information return submitted by the charity. Further discussion of these issues can be found in the article by Robert Hayhoe, in the Miller Thomson Newsletter.

REVISIONS TO THE DISBURSEMENT QUOTAS

The principal disbursement quota under current law is 4.5% of the fair market value of the capital property of a charitable foundation. The Budget proposes to reduce that to 3.5%, which it says is “more representative of historical long-term real rates of return earned on the typical investment portfolio held by a registered charity.” Rachel Blumenfeld,² writing in the Miller Thomson Newsletter, notes that “it might have been preferable for the rate to have been tied to an objective floating standard, such as the interest rate on Canada Savings Bonds,” but she welcomes the proposed change, noting that charities have in the past found it difficult to meet the 4.55 requirement.

Other disbursement quotas are also due to be changed, and these are detailed in Ms. Blumenfeld’s article.

TRANSPARENCY & ACCOUNTABILITY CHANGES

Budget 2004 proposes to authorize the Minister of National Revenue to release to the public some information regarding registered charities in addition to what is already made available. Currently Canadians have access to annual information returns, governing documents, the names of directors and the periods during which they were directors, registration letters, and notices of revocation. The following are proposed to be made available to accomplish greater transparency for the sector:

- Financial statements that are filed with annual information returns.
- Letters sent by the CRA to a charity relating to the grounds for annulment of the charity’s registration.
- The CRA’s decisions regarding a notice of objection filed by a registered charity.
- The information that a registered charity has filed in support of an application for special status or an exemption under the Act, as well as any responses to such applications from the CRA (e.g. requests for permission to accumulate assets).

¹ See also the JRT report http://www.vsi-isbc.ca/eng/regulations/pdf/final_report_chapter5.pdf for a slightly different analysis of how an appeals regime should work.

² Ms Blumenfeld published a casenote in IJCSL in the May 2003 issue, on the case of *Earth Fund v. Minister of National Revenue*. See 1 Int’l J Civil Soc. L. 2 at 36 (May 2003), available at www.law.edu/students/orgs/ijcnl/.

The identification of a registered charity on which a sanction has been imposed, the type of sanction imposed, and the letter sent to the charity relating to the grounds for the sanction.

In addition the Budget proposes that the CRA will make available its reasons for denying the registration of an organization, and to require that the name and website address of the CRA appear on all official receipts of registered charities.

These changes are being made to respond to the JRT's proposals on transparency, which can be found at http://www.vsi-isbc.ca/eng/regulations/pdf/final_report_chapter4.pdf. Further information can also be found in the Budget document.

THE NEW NOT-FOR-PROFIT CORPORATIONS ACT

According to High Kelly, Q.C., who is one of IJCSL's Contributing Editors for Canada,¹ [a] tantalizing inclusion in the 2004 Federal Budget Plan is the promise of a new *Not-for-Profit Corporations Act*. For those of us who have been around for a few years, this almost sounds like the broken record repeated once again. There has been much study over the years, with attendant recommendations, as to how the present *Canada Corporations Act* could be improved.... Until now however, there has not been any sense that the government has seen the reform of legislation for not-for-profit corporations as an urgent matter. What may distinguish the current announcement from those of the past is the fact that it appears in the Budget Plan. It would certainly be presumptuous, as well as premature, to predict the text of what will be included.

According to the Budget plan, "The Government is committed to creating a new Not-For-Profit Corporations Act that will reduce the regulatory burden on the not-for-profit sector; improve financial accountability; clarify the roles and responsibilities of directors and officers; and enhance and protect the rights of members." Such new legislation should affect the over 18,000 NPOs currently registered as corporations under the Canada Corporations Act, Part II (CCA).

The government has indicated that the new legislation will be available to both large and small corporations, and that it will provide for rules requiring new forms of accountability and transparency (such as rules about director responsibilities and liabilities) that are necessary to maintain public trust and confidence. This is consistent with the aim of the many of the other rules contained in the Budget, and one assumes that the proposed new legislation will be in conformance with them. The government has suggested that having new legislation will fulfill a commitment it has made to the voluntary sector over the course of the negotiations over the past few years.

It will be interesting to see, as Mr. Kelly suggests, just exactly what the government intends to do and whether it is consistent with the views of the lawyers who have commented on this issue in the past. As developments occur, IJCSL will follow them.

¹ Mr. Kelly's most recent article for IJCSL is on "Statutory Liability of Officers and Directors," which appeared at 1 Int'l J. Civil Soc. L. 4 at 162 (October 2003), available at www.law.cua.edu/students/orgs/ijcsl/

UNITED STATES

COMMENT: IMPROVING THIRD SECTOR ACCOUNTABILITY

BY VALERE FULWIDER*

EDITOR'S NOTE: This report provides background for a more extensive article to appear on the subject of improving third sector accountability in IJCSL's July 2004 issue.

INTRODUCTION

Public trust in not-for-profit organizations (NPOs) is vital to a vibrant third sector. Given the Enron and other scandals in the for-profit world that have crushed public trust in corporate governance, accountability of third sector organizations has become a pressing issue that US NPOs must address. Many of the same accountability and transparency requirements face both for-profit and not-for profit organizations – in fact, the linkage between the corporate scandals and recent problems in the NPO sector has been made by many observers.¹ NPOs have, of course, responded in several ways. For example, according to Independent Sector, a leading NPO advocacy body in the US, governance structure and standards for not-for-profit organizations should reflect the “highest norms of ethical behavior.”² And, as discussed below, many NPOs have already voluntarily decided to improve their internal governance and external accountability. This essay provides an introduction to ways for third sector organizations to voluntarily improve accountability and transparency. It also discusses the possible impact of federal or state legislation, which may affect their governance structures so as to promote better public oversight of their activities.

A STUDY IN IMPLEMENTING REFORM—THE NATURE CONSERVANCY

Consider, for example, how The Nature Conservancy (TNC), “the world’s largest environmental group,”³ has recently overhauled its governance structure and standards to improve its transparency and accountability.⁴ This Arlington, Virginia-based not-for-profit corporation was made the subject of public debate in early 2003 as *The Washington Post* publicized certain of its controversial practices.⁵ The questionable transactions included “purchases of land from companies affiliated with board members and...selling prime real estate to trustees at a discount in exchange for promises to limit development.”⁶

In late September 2003, TNC convened an independent Governance Advisory Panel (GAP) to “study each of the programmatic areas in question, and recommend appropriate changes as necessary with

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¹See, e.g., Stephanie Strom, *Battle in an Omaha Charitable Group Reflects Issues Raised in Corporate Scandals*, N.Y. TIMES, Jan. 9, 2004, at A13.

²Independent Sector, *Accountability and Effectiveness*, available at <http://www.independentsector.org/issues/accountability.html> (last visited April 30, 2004)(stating that:

Public trust is the single most important asset of the nonprofit and philanthropic community. Without it, donors would not give and volunteers will not get involved. The rights and privileges accorded to the independent sector are a result of the trust placed in the sector to promote the public good. The values that give rise to philanthropy and not-for-profit initiative require all of the organizations and the sector to act according to the highest norms of ethical behavior.

Id.).

³Joe Stephens, *Overhaul of Nature Conservancy Urged*, WASH. POST, Mar. 31, 2004, at A01.

⁴REPORT OF THE GOVERNANCE ADVISORY PANEL TO THE EXECUTIVE COMMITTEE AND THE BOARD OF GOVERNORS OF THE NATURE CONSERVANCY 4 (Mar. 19, 2004)(hereinafter GAP REPORT).

⁵*Id.* at 3.

⁶Stephanie Strom, *Battle in an Omaha Charitable Group Reflects Issues Raised in Corporate Scandals*, N.Y. TIMES, Jan. 9, 2004, at A13.

special emphasis on risk and reputation.”¹ TNC’s goal in addressing the problems through this panel was to become a leader in the sector for governance, accountability, and transparency.²

The GAP spent about six months examining the “Conservancy’s mission and its unique, highly decentralized organizational structure prior to developing its recommendations.”³ Section one of GAP’s final report to TNC begins by recognizing that:

[t]he past years have witnessed a dramatic shift in public expectations regarding the accountability of private organizations and the responsibilities of their governing boards. This has involved highly publicized scandals at large for-profit corporations, and media and U.S. government attention to philanthropic and other non-profit entities. *The Washington Post* series on The Nature Conservancy is illustrative of this trend, but there have been similar reporting and editorial comment in newspapers and magazines throughout the nation. The process is likely to accelerate as Congress examines the manner in which the tax code is currently used by non-profit organizations.⁴

The final report of GAP to TNC made a thorough analysis of how best to restructure the governance structure and standards at TNC. In general, GAP noted: (1) that TNC’s board needs to be more active in overseeing the activities of the organization, and (2) that TNC needs to better define and manage the relationship between its headquarters and its local chapters.⁵ The final report tailors the best practices of not-for-profit governance to the specific needs and organization of TNC. TNC has committed itself to working under the “best standards in governance,” and in recent months has made significant progress in this goal.⁶

As the TNC’s GAP notes, the problems that TNC must work through are symptomatic of a broader struggle within the third sector to improve accountability and transparency to the public. Ensuring public trust in the third sector requires stringent governance norms. Recent developments regarding the accountability and transparency of the for-profit sector are suggestive of reforms that should be made in the not-for-profit sector.

IMPROVING ACCOUNTABILITY—SARBANES-OXLEY TYPE REFORMS

In the for-profit sector, problems with accountability of businesses to their investors and to the public have come to a head in recent years. The Enron and Arthur Andersen disasters are just two examples of a larger structural problem.⁷ In response to these accountability nightmares, the American Competitiveness and Corporate Accountability Act of 2002, known as the Sarbanes-Oxley Act,⁸ was enacted. Sarbanes-Oxley is meant to “rebuild public trust”⁹ in publicly traded corporations by providing for more stringent

¹ *Id.*

² GAP REPORT, *supra* note 3, at 3.

³ THE NATURE CONSERVANCY, *Statement of Henry M. Paulson, Jr., Chairman, Board of Governors: Receipt of Final Report from Governance Advisory Panel*, Mar. 29, 2004, available at <http://nature.org/exclude/print.php> (last visited Apr. 30, 2004) (hereinafter *TNC Receipt of Final Report*).

⁴ GAP REPORT, *supra* note 3, at 6.

⁵ THE NATURE CONSERVANCY, *Board of Governor’s Statement: Adoption of Recommendations from Governance Advisory Panel*, Feb. 2004, available at <http://nature.org/exclude/print.php> (last visited Apr. 30, 2004).

⁶ *TNC Receipt of Final Report*, *supra* note 8.

⁷ BOARDSOURCE & INDEPENDENT SECTOR, *THE SARBANES-OXLEY ACT AND IMPLICATIONS FOR NONPROFIT ORGANIZATIONS 2* (2003), available at <http://www.boardsource.com> (last visited April 30, 2004).

⁸ American Competitiveness and Corporate Accountability Act of 2002, Pub. L. No. 107-204.

⁹ BOARDSOURCE & INDEPENDENT SECTOR, *id.*

governance standards.¹ In particular, the Act requires increased board oversight of audits and financial transactions.²

Sarbanes-Oxley has important implications for the not-for-profit sector. While the Act technically applies only to for-profit publicly traded corporations, it sends an important message to the not-for-profit community. A recent publication of *BoardSource* and INDEPENDENT SECTOR, entitled *The Sarbanes-Oxley Act and Implications for Nonprofit Organizations* (hereinafter *Act Implications* article),³ outlines the main provisions of the Act, how they are relevant to NPOs and their boards, and then makes recommendations for application of the provisions of the Act to the nonprofit sector.

For example, the *Act Implications* article first reviews the provision of the Sarbanes-Oxley Act requiring an independent and competent audit committee. The article then explains why “[i]t is good practice for nonprofit organizations to take steps to ensure the independence of the audit committee.”⁴ Finally, the article makes recommendations for voluntary compliance by not-for-profits with this requirement. It suggests that “the audit committee should be composed of board members who are not compensated for their service on this committee and do not have a financial interest with any entity doing business with the organization. . . . [N]o members of staff, including the chief executive, [should] serve on the audit committee . . . ,”⁵ although members should be knowledgeable in how to perform the auditing functions. Furthermore, the “full board should review the annual audit and the audit committee’s report and recommendations.”⁶ The article goes on to explain the potential for voluntary compliance with provisions regarding: responsibilities of auditors, certification of financial statements, insider trading and conflicts of interest, disclosure, whistle-blower protection, and document destruction.

STATE-MANDATED REFORM

In addition to explaining how third sector organizations could voluntarily comply with Sarbanes-Oxley type requirements, the *Act Implications* article points out that mandatory federal and state regulation may not be far off. Specifically, the article indicates that, “[i]f nonprofit leaders do not ensure effective governance of their organizations, the government may step forward and also regulate nonprofit governance. Indeed, some state attorneys general are already proposing that elements of the Sarbanes-Oxley Act be applied to not-for-profit organizations.”⁷

California and New York, for example, are already considering legislation to improve not-for-profit organization accountability. Highlights of proposed revisions to California law include, for example, preparation of financial statements for organizations by an independent certified public accountant, in accordance with generally accepted accounting principles and auditing standards.⁸ These financial statements must be made available to the state attorney general, and to the public upon written or in-person request.⁹

Proposed changes to California law would also require corporate not-for-profit organizations to “have an audit committee appointed by the board of directors from among its members.”¹⁰ This audit committee would not include any staff members, the committee members would not receive any additional

¹ *Id.*

² *Id.*

³ BOARDSOURCE & INDEPENDENT SECTOR, *supra* note 14.

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.* at 2.

⁸ Proposed revision to § 12586(e)(1) of the Nonprofit Integrity Act of 2004.

⁹ *Id.*

¹⁰ *Id.* at § 12586(e)(2).

compensation (other than for work on board of directors), and must not have “a material financial interest in any entity doing business with the corporation.”¹ Another proposed change to the law would require the board of every charitable organization to review, at least yearly, the compensation and benefits of the corporation’s president or CEO, and its treasurer or CFO.²

New York has introduced a bill to protect “against financial frauds by not-for-profit corporations.”³ The first section of the bill amends the Not-for Profit Corporation Law (NPCL) to require that a corporation’s president or CEO, and treasurer or CFO, each will verify the corporation’s annual report.⁴ The level of scrutiny by the reviewing officer will depend on the gross revenues and assets of the corporation.⁵ Certain exemptions apply.⁶

Section two of New York’s bill amends NPCL to require complete and accurate reporting by not-for-profit corporations.⁷ Failure to report accurately and completely will constitute a breach of director’s and officers duties to the corporation.⁸ Persistent failure to completely and accurately report is cause for removal of officers and directors.⁹

Section four of the New York bill further amends NPCL “to encourage (but not require) not-for-profit boards to designate executive committees and audit committees.”¹⁰ Members of an audit committee will oversee the work of independent auditors and may not:

- (a) accept any consulting, advisory, or other compensatory fee from the corporation; or
- (b) have participated in any interested-party transaction within the previous year.¹¹

Another highlight of section four makes a new requirement for handling certain conflicts of interest. Where there is a conflict of interest between the corporation and its directors or officers, the interested party must prove the “contract or transaction was fair and reasonable.”¹² If the contract or transaction fails to meet the applicable test, the transaction may be voided.¹³

These examples of proposed changes to both California and New York law exemplify the potential responses of States to the need for greater transparency and accountability of not-for-profit organizations.

CONCLUSION

Ensuring accountability of the third sector is essential to its success. Without responsible and transparent governance structures, it is difficult to measure the impact of the third sector organizations on the communities they serve. Moreover, a lack of accountability in the not-for-profit arena will damage public trust, the foundation of all work within the sector. Voluntary adherence to the highest governance standards is an admirable goal, and should be encouraged. It is likely, however, that further government

¹ *Id.*

² *Id.* at § 12586(g).

³ N.Y. A10239 Bill Summary, An act to amend the not-for profit corporation law and the religious corporations law, in relations to the protections against financial fraud and abuse, and to repeal certain provisions of the not-for-profit corporations law, available at <http://www.assembly.state.ny.us/leg/?bn=A10239> (last visited April 30,2004).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ N.Y. A10239 Bill Summary, *supra* note 18.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

intervention in setting standards and requirements for governance structure and standards is forthcoming. Third sector organizations should be sensitive to the need to be accountable to their benefactors, their beneficiaries, and to the public.

SOUTH ASIA

NEPAL

MEDIA FREEDOM IN TIMES OF NATIONAL CRISIS

BY SHRISH S. RANA

There is unanimous consensus that the constitution of 1990 helped engineer a quantum leap in the state of the Nepali media because of constitutional guarantees of freedom of the press and publication and the right to access information. This rare point of convergence on one outstanding achievement of the movement for the restoration of democracy manifests itself amply in the substantial flow of investments in the media sector, which is a result of the growth of the media industry.

A NATIONAL CRISIS?

To the chagrin of media professionals, however, the Nepali media's longstanding linkages with the political establishment has marred professional coverage in preference of partisan or biased political coverage holds.¹ It is in this light that one must assess the exercise by the media of the freedoms enshrined in the constitution for the media on the perspectives for which the media has chosen to opt regarding the existence of, or the recognition of, a 'national crisis' in Nepal. Is there a 'national crisis'?

Typical of this politico-media linkage, a national crisis as recognized by the legal enactment of parliament, and hence, legislated and recognized by the media did exist in the formal imposition of an Emergency under Article 115 of the Constitution of Nepal in November 26th 2001. This emergency was extended by Royal decree upon mandatory expiry on May 27th, 2002. Gokul Pokhrel in a Nepal Press Institute seminar paper '*A Free Media as Defender of Democracy (Freedom of Information in an Emergency)*' explains the process of the first and only officially recognized crisis period in the country invoking an emergency and its impact on the media.² As Pokhrel points out, the November move was "hailed by all political parties and civil society and organizations as a compulsion thrust upon government by the insurgents." The media appears to have obliged. The attempt by the Sher Bahadur Deuba government to extend the emergency after its three-month expiry, however, triggered a series of political crises, the reverberations of which continues to be felt today but is not corroborated as such by the political sector and has yet to be adequately addressed by the media.

Deuba, who took office on a platform of talks with the Maoists, was fired by his party boss, Girija Koirala, on the issue of the extension of the emergency and had to engineer a formal split in the Nepali Congress. In anticipation of the opposition CPN/UML coalesced with his Koirala rivals in parliament to challenge

¹ See Lal Babu Yadav's paper "*Role of Media in Promoting Good Governance*" *Telegraph Weekly* seminar, December, 2001. Of relevance to this paper will also be Yadav's question in his paper "Is the right to information context-free?" and his contention that there is a dearth of empirical comprehension and research on whether a. media has promoted freedom in the country; b. media has promoted education; c. media has curbed corruption; d. media is owned by independent persons; e. there is real competition among the media for content improvement and quality and f. whether media has broadened its reach to capture the diversity and complexity of Nepali life and provided access to public information.

² Workshop on "Freedom of Information during a State of Emergency" jointly organized by the Nepal Press Institute and the Federation of Nepalese Journalists in cooperation with The American Center, June 4-5 2002.

his parliamentary majority on the emergency issue, he chose to recommend the dissolution of parliament while he retained his majority and extended the emergency by Royal decree. This concluded the 'national' approach to a national emergency. If the national crisis is by implication the ensuing Maoist conflict this is the sole occasion in its eight year history when the nation, including the press, has met the crisis as a nation. Ever before or after, it has merely been governments that have tackled the crisis. The media, expectedly perhaps, has followed the political hues.¹

The opposition to the emergency by Deuba's opponents emanated from their contention that the newly promulgated anti-terrorism laws sufficed to cope with the Maoist 'crisis'. The media, directly hit by the curbs, readily agreed. Deuba eventually lifted the emergency. But another national crisis emerged: a constitutional crisis. Until Deuba's emergency existed by decree, he was accused in the media of ruling by decree in the absence of parliament and in coalition with the king and the army. After the emergency was lifted, the non-resolution of the Maoist 'crisis' proved impedimental to elections constitutionally to be held within six months of the dissolution of parliament and the Deuba government, in cognizance with the opposition CPN/UML and the RPP, sought recourse to the use of the residual powers of the king under Article 127 of the Constitution, the interpretations of which is the current source of the constitutional crisis.

In essence, then, there is the Maoist conflict and there is the constitutional conflict. Except for the emergency period, the Maoist conflict has not been approached as a 'national crisis.' It has been approached on separate partisan lines and the media has followed suit. Identifying a national crisis, thus, appears difficult in the for the political and media sectors in Nepal. Its consequences on attempts at conflict resolution are somber indeed. It need not be stressed that crisis role functions can only be determined after the crisis is identified; in the absence of such identification, recourse will be to assume the normal role functions. On the issue of the Maoist conflict, the Nepali media is replete with reportage and comments on the conflict on a routine basis. This would normally be expected in a crisis situation. However, a national crisis situation that would want from the media a role to provoke, promote, and prompt a national approach to the crisis or even to prefer one would surely entail the identification of the national crisis first. Even if the politicians may be blamed for their partisan interests playing foul with the need for a national consensus in approaching the Maoist issue since it has provoked a national crisis, can the media which carries the twist and turns of the conflict and opinions and advice on it daily afford not to identify this as a national crisis and demand a national approach? In this, the media will have digressed from its traditional partnership with the political sector, but will indeed have served a long cherished goal in opinion building. Such a media preference would subscribe to the modernism prescribed by Jurgen Habermas's *Theory of Communicative Action*.²

FREEDOM: COMMUNICATIVE ACTION

As pointed out above, the Maoist insurgency crisis is part of the current constitutional crisis. In the first place, the insurgency relies upon Maoist claims that the constitution is inadequate and a new constitution must replace the current one. This systemic challenge appears not to have been recognized as such by the stakeholders in the system. If it had been acknowledged, one would have seen a suitable response from the stakeholders. Is or is not the media among the stakeholders? Because stakeholders are direct beneficiaries of the Constitution of 1990, this question must be answered in the affirmative. Thus, asking

¹ Gokul Pokhrel's paper which relates the crisis till extension is useful in the current context also because it elucidates upon the freedoms that can be impinged upon constitutionally upon invocation of Article 115. Also of current relevance would be a perusal of Ananda Aditya's comparative study of "*Forms and Frequencies of Restrictions in Media*" produced at the workshop.

² Jurgen Habermas, *Theory of Communicative Action Vols. 1 & 2* Trans.: Thomas McCarthy, Boston: Polity Press, 1995. Of course, one could argue that the media would first have to comprehend the real proportions of the national crisis in order to help prompt the essential national consensus for socialization.

for communicative action on part of the communicators at least in locating the crisis is hardly the preserve of Habermas in our case. As of the moment, if there is a role for our media, it is here.

Concerning the constitutional crisis, recognition by the media that there is linkage between the lack of systemic response and the emergence of the constitutional crisis would be a good beginning. Indeed, this would entail a frank assessment of the events leading to the October 4th, 2002 decision by King Gyanendra to deny prime minister Deuba his claim to continue in office by the use of the king's residual powers in the constitution under Article 127 but, instead, to call for cooperation in the "setting up soon of an interim, neutral administration composed of individuals with a 'clean' image who would not contest the forthcoming polls."¹ As yet, general media coverage has tended to view the king's use of Article 127 in line with the mainstream parties who allege that it is a step towards 'regression'. The Deuba Congress deems its dismissal as unconstitutional and wants its reinstatement in government. In contrast, the Congress- Girija wants the revival of the dissolved parliament. However, CPN-UML, which claims it opposed the dissolution of the house, viewed the constitutional recourse to be the appointment of a government under Article 128 of the Constitution, a clause that gave the interim government of 1990 its constitutional legitimacy after the panchayat constitution was abrogated and the interim government which oversaw the drafting of the new constitution was installed.

Since October 2002, an independent media standpoint on the need for a united national approach to the national crisis would surely have questioned the constitutionality of these partisan interpretations as well. Had the coverage, willingly given, of the international community's suggestion that the King and the political parties cooperate for a permanent solution been granted its constitutional perspective, the constitutional flaws in the separate partisan demands would perhaps have been widely disseminated by a media concerned for the emergence of a national consensus opinion in the formation of a national government capable of placing the constitution back on track and handling the Maoist crisis.

How the political sector is handling the crisis in the agitation is better discussed elsewhere, but after two governments under Article 127 and two sets of failed talks with the Maoists, the actual implications and ramifications of the agitation 'against regression' conducted by the mainstream political parties remains strangely beyond the reach of public discussion in the media. A sense of the surreal, thus, dominates Nepali politics today and its reflection in the media is stranger still. An agitation by and large limited to cadre of the organized political sector largely ignored by the lay public dominates media coverage. A government whose very constitutionality is challenged is isolated by the agitating parties and having to face the brunt of the Maoist crisis. The Maoists have readily taken advantage of both to heighten the crisis. The media has no choice but to cover this, especially when the Maoists have calculatedly increased their violent presence.

In the process, the media must largely tow partisan lines while commenting on and reporting the King's resort to assuage an increasingly desperate people by visiting the crisis affected areas as proof of 'regression,' while the presence of the masses at these gatherings despite the visible non-cooperation of the mainstream parties and the violent opposition to it by the Maoists remains largely dismissed as state sponsored. This, then, should provoke a question of the media: 'What is the Nepali state'? In times of national crisis, it is perhaps in locating the nation that the media can use its freedoms best.

From a media perspective, the use of this freedom would seem especially relevant in analyzing the Nepali crisis and suggesting a role for the media. Noam Chomsky's² much admired analyses on how the state and its partners in the business community control the media for propaganda appears conspicuous in its

¹ M. R. Josse, "*Nepal: Politics of Stalemate, Confusion and Uncertainty*" paper presented at a regional seminar organized in Islamabad, by the Institute of Regional Studies, May 26, 2003, p. 1.

² Media Control by Noam Chomsky, Seven Stories Press; Ripples before the storm by Noam Chomsky, source: Al Ahram Weekly & Noam Chomsky, <http://www.ahram.org.eg/weekly>.

absence in the Nepali context. While this would surely work wonders for any attestation of media freedom in Nepal, Chomsky's logic could well be applied to expose a curiosity: If the state controls the media in the developed democracies in the manner that Chomsky asserts it does, who controls the media in Nepal? One could perhaps deduce that, in accordance to Chomsky's logic, the state and business, in the Nepali case, are not as hand in glove as in Chomsky's media perspective. But in this instance in Nepal, the organized business sector, the Federation of Nepali Chambers of Commerce and Industry and the Chamber of Commerce appear to be among the few in the professionally organized sector that have openly endorsed the King's move under Article 127 and, indeed, even actively participated in it. If anything, this rare political gesture by an otherwise wary business community should indicate the severity of the crisis in Nepal apart from raising questions as to its non-corroboration or reflection in the media defying Chomsky's classical mould.

Partisan media or not, non-empirical academics or otherwise, expert and generalist, foreign and national, all appear to have a rare convergence of view that the crisis in Nepal is a consequence of a series of delinquent neglect in the sphere of governance that helped foster the Maoist demand for change and that the Maoist violence has added to the crisis.¹ In all fairness, partisan though it is, the Nepali media has contributed a fair share to the public exposure and awareness of the flaws in governance over the past decade. Even the massive repression of the Maoists under government police action found considerable coverage, particularly after the Maoist propaganda machine went to work in the media. As a result, public awareness at home and abroad that the crisis in Nepal is all-pervasive and, indeed, 'national' in nature is demonstrably high. How else does one explain the lack-luster public response to the highly publicized agitations mounted by the mainstream political parties in the country? How else can one see the less than luke-warm response of the concerned expatriate community and foreign governments to the agitation? In this sense, the media has succeeded. In doing so, however, one might well ask whether the media has contributed to the crisis or is helping solve it?

SETTING THE STANDARDS

Of course, in the context of our violent conflict, the media echoes the unanimous public demand for peace. It is also in the forefront in voicing the widespread preference for talks along with the cessation of violence and the resort to human rights. But especially in the context of the national crisis, to call for a set of standards prescribed for the media in its coverage of the crisis/conflict/violence would surely seem appropriate here. It is for this purpose that one turns to Norwegian peace studies professor Johann Galtung.² He has "laid out 12 points of concern where journalism often goes wrong when dealing with violence. Each implicitly suggests more explicit remedies.

- **Decontextualizing** violence: focusing on the irrational without looking at the reasons for unresolved conflicts and polarization.
- **Dualism**: reducing the number of parties in a conflict to two, when often more are involved. Stories that just focus on internal developments often ignore such outside or "external" forces as foreign governments and transnational companies.
- **Manicheanism**: portraying one side as good and demonizing the other as "evil".
- **Armageddon**: presenting violence as inevitable, omitting alternatives.

¹ Even the partisan media must now dutifully report prominent politicians who publicly advocate the acceptance of past 'mistakes.' A plethora of books and compilations have emerged in the academic sector provoking snipes of how the conflict in Nepal has become an industry. Of the publications a few come to mind as reference, Ananda P. Srestha and Shiv Raj Dahal eds. *Issues of Governance in Nepal*, Kathmandu: NEFAS/FES 2001; Dhruva Kumar, ed. *Domestic Conflict and Crisis of Governability in Nepal*, Kathmandu: CNAS, 2000; Ananda Shrestha and Hari Uprety eds. *Conflict Resolution & Governance in Nepal*, Kathmandu: NEFAS/FES 2000, etc. The list can go on.

² "12 Ways the Media Misreport Violence" by Johan Galtung, source: <http://www.mediachannel.org/views/dissector/coveringviolence.shtml>

- **Focusing** on individual acts of violence while avoiding structural causes, like poverty, government neglect, and military or police repression.
- **Confusion:** focusing only on the conflict arena (i.e., the battlefield or location of violent incidents) but not on the forces and factors that influence the violence.
- **Excluding** and omitting the bereaved, thus never explaining why there are acts of revenge and spirals of violence.
- **Failure to explore the causes** of escalation and the impact of media causes itself.
- **Failure to explore the goals** of outside interventionists, especially big powers.
- **Failure to explore peace proposals** and offer images of peaceful outcomes.
- **Confusing** cease-fires and negotiations with actual peace.
- **Omitting reconciliation:** conflicts tend to reemerge if attention is not paid to efforts to heal fractured societies. When news about attempts to resolve conflicts are absent, fatalism is reinforced. That can help engender even more violence, when people have no images or information about possible peaceful outcomes and the promise of healing.”

This working list is fully reproduced here to allow us to determine for ourselves a set of standards by which to gauge our performance in media coverage so far. Especially in the context of a national crisis, common sense would dictate that deviations would be non-professional and surely counter-productive.

EXTERNAL/INTERNAL

Mana Ranjan Josse’s paper with a chapter entitled “Quo Vadis Nepal?” in which he has raised questions that need to be answered on the crisis in Nepal.¹ In the context of a media role in the national crisis perhaps answering these inquiries would be tantamount to helping solve the crisis:

- “ Is the Maoists’ move for peace real or merely a time buying strategy akin to that in 2001?
- Would the Royal Nepal Army accept all Maoist conditionalities, including that it incorporate the Maoist militia?
- Is India’s official stance on the Maoists’ “People’s War” genuine or, as many in Nepal still believe, merely a convenient cover for a covert strategy of support with a view to bring her monarch down a la Sikkim?
- Would post-9/11, post-Afghanistan, post-Iraq America stomach rule by an extreme communist party in Nepal, if it comes to that?
- How far do India’s and America’s interests in Nepal, vis-à-vis the current situation, converge and where do they diverge, if they do?
- Would China remain serenely unconcerned if the Sikkim scenario is to be replayed in Nepal?
- Would a military coup be possible?
- Is the ongoing agitation directed squarely against the king entirely homegrown and, if not, where might its roots lie.”

These questions are somber, indeed. Considering that they were posited long before ‘republican’ voices and anti-monarchy slogans were orchestrated in the ranks of the agitating mainstream parties, despite their leaderships’ calculated disassociation from such, they are by no means irrelevant to the Nepali crisis if one is to apply Galtung’s standards. Perhaps the media will be better able to answer these questions if at all the above prescriptions are applied in course of its normal coverage of the crisis in Nepal. Here, too, the media has a role in the exercise of its freedoms.

Of course, much of Josse’s focus in questions cited above remains in the realms of the hypothetical and, in a manner, externalizes the conflict that contributes to our national crises. For a media perspective on its

¹ Pg 31

internalization a clue may be found in the political curiosity of a series of constitutional crises being provoked over the years regarding the prerogative of governments to dissolve parliament and conduct elections. The constitutional crisis provoked by Deuba's insistence on forming an electoral government requires analysis of previous precedents. If anything it will give meaning to the current mainstream parties' claim to electoral government, which continues to contribute to the crisis. Indeed, it could perhaps also provide clues to the future since the Maoists, too, stake a claim on such an electoral government –for a constituent assembly/ referendum- and the linkage here is perhaps a little too glaring to have been greatly overlooked by our media over the years. A section of the Maoists went underground opposing the constitution after their parliamentary representation was erased by a Koirala government which conducted elections. Perhaps we must use our freedoms to unravel this crisis-prone craving for participation in electoral governments and the linkage it has with electoral results. In doing so, we will surely be doing a service for the future of our democracy.

SUB-SAHARAN AFRICA

MOZAMBIQUE

REGARDING RELATIONS BETWEEN THE NGOS OF THE NORTH & MOZAMBIKAN CIVIL SOCIETY¹

BY JOSÉ NEGRÃO*

At the beginning of the nineteenth century, when Hegel referred to civil society as an institution placed between the family and the state's political relations, he allowed for an ambiguous reading on the nature and role of that institution. Would civil society be an intermediate institution, and as such have a role to fulfil? Or would it be more of an intermediary institution, comprising the totality of socioeconomic and productive relations, as interpreted by Marx?

¹ Paper presented at the master's course "Alternative Globalization and Non Governmental Organisations in the Realm of Portuguese as Official Language". October 2003, Faculty of Economics, University of Coimbra, Portugal. The author offers the following references:

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Although appearing to be a matter of little importance - whether the institution is intermediate or intermediary - the fact remains that this question is present in the day-to-day relations between the civil societies of the South and the Non Governmental Organisations of the North; this is reflected also in the manner in which both deal with the challenges of globalization. Here we pose the question whether the NGOs of the South must participate in the same way as the NGOs of the North in the construction of an alternative [form of] globalization. Or should the civil societies from both halves of the planet interact in the negotiation between the people, the states and the markets on a global scale?

This paper seeks to address such questions as well as the need to reconstruct the concept of civil society on the basis of the Mozambican experience.

1. The trajectory of the “intermediate institution” in Mozambique

In a 1997 article entitled “The Civil Sector,” David Sogge presented three reasons why Non Governmental Organisations in Mozambique had a modest impact in comparison with their counterparts in other African countries, particularly with those where the official language is English (Sogge, 1997). In his view, one should consider the weight of history, the absence of public authority and the sheer dimension of informal norms and networks as explanations as to why Mozambique, and perhaps other countries which are members of the PALOP (African Countries with Portuguese as Official Language), had until then neither adopted a liberating agenda in opposition to a closed state and big business, nor had followed the neoliberal route which would fill, by means of charitable activities, the social vacuum left behind by the state and by private enterprise.

After Salazar implemented the corporative *Estado Novo*, the state used the non-governmental entities as propaganda tools and a means to gather support for its policies; in exchange, their members received protection and other benefits. It was the state that determined which structures should be in place for representation of business, the labour force, the farmers and other interest groups identified by the state. However, in Mozambique, the corporative model was never fully implemented and the urban non-governmental space developed very sparsely. Perhaps this was because Mozambique was never a colonisation colony, but a reserve colony, where there was a minute Portuguese presence.³ It was not by coincidence that Mozambican urban nationalism grew out of the few associations which flourished on the margin of the state. These were the Black Association of Mozambique (*Associação dos Negros de Moçambique*), the Mozambican Indigenous Association (*Associação dos Naturais de Moçambique*), the Mozambican Christian Council (*Conselho Cristão de Moçambique*) in Lourenço Marques [now Maputo], and the Mozambican House (*Casa de Moçambique*) in Lisbon.

With national independence the Frelimo government adopted some of the control methods used by the colonial state, albeit with a different ideology. It was the time of the Mass Democratic Organisations (ODMs), which were subjected to strict control and were for the exclusive use of the social or socio-professional groups targeted by them. Thus there was the OMM for women, the OJM for the youth, the OTM for the wage earning workers, the ONP for the teachers, the ONJ for journalists, and so forth. However, it is appropriate to mention that, as in the colonial period, there were movements which started to unfold outside the strict control of the one-party state or the party in power. Examples of this were the continuation of the Mozambican Christian Council, the emergence of Caritas of Mozambique, and the constant difficulties the state had with the peasant movement which became the National Union of Peasants (*União Nacional dos Camponeses*).

² At the time of independence the Portuguese presence in Mozambique was below 3 per cent, while in Angola it had already reached 20 per cent.

From 1980 onwards the war began to spread throughout the country and eventually caused the collapse of the state's power in the rural areas and weakened it in the urban areas. According to Sogge, the informal [sector] then filled the empty space; this resulted in an intersection and even inter-penetration of the social norms and regulations with those of the market, which in turn combined with the state. This was the seed of the institutional creativity which is today a characteristic of Mozambique. At the same time, it marked a period of great vulnerability within the public space where the powers, including the power of words and other symbols, would become an object of contention.

This marked the beginning of a third phase in the history of the Mozambican “intermediate institution”. During approximately ten years, from 1988 to 1998, the NGOs of the North associated themselves with the various donors in order to guide the replacement of the Mass Democratic Organisations and the re-configuration of Mozambican civil society by structures typical of NGOs of the North - development NGOs. This period will be discussed in the next section.

The current phase of this development began in 1998, marking a moment of institutional innovation with concepts being reconstructed; and internal, continental and global relations being subjected to alternative readings. This will become clear in sections three and four below.

The “supply driven” processes of the NGOs of the North

From 1988 onwards, with economic liberalisation and the prospect of a multi-party system being adopted, a string of NGOs from the North began to arrive in Mozambique. Their agenda included assistance to the country which was in a war situation, and was the poorest country in the world. In essence, these NGOs directed the implementation of projects through their local “partners”, having neither any members nor any representation mandate. However, [at the time] in Mozambique there were no local development NGOs which could be constituted as counterparts to the international NGOs.

We then witnessed a process of accelerated formation of local NGOs in which the language used in meetings was English, the funds came from abroad, and the recruitment of staff was detrimental to the local productive and administrative fabric. In addition, they used hitherto unknown methodologies and, above all, answered to agendas which were conceived and developed outside the country. Having an NGO counterpart meant to “disentangle” one's life: one could do anything and argue for the justification of anything, provided there was a duly financed project. These were business NGOs, without any personality or ideology of their own; at the same time, they despised the local associative movement because it did not tie in with the “supply driven” process of the NGOs of the North.

Yussuf Adam called them Modern Messiahs in Search of New Lazaruses, in a metaphoric language aimed at denouncing the “hunting of misfortune” by these NGOs (Adam, 1997). David Sogge denounced the desperate search for local “partners” as investment ducts, and the incapacity of these NGOs to recognise that the local organisations neither belonged to the state, nor were they businesses; they were, rather, manifestations of Mozambican civil society which took a different form from that of a Western Non-Governmental Organisation. For both, the NGOs from the North adopted the strategy of creating local organisations in their own image. Even today many local people consider NGOs as “a foreign thing.”

At the time I wrote an article which pointed out some of the negative points in the intervention of these NGOs. The growing deterioration of the institutions of the Mozambican state worked in favour of the proliferation of a myriad of organizations which sprang up like mushrooms across the whole national territory. Even though the NGOs of the North proclaimed themselves as non-governmental, in fact a significant part of their budgets were provided by their respective governments; and there were cases in

which these amounts were debited to the receiving country's external debt, leaving the Mozambican state with no possibility of recourse (Negrão, 1997).

A second negative point was inefficiency in the utilisation of disposable funds. The high hidden costs and the transaction costs in the NGOs' headquarters in their countries of origin were alarming. Salaries which were paid in the countries of origin, travelling and inter-continental holidays, family visits, accommodation, transport and fuel were all debited to the respective organisations; meanwhile, the national counterparts were not allowed these practices, because they were not sustainable. The 'sustainability' discourse, among many others, was unilateral; this translated in an unequal power relationship, leading me to call them "multinationals of charity."

My last point was an unrelenting criticism of the discourse "we do concrete things." The lack of investment in research, the dearth of viability studies, and the deficient or even non-existent co-ordination with the state's programmes, all this together led to the resurgence of the 1970s myths regarding the economic behaviours of the poor farmers. For example, the myth that they only produce for their own subsistence, having no relation whatsoever with the market; or the myth that technological stagnation is a result of the almost genetic ignorance of the peasant woman.

In a text on this period in Mozambique and the intervention of the foreign or "transnational" NGOs, Boaventura de Sousa Santos emphasised two parallel processes. First the segmentation and sharing of sovereignty among nationals and international NGOs. This segmentation was determined by the different conceptions of intervention by the pivotal states which are behind the international NGOs. Second, the financial dependency of the national NGOs on the international ones, leading to a situation of subservience to the conditions imposed upon them (Santos, 2003).

The result was widespread indignation and, with it, a certain radicalism and absolutism which still holds sway among many public opinion makers in Mozambique. However, as time went by one began to understand that the NGOs from the North are not homogenous; one began to learn to establish the differences among them. An international NGO where the "officers" are entered into the salary sheets of the respective Ministry of Foreign Affairs is different from an NGO which survives from donations collected on the streets of European capitals, whenever television news bulletins invade the homes of ordinary people with the African tragedy. An international NGO that compels its entire staff to pray to Jesus Christ every morning, even when they are Moslem, is different from an NGO that fights for the respect to local creeds, turning them into a platform for its activities. An international NGO that prescribes a work schedule "because it was decided upon by the family" is different from an NGO that sends volunteers to work schedules which are locally defined. The recognition of these differences is essential for the establishment of common platforms; otherwise, the result is the working out of more explicitly normative global agendas on what should be equality, social justice, sustainability and cultural pluralism, than found in the bulk of the mainstream theories which have reached us by means of liberalisation.

During this period, the most burdensome and most difficult to eliminate legacy of the NGOs from the North was the idea that the local NGOs they had created were the alpha and omega of Mozambican civil society. However, in the majority of cases they are neither the one nor the other: they are neither intermediate nor intermediary institutions. What they ended up being are hybrid institutions in the heart of civil society, with the characteristics of a service providing business.

A second grave consequence that derives from the first is their character of exclusivity, with a tendency towards sole representation resulting in them becoming the "mouthpiece for civil society". Having one sole representative of civil society is to leave the door wide open for its manipulation by the political interests in power. The domestication of civil society, which was exactly how it was attempted with the

propaganda associations of the colonial period and the ODMs after independence, continues to be a temptation for the African governments.

However with the passing of time, the organisations that were created as counterparts of the NGOs from the North were becoming different one from another. A national NGO that survives by conferences and seminars about globalization is different from a national NGO that has acquired legitimacy by means of the work being done within a community. A national network that is being paid exclusively through international financing is different from a network that survives from the work carried out by its members and from its capacity to raise some funds towards concrete activities. A national association that bids for consultancy tenders internationally is different from a local cultural association whose members party together as well as assist each other whenever disaster befalls them. The recognition of these differences and diversities is essential for the success of some of the practices we mention in the following section.

3. A practice that leads to a concept reconstruction

Perhaps it is because of their opposition to the “supply driven” model of the NGOs from the North, or because of the internal dynamics of the social movements that, in some concrete spheres, the practices of various Mozambican social organisations acquired totally differentiated contours; these lead to a definition of the role they are supposed to fulfil and to a reconstruction of the concept of civil society in the operational context of the country.

The first rough outlines of an 'autonomous' action in the dependency relationships arose in the post-war period, with the initiative of the Mozambican Christian Council - the campaign known as “Hoes for Arms” and later, the establishment of the Mozambican Debt Group (Grupo Moçambicano da Dívida). None of these initiatives was *sui generis* Mozambican. In other international contexts they had already attempted to collect arms and, symbolically, transform them into hoes as a means to create income alternatives for the combatants and to bind them to the land and the family, making them forget violence. In addition, the international movement for the writing-off of the debt had created various pressure groups in some of the most debt ridden countries.

However, there were two circumstances that made this different in comparison to the previous period. On the one hand, the bond that both initiatives created with the poor farmers and with the national *intelligentsia*; and on the other, the fact that neither needed large amounts of external funding in order to continue. When one spoke of transforming arms into hoes, one was taking in a target population that comprised fundamentally young people of rural origin, and whose childhood had been marked by the collapse of the agricultural sector with a consequent lack of opportunities for a livelihood in the agricultural field; they made war because nothing could be lost, and not because they supported one or other of the ideologies advocated by the contending parties. After independence, the poor family farmers, who had been so artfully mobilised by Frelimo to bring down the colonial regime, were forgotten. With the war this sector reached levels of misery, malnutrition and impoverishment never before encountered by living generations. The Campaign for the Transformation of Arms into Hoes marked the moment of reconciliation between the urban and the rural, in which viable alternatives began to be sought for the poor farmers.

Due to its specific nature, the question of Mozambique's foreign debt could not be led by the NGOs from the North. And, because of its complexity, it could not be left to the two or three NGOs which were interested in the matter. The moment had arrived to integrate all Mozambicans with preparation and information on this matter so that they would support the international lobby for the writing-off of the debt. It was at that moment that persons like Carlos Cardoso, Nuno Castelo Branco and José Negrão got involved, among others who had never depended on and never worked for any NGO from the North. Thus they had maintained a certain autonomy regarding the intellectual control enforced by the one-

party system. The Mozambican Debt Group was the meeting place for Mozambican social activists and intellectuals, in a framework that was neither dominated by the state nor by the NGOs from the North.

It was in this context, ten years after the introduction of neoliberalism into Mozambique, that three initiatives appeared, which led to the current image of Mozambican Civil Society: namely, the Land Campaign, Agenda 2025, and the Poverty Observatory.

The Land Campaign

The land problem was and will continue to be vital for countries such as Mozambique, where the agrarian sector is a source of indispensable income for social reproduction and the place of employment for the overwhelming majority of the population. The end of the war in 1992 opened the possibility for competition for the better, and better located lands for agriculture, for forest exploration and synergistic tourism. In the wake of the Structural Adjustment Programme, the Land Tenure Centre, which was the war horse of USAID and other NGOs from the North, pressured for the granting of individual titles to the land as the only way the right to land could be secured. The fall of apartheid opened the way for speculation in landed estates by white farmers who came from South Africa because they were unhappy about the end of the subsidies they had been receiving there. All in all, it made the land a catalyst for an enormous diversity of interests.

The mobilisation around land was felt on three fronts at the same time: in the innermost recesses of the Catholic Church, by means of Caritas and the Diocesan Commissions for Justice and Peace; inside the Mozambican Christian Council through the ORAM - Mutual Assistance Organisation; and inside the UNAC - National Union of Peasants, due to the conflicts which began to appear because of an accelerated privatisation of the “state farms” and the attempt at usurping the land of the co-operatives. The binding element among the three fronts was the discussion of a new Land Law for Mozambique; the catalysing movement was the Land Campaign. Around 200 organisations gathered around the Land Campaign, from national and foreign NGOs to Grassroots Community Organisations, and from religious denominations (Christian, Moslem and *Mazione* to academics and individual persons. All were interested in a common cause, namely to ensure that access to and possession, of the land by the poorest would not become dependent on the issue of a title. At the same time, they wanted to ensure that mechanisms of land management rooted in custom would be recognised, and that relationships between private individuals and families could be constructed on the basis of mutual advantage (Palmer, 2003).

Unconsciously, the Land Campaign ended up establishing some of the basic characteristics of the new image of Mozambican civil society:

- adherence to common causes, irrespective of ideological diversity;
- possibility of participation of grassroots community organisations without being compelled to be under the direction of an urban NGO;
- full participation of religious denominations, whether they were Christian, Moslem or local;
- the opportunity to define appropriate strategies with the private sector;
- the utilisation of state institutions (the Legislative to approve the Law, and the Executive to carry out the Law) without necessarily having to take on power; and
- participation on an equal footing with international NGOs.

It was in the period that followed the Land Campaign (which ended in 2000) that, after the assassinations of the journalist Carlos Cardoso, the economist Siba-Siba Maquáqua, and of more than 100 people in the Montepuez prison, various factions of civil society once more united in order to demand the moral regeneration of the state and an end to corruption. In this way, journalists, socio professional associations and countless members of the urban élites joined the already existing civil society dynamics. As a result, a

Law was approved by which civil society is responsible for the selection of three candidates for the Presidency of the National Elections Commission. The voting takes place within the Commission whose members are indicated by the political parties which are represented at the national parliament. This is a unique phenomenon in the whole African continent and perhaps even in the whole world.

Agenda 2025

Agenda 2025 arose after the dispute for world institutional hegemony fought between the UNDP and the World Bank/IMF. The objectives of Agendas 2020 and 2025 are to create consensus between all the political forces and the national interest groups around a common vision of the medium term future and of a set of development strategies which must be adopted by the various executives, independent of their political colour.

After the failure of the launch of an initiative to develop an Agenda for the year 2020, because the Party in power tried to do it behind closed doors, there arose Agenda 2025, which had a greater equilibrium of forces among the 14 members of the Council Committee and the circa 100 members of the National Committee. Representatives of practically all the political factions, of all the socio professional groups, and a significant number of intellectuals, artists and writers worked during a whole year under the executive co-ordination of some national figures respected for their impartiality, integrity and nationalism.

For the construction of consensus it was necessary to do a retrospective analysis, to agree on the national potentialities as well as structural weaknesses and, most difficult of all, to discuss the principles which could form the common starting points for the elaboration of all the possible scenarios for the two following decades (Agenda 2025, 2003). In this way, it was possible to draw up four possible scenarios for Mozambique:

- the scenario of the Kid [juvenile goat] - in which each of the main actors hides his/her head under the ground and only thinks of him or herself; this scenario means a return to war, to intolerance and to social exclusion;
- the scenario of the Wild Duck - in which each actor arrogates to him or herself the right to say that he/she knows all, resulting in cyclical crises followed by moments of slow and tenuous recovery because of the breakdown in structures caused by each crisis;
- the scenario of the Xirico [a small song bird] - in which each actor is a small bird that sings as much as possible everywhere possible, but which does not create an harmonious symphony towards the development of all of Mozambique's potentialities; and
- the scenario of the Bee - in which the actors work together and are sure to develop a hive that will meet their own needs and respect the rights of everyone.

The most creative aspect of Agenda 2025 was the identification of the set of determining variables upon which an analytical model was built. On this model the presuppositions which led to the elaboration of the country's scenarios and strategic options were placed.⁴ For the first time, the monopoly of the discussion of the *res publica* was taken away from party summits and the myth of the infallibility of the enlightened vanguards or the enlightened leaders was broken.

New characteristics were thus added to the image of Mozambican civil society:

- the non-existence of vanguards or infallible leaders;

³The 20 determinant variables resulted from the application of an analytical model which was based on four axis: human capital; social capital; economy and development; and governance. By pondering each variable, there appeared another normative model with results that are substantially different from the normative model applied by the PRSPs (Poverty Reduction Strategy Papers).

- the capability of conscious discussion about the future of the public good by various groups of people, provided their right of speech was recognised;
- the acceptance of different points of view, provided common principles are discussed and agreed upon;

the sense of commitment towards the country and, in particular, to social justice.

The Poverty Observatory

The Poverty Observatory appeared in the wake of the movement for the writing-off of external debt. In 1996 the World Bank and the IMF launched the HIPC initiative, whose object was to eliminate what they called the “unsustainable debt” of the poorest and most indebted countries. The objective was to reduce these countries' debt up to the limit of the capitalised liquid value of the debt considered sustainable; this would mean 150% of the export volumes and 250% of the government income. In that same year, the international donor community joined the initiative and the traditional terms of rescheduling of the debt by the Club of Paris and other bilateral creditors were, as far as possible, altered in conformity with those limits (Negrão, 2003).

Mozambique was one of the countries that most benefited by the HIPC initiative. In 1998 its debt was reduced from US \$ 5,6 billion to a sensible US \$ 1,3 billion. The debt-exports ratio was estimated at 200% to 220% in order for the initiative to provide a way-out for the country. The immediate results achieved were satisfactory. Between 1996 and 2000 the annual inflation rate went down from 47% to 2% and the Gross National Product grew on average 10% per annum.

In the year 2000 the country suffered the most devastating floods recorded until then. The losses in the South and Central zones were astronomical, as those regions were literally submerged for more than a month. As a consequence, the World Bank and the IMF decided to accelerate the debt relief by pardoning the total debt servicing payment for that year. The Club of Paris postponed the payment until Mozambique would be in a position to pay, and various bilateral creditors acted in the same way. In this way, Mozambique was able to enter into the second phase of the HIPC initiative, also known as HIPC 2.

In this second phase, the Bretton Woods institutions agreed to grant partial pardons of the debt, provided the country strictly followed the programme approved by those institutions. The creditors of the Club of Paris were prepared to grant debt relief under clearly preferential conditions and it is believed that the same will happen *vis-à-vis* the bilateral creditors.

The World Bank / IDA and IMF set four conditions for finally approving the transition to HIPC 2:

- elaboration of a *Poverty Reduction Strategy Paper - PRSP*, that in Mozambique was called *Action Plan for the Reduction of Absolute Poverty - PARPA*. This plan had to ensure the active participation of civil society, the private sector and the public in general;
- the implementation of a set of measures related to social development, public sector reform, and the legal and regulatory framework for economic activities;
- maintenance of a stable macroeconomic climate under IMF control; and
- confirmation of the participation of other creditors in the debt relief.

On 25 September 2001 the World Bank/IDA and the IMF concluded that Mozambique had met all four conditions imposed in 2000, and had taken the necessary steps to enter into the second phase. This made Mozambique the third country in the world to reach this phase, after Bolivia and Uganda. The external debt became US \$ 750 million, meaning that circa 73 per cent of the initial amount had been forgiven. The debt service went from US \$ 100 million per annum in 1988 to an average of US \$ 56 million

between 2002 and 2010. This means a drop on average from 23% to 10% of the state income from 2002 to 2010; and it is estimated that this average will be 7% from 2011 to 2020.

The savings in the state budget from the reduction of the debt service allowed for an increase of state disbursements towards the PARPA. Translated into figures, the state can make available circa US \$ 130 million per year for the activities of the PARPA.

However, the required full participation of civil society, the private sector and the people in general in the PARPA's creation was reduced to sporadic consultations which often took on an informative character about what was being done or what had already been achieved. Consequently, the conception of the PARPA did not incorporate the perceptions, the knowledge and the experiences of the various actors which have a role to play in the reduction of absolute poverty. On the other hand, the economic development model adopted by the PARPA follows the neo-liberal paradigm applied to Third World countries. The master plan was drawn up by a specialist from Harvard University, who travelled to Maputo for this purpose. Consequently, an almost exclusive emphasis was placed on an export-lead orientation, in the expectation of the trickle-down-effects; the result was that the whole problem of investment required for the formation of national capital was ignored.

In order to compensate for this gap, civil society agreed to push forward the Poverty Observatory, an organ led by the government in order to oversee the implementation of the PARPA. The Mozambican Poverty Observatory comprises three groups of actors: government, donors and civil society in the widest sense.

The nominations of who should represent the whole of civil society were carried out by civil society itself in co-ordination with the government. There is no doubt that the Mozambican government should be praised for affording this opportunity; in Zambia civil society represented in the Poverty Observatory is limited to some NGOs with the exclusive task of supporting the government in the identification and application of some indicators; and in Vietnam it is the NGOs from the North, such as CARE International and Action Aid which participate in the Poverty Observatory. In Mozambique, the government left the selection of its representatives to civil society, prescribing only that the private sector, as well as the trade unions, should have a presence.

After an internal consultation phase, the following were identified as representatives of civil society for the Poverty Observatory in Mozambique:

- four representatives from religious denominations (two Christian and two Moslem).
- two representatives of the trade union federations (OTM and Sindicatos Livres);
- three representatives of private sector associations (commercial association, industrial association and CTA);
- six representatives of 3rd tier organisations (Land Forum, Women's Forum, UNAC, GDM, Link and Teia);
- four representatives of 2nd tier organisations (FDC, Kulima, ORAM, Khindlimuka);
- one representative of an autonomous research institute (Cruzeiro do Sul - IID).

The Poverty Observatory has two objectives: fill the gap created by civil society's lack of participation when PARPA was first conceived; and to establish, on a national scale, a system for monitoring and evaluating poverty (and not only regarding PARPA), which should lead to the elaboration of the Annual Poverty Report by the Civil Society representatives from the point of view of the poor and their demands in general.

Other, new characteristics of the public image of Mozambican civil society began to appear:

- capitalising on opportunities as they surfaced;
- affirmation of a multicultural diversity and interaction for social welfare and an improvement in the quality of life;
- replacement of discourses of a hegemonic character by inclusive, flexible and changeable discourses, in function of the local conditions; and
- co-operation with the government on strategic operational questions.

Reconstruction of the concept of civil society

The experiences which had been accumulated during these last five years ended up giving a special significance to the concept of civil society in the Mozambican context, and perhaps even in the context of other African countries.

There is no doubt that civil society is a construct, and that its application to the African Continent has been the object of the most varied theoretical elaborations and interpretations one can imagine. The charismatic leader of the National Union of Peasants, Ismael Ossemane, once said, “Now everyone calls me civil society, but I do not know very well what that means.” Here we do not pretend to exhaust the topic, but only to contribute the Mozambican experience towards the definition and utility of the concept, that is, the notion of civil society.

For some, this is a contested concept that has been used with different meanings and, as such, has no operational use; for others, however, there are local meanings which are being created around the concept, as part of the universal negotiations among the people, states and the markets.⁵ There are those who argue that civil society refers to a wider set than that of the NGOs, establishing the difference between these and the grassroots, community organisations. But there are also those who prefer to widen the definition of NGO, creating a hierarchy of levels or tiers according to their scope and reach as well as the type of members which are involved. According to this scheme, 1st tier organisations are those which are constituted by community elements or workers; 2nd tier ones are those which generate groups of 1st tier organisations; and 3rd tier ones are those which work with organisational networks of any of the other tier.⁶

In operational terms the issue becomes complex when one has to select representative elements of this construct called civil society, as happened during the three years mentioned above. There are three sectors which are particularly sensitive in regard to the definition of civil society: the private sector, the religious denominations, and the organisational forms derived from kinship.

For some, the private sector does not combine with the associative character principle because for them it is rather a question of talking about “strategic alliances”; for others, however, the private sector is situated between “the home and the state”, and thus its contribution should be considered, not as a useful instrument, but a rightful member, without which there cannot be any development⁷ (Guimah-Boadi, 2001).

For the first philosophers civil society formed part of the social life that was not the Church and that was situated between the state and the family; in practical terms, however, it has been shown that the religious

⁴ Chandoke (2000) has an excellent synthesis on the various meanings of civil society outside the Western context, while Lewis argues that in 2001, on the basis of concrete examples, the concept may at the same time have an analytical value and an inspirational power, which makes it into a useful and operational concept.

⁵ In this regard, see 'Commonwealth Foundation Guidelines on NGOs' in Ball and Dunn, 1995.

⁶ For Guimah-Boadi, from the University of Ghana, civil society refers to the space between the home and the state, it is inhabited by voluntary groups and associations, partaking common interests and amply autonomous from the state. Business has obviously been excluded from this definition.

denominations, when they are not established as an “ideological tool of the state”, fulfil an essential role in mediating between the people and the state, and between the latter and the markets. But religious denominations are not homogenous, and their capacity for incorporating change along the years and the centuries is different from denomination to denomination and in their innermost recesses; therefore, there is not always agreement on their inclusion or not into the operational definition of civil society.

The third considerable sector in the composition of civil society is that of the organisational forms derived from kinship. For Boaventura de Sousa Santos, traditional leaders operate in the sphere of what he called non-civil society, as opposed to the extraterritorial civil society of the NGOs from the North, or the secondary civil society, that is the local NGOs created by the state or by the political class. For him, the visibility of the local authorities is directly related to the administrative incapacity and loss of legitimacy of the state. For Kanji, however, the organisations of mutual assistance and of kinship constitute the largest category of “organised” civil society in Mozambique (Kanji, 2002). Lastly, for David Sogge, the domestic units, pertaining to lineage and community, are merely primitive organisational relations where, in many cases, the main forms of association are compulsory and involuntary. In the revision of this problematic about the composition of civil society representation in the Poverty Observatory, it was concluded that the organisations which are derived from kinship, particularly the traditional authorities, would be better placed in the sphere of decentralisation and participatory democracy than in civil society, since their actions derived, fundamentally, from the Common Law state, and not from the interaction between it and the local people.

The selection of civil society representatives for the Poverty Observatory ended up by synthesising the contribution the Mozambican experience can make towards the reconstruction of the concept in a non-Western context. The diagram below demonstrates the intersection among the spheres of the state, the people and the market, and the areas from which the various representatives of civil society were selected.

To sum up, civil society is a construct that is not self-identified, but that is recognised in the diversity of a whole in which self-organisation, voluntary association, obligatorily not for profit, the defence of citizenship rights before the state and the market, and the demand of a common vision of society, are more than a simple sum of the parts.

Thus we are not dealing with the adoption of a liberating agenda *per se*, nor with a neo-liberal route, but the conquest of a space of interaction between the state, the market and the people; this takes place sometimes through negotiation, other times through constructive dialogue and others yet through sharing of points of view and intervention strategies in favour of common causes which can be so simple like “peace” or so complex like “social and human development.”

4. From inverse relations to analogical relations

What reading should be done of the relations who were established during the reconstruction of the ‘intermediate institution’ in Mozambique? There are two spaces to be read - the space of internal relations and the space of global relations.

In the space of internal relations one went from the concept that the relation between the state and civil society was obligatorily inverse (that means that the one's gains implied the other's losses), to an analogical relation, that is, one that is established between equals, and could be neutral or positive to both the parties.

However, internal relations do not unfold only with the state; they are equally present among NGOs born neither with a mandate nor with legitimacy, and associations which represent interest groups which go from socio professional organisations to the informal dynamics of participation in campaigns for a specific

cause. Furthermore, their relations tend to evolve on the basis of assent on the common principles which guide them, separating the wheat from the chaff when necessary and proclaiming the wealth of diversity, even ideological, of the organisational forms within the national territory.

A third dimension of the space of internal relations is where relations are developed between the urban and the rural, between the market and family economics, and between economic growth and human welfare and development. Also here we note the evolution of contrasting situation to that of the establishment of a continuum, which can lead to the production of innovative forms of integration and articulation, which can be of benefit to both parties.

To sum up, the tendency towards verified change points to a greater maturity and deliberation in recognising mutual spaces and in identifying the causes which might bring benefits and a better quality of life for all. The theoretical implications arising out of this could be:

- To the militancy to conquer power in order to foster popular ideals, perhaps one could add that participation in the public decision making processes can be assured by the practice of participative democracy, without one having to obligatorily belong to a political party.
- To the distinction between the state, the basic economic structures and civil society, established by Gramsci, one could perhaps add the distinction between the day-to-day life of the people, where one finds the real world, and its organisational forms, which constitute civil society.
- To Polanyi's society, in which the market is incorporated among so many other social functions, one could perhaps add the transformation dynamics caused by development, where the economic during a certain time tends to take on priority but without having to, obligatorily, make growth an end in itself.
- To Goran Hydén "affection economics," a product of the consubstantiate interdependencies of kinship relations of the peasant economy, perhaps one could add the enlargement of the kinship networks towards the state's political sphere in Africa, together with intimate friendships (godparents), nepotism and corruption.
- To the analysis of the third system focussed on the people instead of the political system, one could perhaps add the indispensability of the state so that multiplying effects in absolute poverty reduction can be reached, as well as the distribution of wealth on the basis of principles that are recognised in social justice (Martinussen, 1997).

However, in the space of global relations, I am not sure if the same tendency can be found for the transition of the inverse relation into the analogical relation.

Here also there are three dimensions to be read. The dimension of relations with the states, that of relations between organisations from the North and from the South, and that of relations in the interior of the South and the North. The relations that the NGOs from the North establish with the states for their articulation with the South are essentially different from those that the South maintains for the same ends. Subsidies, facilities and, in some cases, diplomatic status, although facilitating the concretisation of their activities, place them in a situation of dependency on the agendas of their states; and these dependencies are replicated by their related organisations in the South. The autonomy in relation to the state is far greater in Africa; this gives the various endogenous national organisations moral authority and the freedom to go ahead with their objectives without fear of any immediate financial reprisals. Thus it seems to me that there is an inverse relation from the side of the large NGOs from the North which operate in Africa and the state, while on the side of the African Continent, one goes in the direction of an analogical relation.

The types of relations which are established between the NGOs from the North and Mozambican civil society have already been mentioned. Although in the specific case of this country there is a tendency to

establish differences between the NGOs from the North and to establish analogical relations with those [NGOs] which partake of common principles, I do not think that the tendency on the Continent is pointing in the same direction. There are some laudable initiatives but there continues to be a pattern of implementing agendas defined by the “sisters” of the North in the South, the reason being the lack of [local] financial support. Perhaps the most blatant case is that of a large NGO with a budget that is larger than the budgets of some African countries; this NGO launched a campaign against the agricultural subsidies of the European Union and the United States, assuming that the market *per se* tends towards perfection, without first entering into dialogue with its counterparts in Africa to find out if it was their priority to remove the subsidies in the North or the establishment of some kind of financial support in the South. There are not many instances like the above mentioned, when actions of this nature unleash an inverse relation where the gains of some are to the detriment of the interests of civil society in the host country in the South.

Lastly, regarding internal interactions, there are still some significant steps to be taken pertaining to the recognition of the right to differ in the spheres of conceptualisation and action. Have there not been various instances when South African organisations arrogated to themselves the right to want to impose their methods and their conceptual framework on the other civil society organisations in Africa? It is also not unusual that Latin American organisations refer to their African counterparts with disdain, and to the South-East Asian ones as being weak for co-operating with their governments.

Also in the realm of global relations, we can extract theoretical deductions:

- To an alternative to neo-liberal globalization, perhaps one could add the globalization of a plurality of conceptual frameworks, of analytical instruments and of definition of practices on the basis of common principles and concomitant objectives.
- To the people's resistance to Bailey and Scott's external intervention, one could perhaps add hospitality, when the fears of the risks of adopting new behaviour [patterns] have been overcome.
- To the global political rhetoric of democracy and human rights, one could perhaps add the analysis of practices of the discourse concerning gender relations, by means of the use of natural resources and by the exploitation of a child labour force in the social institutions which precede civil society.

To sum up, we find ourselves at a moment of intense change in international relations, when a given characteristic rapidly changes into its opposite, and where spaces are successively empty and filled. In this context, it is not possible to produce an objective characterisation on the relations between the NGOs from the North and Mozambican civil society; even less to theorise about it. However, what we have attempted to achieve with this text, is to identify tendencies of change (and from that draw some deductions) so that actions to be realised in the short term may bear in mind the idiosyncrasies of both sides and may be based on the mutual acceptance of diversity, as one of the fundamentals of alternative globalization.

WESTERN EUROPE

REGIONAL

CROSS-BORDER GIVING IN EUROPE: INTERESTING PERSPECTIVES & USEFUL INITIATIVES

BY LUDWIG FOREST*

How to promote cross-border giving in Europe in this era of globalisation and at a time when citizen's mobility and company work are increasing across the Union, was the key issue addressed at the tax seminar organised by the European Foundation Centre in collaboration with the Charities Aid Foundation, the European Association of Planned Giving and the King Baudouin Foundation and held on March 22, 2004 in Brussels. The seminar reviewed the state of the arts in the field, the barriers and practical solutions as well as longer terms perspectives.

More and more European citizens are willing to make cross-border gifts, donations or legacies to help international causes and foreign charities, due to the fact that they are more mobile with as consequence an increasing dispersion of their assets. Europeans have a growing interest in causes that go beyond national borders and are also increasingly tending to anticipate their succession to contribute personally to the successful implementation of their philanthropy.

In the process, however, they often face a complicated legal and fiscal framework as well as national barriers because this matter remains largely outside the scope of European treaties. For example, a donor living in Spain and wanting to support a English charity with assets located in Italy will face a lot of difficulties finding the most appropriate way to implement this valuable intention as he has to consider three different national legal and fiscal legislations. Even a more usual situation with implications in two countries (donor and assets in country A - beneficiary in country B or donor and beneficiary in country A – assets in country B) is likely to be very complicated and not tax-effective.

Legal and fiscal barriers impede effective borderless philanthropy. The EU countries do not provide incentives for donors to give cross-border, as tax-deductibility is not granted for donations made by individuals and corporate donors to foreign beneficiaries. Donors can, in most cases, only deduct donations from their income or corporate income tax if they give to a domestic charitable or public organisation. Furthermore, cross-border giving is generally not exempted from gift and inheritance tax (or transfer taxes) and is often even taxed at the highest applicable rate. With the consequence that the intended gift, donation or legacy is not at all tax-effective and that the donor should, in most cases, be advised not to fulfil it. Possible tax relief with regard to gift and inheritance tax is again generally only provided for donations made to a beneficiary located in the country of residence of the donor.

National authorities took very small steps to solve the problem, mainly in the form of agreements between countries. Concerning tax-deductibility, there are no mutual agreements or treaties between European countries that solve this problem. For gift and inheritance taxes, donors must always check whether or not a cross-border transaction can benefit from tax relief in accordance to charity-friendly provisions in a double income tax treaty, a declaration of reciprocity or in any other bilateral agreements concluded by the countries involved. In such cases, a cross-border donation would be taxed at the same rate as if it was made to a national beneficiary. Unfortunately, these provisions remain more the exception than the rule.

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At European level, there have been some interesting developments. The European Commission has requested Belgium to change its legislation on gift and inheritance tax, which is seen as discriminatory because it confines the preferential rates for philanthropic donations or legacies to entities established in Belgium. This required the three Belgian regions, in charge of the administration of gift and inheritance taxes, to amend their legislation to comply with the request. Some say that Belgium was a test for the European Commission and that the positive evolution of this question in Belgium will motivate the Commission to request the same implementation in other EU countries. This could be, of course, a very interesting perspective.

In the meantime, European cross-border giving is possible but remains difficult. In some countries, finding an effective solution will be easier than in others and the outcome depends on where the donor has his residency and his assets and in which country the beneficiary is located. In any case, professional tax and legal advice should be sought specific to the donor/testator's situation.

Helping to overcome the barriers and provide long-term solutions is important to the foundation sector in Europe. Apart from the experience they have in this matter and the fact that it is relevant to contact national foundations for advice, several international initiatives were already taken. Members of the European Foundation Centre (EFC) have worked on developing "Fundamental Legal and Fiscal Principles for Public Benefit Foundations in Europe", which were translated into a Model Law. The EFC is also working on recommendations for the development of a European legal form for Foundations. All of these ongoing working documents address the issue of improving cross-border giving.

The Transnational Giving Europe agreement between the Charities Aid Foundation (UK), the Fondation de France (France), the King Baudouin Foundation (Belgium) Oranje Fonds (The Netherlands) and Maecenata International (Germany) provides a uniform and reliable framework allowing tax-efficient cross-border cash donations between the five countries. TGE allows the donor to benefit from tax-deductibility in the country where he pays taxes when supporting a beneficiary located in a country covered by the network. The partners ensure secure transfers of funds and validate beneficiary projects. It's easy to understand that TGE is opening Europe-wide opportunities to fundraisers to mobilise resources.

Last but not least, the King Baudouin Foundation is actually developing an interactive database that will contain concrete information, best practices and solutions concerning cross-border giving in all EU member States as well as in Switzerland. This project has the aim to overcome the recognised lack of structured information and knowledge on this issue and will inform donors, intermediaries and beneficiaries about the legal and fiscal aspects involved in a cross-border philanthropic transaction and this, taking into account the country of residence of the donor and the beneficiary and the country where the assets are located. This "Giving in Europe" initiative will become a free-access website to facilitate consultation throughout Europe and will be launched later this year.

All these initiatives and perspectives are slowly improving the situation but there is still a lot of work ahead before allowing cross-border philanthropy in Europe to fulfil its full potential for dynamic change.

BELGIUM
THE NEW LEGAL REGIME
FOR NOT-FOR-PROFIT ORGANIZATIONS IN BELGIUM

BY MICHEL DE WOLF*

Belgium had for decades separate statutes for domestic and international not-for-profit organizations (NPOs) (acts of 27 June 1921 and 25 October 1919). These statutes have been revisited and substantially revised by the law of 2 May 2002, supplemented by several royal decrees (15 May, 26 June and 19 December 2003). All these texts can be found on www.moniteur.be in French, Dutch, or German. This is a summary of the new regime applicable to not-for-profit organizations in Belgium. The existing NPOs must adapt themselves to the new regime beginning 1st January 2005, except for the rules concerning the accounts, where they have one additional year to fulfil their new obligations.

Several categories of not-for-profit organizations

The new legislation provides for four categories of not-for-profit organizations, having their seat in Belgium:

1. "ASSOCIATION SANS BUT LUCRATIF" (ASBL): this is the most common framework, requiring that the association fulfil mainly the following criteria:
 - The purpose of the association may not be to carry out a commercial activity;
 - There is no possibility for the members to take some material profit from their participation in the association;
 - There are at least three members (Belgians or foreigners); and
 - In case of liquidation, the remaining balance of assets must be used for a not-for-profit purpose.

2. "ASSOCIATION INTERNATIONALE SANS BUT LUCRATIF" (AISBL): this is a framework existing since 1919, having many common features with the "ASBL", but with the word "international" in its name, and fulfilling mainly the following criteria:
 - The purpose of the organization must not be to carry out a commercial activity; there must be a not-for-profit goal with an international dimension. This international dimension will be clearer if the membership is itself international, but this is not a condition. Conversely, it is not required that the management of the AISBL include at least one Belgian member;
 - There is no possibility for the members to take some material profit from their participation in the association;
 - In case of liquidation, the remaining balance of assets must be used for a not-for-profit goal;

3. "FONDATION PRIVÉE" (private foundation): this is a new framework, which must fulfil mainly the following criteria:
 - The foundation must have received from its founder(s) a gift for the furtherance of a not-for-profit goal. However, there is no minimum value required for these initial assets. The founder is not necessarily required to be a natural person: another association, or even a company, can be a valid founder;

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- There is no possibility for the founders, Board members or third parties to take some material profit from the foundation. However, there can be a material interest for third parties, if this is required for achieving the not-for-profit goal of the foundation. For instance, a foundation established for helping a disabled child may give some support to this child;
 - The foundation must be established by an act of a public notary;
 - In case of liquidation, the remaining balance of assets must be used for a not-for-profit goal, but the founder or his legal successors may take back the gift or the value of the gift that the founder made when establishing the foundation;
4. "FONDATION D'UTILITÉ PUBLIQUE" (foundation of public interest): this framework was known under the previous legislation under the name "établissement d'utilité publique;" it must fulfil the criteria set for a private foundation, and, in addition, have a philanthropical, philosophical, religious, scientific, artistic, educational or cultural aim. It is possible for a private foundation to be converted to a foundation of public interest

These four categories vary along some structural lines. For instance, ASBL's and AISBL's must have general meetings of the members (every year for the ASBL but possibly on a less frequent basis for an AISBL), while foundations may work only with a Board. Indeed, foundations have no members.

Within the ASBL, the rights of the members are very strictly enforced. Any appointment of a Board member must be done by the general assembly of the members. Any exclusion of a member must be decided by a special majority within the general assembly. But the general assembly may change the charter of the association, without unanimous consent of the members.

All members of an ASBL have the right to read and investigate the minutes of the Board, as well as the financial documentation of the association. This is one of the most controversial innovations of the new law. There is some expectation that this rule will be amended before the date provided for its implementation (1st January 2005).

NPOs become separate legal entities from the date when their charters are registered in a public file (ASBL and private foundation), or after a royal decree has been issued establishing them (AISBL and foundation of public interest). The need for a royal decree makes a clear distinction between the ASBL and the private foundation, on one hand, and the AISBL and the foundation of public interest, on the other hand. Generally, however, ASBL's and AISBL's are similar on many other points, while private foundations and foundations of public interest have many rules in common.

Some new principles of corporate governance have been introduced in the new statute. For instance, the Board of an ASBL may not be a single person, and it may not have as many members as the general assembly has -- there must be at least one more member of the general assembly than the members of the Board. In addition, the charter of a foundation must include a procedure for solving any conflicts of interest arising within the foundation.

An ASBL can also be converted into a not-for-profit company. Not-for-profit companies ("SOCIÉTÉ À FINALITÉ SOCIALE" - SFS) are another category of NPO, but they are provided for by the company law (articles 661-669 of the Company Code). They are intended to carry out commercial activities (a purpose forbidden within the framework of an ASBL or an AISBL, but surprisingly allowed for a foundation), but without any provision for material benefit to the associates (aside from a minor amount of interest that may be paid on their personal capital contributions). The SFS's are not really a success story, due to the many legal constraints they must meet (e.g., the limitation of the number of votes an individual associate may have, the right of any worker to become an associate, etc.).

Common features for all types of NPOs in Belgium

The main common feature, which is also one of the most fundamental changes brought in by the new law, is found in the new accounting standards applicable to NPOs beginning in 2006. All ASBL's, AISBL's and foundations must now publish their annual accounts. They must send these accounts to an official public file: either the tribunal (for small ASBL's and small private foundations), or the ministry (for foundations of public interest), or the Central Bank of Belgium (for large ASBL's and private foundations). When the accounts have been published, they become very easily accessible (even through the Internet).

There are two different accounting regimes:

- One is for small NPOs, which must record their cash expenses and cash receipts, but they must also draft a so-called simplified balance sheets of their assets and liabilities;
- One for large NPOs, which must satisfy the accounting rules provided for by the company law, with some peculiarities.

A NPO becomes "large" when it exceeds, for one year, two of the three following criteria:

- 5 workers (in equivalent full time)
- 250,000 EUR annual cash receipts
- 1,000,000 EUR of balance sheet assets.

Moreover some NPOs must submit their accounts to an audit by a legal auditor. This is relevant for NPOs having 100 workers, or exceeding two of the three following criteria for one year:

- 50 workers
- 650,000 EUR annual cash receipts
- 3,125,000 EUR total balance sheet assets.

The legal auditor is appointed by the general assembly of the members (ASBL's) or by the Board (AISBL's and foundations). S/he is required not only to check the accounts, but also the legality of the expenses of the NPO in relation to the law and its charter.

In all kinds of NPOs, the principle of limited liability towards third parties applies, both vis à vis the members (if any) and the Board members (except when they commit a misdemeanor). As opposed to Board members of companies, association and foundation Board members are not subject to a special set of criminal rules; they are, of course, subject to the general rules included in the Criminal Code of Belgium.

A judge has the power to liquidate associations and foundations that are in serious violation of the law. Moreover, a judge's decision is the only way to liquidate a foundation.

Foreign NPOs

The new Belgian law is also relevant for some foreign NPOs. If an NPO has an "operational center" within the Kingdom, it must publicly register in Belgium. This public registration must contain, among other documents, the charter and the identification of the managers of the Belgian operational centre. Such NPOs must also publish the annual accounts of the operational center in Belgium.

Any foreign association that does not fulfil its legal obligations may be forbidden from having an operational center in Belgium. It may also have its judicial claims dismissed by a judge.

Tax regime

The new law does not change much concerning the taxes affecting NPOs. Most NPOs in Belgium do not pay any tax on their net profits. But they must pay a tax on the value of their fixed assets (0,17% every year), as well as schedular taxes on certain kind of gross income (interests, dividends, royalties, real property incomes, etc.).

Moreover, small fees must be paid for publishing the charter of the association or foundation, the names of the Board members, the accounts, etc. These publications must be done in one of the official languages of Belgium (Dutch, French, or German). English may be used internally for reports, but not for official publications.

Conclusion

The new Belgian law has revisited the set of rules applicable to NPOs in Belgium. Belgium has been known since 1919 for allowing foreigners to participate fully in NPOs having received a separate legal entity status under the name “INTERNATIONAL ASSOCIATIONS;” and: this has not been changed. The main changes accomplished by the 2003 law concern the accounts that *all* NPOs, including foreign NPOs having an operational center in Belgium, must publish beginning in 2006. This is a move favoring transparency, responsibility, and good governance. Maybe Belgium is once again opening the way for the world to change its attitudes about NPO transparency.

GERMANY

THE MORMON CHURCH IN EAST GERMANY: AN INTERESTING CASE OF CHURCH-STATE RELATIONS

BY CHRISTINE R. BARKER*

BACKGROUND

Church-State relations in Germany, as in other countries, have over the centuries proved problematic in various respects. The German experience in the latter part of the twentieth century was particularly tense in East Germany during the regime of the German Democratic Republic (GDR). Interestingly, it was in this part of Germany, five centuries earlier, that the Church Reformation movement began. Its inaugurator, Martin Luther, was born in 1483 in Eisleben in the Eastern part of Germany, territory which for a period of forty years after the Second World War became the Communist GDR.

As far as the constitutional position regarding Church-State relations in the twentieth century is concerned, a significant development came in 1919 when a new constitution, the Weimar constitution of

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11 August 1919, came into effect. The Weimar constitution contained several important provisions as far as Church-State relations are concerned which remained a part of constitutional law in both East and West Germany during its division in the latter part of the twentieth century.

Following the Russian occupation of the eastern part of Germany at the end of the Second World War in 1945, the GDR was established in 1949. The GDR constitution, the *Verfassung der Deutschen Demokratischen Republik*, which came into force on 7 October 1949, like the West German *Grundgesetz* (Basic Law) of the same year, adopted most of the State-Church law from the Weimar constitution of 1919, which accorded various rights to Churches and other religious communities as institutions; for example, the ability to employ their own officials without State interference and to administer their own affairs independently.

These and other important State-Church provisions were—unexpectedly perhaps—included in the first GDR constitution of 1949, which contained a substantial section devoted to religion and religious communities (Articles 41–48). Article 41(1) states that every citizen enjoys full freedom of belief and conscience and that the freedom to practise one’s religion without hindrance enjoys the protection of the Republic. Subsection (2), however, adds the caveat that the Churches are not allowed to be party-political or to do anything unconstitutional either in their institutions or in their religious education. Under the terms of Article 42(2) the exercise of private or civil rights or appointment to public office are independent of religious belief.

Importantly, following the Weimar constitution, Article 43 states: “There is no State Church,” but, like the Weimar constitution, goes on to guarantee freedom of association to religious communities. Article 43(4) upholds the right of religious organisations which are public law corporations to levy tax from their members on the basis of State tax lists, and Article 44 guarantees the Church’s right to give religious education in school rooms. While it was not envisaged that religious education would be part of the normal curriculum, rooms were to be put at the Church’s disposal for this purpose. Under the terms of Article 44, it was up to parents to decide whether their children would participate in this religious instruction, and no provision was made for older pupils to decide for themselves, as was the case in West Germany.

Article 46 refers to the provision of services and pastoral care to those in hospitals, prisons and other public institutions, but omits the specific reference to the army contained in Article 141 of the Weimar Constitution and carried through into the *Grundgesetz* in West Germany. Article 47 states that anyone wishing to leave a public law religious organisation must declare this before a court or submit a declaration in an officially recognised form. Article 48 states that children can decide Church membership for themselves after the age of 14, prior to which the decision resides with parents.

Despite these constitutional guarantees, which were considerably restricted in the subsequent GDR constitutions of 1968 and 1974, Church-State relations in the GDR were notoriously difficult both for the mainstream Churches and for minority religious organisations, such as the Jehovah’s Witnesses (who were banned in the GDR in 1950 and only reinstated as a permissible religion in 1990).

This article considers the relationship between the GDR government and the Church of Latter Day Saints, more commonly known as the Mormons. They established their first church in Germany in the 1840s, shortly after the foundation of their religion by Joseph Smith in 1830 in the US, and, as far as East Germany is concerned, there had been a branch in Dresden since 1855. By 1945 there were more than thirty branches of the Mormon Church in East Germany and the number of adherents there was estimated at approximately 5000. This was a relatively small number in comparison with the main Protestant and Catholic Churches. However, the Mormons made their mark, and in the latter stages of the GDR regime they managed to achieve historical developments in the promotion of their Church

within the politically atheist State.

THE EARLY YEARS

In common with other religious groups, the Mormons were severely constrained in the earlier decades of the GDR. Religious meetings were monitored, there were difficulties in getting buildings repaired, and Church literature was severely restricted. In addition, close contacts with Mormon communities in the US and their active conversion programme led to repeated conflicts with the atheist State in the first fifteen years of the GDR.

Many GDR residents suffered financial hardships in the 1950s, and the Mormons were no exception. A large number of men throughout Germany had been killed in the Second World War and much of the infrastructure of the country was destroyed. While West Germany benefited from generous financial assistance provided by the US, Russia was not in a position to rebuild the East German economy. It was often difficult for families there to obtain the food and clothing they needed and, as a consequence, food parcels were sent from the West to assist GDR families, principally from West Germany, and in the case of the Mormons also from the US.

In addition to difficult living conditions in the GDR, all religious organisations experienced a lack of freedom to worship. The Mormons even had difficulty in finding meeting places, many of which had been bombed during the Second World War. The Dresden branch was housed in a former officers' mess in a bombed building that had belonged to the German army. Branches elsewhere in the GDR moved from one rented room to another or met in private houses until they were eventually able to acquire and renovate disused properties such as barracks, stables or cinemas. It was very difficult to obtain building materials, which had to be reclaimed from demolished buildings, and the State authorities were reluctant to give the necessary planning permission. The constraints placed upon their freedom to worship led several Mormon families to emigrate during the 1950s, initially to West Germany and then to the US, under the sponsorship of American families.

The construction of the Wall in 1961 restricted contact with the West in general and with the US in particular. It also curtailed the missionary work of the Mormon Church. Prior to the erection of the Wall, the leadership and members in the GDR were able to have limited contact with the Mormon Church in the West. The Mission presidents in West Germany also presided over missionary work in the East. Once the Wall was built, however, they were generally only allowed to visit twice a year, at the time of the Leipzig trade fair, when it was easier for visitors from the West to obtain a visa.

The restrictions on Church literature were also more severely imposed after 1961, and official publications of the Mormon Church were banned. Members were advised by their Church leadership to destroy any literature in their possession, as the secret police were liable to search houses. In the 1960s and early 1970s most Branch Presidents had to apply for a police permit before each Church meeting, and secret police often attended the meetings.

Most missionary activities were also banned, although older, retired couples were permitted to engage in a limited amount of missionary work. A Mission was founded in Dresden in 1969 for all members within the GDR and Henry Burckhardt, a GDR citizen and former counsellor in the presidency of the North German Mission, was elected the first Mission president. But it was not until October 1988 that the GDR government gave permission for full-time missionaries to enter the country.

Despite, or perhaps because of, all the obstacles which were put in their way, the Mormon Church in the GDR continued to thrive. Meetings were well attended and Church members grew closer as they faced the difficulties together. While the mainstream Protestant and Catholic Churches saw their membership

fall, the Mormon Church did not. Also, while the Protestant and Catholic Churches suffered financially when the State refused to co-operate with them in collecting Church tax and many members did not pay the tax voluntarily, the Mormons continued with their practice of tithing, thus maintaining the Church's financial basis.

THE 1980S

Church-State relations as a whole improved significantly following a landmark meeting on 6 March 1978 between the Federation of Protestant Churches in the GDR, chaired by Bishop Albrecht Schönherr, and Erich Honecker. The Protestant Church was the largest Church in the GDR in terms of membership and sought a more conciliatory attitude from the government not only towards itself but also towards other Churches. Erich Honecker emphasised that there was much common ground between GDR politics and the ethos of the Churches as they strove for peace and the physical and spiritual well being of the people.

The occasion of the 500-year anniversary of the birth of Martin Luther in 1983 also provided an opportunity for the Protestant Church and the State to work together. On 6 March 1978 Honecker announced that there would be a State Commission for this anniversary and suggested a co-ordinated approach by Church and State. Their respective committees did work together in many respects in the organisation of the 1983 celebrations and there were positive spin-offs for Church-State relations. Ironically, perhaps, the greater freedoms enjoyed by the Protestant Church in the 1980s also enabled it to challenge the State more effectively and to become the main rallying point for the protest groups which would eventually bring about the end of the GDR regime with the fall of the Wall in 1989.

The Mormons, too, achieved remarkable steps forward in the 1980s but had a rather different relationship with the State. While the Protestants and other religious organisations had difficulty in accepting many aspects of the GDR regime and felt compelled to campaign against those with which they disagreed, it is part of the Mormon faith to respect the authority of the State in which its members reside, and to abide by its laws. Church-State relations in the 1980s were more cordial in many respects, but were also characterised by opposition movements which met under the aegis of the Protestant Church. Mormons, however, were advised not to participate in any anti-government activities or demonstrations, at least in their capacity as members of the Mormon Church.

An illustration of the difference between the Mormon Church and other religions in the GDR can be found in their attitude towards military service. This was a major point of contention between State and Church in the GDR. Military service for a period of 18 months for men between the ages of 18 and 26 was introduced in the GDR in 1962, the year after the building of the Wall. The law which introduced it did not include any provisions for refusal on the grounds of religious or conscientious objection, and those who failed to comply faced the prospect of imprisonment.

This presented a problem for members of many religious organisations, both mainstream and minority, as they were committed to peace and refused to bear arms. Church leaders, in particular from the Protestant Church, persuaded the government to agree to a compromise solution whereby those who objected to carrying arms would instead be employed on building duties as Bausoldaten. However, since the buildings concerned were military installations, many also refused to do this. The Mormons, by contrast, commit themselves to recognise, respect, and support the law of the country in which they live, and this includes participating in military service if this is required by the law of the land. In the GDR this set them apart from most other religious groups and no doubt contributed towards the good working relationship which ultimately developed between the Mormon Church and the GDR government.

A major event in the history of the Mormon Church in the GDR was the erection of the first Mormon Temple on German soil and the first in any Communist country. The Temple was built in 1985 in

Freiberg in the East German province of Saxony and was financed by the Mormon Church in Salt Lake City, Utah (US). Until then the nearest Temple had been in Switzerland, and East German Mormons had difficulty in obtaining permission to go there.

Any Church building programme was practically impossible until the mid 1970s, when negotiations between the Protestant Church and the government allowed money and building materials from the West to be used to restore the most important church buildings. The GDR regime saw the economic advantages of this building programme, the so-called Valutasonderbauprogramm, and in 1979 extended it to other Churches. The Mormons erected a total of 15 new buildings under this programme, the most significant of which was the Temple in Freiberg.

The Temple is a special place for Mormons. While their meetinghouses are open to the public and anyone may attend Sunday services and other meetings, the Temple is only open to faithful members of the Mormon Church for the performance of their most sacred rites. They must obtain from their Church leadership a permit which is granted upon the successful completion of interviews. Once dedicated, a Temple becomes “vested with a character so sacred that only members of the Church in good standing are permitted to enter. It is not a matter of secrecy. It is a matter of sanctity”.

However, as is normal in the period immediately prior to the dedication of a Mormon Temple, arrangements were made for members of the public to visit the Freiberg Temple and to view its various features. It was opened to the public from 1–16 June 1985, and no less than 90,000 GDR citizens queued up to see it. The construction of such a significant religious edifice in the Communist GDR was a major event, and GDR citizens were understandably curious to see it for themselves. The fact that the money for its construction had come from the US, the principal antagonist of Communism during the “Cold War” era, made it all the more interesting. The Mormons might not have expected such a degree of interest in their new Temple, but in keeping with their tradition made the most of this missionary opportunity. New branches of the Mormon Church were subsequently established in Leipzig, Dresden, Zwickau, Berlin, and Halle.

Not only did the GDR government allow the construction of the Freiberg Temple, it was also represented at the Temple’s consecration on 28 June 1985. The State Secretary for Church matters, Klaus Gysi, who was represented at the ceremony by his deputy, Hermann Kalb, sent a letter stating that the erection of the Temple was proof of the principle of complete equality for all religions in the GDR. Hermann Kalb emphasised the commonality of State and Church in the daily struggle for peace. The ceremony was also attended by President Gordon Hinckley, a member of the First Presidency of the Mormon Church in the US. He handed over a letter addressed to Erich Honecker thanking him for making the building of the Temple possible. Other representatives of the Church leadership were also present. Thomas S. Monson, from the Quorum of the Twelve Apostles, conveyed greetings from the President of the Mormon Church, Spencer W. Kimbal. The Area President for Europe, Josef B. Wirthlin, said the building was clear proof of the freedom of faith and conscience in the GDR.

In the years following the consecration of the Temple in Freiberg, the Mormons were able to build a number of new meetinghouses in various parts of the GDR, and State officials attended each opening ceremony, underlining the increasingly cordial relations between the Mormon Church and the State. At the consecration of a meetinghouse in Zwickau in 1988, the mayor hailed the event as an expression of the growing and trusting relationship between State and Church in the GDR. He said the members of the Mormon Church were respected citizens who actively promoted peace and public welfare. Similarly, at the consecration ceremony of a meetinghouse in Karl-Marx-Stadt (Chemnitz) in 1989, a representative of the State Secretary for Church matters conveyed the State Secretary’s good wishes and Church representatives thanked the GDR government for their support for the building operation.

It might have been thought that the close links between the Mormon Church and Communism's "Cold War" enemy, the US, would not be conducive to a rapprochement with the GDR State. However, not only did the GDR government allow the building of the first Mormon Temple in a Soviet country in 1985, three years later a top level delegation from the Mormon Church in the US was given a State reception.

On 28 October 1988 Erich Honecker met in person with Mormon leaders from the US when he received a visit from President Thomas S. Monson and two counsellors from the First Presidency of the Church, together with other representatives of the Church from inside and outside the GDR. President Monson presented Erich Honecker with a sculpture of the Holy Family as a symbol of the value which the Church, like the State, placed upon family harmony, unity, and well being.

In the course of their subsequent discussions, both parties agreed that the most important thing at that time was to preserve peace and avoid the danger of a nuclear war by continuing with the process of disarmament. Erich Honecker emphasised that in many fundamental respects there was common ground between State and Church which had resulted in a productive partnership. He mentioned in particular the strengthening of the homeland, the development of young people, and family happiness. Socialism was concerned with all aspects of the well being of its people and this included Christian goals and values. The GDR, he said, was working for peace and humanism which required the participation of believers as well as non-believers. He was pleased that in its almost forty-year history the GDR had remained true to its principle of equality in law for all Churches and religious communities.

President Monson thanked the GDR for its tireless efforts towards international understanding and co-operation. While appreciating that State and Church could not agree on all issues, he drew favourable comparisons between Church-State relations in the GDR and those in some other countries in the world. Henry Burkhardt, President of the Mormon Church in the GDR, likewise praised the good and trusting co-operation with the State. It was of particular importance, he said, that the GDR State treated all religions equally, regardless of size or beliefs.

In a lengthy letter to Erich Honecker on the occasion of this meeting, Henry Burkhardt and his colleagues thanked him for making possible this exchange of ideas about key questions of the day, which they describe as the peaceful coexistence of mankind and the protection of God's creation. The letter emphasises the loyalty of the Mormon Church towards the State and, significantly, states that the Church does not, as a matter of principle, place itself at the disposal of anyone seeking a platform for opposition. Such statements offended many of the other Churches, since they were, of course, doing precisely that by providing a meeting place for dissident groups, particularly in 1987–89.

The Mormon Church, however, was adamant that it was not a political organisation and did not wish to use its authority to exert political influence on its members. This appears to have been linked to its interpretation of the concept of the separation of Church and State, important not only to the Mormon Church but also a significant aspect of the various German constitutions from 1919 onwards. The realisation of this principle of separation of Church and State in the GDR had, according to the letter to Erich Honecker, not gone unnoticed in the wider world and had attracted favourable comments from foreign visitors to the Mormon Church in the GDR.

The international connections of the Mormon Church doubtless played their part in their eventual relationship with the GDR government. The GDR authorities had always been keen to obtain recognition of their State on an international level and to this end had, for example, permitted representatives from various Churches in the GDR, large and small, to travel to international gatherings. The State authorities in the 1980s also seemed keen to demonstrate to the world their tolerance of all religious communities, whatever their size, but not all minority religions fared as well as the Mormons.

The fact that the Mormon Church always seeks to co-operate with the State in which its members reside and obeys that State's laws, including the obligation to do national service, where applicable, explains to a large extent the high level of Church-State contacts which developed between the two in the GDR in the 1980s. This was in stark contrast to the Jehovah's Witnesses, removed from the GDR's list of permitted religions in 1950 and only reinstated in a legal capacity as a religious community in that part of Germany in 1990. Jehovah's Witnesses do not join political parties and do not vote in political elections, nor did they participate in the compulsory military service which was introduced in the GDR. As a consequence they quickly fell foul of the GDR authorities and suffered persecution both there and in other parts of the Eastern bloc. Six thousand of their 20,000 members in the GDR were arrested. The Salvation Army was also banned in the GDR, but was not persecuted to the same extent.

While Church-State relations in general improved in the 1980s, and on the surface the GDR State appeared to be building a relationship based on trust, it nonetheless continued to view religions with suspicion, and its secret police attempted—with varying degrees of success—to infiltrate the various religious organisations. The full extent of this ambivalent attitude only came to light after the fall of the Wall, and the Mormon Church was not alone in taking the proffered hand of friendship at face value and responding accordingly.

The Mormon Church's own stance on Church-State relations was unique in many respects, as can be seen from its endorsement of the GDR and its leadership just a year before opposition groups based in Protestant churches were instrumental in bringing about the end of the GDR State. The achievements of the Mormon Church were, however, also unique, most notably the construction of the first Mormon Temple in any Communist country in the East German town of Freiberg in 1985. In October 1988 the government gave permission for missionaries from overseas to travel to the GDR and full-time missionary work there began again early the following year, after a gap of fifty years.

It has been suggested that part of the motivation of the GDR authorities in allowing the building of the Temple was to show other Church communities what was possible if they were compliant with the State regime, perhaps in contrast to the more troublesome Protestant Church. It is, however, Mormon policy to work with the State rather than against it, and there was sufficient common ground on an ideological level—such as a commitment to peace and family welfare—upon which a meaningful relationship could be built. Nevertheless, the high level of contact and co-operation between the Mormon Church and the GDR State in the 1980s is a remarkable episode in Church-State relations in a Communist land.

UNITED KINGDOM

ENGLAND

CHARITY BILL DEVELOPMENTS

BY PAUL BATER*

The post of Chief Charity Commissioner is to be abolished and replaced by a full-time chief executive and a part-time chair. The changes were first proposed in 2002 in the Cabinet Office Strategy Unit review of charity law and regulation. The two new posts were advertised in February 2004, and the Government and the Charity Commission could break with tradition by appointing someone outside the civil service. The successful applicants are expected to take up their posts by July 2004, when the five-year term of the current Chief Charity Commissioner ends. According to the Strategy Unit report, the role of the Charity

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Commission chair will be to "ensure good corporate governance and the smooth functioning of the enlarged board, and represent the commission in public and at a high level within government and the charitable sector. "Other impending reforms to the Commission include increasing the number of Commissioners from five to nine and the creation of an independent appeals tribunal, which will be introduced in the forthcoming Charities Bill. (Third Sector, 5 February 2004)

In January 2004 the Charity Commission issued a progress report on its implementation of those recommendations in the September 2002 Cabinet Office Strategy Unit report 'Private Action, Public Benefit' that do not require legislation.

1. Reforming the legal framework: a modern approach to charities focusing on public benefit
The Charity Commission should undertake on-going checks on the public character of charities (Recommendation 2). The Commission is reviewing the scope for public character checks, following which it will reconsider its guidance for charities on public character and will then decide on what basis public character checks may be carried out.

The Charity Commission guidelines on campaigning should be revised so that the tone is less cautionary and puts greater emphasis on the campaigning and other non-party political activities that charities can undertake (Recommendation 4). The Commission has already started work on reviewing its guidance for charities on campaigning. It has had a number of discussions with charities and in November 2003 held a focus group discussion with sector representatives. It will hold a public consultation on the revised guidelines during February to April 2004 and expects to publish them in August 2004. At the same time it will look again at its guidance on human rights which has links to the issue of campaigning.

2. Reforming the legal framework: a range of legal forms enabling charities and other not-for-profit organisations to thrive. The Charity Commission should provide specific advice to facilitate mergers, possibly by creating a dedicated internal unit (Recommendation 5). This recommendation is linked to a legislative proposal of a package of legal measures to assist mergers. The Commission is planning how to take this forward and aims to publish a policy statement during 2004-05.

3. Building public trust and confidence and supporting the sector in improving performance
As part of their Report and Accounts, the largest charities (those over the proposed new £1m audit threshold) should complete an annual Standard Information Return (Recommendation 18). The Commission has established a group, which includes a range of external sector representatives and members of its staff, to inform development of the Standard Information Return. Working jointly with the National Council of Voluntary Organisations it has commissioned research on this issue and ran a seminar in January 2004, which will be followed by a public consultation in March 2004. Recommendations on use of the Statement of Recommended Practice (SORP) for charity accounts) to make charities more transparent and accountable:

- develop improved methods for apportioning costs and expenditure, enabling more meaningful financial comparisons between organisations to be made (Recommendation 19);
- improve SORP to strengthen its focus on achievements against objectives, organisational impact and future strategy (Recommendation 20);
- smaller charities with significant holdings of equities should make a declaration of their ethical investment stance on a voluntary basis; large charities should also make this declaration but it should be made compulsory by an amendment to the accounting regulations rather than on a voluntary basis (Recommendation 22).

These proposals are being considered by the group mentioned under the previous recommendation and by the Committee reviewing the SORP. This year's annual review of the SORP will include issues raised in the SU report, and there will be a public consultation on possible changes in Spring 2004.

The ability of charities to follow a broad ethical investment policy should be clarified (Recommendation 23).

The Commission completed work on this in February 2003, with clarified guidance included in its revised publication "Investment of charitable funds" (leaflet CC14).

The liaison arrangements already in place between the Charity Commission, local authorities and the police should be strengthened by means of protocols setting out agreements on joint working in order to address problems relating to bogus fundraising (Recommendation 30). On a national level the Commission is working with the Association of Chief Police Officers (ACPO) and the Local Government Association (LGA) to produce a draft memorandum of understanding with both. These are likely to be agreed in early 2004. The Commission is also working to improve liaison with local groups including the licensing departments of individual local authorities.

The SORP should provide for annual reports to include a statement of procedures for recruitment, induction and training of new trustees (Recommendation 34). Proposals are being drafted for public consultation as part of the SORP Review in Spring 2004.

4. Ensuring independent, open and proportionate regulation

Indicators should be developed by the regulator, in consultation with interested parties, to allow its performance against its objectives, and its impact on the charitable sector, to be judged (Recommendation 38). The Commission has started reviewing its indicators, and will report progress on its website.

The Charity Commission should open its Board meetings to the general public (Recommendation 41). The Commission intends to have an open Annual General Meeting from 2004. Its formal Board meetings will be open to public observation from September 2004 and it will publish agendas, papers and minutes for these meetings on its website. In line with both the Strategy Unit recommendation and the Government's response some business will be reserved if there are good reasons for doing so.

The Charity Commission should develop a better focus on the needs of stakeholders other than the regulated constituency (Recommendation 42) by:

- providing advice on giving aimed at potential donors;
- making standard information about the largest charities available on its web-site; and
- signposting on its website other appropriate bodies that members of the public should contact if they wish to complain about a particular aspect of a charity's work or mode of conduct.

The Commission has worked with the Institute of Philanthropy to help potential large donors who want to create foundations through which to give to charity by publishing a guide to the establishment of charitable trusts in October 2003 (available at www.philanthropyUK.org) and adopting a streamlined approach to registering this type of charity. Standard information about the largest charities will be collected by a Standard Information Return (see recommendation 18). In the shorter term the governing documents and accounts of the 400 largest charities will be available on our website by March 2004. In the medium term this will be expanded to cover more charities during 2004/05. The Commission's website was relaunched in October 2003 and now includes links to other bodies. Further work will be

done in early 2004 to provide details of relevant bodies for handling particular types of complaint about charities.

The Commission should seek to separate the process of judging whether or not an applicant is a charity from that of assessing viability (Recommendation 43). In December 2003 interim improvements were made to the pack used by those applying for registration, and work on this will continue during 2004.

The Charity Commission should review, with sector participation, and report on the performance of different charitable sub-sectors with a view to correcting information failures and enabling stakeholders to maximise beneficiaries' interests and better fulfil underlying charitable objects (Recommendation 47). This will be taken forward during 2004/05.

The Charity Commission should open an office in Wales (Recommendation 50). The Commission has announced the opening of an office in Newport by April 2004 (see press release of 28 November 2003).

A new umbrella committee, on which all UK charity regulators are represented, should be created, to ensure a consistent regulatory approach UK-wide and to share information and best practice (Recommendation 51).

After initial work by the Home Office it was agreed in November 2003 that the Commission would take this forward and it will be doing so during 2004.

The Charity Commission, with advice from the Cabinet Office's Regulatory Impact Unit, should quantify the impact of regulation on charities and other not-for-profit organisations, monitor it over time, publish the results and highlight areas where regulation appears excessive (Recommendation 61). The reviews will be designed and piloted during 2004. (Charity Commission, January 2004, www.charity-commission.gov.uk)

SCOTLAND

PROGRESS TOWARDS A CHARITY BILL

BY PHILIPPA BONELLA*

In September 2003, Margaret Curran, Minister for Communities, announced that the Scottish Executive would publish draft charity legislation for consultation. The purpose of the legislation, currently being drafted, is to provide a robust, effective and proportionate regulatory system for Scottish charities, which will secure the widespread support and confidence of both the public and the charities sector.

The bill team has developed an innovative consultation strategy to ensure a robust dialogue with the sector and other stakeholders as we draft the bill. We are using a number of tools to make sure we hear a range of views on the policy issues dealt with by the bill, as well as the technical detail. We are also looking at a number of international examples to ensure we learn from debates that have taken place elsewhere.

* Philippa Bonella is a staff member of the Scottish Executive Voluntary Issues Unit. Interested readers may find additional information at the following websites:

<http://www.scotland.gov.uk/about/UNASS/UNASS/00015300/page1389970724.aspx>

<http://www.oscr.org.uk/>

<http://www.scotland.gov.uk/cru/kd01/scl/scl-anx8-3.pdf>

Preparing the bill is a complex process, particularly because we are still meeting with stakeholders and there may well continue to be refinements to the policy detail before the draft is published.

The bill is motivated by the Executive's belief that there is a clear public interest in the effective regulation of charities in Scotland. For regulation to be effective, we believe it must meet five key criteria. It must be:

- independent
- proportionate
- accountable
- transparent
- consistent

The bill will be wide-ranging, bringing Scots charity law requirements together in one place for the first time. It will set out a Scottish definition of charity, based on a public benefit test. It will provide for the newly-established Office of the Scottish Charities Regulator (OSCR) to become an independent statutory body with an enhanced range of powers, including granting charitable status and maintaining a register of all charities operating in Scotland.

In addition, it will modernise regulation of fundraising, ensuring that public collections are effectively monitored and that fundraisers inform the public how much of a donation will go to charity. It will also take forward a number of measures which have been called for by charities, including the creation of a Scottish Charitable Incorporated Organisation form, making charity re-organisation easier, and widening trustees' investment powers.

The bill will create a specific Scottish regime of charity regulation which recognises the needs of the Scottish charity sector, and the public interest in effective regulation. However, where it makes good sense for our measures to fit with the approach being taken in England and Wales, we do plan to ensure our proposals complement theirs.

In some areas, it is helpful that the Home Office are looking at similar issues. For example, since the definition of charity in law has implications for an organisation's tax status, it is clearly important that our definitions are similar north and south of the border.

Some of the issues we have set out to be included in the bill are particularly technical. Some cover broad issues of principle, about how we want charities to behave in modern Scotland. For example, there is a debate in Scotland about whether some types of organisations should continue to have charitable status. There are also different views about whether independence from government is (or should be) a defining characteristic of charity. We welcome these debates, which raise a number of interesting questions.

Nothing is yet cast in stone, and we are continuing to engage with the sector and with charity law experts to make sure we get the policy right. The key is to develop a bill based on the principles set out above, to ensure that the regulatory structure we create is fit for purpose.

The draft bill will be published for consultation later in the spring.¹

¹ For more details about the work of the bill team, please visit www.scotland.gov.uk/viu. One can find out more about the OSCR at <http://www.oscr.org.uk>.