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## LETTER FROM THE EDITOR

April 2005

Dear Friends

This letter is being written to you on a very beautiful spring day in the Washington DC/Annapolis MD area – I am on sabbatical this year and have been and will be able to travel all over the world, but it is good to be back home for this lovely time of year.

Just as spring is a time for renewal in nature, so it is for our publication. As the third year students, Zaine Watson, Reema Ali, and Johnny Ragheb are about to graduate, they are passing the baton to a wonderful new group of student editors. Maureen McCarthy will fill Zaine's hard to fill shoes as Managing Editor, and Sarah Bagley, Patrick Morand, and Alaina van Horn will be the new Associate Editors. We wish our graduates well and thank them for their wonderful work. And we welcome the new students who will take over with the July issue.

This is also the time of year when we publish a great deal of student work – our Articles section includes some interesting pieces by students:

- Douglas Friedman's analysis of California's Nonprofit Integrity Act of 2004 from the viewpoint of a civil society practitioner and soon-to-be graduate of the National Catholic School of Social Service with an Masters in Social Work;
- Apooov Kurup's look at civil society in India; Apooov is an undergraduate at the National Law Institute University, Bhopal (India).
- Maureen McCarthy's discussion of civil society organizations and their interactions with the OAS; Maureen is in her fourth year at CUA, where she is obtaining a joint degree in law and social work.
- Leila Tanayeva's comparison of state financial support for NPOs in Hungary and Kazakhstan; this paper is derived from the LLM thesis she wrote for her degree from Central European University.

We are also pleased to be able to re-publish two very timely pieces that relate to the work of ICCSL – a chapter on governance from the UK government's "Commission for Africa" Report; and an analysis by Milt Cerny and Michael Durham of the NPO response to the tsunami disaster of late December 2004.

In our country report section we would like to call readers' attention to two particular papers:

- In the Special Report on Korea we are publishing some documents about government-NPO cooperation mechanisms, which are good models for other countries (and which were never before available in English); and
- In the report on Mongolia, we are seeking to put together a group to make comments on the proposed NPO legislation for Mongolia. If you are interested to join, please contact me as soon as possible.

Finally, we are adding a new feature, which we call Perspectives, in which some thinkers in the field address pertinent matters. In this case, our Perspectives piece by Marc Ross Manashil looks at the issue of how the world perceives of and responds to disaster, such as the December 2004 tsunami versus diseases of epidemic proportions, such as HIV/AIDS and malaria, the modern bubonic plagues.

There are, of course, additional significant Country Reports, and we urge you to read them as well. As usual, any comments you may have are most welcome. Please write to me or Maureen McCarthy, our new Managing Editor ([40MCCARM@cua.edu](mailto:40MCCARM@cua.edu)).

Very best wishes,

Karla W. Simon  
Editor-in-Chief  
[simon@law.edu](mailto:simon@law.edu)

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## IJCSL EDITORIAL POLICY

April 2005

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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**IJCSL RETAINS FINAL EDITORIAL CONTROL** of all aspects of publication and will share copyright with authors.

We look forward to hearing from you.

Thank you.

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

## PERSPECTIVES

### **DON'T FORGET THE WORLD'S DAILY DISASTERS GLOBAL TRAGEDY DID NOT BEGIN OR END WITH THE 2004 TSUNAMI. SEIZE A CHANCE TO COMMIT TO INTERNATIONAL GIVING.\***

BY MARC ROSS MANASHIL \*\*

Now that coverage of the tsunami is beginning to fade, it remains to be seen whether the impressive philanthropic response will translate into an increased long-term commitment to international philanthropic giving. For those giving globally for the first time, I hope that your response to this tragedy is only the beginning.

Not unlike the outpouring of donations that followed the aftermath of September 11, 2001, the tsunami disaster once again unleashed the tremendous generosity of Americans. Published giving estimates report that private donations from U.S. organizations and individuals for tsunami relief have passed the \$1 billion mark.

Our small public foundation was one of many that wanted to help. Following news of the disaster, we received an urgent appeal from one of our grantees in Sri Lanka and passed along the message to our network of donors. An e-mail that was originally sent out to a few hundred people soon got forwarded to their friends, family and colleagues around the country. Checks ranging from \$25 to \$5,000 began to pour into our office from people I had never met.

This outpouring of generosity has been one of the most inspiring experiences of my professional life. I feel a great sense of hope that when their hearts are touched, Americans will respond to international disasters as they do to domestic ones. Yet I cannot help but wonder why other global tragedies have not produced the same level of response.

#### **Slow, Steady Killers**

In our rush to help tsunami victims, let us also not forget the countless others worldwide who are suffering and dying on a daily basis, many of whom are children. More than 10 million children die each year in the developing world, the vast majority from causes that could be prevented if only they received basic care, nutrition and medical treatment. HIV/AIDS claims the lives of 6,000 people every day, with another 8,000 becoming newly infected.

Those disasters may not receive the same intensity of media attention, because they are slow killers rather than the result of a single horrific act of nature. Yet, it only takes a few days for the death toll of children in developing countries to equal the estimated number of innocent people who perished from the tsunami.

War and genocide have also had a significant impact on innocent people the world over. In the Democratic Republic of Congo, for example, the International Rescue Committee estimates that nearly 4 million people have perished over the past six years (31,000 per month). The crisis in the Sudan has

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\* This commentary was originally published in Foundation News & Commentary in the March/April 2005 edition. It has been reprinted here with the permission of the author.

\*\* Marc Ross Manashil is executive director and co-founder of The Clarence Foundation, which promotes engaged international philanthropy by serving as a catalyst for globally focused giving circles.

received more attention, but with at least 70,000 people killed and another 2 million displaced, the situation remains unsettled at best.

One can offer various theories to explain why the philanthropic response to the tsunami has been so immense compared to other global tragedies. Perhaps, something about natural disasters leads us to personally relate to the victims and imagine ourselves in a similar circumstance. Maybe it was the suddenness of the destruction or the helplessness of the victims who perished in a moment's notice—as we witnessed on September 11, 2001. Perhaps it was that the tsunami was an act of nature and not of humans. Maybe the intense media coverage made the difference.

### **An Ounce of Prevention**

My hope is that the philanthropic response to the tsunami is not a one-time foray into global giving until the next major natural disaster hits, but an opportunity for many to begin a lifelong commitment to international philanthropy. I hope the disaster will open our hearts and minds to solving global problems of poverty, war, human rights abuses and environmental destruction—I hope it motivates us not only to respond after the fact, but also to act now to prevent the world's daily disasters.

If you would like to devote some percentage of your time and money to international causes, now is a great time to start. One way to get involved is by becoming a member of Grantmakers without Borders ([www.internationaldonors.org](http://www.internationaldonors.org)), a network of funders committed to promoting global social change philanthropy. Consider forming or joining a global giving circle with The Clarence Foundation ([www.theclarencefoundation.org](http://www.theclarencefoundation.org)). Attend one of the many conferences devoted to international philanthropy around the country or join one of the many globally focused affinity groups on an issue or region that resonates with you.

The post 9/11 environment has caused some donors to hesitate to engage in international giving. However, the greatest barriers to giving are psychological, not legal. There are strong support networks for donors who want to engage in cross-border philanthropy and some wonderful U.S.-based intermediaries that make international giving both highly accessible and influential. If responding to the tsunami was one of your first international donations, please consider making it an integral part of your philanthropic practice.

## ARTICLES

### NGO RESPONSE TO TSUNAMI: NOW AND THE FUTURE\*

BY MILTON CERNY AND MICHAEL W. DURHAM\*\*

**December 26, 2004, 8:00 a.m.:** Deep below the Indian Ocean, the Burmese and Indian tectonic plates shifted off the northwest coast of Sumatra, causing an earthquake of 9.0 on the Richter scale and generating huge surges of water speeding at 400 miles an hour across the Indian Ocean to India. In its wake of 50-foot-high waves, the tsunami devastated property in 11 countries, caused destruction costing billions of U.S. dollars, and killed at least a quarter of a million helpless people in such distant places as Hikkaduwa, Sri Lanka; Thailand; and Banda Aceh, Indonesia. Its effect seven hours later was felt 4,000 miles away in Africa. The World Health Organization estimates that 500,000 people were injured in the Indian Ocean tidal waves, many of whom were poor and lived in ramshackle villages along the coasts of the affected nations. Thousands of vacationing tourists from all over the world perished or are still missing. The exact amount of carnage caused by this tsunami may never be known because human bodies were devoured by the sea and may never be identified. In Indonesia alone some estimate that the final toll of fatalities may exceed 200,000. The United States has reported over 30 deaths, but thousands of Americans are still missing and unaccounted for in the region.

As we grasp the enormity of this disaster, the outpouring of support and volunteers has been phenomenal. More than US \$ 8 billion in pledged donations, interest-free loans, and debt relief has already been received from various governments. Criticism had been leveled at certain governments, including the United States, for being too slow and “stingy” in responding. However, we must realize that the situation needed to be assessed in areas whose infrastructure of roads and communication was totally devastated before the aid would be forthcoming. What is amazing has been the response of the nongovernmental organizations in the affected countries and the international NGOs, including the United Nations and the World Bank, who had committees working on the assessment and planning almost immediately. If anyone questions the usefulness of NGOs in a disaster of this magnitude, this response should put those doubts to rest. The ability of the world community to react to this historic disaster required not only cooperation between nations, but the integration of the NGOs into the process of providing the volunteers and the catalyst necessary for delivering the needed humanitarian relief. NGOs should also be allowed to do their part in the ongoing assistance and rebuilding of the grief-stricken areas that will take months, if not years, to return to some type of normality.

The following discussion of NGO involvement tells us what is being done, what impediments exist, what we have learned from this disaster relief, and what the future holds for NGO involvement in other disasters resulting from both human and natural causes – Sudan, Congo, and Guinea – where it is estimated that 7,000 people die daily from malaria, diarrhea, and other preventable diseases. The tsunami disaster sounds a clarion call not only to governments to reexamine their international responsibilities, but also to the international NGO community to review its coordination policies and delivery of services to the most needy throughout the world through indigenous NGOs of the countries affected. We cannot possibly gauge the future until we know the present, and thus this discussion can only be a beginning to a broader dialogue in other articles as we review the effectiveness of NGO activities that have been undertaken in the various affected countries and what lessons have been learned.

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\* 37 TAX NOTES INT’L 487 (Feb. 7, 2005). This article was originally published in Tax Notes International in the February 7, 2005 issue and is reprinted here with the permission of the author.

\*\* Milton Cerny, a partner in the firm of Caplin & Drysdale in Washington, was an official in the IRS Exempt Organizations Division. Michael W. Durham is an associate attorney at Caplin & Drysdale specializing in exempt organizations issues.

## I. The Initial Relief Effort

As in any disaster, the bulk of the immediate response was mounted by local government officials, individuals, and NGOs. They were responsible for getting survivors to safety and providing immediate care for the injured. Local hospitals, Red Cross and Red Crescent Societies, and other relief organizations swung into action, sometimes despite devastating personal losses and despite incomplete staffing and damaged facilities.<sup>1</sup> Indeed, because the devastation has thus far kept international aid from reaching many affected areas, local organizations in those places have had to respond to the crisis on their own for more than two weeks. When Doctors Without Borders finally got a team into the Indonesian city of Sigli, they found a local hospital that was in sore need of medical supplies and improved sanitation, but still functioning.<sup>2</sup> Doubtless stories of other heroic local relief efforts are still to come. The international NGOs' response was amazingly swift. For example, because Action Against Hunger already had a local operation in Sri Lanka, it was able to make its preliminary need assessment almost immediately, and had a planeload of water purification supplies in Colombo by Tuesday, December 28 – only two days after the catastrophe.<sup>3</sup> By then, representatives from other organizations were performing their assessments and asking local government leaders how they could be most helpful. Days later, more planes containing hundreds of tons of materials were crowding the airports.

Shelter, water, food, and medical relief continue to be priorities, with Oxfam, UNICEF, CARE, Action Against Hunger, AmeriCares, World Vision, Save the Children, and many others bringing in (or purchasing locally) supplies for hundreds of thousands of tsunami victims for the coming weeks and months. But there are other problems to be addressed, too:

**Establishing distribution systems.** One of the most vexing problems facing the relief effort has been the difficulty of getting the relief where it is needed most, especially in Banda Aceh. The International Organization on Migration and the Red Cross, along with many partners, have worked to set up distribution systems in the affected areas, requisitioning warehouses and trucks to manage the large quantities of aid materials flowing into the region. Military helicopters from the United States and elsewhere have been essential in distributing aid to places inaccessible by road.

**Caring for children.** Organizations like UNICEF and Save the Children have begun to shift from focusing solely on food, hygiene, and shelter to their particular child-focused missions. UNICEF has begun to construct temporary school facilities and distribute “school-in-a-box” kits. The Red Cross and various partners are working to vaccinate the displaced children against measles, and Save the Children has taken steps to register child victims to help prevent their exploitation.

**Post-trauma counseling.** Children and adults alike may need psychological help to deal with the trauma of the disaster; in India, social workers, psychologists, and others have volunteered as counselors in the affected areas, but this is only a beginning. The Red Cross is sending more counseling professionals to the affected areas.

**Locating and identifying the dead.** This may be one of the largest forensic challenges of all time, with more than 20 forensic teams in Thailand alone gathering DNA samples for analysis on site or in the

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<sup>1</sup> See, e.g., Nicole Wallace, “After the Devastation,” *The Chronicle of Philanthropy*, Jan. 6, 2005, at 45.

<sup>2</sup> See “Doctors Without Borders Surgical Team Starts Operations in Sigli, East of Banda Aceh,” at <http://www.doctorswithoutborders.org/news/2005/01-05-2005.shtml> (Jan. 5, 2005).

<sup>3</sup> See “AAH Responds to Earthquakes, Aftershocks in South Asia,” at [http://www.aah-usa.org/news/release\\_dec27\\_04.html](http://www.aah-usa.org/news/release_dec27_04.html) (Dec. 27, 2004).

People's Republic of China. Their efforts have been complicated by the need to bury corpses quickly to prevent the spread of disease.

**Restoring livelihoods.** The tsunami destroyed the boats of many coastal fishermen, making it impossible for them to earn a living. Already, one U.S. group has begun raising money to pay local shipwrights to replace the lost vessels, thus stimulating the local economy while allowing the fishermen to become self-sufficient once again.

**Cleanup and reconstruction.** NGOs on the ground in the affected areas estimate that cleanup alone could take a year or more, and obviously rebuilding infrastructure and the local economy will take even longer. While assessments are already being made, this phase of the relief is not yet at the fore.

## II. Unprecedented Levels of Generosity

Governments grabbed headlines as they promised larger and larger aid packages for the affected nations (with Japan, Germany, and Australia each promising a half billion U.S. dollars or more in grants and concessional loans).<sup>4</sup> But private giving was equally impressive. As of January 13, private donors and grantmakers in the United States alone had contributed some US \$ 406 million for the affected areas, more than matching the size of the U.S. government contribution.<sup>5</sup> That money went primarily to the large charities; the American Red Cross took in more than US \$ 170 million in the first 12 days, and UNICEF, Save the Children, Catholic Relief Services, Oxfam America, and Doctors Without Borders each raised more than US \$ 20 million.<sup>6</sup>

Worldwide, private donations soared above US \$ 2 billion. As of January 14, the most significant sources of private donations outside the United States were Germany (more than US \$ 450 million), Britain (close to US \$ 200 million), and the Netherlands (about US \$ 150 million); Canada, France, Switzerland, Australia, and Saudi Arabia also raised more than US \$ 100 million apiece – donations that dwarf U.S. donations in per capita terms.<sup>7</sup>

A key ingredient in the recent outpouring has been the Internet. Links from popular Web sites like Amazon and Google generated millions in private contributions each day, and roughly half of the US \$ 324 million in U.S. contributions were made online.<sup>8</sup> But more conventional fundraisers – including telethons, benefit concerts, and collections by religious groups of every stripe – have also played an important role, raising tens of millions of U.S. dollars in the United States alone. This fundraising effort has underscored the power of a diverse civil society to mobilize resources, as many different organizations attract funds from different donor bases. Of course, as in any emergency, the wave of generosity has brought in its wake its share of fraud as well, but here again NGOs have played a leading

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<sup>4</sup> See "Tsunami Aid: Who's Giving What," at <http://news.bbc.co.uk/1/hi/world/asia-pacific/4145259.stm> (last updated Jan. 8, 2005).

<sup>5</sup> See Brennen Jensen and Nicole Wallace, "\$ 406-Million has Been Donated to American Charities Helping the Tsunami Victims," *The Chronicle of Philanthropy*, Jan. 13, 2005.

<sup>6</sup> *Id.*

<sup>7</sup> See "Nations Pledge Aid After Tsunami Disaster," Jan. 11, 2005, at <http://www.alertnet.org/thenews/newsdesk/L05533-984.htm>; *French Charities Amass Euro 95m in Tsunami Aid*, at <http://www.expat.com/>; Jeffrey Fleishman, "Germans Give Schroder Good Marks for Tsunami Reaction," *L.A. Times*, Jan. 13, 2005. For information on how these donations compare in per capita terms, see Emily Smith, *Private Sector Digs Deep*, at <http://edition.cnn.com/2005/WORLD/asiapcf/01/12/tsunami.privateaid/>. According to that report, the Swiss had made almost US \$15 per person in private contributions, compared with U.S. per-capita private contributions of less than US \$2.

<sup>8</sup> See Jensen and Wallace, *supra* note 5.

role in educating the public about possible scams and rating various organizations' efficiency at applying donations to their charitable purpose.

Governments also have taken steps to encourage private donation. As detailed below, most of the large donor countries provide significant tax incentives for charitable contributions. In addition, Britain and Canada have pledged to match donors' private contributions. In the United States, special legislation allows January 2005 tsunami relief contributions to be counted as a deduction on 2004 tax returns.<sup>9</sup> In India, the government is expected to declare the tsunami a national calamity, making contributions to tsunami relief charities 100 percent rather than 50 percent deductible.<sup>10</sup>

### III. Legal Framework for Tsunami Aid: Recipient NGOs

As the initial emergency relief operation gives way to long-term reconstruction, local NGOs will become increasingly important. Local NGOs (including local chapters of international NGOs) have important advantages over their foreign counterparts, including knowledge of languages and customs and a committed staff that can stay permanently in the area. At the same time, the huge outpouring of international support means that most of the resources for the recovery will come from foreign NGOs and governments (which may channel their aid in part through grants to NGOs). The long-term provision of aid will make ongoing cooperation between local and foreign governments and NGOs essential; it will also make the regulatory regimes affecting local NGOs and international support for those NGOs more important than ever. In some cases, legal reform may be necessary to handle the increased flow of aid to the region properly. What follows is a brief overview of a few aspects of the law most relevant to the relief efforts.

#### A. General Background

The basic framework for NGOs in the area is shaped in part by South Asia's colonial past. Thailand and Indonesia have civil law systems allowing for associations and foundations;<sup>11</sup> India and Sri Lanka use common-law forms (the society, the trust, and the nonprofit company).<sup>12</sup> However, the use and character of these legal structures is informed by older philanthropic traditions and religious law. Private philanthropy, too, tends to flow in traditional channels, going first to needy individuals and then to religious institutions; more modern NGOs often struggle to attract local donors and must rely on other means of fundraising.<sup>13</sup> It remains to be seen whether the tsunami disaster will serve as a catalyst for the public to extend more significant support to the growing number of local NGOs working in the development and poverty-relief fields.<sup>14</sup>

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<sup>9</sup> The legislation was H.R. 241. President Bush signed the legislation January 7, 2005, and the IRS is in the process of issuing implementing guidance.

<sup>10</sup> See Noshir Dadrawala, "Donations for Tsunami Relief," at <http://www.icnl.org/PRESS/Articles/2005/Donating%20in%20India%20for%20Tsunami%20relief.doc> (last visited Jan. 11, 2005).

<sup>11</sup> See Satya Arinanto, "Indonesia," in *Philanthropy & Law in Asia* 125, 125-127 (Thomas Silk, ed., 1999); Chinchai Checharoen and Titawat Udornpim, "Thailand," in *id.* at 332, 332-333. Unless otherwise noted, our information about Indonesia and Thailand has been drawn from those reports.

<sup>12</sup> See Sanjay Agarwal and Noshir Dadrawala, "Philanthropy & Law in India," in *Philanthropy & Law in South Asia* 115, 116-117, 120-123 (Mark Sidel & Iftekhar Zaman, eds., 2004); Arittha Wikramanayake, "Philanthropy & Law in Sri Lanka," in *id.* 331, 339. Unless otherwise noted, our information about India and Sri Lanka has been drawn from these reports.

<sup>13</sup> See Public Interest Research and Advocacy Center, "Investing in Ourselves: Giving and Fundraising in Indonesia," xiii-xiv (2002), available at <http://www.asianphilanthropy.org/appc/Indonesia.pdf>.

<sup>14</sup> As one point of comparison, the quick response of NGOs in Japan after the Kobe earthquake of 1995 triggered an outpouring of donations to them and, somewhat later, legal reform designed to create a more supportive legal

## **B. Insufficient Checks on Abuse**

In Sri Lanka and Indonesia, gaps in the regulatory regime have allowed some abuses in the NGO sector to go unchecked. In Indonesia, the law governing foundations until recently contained no prohibition against using foundation funds for private purposes or distributing foundation assets upon dissolution; while a 2001 law changed that, the new standards have yet to be fully understood and implemented by the public.<sup>15</sup> In Sri Lanka, organizations can declare themselves to be charitable organizations exempt from tax and eligible to receive tax-deductible donations without any prior determination from the government, and in general there is widespread noncompliance with the tax regime. The lack of oversight has allowed a growing number of abuses that have hurt the reputation of the nonprofit sector. Weak domestic controls increase the risk of local attempts to obtain international funds fraudulently and make it more difficult for international grantmakers to give confidently, especially to new organizations.

## **C. Government Control of NGOs**

A perennial problem in NGO-government relations is governments' tendency to see the independence of the "independent sector" as a threat that could compromise the government's control of the public policy agenda. Although civil society is growing throughout the region, some nonprofit regimes in the tsunami-affected countries still suggest a model of strong state control rather than openness and associational freedom. Thailand, for instance, makes forming an NGO a cumbersome process requiring discretionary approvals from multiple government offices; the National Culture Act gives the National Culture Commission broad authority to decide whether to permit new NGOs or dissolve old ones. And while Sri Lanka and Indonesia inherited fairly lax standards for registering NGOs from their colonial legal systems, each has recently passed legislation giving the state more power over the registration and supervision of at least some NGOs.<sup>16</sup> Of course, tighter controls may be necessary to curb abuse, but some in the sector remain worried that the new laws (which have not yet been fully implemented) will be used more to maintain political control than to fight corruption.<sup>17</sup>

One reason these registration requirements have not been more stifling is that many NGOs simply choose to operate without any formal legal recognition, forgoing whatever slight benefits accompany registration. Increased availability of foreign grants in the coming years will make this decision more costly, since foreign donors may find it difficult or impossible to make grants to entities that do not formally exist. Thus, foreign aid runs the risk of increasing governmental power over the sector by increasing the value of the legal status to which government holds the key. As foreign funds attract more NGOs to the formal registration process, it will become increasingly important to make sure that registration processes are fair and reasonable.

## **D. Restrictions on Receiving Foreign Aid**

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environment for the organizations. See Takako Amemiya, "Japan," in *Philanthropy & Law in Asia* 131, 131 (Thomas Silk, ed., 2004).

<sup>15</sup> See Rustam Ibrahim, Abdi Suryaningati, and Tom Malik, "Country Report on Indonesia," in *Asia Pacific Philanthropy Consortium, Governance, Organizational Effectiveness and the Nonprofit Sector* 138-140, 142 (2003), available at <http://www.asianphilanthropy.org/staging/about/INDONESIA.pdf>.

<sup>16</sup> In Sri Lanka, amendments to the 1998 Voluntary Social Services Organizations (Registration and Supervision) Act gave the government power to take control of such organizations in the event of fraud. See Wikramanayake, *supra* note 12, at 338. In Indonesia, Law No. 16/2001 for the first time gives the government control over the registration of foundations. See Ibrahim et al., *supra* note 15, at 140.

<sup>17</sup> See Ibrahim et al., *supra* note 15, at 135.

Several of the countries in the region require government approval before foreign NGOs can operate within their borders or contribute to local NGOs. Thailand, for instance, requires such organizations to obtain approval from the Commission for Oversight and Management of Foreign Organizations; every grant, no matter how small, is subject to review by the Commission.

Other restrictions limit local organizations' ability to obtain foreign funds. For instance, Indian NGOs wishing to receive foreign funds must either obtain a special status as a qualified recipient of such funds (a status available only to organizations at least three years old) or must obtain special permission before receiving each grant (permission requests can take up to four months to process and are not uncommonly denied without explanation). The practical effect is that most foreign funds reach only a small number of established organizations, which has discouraged the growth of new organizations. In the wake of the tsunami, India has temporarily lifted these restrictions, but only until March 31, 2005.<sup>18</sup>

In Indonesia, a 1985 law imposes a similar preapproval requirement on "social organizations," and even threatens dissolution if such an organization receives a foreign contribution without prior clearance. It is not clear whether this requirement applies to foundations (the predominant NGO in Indonesia), especially since the new 2001 Law on Foundations was passed, but in practice foreign donors wishing to make donations still seem to be going through the government.<sup>19</sup> Moreover, the Indonesian government recently imposed new regulations requiring foreign aid workers to register and stay in main cities except when accompanied by an Indonesian military escort.

Without modification, these tight controls on foreign funding will limit the local NGO sectors' access to foreign funds, and will probably channel most aid into a few well-established groups or groups favored by their governments. As the mechanics of aid provision are worked out, international funders should seek to ensure that the new funds are available more widely, so that the growth of civil society is promoted.

## **E. Income Tax Benefits**

The affected countries vary considerably in the amount and kind of tax benefits they provide for charitable NGOs. Probably the most generous is India. There, charitable organizations are exempt from income tax to the extent that they spend at least 85 percent of their income (excluding contributions), and donors can deduct 50 percent of amounts contributed to charity (up to 10 percent of their income). In addition, for projects identified as a priority to the government, the full amount of the donation can be deducted.

At the other extreme, Indonesia provides no income tax exemption for foundations and associations, although contributions and grants are not considered taxable income. And while there is a deduction for payment of zakat (a Muslim obligation analogous to Jewish or Christian tithes) to certain state-created entities, Indonesia provides no deduction for contributions to NGOs.<sup>20</sup>

Other countries provide NGOs with tax advantages that have had limited importance in practice. Sri Lanka exempts charitable trusts from income tax and allows certain approved charities to receive tax-deductible donations. However, the low maximum deductions for individuals (LKR 25,000, or approximately US \$ 243), the lack of public knowledge about which charities are approved, and the reality of widespread tax evasion (less than 1 percent of the population are registered taxpayers) all limit the effect of this tax preference. In Thailand, charitable organizations certified by the Minister of Finance

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<sup>18</sup> See Dadrawala, *supra* note 10.

<sup>19</sup> See "Country Note on Indonesia," at <http://www.usig.org/countrycodes/indonesia.asp> (last updated Aug. 2004).

<sup>20</sup> See *id.*

are exempt from income tax, and their donors (like donors to temples, schools, and hospitals) can deduct donations up to 10 percent of their income. However, because organizations cannot qualify if they have business activities or more than 25 percent in administrative expenses, only a small fraction of associations and foundations have actually been certified.

## **F. Customs and VAT**

It is common for charitable exemptions from customs duties to be almost entirely ad hoc and within the discretion of the relevant officials. VAT rules generally leave less room for discretion. In Sri Lanka, imports of foreign charitable gifts by approved charitable organizations are exempt from VAT. India provides some charitable exemptions from sales tax but not from VAT; however, the thresholds for both taxes are high enough (US \$ 8,700 and US \$ 218,000, respectively) that these taxes do not generally affect Indian charities. Indonesia exempts certain basic staples like rice and salt from VAT, but exempts foreign grants from VAT only on an ad hoc basis.<sup>21</sup>

In the initial aftermath of the disaster, governments have been fairly willing to waive customs duties and cut down on red tape for incoming shipments. However, officials' wide discretion can lead to unexpected results. Thus, for example, one observer reported that Sri Lankan officials were not charging customs on a planeload of emergency humanitarian relief supplies, but still insisted on applying a 200 percent duty on the vehicle sent to be used in distributing the supplies. As attention turns to medium- and long-term reconstruction and economic recovery, an increasing variety of goods and services will be needed in the relief effort. That may bring more examples of goods and services that, although they are a necessary part of relief operations, do not merit relief in the eyes of customs officials.

## **IV. Legal Framework for Tsunami Aid: Donors**

### **A. Controls on Donations Abroad**

Like the United States, most major donor countries allow deductions only for gifts to domestically organized charities. In the United States, Germany, and the United Kingdom, recipient domestic charities are free to spend those funds abroad or give them to local partners. The only requirement is that the domestic charity take certain steps designed to ensure that the funds distributed abroad are in fact used for charitable purposes.

The rules are more strict elsewhere. In Australia, charitable trust funds are categorically prohibited from giving outside of Australia, and Australian public benefit institutions (roughly analogous to U.S. charitable nonprofit organizations) cannot receive deductible donations unless either (1) they make their expenditures principally within Australia or (2) they go through a lengthy process to be approved by both the Minister of Foreign Affairs and the Treasurer as "overseas aid funds."<sup>22</sup> In practice this means that a new Australian organization set up to aid tsunami victims, unlike an American one, probably could not expect to receive tax-deductible donations. India does not tax income on property held in charitable trust, but only so long as that income is spent in India (or to promote international welfare in which India is interested).<sup>23</sup> Japan requires disclosure of all foreign disbursements, and predisbursement notification to the government of any disbursement above Y2 million.<sup>24</sup>

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<sup>21</sup> See *id.*

<sup>22</sup> See Myles McGregor-Lowndes, "Australia," 53 *Studies on Int'l Fiscal Law* 231, 237- 238, 246 (1999).

<sup>23</sup> See Kanwarjit Singh, "India," 53 *Studies on Int'l Fiscal Law* 449, 461 (1999).

<sup>24</sup> See "Amendments to the NPO Law and Tax Bill Bring Increased Flexibility to Nonprofits," 8 *Civ. Soc'y Monitor* 2 (2003), at <http://www.jcie.or.jp/civilnet/monitor/8.pdf>.

These categorical restrictions and heightened procedural requirements do serve the valid purpose of minimizing the possibility that charitable funds will be diverted once out of the reach of the grantor country's regulators. However, their cost is a decreased amount of international aid and a more sluggish and bureaucratic system of aid delivery. The suddenness of the tsunami disaster underscores the importance of allowing the international charitable community to be as immediately responsive as possible.

## **B. Tax Incentives for Contributions**

U.S. donors enjoy generous tax benefits; by giving through a domestic charity, they can claim a deduction of 100 percent of the contribution, up to 50 percent of an individual's total income (or 10 percent of a corporation's income) in the case of donations to public charities. Australia is even more generous, setting no limit on the percentage of income that can be deducted (although gifts for international relief are not normally deductible unless made to a specially registered overseas aid organization).<sup>25</sup> The gift aid system in the United Kingdom (also with no cap on the amount that can be donated) produces almost the same effect as a tax deduction, although its mechanics are somewhat different; instead of allowing a deduction, the United Kingdom requires the donor to pay tax on the gifted income and then remits the tax back to the charity.<sup>26</sup>

Other countries have stricter limits. In Germany, donations for the relief of the poor can be deducted up to 10 percent of income (or 2 percent of total turnover and personnel costs), while donations for other public benefit purposes are deductible only up to 5 percent of income or not at all.<sup>27</sup> In Japan, individuals can deduct gifts of up to 25 percent of annual income, minus ¥10,000 (\$ 243). However, only a small percentage of NGOs organized under the Japanese Civil Code have been made eligible for tax-deductible contributions.<sup>28</sup> Moreover, many organizations are organized not under the Civil Code (which requires extensive ministry approval and supervision of the organization) but under the more recent 1998 Law to Promote Specified Nonprofit Activities. Although it has been possible for such organizations to qualify to receive tax-deductible donations since 2001, the requirements are so onerous that in the first three years fewer than 30 organizations have managed to do so.

## **V. Lessons to Be Learned**

One positive note in this tragedy was the degree of cooperation between local government leaders and the NGO community immediately after the disaster. With some exceptions,<sup>29</sup> the governments in the region seem to have removed many of the normal obstacles to the flow of foreign aid. India has suspended its restrictions on Indian NGOs receiving foreign aid until the end of March. After some initial delays as Sri Lankan customs officials adjusted to the sudden influx of goods, the Sri Lankan government seems to have cleared much of the red tape, declaring unequivocally that disaster relief supplies would not be subject to import duties. Indonesia allowed a panoply of foreign relief organizations into the previously restricted Aceh region.

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<sup>25</sup> See McGregor-Lowndes, *supra* note 22, at 244.

<sup>26</sup> See John J. Dilger, "United Kingdom," 53 *Studies on Int'l Fiscal Law*, 753, 766-767.

<sup>27</sup> See Michael Ernst-Porksen and Til Porksen, "Third Sector Organizations," in *Germany: Legal Forms and Taxation* 20-21 (2004) (on file with authors).

<sup>28</sup> See Amemiya, *supra* note 14, at 144.

<sup>29</sup> For example, relief workers lost crucial days in getting relief to the Indian islands of Andaman and Nicobar while they waited for clearance to visit them. In addition, there were some reports of local officials in India insisting that aid be delivered to them, not directly to victims. See Rama Lakshmi, "Private Citizens Outdo Officials in Aid Efforts," *The Washington Post*, Jan. 1, 2005, at A14.

Unfortunately, at the time of this writing, there are some signs that this spirit of cooperation is already beginning to fade. As noted previously, Indonesia is again tightening restrictions on foreign aid workers, and requesting foreign militaries to leave by the end of March; India plans to reinstate its restrictions on foreign aid at the same time. It is becoming all too possible that foreign and local governments and NGOs will return to business as usual, putting aside the spirit of cooperation until the next disaster strikes.

The response to the tragedy has demonstrated how fruitful collaboration between international and local governments and NGOs can be. NGOs bringing medical supplies have turned them over to governments or local health departments for use in existing state-run hospitals. Local and foreign military forces, with their efficient chains of command and unique technological assets, have opened roads and distributed NGO relief supplies by helicopter. International NGOs have relied on local government officials' superior local knowledge to determine what aid is needed most urgently; with the help of the Internet, for example, charities all over the world were able to shift priorities in loading planes and containers just hours after Sri Lankan government officials reported that they had more than enough clothes. And on the other hand, NGOs have been able to provide relief in areas where political turmoil would make the presence of local government or military forces complicated.

Collaboration between international and local NGOs has also been valuable. Often, relatively small grants from foreign sources to local NGOs have furthered the relief efforts far more efficiently than a wholly foreign operation could have. For instance, an arm of the Asia Foundation made one grant to support members of a local Indonesian NGO as they provide volunteer labor for international relief operations over the next month, at a fraction of the cost of employing foreign relief workers. In some cases, humanitarian organizations affiliated with major Christian denominations have provided aid indirectly through Muslim groups to which aid recipients might be more receptive. In another case, a small Indonesian organization of radio operators obtained funds to develop a satellite radio system that could close crucial gaps in the relief workers' communication network.

One lesson that should be learned from the recent weeks is that this kind of post-disaster collaboration is not enough. Key elements of the primary relief effort came from organizations that were already well-organized locally and that had good links abroad, allowing them to mobilize foreign support quickly. Obviously, the moment after the disaster strikes is too late to encourage the formation of capable local organizations. It is also too late to establish the track records and working relationships with foreign NGOs that allow foreign NGOs to disburse funds quickly, confident that they are funding legitimate, well-run operations and not hastily constructed frauds. Thus, while we applaud the current relief effort, we hope it will also provide an occasion to contemplate more permanent improvements in cooperation.

It is also worth noting the great number of organizations and individuals who have spontaneously tried to help. They stand as a testament to the genius of a vibrant civil society, which encourages, supports, and depends on this kind of spontaneous volunteerism. Indeed, an essential role of NGO law is to provide legal vehicles that facilitate this kind of spontaneous action. That is not to deny the important role of large, well-established NGOs in the relief efforts. However, there should also be room for private citizens to form new organizations that contribute in new and innovative ways. To the extent that NGO laws impose burdensome registration requirements, give overwhelming advantages to existing organizations, or otherwise discourage the formation of new organizations in response to new needs, they limit the diversity and vitality that are the hallmarks of a civil society.

## **VI. Conclusion**

We are all numbed by the toll of human misery from this disaster. It is estimated by the World Health Organization that three to five million people in the region lack basic necessities such as food, clean drinking water, and shelter with the specter of disease-related illness spreading through typhoid, cholera,

and dysentery because of contaminated water systems. Today the United States government annually spends less than 1 percent of its budget on foreign aid, mainly through USAID. Even the US \$ 350 million pledged by the United States government for this disaster relief accounts only for 0.003 percent of our gross national product. The oil-rich kingdoms of Saudi Arabia and Kuwait, which run billion dollar surpluses in their budgets, initially gave only US \$ 10 million each to the relief effort as compared to the US \$ 764 million relief package announced by Australia and Germany's pledge of US \$ 674 million and Japan's pledge of US \$ 500 million.

Donations and pledges by individuals and companies are pouring into relief agencies such as the American Red Cross and the Red Crescent Societies. Church-related charities are soliciting from their denominational members in unprecedented amounts. Former U.S. Presidents George H.W. Bush and Bill Clinton are leading a national campaign to increase private giving to the relief effort. The U.S. IRS and Congress have made it easier for contributors to donate to assisting charities that have a track record of providing direct humanitarian relief.

We are seeing a confluence of assistance, a spirit of cooperation and giving that has not been seen since our own human tragedy of 9/11. Some charities like Doctors Without Borders and Save the Children are overwhelmed with financial support beyond their needs and capacity to deliver needed relief and are advising contributors to make contributions to other agencies and for broader causes. How NGOs handle this outpouring of money and support may well determine how the world supports this sector in the future. We are rapidly approaching the time that once the immediate humanitarian relief is provided we must look to the future. An international relief effort will be needed to coordinate the assistance for the rebuilding of devastated communities and families. In this rebuilding and planning process, the lessons learned from our experience with other disasters will be helpful but only a beginning unless we thoroughly change the process for the delivery of disaster relief.

What must be done is to continue the cooperation and building of the capacity of indigenous NGO communities so that they can become active participants when disasters of this nature occur. The scale of this tsunami tragedy offers an opportunity for international and domestic NGOs to focus on a more integrated process of relief, rebuilding, and, most important of all, reducing the vulnerability of international communities to future dangers.

NGOs need to be more proactive in advocating preemptive strategies for the next tragedy. For example, primary factors contributing to the high death toll are poverty and poor living conditions. NGOs must advocate long-term economic development and infrastructure projects including better roads, building construction, and more hospitals and clinics. NGOs must participate in economic and government reforms in the poorer countries in exchange for the support of richer nations providing more aid and favorable trade and debt reduction policies toward the affected countries. The World Bank should insist that future funding include community participation in redevelopment efforts and transparency in government action. The Bush administration's Millennium Challenge Account is another example of an attempt to fight global poverty by requiring recipient countries to meet tougher standards of good government and accountability. NGOs must remain in the forefront of advocating reform and democratic ideals under the rule of law. The world will be carefully watching to see what we have learned from this disaster.

## CHAPTER 4 GETTING SYSTEMS RIGHT: GOVERNANCE AND CAPACITY-BUILDING

EXCERPT FROM THE REPORT OF THE COMMISSION FOR AFRICA\*

### Summary

Effective states – those that can promote and protect human rights and can deliver services to their people and a climate for entrepreneurship and growth – are the foundation of development. Without progress in governance, all other reforms will have limited impact. While there have been improvements in many African countries, weakness in governance and capacity is the central cause of Africa’s difficult experience over the last decades. Improvements in governance, including democracy, are first and foremost the responsibility of African countries and people, and they take time and commitment. But there are also actions that outsiders can take both to support and to avoid undermining good governance. Two areas are crucial: capacity (the ability to design and deliver policies) and accountability (how the state answers to its people). This chapter proposes:

- Providing strong political and financial support for the pan-African and regional organisations, particularly the African Union and its programme NEPAD;
- Making changes in donor behaviour, to get fully behind a comprehensive national strategy for capacity-building;
- Building up professional skills and knowledge, including by revitalising Africa’s higher education, especially in science, engineering, and technology;
- Broadening participation and strengthening institutions that improve accountability, including parliaments, local authorities, the media, and the justice system;
- Increasing transparency of revenues and budgets, especially in countries rich in natural resources; this also makes a powerful contribution to conflict prevention;
- Tackling corruption, including repatriation of stolen state assets;
- Strengthening the quality and management of data.

A full list of the Commission’s recommendations on Governance and Capacity-Building can be found at the end of this chapter.

1 Poor people in urban slums, forced to live with mountains of uncollected, disease- infested rubbish, open sewers and dirty and expensive water. Farmers who cannot sell their produce because the road to market is impassable in the rainy season. Clinics that have no drugs and schools that have no teachers. Investors, domestic and foreign, who choose to put their money – which could create jobs and growth – elsewhere. Monies that disappear from hard-pressed national budgets. Ordinary people, threatened by crime but unable to trust the police to help. Tensions and violent conflict between communities. These are some of the consequences that arise when governments fail to protect freedom and human rights, to provide effective public services that meet basic needs, and to respond equitably to the requirements of

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\* The full text of the Report can be found at [http://www.commissionforafrica.org/english/report/thereport/english/11-03-05\\_cr\\_report.pdf](http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf) . Links to specific chapters within the report are available at <http://www.commissionforafrica.org/english/report/introduction.html>.

every section of society. Recent research shows a strong link between improvements in the way states govern and better development results, whether in terms of income per capita, child mortality or illiteracy<sup>1</sup>. We can see the implications of weak governance and conflict for economic decline, from Liberia to Côte d'Ivoire to Zimbabwe, and how strong the turnaround can be when governance improves and conflict is resolved, from Mali to Mozambique to Uganda.

2 Strengthening states, so they are effective and able to deliver is, therefore, the foundation of our report. Unless Africa makes a concerted effort to do so, we believe that all other reforms, in international trade, debt and aid – essential though these reforms are – will have only limited impact.

3 The environment for progress is demanding, challenged by HIV and AIDS. This epidemic may undermine the capacity for effective governance in the hardest-hit countries by affecting key workers, public officials, and armed forces. AIDS may also damage democratic progress through impacts on elected representatives, ministries and the electorate itself. Unless HIV and AIDS responses are mainstreamed into governance strategies and public awareness, much potential progress will be lost.

4 There are a number of practical measures that African governments, with support from the international community, must take to improve both political and economic governance. They must also avoid making policies that undermine the state, such as requiring unnecessary permits, which discourage investors and can allow individual officials to make personal gain from discretionary allocation. Improving the *capacity* of the state to design and deliver good policies and services, and to manage its development partners, along with better *accountability* for how the state answers to its entire people for its policies and actions, are central. Action in other areas will support these. For example, increasing *transparency* – openness about how policies are made and delivered – helps people to hold their governments to account and increases their ability to play a part in the decision-making process. Tackling *corruption*, including through increased transparency, will improve services by reducing diversion of resources. Improving the quality and availability of data will provide better evidence on which to base policies and will allow results to be monitored and measured. Building effective states requires strong progress in all these areas.

5 Evidence suggests that there have been some improvements. The forthcoming African Governance Report (AGR) – a major 28-country study pioneered by the Economic Commission for Africa (ECA) to measure progress towards good governance, both political and economic, in Africa – shows that governance overall is getting better and that the situation across the continent is markedly different from a decade ago<sup>2</sup>. It highlights positive developments in four areas: the continent's growing transition to democracy; growing attempts to include in the political process many groups that have traditionally been excluded; better systems of accountability; and improvements in general levels of economic management.

6 However, there are significant variations and some countries have made much less progress than others. The poorest performance is found in countries in conflict. In some cases action lags behind rhetoric. For example, although most governments have signed major international treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its optional protocol<sup>3</sup>, many have yet to translate them into national law, to enable them to be implemented effectively. As the AGR also highlights, weaknesses remain in most countries in the efficiency of government services, the control of corruption, the transparency and accountability of the civil service, and the effective decentralisation of government structures<sup>4</sup>. Further improvements are also needed in management of budgets and public resources<sup>5</sup> and strengthening the rule of law.

#### **4.1 Pan-African organisations**

7 African leaders have started to work more closely together to tackle these problems and to hold each other to account for performance. In 2002 they established the African Union (AU) to promote African economic, social and political integration as well as peace and security. When fully realised, the AU will have a number of organs and agencies, including the Pan-African Parliament (established in 2004, to debate continent-wide issues) and a Court of Human Rights.

8 One tangible outcome of AU/NEPAD's work is the African Peer Review Mechanism (APRM), adopted by the AU in July 2002, with the aim of promoting good governance<sup>6</sup>. The APRM reviews cover political and economic governance (including issues such as the independence of the judiciary and the transparency of the budget process), as well as corporate governance (including codes and standards) and socio-economic development. 24 countries, representing some 75 per cent of Africa's population, have so far signed up. Four countries are currently in the process of peer review<sup>7</sup>. A key outcome of the process is development of a country Programme of Action, to identify the country's priorities and the time-bound and costed steps needed to address the weaknesses, including capacity shortages, which have prevented progress. Peer pressure creates a strong incentive for participating countries to implement review findings: reports are discussed by Heads of State and Government of participating member countries, then formally and publicly tabled in key regional bodies; and follow-up reviews (every two to four years) will report on progress made.

9 All of these organisations and initiatives are relatively new; their finances (provided by participating governments) are limited, and human capacity stretched. In many areas it is too early to see strong results from their actions. However, interventions by the AU and Regional Economic Communities (RECs) in conflict in Africa (Chapter 5) do already provide an example of the practical value and potential of a strong pan-African and regional approach. Recommendation: Developed countries should give strong support – both political and financial – to Africa's efforts to strengthen pan-African and regional bodies and programmes, including the African Peer Review Mechanism. The precise nature of this support will vary by institution, but common elements will be: active engagement as partners in dialogue (as, for example, the Africa Partners Forum); building of institutional capacity, including for research and analysis, through funds (to complement those provided by member countries) for the AU's US\$50 million institutional transformation programme and the US\$15.5 million required by the APRM Trust Fund for 2005-07; exchange of experts; and provision of funding for operational programmes,<sup>8</sup> in a way which enables the organisation to decide and manage its own priorities – in other words, aligned with the organisation's strategies, not donors' particular predilections, priorities and procedures, and co-ordinated among donors so as to avoid taking up the time of stretched officials. Where appropriate, the international community should support, at the national level, countries' responses to the work of these institutions. For example they should be prepared to help countries meet the costs of participating in APRM reviews and help finance the programmes of action that arise from their recommendations.

## **4.2 Capacity to deliver**

10 Weak institutional capacity prevents the state from undertaking its responsibilities effectively, whether planning and budgeting, managing development assistance, providing services or monitoring and evaluating progress.

11 Weak capacity is a major problem in most African countries. All tiers of government are affected, and the problem is growing in urban areas, whose populations are already doubling and will continue to double every ten to twenty years. Violent conflict has seriously undermined capacity in many countries, as has HIV and AIDS<sup>9</sup>.

12 Tackling the huge need for capacity strengthening will have major knock-on effects for all the other areas of our report, whether by increasing security and the rule of law, reducing corruption, improving service delivery and the operating environment for business, or reducing the constraints which have limited governments' ability to absorb higher levels of development assistance. Action to strengthen capacity should therefore be a high priority<sup>10</sup>.

13 Many attempts have been made, with donor support, to reform the public sector and improve its capacity. More than a quarter of bilateral aid to Africa is channelled directly into capacity-building<sup>11</sup>. However, a number of recent reviews have shown that results have often been poor<sup>12</sup>.

14 There are many reasons for this. Reforms have often been piecemeal, and have not been made within an overarching strategy. They have not been seen as a key element in a broader political process and African governments have not been fully committed to them or given them strong leadership. They have not focused enough on behavioural issues, which can have a corrosive effect even within a formal structure. They have often had too short-term a focus. And not enough emphasis has been given to monitoring the impact of the reforms.

15 Moreover, many donors have supplied assistance in ways that undermined national capacity. Instead of building up the abilities of African government ministries, they have insisted on discrete Project Implementation Units (PIUs), which often poached the most qualified staff from government. Aid agencies have also overloaded governments<sup>13</sup> with additional procedural, reporting, monitoring and accounting burdens, which bypassed national budgeting and accounting practices. Tied aid – insisting that development cash is spent on the products of the donor nation – has raised the cost of goods and services, and has not developed the ability of the private sector in African countries to compete in the provision of such goods and services themselves<sup>14</sup>. All this has left African governments feeling more accountable to donors than to representatives of national institutions and to citizens.

16 If capacity is to be strengthened, this must change. African governments have the lead responsibility. They should, in the context of their poverty reduction strategies, draw up an overarching capacity-building strategy that responds to the unique political economy of each country,<sup>15</sup> includes all levels of government (including local authorities), and takes account of the indigenous knowledge base. It should identify the constraints (both internal and outside the public sector), the steps necessary to overcome them and the areas where external support can contribute. Once developed, Programmes of Action, arising from APRM reviews, could fulfil this function.

17 African governments should then manage donor support for their strategies. In South Africa, a Technical Assistance Unit has been set up in the National Treasury, staffed with South African nationals, to carry out capacity-building tasks. It is demand driven and focuses on building indigenous capacity, using local and international technical assistants and support. Recently the NEPAD secretariat has shown interest in replicating this model in other countries to help overcome co-ordination and quality control problems.

18 Regional programmes – such as the African Capacity-Building Foundation (ACBF)/Partnership for African Capacity-Building (PACT) and the African Regional Technical Assistance Centres (AFRITACS) – also have a strong role to play in providing regionally oriented technical assistance and capacity-building programmes.

19 Recommendation: African governments should draw up comprehensive capacity-building strategies. Donors should invest in these, making sure that their efforts are fully aligned with these strategies rather than with their own competing priorities and procedures. They must provide predictable and flexible long-term finance to allow African governments to plan over a longer term than at present. For example, without a predictable flow of funds and ability to use development assistance for recurring expenditure, such as salaries, governments will be cautious about hiring teachers or nurses.

20 Within this framework, action in three specific areas would build on and enhance existing capacity: professional skills and leadership; incentives; and equipment and infrastructure, including Information and Communications Technology (ICT).

#### **4.2.1 Professional skills and leadership**

21 Qualified professional staff are essential to all forms of development. The delivery of health, education and other services depends on them. They are crucial for collecting and managing data, and debating and developing good policies, based on the evidence of what works and what does not. They are essential to implementing those policies and to monitoring how they are put into effect. Scientifically and technically proficient staff are needed to identify opportunities arising from innovation and scientific discoveries and to develop effective policy in areas such as science, trade and resource management. Especially in the private sector, these particular skills are key to performance and innovation. Africa has been lacking skilled men and women in all these spheres and fundamental to this shortage is the loss of much of Africa's pool of skills to the developed world. Around 70 per cent of Ghanaian medical officers trained in the 1990s have left<sup>16</sup> and it has been estimated that there are more African scientists and engineers working in the USA than in the whole of Africa<sup>17</sup>.

22 This shortage starts with higher education, which ought to be the breeding ground for the skilled individuals whom the continent needs. Higher education and research institutes can also improve the accountability of governments and build participation and citizenship. As well as providing skilled staff, they also generate independent research and analysis that supports the vibrant debate that can greatly improve the effectiveness of government policy and other services.

23 But many of Africa's higher education institutions are still in a state of crisis. They lack physical infrastructure, such as internet access, libraries, textbooks, equipment, laboratories and classroom space. Senegal's Université Cheikh Ata Diop built for 13,000 students now houses over 23,000<sup>18</sup>. They lack human resources, such as teachers, lecturers, and administrative and managerial systems. Unattractive conditions, brain drain and HIV and AIDS are depleting capacity and faculties are ageing. (Chapter 6 also discusses responses to the current teacher shortages.) Yet demand for higher education is increasing: in 2000, Nigeria had the capacity to accept only 12 per cent of qualified candidates<sup>19</sup>. Hit by these pressures and a lack of funding, the research capacity of Africa's institutes has declined. The capacity that does exist is not being used efficiently, as there is limited collaboration, and human and financial resources are spread thinly.

24 The African diaspora have long contributed to developing capacity in their country of origin, through activities such as setting up facilities, institutions and conferences. However, it is crucial that better use is made of their enormous potential. One such example is making greater use of skilled expatriates to train African nationals as part of exchange processes, including through the UNDP's Transfer of Knowledge through Expatriate Networks (TOKTEN) project. Another is encouraging further links between businesses or universities in Africa and their country of residence.

25 The African Association of Universities (AAU), the South African Association of Vice Chancellors and the Association of Commonwealth Universities (ACU) have developed a ten- year partnership programme, ‘Renewing the Universities,’ which has pan-African scope, involves key African and international stakeholders, and has a nine-point programme addressing the major challenges to Africa’s higher education system. Funding of US\$500 million per annum would be required to roll out the programme. Recommendation: The international community should commit in 2005 to provide US\$500 million per annum over ten years to revitalise Africa’s institutions of higher education.

26 On top of this, specific action for strengthening science, engineering and technology capacity is an imperative for Africa. Scientific skills and knowledge enable countries to find their own solutions to their own problems, and bring about step-changes in areas from health, water supply, sanitation and energy to the new challenges of urbanisation and climate change. And, critically, they unlock the potential of innovation and technology to accelerate economic growth, and enter the global economy.

27 There is some scientific capacity in Africa. The African Economics Research Consortium (sub-Saharan Africa), the Biosciences Facility for Central and Eastern Africa (hosted in Kenya), CIDA City Campus (South Africa), the Kigali Institute of Science and Technology (Rwanda), and the University Sciences, Humanities and Engineering Partnership (Central and East Africa) are some examples of the excellent centres, institutes, universities and partnerships that there are. However, overall scientific capacity is limited and restricted to a few regions. In 2000, over 60 per cent of Africa’s total expenditure on research was in South Africa<sup>20</sup> and there are areas, such as the greater Congo basin, where there is virtually no science at all. The science gap between Africa and the rest of the world is widening and under business-as-usual this gap will continue to grow.

28 Centres of scientific excellence can act as springboards for developing scientific capacity. For example, the Indian Institutes of Technology, which are now globally front-ranking institutions, have made a crucial contribution to India’s scientific and industrial development<sup>21</sup>.

29 To be effective in Africa, centres of excellence must have several key characteristics. They can be both physical centres and virtual networks of research that are internationally competitive. They need to be regional, as carrying out research is beyond the resources of many single African countries; regional centres and networks concentrate capacity. They need to set up the public-private partnerships or ‘innovation hubs’ that are critical to fostering innovation, entrepreneurship and technology diffusion. They also need to engage with local communities, the government, the African diaspora and international partners to ensure that science extends beyond the laboratory into everyday life and that Africa participates in the global knowledge community.

30 The development of up to thirty regional centres of excellence in the environmental, physical, medical and social sciences is needed, building on existing centres where it is possible, and creating new capacity where it is not. Developing institutes of technology to sit at the apex of the educational and research system in each region of sub-Saharan Africa should be a core part of the programme. Funding would need to be rolled out on a sliding scale, with a five-year rolling budget. The programme will need to involve public- private partnerships and bring together governments and research institutions in Africa and industrialised countries. Recommendation: The international community should commit in 2005 to provide up to US\$3 billion<sup>22</sup> over 10 years to develop centres of excellence in science and technology, including African institutes of technology.

31 UNESCO and AU/NEPAD should set up a high-level working group to complete a detailed programme for implementation by December 2005, building on the AU/NEPAD mapping of science and

technology capacity. International donors, partners from southern nations such as India and Brazil, the World Bank, and other national and regional stakeholders should be involved. Improved co-ordination in Africa should be matched by co-ordination amongst international donors. The programme needs to be rolled out to capitalise on existing strengths, to address gaps and ensure that investments in physical and human capital are sequenced. A strategic and coherent approach is absolutely crucial.

32 These initiatives should be closely linked with the ideas proposed in Chapter 7 to expand agricultural research, innovation and extension, and promote the participation of the poor in growth.

33 In addition to qualified professional staff, Africa needs leaders. Strong leadership, committed to change, is one of the key drivers of progress. Developing the capabilities of leaders at all levels and in all spheres – political, the public sector, business and civil society – is critical to African-led sustainable development. Our proposals to strengthen tertiary education will contribute to developing leaders. Short training programmes, seminars and workshops, facilitated networking and learning exchanges, mentoring and coaching also play a part, as do south-south and north-south partnering with universities, and civil society more generally<sup>23</sup>.

#### **4.2.2 Incentives**

34 Africa spends an estimated US\$4 billion annually on recruiting some 100,000 skilled expatriates<sup>24</sup> to replace the many African professionals or managers with internationally marketable skills who have found the lure of emigration too strong. A study by the World Bank reported that some 70,000 highly qualified African scholars and experts leave their home countries every year to work abroad, often in more developed countries<sup>25</sup>. The problem of recruiting, retaining and motivating qualified staff is especially acute in the public sector.

35 Finding and retaining staff to work in remote or difficult areas is a particular problem. A survey in Malawi showed that 25 per cent of teachers who started work in rural areas in January 1999 had left by October that same year<sup>26</sup>. Gender dynamics have an impact: in Africa it is generally accepted that women teachers should not be separated from their husbands/partners. Also, even if single, posting young female teachers in remote places isolates them socially and is not the best way to motivate women to remain in the profession.

36 So what is the answer? Better pay scales, which reward performance, may improve status and motivation and so begin to trigger change. Financial and other motivational incentives such as accelerated promotion and participation in regular training workshops, especially for those working in remote areas or urban slums (which have the most serious staff retention and recruitment problems) would help, as would steps that make it easier to get the job done (such as improvements in infrastructure). They could encourage the diaspora to bring their skills back to Africa. However, all of this will have a significant impact on public finances, which are already stretched. They will have to be built up. Until then, such steps will only be taken if they have external support. For the next five to seven years donors, working closely with African governments, should shift technical assistance funding towards salary enhancement programmes<sup>27</sup>, particularly for priority skills which are difficult to recruit or retain, whether the successful employee is local or expatriate, including members of the diaspora. Programmes could be linked to a number of principles, such as a full day's work for a full day's pay; accountability to local communities; and zero tolerance of corruption. Donor support must be predictable, though limited in time and with a phased exit, so that African governments can take over as other reforms produce the necessary increases in growth.

37 Pressure from local communities is another means of improving services. This can come from

individuals, informal groups such as parents acting together, or from formal organisations, either in civil society, the private sector or traditional tribal structures. This can improve the motivation of those who provide the services, by attaching greater perceived value to their jobs or by increasing their sense that they are answerable for what they provide.

38 Public services are also provided at the local level by organisations that operate outside the state system, most particularly religious networks and faith groups. Often these have a wider reach than the state and there is a persuasive case for making use of them, provided they complement the state (for example by adhering to similar standards) rather than compete with it.

39 This approach is especially relevant in fragile states – such as those in conflict or emerging from it – where government is so weak that it is not possible to work with it. Donors should work at community level, with faith groups and other private providers, and with local government, to provide basic services such as education. These projects must help to build capacity and be accountable to the local population so that they can be integrated into state systems in the future. Wider issues of assistance to weak and failing states are discussed in Chapter 9.

#### **4.2.3 Equipment and infrastructure, including ICT**

40 Basic equipment, such as the tools of keeping records, files, accounting and personnel systems, is essential for public servants to do their work properly and efficiently. Provision is at present very variable. Many do not even have functioning telephone systems. That needs to change if computers are to be used to their full potential.

41 E-governance<sup>28</sup> has a particularly powerful role to play in improving administrative efficiency, driving technical innovation and making the governance process more transparent, accountable and open to participation by everyone. Strategic programmes for e-governance have been established recently in countries such as Egypt, Kenya, Senegal, Mozambique and South Africa and there is a wide range of relatively successful African e-governance projects, such as a tax portal in Cameroon. This site contains tax-related data and guidance, providing instant information on payment and refund procedures to citizens and businesses, to limit opportunities for corrupt officials to charge for such information.

42 However, not all African e-governance projects have been success stories. The transition to e-governance is rarely smooth in any country but African e-governance faces two additional barriers: the lack of ICT infrastructure (see Chapter 7) and mass connectivity to the Internet, and under-resourced and unaccountable bureaucracies. A good start could be for a number of African governments to pilot development of e-governance strategies, and then spread good practice developed through them to a second group of countries. The international community should support this work and consolidate and expand e-governance training for African civil servants.

#### **4.2.4 Monitoring of capacity-building**

43 What is measured and monitored usually gets results. Establishment of an explicit framework for monitoring results of well-defined activities will be crucial for enhancing effectiveness of capacity development. Some instruments to do so are already in place. HIPC tracking surveys deal with effectiveness of public financial management. Client service charters, which entail scorecard type assessments of delivery of public services, have been developed in Tanzania. Development of coherent national frameworks to monitor state effectiveness will be important for the success of the APRM as a peer pressure instrument. There is also a need for mutual review by donors and African governments, for

assessing the appropriateness of programme instruments and setting criteria for measuring impact. Mutual review is discussed further in Chapter 10.

### **4.3 Accountability**

44 Accountability is our second area of focus. It is fundamental to the legitimacy of a state and to the freedom and human rights of its people. The African Charter for Human and Peoples' Rights, which provides the framework for promoting and protecting human rights, states that every citizen shall have the right of equal access to the public services of the country<sup>29</sup>. Governments must answer to all their people, including the poorest and most vulnerable, and must not respond only to the interests of elites or particular groups (including donors), parties or tribes. Accountability to all citizens is also a prerequisite for political stability and effective development. Good intentions are not enough. Mechanisms are needed to make sure that the voices of all citizens are heard; to monitor how governments respond to what they hear; and to enforce the rights of ordinary citizens. In this section we discuss participation, then consider key mechanisms of accountability: constitutional structures, parliaments and political processes; the media; the justice system; local government, traditional leaders, business, civil society and trades unions.

#### **4.3.1 Participation**

45 Policies often fail because they are created without a full understanding of the local situation, people or history. As we saw in Chapter 3, Africa's diversity makes this point particularly pertinent. The term 'participation' holds a variety of meanings, but in essence is about people expressing their views and taking part in the decisions that affect their lives. It is common sense that people have a clearer idea of the problems and opportunities affecting their own communities than outsiders do. Although in the past participation has been associated with community development projects, African participation is required broadly, from the project to the national or international level. Creating opportunities for people to be heard can lead to unpredictable and often contradictory messages but has the potential to inform policies, improve accountability and improve service provision.

46 Participation in decision-making has long been a feature of many African societies. However, African voices often fail to be heard within the development sector, including in international processes. This is partly due to an arrogance that expert outsiders or domestic elites 'know best' and partly due to institutional pressures for quick, consensual and anticipated results.

47 Within participatory approaches, the more powerful often have a vested interest in maintaining the status quo and the education and influence to ensure that their voices are heard. Meaningful participation is a political phenomenon and requires those who traditionally make decisions to relinquish some of their control and to hear voices they may not agree with or may not usually listen to, including those of women and youth.

48 Social disenfranchisement, lack of confidence and respect for social and gender norms will disproportionately restrict some people from being heard. Logistical problems will also prevent the poorest people from being able to participate and hinder the involvement of inaccessible or mobile people, such as indigenous peoples, pastoralists and refugees.

49 Addressing the obstacles to full inclusion will require more than simply ensuring quotas of certain groups are physically present at discussions. International institutions, policy makers and elites will need to question the ways they work. They should explore different means of expression, including through African languages, traditional media such as community radio, and new forms of ICT. Practical, logistical and cultural considerations are necessary.

50 African governments and the international community should base policy change on broad participatory research. Participation should occur at all levels and stages of policy-making, including during monitoring and evaluation. Local authorities are a good entry point for democratic debate. Local or regional expertise should be invested in, in preference to bringing-in external experts. Decision makers should allow long timeframes for participation and ensure that the least powerful are able to express themselves. Facilitators should be trained in negotiations and communication, and informed of local gender norms and power relations.

#### **4.3.2 Constitutional structures, parliaments and political processes**

51 A strong state derives from and depends on a legitimate constitution that balances the interests of all its citizens and separates the powers of the judiciary and legislature from the executive. In many cases this balance was lost at independence and power was consolidated in the executive<sup>30</sup>. As settling the constitution did not involve the people, it lacks popular legitimacy in many countries.

52 Constitutions are weakened further when leaders seek to stay in office beyond the constitutionally prescribed term. Several factors can contribute to a decision to seek to extend tenure, ranging from a belief that there is no suitable successor to a fear that immunity will be removed, to concerns about ‘what next’ and sources of finance. One answer could be to establish pension provision and clearly defined roles for retiring presidents – a ‘presidential legacy’ – to address these problems. These pressures on constitutions would be reduced in a system where leaders depended on the electorate to determine their stay in office.

53 The African Union should address these issues in its current efforts to promote good governance and resolve conflict. African governments should revisit constitutions, and the international community should be prepared to support this work with funds and technical assistance.

54 Democracy has been growing in Africa. A key element in the democratic process is the election, in many cases involving parliaments which are independent of the executive and whose remit is to make laws in the interests of the people, exercise power over the budget and oversee public institutions. According to the AGR, fewer than half of the respondents in 15 out of 28 African countries considered their legislature to be free from external control and only about a quarter of respondents rated the performance of their parliaments as good<sup>31</sup>. The low levels of education or training of legislators in many countries limits their ability to perform efficiently. The position of women in government is poor. Many African governments have made concerted efforts to raise awareness of the importance of women’s involvement – South Africa, Uganda, Rwanda<sup>32</sup> and Mozambique have levels of women’s representation in parliament ahead of most developed countries. But most countries fall well short of gender equality at all levels of political decision-making. This is despite evidence that corruption falls as the proportion of parliamentary seats held by women rises<sup>33</sup> and the fact that many Africans believe women MPs are more likely to listen and attend to basic community needs<sup>34</sup>. Whether men or women, parliamentarians need better knowledge and capacity to address gender concerns – such as review of inheritance and property tax rights and of laws or customary practices that discriminate against women – and to mainstream gender into sector policies and budget processes. Recommendation: Parliaments in both developed and other developing countries should establish partnerships to strengthen parliaments in Africa, including the Pan-African Parliament. For maximum value, these should go beyond short exchanges, conferences and study visits to become longer term, practically focused partnerships,

based on mutual learning, for example in areas such as consultation with all their constituents<sup>35</sup>. Partnerships could include training in the effective use of parliamentary processes, provision of ICT resources and skills, and sharing of practical experience. We also recommend that developed country parliaments consider whether their own institutional structures facilitate their international work.

### 4.3.3 Media

55 The right to receive information and to the freedom of expression is set out in the African Charter for Human and Peoples' Rights<sup>36</sup>. This must be respected. The media is an educator and key information source that can help deliver the MDGs, promote transparent governance<sup>37</sup> and, through balanced reporting, help prevent conflicts. The wide benefits from plural media means it acts as a public good in development.

56 Information flows in Africa through a variety of media, including established media such as radio, traditional communication such as song and story-telling, and new technologies including mobile phones. Private media outlets and liberalised airwaves are increasing. For example, Mali now has 30 private newspapers, 147 independent local radio stations, seven state radio stations and one television station<sup>38</sup>. In Uganda, those villages that in 1985 had ten community broadcasting stations have 300 or more now<sup>39</sup>. This rapid expansion has generated some problems, including inadequately trained journalists, poor professional standards and weak self-regulation. Moreover, much of African media remains government owned or controlled. The monopolisation of media by any one group, including the government, undermines media freedom and popular trust, and creates space for distortion and rumour.

57 African journalists should maintain strong self-regulation and professional ethics in order to allow the media to fulfil its role as a public watchdog and generator of change. In addition, the political environment must be supportive of diverse, plural and free media, with a balance of public service, private, community and local media<sup>40</sup>. AU/NEPAD should encourage African governments to eliminate any current restrictions on mass media, promote competitive frameworks that enable investment in diverse broadcasting infrastructure, and develop transparent and flexible regulatory environments and legal frameworks in co-operation with civil society. They should strengthen their relationship with civil society and independent media institutions.

58 African media would benefit from a regional or continental media reference point<sup>41</sup>. Although some regional media bodies exist, they are few in number and tend to cover only particular aspects of the media. The Media Institute of Southern Africa (MISA) for example does good work, but is focused primarily on promoting free media. A pan- African approach could increase the scale of funding and ensure co-ordination and a holistic approach to include the various aspects of media. Recommendation: Independent media institutions, public service broadcasters, civil society and the private sector, with support from governments, should form a consortium of partners, in Africa and outside, to provide funds and expertise to create an African media development facility. Support for this is already evident from some media organisations<sup>42</sup>. The consortium should work with African government ministries, independent institutions and civil society in order to provide long-term support for the strengthening of media capacity<sup>43</sup> and programme-making through supporting regulatory reform, training<sup>44</sup> and the generation of market and audience research<sup>45</sup>.

59 Donors have tended to see support for the media as an 'add-on' to other development programmes, such as health initiatives. Whilst this is important, the media sector also requires support. We urge donors

to increase substantially their funding to African independent media institutions and those governments promoting free media. Communications infrastructure must also be strengthened, and is addressed in Chapter 7.

60 A more effective African media will contribute to informed perceptions of the continent in the rest of the world. Currently much of the media in developed countries offers low and unbalanced coverage of Africa. We challenge the media sector to do more to ensure that audiences in developed countries understand what is happening in Africa, including through monitoring their coverage of Africa and increasing programme co-production with African professionals<sup>46</sup>. The Internet gives people the control to find their own information and is demonstrating a growing appetite for news of Africa in developed countries. African media should be supported to serve audiences outside the continent via the Internet.

#### **4.3.4 The justice system**

61 The role of the justice system, including judges and lawyers, police and prison officers, is to guarantee rights and uphold the law equally for all sections of society. It is what keeps a state together as a dispenser of justice and a custodian of peace and security for all. Without effective policing, ordinary people suffer violence, crime and insecurity; without a functioning court system investors cannot be sure their contracts will be enforced<sup>47</sup>. To fulfil their role, all sections of the justice system need to be impartial, adequately funded and independent of government. Yet this is not the case: too little money and too few professionally trained people continue to hamper performance, as does political intimidation and corruption. For example, Sierra Leone (with a population of almost six million) has only 125 lawyers, 95 per cent based in Freetown<sup>48</sup>. Cases are slow to come to court, taking three to four years in some cases<sup>49</sup>.

62 Access to justice can be difficult, especially for poor people, who do not have means of financial support or access to legislative proceedings and major reports in local languages. The establishment of legal aid councils can help address these gaps as can resources to translate laws and proceedings into simple terms for average citizens. Our proposals on higher education can help build capacity in the justice sector. Training for court officials, police and prison officers will also be required. In addition to funding and training, African governments should take steps to guarantee the tenure of judges, introduce computerised case management systems and strengthen judicial oversight commissions.

#### **4.3.5 Local government, traditional leaders, business, civil society and trade unions**

63 Devolving power and the provision of public services to local units and layers of government has potential as an effective means of bringing politicians and policy makers closer to clients and making services more effective<sup>50</sup>. It can strengthen the ability of all citizens, particularly excluded groups, to participate in decision-making. However, at the local level, institutions and participatory development mechanisms are often weak, resulting in poor service delivery, particularly when financial management systems and regulatory oversight structures are underdeveloped. This calls for increased capacity-building of local authority officials in transparent and democratic management. Moreover, reformers should not assume that it is always the best way to effect change in the short and medium term. Alternative strategies for strengthening accountability should be considered, such as partnerships for service delivery with the private sector and civil society.

64 Traditional leaders may, in some cases, provide a link between people and government. As we have shown in Chapter 3, there are forms of effective governance in Africa that are hybrids of traditional and more western-influenced forms of government. These can offer a form of accountability that attract loyalty and can deliver forms of governance that people need.

65 Business groups, trades unions and other non-governmental organisations (NGOs) can often speak for a community, especially where individuals can find it difficult to make their voice heard or are unwilling to speak out. The number of these civil society organisations has risen dramatically over the last decade or so, in response to removal of restrictions. In Tanzania, for example, there were over 9,000 registered civic organisations in 1999, compared to 168 in 1990<sup>51</sup>. Civil society organisations are increasingly viewed as credible partners, but may still suffer from weak capacity, poor transparency and lack of accountability, particularly where their work becomes influenced by the agenda of their funders. Support should be provided, including by their counterparts outside Africa, to develop their human resources and institutional capacity.

66 Trades unions in Africa have a particularly important role to play in both helping those in work and seeking work to access their rights and in creating a thriving civil society in which citizens are able to take part in decisions about economic life. People in Africa aspire to decent jobs in the same way as do people everywhere, with fair rates of pay and good health and safety. Core labour standards can help to achieve this.

#### **4.4 Transparency**

67 Transparency is a vital component of governance. Openness about policies and decisions makes it easier to hold governments to account for their actions. It makes it more likely that existing resources and capacity will be better used. It reduces the scope for inequitable allocation of resources, which could stoke ethnic tensions and increase the risk of violent conflict, or leave the poor and the marginalised inadequately provided for. It makes it more difficult to divert money into corrupt pockets. And greater access to information about the government's activities strengthens the public's ability to participate in the policy-making process by making their voices heard. This increases the commitment and ownership which citizens feel.

68 Budget transparency is one of the most critical areas where transparency can promote better governance. Citizens have a right to information about how budgets are spent<sup>52</sup>. Without budget transparency, inefficiency, inequity and corruption go undetected. Budget transparency is particularly important when it comes to large revenue items, such as the enormous amounts of income generated in some African countries from their natural resources sectors. The next section looks in more detail at some of the governance problems that mark this sector.

##### **4.4.1 Natural resources revenue management: the extractive industries**

69 Many countries in Africa are blessed with abundant natural resources, which sustain millions of people. They also have the potential to drive economic growth and human development – but this potential is often not realised. As Table 4.1 illustrates, many of the most resource-dependent countries in Africa have a poor record in human development.

70 This is due at least in part<sup>53</sup> to mismanagement and misappropriation of revenues and corruption, made possible by a lack of openness about how natural resource revenues are used. There is strong evidence, for example, that in many developing countries rich in oil, this wealth enriches only the ruling elite. For the vast majority of the population it often appears merely to increase poverty, corruption, environmental degradation and attendant political instability<sup>54</sup>. A lack of transparency on the part of all actors – governments, domestic and foreign extractive companies and investors – can contribute to the problem.

<b>Country or region</b>	<b>% Share of primary commodities in:</b>		<b>HDI ranking* (2002)</b>
	<b>exports (2000)</b>	<b>GDP (2000)</b>	
Equatorial Guinea	91.8	89.0	109 (out of 177)
Angola	92.6	81.6	166
Congo	97.5	79.1	168
Gabon	86.6	62.4	122
Guinea-Bissau	99.7	50.9	172
Nigeria	98.1	50.1	151
<b>Africa (average)</b>	78.6	21.2	
All developing countries	30.6	9.6	
Developed countries	15.8	2.6	
<b>World</b>	21.4	4.3	

*\*The UNDP ranks countries from 1 (highest) to 177 based on an aggregate of three indicators: life expectancy, education as measured by literacy and school enrolment rates, and standard of living as measured by per capita GDP and purchasing power. 2000 HDI rankings are not available.*

*Source: UNCTAD Commodity Yearbook, 2003; UNDP Human Development Report, 2003*

71 Clearly, the responsibility for managing resources lies with the state. But the international community also has a role to play in maintaining high standards of governance. If it does so in its own activities – and demands it in the activities of private sector agents, like the multinational companies active in developing countries – then it will be better positioned to encourage similar high standards in the way African countries manage the cash from their natural resources.

72 Developed country governments are already making strong efforts in this field. The G8 countries and European Union are giving high priority to the need for increased transparency in the extractives sector. This is evident in the G8 Declaration on Fighting Corruption and Improving Transparency, issued in Evian in 2003<sup>55</sup>; the Transparency Directive adopted by the EU late in 2004<sup>56</sup>; and the Transparency Compacts between the G8 and four developing countries, agreed at the Sea Island Summit in 2004<sup>57</sup>. Commitments in principle should now be translated into action.

73 Developed country governments should take strong steps to promote revenue disclosure among all companies operating from their territories. Many of these companies already disclose a lot of detailed information about their operations in developing countries; others should follow suit. Where there are no laws to govern the actions of multinational extractive companies, codes and norms should be used to set standards for behaviour. There is also much that ‘ordinary people’ like shareholders and consumers in developed countries can do to persuade companies to maintain high standards of social and economic governance. Shareholders have a direct say in corporate policy and there are numerous examples where civil society campaigning and consumer action such as boycotts have succeeded in effecting changes in practice<sup>58</sup>. Again, access to reliable information about companies’ activities makes scrutiny possible and increases the scope for good governance. Recommendation: Developed country governments, company

shareholders and consumers should put pressure on companies to be more transparent in their activities in developing countries, and to adhere to international codes and standards for behaviour.

74 One promising initiative in this field is the Extractive Industries Transparency Initiative (EITI). EITI is a multi-stakeholder agreement under which oil, gas and mining companies agree publicly to disclose all payments they make to developing country governments and governments agree to publish what they receive. Published information is audited independently, and there is a clear role for civil society, who participate actively in the design, implementation and overview of the disclosure process. EITI is currently being implemented in nine countries, four of which are in Africa (Nigeria, Ghana, Republic of Congo and São Tomé e Príncipe)<sup>59</sup>. Several other African nations have expressed an interest in implementing it in the near future<sup>60</sup>.

75 EITI is a relatively young initiative – it was introduced in 2002 – and still lacks clear implementation guidelines (these are being developed), and a way to validate whether it has been fully implemented. It does, however, have the potential to be a firm first step towards greater accountability and better management of valuable natural resources. Among its strong points are its participative nature and the fact that it makes revenue disclosure mandatory for all companies active in a country whose government has signed up to EITI, including those owned by the state, thus levelling the corporate playing field.

76 It is therefore recommended that as many resource-rich countries as possible sign up to EITI, and that they take full ownership of the process to ensure its longer-term sustainability. The international community should support this by promoting EITI as a global framework for resource revenue transparency with African governments, with the continent's regional organisations, and with the AU/NEPAD, which could potentially absorb the principles encapsulated in EITI into the transparency criteria of the APRM. Particular attention should be given to resource-rich countries that are emerging from conflict, where transparency measures should be built into the process of restoring the state's ability to capture revenues.

77 It is also important that the necessary capacity is created for each of the parties to participate in the process as intended. In most countries, the need is particularly great among civil society, where capacity is needed to interpret and respond to disclosed information<sup>61</sup>. All this will happen faster if such schemes are backed by developed countries, both politically and with cash.

78 Recommendation: The international community should give strong political and financial support to schemes such as the Extractive Industries Transparency Initiative (EITI) to increase the transparency of payments made to, and received by, governments, and should encourage its acceptance by all resource-rich African countries. It should support the development of criteria and a means of validating EITI implementation. Donor countries should also support and fund capacity-building among public servants as well as civil society, by contributing to the EITI Multi-donor Trust Fund.

#### **4.4.2 Other natural resource sectors**

79 There are many countries that are heavily dependent on natural resources even though they do not have large oil or mining reserves<sup>62</sup>. As shown in Table 4.1, on average, African economies derive over 21 per cent of their GDP from primary commodities, compared to an estimated five per cent for South and East Asia<sup>63</sup>. Recommendation: Principles of transparency such as those in EITI should be extended to other natural resource sectors, including forestry and fisheries.

#### **Forestry**

80 Forests play a central role in the lives of millions of Africans, and their sustainable management is crucial for protection of livelihoods, preservation of biodiversity and fighting desertification<sup>64</sup>. African nations have already indicated that they see this as a priority and have made political commitments to strengthen capacity to enforce forest law, particularly in relation to illegal logging and the trade in illicit timber and wildlife resources<sup>65</sup>.

81 It is now more necessary than ever for rich countries to support this process, both to ensure that forests are protected and that developing country governments receive the tax revenues generated by commercial logging which they are entitled to and which are essential to fund investments in health, education, infrastructure and the like. Recommendation: Timber importing countries should ensure they do not trade in illegally acquired forest products and should procure only legally sourced timber and products. To provide evidence of legality, certification or licence schemes (perhaps along the lines of those being developed under the EU Forest Law Enforcement, Governance and Trade voluntary partnership scheme) should be used.

82 Whereas legality should be a minimum requirement for all traded forest products, sustainable management of forests is another objective of great importance. Here, too, certification schemes can help to ensure that timber sourced from sustainable forests is given preference in international markets. In Africa, very few forests are certified as being sustainable as yet, but some governments are working hard to change this. There is much that the international community and the private sector can do to support the process. Importers should give preference to contractors who demonstrate their logging is sustainable and the international community should work with African partners to increase the area of certified forest. In order that countries working towards sustainable forest management should not be excluded from international trade, a step-by-step approach to evidence of sustainability should be adopted, with legality as a minimum requirement<sup>66</sup>.

83 Companies also have an important role to play. Timber companies from the developed world should work with partners in African countries to make their operations more transparent, promote sustainable forest management, be of greater benefit to local communities and reduce poverty through more investment in the processing of forest products. They should develop responsible policies for their purchasing, aligned with government procurement policies. All interested parties, particularly local populations, must be able to influence the management of forests. This will require the production and ready dissemination of accessible information on legislation, policies and the allocation of concessions. It will mean independent monitoring of forest law development and enforcement. It will also mean protecting the rights of vulnerable groups, such as indigenous peoples, who need access to information about their rights to water, land and forests as sources of livelihood and to compensation should this access be threatened by commercial activity or environmental concerns. It must also recognise the wider role of forests as reservoirs of biodiversity, sources of food and fuel and protectors of watersheds<sup>67</sup>.

## **Fisheries**

84 Fisheries is another sector of great importance to many African countries and one that is plagued by serious problems, including a lack of policy coherence among international players, the damaging impact of subsidies on local fishing industries<sup>68</sup> and the loss of substantial revenues and livelihoods through illegal, unreported and unregulated ('IUU') fishing<sup>69</sup>. A lack of information about the value of fish stocks, the rights of access to them and the revenues generated from them compounds the problems of managing this sector. Another cause for concern is the lack of openness about the terms on which African countries allow international fleets to fish in their waters. Royalty agreements represent a major source of

revenue in a number of coastal countries<sup>70</sup>, but the negotiation process is highly non-transparent and frequently results in terms that are seen as unfavourable to African countries. Issues of sustainable fishing and fish stocks management are clearly of concern here but so is the significant lost revenue, which could have been spent on development goals.

85 There is scope for African coastal states to extract much greater benefit from these royalty agreements<sup>71</sup>, and they could benefit significantly from greater transparency in the process of negotiating royalty agreements with third parties. The international community, for their part, could take steps to ensure negotiations are transparent and accessible. Developed countries should promote transparency and accountability in natural resource sectors such as fisheries, including in the negotiation of international fishing licences and sustainable management of fishing stocks. The rights of local fishermen should be taken into account specifically.

#### **4.4.3 The role of the International Financial Institutions**

86 International Financial Institutions (IFIs) can play an invaluable role in promoting good governance in natural resource revenue management. They can set an example through maintaining high standards of governance and transparency in their own activities. But they are also in a strong position to persuade developing country governments, and the companies that operate in their territories, to adopt similar high standards. The value of IFI involvement in large-scale projects is usually not purely financial; in fact, their financial contribution is often quite modest. Rather, their endorsement confers credibility on a project and clears the way for private sector investors to take up the main burden of financing. This critical influence gives IFIs a lot of leverage with which to encourage all parties involved in large-scale natural resource projects to manage the revenues from the project in a transparent and accountable way, and to demand high standards of social, environmental and economic governance.

87 IFIs also contribute to improved governance by setting standards and creating benchmarks for the private sector in their engagement with developing countries. For example, the Equator Principles, a set of norms to "promote responsible environmental stewardship and socially responsible development" that were collectively adopted by a group of ten private banks in 2003<sup>72</sup>, were modelled on World Bank and IFC guidelines for good environmental and social governance. Both the World Bank and the IMF have taken firm steps in recent times to promote transparency in large-scale natural resource projects. The World Bank's response to the Extractive Industries Review<sup>73</sup> and the IMF's current development of a Guide on Resource Revenue Transparency<sup>74</sup> both place strong emphasis on the need for transparency of revenues and good fiscal practice. Donor countries should press for all multilateral banking institutions and regional development banks active in Africa to require high standards of transparency in all their lending, development and technical assistance for natural resources projects in developing countries.

#### **4.5 Corruption**

88 Corruption is a by-product of weak governance. It manifests itself in many ways, some of which have been described in the previous section. Much of it takes place at the grassroots level and affects people's daily lives, for example through bribes paid to bureaucrats, or non-delivery of services to poor people. The corrosive effect of corruption undermines all efforts to improve governance and foster development. Major increases in financing for infrastructure, which we recommend in Chapter 7, must be accompanied by strong improvements in governance. Numerous conventions and initiatives exist to curb corruption. These include the OECD Convention on Combating Bribery of Foreign Public Officials in International

Business Transactions (1999) (the ‘OECD bribery convention’); the UN Declaration against Corruption and Bribery in International Commercial Transactions (1998); and the UN Convention Against Corruption (2003). But the persistence of the problem suggests that these are not always being efficiently enforced. It is time the international community turned words into action.

89 While greater transparency about budgets and revenues will go a long way to limiting the opportunities for corrupt practices, this alone will not be enough. African governments, together with their development partners, should broaden their investigation of means to address corruption at all levels. This should include the use of coalitions for change and the involvement of non-state actors. The initial focus should be on tackling corruption in those sectors where it is most pervasive, such as in the lucrative natural resource sector, which we have discussed already, and in the area of procurement.

#### **4.5.1 Corruption: procurement**

90 Procurement – the way that governments buy in goods and services – suffers particularly severely from corruption. Abuse of this system takes many forms. Though public sector contracts are widely put out to sealed tender, bribes – known by euphemisms such as ‘signature bonuses’ – can be requested or offered which result in the accepted bid not being the best available. Quotations can be doctored to build in false costs. It is not only the politicians and public officials who create the problem: it is also the bankers, the lawyers and the accountants, and the engineers working on public contracts.

91 One of the sectors where bribery is most prominent is the international construction and engineering sector. Public Works and Construction came top in the Bribe Payers Survey published in 2002 by the corruption watchdog Transparency International, with business leaders in 15 emerging markets suggesting this industry to be the most corrupt<sup>75</sup>. Experts estimate that systemic corruption can add as much as 25 per cent to the costs of government procurement, frequently resulting in inferior quality construction and unnecessary purchases. Transparency International’s most recent Corruption Perception Index suggests that, of the US\$4 trillion spent worldwide on government public contracts every year, some US\$400 billion is lost to bribery<sup>76</sup> (Corporate Social Responsibility is discussed further in Chapter 7). Since this money comes out of the public purse this means a major loss of resources that could otherwise be spent on education, healthcare and the reduction of poverty. Of course, the problem of corruption in public procurement is by no means unique to Africa. But in countries with very limited resources, it has particularly damaging consequences for the population at large.

92 Recommendation: The international community should encourage more transparent procurement policies in both Africa and the developed world particularly in the areas of construction and engineering. It should also strengthen existing international instruments aimed at curbing corruption. This includes ratifying the UN Convention Against Corruption, as recommended below, and wider accession to the 1999 OECD bribery convention by countries engaged in commercial activity on Africa. Governments should also take strong action to encourage companies registered in their territories to adhere to the various international guidelines, such as the OECD Guidelines on Multinational Enterprises,<sup>77</sup> that exist, among other things, to prevent corrupt commercial practices in developing countries.

93 Technology can also help in the fight against corrupt and inefficient procurement policies. Online bidding processes can be designed to be more open and easier to scrutinise than the traditional ‘sealed envelope’ – this makes it much more difficult to award contracts to non-competitive or unscrupulous bidders. This kind of ‘e-procurement’ also has other benefits: it cuts out red tape, and tends to be cheaper and easier to use, thus making it more feasible for small businesses to participate in the process as well.

#### **4.5.2 Export Credit Agencies**

94 Export Credit Agencies (ECAs) are government-backed bodies which provide loans, guarantees, credits and insurance to private companies registered in their territories who invest or engage in trade with developing countries – particularly those marked by high political and financial risk. Collectively, ECAs are now the largest source of public finance for private sector projects in the world<sup>78</sup>. They play a crucial role in supporting foreign direct investment into developing countries. Like IFIs, ECAs tend to become involved at the early stages of large-scale projects; and many projects would not go ahead without their support.

95 ECAs are therefore in a strong position to demand high standards of governance from projects in which they become involved. However, in the past they have had a poor record of using their unique position to encourage better governance; generally, they were not required to ensure that the projects they financed met minimum developmental, environmental or social standards<sup>79</sup>. ECAs themselves also tend to function in highly non-transparent ways<sup>80</sup>. Some progress has been made in establishing common standards and promoting best practice, such as the OECD Common Approaches on Environment and Officially Supported Export Credits<sup>81</sup>, but there is still substantial scope for improvement. ECAs are competitive organisations; thus any measures to improve governance in the sector will have to apply equally to all of them, or else it will merely serve to create a competitive advantage for those who do not comply with higher standards. Recommendation: Developed countries should encourage their ECAs to be more transparent, and to require higher standards of transparency in their support for projects in developing countries. Developed countries should also fully implement the Action Statement on Bribery and Officially Supported Export Credits<sup>82</sup> agreed by the OECD<sup>83</sup>. The Action Statement requires the implementation of measures to deter bribery. These include inviting exporters applying for export credits to declare that neither they, nor their agents, will engage in bribery. It also requires credit applications to be refused where bribery is established and appropriate action to be taken if bribery comes to light later.

96 Following on from the OECD's Action Statement, a subsequent Best Practices Paper sets out even higher standards for officially supported export credits. If bribery is to be seriously confronted, members of the OECD should adopt and implement this paper as well. In addition, we would like to see the OECD Working Party on Export Credits and Credit Guarantees<sup>84</sup> publish figures on the number of applications turned down on grounds of bribery so that the international community can determine whether these voluntary measures are working sufficiently well.

### **4.5.3 Stolen assets**

97 One specific problem affecting Africa particularly severely is the illicit acquisition of public assets. The scale of the problem is huge: an EC report estimates that stolen African assets equivalent to more than half of the continent's external debt are held in foreign bank accounts<sup>85</sup>. In the most egregious cases, amounts held in individual foreign accounts run into billions of dollars. Rich countries have recognised the importance of the issue, and have made commitments, such as that made by G8 countries at Kananaskis in June 2002<sup>86</sup>; but the amount of stolen money returned to African countries is still relatively small. Recommendation: Countries and territories with significant financial centres should take, as a matter of urgency, all necessary legal and administrative measures to repatriate illicitly acquired state funds and assets. We call on G8 countries to make specific commitments in 2005 and to report back on progress, including sums repatriated, in 2006. We now turn our attention to the obstacles that are usually raised to meeting this responsibility.

98 The underlying difficulty is that the legal systems to effect recovery and repatriation are essentially designed to deal with claims from one developed country to another. African judicial systems are often

unable to meet the requirements for the amount and quality of evidence. The challenge is for developed nations to help African countries develop the capacity, and show the political will, to overcome the blockages.

99 Good progress has been made recently through the work of international bodies and regulators, particularly after the recognition that some laundered money was being used to finance terrorist activities, such as those of 11 September 2001. Many countries now have controls built into their legal systems. But implementation is not always effective, especially where many different parts of the administration – finance and justice ministries, financial regulators, law enforcement agencies etc. are involved. The same vigour as was exercised in developing controls against terrorist financing – which resulted in the preparation of international guidelines<sup>87</sup>, model legislation, and technical assistance programmes – should be applied to tracking and returning stolen state assets. The theft of billions of dollars from an African country undermines standards and leads to a collapse of public services that can have as devastating an effect as a terrorist incident there.

100 Positive action would not only ensure that significant sums were returned to the budgets of several African countries, but would also send a strong deterrent signal to potential corrupt figures that crime does not pay. The action is needed in a series of linked areas: introducing measures to *prevent* the theft of assets at source; improving systems to *identify* funds that have been acquired illicitly; facilitating the authorities' power to *freeze and confiscate* assets while further investigations are carried out; and creating instruments to *hand back* funds to the jurisdiction from which they were looted. Failure by African governments to recover stolen assets has resulted from obstacles in each of these areas, so all need to be addressed. There are actions here both for countries where the financial centres are located and African countries, which must be able to assist in identifying the theft.

## **Prevention**

101 A recent report estimates around US\$18 billion was laundered in eastern and southern Africa in 1999 alone.<sup>88</sup> This figure covers the laundered proceeds of drug trafficking and other crime, not just corruption. Some could have been linked to financing terrorism. To combat this, and to respond to requests for financial intelligence about stolen assets, African states need appropriate legislation and robust financial institutions. The international community should give priority to helping build these, by providing expert advice. This could include training courses for financial investigators, providing mentors, and strengthening or creating African regional bodies associated with the Financial Action Task Force.<sup>89</sup>

## **Freezing and Confiscation**

102 Most large financial centres have appropriate legislation and regulations to permit freezing and confiscation of assets in criminal investigations, but often assets cannot be frozen until criminal proceedings are well advanced, allowing time for corrupt individuals to move stolen money. To reduce this risk, amendments to legislation should be made to allow assets to be frozen at a much earlier stage in a criminal investigation<sup>90</sup>.

103 It is also likely that states with advanced money laundering controls will notice financial irregularities in a foreign customer's account that the home country might have failed to recognise. All countries should exchange information with African state authorities on suspicious transactions in bank accounts of African individuals (and their family members and close associates) who are, or have been, entrusted with prominent public functions. They should assist them to put together a Mutual Legal Assistance<sup>91</sup> request, which is usually needed before further legal progress can be made.

104 The need to rely on criminal proceedings is a further major obstacle. Most developed countries apply the principle of Dual Criminality, which means they can only investigate activities that are recognised as a crime in both countries. Also, no conviction can be brought if the accused is dead (often the case with African leaders in these situations). One way to address this problem is to take action against the proceeds of crime rather than the individual (non-conviction based forfeiture). Some countries have recently passed legislation making this possible, and have used it successfully to recover stolen assets. All financial centres that have not done so should introduce and implement legislation to allow confiscation without needing a criminal conviction.

105 Family members of the accused frequently appeal against confiscation and repatriation of illicitly acquired funds. This can severely hold up the process, and is sometimes used as a deliberate delaying tactic. It is of course important to ensure a citizen's right to appeal against a conviction. However, there are rights to consider on both sides; and the existing balance is so distorted as to be ineffective. Developed states should consider ways to reduce the number of appeals allowed in a given case<sup>92</sup>. Another serious obstacle is the application of political immunity for serving leaders and their families<sup>93</sup>. African states should restrict the application of immunity<sup>94</sup>, and pursue criminal cases against those shown to be corrupt.

### **Repatriation**

106 There is a distinction to be drawn between embezzled funds and the proceeds of other crime (including corruption). Embezzled funds must be repatriated to the state of origin, as maintained in the UN Convention Against Corruption. In other cases, it is difficult to establish to whom funds should be returned, as the crime is often regarded as 'victimless'. Concerns therefore exist about how funds are utilised: several mechanisms have been used to ensure transparency in the deployment of returned funds. These include a mutually agreed contract and a designated trust fund<sup>95</sup>. A further possibility is to establish a fund managed by a third party. The most suitable mechanism will vary from case to case; the key point is to reach mutual agreement before funds are repatriated. Financial centres should agree a mutually acceptable mechanism for returning and monitoring the use of funds.

107 Momentum is building to address these problems. But the first step is to ratify the UN Convention Against Corruption (UNCAC). Signed in December 2003 this is the first international legal instrument to recognise the need for all states to commit to asset repatriation (see Article 57)<sup>96</sup>. For UNCAC to come into force 30 states must ratify it. By the end of 2004, only one OECD state had ratified the Convention. Recommendation: All states should ratify and implement the UN Convention Against Corruption during 2005<sup>97</sup>.

### **4.6 Strengthening the quality and use of data**

108 One thing that has emerged from all our considerations on issues of governance and capacity is the importance of good information and communication. In so many areas information can be a valuable driver for change. It is also necessary for monitoring and measuring performance and results. It is the lifeblood of transparent, informed and open societies, able to debate, decide and implement successful reforms, measure their impact and hold their governments to account.

109 Many countries have recognised the need for better data to guide policies for poverty reduction and human and economic development. As a result, more and better data are available than five years ago and, to understand better the dimensions of poverty, some indicators are now disaggregated by location and gender. But despite improvements the quality of national data systems in many sub-Saharan African

countries remains inadequate. Only about a third of countries have a strategy for national statistical development, and few if any have the ability to disaggregate urban and rural development statistics. Important social, economic and environmental data – including, for example, data on gender or ethnic groups – are too often not available or of inadequate quality. Even where data do exist they are often poorly disseminated and used. Rarely do African governments and local authorities have access to or use modern planning tools like Geographical Information Systems (GIS).

110 Donors have recognised the importance of supporting development of data systems, and a number of initiatives exist<sup>98</sup>. An action plan for statistics<sup>99</sup> was endorsed at the World Bank Roundtable on ‘Managing for Results’ in Marrakech in February 2004. This proposes a six-point plan for addressing statistical capacity-building issues, with actions at national and international level<sup>100</sup>. Two vital elements are helping countries to develop national strategies for statistical development (which would analyse current strengths and weaknesses and set out the country’s own needs and priorities for data, taking account of all the main producers and users) and increasing financing for statistical capacity-building. Recommendation: Good information is essential to informed policy making and effective delivery. Donors should provide the additional amount required to help Africa improve systems to collect and analyse statistics, to meet criteria normally regarded as an acceptable minimum (estimated at about an additional US\$60million per year). They should also support capacity-building in the use of modern information systems like GIS.

111 Even where data are available they are often not used in decision-making, which can lead to poor decisions. Governments need to promote a culture of evidence-based decision-making, where those with responsibility actively seek data and analysis on the impact of policy options. Poverty and Social Impact Analysis and Strategic Environment Assessments, increasingly being used to assess the impact of major policy decisions on poor people and other vulnerable groups before final decisions are taken, are useful tools in this respect.

#### **4.7 Conclusion**

112 As this chapter has shown, good governance underlies all development, and its impact is felt in every sphere. It is an area where African countries must be firmly in the lead. There are, nonetheless, a number of practical and effective actions that the international community can take to support them. These have been highlighted throughout the chapter. Some of these require resources. Others are about changes in policies, behaviour and practices. Only by taking action in both areas will the international community be able to help African countries bring about the changes needed to achieve stability, growth and poverty reduction.

#### **Recommendations on Governance and Capacity-Building**

Weak governance has blighted the development of many parts of Africa to date. Weak governance can include bad government policies and an economic and political climate which discourages people from investing. It can also include corruption and bureaucratic systems that are not open to scrutiny and therefore are not answerable to the public. And it includes a lack of accountability and weakness in mechanisms to ensure that people’s voices are heard and their rights upheld, such as parliaments, the media and the justice system.

At the core of the governance problem in many parts of Africa is the sheer lack of capacity of national and local government ministries, and the problems of recruiting and keeping skilled staff, equipped and motivated to do their job. The continent’s regional and pan-African organisations, including the African Union and its NEPAD programme, which are so important to Africa’s future, also need strengthening.

### **Investing in capacity-building**

- Developed countries should give strong support – both political and financial – to Africa’s efforts to strengthen pan-African and regional bodies and programmes, including the African Peer Review Mechanism.
- African governments should draw up comprehensive capacity-building strategies. Donors should invest in these, making sure that their efforts are fully aligned with these strategies rather than with their own competing priorities and procedures.
- Skilled professionals are key to building improvements in the administration and technical ability which Africa so gravely lacks. The international community should commit in 2005 to provide US\$500 million a year, over 10 years, to revitalise Africa’s institutions of higher education and up to US\$3 billion over 10 years to develop centres of excellence in science and technology, including African institutes of technology.

### **Increasing accountability and transparency**

- Parliaments in both developed and other developing countries should establish partnerships to strengthen parliaments in Africa, including the pan-African parliament.
- Independent media institutions, public service broadcasters, civil society and the private sector, with support from governments, should form a consortium of partners, in Africa and outside, to provide funds and expertise to create an African media development facility.
- Developed country governments, company shareholders and consumers should put pressure on companies to be more transparent in their activities in developing countries and to adhere to international codes and standards for behaviour.
- The international community should give strong political and financial support to schemes such as the Extractive Industries Transparency Initiative (EITI) to increase the transparency of payments made to, and received by, governments and should encourage its acceptance by all resource-rich African countries. It should support the development of criteria and a means of validating EITI implementation; and support and fund capacity-building among public servants as well as civil society, by contributing to the EITI Multi-donor Trust Fund.
- Principles of transparency such as those in EITI should be extended to other natural resource sectors, including forestry and fisheries.
- Timber importing countries should ensure they do not trade in illegally acquired forest products and should procure only legally sourced timber and products.

### **Corruption**

Corruption is a systemic challenge facing many African leaders. They must demonstrate renewed political will to fight it at all levels in the economy and society. Many African nations have begun this task. Increased transparency by African governments will assist this. But fighting corruption involves tackling those who offer bribes as well as those who take them.

- Developed countries should encourage their Export Credit Agencies (ECAs) to be more transparent,

and to require higher standards of transparency in their support for projects in developing countries. Developed countries should also fully implement the Action Statement on Bribery and Officially Supported Export Credits agreed by members of the industrialised nations group, the OECD.

- Countries and territories with significant financial centres should take, as a matter of urgency, all necessary legal and administrative measures to repatriate illicitly acquired state funds and assets. We call on G8 countries to make specific commitments in 2005 and to report back on progress, including sums repatriated, in 2006.
- All states should ratify and implement the UN Convention against Corruption during 2005 and should encourage more transparent procurement policies in both Africa and the developed world, particularly in the areas of construction and engineering.

### **Strengthen information systems**

- Good information is essential to informed policy-making and effective delivery. Donors should provide the additional amount required to help Africa improve systems to collect and analyse statistics, to meet criteria normally regarded as an acceptable minimum (estimated at about an additional US\$60million per year).

### **Chapter 4: Notes**

1 Kaufmann, 2003: 14.

2 Economic Commission for Africa, 2004: iii.

3 See proposal submitted at Commission for Africa Regional Consultation with Civil Society, Nairobi, 6-8 December 2004. Other international instruments on women's rights include the Beijing and Dakar Platforms for action, the ICPD Programme of Action and the protocol to the African Charter on Human and People's Rights on the rights of women in Africa.

4 Similar conclusions are reached by the Global Monitoring Report 2004, which notes that performance varies widely, that reform needs to be accelerated and deepened in many countries, and that most serious shortcomings are in transparency, accountability and control of corruption. World Bank, 2004b: xvii - xviii.

5 World Bank, 2004b: xviii.

6 The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity-building.

7 The first four countries to be reviewed are Ghana, Rwanda, Mauritius and Kenya. The first country review is expected to be undertaken within eighteen months of a country becoming a member of the APRM process, and then, except in exceptional circumstances, a periodic review will take place every two to four years. The APRM process from start to finish should take between six and nine months. It consists of five stages: careful analysis of the governance and development environment in the country to be reviewed; country review visit of the APR team; preparation of the mission findings and discussions of the draft report with representatives of the government; discussion and consideration of the country review findings by the participating Heads of State and Government; and, formal and public tabling of peer review reports.

8 Member countries are the main source of finance, and it is not possible to put a figure to the likely level of donor funding required. As capacity grows, institutions may expand their operational activities, and funding requirements may grow. Given the importance of the increasing role of the pan-African and regional institutions, pre-commitment to provide funds would be valuable.

9 The HIV and AIDS crisis has compounded staff shortages by increasing pressures on staff, and by

infecting and killing them. In Malawi, 25 per cent of nurses are lost every year, roughly a third of these falling ill and dying of AIDS. In Zambia despite renewed efforts in teacher training, teachers are dying faster than they can be trained. See submission from Africa All Party Parliamentary Group, November 2004.

10 In July 2003 the AU's programme for Capacity Development for Governance of Public Administration in Africa was endorsed as a priority component of the overall NEPAD programme.

11 26 per cent of bilateral overseas development assistance to sub-Saharan Africa, excluding South Africa, was spent on technical cooperation in 2002, see [www.oecd.org/dac/stats/idsonline](http://www.oecd.org/dac/stats/idsonline).

12 Boesen, N and O Therkildsen, 2004; Boesen, N., 2004.

13 Tanzania, for example, prepares about 200 reports of different kinds and has received more than a thousand donor delegations each year. World Bank, 2004c: 207.

14 ECA/OECD-DAC (2005).

15 Levy, Brian and Sahr Kpundeh, 2004.

16 The State of the Ghanaian Economy Report, 2002.

17 Ndulu, 2004: 2

18 Sawyerr, 2004: 27

19 Sawyerr, 2004: 18

20 UNESCO Institute of Statistics, 2004: 3

21 World Bank, 2000: 6

22 Calculated on an average of \$10 million per annum for each of the thirty centres. In practice funding would vary by centre and over time, depending on absorptive capacity and requirements.

23 The programme should also tie in with the objectives and networks of the new African Leadership Council. The Nelson Mandela Foundation and the Mandela Rhodes Foundation could also have an important role to play.

24 World Bank, cited in International Organization on Migration, 2003.

25 World Bank, 2002 in International Development Select Committee, 2004.

26 Bennell, P, 2004.

27 A UNDP/UNICEF expert group calculated that, for Mozambique, a shift of around US\$100 million per year from provision of technical assistance workers (around US\$350 million per year total) to national salaries would allow salaries to double on average and finance an incentive scheme.

28 E-governance refers to the use of information and communications technology to improve the performance of public institutions and make them more transparent and responsive.

29 Article 13.2. The African Charter for Human and Peoples' Rights was adopted in June 1981 and entered into force in October 1986.

30 This was thought necessary to enhance implementation of development projects and give 'teeth' to the President. This paved the way for autocratic rule by Presidents for life under one party states. Moreover, in cultures that revere elders and ceremonial obligations, an Executive President may not be the best model. There are a number of possible models for change, ranging from a ceremonial President with an Executive Prime Minister who oversees day-to-day conduct of government business, to a constitution that balances power between the President and the Prime Minister.

31 Economic Commission for Africa, 2004:4.

32 The highest percentage of women in public office is in Rwanda at over 45 per cent, see proposals submitted at the Commission for African Regional Consultation with Civil Society, Alexandria, 14-16 December 2004.

33 World Bank, 2001: 95.

- 34 British Council, 'Women in Politics and Leadership,' 2003 cited in Helen Jackson MP et. al., 2004.
- 35 See submission from Parliamentary Labour Party International Development Committee 2004.
- 36 The African Charter on Human and Peoples' Rights; Article 9: 1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.
- 37 See submission from OSI-AfriMAP, 2004.
- 38 Economic Commission for Africa, 2004: 11.
- 39 World Bank, 2002: 10.
- 40 See submission from M. Myers, 2004.
- 41 Potentially including pan-African broadcasters or news channels. See submission from Moeletsi Mbeki, 2005.
- 42 For example see BBC World Service Trust submission, 2005.
- 43 This should include supporting AU/NEPAD's media department to build on its ongoing work.
- 44 See submission from Royal African Society, 2004.
- 45 In particular: training and accreditation of training programmes through regional networks; equipment resources; stimulation of African indigenous programming; development of public service broadcasting and provision of information to rural areas, women and youth; support for community radio and local language media; regulatory and legal reform; provision of digital skills for diversified content through internet access; and the generation of market and audience research in order to provide the data required to increase relevance of content as well targeted marketing and advertising revenue.
- 46 See submission from Sally-Ann Wilson, 2005.
- 47 For example, in Angola it takes over a thousand days and 47 procedures to enforce a contract, compared with 27 days and 14 procedures in Tunisia. (Economic Commission for Africa, 2004:20).
- 48 Estimate of the State Counsel in the Law Officers Department in Freetown as of November 2003 cited in Open Society Justice Initiatives, 2004: 57.
- 49 Economic Commission for Africa, 2004: 5.
- 50 A report by the World Bank about Uganda's Poverty Reduction Strategy (PRS) indicates that "*Decentralization helped expedite the implementation of equalization grants to enable districts to meet locally identified poverty priorities*" cited in Local Government International Bureau submission.
- 51 Economic Commission for Africa, 2004:10.
- 52 IDASA (not dated). See <http://www.idasa.org.za/>
- 53 Poor governance is not the only reason why resource-rich countries remain poor. In the abundant literature on this subject, several other explanations are offered for the phenomenon known as the "resource curse", including a long-term decline in terms of trade; revenue volatility; Dutch disease; crowding out effects; an increase in the role of the state; and certain socio-cultural and political effects associated with resource dependency. See, for example, Sachs and Warner, 1995; Auty, 2001; Ross, 2003. For an overview of the literature, see Stevens, 2003.
- 54 Gary, I and TL Karl, CRS, 2003; see also Ross, 2001.
- 55 G8 Declaration on Fighting Corruption and Improving Transparency, Evian 2003, accessible via [http://www.g8.fr/evian/english/navigation/2003\\_g8\\_summit/summit\\_documents/fighting\\_corruption\\_and\\_improving\\_transparency\\_-\\_a\\_g8\\_declaration.html](http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/fighting_corruption_and_improving_transparency_-_a_g8_declaration.html). Section six deals with the extractives industry in particular.
- 56 For more information about the Transparency Directive, see [http://europa.eu.int/comm/internal\\_market/securities/transparency/index\\_en.htm](http://europa.eu.int/comm/internal_market/securities/transparency/index_en.htm). Extractive industry companies are dealt with in paragraph 14 of the Directive.

- 57 The countries are Georgia, Peru, Nicaragua and Nigeria. For details of the compacts, see <http://www.g8usa.gov/documents.htm>.
- 58 Some of the better-known examples include the action taken against Shell Oil about the sinking of the decommissioned Brent Spar oil platform in the North Sea, and action against Barclays for its support of South Africa's apartheid regime.
- 59 The other five countries where EITI is being implemented are Azerbaijan, the Kyrgyz Republic, Trinidad and Tobago, Peru and Timor Leste.
- 60 For more information on EITI, see its official web site at [www.eitransparency.org](http://www.eitransparency.org)
- 61 The need for capacity-building among civil society was highlighted in a letter to the Commission for Africa from the Publish What You Pay coalition, 10 December 2004.
- 62 For example, in Burundi up to 90 per cent of export income during 1990-1999 came from coffee, tea and sugar; Ethiopia derived 80 per cent of export revenue from coffee, hides and skins and sesame seed over the same period; while São Tomé and Príncipe, slated to become a major oil producer over the next few years, relied on cocoa, fisheries and coffee to generate 81 per cent of total exports during the previous decade. UNCTAD, 2003.
- 63 UNCTAD, 2003.
- 64 Barrett, 2004.
- 65 In October 2001 ministers from 31 African nations, meeting in Yaoundé, signed the African Forest Law Enforcement, Governance and Trade (AFLEG) declaration. Designed to fit within the umbrella of the NEPAD, it aims to galvanise international commitment at high political levels to strengthen the continent's capacity to enforce forest law throughout Africa, with particular regard to illegal logging and the trade in illicit timber and wildlife resources. AFLEG Ministerial Declaration, 2003. <http://www.illegal.logging.info>
- 66 Experience from developing a timber procurement policy in the UK indicates that buying only legal timber could initially raise procurement costs by between 0 and 20 per cent, with premiums varying from product to product, but the increase is expected to be temporary and will fall away as the percentage of legally sourced timber on the world market increases.
- 67 AFLEG Ministerial Declaration, 2003.
- 68 For a discussion, please see Chapter 7.
- 69 See, for example, the 2004 UN General Assembly Resolution A/59/L.23, available at <http://daccessdds.un.org/doc/UNDOC/LTD/N04/594/63/PDF/N0459463.pdf?OpenElement>
- 70 Royalty agreements for EU boats to fish in Africa are estimated to be worth €0.6bn. Information provided to the Commission for Africa by the UK Department for Environment, Food and Rural Affairs.
- 71 For example, African coastal states should consider using their right under international law to licence and control fishing in their waters to recover the full cost of administering and enforcing regulations for sustainable fishing, as well as generating revenue for development and other goals. This is the exercise of the "sovereign right of the sovereign state" in their exclusive economic zone (EEZ) as provided for in the articles 61 and 62 of the United Nations Convention on the Law of the Sea, 1982.
- 72 To date, 28 institutions, including the European Investment Bank and the Danish Export Credit Agency, have adopted the Equator Principles. For details, see <http://www.equator-principles.com>. The Principles have been welcomed but a number of signatory banks have been criticised for continuing to finance projects that are environmentally and socially controversial. For more information, see [www.banktrack.org](http://www.banktrack.org)
- 73 In 2004 the Bank announced that, in response to the findings of the Extractive Industries Review, it would begin requiring disclosure of revenue figures for new major extractive industries projects immediately, and that this requirement would become retrospectively effective within two years. It also endorsed the EITI, and committed to use explicit governance indicators - such as the quality of fiscal management, transparency, and anti-corruption policies - in determining whether to engage in extractive

industries projects. World Bank, 2004a.

74 Comments have been invited on a draft version of the IMF's Guide on Resource Revenue Transparency - see <http://imf.org/external/np/sec/pr/2004/pr04274.htm>

75 Transparency International, 2002.

76 Transparency International, 2004.

77 For a fuller discussion of these and other guidelines, see section 7.3.3 in Chapter 7.

78 Publish What You Pay, accessed via <http://www.publishwhatyoupay.org/english/objectives/ecas.shtml>

79 There are exceptions; for example, the Danish Export Credit Agency EKF has signed up to the Equator Principles - see note 72.

80 See [www.thecornerhouse.org.uk](http://www.thecornerhouse.org.uk). For more NGO views of ECAs, see also [www.eca-watch.org](http://www.eca-watch.org), [www.environmentaldefense.org](http://www.environmentaldefense.org)

81 Adopted by the OECD Council in December 2003, the Recommendation sets out common approaches for identifying and evaluating the environmental impact of projects they support, including the impact of involuntary resettlement, indigenous peoples and cultural property. For more detail, see <http://www.oecd.org/dataoecd/26/33/21684464.pdf>

82 Agreed in November 2000 by the members of the OECD Working Party on Export Credits and Credit Guarantees, OECD 2000.

83 For a definition, refer to the Glossary.

84 For more detail on the Working Party's activities, see [http://www.oecd.org/department/0,2688,en\\_2649\\_34181\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34181_1_1_1_1_1,00.html)

85 Commission of the European Communities, EU Africa Dialogue, 2003: 7. As an indication of the amount that could be repatriated if financial centres implemented all the actions below, the government of Switzerland, which has taken the necessary steps, has recently completed repatriation of around US\$700 million of Abacha funds to the government of Nigeria.

86 G8 Africa Action Plan, June 2002, Section 2.6: "We commit to... intensifying international co-operation to recover illicitly acquired financial assets."

87 In October 2001, the Financial Action Task Force drew up eight special recommendations on combating the financing of terrorism to supplement the existing 40 recommendations setting the global standards on combating money laundering. A Plan of Action was also agreed to ensure global compliance with these recommendations.

88 Goredema, Institute of Security Studies, Republic of South Africa 2003.

89 Institutions like the World Bank and UN provide assistance of this kind; but to date most focus has been on countries like Kenya and Nigeria that are regional financial hubs, major oil or diamond producers, or where terrorism is perceived to be a threat. There is therefore a gap in other African countries.

90 Some countries have already taken appropriate steps. In Switzerland, for example, it is now possible to freeze an account when there is reasonable suspicion to suggest this course of action; the suspicion can be based on information passed in a telephone call.

91 See Glossary.

92 In Switzerland, for example, the number of possible appeals has been reduced to one, which comes at the end of the process.

93 See inter alia Transparency International's Global Corruption Report, 2004: 89-91.

94 In Zambia, for example, the Supreme Court upheld a parliamentary vote to remove immunity from former President Chiluba in February 2003.

95 A contract determining the terms for returning funds can be agreed between the returning and recipient states. A trust fund, as set up by Peru, can be established for the sole purpose of receiving

returned stolen assets.

96 UN Convention Against Corruption, accessed via [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf)

97 See also recommendations from the regional consultation event in Nairobi.

98 These include PARIS21, an international network of statisticians, policy makers and development agencies that aims to improve evidence based policy making. It works through raising the profile of statistics, promoting cross-country lesson- learning and developing and implementing best practice; the World Bank Trust Fund for Statistical Capacity Building, which provides seed money to help countries develop and implement strategic plans for statistical systems; STATCAP, which provides funds for statistics programmes after countries have developed statistical strategic plans; and the IMF's General Data Dissemination System, which provides a framework for assessment.

99 The Marrakech Action Plan for Statistics (MAPS).

100 National needs: mainstream strategic planning for statistical systems and prepare national statistical development strategies for all low-income countries by 2006; begin preparations for the 2010 census round; increase financing for statistical capacity building. International responsibilities: set up an international Household Survey Network; undertake urgent improvements needed for MDG monitoring by 2005; increase accountability of the international statistical system.

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# FINANCIAL TRANSPARENCY OR NEEDLESS BUREAUCRACY? ANALYZING THE CALIFORNIA NONPROFIT INTEGRITY ACT OF 2004

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## Policy Information

### *Policy Identification*

The California Nonprofit Integrity Act of 2004 (“Act”) amends sections of previous Business and Professions Code and Government Code relating to charitable organizations and fundraising in California. The Act was first introduced as SB1262 in the California State Senate by its author, Senator Byron Sher (Democrat, District 11) on February 13, 2004. The bill, which was sponsored by California Attorney General Bill Lockyer, passed in the State Senate on August 26, 2004 and in the State Assembly on August 25, 2004. The Act received the signed approval of Governor Arnold Schwarzenegger on September 30, 2004 and went into effect on January 1, 2005 (“SB1262,” 2004).

A key provision of the Act requires that charitable organizations, trusts, and unincorporated associations with annual gross revenues of more than \$2 million must use generally accepted accounting principals to prepare annual financial statements that are audited by independent certified public accountants. These statements must then be submitted to the Attorney General for public disclosure no later than nine months at the close of the fiscal year. In addition, the Act requires each target organization meeting the above criteria to have an audit committee appointed by the Board of Directors (“Board”). The audit committee must be separate from any other financial committees of the organization, and its members can not include any compensated members of the Board, staff, or anyone otherwise receiving compensation from the organization for services (“SB1262,” 2004).

Other provisions in the Act target all NPOs that are registered with the Attorney General of California regardless of their annual revenue. The Act stipulates that the Board of every such organization must formally review and approve compensation for any officers to ensure that such compensation is “just and reasonable.” Other provisions call for public disclosure of all financial statements that are audited by a CPA, timely registration with the Registry of Charitable Trusts upon initially acquiring assets, and specific regulations regarding contracting for services with any commercial fundraiser or fundraising counsel. Commercial fundraisers and fundraising counsel must formally notify the Attorney General’s Registry of Trust no less than 10 days before beginning a campaign or holding an event to solicit funds. In addition, such fundraisers and counsel must have a written contract with the charity organization. The minimum requirements of such contracts are further specified in the Act (“SB1262,” 2004).

### *Target Issue*

The Act affects all charities that are registered with the Attorney General. There were 85,455 charities registered in California as of 2003 with over \$200 billion in assets and over \$70 billion in annual revenue (Silk, 2004). In particular, the Act includes provisions that specifically target charitable organizations with gross revenue over \$2 million per fiscal year, excluding governmental funds, such as grants or contracts, for which compliance with current accounting regulations is required (“SB1262,” 2004). The

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Act also includes provisions affecting commercial fundraisers. Exempted from the Act are charities organized as hospitals, educational institutions, and religious organizations (“SB1262,” 2004).

The Act targets California nonprofit organizations, charitable trusts, and unincorporated charitable associations, as well as commercial fundraisers, in an effort to increase financial accountability and decrease corrupt financial practices. The problem is simply that money donated, granted, or distributed to charities finds its way into the pockets of individuals and corporations for their own profit rather than to the intended beneficiaries of the charitable donations. The cause of this is capitalism at its worst – greed. The consequence is that the trust of the general public is broken and the intention of good will is distorted. Although evidence of this problem is not necessarily widespread in California, two cases in particular, Tonken and PipeVine, received extensive media attention and propelled political and legislative response. This is an Act that seeks to make amends, literally in the form of amendments, for the worst kind of social injustice – the clear, willful re-distribution of financial resources from the least advantaged to the most devious whose intention is to benefit monetarily by deceiving those who give their own money in the name of charity. The amends, and amendments of the Act, center on ensuring and restoring the “integrity” of those who handle the raising, receiving, and distributing of money in the name of charity.

### *Historical Context*

The Act is a state reaction to a problem that has gained national attention in the corporate world with the likes of Enron, WorldCom, and other such cases of accounting malpractice and financial scandals. The problem is greed. Corporate greed is a risk of capitalism that comes with legal consequences. Unfortunately, these legal consequences have not been enough of a deterrent to curtail incidents of greed throughout the short, yet rich, history of corporate America. The problem is that greed corrupts not only individuals and corporations in the marketplace, but it also corrupts the integrity of charitable organizations. Specifically for NPOs, tax-exempt status is a privilege that has wrongfully been taken advantage of by individuals for their own financial benefit. In contrast to cases involving for-profit companies like Enron and WorldCom, the financial abuse is compounded in cases involving NPOs, since the defining purpose of incorporation is expressly for charitable purposes not private or individual gain. This is clearly outlined in organizing procedures for charities and clearly violated by those seeking personal gain.

The intended effect of the Act is to create stricter financial management and governance for charity organizations, as well as to prevent fundraising malpractice by both charities and commercial fundraisers in the name of charities. Much of the Act follows the recommendations of Attorney General Lockyer. Lockyer’s recommendations followed on the heels of the Tonken and PipeVine cases. The California Association of Nonprofits (“CAN”), which represents over 1,700 organizations under its umbrella, opposed the legislation in large part because of the undue burden it would place on smaller charities to meet the extensive and complicated changes to existing law and reporting practices. CAN also points out that the existing law already serves its function, since Tonken is in jail and PipeVine has been dissolved. Regardless, CAN points out that there is still no adequate mechanism in place for monitoring the existing law – a fact not likely to change with the adoption of the Act (Larson, 2004)

### *Juridical, Economic, and Political Forces*

In the wake of fraudulent corporate practices, Senator Paul Sarbanes and Representative Michael Oxley authored and introduced the Public Company Accounting Reform and Investor Protection Act, also known as the Sarbanes-Oxley Act or SarbOx. This piece of federal legislation passed both the House and Senate. With the signature of the President, SarbOx became Public Law 107-204 on July 30, 2002. SarbOx went effect on November 15, 2004. The two-year delay from its passing into law to its effective

date provided companies with time to work on their compliance with the legislation. The new law sets forth the greatest reform in corporate accounting practices since the Securities Exchange Act of 1934. SarbOx calls for the creation of an auditing board charged with oversight of company accounting practices as further outlined in the text of the act itself. These guidelines represent federal standards with which companies must comply. Violations of these guidelines give rise to the same penalties that may be imposed for violations of the 1934 Act. However, SarbOx alone does not necessarily ensure the monitoring of corporate governance and compliance by such boards and companies (Moerschbaecher, 2004).

Shortly after the passage of SarbOx, corporate America began to focus on “best practices” and “financial transparency.” While SarbOx provided federal guidelines and greater accountability in the corporate world, NPOs were not immune to similar problems or, as evidenced by the Act, similar reactive legislation. The Tonken case and PipeVine case prove that NPOs in California were vulnerable to financial corruption. Not only are NPOs subject to similar corruption, but the degree to which the scandal violates the trust of the American public is exponentially greater when the pretense for revenue is specifically “not for profit.”

Aaron Tonken worked as an event planner that frequently contracted with NPOs for fundraising, with an emphasis on getting celebrity involvement. His creative bookkeeping and lack of proper accounting practices enabled him to gain access to, and support of, celebrities in the name of charities by offering cash, jewelry, political donations, and other gifts to friends and associates of celebrities and to the celebrities themselves. Tonken refused to account for millions of dollars in donations, which he diverted to private bank accounts rather than to such victimized charities as the Kids Campaign, the Michael J. Fox Foundation, City of Hope, and the Betty Ford Center, among others. Commercial fundraisers, like Tonken, have a fiduciary responsibility under both statutory and common law to the donors and to the charities for which they solicit funds. Attorney General Lockyer filed a lawsuit in March 2003 against Tonken, who is now serving 63 months in a federal prison in California and has been ordered to pay back nearly \$4 million dollars to charities he defrauded (Office of the Attorney General, 2003).

In addition to hitting the heart of Hollywood, NPO scandal reached PipeVine, a San Francisco organization established by, and closely linked to, the United Way. PipeVine failed to properly process the \$100 million a year it had been receiving in donations and was shut down in early 2003 as a result of another lawsuit waged by Lockyer. PipeVine had nearly \$5.6 million in assets when it was shutdown and investigation revealed that the organization never distributed more than \$19 million in contributions to various charities. Even if it intended to distribute the money owed at its dissolution, the organization was \$13 million short. PipeVine was designed as a fee-based processing agency that would take money raised in workplace campaigns of such corporations as Bank of America, Clorox, and Chevron/Texaco and route the money to thousands of designated charities. Although measures have been taken to collect and redistribute that money, charities have yet to receive millions of dollars owed, even with the United Way of the Bay Area agreeing to pay a \$13 million settlement to make up for the shortfall (Wallack, 2004). With Tonken and PipeVine in the national headlines following SarbOx, the environment for change at the state level was apparent and inevitable.

### *Models of Decision Making*

In light of the above-mentioned cases, there was both a rational and immediate choice guiding the decision-making process leading to the California Nonprofit Integrity Act. The Act is a legislative reaction that was intended to avoid the worst consequences of financial malpractice among NPOs and prevent the problem from continuing to progress in a negative direction. That progression has been marked with the betrayal of the philosophical goodness with which the public views and gives to charity organizations. Although it may seem to fall under the rational decision making process, the immediate,

stopgap nature of the Act places it in a category of incremental change. The intent in this case is that when the new law is enacted, the accounting malpractice and financial abuse involving charitable organizations will end. The reality is that greed does not just end, no matter how difficult it becomes in a strictly regulated capitalist environment to maliciously act out of greed for individual gain.

Governor Schwarzenegger (2004) stated in a press release upon signing the Act, “While I support transparency, accountability and curbing unscrupulous activities, I encourage the Legislature to ensure the non-profit community is not subjected to needless bureaucracy...” and, “If this bill results in unnecessary expense to the non-profit community I encourage the Legislature to revisit this issue” (p. 1). This statement clearly indicates that this issue is not closed and the problem may not be solved by this Act alone. It will take a carefully planned, rational approach to alter the practices of NPOs in the long term. An incremental approach was necessary to provide a stopgap measure to answer the problem in the face of public scandals reaching epidemic proportions.

## **Implementation**

### *Goals, Objectives, Benefits, and Services*

The broad goal of the Act is to move charity organizations in the direction of financial integrity by creating stricter governance and financial accountability among NPOs and fundraisers. This reflects a reaction to the current climate in which financial malpractice dominates the headlines by ensuring a return to positive principles in business – especially the business of charity. The adequacy of the Act in ensuring this value based shift can only be measured in time through the close monitoring of the financial practices of charity organizations, as well as in the court of public opinion. It may be in the public arena that this Act will have its biggest positive impact and achieve its objective. The problem may not be solved, but there will have been an immediate and decisive legislative action taken to restore good will and integrity to the NPO sector in the wake of public scandal. The Act accomplishes this in theory; however, the Act introduces objectives that may create more problems than they solve.

The goals and objectives are not designed to provide positive outcomes, but rather to prevent negative practices. Following this, the objectives, benefits, and services in this Act take the form of guidelines, requirements, and provisions with which the target organizations must comply. The efficiency with which the goals and objectives are met will be measured by the ability of affected organizations to comply, the level of compliance, and the ability of the Attorney General’s office to monitor compliance. In the short-term, a state law has answered the public scandals with strict regulations governing charity organizations and fundraising. In the long-term, the Act may prove to be too burdensome for its unintended target and hinder the ability of charity organizations to provide services and contributions to California and society at large. In fact, Governor Schwarzenegger acknowledged this exact potential consequence in his statement upon signing SB 1262 by encouraging Legislature to revisit the issue if such a hindrance and burdensome result occurs within the nonprofit community (Schwarzenegger, 2004).

### *Policy Instruments and Eligibility Rules*

On behalf of the NPOs, CAN argues that the Act is too broad and will “make a wrongdoer of every charity that raises funds because the bill imposes on every charity making the simplest requests for funds disclosures that are so burdensome that they will be impossible to satisfy in day-to-day practice” (“Stop SB1262,” 2004, p. 1). Although the Act is indeed broad, the reporting demands are not impossible and the small charities that CAN hopes to protect are not as small as the targets of similar local legislation in New York. Attorney General Spitzer in New York proposed that the annual revenues for target organizations be set at \$500,000. In fact, the first draft of the Act in California included a lower threshold for NPOs set at \$250,000 (Moerschbaecher, 2004). In that draft version, the Act would certainly place an

incredible burden on small charities that would arguably outweigh the benefit of safeguarding financial integrity at that level. In its current form, the Act affects organization with annual gross revenues over \$2 million dollars. In comparison to the only other proposed local legislation of this kind, and to its initial draft, the Act in its current form in California functions at a more equitable level with regard to its targets. Regardless, a consequence of the Act is that in order to comply and keep up with its extensive filings requirements, NPOs will have to shift their energy and money for programs and services to board restructuring and record management (Silk, 2004).

### *Financing, Administration, and Delivery*

The Act changes the time limit that charitable organizations have to register with the Attorney General and file Articles of Incorporation from six months to 30 days after receipt of property (SB1262, 2004). Although this objective is intended to create a more accurate registry and a means of tracking, it will admittedly be difficult for the Attorney General to track. In “Stop SB1262” (2004), CAN points out that, “The Attorney General’s own website states that, ‘The Attorney General has a small staff and limited financial resources to carry out charitable investigations’” (p. 1). The unintended consequence is that the Attorney General will have to hire more staff to manage the registry and to investigate and enforce the Act. This, in turn, would cost Californians more in tax dollars, provided it is the intention of the Attorney General to expand his office to meet the demands of processing and monitoring created by the Act.

The Act requires all qualifying organizations to prepare annual financial statements that are audited by an independent CPA. Although NPOs already file annual financial statements with the IRS that are available to the public (IRS form 990), the Act calls for state reporting over and above this federal requirement. The organizations now have an added financial responsibility to hire and pay for the services of a CPA. In addition to the function of an independent auditor, NPOs must appoint an Audit Committee separate from any existing financial committees. Members of any such financial committees must comprise less than half of the Audit Committee. The pool of individuals from which the Board is allowed to appoint members thins out significantly as the Act prohibits Board officers, staff, and anyone who receives compensation from the organization for any business other than the Audit Committee. Members of the Audit Committee may not receive compensation that exceeds the amount that any member of the Board receives for service on the Board. Although the function of an Audit Committee contributes to the effectiveness of the Act and its intended objectives, the creation and maintenance of such a committee diverts time, energy, and finances from the NPOs from the delivery of services or programs to governance and administration. This is not a cost effective provision, nor does it ultimately serve to ensure the best practices of NPOs.

### **Recommendations**

Requiring commercial fundraisers and fundraising counsel to formally contract with charity organizations and to formally notify the Attorney General’s office of activities is an excellent measure to aid in safeguarding against financial abuse. The burden of monitoring such activities should fall upon the Attorney General’s office, rather than upon each individual organization in the form of an audit committee. 90,000 separate audit committees for each charitable organization in California represents a mismanagement of energy and resources in the social service sector. A fully staffed audit committee under the Attorney General that could oversee and maintain a registry of fundraisers and fundraising counsel would serve the same purpose more efficiently. Although existing law for financial malpractice has proven sufficient in its penalties (Tonken imprisoned, PipeVine dissolved), the penalties for non-compliance with the Act simply include late fees and fines. These monetary penalties do little to sanction the actions of financial malpractice at the hands of NPOs with large revenue and do great harm to small NPOs that simply do not have adequate resources to comply with the Act. Instead, an audit committee

devoted to monitoring and oversight with the ability to restrict the fundraising activities of parties involved would better serve this function.

The Act was signed on September 30, 2004 and went into effect on January 1, 2005. This gave NPOs three months to comply with the extensive and complicated changes to existing law. After SarbOx passed into law, companies were given more than two years to work toward compliance. SarbOx called for the creation of an auditing board similar to the audit committee required by the Act. The immediacy with which the Act took effect places a great strain on charitable organizations and represents a hasty reaction rather than a carefully planned systemic change. This does more to act as a broad and sweeping punishment of the whole for the negative behavior of a few bad seeds than it does to act as a method of prevention. The problem calls for a rational model of change, not an incremental model that was acknowledged as such by the Governor as he signed it into law. It would have been wise to allow NPOs sufficient time to understand, process, and implement the complicated changes to existing law. It is wise now to revisit the matter as suggested by the Governor.

In addition to the burden placed upon charitable organizations with over \$2 million in gross annual revenue, the Act impacts nearly 60,000 NPOs that do not come close to meeting this threshold. According to CAN in “Stop SB 1262” (2004), nearly two-thirds of the 90,000 NPOs that currently report to the Registry of Charitable Trusts are so small that no staff is even employed. By contrast, the Act excludes nonprofit schools, universities, colleges, hospitals, and religious organizations. These NPOs employ ample staff and are thus better equipped to meet requirements of the Act. In addition, and in even more glaring contrast, these particular NPOs account for billions of dollars in solicitations annually, making them arguably more susceptible to financial malpractice; and, yet, they are not affected by the Act. This is an inequitable administration of the law that must be, as Governor Schwarzenegger (2004) said, revisited by Legislature.

### **Executive Summary**

The California Nonprofit Integrity Act of 2004 intends to increase financial accountability and decrease corrupt financial practices by creating stricter governance and financial accountability among charitable organizations and fundraisers. This reflects a reaction to the current climate in which financial malpractice dominates the headlines with the likes of Enron, WorldCom, Tonken and PipeVine. While Enron and WorldCom represent corporate scandals, Tonken and PipeVine are California cases that involved defrauding charities. The problem is simply that money donated, granted, or distributed to charities finds its way into the pockets of individuals and corporations for their own profit rather than to the intended beneficiaries of the charitable donations. The cause of this is capitalism at its worst – greed. The consequence is that the trust of the general public is broken and the intention of good will is distorted.

California Attorney General Lockyer filed lawsuits against Tonken, who is now serving a 63-month sentence in prison, and PipeVine, which has been dissolved and is in the process of distributing owed funds to charities with the help of a \$13 million settlement paid by the United Way of the Bay Area. These cases created a climate ripe for reform. The Act was sponsored by Attorney General Lockyer and follows recommendations made on the heels of the Tonken and PipeVine cases. Although legislation followed, the California Association of Nonprofits (CAN) argued that the existing law proved sufficient as evidenced by the successful prosecution under the law in both cases. CAN’s argument stems from the unnecessary burden that the Act places on smaller charities that will be affected by the extensive changes to existing law that simply need to be better enforced and more closely monitored.

Specifically, the Act calls for charitable organizations, trusts, and unincorporated associations with annual gross revenues of more than \$2 million to use generally accepted accounting principals to prepare annual

financial statements that must then be audited by independent certified public accountants. These statements must then be submitted to the Attorney General for public disclosure no later than nine months at the close of the fiscal year. This seems appropriate, but these NPOs already file a 990 with the IRS that contains similar financial information and is open to public review. In addition, there is a limited pool of CPAs available to the 90,000 charity organizations that would be required to file such reports.

The Act requires each target organization meeting the above criteria to have an audit committee appointed by its Board of Directors. The audit committee must be separate from any financial committees of the organization, and its members can not include any compensated members of the Board, staff, or anyone otherwise receiving compensation from the organization for services (“SB1262,” 2004). The creation of such a committee outside of existing financial committees places an undue burden on organizations. The energy spent creating such a committee could be better used focusing on providing services and programs. An alternative could be to increase the staff of the Attorney General’s office. As CAN indicates, “The Attorney General’s own website states that, ‘The Attorney General has a small staff and limited financial resources to carry out charitable investigations’” (“Stop SB1262,” 2004, p. 1).

SarbOx is a piece federal legislation from which the Act draws much of its foundation. SarbOx, which passed in 2002, also called for the creation of an auditing board with oversight of company accounting practices. However, SarbOx did not take effect for two years in order to allow companies to have sufficient time to comply with the changes to existing law. The immediacy with which the Act takes effect in California would do more harm than good.

Other provisions in the Act target all NPOs that are registered with the Attorney General of California regardless of their annual revenue. Thus NPOs that do not even have the capacity or need to hire full time staff are subjected to extensive requirements that will hinder their ability to perform their charitable purposes. As Governor Schwarzenegger (2004) stated when signing the Act, “While I support transparency, accountability and curbing unscrupulous activities, I encourage the Legislature to ensure the non-profit community is not subjected to needless bureaucracy...” and, “If this bill results in unnecessary expense to the non-profit community I encourage the Legislature to revisit this issue” (p. 1). With such a disclaimer, the Legislature should revisit the issue before placing such a tremendous burden on NPOs and threatening their livelihood.

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# FOSTERING DEMOCRACY AND REGULATING MARKETS FOR GOOD GOVERNANCE: THE CONTEMPORARY ROLE OF CIVIL SOCIETY IN INDIA

BY APOORV KURUP\*

## INTRODUCTION

Good governance must be distinguished from ‘good *government*.’ While the latter connotes the efficient rendering of public services through maximization of market and quasi-market intervention, the former refers to the ability to deliver goods to the stakeholders, be they civil society, government, corporate enterprises, or a local community. Good governance no longer refers solely to accountable authority; it looks beyond administrative confines to *other* stakeholders. Good governance requires an intricate arrangement, one where stakeholders give and take goods to enhance their ability to gain a better and more dignified life, and have more options. None of these factors are dispensable, especially not in civil society.

The significance of civil society in promoting good governance in India is accentuated by the withdrawal of the state. The New Economic Policy introduced in India in 1991 implemented the policies of liberalisation, privatisation and globalisation (LPG), thereby calling for diminished state presence. When state presence withdraws, civil society plays a crucial role: it fills the void between the receding sphere of influence and the needs of stakeholders. Civil Society contributes significantly to good governance by creating a climate fostering an unhindered transition from a planned, to a market-based economy. As a corollary of less state control, civil society also proselytizes people into a democratic way of life. This brief note addresses these two important contributions civil society has made in India.

The concatenation of various aspects of good governance, democracy and market regulation is the essence of civil society. However, cultures develop their own, individual versions of civil society. Therefore, although observations made in this note are specific to India, they should be understood also as relating to other jurisdictions. For pragmatic reasons, this note restricts itself to analyzing the intercourse between civil society, democracy, and markets. First, because civil society is so broad in scope, a general discussion of its contributions toward good governance would generate more questions than answers. Second, even if civil society is discussed narrowly, it must relate to India’s contemporary problems. In selecting issues relevant to India’s liberalizing economy, any analysis must recognize how difficult it is to instill democratic ethos from the bottom up. Keeping these considerations in mind, it is important to note that specialized study has focused mainly on civil society’s contribution toward bringing together markets and a democratic government. In studying India, the analysis must shift.

## THE IMPERATIVES OF ‘DEMOCRACY’ AND ‘MARKET REGULATION’

This note follows Partha Chatterjee’s definition of the term “civil society” as meaning:

those characteristic institutions of modern associational life originating in Western societies which are based on equality, autonomy, freedom of entry and exit, contract deliberative procedures of decision making, recognized rights of and duties of members, and other such principles.<sup>1</sup>

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According to Chatterjee, civil social institutions survive in India “not as quaint remnants of colonial modernity, but often as serious protagonists of a project of cultural modernization still to be completed.”<sup>2</sup> Lately, the influence of these institutions has been dulled by the fact that much of their activity fails to touch the majority of the population. As Chatterjee remarks, the “domain of civil social institutions . . . is still restricted to a fairly small section of citizens.”<sup>3</sup>

If civil society was an inherent component of a system producing “good” governance, the reach of civil social institutions would be directly proportional to the “goodness” of governance. An extensive network of civil social institutions that co-opts every individual is expected to compel this ideal. It is, therefore, in the best interest of governance initiatives to promote a flourishing civil society. The main question then becomes: where must civil society concentrate its efforts?

The answer to this question depends on how well we comprehend contemporary developments in India. In a post-colonial, deregulated India, democracy and markets were suspicious. Because of India’s deep-rooted and universally acknowledged commitment to suffrage, democracy appeared to be at odds with fundamentalism. Although civil society first arose in India to regulate the social consequences of early commerce, today markets fill the gap left by the shrinking public sector and the weakening bureaucratic hold over enterprise. These trends promise a paradigmatic shift toward freer society.

Civil society is expected to aid developing countries in the ‘transition to competitive politics.’ This includes the consolidation of fledgling democracies and establishment of market-oriented economic policies. In the years since independence, India has already embedded competitive politics, as well as institutionalised democracy, and introduced a market-oriented economy. By providing democracy with a grass-roots base and a system of regulating the market, India has taken steps that are essential to ensuring that market economies remain.

In an effort to promote democracy, civil society would directly engage hitherto ignored sections of the citizenry. This active participation not only helps institutions regulate the void left by a withdrawing state, but also would accord civil social institutions instantaneous respect. However, this does not imply that civil social institutions need to intervene in the democratic process or market affairs in order to survive: the very notion of civil society is premised on societal good. Therefore, their purpose is by definition, altruistic. Civil social institutions are supposed to labour for advancing the cause of every citizen. Their devotion to the furtherance of democracy and economic liberalism is consistent with the philosophy of their existence. Included within this purpose is the promotion of good governance.

## **A VIBRANT CIVIL SOCIETY FOR A FLOURISHING INDIAN DEMOCRACY**

Civil society consists of open and secular institutions that mediate between citizens and the state. Therefore, it comes as no surprise that civil society has helped liberal democratic institutions perform credibly in India. In his article “Mistaking ‘Governance’ for ‘Politics:’ Foreign Aid, Democracy and the Construction of Civil Society,” Rob Jenkins argues that donor agencies of the West perceive the role of

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<sup>1</sup> Chatterjee, Partha, "On Civil and Political Society in Postcolonial Democracies", *Civil Society: History and Possibility*. eds. Sudipta Kaviraj and Sunil Khilnani (Cambridge University Press, 2001): 165-178,172.

<sup>2</sup> Chatterjee, 172.

<sup>3</sup> Chatterjee, 172.

civil society as being instrumental in promoting democratic development in third world countries.<sup>4</sup> Also, according to Geoffrey Hawthorne in “The Promise of ‘Civil Society’ in the South,” civil society “can improve communication between citizens and their governments, raise public morality, create a more satisfactory balance of power, and in these ways shape an acceptable democracy.”<sup>5</sup> By performing these tasks, civil society acts as a countervailing force, curbing authoritarian practices and excessive state intervention.

To ensure the benefit of development to all citizens today, the concept of good governance demands the existence of a participatory democracy. Social inequality has remained a major stumbling block in achieving this objective. A plausible solution to eradicating this barrier is the substantive democratization of India through the involvement of civil society. Drawing upon the definition of Partha Chatterjee, it is axiomatic that civil society is equated with equality.<sup>6</sup> The influence of civil society would motivate social groups to assert their rights to equality. They can do this through means that are entirely within social relations, or through petitions to the government to act against favored groups. Another hurdle to overcome is the threat of the state turning oppressive. India scholar Dhiraj Nayyar opines that the state, in general, and the bureaucracy in particular, also create significant hurdles.<sup>7</sup> A “committed bureaucracy” has often been accused of aiding disruptive political practices and partisan enforcement of laws. In this area also, civil society can help. An effective civil society transforms the relationship between the state and the individual from one of confrontation, to one of cooperation. By cooperating with the state, citizens will gradually assert rights and privileges limiting its intrusive power. This will lead to the formation of associations and pressure groups, where active individuals can pursue their efforts to reign in the wide writ of the state. When this occurs, the once sacrosanct sphere of public policy is subject to private scrutiny. Nayyar calls this rejuvenation “concomitant democracy,” where individuals rely more on inter-personal relations, trusts, norms and networks, rather than the state, for self-rule.<sup>8</sup>

On the other hand, scholar Anurag Mathur contends that civil society in India cannot be considered inherently democratic.<sup>9</sup> He argues that since civil society is associated with liberty and freedom, associations and groups will also form that advocate curbing the autonomy of particular groups.<sup>10</sup> Therefore, it is necessary that the freedoms created by civil society also be counterbalanced by the protection of civil rights.

In light of Mathur’s comment, it is essential for courts and the Constitution to play vital roles in ensuring and protecting civil rights. Judicial activism in India has ascribed previously unfathomable meanings to the fundamental rights guaranteed under Part III of the Constitution. The court has exercised the political technique of applying certain basic values to limit the majoritarian impulse of democracy. In nearly six decades of existence, the Indian Supreme Court has steadfastly adhered to the maxim: ‘your right ends where my nose begins.’ The guarantee against “arbitrariness” in *E. P. Royappa’s case*, the protection of “expression” in *LIC v. Manubhai Shah*, the preservation of “life and liberty” in *Manaka Ghandi*, and

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<sup>4</sup> Jenkins, Rob, “Mistaking ‘Governance’ for ‘Politics:’ Foreign Aid, Democracy and the Construction of Civil Society,” *Civil Society: History and Possibilities*. eds. Sudipta Kaviraj and Sunil Khilnani (Cambridge University Press, 2001): 250-268, 263.

<sup>5</sup> Jenkins, 263.

<sup>6</sup> See Chatterjee, 172 and n. 1.

<sup>7</sup> Nayyar, Dhiraj, “Alleviating Poverty: Role of Good Governance and Constitutional Reform,” *Economic and Political Weekly* 35(42) *Economic and Political Weekly* (October 14-20, 2000): 3739, 3742.

<sup>8</sup> See Nayyar, 3739, 3742.

<sup>9</sup> Mathur, Anurag. “On Civil and Political Society in Postcolonial Democracies”, *Civil Society: History and Possibility*. eds. Sudipta Kaviraj and Sunil Khilnani (Cambridge University Press, 2001): 193.

<sup>10</sup> See Mathur, 193.

recently, the guarantee of the rights of minorities to establish and administer educational institutions of their choice in *T. M. A. Pai*, compose only a miniscule part of jurisprudence on fundamental rights developed by the highest court of India.

The strength and influence of the courts aside, it must also be acknowledged that a mature democracy is a polyarchy of several institutions within the wide compass of 'civil society.' These institutions are drawn into the process of democratization through the electoral system. Strong electoral systems promote sustainable human development, educate citizens to become active participants in the political life of their societies, and allow civil society organizations to fulfill their role as intermediaries. Elections also provide civil social institutions with a forum for expressing opinions on governmental policies and other pertinent issues. Voting in India is essential; it grants civil social institutions the opportunity to develop the social and political rights of the poor, thereby increasing their effectiveness in influencing governmental institutions. By having the power to influence the government, the poor can make the latter more responsive to their needs.

An obstacle to this development exists in the relationship between democracy and a weak civil society. Weak civil societies permit political parties to assume the role of an intermediary between the masses and the elite. Although such a role is important for 'building a sustainable democratic polity,' it also may set a dangerous trend in a country where such political groups easily succumb to "vote-bank" politics. Instances of this behavior is evidenced in the many unfilled poll promises made by numerous political parties that owe allegiance to either a particular caste, religion, or economic strata of society. The fear is that the political parties drawn into this quagmire of appeasement will often disregard the development of real links with the community, democratic internal structures and broad, multi-ethnic programs in favor of vote-bank politics.

#### **ON THE INTERRELATION BETWEEN MARKETS AND CIVIL SOCIETY**

India's first prime-minister, Jawarharlal Nehru, believed that this country must grow as a "socialist democratic state" in which every person had the fullest opportunity for development and the state would control the means of production and distribution. This Nehruvian ideology dominated much of post-colonial Indian history. Socialism was advocated not only as an economic doctrine, but as a "philosophy of life." The belief was that Socialism would create a new civilization, radically different from the present capitalist order. Unfortunately, on the pretext of "welfare," Socialism crated a burgeoning state. The aphorism "government as a benevolent guardian" precipitated neglect of civil society and the curtailment of citizen choice. The judgment of the state machinery ensured that no one but the government had to authority to accord finality.

India's transformation from a command to a market economy in the last years of the twentieth-century marks the point of a rapid decline in state hegemony over matters of the economy, and signifies the opportunity for progress in the form of civil society institutions. The transition dislodged the public sector from commanding the economy and simultaneously relaxed administrative regulation of private enterprise. This engendered a "freer" society. Critics warn that such a positive outlook may be short-lived if civil society fosters unrestrained freedom; bereft of the state as a master, and girdled by the laws that have long ceased to be effective, "free" society will degenerate into chaos. Russia, for instance, was in the throws of similar turmoil soon after the demise of the Soviet Union. It resulted in high crimes rates, irresponsive private enterprise and wanton disregard for the law.

Nonetheless, in contemporary India civil society bears the role of placing markets within wider social arrangements. The belief is that free markets shield society from narrow mindsets, immorality, and crass commercialism. At present, private enterprise is still ignominiously chastised in this country as being a "Frankenstein monster" incapable of furthering social justice. Markets, it is said, are incredibly efficient

at providing goods and services only to those who have the wherewithal to pay. Civil society could change this: free enterprise would be able proselytized *against* mindsets recognizing only monetary incentives, because civil social institutions appeal to deeply held values verging on the religious. Civil social institutions seek to channel the ethics and morals of a particular society into the activities of free enterprise by retrieving and renewing older traditions and introducing them to contemporary reflection about the market economy. To paraphrase an exhortation made by F. Fukuyama:

If the institutions of . . . capitalism are to work properly, they must coexist with certain pre-modern cultural habits that ensure their proper functioning. Law, contract, and economic rationality provide a necessary but not sufficient basis for both the stability and prosperity of postindustrial societies; they must as well be leavened with reciprocity, moral obligation, duty towards community, and trust, which are based in habit rather than rational calculation. The latter are not anachronisms in a modern society but rather the *sine qua non* of the latter's success.<sup>11</sup>

The material advances facilitated by free markets are eulogized, but not at the cost of the superlative free market objectives: citizen welfare and prosperity. To create responsible markets, groups within civil society, known as “advocacy action conditions,” may be formed. These pressure group form linkages with private enterprises and state institutions with a view towards affirmative action on key societal issues, such as welfare reform, health provisions and rural economic development. Further, civil society institutions help develop an accountable, self-regulating, profitable, human, and competitive market systems through a suitably moulded framework of law. In this paradigm, free markets are not entirely “free:” legislations reflect the ethical and moral convictions of civil society and are often the result of intense lobbying with state institutions. A number of concerns which otherwise would have evaded legislation, such as particular problems of environmental pollution and consumer protection, are thereby brought into the fold. Abhorred consumerism is also given the more sublime term, “ethical” consumerism, wherein private enterprise is considered a force for good by tying their profits to labour and social obligations. The interface between civil society and markets strives towards creating a *civil economy*.

Those who favor market economics emphasize the connection between suppression of economic liberty and the diminishment of political and civil freedoms. Here, however, civil society contributes by filling the gaps left by a withdrawing state and merging with these obligations by linking economic freedom to political liberty. Markets provide choices, and choice is the credo of democracy.

## CONCLUDING REMARKS

Ultimately, the role of civil society in good governance is a euphemism for constitutionalism. An extensive document, the Constitution of India, embodies the entire gamut of features that must find a place in every archetype of good governance. Its section on Directive Principles of State Policy, Fundamental Rights, Panchayats (local government authorities) and Municipalities are easily identified. The concept of civil society, with its expansive interpretation and multifarious applications, is also encompassed therein. The meaning of civil society not only finds a place in constitutional theory, but is represented in explicit provisions of the text. Consequently, executing the mandate of the constitution in

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<sup>11</sup> Fukuyama, F. *The End of History and the Last Man*. (New York: Free Press, 1991).

its true spirit would be tantamount to establishing a vibrant civil society. In fact, the emerging concept of constitutional good governance is premised on such a notion of civil society.

Still, at a more rudimentary level, civil society requires not only for citizens effectively participate, but that once engaged they have the freedom to express opinions criticizing the inadequate functioning of government, the market, or other institutions. To ensure that these conditions are satisfied, constitutional guarantees of education and free press must be upheld. Education teaches civic awareness and organizational skills essential for a citizen to contribute to civil society, whereas the freedom of press allows civil society to attack corruption and mismanagement in government and business.

The contribution of civil social institutions in good governance would also depend upon the willingness of the Indian government to listen. Civil society functions as a check on state activities, but is not antagonistic to state functioning. The government functionaries have to realize their role as mediators between citizens and the state, and their obligation to assist the citizens whenever possible. Their amicability towards building associations with civil society organizations will determine the success of good governance initiatives.

In essence, therefore, civil society can be defined as a key interlocutor between the state and society, more often representing the interests of individuals than their conglomerates against a rapacious state. In its most effective form, civil society delineates the boundary of politics and engages the state in a constructive dialogue in determining the “body politic.” Contextualising civil society as an instrument of negotiation invariably creates opportunities for good governance. As freedom, liberty, and the rule of law become the cornerstones of civil society, the security of citizens becomes the paramount concern of the state. From this concern, good governance naturally emerges.

# THE STRUGGLE FOR A CULTURE OF ACCEPTANCE: CIVIL SOCIETY ORGANIZATIONS AT THE OAS

BY MAUREEN MCCARTHY\*

## I. Introduction

In 1999, the Organization of American States passed Resolution 759, entitled *Guidelines for the Participation by Civil Society in OAS Activities (Guidelines)*. The resolution created an accreditation process by which civil society organizations (CSOs) contribute to the policymaking process. Some five years after the *Guidelines*' passage, the resolution receives mixed reviews from CSOs.

True CSO integration depends on many factors: the history of the OAS, US-Latin American Relations, the issue of sovereignty, CSO activism, CSO specialty. This paper explores the various factors that impede CSO assimilation. The first part of the paper lays the groundwork for understanding the OAS. It begins with the OAS mission statement and includes information about its members, permanent observers, finances and history. The next section evaluates the oft-debated definition of civil society and civil society organizations. It also describes the accreditation process. The second part of builds on the OAS background as it analyzes why some OAS member states respond with suspicion and distrust to CSO involvement in OAS activities. The analysis concludes with CSO representatives' analysis of the OAS/CSO dynamic.

## II. Background: What is the OAS?

### a. The OAS Mission

The Organization of American States (OAS) "is the principal forum in the Western Hemisphere for political, social, and economic dialogue as well as legal cooperation among states." The mission, as recorded in the Charter recognizes the seven essential purposes:

a) to strengthen the peace and security of the continent; b) to promote and consolidate representative democracy, with due respect for the principle of nonintervention; c) to prevent the possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among its members; d) to provide for common action on the part of those states in the event of aggression; e) to seek the solution of political juridical and economic problems that may arise among them; f) to promote, by cooperative action, their economic, social and cultural development, and g) to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.<sup>1</sup>

### b. The OAS Member States

The 35 member states and the years they became members are:

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<sup>1</sup> OAS Charter, *opened for signature* April 30, 1948, 2 U.S.T. 2394, O.A.S.T.S. 1-C & 61, art. 2 (entered into force Dec. 13, 1951). The full text of the OAS Charter, as amended by four protocols, can be found at 33 ILM 989 (1997).

Antigua and Barbuda (1981), Argentina (1956), the Bahamas (1982), Barbados (1967), Belize (1991), Bolivia (1950), Brazil (1950), Canada (1990), Chile (1953), Colombia (1951), Costa Rica (1948), Cuba (1952), Dominica (1979), Dominican Republic (1949), Ecuador (1950), El Salvador (1950), Grenada (1975), Guatemala (1955), Guyana (1991), Haiti (1951), Honduras (1950), Jamaica (1969), Mexico (1948), Nicaragua (1950), Panama (1951), Paraguay (1950), Peru (1954), St. Kitts and Nevis (1984), St. Lucia (1979), St. Vincent and the Grenadines (1981), Suriname (1977), Trinidad and Tobago (1967), United States (1951), Uruguay (1955), Venezuela (1951).<sup>2</sup>

#### c. OAS Permanent Observers

OAS permanent observers maintain the right to attend public meetings and provide advice and support.<sup>3</sup> Permanent Observers offer aid for humanitarian programs and gave cash and in kind donations.<sup>4</sup> In 2003, cash donations totaled \$12 million.<sup>5</sup>

The permanent observer countries are:

Algeria (1987), Angola (1991), Armenia (2001), Austria (1978), Azerbaijan (2001), Belgium (1972), Bosnia and Herzegovina (1995), Bulgaria (1997), China (2004), Croatia (1995), Cyprus (1985), Czech Republic (1995), Denmark (2000), Egypt (1977), Equatorial Guinea (1987), Estonia (2002), European Union (1989), Finland (1988), France (1972), Georgia (2002), Germany (1972), Ghana (1996), Greece (1979), Holy See (1978), Hungary (1990) India (1991), Ireland (2000), Israel (1972), Italy (1972), Japan (1973), Kazakhstan (1996), Korea (1981), Latvia (1995), Lebanon (1994), Luxembourg (2004), Morocco (1981), Netherlands (1972), Norway (2000), Nigeria (2003), Pakistan (1988), the Philippines (1999), Poland (1991), Portugal (1975), Qatar (2002), Romania (1990), the Russian Federation (1992), Saudi Arabia (1980), Serbia and Montenegro (2002), Spain (1972), Slovak Republic (2002), Slovenia (2003), Sri Lanka (1996), Sweden (1996), Switzerland (1978), Thailand (1998), Tunisia (1990), Turkey (1998), Ukraine (1994), the United Kingdom (1995), Yemen (1997).<sup>6</sup>

#### d. OAS Structure

The OAS consists of eight bodies, called Organs.<sup>7</sup> They include the General Secretariat, Permanent Council, and General Assembly. Generally speaking, the General Assembly decides the budget,<sup>8</sup> actions

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<sup>2</sup> ENRIQUE LAGOS, Organization of American States, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS SERIES, (Kluwer Law Int'l, 2001). See also State Department Fact Sheet available at <http://www.state.gov/p/wha/rls/fs/37856.htm>; Organization of American States: Background, available at

<http://oas.org/main/main.asp?sLang=E&sLink=.../documents/eng/oasinbrief.asp>.

<sup>3</sup> ENRIQUE LAGOS, Organization of American States, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS SERIES, (Kluwer Law Int'l, 2001) at 24. See also Permanent Observers to the Organization of American States, OAS General Assembly Res. 50, AG/RES. 50 (I-O/71) art (1971).

<sup>4</sup> Office of External Relations, Permanent Observer Countries, Contributions 1998, available at <http://www.oas.org/main/main.asp?sLang=E&sLink=.../documents/eng/outreach.asp>

<sup>5</sup> Office of External Relations, Actividades, 2003-2004, available at <http://www.oas.org/main/main.asp?sLang=E&sLink=.../documents/eng/outreach.asp>

<sup>6</sup> ENRIQUE LAGOS, Organization of American States, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS SERIES, 24 (Kluwer Law Int'l, 2001).

<sup>7</sup> OAS Charter, *opened for signature* April 30, 1948, 2 U.S.T. 2394, O.A.S.T.S. 1-C & 61, art. 53 (entered into force Dec. 13, 1951).

<sup>8</sup> OAS Charter, *opened for signature* April 30, 1948, 2 U.S.T. 2394, O.A.S.T.S. 1-C & 61, art. 55 (entered into force Dec. 13, 1951).

and policies of the Organization as a whole.<sup>9</sup> It meets yearly<sup>10</sup> in various member state cities. Each member state has the right to representation at the General Assembly and has one vote.<sup>11</sup> Decisions are made by “an absolute majority.”<sup>12</sup> The Permanent Council, upon mandates from the General Assembly, promulgates resolutions<sup>13</sup> upon a two thirds vote.<sup>14</sup> Each Member State has one representative at the Permanent Council.<sup>15</sup> The General Secretariat coordinates the duties of OAS organs and performs numerous functions depending according to treaties and mandates.<sup>16</sup> The Secretary General directs the General Secretariat,<sup>17</sup> which is headquartered in Washington, DC.<sup>18</sup> The Secretary General is elected by the General Assembly and serves a five-year term.<sup>19</sup> Other OAS organs, which are beyond the scope of this paper, are: The Meeting of Consultation of Ministers of Foreign Affairs, the Inter-American Commission on Human Rights, the Specialized Conferences, the other Councils (besides the Permanent Council) and the Specialized Organizations.<sup>20</sup>

#### e. OAS History

Simon Bolívar is widely credited with the vision what became the OAS. Bolivar was a South American hero instrumental in gaining Latin America’s independence from Spain. In 1826 he called the Congress of Panama to begin an age of continental solidarity and collective security among Spanish-American states in the hemisphere.<sup>21</sup>

History debates Bolívar’s intentions. Some say his original purpose was to unite only those countries in the former Spanish empire. Others say the original purpose was to unite the continent and create an Inter-American system. The difference is that one “original purpose” involves the US and the other does not. OAS historian Stoetzer attributes the latter purpose to the US Secretary of State in 1889, James G. Blaine. The former originated with the Latin American hero, Simon Bolívar.<sup>22</sup>

In 1890, Washington DC held the First International Conference of American States (the Conference). It established the International Union of American Republics. Eighteen<sup>23</sup> Central and South American nations, including the United States, attended. The Conference consisted of a series of meetings of heads of state. In 1910, at the Fourth Conference in Buenos Aires, the International Union adopted the name Pan American Union.<sup>24</sup>

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<sup>9</sup> OAS Charter, *opened for signature* April 30, 1948, 2 U.S.T. 2394, O.A.S.T.S. 1-C & 61, art. 54a (entered into force Dec. 13, 1951).

<sup>10</sup> (art 57)

<sup>11</sup> (art 56)

<sup>12</sup> (art 59)

<sup>13</sup> (art 70)

<sup>14</sup> (89).

<sup>15</sup> (80).

<sup>16</sup> (art 107).

<sup>17</sup> (109)

<sup>18</sup> (121).

<sup>19</sup> (108).

<sup>20</sup> 53

<sup>21</sup> ENRIQUE LAGOS, *Organization of American States*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS SERIES, (Kluwer Law Int’l, 2001).at 12.

<sup>22</sup> O. CARLOS STOETZER, *THE ORGANIZATION OF AMERICAN STATES* 2 (2d ed., 1993).

<sup>23</sup> STOETZER, *supra*, note 22 at 15. The signatories were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, the United States of America, Uruguay, and Venezuela.

<sup>24</sup> LAGOS, *supra* note 2 at 13.

In 1948 twenty-one countries met in Bogotá, Colombia to sign the OAS Charter. Participating countries pledged to respect each other's sovereignty and support common principles, such as peace and nonintervention. The following nations signed the original 1948 Charter: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela.<sup>25</sup>

Also at the 1948 Bogota meeting, member states signed the American Declaration of the Rights and Duties of Man.<sup>26</sup> The document outlined 28 basic entitlements such as freedom of religion,<sup>27</sup> equality before the law,<sup>28</sup> and the protection of mothers and children.<sup>29</sup> It named 10 areas in which men and women owe debts to society, for example voting,<sup>30</sup> obeying the law,<sup>31</sup> and working.<sup>32</sup> Such international agreements were groundbreaking in 1948, and the OAS remains "an innovator in the field of human rights."<sup>33</sup>

#### f. OAS Relations with the US

When Stoetzer published the first edition of his book entitled *The Organization of American States*, the year was 1965. He called US-Latin American interaction as one of "almost constant confrontation with the United States."<sup>34</sup> In the new millennium, much remains the same.

Until 1923, the US required potential OAS member states to have good relations with the US. It also imposed the rule that the chair of the governing board be the US Secretary of State. At the Fifth International Conference of American States, Latin American countries affirmatively vetoed these rules and made the chair position elective. They also ensured that diplomatic relations with the US were no longer a requirement.<sup>35</sup>

The OAS Charter clearly includes promotion of peace and nonintervention as part of its mission. However, the US repeatedly ignores the mandate. The US invasion of Panama in 1964<sup>36</sup> and the Dominican Republic in 1965<sup>37</sup> indicated nothing but US disregard for OAS standards. Even today, the OAS remains at odds with the US regarding the invasion of Panama.<sup>38</sup> Moreover, when Great Britain decided to reoccupy Argentina's Malvina/Falkland Islands, the US broke its OAS loyalties and sided with Great Britain instead of Argentina.<sup>39</sup> In the 1980s, the US intervened in Nicaragua to train and supply insurgents in order to destabilize the Nicaraguan government.<sup>40</sup>

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<sup>25</sup> OAS Department of Public Information, Key OAS Issues, OAS History at a Glance, (last modified September 2004) <[http://www.oas.org/key\\_issues/eng/GAhistory.htm](http://www.oas.org/key_issues/eng/GAhistory.htm)>.

<sup>26</sup> American Declaration of the Rights and Duties of Man, art. 11, OEA/Ser.L.V/II.82 (1948); *See generally* STOETZER, *supra* note 22 at 244-45.

<sup>27</sup> *Id.* at art. 3.

<sup>28</sup> *Id.* at art. 2.

<sup>29</sup> *Id.* at art. 7.

<sup>30</sup> *Id.* at art. 32.

<sup>31</sup> *Id.* at art. 33.

<sup>32</sup> *Id.* at art. 37.

<sup>33</sup> LAGOS, *supra* note 2 at 16.

<sup>34</sup> O. CARLOS STOETZER, *THE ORGANIZATION OF AMERICAN STATES: AN INTRODUCTION*, (2d ed.) 1965.

<sup>35</sup> LAGOS, *supra* note 2 at 13-14.

<sup>36</sup> STOETZER, *supra* note 22 at 284.

<sup>37</sup> STOETZER, *supra* note 22 at 286.

<sup>38</sup> LAGOS, *supra* note 2 at 17.

<sup>39</sup> STOETZER, *supra* note 22 at 171-73.

<sup>40</sup> *Id.* at 297.

In the 1980s and 1990s the OAS risked irrelevancy in the post Cold War world. Though Latin America did not have a direct stake in the outcome, the US drew an unwilling OAS into the conflict.<sup>41</sup> At the same time, it faced a serious budget crisis, as member states failed to pay dues.<sup>42</sup> The result was an organization that was “mired in dissent and inaction.”<sup>43</sup> Faced with weighty Cold War issues and budget crises, the OAS scrambled to remain a viable entity. In 1985, the OAS added a new official purpose to its mission: promotion of representative democracy.<sup>44</sup>

#### g. Finances

The budget issue was a serious problem that “would never be solved.”<sup>45</sup> Author Stoetzer states that the crisis arose, in part, because the Reagan administration neglected their responsibilities to the OAS. He writes that the “negative [US] position toward all international organizations, and particularly the OAS” contributed to the crisis.<sup>46</sup>

Currently, more than half of the approximately USD70 million OAS “regular” or principal budget depends on US funding;<sup>47</sup> in the early years of the OAS, the US quota was 66 percent.<sup>48</sup> Unfortunately for the OAS budget, the US is not consistent in its dedication to the OAS. Stoetzer writes, “[W]hen it seemed to serve its interests, the United States has seen it appropriate to fulfil (sic) its obligations and take the international organizations with a greater sense of seriousness.”<sup>49</sup>

The OAS is saddled with mandates without the necessary corresponding increase in funding. Even without increasing mandates, the OAS “has a chronic fiscal deficit.”<sup>50</sup> The regular fund, the principal purse for regular operations has “shown a decline in resources from an approved budget of \$88 million to \$76 million. This decline represents a decrease of 13% in nominal terms and 24% in real terms.”<sup>51</sup>

While the budget shrinks, the varied and numerous OAS mandates have not declined. In 2000, a working group charged with evaluating the OAS budget reported, “The General Secretariat has made frequent reference to the contradiction between the growing number of mandates it receives and the fact that the total budget not only does not grow proportionately but also has, in real terms, been shrinking.”<sup>52</sup>

*El Comercio*, a Peruvian newspaper published an article outlining the OAS’ serious budget crisis. Diego García-Sayán, former Chancellor of Peru and Director of the CSO Andean Commission of Jurists, wrote the article. Among many serious allegations, he highlighted how the budget issue affects personnel. He writes,

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<sup>41</sup> *Id.* at 137; *See also* LAGOS, *supra* note 2 at 17.

<sup>42</sup> LAGOS, *supra* note 2 at 18.

<sup>43</sup> *Id.* at 17.

<sup>44</sup> LAGOS, *supra* note 2 at 16. *See generally* OAS Charter, *supra* note 1 at art. 2.

<sup>45</sup> STOETZER, *supra* note 22 at 298.

<sup>46</sup> *Id.*

<sup>47</sup> LAGOS, *supra* note 2 at 91.

<sup>48</sup> *Id.*

<sup>49</sup> STOETZER, *supra* note 22 at 298.

<sup>50</sup> LAGOS, *supra* note 2 at 89.

<sup>51</sup> *Report on Fundraising Covering the 12-Month Period Ending on June 30, 2004*, OAS Permanent Council Doc. 2059, CP/doc. 3956/04 art. 2 (November 2, 2004). *See generally* Amnesty International: Open Letter to the Candidates for the Post of Secretary General of the Organization of American States, num. 7 (March 15, 2005) at <<http://web.amnesty.org/library/Index/ENGIOR620012005>> (referencing in item seven the 10 percent budget cut for the Inter-American Commission and a letter by the Inter-American Court declaring their inability to operate under current budget restraints); LAGOS, *supra* note 2 at 89 (noting the 2000 budget was USD78 million).

<sup>52</sup> *Id.*

Fifty years after its founding, the OAS appears to have hit bottom. Its budget deficit is only the tip of the iceberg of its administrative and financial crisis... The severity of the crisis was demonstrated by the fact that OAS staff members throughout the continent almost did not receive their paychecks on two occasions this year [2004].<sup>53</sup>

### III. CSOs, Civil Society, and Nongovernmental Organizations

#### a. Civil Society Defined?

The definition of civil society is amorphous and changing. John Foster, principal civil society researcher at the North South Institute, said there is “more confusion than light in that [the civil society] area.”<sup>54</sup> According to the London School of Economics (LSE) Centre for Civil Society (CCS), the concept of civil society is contested historically and in contemporary debates.<sup>55</sup> The LSE’s definition is useful for understanding the complexity of the term. It reads,

Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women's organisations, faith-based organisations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy groups.

In one sense, it is difficult to define civil society because the spheres of State and market do not begin and end at clear points. The LSE definition highlights this difficulty by stating, “[T]he boundaries between state, civil society, family and market are often complex, blurred and negotiated.”<sup>56</sup> In another sense, civil society organizations are difficult to define due to their voluntary nature. John Foster of the North South Institute addresses this additional layer of complexity by probing the indefinite types of volunteer organizations that may be included within civil society. Will the term include a nongovernmental organization such as the National Rifle Association (NRA)? The NRA is an organization unassociated with market or state. Similarly, will a humanitarian for profit organization be prohibited from OAS affiliation? For example, Oxfam, has for-profit ventures. Would it be included in the nonprofit sphere of civil society?<sup>57</sup> Civil society thrives on its diversity, but the diversity of representation also confuses the issue. Foster elaborated on the point, noting that “voluntary associations are as different as slave owners and the slaves.”<sup>58</sup>

The difference between nongovernmental organizations and civil society organizations is also important to understand. The OAS defines a civil society organization as “any national or international institution,

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<sup>53</sup> Diego García-Sayán, *The OAS in Search of a New Identity*, El Comercio, (October 27, 2004) at <<http://www.cajpe.org.pe/informa/andean01.htm>> (published online by the Commission of Andean Jurists, an accredited CSO with the OAS).

<sup>54</sup> Telephone interview with John Foster, principal civil society researcher at the North South Institute March 31, 2005.

<sup>55</sup> London School of Economics (LSE) Centre for Civil Society (CCS), (last updated March 22, 2004) at <<http://www.lse.ac.uk/collections/CCS/introduction.htm>>

<sup>56</sup> *Id.*

<sup>57</sup> Foster interview, *supra* note 54.

<sup>58</sup> *Id.*

organization, or entity made up of natural or juridical persons of a non-governmental nature. This includes, among other organizations, non-governmental organizations, academic institutions and universities, think-tanks, the private sector, religious groups, and professional associations.”<sup>59</sup> For OAS purposes, the definition of civil society is the broader term that includes nongovernmental organizations.<sup>60</sup>

Until an accreditation process for CSOs was in place, the OAS used the term NGO instead of CSO. For example, in 1971 General Assembly Resolution 57 formally permitted the OAS to establish “relations” with outside organizations including “non governmental organizations.”<sup>61</sup> The term CSO first appeared 1999 with *Guidelines for the Participation of Civil Society Organizations in OAS Activities*.<sup>62</sup>

Employing a broader term may have been more amenable to the diversity of OAS interests. Dr. Yasmine Shamsie supports this theory, stating,

We don't really know how the debates around defining civil society played themselves out. Supposedly it was just too political to openly debate the question. In other words who should be included, who should have a voice in these mechanisms was controversial. For instance, if a group was hostile to a particular member state it may be less welcome. It's the same with business associations. Is the private sector part of civil society? Some CSOs have argued that the private sector should be excluded. In addition, some governments wanted organizations applying for consultative status to have a charter but many community groups don't have that, so this regulation could have served to exclude the less sophisticated groups. Moreover some NGOs feared that they would be targeted if they were placed on the government registries.<sup>63</sup>

#### b. Accreditation in Brief

According to Shamsie's interviews, the process of enabling CSO accreditation was fraught with controversy. While prior resolutions insisted there was no need for change,<sup>64</sup> the truth, in her view, was that there was a need for change, but member states could not reach a consensus on a new system. The result was to leave the system alone and offer future incremental amendments. Shamsie declared that draft resolutions usually take one year to complete. The two-year lapse between the mandate and the submission of this particular draft resolution indicated the negotiations were contentious.<sup>65</sup>

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<sup>59</sup> *Guidelines for the Participation of Civil Society Organizations in OAS Activities*, OAS Permanent Council Res. 759, CP/RES. 759, art. 2 (December 15, 1999). See generally, *Guidelines*, available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.civil-society.oas.org> (click on OAS Documents).

<sup>60</sup> The Inter-American Development Bank is a separate entity from the OAS, yet part of the Inter-American system of humanitarian organizations, lends money to Latin America in the same way that the World Bank lends money to the world. It includes NGOs in their broad idea of civil society. “Civil society organizations –which include non-governmental organizations (NGOs), community groups, private sector entities and others--, also help improve development effectiveness, stimulate transparency and sound governance, holding governments and policymakers publicly accountable for their policies and actions.” Inter-American Development Bank, About IDB, Civil Society (last updated 2005) at <http://www.iadb.org/aboutus/VI/civilsociety.cfm?language=English>

<sup>61</sup> *Standards on Cooperative Relations Between the Organization of American States and the United Nations, its Specialized Agencies, and Other National and International Organizations*, OAS General Assembly Res. 57, AG/RES. 57, art. 13-22 (April 23, 1971).

<sup>62</sup> *Guidelines*, supra note 59 at op. para. 18

<sup>63</sup> Telephone interview with Yasmine Shamsie, associate professor, Wilfred Laurier University (March 29, 2005) (corrected previous quote, per email dated April 28, 2005).

<sup>64</sup> *Report by the Committee on Juridical and Political Affairs on the Status of Non-Governmental Organizations (NGOs) in the OAS*, OAS Permanent Council, CP/doc.2946/97, §II.2 para. 3 (July 11, 1997) [hereinafter *Status*].

<sup>65</sup> Shamsie, supra note 43 at 11.

The Permanent Council passed the draft resolution on December 15, 1999. The resulting resolution, *Guidelines for the Participation of Civil Society Organizations in OAS Activities*<sup>66</sup> outlines the process for accreditation of CSOs.

In general, the resolution requires that a CSO must be financially sound, supportive of the OAS mission and representative of its members.<sup>67</sup> It must include in its application basic information, such as its location and the names of important officials, the focus of the organization, and how it can further the objectives of the OAS.<sup>68</sup>

The CSO must have a “charter or constitution,” statutes, an annual report, a mission statement, and financial statements that reveal funding sources. Additionally, the evaluation criteria mandate that the organization be “of recognized standing within its particular field of competence and shall be of a representative nature.”<sup>69</sup> The officers of the organization must be accountable to its members, have a legal liaison, and a recognizable headquarters.<sup>70</sup> The financial documents must indicate “transparency” and “independence” thus guarding against corruption and subversive activities.<sup>71</sup>

The application is channeled first through the General Secretariat (the screening office is now called the Summits of the Americas Secretariat) and then to what is now called the Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities (or CISC by its Spanish initials). The CISC then passes its recommendations on to the Permanent Council for a final decision.<sup>72</sup> Member states are invited to “submit comments and request information” regarding an application.<sup>73</sup>

The organization must respond to periodic “inquiries” from the OAS and provide advice upon request.<sup>74</sup> The rules also require that when member states request information from CSOs, they must furnish the information.<sup>75</sup>

Yearly reports are required from CSOs, in which they disclose sources of funding and their financial status.<sup>76</sup> They may participate in OAS conferences upon written request and must disclose the name of the officer attending the conference.<sup>77</sup> The Committee will review the application and make adjustments, as it deems necessary.<sup>78</sup>

Membership may be suspended or canceled on four grounds: deviating from the aims or mission of the OAS, failing to effectively contribute to the work of the OAS, failing to submit reports for two consecutive years, or furnishing falsified documents.<sup>79</sup> In addition, the committee reserves the right to

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<sup>66</sup> *Guidelines, supra* op. para. 18 (1999).

<sup>67</sup> *Id.* at art. 6.

<sup>68</sup> *Id.* at art. 6(a-d).

<sup>69</sup> *Id.* at art. 8(a).

<sup>70</sup> *Id.* at art. 8(b).

<sup>71</sup> *Id.* at art. 8(d).

<sup>72</sup> *Id.* at art. 6; *See generally* Civil Society at the OAS: Registration for Civil Society Organizations

<http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.civil-society.oas.org> (click on Registration to the OAS).

<sup>73</sup> *Id.* at art. 10.

<sup>74</sup> *Id.* at art. 11(a).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at art. 11(c).

<sup>77</sup> *Id.* at art. 12(a).

<sup>78</sup> *Id.* at art. 12(c).

<sup>79</sup> *Id.* at art. 15(a-d).

review a CSO's annual report and its participation in OAS activities.<sup>80</sup> The organization will receive notification and will be provided with "a reasonable opportunity to submit any comments, observations, or information it deems relevant."<sup>81</sup>

A member state may also delay accreditation of a CSO, as was the case with the Andean Commission of Jurists. On October 17, 2003, Venezuela objected to the application of the Andean Commission of Jurists, a Venezuelan CSO. According to an observer, the Venezuelan representative claimed the organization was "anti-democratic and a supporter of the short-lived coup against the government of Hugo Chavez in April 2002."<sup>82</sup> No other member state supported this viewpoint; rather, the Panamanian representative spoke in favor of the Andean Commission of Jurists, noting that a former director of the Andean Commission of Jurists was a respected Peruvian official.<sup>83</sup> The Commission later became a registered CSO.<sup>84</sup>

### c. Accredited CSOs

There are 115 CSOs registered at the OAS. They include worldwide human rights organizations like Amnesty International as well as anti-corruption groups like Transparency International, which has offices in Paraguay, the USA, Germany and Colombia. Smaller organizations include the Esquel Group Foundation of Ecuador, which works for sustainable human development.<sup>85</sup> OAS CSOs include many specialty CSOs like the Huancavilca Foundation, which was founded when, "In 1992, a group of individuals committed to social development converted the Community Development Center of Guasmo, Ecuador, into a nongovernmental organization and named it after the Huancavilca people, who originally lived in what is now the Province of Guayas."<sup>86</sup> The Huancavilca Foundation works to eliminate poverty and social exclusion.<sup>87</sup>

Another special interest CSO is GELEDÉS, which focuses on African-American Brazilians. It was inspired by the, "secret female societies of religious nature existing in the *yoruba* culture, that express the female power over land fertility, procreation and community wellbeing (sic)."<sup>88</sup> The GELDÉS mission is to "fight racism and sexism, promote Afro-Brazilian women in particular and the Afro-Brazilian community in general."<sup>89</sup>

Accreditation of CSOs such as the Latin American Banking Federation (FELABAN) demonstrates the scope of the term civil society. FELABAN's purpose is to "promote relations among the region's credit

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<sup>80</sup> *Id.* at art. 16-17.

<sup>81</sup> *Id.* at art. 18.

<sup>82</sup> Notes of CISC legal adviser, meeting of Oct. 20, 2003 (copy upon request).

<sup>83</sup> *Id.*

<sup>84</sup> Civil Society at the OAS: Registry of Civil Society Organizations Within the Organization of American States, <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.civil-society.oas.org> (click on Registered Organizations).

<sup>85</sup> *Application to Participate Pursuant to Article 6 of the Guidelines for Participation by Civil Society Organizations in OAS Activities*, (Esquel Group Foundation), Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities, Res. 132, CP/CISC-132/0413, art. 1 (September, 2004).

<sup>86</sup> Request from Civil Society Organizations for Permission to Participate in OAS Activities, (Huancavilca Foundation) OAS Permanent Council Doc. 3365, CP/doc.3365/00, art. 1 (12 November 2000).

<sup>87</sup> *Id.*

<sup>88</sup> *Application to Participate Pursuant to Article 6 of the Guidelines for Participation by Civil Society Organizations in OAS Activities*, (GELEDÉS-Instituto da Mulher Negra), Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities, Res. 8, CP/CISC-8/02, art. 1 (October 18, 2002).

<sup>89</sup> *Id.*

agencies, further the standardization of banking practices, and work for the development of its members' countries."<sup>90</sup>

#### IV. OAS Response to CSOs: The *Guidelines* in Practice

##### a. CSOs Infringe on Member States' Sovereignty

The OAS mission statement includes the mandate, "to promote and consolidate representative democracy, with due respect for the principle of nonintervention."<sup>91</sup> The OAS is unique for its observation of nonintervention, compared to the United Nations.<sup>92</sup> Its nonintervention clause is considered "on paper...the most comprehensive clauses on non-intervention in the world, far more than those in the UN Charter."<sup>93</sup> Such unique concern for nonintervention results from past US intervention and fear of future US intervention.<sup>94</sup>

However, this particular mission statement is problematic. Promoting democracy requires intervention. Enrique Lagos of the OAS Legal Secretariat, writes, "[P]romoting democracy is in tension with one of the inter-American system's most cherished and time-honored norms, the right of non-intervention."<sup>95</sup> Civil society organizations are tools of democracy promotion because they disseminate the OAS mission to individuals at a low cost to the organization.<sup>96</sup> As democracy representatives, CSOs become anathema to member states trying to protect their sovereignty. Mexico, for example, vigilantly protects their sovereignty.<sup>97</sup> Perhaps because of its desire to protect its sovereignty, Mexico, as well as Venezuela are cited as the member states most staunchly against CSO involvement in OAS activities.<sup>98</sup>

##### b. OAS officials Object CSOs to Combat a Power Imbalance

Laurie Cole, principal analyst at FOCAL, an OAS accredited CSO, says, "A lot of the countries at the OAS are still really reticent... I don't think the participation is useful...its sort of a showpiece...they're not deep conversations, not good discussion. A lot of the critical information is not shared. But [we are] getting better and more spaces open."<sup>99</sup>

Michael Shifter, vice president for policy at Inter-American Dialogue, a registered OAS CSO, says member states' objections to CSOs are a byproduct of the US-Latin American rift. He noted that there is a "suspicion of [US] motives" on the part of Latin American countries, particularly between the US and Venezuela. Caribbean countries, especially in the environmental arena, resent the oversight and activism

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<sup>90</sup> *Application to Participate Pursuant to Article 6 of the Guidelines for Participation by Civil Society Organizations in OAS Activities*, (GELEDES-Instituto da Mulher Negra), Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities, Res. 88, CP/CISC-88/04, art. 1 (February 24, 2004).

<sup>91</sup> OAS Charter, *supra* note 1 at art. 2.

<sup>92</sup> Lagos, *supra* note 2 at 72-73.

<sup>93</sup> *Id.* at 73, (quoting L.R. Scheman, *The Inter-American dilemma: The Search for Inter-American Cooperation at the Centennial of the Inter-American System* 56 (1993)).

<sup>94</sup> *Id.* at 73.

<sup>95</sup> *Id.* at 72-73.

<sup>96</sup> Cole, *supra* note 43 at 6.

<sup>97</sup> LAGOS, *supra* note 2 at 73 (quoting Mexico's statement at the Protocol of Washington, which provided the possibility that a member state's OAS privileges may be suspended in the event that its government is overthrown by force (33 I.L.M. 1005 (1994)) Mexico wrote, "It is unacceptable to give to regional organizations supra-national powers and instruments for intervening in the internal affairs of our states").

<sup>98</sup> See generally Shamsie, *supra* note 43, at 11; Telephone interview with Michael Shifter, vice president of policy, Inter American Dialogue (March 29, 2005); LAGOS, *supra* note 2 at 73.

<sup>99</sup> Telephone interview with Laurie Cole, principal analyst, FOCAL (March 30, 2005).

of US civil society organizations. There is “a sense of Latin American countries that CSOs based in the US focus their attention on them; they are being monitored, evaluated...and don’t look enough at the US.” Shifter senses that the suspicion would not be there if there weren’t such a great power differential between the US and other countries. It is difficult to manage an “overwhelmingly influential...superpower.”<sup>100</sup>

One official in Shamsie’s report noted, “If the US alone was pushing the CSO agenda forward, there would be the perception that this is just another cycle of the United States controlling events in the hemisphere.”<sup>101</sup> Mexico, which plays a significant leadership position in the region, took a strong stance against expanding CSO involvement.<sup>102</sup>

The entrance of Canada<sup>103</sup> diffused some of friction regarding the power differential. With Canada a strong proponent of the initiative and the US also supporting the measure, the issue looked less like the US was imposing its will on others. But the two countries’ powerful votes were, in the end, only two votes.<sup>104</sup>

Central and South American countries also suspected that US and Canadian funded CSOs would push their donors’ agendas.<sup>105</sup> Given the political history between the Northern and Southern Hemisphere countries, leaders in Latin America have reason to try to protect their countries from the Northern Hemisphere agenda.<sup>106</sup> However, most of the CSOs are funded by the US and Canada, so the opposition of Central and South America may be less discontent with CSOs and more opposition to the US.

Shamsie, interprets these power issues in a historical sense. “Who has the power, who has the resources, especially in a situation of scarcity...When there is only so much resource, power, it become more about that...In very particular circumstances, depending on the regime, Guatemala, with a long history of military rule...persistent influence of military in civilian affairs, where CSO groups are seen as insurgents.”<sup>107</sup>

While not an exhaustive list, the following list of Latin America guerrilla and military are notable examples that support Shamsie’s theory:

Sendero Luminoso (Shining path) in Peru in the 1990s; Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN) of Colombia and overflowing into Venezuela; the ‘Dirty War’ in 1970s Argentina; Che Guevara in Bolivia; the leftist Araguaia guerrilla war in Brazil; Augusto Pinochet in Chile; Farabundo Marti National Liberation Front (FMLN) in El Salvador (1980-2000); the Guatemalan National Revolutionary Unity (URNG in Spanish) in Honduras (1982-1998), the United Fruit Company strike and the Communist insurrection that ensued (1954); Zapatistas in Mexico (1994-present); Nicaraguan Contras and

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<sup>100</sup> Shifter, *supra* note 98.

<sup>101</sup> Shamsie, *supra* note 43 at 5.

<sup>102</sup> *Id.* at 5.

<sup>103</sup> See Department of Ministers of International and Foreign Trade, *Canada and the OAS: History* (last updated, July 10, 1004) at <http://www.dfait-maeci.gc.ca/latinamerica/oas-history-en.asp> (Canada joined the OAS as the 33<sup>rd</sup> member state in 1990).

<sup>104</sup> See *supra* note 11 (referencing the OAS Charter, which says that each country has only one vote).

<sup>105</sup> Shamsie, *supra* note 43 at 5.

<sup>106</sup> See generally LARS SCHOULTZ, *BENEATH THE UNITED STATES. A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* (1998) (exposing the shortcomings of US diplomacy and attributing the failures to lack of cultural knowledge and imperialist goals).

<sup>107</sup> Shamsie, *supra* note 63.

Sandanistas (1980s); Tupac Amaru Revolutionary Movement (MRTA) and Sendero Luminoso in Peru (present); National Liberation Army in Uruguay (1960s and 70s).<sup>108</sup>

An “insider” in Shamsie’s piece noted, “Fifteen years of democracy has not wiped out the memory of what these groups stood for and the fact that they were fighting against the State. Some are worried that they will not know the truth about the CSO. Are they dialoguing with Sendero Luminoso? The Ford Foundation?”<sup>109</sup>

### c. Service Delivery

Some opponents of CSO participation in the OAS urge that CSOs are “redundant,” that is, by including them in the OAS realm of aid distribution and policymaking, they are undermining the efforts of officials who were elected by the people.<sup>110</sup> Shamsie describes this as the “belief that the current systems are sufficient—because governments are elected, they *de facto* represent the views of the people who elected them.”<sup>111</sup> Indeed, one government official’s view was that he, as an elected official representing the people, was civil society.<sup>112</sup>

One ambassador, who remained confidential in Shamsie’s report, cited a pertinent example of aid given during Hurricane Mitch. Eighty percent of aid came from CSOs. He noted that when foreign actors distributed aid instead of their home government, the government’s legitimacy was undermined. If the aid had been channeled through traditional means, their belief in the ability of the state to protect them would have been heartened rather than undercut.<sup>113</sup>

## V. Recent Progressive Developments for CSOs

### a. The Voluntary Fund

The proliferation of Northern Hemisphere CSOs<sup>114</sup> remains problematic, as it sends the message of domination and imposition of power. However, on April 27, 2004, the Permanent Council approved a voluntary fund to support greater CSO participation.<sup>115</sup> Lower income countries did not have the means to travel to OAS meetings while representatives of CSOs from higher income countries were over-represented at meetings. This special fund allows one representative from an accredited CSO to obtain a travel and per diem allowance in order to ensure “equitable geographic representation as well as relevant experience and background in the subject matter in question.”<sup>116</sup>

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<sup>108</sup> Dr. Antonio Rafael de la Cova, Indiana University in Bloomington, Latino Studies Resources at <http://www.latinamericanstudies.org/home2.htm>.

<sup>109</sup> Shamsie, *supra* note 43 at 5. OAS officials are not the only ones claiming multilateral organization partnership with CSOs/NGOs can be problematic. A 2004 *Economist* article criticized the NGOs participating in the European Union (EU). It questioned how unbiased the alleged NGO can be when it is funded by the EU itself. The article implied that with such overlapping interests, the door is open to corruption. *A Rigged Dialogue with Society: How independent are the civil-society organizations beloved by the European Commission?*, THE ECONOMIST, October 23, 2004, at 54.

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 7.

<sup>114</sup> Cole, *supra* note 43 at 16. In 2003, registered CSOs totaled 67. Over half (32) were from North America; Twenty-six of the 32 were from the US.

<sup>115</sup> *Specific Fund to Support the Participation of Civil Society Organizations in OAS Activities and the Summits*, OAS Permanent Council Res. 864, CP/RES. 864 (1413/04) (April 27, 2004).

<sup>116</sup> *Id.* at op. para. 6.

During a January 2005 “Roundtable” meeting between CSOs and the OAS Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities, the fund demonstrated its effectiveness. Of 52 requests to receive assistance with travel expenses, 38 organizations received financing from USAID and the Open Society Institute. The OAS claimed it established a more equitable CSO balance by way of gender and geography.<sup>117</sup>

The Indian Law Resource Center corroborates OAS claims of success. Indigenous Law Research Center program associate Esperanza Lujan states that she is convinced of the success of the fund. She notes that the OAS also offers funding for CSOs to attend the three to five day indigenous caucus meetings occurring prior to the formal OAS meetings.<sup>118</sup>

#### b. The Requirement to Negotiate with CSOs Before Assembly Meetings

Resolution 1915, entitled *Increasing and Strengthening Civil Society Participation in OAS Activities* includes a mandate that member states embrace “as a regular activity” the “informal dialogue” between heads of the delegation and representatives of CSOs before General Assembly meetings.<sup>119</sup> This is the first time a resolution required any sort of dialogue with CSOs at a specific time and place.

Despite the landmark resolution, some member states try to “leapfrog the consultation process.” They appear at international summits and declare no need to consult with the CSOs present because they sought CSO consultation on the national level prior to the meeting. They do not indicate the qualitative nature of the consultation.<sup>120</sup>

Amnesty International acknowledges this phenomenon by writing that OAS resolutions are more progressive than the OAS culture. In other words, the OAS has reached the stage where some of the member states are CSO friendly. However, the member states that do not support the resolutions find loopholes. In a March 2005 piece entitled *Open Letter to the Candidates for the Post of Secretary General of the Organization of American States*, Amnesty International described their view of the dominant OAS culture toward CSOs.

With a few exceptions, organizations from civil society in the continent still have very limited involvement in OAS activities, due to the bureaucratic inertia and interests which prevail within the organization as well as the political will of some governments which try to prevent such involvement. This happens despite the commitment made by the OAS as an institution...<sup>121</sup>

#### VI. Patterns in Policymaking: When does the OAS respond to CSOs?

The broadness of the OAS mission and geographical range makes blanket conclusions nearly impossible. CSOs may range from female Afro-Brazilian activists to anti corruption groups. However, through

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<sup>117</sup> *Summary of Recommendations from Civil Society Representatives, Roundtable with Civil Society and Special Session of the CISC: Creating Employment to Confront Poverty and Strengthen Democratic Governance*, Summit Implementation Review Group, GRIC / SIRG, (GRIC inf 3/05), preambular para. 8, (February 14, 2005). (Online at [http://www.civil-society.oas.org/Events/Roundtable20050124/INF3\\_Roundtable\\_Summary\\_of\\_Recomendations\\_ENG.doc](http://www.civil-society.oas.org/Events/Roundtable20050124/INF3_Roundtable_Summary_of_Recomendations_ENG.doc))

<sup>118</sup> Telephone interview with Esperanza Lujan, Program Associate, Indian Law Resource Center (April 7, 2005).

<sup>119</sup> *Increasing and Strengthening Civil Society Participation in OAS Activities*, OAS General Assembly Res. 1915, AG/RES. 1915 (XXXIII-O/03) para. 1-3 (June 10, 2003).

<sup>120</sup> Shamsie, *supra* note 63.

<sup>121</sup> Amnesty International: *Open Letter to the Candidates for the Post of Secretary General of the Organization of American States*, para. 9 (March 15, 2005) at <<http://web.amnesty.org/library/Index/ENGIOR620012005>>

interviews with different types of CSOs, one can gauge (1) how the OAS reacts to sharing information with CSOs about certain subjects and (2) which types CSOs are more satisfied with OAS response.

#### a. Information Sharing

In June 2003, Laurie Cole wrote a stinging critique of OAS treatment of CSOs. She particularly mentioned the “lack of timely, accessible and complete information.”<sup>122</sup> For example, FOCAL, based out of Ottawa, Canada, received an invitation to participate in an OAS meeting two days before the event was to occur.<sup>123</sup> Shamsie corroborates Cole’s critiques by mentioning similar instances of the OAS not responding to *specific* information requests. For example, if a CSO wished to see the minutes of a particular sustainable development meeting, the OAS is not likely to respond.

Given OAS administrative and budget issue, a natural question is whether the lack of response is inefficiency or a purposeful attempt to marginalize CSOs. Shamsie says, “Probably... a level of inefficiency, but also a very convenient... strategy of not giving certain groups the information that they want.”<sup>124</sup> The OAS, she says, has a tendency to respond to specific information requests in generalities. If an organization were to request information on country conditions, they would receive an answer of “a quantitative analysis.” For example, this is how many of you are concerned about this issue; this percentage of CSOs expressed interest in this area. Shamsie continues, “it [the process of CSO participation] is not a dialogue of the issues raised... Governments only feel they need to explain their rationale to the electorate. That’s who they’re accountable to..that’s why they’re in office.”<sup>125</sup>

#### b. Typifying CSOs Satisfied with OAS Response

OAS effectiveness and openness with regard to CSOs depends on the CSO agenda and approach. Shamsie notes, “CSOs are so varied; some have no complaints, some have problems with procedure, some say they have no impact, not listened to, that there is a strategy to undermine or sideline them.”<sup>126</sup> For example, Shifter from the Inter-American Dialogue admitted he did not experience friction with member state representatives. On the contrary, he seemed to see the partnership as an effective working relationship. He recognizes there are all kinds of CSOs, but Inter-American Dialogue has an agenda and a style that “finds that balance” between advocacy and conciliation. Other CSOs, he said, “spend a lot of time being critical.” To be an effective contributor to the policymaking process, Shifter suggests that CSOs “become more professional... come up with alternatives... The OAS grapples with serious problems; CSOs must have practical ideas.”<sup>127</sup>

On the other hand, FOCAL, a more activist group, says that even though some agendas may not be popular, the conciliation that Shifter suggests prevents the OAS from seeing the ultimate truths. She says it is helpful for “people to blue sky—[to say] this needs to be on the agenda.” While Shifter would probably deem the FOCAL approach as impractical, Cole declares, “You need voices that say that.”<sup>128</sup>

OAS response to CSOs also depends on the field of expertise. In 2003, Cole argued that environmental discourse was far more agreeable for OAS officials. Indeed, the Bolivia Conference on Sustainable

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<sup>122</sup> Cole, *supra* note 43 at 18.

<sup>123</sup> *Id.*

<sup>124</sup> Shamsie, *supra* note 63.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Shifter, *supra* note 98.

<sup>128</sup> Cole, *supra* note 99.

Development was a remarkable highpoint of NGO involvement.<sup>129</sup> The conference's host fostered NGO involvement by allying with The World Resource Institute, a non-governmental organization, to plan the event.<sup>130</sup> In addition, two NGO consultation groups advised member state delegations. The unprecedented exercise was well received and apparently helpful to member states.<sup>131</sup>

Despite unprecedented CSO participation at this conference, the areas of environment and sustainable development contrasts with CSO participation in the area of trade. Environmental groups, which are frequently involved in sustainable development discussions, pose less of a threat to member states than trade groups. The contrast is due, at least in part, to the politics of trade and the history of secretive trade negotiations. Trade negotiations are "closed and opaque."<sup>132</sup> John Foster, who specializes in the topic of free trade, says that the negotiations started to open, but derailed when post 9/11 higher security measures were implemented. Also, after the FTO protests in Seattle, trade negotiations are not as welcoming to CSO participation.<sup>133</sup>

The passage of time may have expanded the scope of topics that are open to productive OAS/CSO discussion. In a recent interview, Cole said, "A lot of the countries at the OAS are still really reticent [to engage in dialogue with CSOs]." Yet she hinted that the culture of the organization has changed. It has become "unpolitically correct-verboten-to not make the effort to discourse with civil society. It is no longer acceptable to say, 'We won't.'"<sup>134</sup>

OAS' reputation as a forerunner in the area of human rights extends to the area of CSO dialogue. John Foster notes that there is a "long history of civil society and OAS commissions in this area."<sup>135</sup> Southern Hemisphere CSOs are also well represented in the area of human rights.<sup>136</sup> Esperanza Lujan of the Indian Law Resource Center, an OAS accredited CSO, is pleased with indigenous peoples human rights groups' input in the passage of resolutions. Regarding the draft declaration of indigenous peoples, she notes that the OAS understands that they "can't pass this declaration without our [CSO] input."<sup>137</sup> However, OAS recognition did not come without concerted, exhaustive advocacy efforts. "[It has] taken several years...[but] indigenous peoples' representation is now more institutionalized."<sup>138</sup> "Indigenous peoples have been very successful," she adds, "Member states are not able to shy away from that...It is accepted as the norm."<sup>139</sup>

Lujan attributes indigenous human rights groups' success to vigorous advocacy of a collective nature. Indeed, collective advocacy is a hallmark of the CSO effort. Both Cole and Lujan agree that they owe many successes to collaborative working groups and information sharing.<sup>140</sup>

Despite differences in approaches and areas of expertise, all types of CSOs acknowledge that government officials make the final decision. Shifter states, "CSOs have to recognize this is a governmental

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<sup>129</sup> See Shamsie, *supra* note 43, at 18 (describing the Summit as an NGO "lovefest").

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 19.

<sup>132</sup> Roberto Patricio Korzeniewicz & William C. Smith, *Protest and Collaboration: Transnational Civil Society Networks and the Politics of Summity and Free Trade in the Americas*, North South Center Press, September 2001, at 19.

<sup>133</sup> Foster, *supra* note 54.

<sup>134</sup> Cole, *supra* note 99.

<sup>135</sup> Foster, *supra* note 54

<sup>136</sup> *Id.*

<sup>137</sup> Lujan, *supra* note 118.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*; Cole, *supra* note 99.

organization—they should have influence but at the end of the day the people that make the decisions are government officials.”<sup>141</sup>

## VII. Conclusion

The degree of satisfaction with OAS response greatly depends on CSO agenda and approach. OAS response also depends on the topic for discussion. In the “opaque” area of trade, the exchange will be strained, while an environmental discussion traditionally will be more fruitful. The area of human rights seems to be a unique area that benefits from a progressive OAS agenda.

But CSOs are making progress. The voluntary fund provides greater geographical diversity and allows geographically isolated CSOs to attend meetings. A culture of CSO exclusion is becoming unacceptable. CSOs seem hopeful for the future. However, the OAS suffers from chronic budget shortfalls and unfunded mandates.

CSOs must contend with the distrust and suspicions arising from historical tensions between the US and Latin America. Some member states view CSO participation in negotiations as a threat to their sovereignty. Others see CSOs as an indirect way for the US to oversee other nations’ policies.

As long as the OAS remains crippled with internal division and financial woes, CSO progress in the areas of acceptance and involvement in policymaking will be challenged. Yet CSOs have overcome significant obstacles and are poised to continue such progress through comprehensive collaborative efforts and repeated demands for a culture of acceptance.

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<sup>141</sup> Shifter, *supra* note 98.

# STATE FINANCIAL SUPPORT POLICIES TOWARDS NOT-FOR-PROFIT ORGANIZATIONS IN HUNGARY AND IN KAZAKHSTAN

BY LEILA TANAYEVA \*

## INTRODUCTION

One of the most important challenges for countries in transition in Central and Eastern Europe and Central Asia is the development of a financially stable and mature not-for-profit sector<sup>1</sup>. This process involves a major re-thinking of the relations between the state and not-for-profit organizations (NPOs) from opposition and control to the understanding of necessity for non-restrictive legal environment and state financial support of NPOs.

The state financial support to NPOs was commonly thought to undermine the sector's independence and lead to its vulnerability to state control. That is why the idea of state financial support was not initially welcomed in the newly democratic countries. Now, however, it is becoming more acceptable that clear policies on state regulation of the sector's financial income, including the state financial support are needed. In addition, they are highly recommended by such international instruments, as the World Bank Handbook on Good Practices for Laws Relating to Non-governmental Organizations, the International Guide to Nonprofit Law (by Lester Salamon, John Wiley & Sons), and the OSI Guidelines for Laws Affecting Civic Organizations.

Much has been written about Hungarian experience in state regulation of not-for-profit activities. Hungary attracted the attention of international researchers as a country that experienced a rapid development of not-for-profit sector and the Government willing to adopt progressive legislative provisions. The European Center for Not-for-Profit Law<sup>2</sup>, for example, has collected a vast library of resources related to not-for-profit activities in Hungary, including laws, reports and policy papers. Moreover, Hungarian legal researchers themselves are being active in exploring the issues related to not-for-profit organizations and their financial sustainability. Eva Kuti, Agnes Vajda, Aniko Kaposvari, Gabor Porsch, Nilda Bullain and other Hungarian authors dedicated their time to research of legal regulation of NPOs in Hungary.

After the adoption of 1% law, the literature on Hungary became an important source of information for other countries willing to adopt similar systems. NPOs themselves started to collect information about effects and results of 1% law and subsequent creation of the National Civil Fund. NIOK, Nonprofit Information and Training Center<sup>3</sup> has generated vast library of resources related to Hungarian experience in NPO regulation. In addition, the researchers usually give their analysis and recommendations on improvement of the situation.

In Kazakhstan, state financing of NPOs is a new issue that has to be dealt with by Government and NPOs themselves. Because of lack of experience of state financing and recent developments (particularly, development of Draft Law on Social Contracting), not much research has been done in the area as it is

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<sup>1</sup> In this work, the not-for-profit organisations, also referred as NPOs, define voluntary membership and non-membership organisations that do not pursue economic activities as their primary purpose and do not distribute profit.

<sup>2</sup> The International Center for Not-for-Profit Law, <<http://www.icnl.org>>.

<sup>3</sup> Nonprofit Information and Training Center Foundation, <<http://www.niok.hu>>.

still difficult to assess the impact of new policies. The Central Asian office of International Center for Not-for-Profit Law (ICNL) and its lawyers (particularly, Vsevolod Ovcharenko) are writing commentaries to the laws and policies and advocating for their improvement. Also, there is a contribution from international human rights organizations (such as Justice International<sup>4</sup>) to analysis of Kazakhstani laws. However, there is no detailed review of state financial support nor there are recommendations on introduction of percentage legislation in Kazakhstan.

This article, thus, focuses on the state's role in ensuring financial sustainability of NPOs. More specifically, it discusses the ways the state can promote or hinder financial sustainability of the sector through legal regulation on the example of Hungary, as a pioneer of NPO legal reforms in the region. This research compares the Hungarian and Kazakhstani provisions on state regulation of NPO financial status and recommends Kazakhstan on improvement of the situation. Particularly, it recommends Kazakhstan to establish a state organ responsible for communication with NPOs, and introduce percentage legislation as a tool for sustaining the financial status of NPOs and general democratization of the country. The recommendations given in this work do not suggest copying the Hungarian example, but rather take into account the issues that arose in Hungary after percentage legislation was introduced.

### **State Indirect and Direct Support to NPOs in Hungary and in Kazakhstan**

It was common in countries that started transformation from socialist center-planned regime to democracy in 1990s, involving major changes in state policies towards civil society organizations and citizens' initiatives, to oppose the idea of governmental financial support to NPOs. This opposition resulted from societal perception of civil society organizations built during the socialist times, namely, the expectation that only NPOs that are financially independent on Government are able to oppose the state policies and serve as a check to governmental powers. The state financial support was thought to undermine the sector's independence and impartiality.

Thus, confrontation of the state and civil society organizations was the accepted model of relations both in Hungary and Kazakhstan for a long period of time. This confrontation continued in the early 1990s too, when both countries started their transition processes, mainly due to history of oppression of dissident civil society movements and state support of pro-government organizations. In Hungary and Kazakhstan, those usually were the associations of disabled people, the children's rights organizations, the environmental NPOs and trade unions, in other words, organizations, which did not have a political agenda in their activities.

This discourse helps to understand why the idea of state financial support appeared unacceptable for civil society circles and government officials in transition countries for a long period of time. In Kazakhstan, for example, the state financing of NPOs is still prohibited by the 1995 Constitution. The Constitutional Court upheld this prohibition in 1997, saying "any financial interference of the state into NPOs' internal affairs from both national and local budget put NPOs into financial dependence on the state".<sup>5</sup> Even though important changes occurred in the sphere, this decision shows how unacceptable the notion of state financing of NPOs was in Kazakhstan at that time.

This attitude was gradually changing in Eastern Europe after establishment of a new regime. Hungary, often called a pioneer in the sphere of state financing techniques, has not only increased the amount of

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<sup>4</sup> Law Association Justice International, <<http://www.justint.org/>>.

<sup>5</sup> Postanovlenie Konstitucionnogo Soveta RK ot 29 aprelya 1997 g. N 8/2 Ob oficialnom tolkovanii punkta 2 stati 5 Konstitucii Respubliki Kazahstan [Decision of the Constitutional Council from 29 April 1997, N 8/2 on Official Interpretation of paragraph 2 of Article 5 of the Constitution of the Republic of Kazakhstan] (visited October 29, 2004) <[http://www.icnl.org/library/nis/Laws/KazDecisionConCourt8-2\(rus\).htm](http://www.icnl.org/library/nis/Laws/KazDecisionConCourt8-2(rus).htm)>.

state support provided for NPOs, but also radically changed its type from usual budgetary allocations to support of different programs, such as education and social services<sup>6</sup>. More state institutions, and after the adoption of unprecedented percentage law, the taxpayers themselves, started to take part in financing NPOs through percentage legislation.<sup>7</sup>

Following the Hungarian example, more countries in Central and Eastern Europe and former Soviet Union started adopting percentage and procurement legislation: Slovakia, Lithuania, Poland, and Romania have already introduced percentage laws and Ukraine, Georgia and Macedonia are currently working towards it.<sup>8</sup> There are definite changes in regulation of NPOs in Central Asia too. Kyrgyzstan, for example, adopted amendments to the Tax Code, exempting humanitarian aid, grants, charity donations and membership fees from income tax. Kazakhstan has adopted the state policy on civil society in 2003 that upholds the state financial support to NPOs. So, there is a clear trend in the Eastern European and Central Asian regions to adopt a more favorable financial policy towards NPOs.

A number of arguments can be used to advocate for the idea of state delegation of its responsibilities to NPOs: first, the not-for-profit organizations usually have more flexible and less bureaucratic structures than state bodies which allows more time-effective solution of social problems. As they work closely with the population, they are able to identify and react to social problems faster than the Government. Another factor, which is beneficial for the state, is the cost effectiveness. NPOs use different sources of financing: they get funds from individual donations, grants, membership fees and income from economic activities. When there is no more demand for certain social service, or the state has no money for rendering this service, it is much easier for the state to stop financing an NPO than to dissolve a state organ.<sup>9</sup> In general, this delegation leads to de-centralisation of power and activation of the citizens' initiatives.

To avoid the preferential treatment of NPOs in providing financial support, several methods can be employed by the state and by NPOs. These methods include introduction of percentage philanthropy and creation of organ responsible for distribution of budgetary funds among NPOs, consisting of state and NPO representatives. The example of such a system is Hungary, the pioneer in the Eastern European region in adopting the percentage law and creation of the Civil Fund, which is to be discussed in Chapter IV of this work. NPOs at that shall be transparent in their financial matters and raise the public awareness of their activities.

The state support to NPOs provided in countries under review is "indirect", which presupposes the tax exemptions on NPO activities, and "direct", which takes different forms in different countries, but usually includes grants, subsidies, and contracts of the Government with NPOs for conducting certain, usually public benefit activities. While indirect financial support is widely accepted throughout the world and is now an inalienable principle of operation of NPOs in any country, direct government support is still in the process of introduction in many countries. For Kazakhstan, being one of those countries that introduced the procurement legislation just recently, it is very important to observe the practices of other countries and draw its conclusions.

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<sup>6</sup> István Csóka, *The Relationship Between the Governmental and Civil Sectors in Hungary*. The International Journal of Not-for Profit Law [IJNL], Volume 3, Issue 1, at 1. (visited November 29, 2004) <[http://www.icnl.org/journal/vol3iss1/ar\\_csoka1.htm#\\_ftnrefl](http://www.icnl.org/journal/vol3iss1/ar_csoka1.htm#_ftnrefl).

<sup>7</sup> *See id.*

<sup>8</sup> Percentage philanthropy workshop, held on October 16-21, 2004 by the Nonprofit Information and Training Center Foundation (NIOK) in Budapest has gathered NPO representatives from Georgia, Ukraine and Macedonia to help them advocate for introducing the percentage systems in their countries.

<sup>9</sup> Conference. *Gosudarstvenny Socialny Zakaz (State Social Order)*, p.44 (2001). Almaty.

## Indirect State Support: Tax Preferences and Tax Exemptions

In most countries, NPOs are exempt from corporate tax, individual income tax, VAT and some other taxes as applicable. There is some disagreement over whether the 1% designation in Hungary is one of the means of an indirect Government support, as suggested by Istvan Csoka, or a type of private philanthropy. Nilda Bullain, for example, thinks “percentage designation is not a donation, a tax benefit, or a tax incentive in the strict sense of these concepts, but that it may, nevertheless, have a significant effect on philanthropic behavior in transitional societies”.<sup>10</sup> It could be said that, even if it does not strictly fall under definition of the state support or private philanthropy, it still contributes to development of both. Thus, the percentage is allocated from money that would normally go to state budget, and it also requires individuals to make a conscious choice of managing their funds.

As NPOs do not generate profit from their activities, the preferential tax treatment is essential for sustaining their status. Black’s Law Dictionary includes the tax benefits in the definition of not-for-profit organisation, showing the close link between not-for-profit status and the tax exemption and providing that “[non-profit corporation] ... [is] usually afforded special tax treatment”.<sup>11</sup>

Tax preferences are considered essential in creating the enabling environment for development of not-for-profit activities.<sup>12</sup> The tax preferences do not only free NPOs from the burden of taxpaying, but also allow them diversifying their sources of income through encouraging different financing techniques, such as corporate and individual donations, or pursuing economic and fundraising activities. Clearly, a well worked out system of preferential tax treatment of NPOs contributes to positive development of not-for-profit sector.

The countries of Central and Eastern Europe, including Hungary, have made a strong progress towards reforming of their tax legislation to afford a more enabling fiscal environments for NPOs since 1990s, when most changes in legislation occurred.<sup>13</sup> Hungary is one of the countries that developed the innovative technique of financing, namely, 1% legislation that allows the individual taxpayers to designate a part of their income to the NPO of their choice.<sup>14</sup> Central Asia has also seen major changes in fiscal legislation, one of the examples being abolition of taxes on entry and membership fees.<sup>15</sup> Kazakhstan was one of the countries that has made the most notable advancement, along with Ukraine and Kyrgyzstan, that have broadened the scope of organizations entitled to tax-exempt status.<sup>16</sup>

### ***1. Types of Tax Exempt Organizations***

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<sup>10</sup> Nilda Bullain. *Explaining Percentage Philanthropy: Legal Nature, Rationales, Impacts*. IJNL. Volume 6, Issue 4 (September 2004) <[http://www.icnl.org/journal/vol6iss4/ar\\_bullain.htm](http://www.icnl.org/journal/vol6iss4/ar_bullain.htm)>.

<sup>11</sup> Black's Law Dictionary, “corporation”, (8th ed. 2004).

<sup>12</sup> For a detailed analysis of tax laws in Central and Eastern Europe, see *Survey of Tax Laws Affecting NGOs in Central and Eastern Europe*. International Center for Not-for-Profit Law available at <<http://www.icnl.org/programs/cee/pubs/taxsurvey/p10.pdf>>.

<sup>13</sup> Survey on Tax Laws Affecting the Non-governmental Organisations in Central and Eastern Europe. International Center for Not-for-Profit Law (last visited November 15, 2004) <<http://www.icnl.org/programs/cee/pubs/taxsurvey/p10.pdf>>.

<sup>14</sup> Czech Republic is another country that introduced the innovative law on endowment funds and permitted the tax benefits on earnings on the invested funds. For a more detailed description, see *supra*.

<sup>15</sup> Survey on Tax Laws Affecting Non-Governmental Organisations in Newly Independent States. International Center for Not-for-Profit Law [*hereinafter* Tax Survey]. (October 2003). <<http://www.icnl.org/LIBRARY/nis/reports/NISTaxSurvey.pdf>>.

<sup>16</sup> *id* at p. 2.

Both Hungarian and Kazakhstani fiscal systems distinguish between *the types of organisations* permitted to seek the tax exemptions. Thus, the Kazakh Tax Code of 2001 (amended in 2003) determines two types of entities entitled to tax benefits: “non-commercial organisations” (NCOs) and “social-sector organisations” (SSOs). In Hungary, all registered non-governmental organizations are entitled to tax benefits, at that, the organizations recognized as Public Benefit Organizations (PBOs) and prominently PBOs receive greater benefits. The systems in two countries are somewhat similar, as the SSOs in Kazakhstan have greater tax exemptions than ordinary NCOs.

Further, I will discuss the controversies of *the definition of NCOs and SSOs in Kazakhstani legislation*. These controversies affect the process of granting of the tax exemptions to NPOs, which often negatively influence their financial sustainability. Clear legal definitions of the organizations entitled to tax benefits are important for NPOs to be able to apply for a special status. On the other hand, the application of the laws shall be flexible enough to envisage the case-to-case consideration.

The Non-Commercial Organizations in Kazakhstan are defined by the Tax Code and by the Civil Code; the definitions, at that, are not entirely consistent. For instance, the civil law includes a wide range of organizations into the definition of NCOs: public associations, public foundations, religious organizations, associations of legal entities, notary chambers, bar associations, auditing chambers and cooperatives of owners of the apartments. The Tax Code adds that, to become a NCO in the tax law sense, an *organization must serve public interest and not have a purpose of generating income* (while the Civil Code only requires that the pursuit of profit shall not be the primary purpose of an NCO).

The Social Sphere Organizations (SSOs) include two types of organizations. First, the organizations that derive no less than 90% of their gross annual income from providing services in the fields of healthcare, child care and education, science, sports, culture, library services and social welfare<sup>17</sup> are defined as SSOs. Secondly, the organizations that employ certain percentage of people with disabilities qualify for being the SSOs for the purposes of taxation.<sup>18</sup>

The difference between tax treatment of NCOs and SSOs is minor: the NCOs are exempt from income obtained on a gratuitous basis, and certain types of investment income, while the SSOs are exempt from the same taxes plus income gained from entrepreneurial activities. However, the SSOs can only be exempt from tax on income from entrepreneurial activities if their entire income is used for enlisted activities. Violation of this rule results in loss of the whole exemption. Thus, there is a clear uncertainty in the definition of the organizations themselves, which makes it difficult to apply for a tax-exempt status. Also, the inflexibility of the legislation in case of NPOs involving into minor economic activities limits the freedom of NPOs in sustaining their financial situation.

As for Hungarian legislative provisions on types of NPOs entitled to tax benefits, the law allows both mutual benefit (membership) organizations and public benefit organizations to be granted the tax-exempt status. This inclusion of mutual benefit organizations into the list of potentially tax-exempt organizations is in accordance with international standards on NPO regulation, and it differs from Kazakhstani provisions, that in theory exclude from taxation only organizations operating for public purpose.

Notably, Hungarian Act on Corporate and Dividend Tax applies to the economic activities of public benefit organizations as well (as opposed to Kazakhstan, as discussed earlier in this Chapter). Income from economic activities below certain threshold is exempt from taxation, which allows more flexibility for NPOs in generating income for their activities. The public benefit organizations, at that, are defined as organizations that pursue public benefit activity enlisted in the law, including healthcare, social work,

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<sup>17</sup> Tax Code of the Republic of Kazakhstan (June 12, 2001, effective January 1, 2002) section 121 (Rus) [Tax C.].

<sup>18</sup> Tax C. section 121 (2) (Rus).

scientific activities and research, cultural activities, protection of nature and animals, human rights, employment rehabilitation, consumer protection, and other activities defined by law. The list is much wider than the list of activities that make Kazakhstani NPOs qualify for being a SSO, besides, certain organizations qualifying for “prominently public benefit organizations” receive greater tax benefits than ordinary PBOs. “Prominently” PBOs are organizations that usually take on duties normally performed by state bodies.<sup>19</sup> Public Benefit Corporation is another type of organization that falls under the definition of NPOs in Hungary, and is entitled to claim tax benefits. Public benefit corporations can be engaged in both business activities and public benefit activities, and, just as the PBOs, they should not distribute profits among its participants.

## ***2. Types of Tax Preferences***

### **2.1 Membership fees**

Both Hungary and Kazakhstan provide for tax exemptions for income received by NPOs as grants or membership dues to advance their statutory or public benefit purpose.<sup>20</sup> The Kazakhstani NCOs have to make a separate from taxable income account.<sup>21</sup> The SSOs, however, are not entitled to getting an exemption from entry and membership fees; this provision seems to be unclear as the SSOs, if making an analogy with PBOs, should receive more tax benefits than ordinary NPOs. This provision, whether an intentional omission, or a mistake, shall be changed.

### **2.2 Economic Activities**

In Kazakhstan, the “business/economic activity” is defined by the Civil Code as any activity resulting in receiving profit. There are different standards for NCOs and SSOs: the NCOs are allowed to engage in economic activities as long as it is not their primary activity according to the Civil Code, while the Tax Code provides no exemptions for the income gained from such activities. Potentially, excessive engagement of the NCOs into economic activity results in their losing their tax-exempt status and all benefits associated with it.<sup>22</sup> As for the SSOs, they are exempt by the tax legislation from taxes on income gained from certain activities, whether economic or not. This provision, however, relates only when the exempt activity constitutes 90% of SSO’s annual income. Engaging into economic activity not within the field of allowed areas results in loss of all tax benefits as well as in case the income from allowed activity is under 90% of gross annual income. The tax on income in these cases can be imposed for a whole financial year.<sup>23</sup>

In Hungary, the legislation excuses NPOs from paying the taxes on income gained from economic activities that is used to further their public benefit purposes. There is a certain threshold of income; if NPOs do not exceed it, they are exempt from taxation. This threshold is the same for mutual benefit (MBOs) and public benefit organizations, and is a little higher for prominently PBOs: thus, for MBOs and PBOs it is 10% of total income, and for prominent PBOs it is 15% of total income.

As we can see, Hungarian legislation allows certain level of flexibility in taxation of NPOs by distinguishing between MBOs, PBOs and prominent PBOs. The controversies in Kazakhstani legislation,

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<sup>19</sup> *Supra* note 13, p.13.

<sup>20</sup> Act CLVI of 1997 on Public Benefit Organizations, as amended by Act XIV and Act XXXIII of 1998 [Act on PBOs] section 6 (1).

<sup>21</sup> Tax C. section 120 (4).

<sup>22</sup> Tax Survey *supra* note 15, at p. 49.

<sup>23</sup> Tax C. section 19.

on the other hand, limit NPOs in their freedom to pursue economic activities and put them under threat of being refused all the tax benefits at once.

### 2.3. VAT

It is recommended by the international instruments, including the OSI Guidelines that the PBOs should be given preferential treatment under a value-added tax (VAT)<sup>24</sup>. In addition, NPOs should be given a choice of being relieved from VAT upon application.

In Hungary, the tax-exempt organizations that have their annual income from economic activities less than 2.000.000 HUF may elect exemption from VAT as well. Providing certain services, such as healthcare, social care, organization of scientific events, public radio and television, education, libraries, museums and amateur sports. Pharmaceuticals, public education books, and products for the blind are getting zero-rating.

In Kazakhstan, the VAT rate was decreased from 16% to 15% with amendments to the Tax Code in January 2004. A zero-rate applied to exports and international transportation.<sup>25</sup> Neither NCOs nor SSOs are entitled to zero-rating for income from their socially beneficial activities. As noted by international observers, the process of claiming the exemption of VAT is so complicated that many NPOs are discouraged from applying at all. Moreover, the applications can entail lengthy audit inspections, which NPOs do not want to deal with.<sup>26</sup>

#### Direct Government Support.

Hungarian Budget Law envisages a part of financing for NPOs, and the system of contracting is in force. The government cooperation with NPOs in this sphere is more progressive than in Kazakhstan: through inviting NPOs to take part in creation of budget and the work of special Parliamentary Committee the interests of NPOs are taken into account. Moreover, there is an innovative process according to which NPOs can receive funding in the form of reimbursement for services delivered to individuals.

Kazakhstani Government has definitely moved towards more cooperation with the civic sector too. In 2003, at the first Forum of state and non-governmental organizations, the need for state support of NPOs' social services was recognized. As a result, the Draft Law on State Social Order was developed. However, there are still drawbacks in the system itself: NPOs do not actively take part in drafting of budget, and the process of distribution of funding for social services and grants under procurement lacks transparency. To improve the situation, the legislation should be revisioned to be more precise and the system of distribution of funds should be more transparent than now. It will involve both work from the Government towards more cooperation with NPOs, and NPOs to be more active and advocate for their right to information and participation in competitions.

#### *1. Subsidies*

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<sup>24</sup> OSI Guidelines *supra* note 22 at p. 83, section 9.4.

<sup>25</sup> Tax C. section 224.

<sup>26</sup> Patricia Armstrong. *Non-Governmental Organisations. Financial Sustainability: Kazakhstan*. Legislation On-line. (visited November 20, 2004)

<<http://www.legislationline.org/index.php?topic=161&PHPSESSID=8309273b8cfc4afb282bef40b5dce0f&country=42&org=0&eu=0>>.

Defined at the Symposium on NGO-Government Partnerships<sup>27</sup> as direct government funding, not linked to any particular project or activity, for the general support for the organization; most often provided for in the budget (central or local), subsidies are available for NPOs both in Hungary and Kazakhstan.

In Hungary, the major financing is made from the resources of central government budget. The civil society organizations have two ways of receiving the state financial support: the budget allocation and the resources designated for a certain type of public benefit activities.<sup>28</sup> Each year the act on state budget decides on the amount of the funds allocated from budget to civil society organizations to cover their operational costs.<sup>29</sup> This act determines the amount of funding allocated, while the Parliament decides on actual distribution among the organizations on the basis of proposal of Parliamentary Committee on Civil Society Organizations upon their application.<sup>30</sup> Article 83 of the Government Decree 217/1998 of the System of Operation of Public Finance precisely describes the content of the application, and Article 85 sets the rules for judging the application. It is worth noting that there is an automatic disbursement of the subsidy in case organs or persons authorized to judge the application do not act within 15 days of receipt of the application. State subsidies are an important source of funding for Hungarian NPOs: for instance, in 2000 the civil society organizations, including foundations, social foundations, public benefit organizations and social organizations, received almost 26.000 HUF (approximately 97400 Euro).<sup>31</sup>

The system described allows re-considering the list of organizations that receive the state support annually, thus extending the pool of potential recipients and encouraging them to show their benefit in order to qualify for assistance. In Kazakhstan, the same organizations receive the state financial support, besides, there is no system of application and no special Parliamentary body exists that would deal with NPOs. Adoption of budget in Kazakhstan is a peculiar process in general: it is not easy for NPOs to take part in its creation and it is difficult to oversee the execution of budget, as requests are usually not served.<sup>32</sup> As suggested by Pavel Smiltneks, an ICNL expert in CIS, in many newly Independent States NPOs are still not mature enough to replace state bodies, that is why the subsidies are not so much in use as the designated subsidies for certain projects.<sup>33</sup> As it was said before, there is no institution responsible for maintaining the dialogue between the Parliament and NPOs in Kazakhstan.

There is a Constitutional obligation on both countries' governments to involve NPOs into decision-making process, however, it is not always so in practice. As Meruert Mahmutova, representative of the Center for Social Problems Analysis (Centr Analiza Socialnyh Problem) in Kazakhstan states, the problem lies not only in unwillingness of the Government, but also in weakness of NPOs and their poor understanding of the role that they have to play in the adoption of budget.<sup>34</sup> This situation with lack of communication was improved in Hungary by creation of the Parliamentary Committee, which ensures

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<sup>27</sup> *Preliminary Study of the Legal Frameworks for Public Financing of NGO Activities in Bulgaria, Croatia, Hungary, Romania, and Slovakia*. IJNL. Volume 3. Issue 4 (June 2001) <<http://www.icnl.org/journal/vol3iss4/prelimstudy1.htm>>.

<sup>28</sup> Posch Gabor. *The Role of the Budget in the Financing of Public Benefit Organizations In Hungary*. IJNL. Volume 3, Issue 4 (June 2001). p.2. <<http://www.icnl.org/journal/vol3iss4/posch1.htm>>.

<sup>29</sup> István Csóka. *The Relationship between The Governmental and Civil Sectors in Hungary*. IJNL, Volume 3, Issue 1, p.2 <[http://www.icnl.org/journal/vol3iss1/ar\\_csoka2.htm](http://www.icnl.org/journal/vol3iss1/ar_csoka2.htm)>.

<sup>30</sup> *id.*

<sup>31</sup> See Posch Gabor *supra* 29 at p. 2.

<sup>32</sup> Parliamentary Centre. *Preliminary Assessment of Needs of the Kazakhstan Parliament*. (December 2003) <<http://www.parlcent.ca/easterneurope/docs/post%20mission%20report%205.pdf>>. p.2.

<sup>33</sup> Conference. *Gosudarstvenny Socialny Zakaz* (State Social Order) (2001) Almaty. p.45.

<sup>34</sup> Yaroslav Razumov. *Centr Alaniza Obshestvennyh Problem Provodit Treningi Po Vovlecheniyu Obshestvennosti v Process Budjentogo Planirovaniya* (The Center of Social Problems Analysis Conducts Training on Attracting the Population into the Process of Budgetary Planning). Panorama (February 2003). <<http://www.panorama.kz/info/index.asp?yearfolder=2003&num=05&NumArticle=15>>.

that both parties work towards cooperation and reduce the cases of preferential treatment of certain NPOs close to the Government. This model is highly desirable for Kazakhstan too.

The Kazakhstani legislation provides for the possibility of unconditional funding through subsidizing the children and youth organizations.<sup>35</sup> Local municipal legislation envisages the so-called “natural subsidies”, meaning the lease of the state buildings for the use of the public associations. However, the problem with both national and local laws is that they do not specify the criteria for NPOs to be entitled to such subsidies. Thus, in many cases decisions of “natural subsidies” are left to discretion of the local authorities.<sup>36</sup> If the controversial Draft Law on NGOs adopted, it would introduce the notion of Public Benefit Organizations (PBO) but would not specify what does it mean and permit the government to decide on NPOs to which to channel its financial support.

In Hungary, NPOs involved in certain activities relevant to Ministry’s work can apply for funding and be included in the annual budget of the Ministry. In Kazakhstan, the process of subsidizing of NPOs is still much centralized, which leads to the same organizations of national importance getting money, but smaller NPOs operating on local level being left out.

## **2. Grants.**

Grants are usually understood as legal instruments, which are used to transfer funds or any other in-kind assets to the recipient for public benefit purposes.<sup>37</sup> The statutes usually regulate the grants allocation and distribution. Unlike subsidies, grants are usually given conditionally for performing certain projects or conducting certain public benefit activity and are provided by the central governmental institutions.<sup>38</sup>

In Kazakhstan, the definition of “grants” is twofold; first, it is an unconditional assistance from the Government, and the second, from “foreign non-governmental public organizations and funds performing charitable operations at an international level”.<sup>39</sup> The organizations at that shall be enumerated in the list approved by the Government. This part of the Chapter is going to discuss “grants” under procurement legislation, i.e. conditional funding for certain projects given out by the state through tenders. Interestingly, according to Sergei Gmyrya, the Head of Department on work with NPOs at the Ministry of Culture and Information, the Constitution is not violated in case of grants, as not NPOs, but their projects are funded in this scheme.<sup>40</sup>

In Hungary, the fact that the distribution of grants is made by the ministries on the basis of their up-to-date needs, allows a more flexible approach as opposed to the first Kazakhstani tender conducted by the Ministry of Information, Culture and Social Accord (now changed into the Ministry of Information and Culture). On the other hand, it can involve certain level of discretion in allocation of grants.

## **3. Contracts/Procurement.**

Section 11.2 of the 2004 OSI Guidelines for Laws Affecting the Civic Organizations recommends that “civic organizations should be entitled to participate in an open, fair and non-discriminatory procurement

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<sup>35</sup> Vsevolod Ovcharenko. *The State-Civil Society Relationship in Kazakhstan: Mechanisms of Co-operation and Support*. IJNL. Volume 6, Issue 3 (June 2004).

<sup>36</sup> *Id.*

<sup>37</sup> United States Agency for International Development. *Glossary of ADS Terms*. Washington, DC: USAID. 2001, p.81, <<http://www.usaid.gov>>.

<sup>38</sup> *Supra* note 28 at p.3.

<sup>39</sup> Tax C.

<sup>40</sup> Conference. *Gosudarstvenny Socialny Zakaz* (State Social Order), (2001). Almaty. p. 117.

processes carried out by state bodies for the acquisition of goods and services”. The explanation developed at the Symposium of NGO/Government Partnerships provides that procurement is a “government purchase of goods, works or services”.<sup>41</sup> NPOs, thus, are mostly funded for delivery of social services.

In Kazakhstan, the 2001 Law on Non-Commercial Organizations mentions in Article 40 (State and Non-Commercial Organizations) the only possible form of state financial support for NPOs through the state social order. The system of contracting NPOs is now under development, after long-term advocacy efforts on part of NPOs, the draft law on State Social Order was finally created. The way it worked in Kazakhstan was that with Constitutional ban on state financing of NPOs and absence of legal framework for social contracting, there was a legal vacuum, in which NPOs had to find their ways to social financing from the state. In these cases, the state organs’ being cooperative was very important.

A good example was demonstrated by NPOs in one of the regions in Kazakhstan, the Kostanai Oblast, where they approached the municipality in 2001 with suggestion of performing social services and being financed from regional budget. As there were no legal mechanisms for this support, the municipality had to develop its own program. Financial control organs considered this initiative unacceptable. So, there is a clear need for well-developed legal frameworks for social contracting. Apart from the national procurement regulations, local government-NPO cooperation is needed to be legally regulated as well, or otherwise, it should be left to discretion of the municipalities themselves, as in Hungary, where the ministries can decide on their budget according to their needs.<sup>42</sup>

There are many other NPOs in Kazakhstan engaged in provision of social services: health, education, protection of rights, environmental protection – most of them target vulnerable groups or groups unable to pay for the services, which make NPOs dependent on foreign project funding. On the other hand, if the Government supported these services through concluding contracts with the NPO, its work would have much more impact and be more financially secure. It would also increase the public trust in Government, which is the issue in all the countries in transition.

Until the Law on state social contracts is adopted in Kazakhstan, NPOs can only participate in state procurements along with other commercial organizations. This puts them in unequal conditions with businesses, which usually possess more financing and resources for implementing a special project. Moreover, no special provisions on “social services” exist in current legislation, whereas it could help the situation, as the commercial companies are not usually taking part in these tenders due to low cost of bid and their incompetence in social services.

#### ***4 Reimbursement to NPOs for services to individuals.***

In Hungary, the government also provides financial support to NPOs for special services to individuals, such as healthcare or education. The individuals can make a choice of the NPO that will deliver services, which, upon providing a service, is then reimbursed by the Government within the limit of the amount that would come up if the same service was provided by the Government<sup>43</sup>. NPOs at that shall submit a report on the services delivered in the beginning of the year. The described system is somewhat outstanding in the Eastern European region, and not existent at all in Central Asia.

In conclusion, the idea of state financing of the not-for-profit organizations is getting a general recognition in both Hungary and Kazakhstan. In Hungary, there are legal mechanisms in use that afford state unconditional and conditional financing of NPOs, the subsidies, grants and contracts. Even though

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<sup>41</sup> Supra note 28 at p.4.

<sup>42</sup> Conference. *Gosudarstvenny Socialny Zakaz* (State Social Order) (2001) Almaty. p.72

<sup>43</sup> Supra note 28 at p3.

adopted recently, it is already possible to assess their positive impact to financial situation of NPOs. Besides, delegating the delivery of social services from the state to NPOs contributes to decentralization of state power and general democratization of the country. In Kazakhstan, *de facto* state support is in use for several years now, however, there is still gap in legal regulation of the practice. It creates confusion and can lead to abusive discretion of the state. It is thus very important to rely on international good practices, Hungarian, in particular, to develop a positive legal framework for state support of NPOs. The willingness of the state to ensure fair and transparent treatment of NPOs is highly important.

#### Private Philanthropy: State Regulation

*"He gives a benefit twice who gives quickly."  
Romani proverb.*

#### **Introduction**

“Philanthropy” is not a legal definition by itself, but rather a sociological concept of a “voluntary private giving for public purposes”.<sup>44</sup> In some countries in Europe it has developed from the social traditions of voluntary giving to churches, and then proceeded by the state regulation of donations to nonprofit and religious organizations.<sup>45</sup> Now the concept of „private philanthropy” has grown into a term that defines „donations from individuals, corporations, businesses, or private (non-government) foundations”.<sup>46</sup>

It can be seen that development of a better mechanism for philanthropy has become an important issue on the agenda of NPOs and Governments in Central and Eastern European countries and the Newly Independent States. Businesses start to become more aware about their socially responsible behavior, encouraged by introduction of tax deductions. Giving to NPOs working in the social area is but one way of improving the lives in one’s community. For countries in transition, where communities lacked independence for a long time of managing „from the center”, it is an important tool for developing the spirit of civic responsibility and democratic participation. For NPOs themselves, donations are another source of sustaining their not-for-profit activities.

The state role in managing the private philanthropy is of utmost importance as the fiscal legislation can promote or hinder the individual and corporate as well as foreign giving in the country. The law itself cannot require corporate philanthropy indeed, as noted by Robert L. Payton, no matter how much influenced by tax considerations, it is still a voluntary action stemming from tradition or peer pressure.<sup>47</sup> However, the legal environment can encourage the corporations to donate, and the state can contribute to development of culture of voluntary giving by different means. David Moore, for example, in his article on the Fiscal Framework for Corporate Philanthropy in CEE and NIS, refers to the studies made in the US showing that donor’s decisions to give are mainly based, among others, on the possibility to claim tax deduction.<sup>48</sup>

#### Individuals

Hungary and Kazakhstan have entirely different systems for regulating the individual donations to NPOs. Hungary does not allow individuals to claim deductions for their donations, but offers the tax credits

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<sup>44</sup> Nilda Bullain. *Explaining Percentage Philanthropy: Legal Nature, Rationales, Impacts*. IJNL. Volume 6. Issue 4 (September 2004) <[http://www.icnl.org/JOURNAL/vol6iss4/ar\\_bullain.htm#\\_ednref8](http://www.icnl.org/JOURNAL/vol6iss4/ar_bullain.htm#_ednref8)>.

<sup>45</sup> *Id.*

<sup>46</sup> This definition is given, for example, by Johnson State College, Johnson, Vermont, when describing their donation programs (visited November 15, 2004) <<http://www.jsc.vsc.edu/faculty/1300.html>>.

<sup>47</sup> Robert L. Payton, *Philanthropy Voluntary Action for the Public Good* at p. 187 (American Council of Education 1998).

<sup>48</sup> David Moore. *The Fiscal Framework for Corporate Philanthropy in CEE and NIS*. IJNL, Volume 6, Issue 2 (January 2004). <[http://www.icnl.org/journal/vol6iss2/ar\\_moore.htm](http://www.icnl.org/journal/vol6iss2/ar_moore.htm)>.

instead.<sup>49</sup> The tax credit, at that, is limited to 30% of tax liability up to approximately \$265 or \$530 for „prominently” public benefit organizations.<sup>50</sup> In Kazakhstan, the individuals can claim deductions for up to 2% of their taxable income for their donations to the NPO.<sup>51</sup>

The 1% law in Hungary, which allows individuals to channel 1% of their taxes to an NPO and 1% to a church, is often referred as a kind of individual philanthropy. This statement is criticized as it is said that individuals perceive this allocation of their taxes as an obligation, not as an act of voluntary giving. However, there is a strong link between 1% designations and development of philanthropy, as it will be shown in the next Chapter.

### Corporate Philanthropy

There is no common definition for corporate philanthropy for the reasons mentioned above: the concept involves many other elements apart from tax exemptions, such as ethical charity considerations and the sense of social responsibility maintained by the companies and their employees. The Committee on „Changing Society and Corporate Philanthropy” in Japan, for example, defines the purpose of corporate philanthropy as "to notice and to voluntarily take action for the urgent issues of the society, to which corporate resources are donated without seeking direct pay-off."<sup>52</sup> There are several notions in this definition that, in my opinion, define the corporate philanthropy in any country: „voluntary”, „urgent issues of society”, absence of direct benefit.

The voluntary character of the action and absence of direct benefit determine the way in which the corporate philanthropy can be encouraged, as, clearly, it is not something which the state can impose on the companies. Among methods that the state can employ is *providing the tax incentives for the companies* that donate to NPOs. The OSI Guidelines state that „to encourage philanthropy and good citizenship, individuals and business entities should be entitled to reasonably generous income or profits tax preferences with respect to donations made to PBOs”.<sup>53</sup>

Hungary has the most progressive tax incentives provided by law in the region. Donations given to public benefit organizations (PBOs) are tax-deductible and there is a possibility of long-term giving. The tax base can be reduced by 100% up to 20% of the tax base. In case of long-term giving, it can be increased by 20% per year.<sup>54</sup> The „prominent” PBOs can receive donations with reduced 150% tax base. Not only corporations, but also unincorporated businesses and individual entrepreneurs may deduct up to 20% of pre-tax profits. As we can see, the law is quite progressive in providing the tax benefits to NPOs, allowing more deductions in case of donors supporting the public benefit activities. There are good examples of international companies supporting NPOs, such as Danone, Levi-Strauss; national businesses are involved

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<sup>49</sup> „Tax credit” is defined by the Black’s Law Dictionary as „An amount subtracted directly from one’s total tax liability, dollar for dollar, as opposed to a deduction from gross income”. (8th ed. 2004), 1047. *C.J.S. Internal Revenue* §§ 58, 336-357, 489-492; *Taxation* § 1758.]

<sup>50</sup> According to the 1997 Hungarian Act on Public Benefit Organizations, „prominently” public benefit organizations “perform] public duties which, by virtue of law or in accordance with the provisions of other legal regulations based on the authorization granted by law, are to be provided by a state agency or by a local government”.

<sup>51</sup> Tax C, article 122.

<sup>52</sup> Kyoko Shimada. Overview of the Japanese Corporate Philanthropy in 1990’s. (Article excerpted and translated from titled "The Philanthropic Ideas which Have Added New Values to Companies"). (visited November 10, 2004). <<http://www.keidanren.or.jp/japanese/profile/1p-club/book200107e/prologue.html>>.

<sup>53</sup> *OSI Guidelines* see *supra* note 22, section 9.2.

<sup>54</sup> Nilda Bullain. *A Glass Half-Full or Half-Empty? A Corporate Philanthropy in Hungary*. *Social Economy and Law Journal (SEAL)* (Autumn 2003) < <http://www.efc.be/cgi-bin/articlepublisher.pl?filename=NB-SE-10-03-1.html>>.

in corporate philanthropy as well: oil companies and telecommunications companies sponsor social, cultural, sports and environmental projects.<sup>55</sup>

In both Central Europe and former Soviet Union the primary deciding factor for providing the tax deductions for corporate donations is the purpose of donation. In Hungary, however, the main factor is the organizational form of the NPO being designated the donation. Thus, corporations that donate to public benefit organizations can deduct up to 20% of their pre-tax profits, whereas donors that give to prominent PBOs can deduct 150% of the donation up to 20% of pre-tax profits.<sup>56</sup>

There is clearly a need for improvement of mechanisms for corporate donations both in Hungary and in Kazakhstan. Despite the fact that Hungary has a good tax environment for donations, the corporate philanthropy is not working well: thus, the share in total income of the sector was only 5% in 2000.<sup>57</sup> NPOs mostly rely on Government support, which comprises 79% of income. In Kazakhstan, the situation is not the same: NPOs get major financing from foreign grants, which tend to be short-term project oriented; the state support is minimal, while the local companies do not see the benefits of donating to NPOs. Several international companies (Coca-Cola, Mobil, and Philip Morris) support NPOs; local companies, however, are not so active in giving out.<sup>58</sup> The corporate donations should be encouraged in both countries to diversify the funding base for NPOs, in order for them not to completely rely on single source of funding.

In case of Kazakhstan the legislative framework for corporate donations could be named as one of the main factors responsible for stagnation of corporate philanthropy – or at least one that is referred to in most cases (Tax Code only allows 2% tax deductions from taxable income). However, it is clear from the Hungarian example that providing tax incentives to donors will not automatically result in improvement of corporate philanthropy if there is no history/culture of voluntary giving. There should be other methods employed by the state to develop the responsible businesses-NPO relations. They can include non-financial incentives that contribute to development of a corporate culture, a sense of responsibility in society and facilitation of the dialogue between companies and NPOs such as providing information about NPOs to businesses or creating a special award. It is for the state, together with NPOs and companies, to decide which methods would work in current social and political situation. The Hungarian examples of NPOs cooperation with companies could prove very useful here, one of them is when the consulting companies were providing information assistance to NPOs in implementing their 1% campaigns. Local donors often provide such support as in-kind donations, services and other financial and non-financial help. NIOK (Nonprofit Information and Training Center), for example, recognizes the Corporate Donor of the Year<sup>59</sup> by rewarding the donor.

The question need for organized development of corporate philanthropy in Kazakhstan was only raised recently: in May 2004 the first Round Table on Socially Responsible Business in Kazakhstan was organized by Kazakhstani Press Center and Eurasia Foundation to discuss the definition and the practices of socially responsible business in Kazakhstan.<sup>60</sup> It was made clear that it is not only the state's responsibility to encourage the corporate giving, but also NPOs, which should better communicate their

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<sup>55</sup> *Id.*

<sup>56</sup> David Moore. *The Fiscal Framework for Corporate Philanthropy in CEE and NIS*. IJNL. Volume 6, Issue 2 (January 2004) <[http://www.icnl.org/journal/vol6iss2/ar\\_moore.htm](http://www.icnl.org/journal/vol6iss2/ar_moore.htm)>.

<sup>57</sup> Nilda Bullain. *About Miracles and Misperceptions - Lessons from the "percentage mechanism" in Hungary*.

<sup>58</sup> The United States Agency for International Development Web-Site. 2003 NGO Sustainability Index. Kazakhstan p. 98. <[http://www.usaid.gov/locations/europe\\_eurasia/dem\\_gov/ngoindex/2003/kazakhstan.pdf](http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2003/kazakhstan.pdf)>.

<sup>59</sup> Nilda Bullain see *supra* 55.

<sup>60</sup> *Forum Otvetstvenny Biznes v Kazahstane (Responsible Business in Kazakhstan)*. Kazakhstan Press Club (24 May 2004) <[http://www.pressclub.kz/pubs/default.asp?pub\\_type\\_id=54](http://www.pressclub.kz/pubs/default.asp?pub_type_id=54)>.

needs to businesses and present other incentives to them. As noted by Nilda Bullain, NPOs should educate citizens about corporate culture of giving and about their „own power as consumers”.<sup>61</sup>

As it was shown in this Chapter, the state tax regulations play an important role in development of philanthropy. Thus, by providing the tax incentives to donors, governments can promote the culture of voluntary giving in the country. Hungary has an advanced system of tax deductions for donations to public benefit organizations, which encourages the corporate and individual giving.

However, the analysis of the laws and its results has also shown that the tax incentives alone cannot provide the corporations enough incentives, especially in the countries where there is a lack of giving culture. Other, non-financial means of encouragement should be employed by the state, such as providing information about NPOs to donors, or establishment of an award. NPOs themselves should, as they were in Hungary, initiate and participate in attracting donors.

Whereas Hungary needs to improve the culture of voluntary giving for NPOs, Kazakhstani system demands re-consideration of legal regulations concerning tax treatment of donors' donations. This should be combined with programs on donor education and encouragement.

## **Innovative Financing Techniques in Hungary and Prospects for their Introduction in Kazakhstan**

### **Introduction**

It is commonly agreed that percentage laws solve some problems related to a post-communist country's development and that they are relevant in countries with recent establishment of democratic institutions, a relatively young NPO sector, few resources available to NPOs and a heritage of centralized management.<sup>62</sup> While these issues are relevant to both Hungary and Kazakhstan, we should remember that they were not similar in their development since 1990. The NPO sector in Hungary was much more active than the one in Kazakhstan. According to statistical findings of the Central Statistical Office<sup>63</sup> there were 19 700 foundations and 27 444 associations that operated in the Hungarian non-profit sector in 2000. In the same year in Kazakhstan there were 6.000 NPOs registered, though only about 1000 of them were active.<sup>64</sup> In Hungary, there is greater Government support than in Kazakhstan, shown through a positive legal environment, the creation of the Civil Fund and Committees in Government dealing with the civil sector. Kazakhstan still has a Constitutional ban on NPO financing and, even though it is not strictly followed, NPOs closer to Government are the ones financed in most of the cases. The restrictive provisions on territorial registration are also still in existence.<sup>65</sup> It should however be noted that the situation with the NPO regulation and state-NPO relations in Hungary is not perfect either: NPOs are still sometimes left out of the decision-making process, and there is still concern about sustaining their financial status. So, neither's country's situation with civil society is ideal yet. In this setting, it is interesting to see how countries deal with the problems and thus, it would be useful to learn from the Hungarian lesson in Kazakhstan.

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<sup>61</sup> Nilda Bullain see *supra* note 55.

<sup>62</sup> Marianna Torok. *Percentage Philanthropy*. SEAL, (Summer-Autumn 2004), Volume 7, No.1. p.4.

<sup>63</sup> Statistical Findings on Nonprofit Sector. Hungary. Central Statistical Office (visited October 29) <<http://www.nonprofit.hu/english/kiadvanyoktanulmanyok.html>>.

<sup>64</sup> The United States Agency for International Development (USAID) Web-Site. 2001 NGO Sustainability Index. Kazakhstan

<[http://64.233.161.104/search?q=cache:boF\\_7Zgi0d0J:www.usaid.gov/locations/europe\\_eurasia/dem\\_gov/ngoindex/2001/kazakhstan.pdf+number+of+ngos+in+Kazakhstan&hl=en](http://64.233.161.104/search?q=cache:boF_7Zgi0d0J:www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2001/kazakhstan.pdf+number+of+ngos+in+Kazakhstan&hl=en)>.

<sup>65</sup> Vsevolod Ovcharenko see *supra* note 36.

## 1% Law – Lessons of Hungarian Experience and their Implications for Kazakhstan

The first 1% provisions were introduced and incorporated into the Tax Code in Hungary in 1995, and stated in Article 45 that:

- (1) *“Private persons can make a declaration about their disposition concerning the use of 1% of their actually paid personal income tax. This 1% is transferred to the beneficiary designated in the taxpayer’s declaration.*
- (2) *The beneficiary mentioned in paragraph (1) can be an organization, institution, fund or foundation carrying out or supporting activities which serve public benefit.*
- (3) *The manner of implementing the provision and the circle of the eligible beneficiaries will be regulated by a separate act.”*

After a heated debate on the range of beneficiaries eligible to receive the designations (thus, churches did not want to be included into the scheme as voluntary organizations), the Hungarian Parliament finally enacted Law CXXVI/1996 on the Use of Some Part of the Personal Income Tax in Accordance with the Disposition of Taxpayers, on December 19, 1996. Now, according to amendments in 1997, the list of beneficiaries includes both voluntary organizations and churches. The taxpayer can now designate 1% to the organization of his/her choice and another 1% to a church, so that the churches do not compete with NPOs.

The possibility of introducing the percentage legislation has not yet been discussed in Central Asian countries and it is usually said that this is because neither the population nor the Government is ready for introducing it. Besides, there is a certain skepticism following the examples of European countries justified by a few similarities in laws of Europe and former Soviet Union. Now however, Ukrainian and Georgian NPOs have turned to Eastern European countries for their experience with regulating the incentives for individual donations. It would be useful to see the developments of these countries in this sphere and to draw lessons for Kazakhstani NPOs and Government.

The studies and research that are being done in Central Europe generally show positive effects of the 1% laws. The arguments can be summed up in accordance with the impact of the law to the beneficiaries: *NPOs, the taxpayers, and the state*. In addition to this there is a general effect to a *state of democracy and development of philanthropy*.

### *1. Benefits for NPOs*

Thus, the following *advantages for NPOs* are usually mentioned in the studies of percentage laws in Eastern Europe:

- *Receiving additional sources of income*

Clearly, the 1% of taxpayers income is money and, as NPOs are always trying to raise money from different sources, this percentage could prove to be quite helpful. This statement is disputed among NPO researchers who usually give two main reasons for doubts. Firstly only a small part of NPOs gain benefit in stiff competition and secondly, their income gained through 1% designations does not constitute a large part of their overall income.<sup>66</sup> Although claimed to be insufficient, the 1% has nevertheless diversified the funding base and has given access to public funding for NPOs in Hungary and proved to be a reliable source of income for them. As reported by the Hungarian tax authority in

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<sup>66</sup> Conference, Kuba Wygnanski. *The Origins and Implications of Percentage Laws, The Percentage System in Central and Eastern Europe – Implications for Civil Society and Public Philanthropy* (November 2003). [http://www.onepercent.hu/Dokumentumok/Chapter\\_1\\_Wygnanski.pdf](http://www.onepercent.hu/Dokumentumok/Chapter_1_Wygnanski.pdf) >.

2003, almost 22 thousand civil society organizations were designated 1% amounts, which is equal to about 23.5 million Euro.<sup>67</sup> The following table shows the figures of funds received by NPOs from 1999 to 2003 and indicates an increase of funding after application of the law:

Year	Amount (in Euro)
1999	12.250
2000	15.100
2001	17.500
2002	20.800
2003	24.900

Source: *News from Hungary - 20% more support for 1% beneficiaries in 2003; 6% more taxpayers give 1% support to civil society organisations*. Percentage Philanthropy Project (September 2003) <<http://www.onepercent.hu/news.htm#Benefici>>.

The data taken from Slovakia and Hungary<sup>68</sup> shows that even if the 1% was not a primary source of NPO income it has “played an important developmental role in the composition of the sector”. It also provided access to funds for organizations, which would otherwise not have an opportunity to have them. In Hungary, the 1% inflow to the civic sector in 2003 represented only 0.8% of the total income of the organizations. This is an insignificant amount itself, however, it was significant for individual organizations.<sup>69</sup>

The financial situation of NPOs in Kazakhstan is quite unstable due to uncertain tax provisions in case of involvement in economic activities. Besides, they can only receive grants from foreign organizations from the list approved by the government and the system of procurement is not well worked out yet. NPOs are still heavily dependent on foreign grants, while the Government wants to reduce their amount. There are almost no incentives for business companies or foreign organizations to donate to NPOs.<sup>70</sup> The 1% designations would, thus help the Kazakhstani NPOs to gain a new source of income and to rely on taxpayers rather than on the state for the distribution of funds.

Other weak points of the Kazakhstani legislation, such as the prohibition of state financing of NPOs and limited access to grants of foreign donors, could be remedied by the 1% legislation. It seems however that either the Constitutional ban on state financing should be repealed, or the percentage legislation should be understood as a form of private philanthropy administered by the state for the purposes of Kazakhstani legislation.

Another advantage related to this argument is that the income gained from the taxpayers’ funds can be used for the core activities and operational expenses of NPOs, as opposed to project funding that is possible in a current setting in Kazakhstan. Without percentage law the state finances either well-known national NPOs or announces tenders to certain projects. With it, however, the smaller NPOs and NPOs in remote regions could benefit by being closer to the citizens and taxpayers. The preferential treatment of pro-government NPOs can also be prevented with the help of a percentage law.

- *Raising public awareness about NPOs*

<sup>67</sup> Conference, Balazs Gerencser. *The Process of Development of Percentage Laws. From Hungary’s 1% Law to a National Civil Fund* (October 2003) <[http://www.onepercent.hu/Dokumentumok/Chapter\\_3\\_Gerencser\\_Hu.pdf](http://www.onepercent.hu/Dokumentumok/Chapter_3_Gerencser_Hu.pdf)>.

<sup>68</sup> Nilda Bullain. *Explaining Percentage Philanthropy, Legal Nature, Rationales, Impacts*. SEAL (Summer-Autumn 2004), p.11.

<sup>69</sup> Nilda Bullain see *supra* note 55.

<sup>70</sup> USAID web-site see *supra* note 65 at p. 98.

Another positive impact of the 1% legislation in Hungary and other countries that have adopted the system is that the people can get to know NPOs and make a choice on the designation of their money. Clearly, when one wants to designate his/her income, he/she has to know where his/her money would go. For that to be the case NPOs would have to reach the taxpayers by raising public awareness about their activities and working more effectively on providing public benefit services. As opposed to NGOs competition for budgetary funding, where they have to write proposals to the Parliament, with 1% their success depends on their ability to communicate with the community, directly with people.<sup>71</sup>

In Hungary, for example, NPOs started advertising campaigns after the introduction of the 1% law. This entailed press and television commercials, and public outreach. NIOK, the Nonprofit Information and Training Center in Hungary started its awareness raising campaign, which included explanation of the percentage designation technique and maintaining the database of NPOs. Evidently NPOs will try to be active in order for taxpayers to know them and choose to donate a part of their income. In Kazakhstan, where many registered NPOs exist only *de jure*, but do not actually operate as such, this would be a good incentive for them to become more efficient.

The civil society is often said to be an important element of democratic development. In transition societies with socialist legacy the civil initiatives are understood as promoters of democratic values and checks to the Government. The development of democracy through law is an approach taken by many aid agencies working on legal reforms. Introduction of 1% law is indeed seen as a tool for promoting the notions of civil society and civil participation in the country and changing the attitudes towards nonprofits in society.<sup>72</sup>

The problem associated with this is that some NPOs that possess more resources than others and are more visible to the public because of their activities might be more successful in attracting money. Some activities which are particularly popular (working with children and elderly, for example), might get more support than others, which do not usually attract the average taxpayer (prisoners' rights, mentally disabled people). In Kazakhstan, the women's rights and environmental NPOs are the most prominent and they account for the most part of the sector. NPOs in big cities receive more attention than the ones in villages partly due to the vast territory of the country. Because of this, the percentage law in Kazakhstan could help those smaller NPOs raise their funds, as they are known in small communities.

Generally, the citizens' awareness of NPOs in Kazakhstan has improved since 2002, but it is still low for democracy development; thus, only 33.6% know NPOs, only 2.3% are members of NPOs, and only 2.7% say that they have been positively affected by NPOs.<sup>73</sup> The situation could be positively changed with the adoption of 1% law, which will make the taxpayers pay attention to what activities are done by the civil society organizations. According to the USAID sustainability index,<sup>74</sup> NPOs become more engaged into advocacy activities, which makes them more visible through mass media. Even though they do not have enough resources to conduct public outreach campaigns, mass media attention would make an advertisement for this new instrument.

#### - *Development of NPOs*

As noted by the NPO researchers, the mechanism of percentage designation helps NPOs themselves to improve their organizational structures by bringing more transparency to their activities, help them develop their public relations skills, make them more responsible and increase their

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<sup>71</sup> Nilda Bullain see *supra* note 55.

<sup>72</sup> *Id.*

<sup>73</sup> USAID web-site see *supra* note 59 at p.101.

<sup>74</sup> *Id.*

accountability. This system makes NPOs more visible to society, which encourages them to act in good faith and adhere to good principles of internal management and external outreach. This factor plays an especially important role in transition societies where NPOs do not have a very good public image. Particularly in Kazakhstan, where the state usually supported pro-government NPOs, it will help to change the social perception of NPOs as governmental institutions. Recently, when many international aid agencies have started to sponsor NPOs, and because their internal organization was not always transparent, NPOs, especially in big cities, were perceived as rich organizations difficult to approach. The 1% law would help show which organizations were actually doing work. The skills that NPOs would develop in order to attract designations from the taxpayers, such as, communication and public relations, would also help them in other fundraising activities.

## ***2. Benefits for Taxpayers.***

The *taxpayers'* willingness to designate an amount of his/her income is essential in such a system. It requires not only a simple act of writing the name of an NPO in a tax declaration, but also a certain knowledge of organizations and their activities, thus, it is important to know what advantages such a system entails for the *individuals*.

Named "*taxation self-determination*" by Erzsebet Fazekas, the percentage designation is said to enable the taxpayers get possession of their democratic rights by making autonomous decisions on their income tax.<sup>75</sup> The fact that the taxpayers can control the distribution of their own funds helps to develop trust to the whole system which was lacking during socialist times. The democratic culture of participation is strengthening when individuals start managing public funds.

As mentioned above, the introduction of the 1% law in Hungary was the Government's initiative. According to the studies, 80% of the state funding of NPOs in Hungary was provided by the central government and 80% of this funding was being distributed without any tenders or competitions<sup>76</sup>. The centralized nature of the distribution of public funds is a characteristic of the Kazakhstani system too. Thus, the government's will to give out its power, move towards **de-centralization** and gain positive public image is more important here than any financial benefits.

## ***3. Benefits for the State***

### *- Decentralization*

The Council of Europe's Fundamental Principles declare that it is essential that the public is informed of the support that NPOs receive from the state, including the criteria for distribution of this support. As the tax designations are made from funds that would normally stay in state budget, a 1% law can serve as a check to Governmental powers in the sphere of the distribution of the funds.

Although the funds distributed through percentage legislation are not substantial, when channeled according to the taxpayers' decisions, they will help to decentralize the decision-making process and delegate the state powers to the citizens. The citizens then get the chance to support local initiatives, which they are close to. Sometimes it motivates them to establish their own NPOs. All of these arguments work only in case if the Government has a will to operate more openly and become closer to its citizens.

### *- Support to the activities that benefit the public*

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<sup>75</sup> Erzsebet Fazekas. *The 1% Law in Hungary: Private Donation from Public Funds to the Civil Sphere*. The Journal of East European Law [JEEL] Vol. 7, Nos. 3-4, Columbia University (2000), e.g. on p. 447.

<sup>76</sup> Nilda Bullain see *supra* note 69 at p.13.

Another advantage of percentage legislation for the state is that by seeing the taxpayers' choices the Government can observe which activities the public deems to be useful and is willing to support. To be working, this argument also requires the Government to be aware of civil society and citizens' initiatives. That is why, if the state is not ready to make such a choice itself, it will require more efforts from NPOs to advocate the adoption of the law by showing the usefulness of these results for the state and the civil society.

- *Improvement of public relations*

As suggested by Kuba Wygnanski, the percentage system is a "cheap way to please taxpayers"<sup>77</sup> – to introduce a personal element into unpleasant procedure of taxpaying. At that, the state still controls the use of money through seeing which NPOs are being funded through designations.

#### **4. Development of a Philanthropic Culture**

One of the most important effects of the percentage legislation that is mentioned by researchers of the system in Hungary and other Eastern European countries that just adopted it, is **development of a philanthropic culture**. Because there is a lack of voluntary giving habits in both Hungary and Kazakhstan, this instrument is thought to help to gradually change this attitude. In addition, percentage law is said to change the understanding of civic responsibilities.<sup>78</sup> One remark should be made: according to data drawn from Hungary and Slovakia, the citizens that are already aware of democratic values are more inclined to participate in 1% designation.<sup>79</sup> Thus, it is necessary to continue programs on civic education, and include raising awareness of philanthropy there.

It is often said that the tax designations are not purely "voluntary" since 1% is the amount from the taxes that the citizens would have to pay anyway. However, we could say that there is a strong link between 1% law and development of voluntary giving based on data of Hungarian Statistical Office from 1997-2000. Thus, the amount of individual donations was increasing by more than 100% each year since introduction of the 1% law.<sup>80</sup> On the other hand, as noted by Nilda Bullain, the 1% law can make people think that they have performed their philanthropic duties when designating their taxes and do not have to support NPOs in other ways.

#### **5. Disadvantages**

After summarizing the arguments for the introduction of percentage law in Kazakhstan on the basis of the Hungarian example, I will discuss the arguments that could be used against it. These arguments should be taken into proper account when advocating for the introduction of percentage law in Kazakhstan.

- The understanding of the mechanisms of percentage legislation shall be ensured, thus, it should be made clear that percentage law does not substitute traditional philanthropy. As it happened in Slovakia and Lithuania, the **government's misperception of percentage philanthropy** led to an **abolition of tax deductible donations**.<sup>81</sup> So, it will be important in Kazakhstan to guarantee that, in addition to innovations in tax regulations, the "traditional" tax incentives should be further developed towards international standards.

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<sup>77</sup> Conference see *supra* note 67.

<sup>78</sup> Nilda Bullain see *supra* note 55.

<sup>79</sup> *Id.*

<sup>80</sup> Nilda Bullain see *supra* note 55 at p. 18.

<sup>81</sup> Nilda Bullain see *supra* note 69.

- As it was the case in Hungary, *some NPOs might get more financial support than others* due to their visibility (which possible in many cases if they are financially well-situated as they conduct good PR campaigns) or if they deal with issues popular in society. Thus, most of the allocations in Hungary go to health-care and education institutions.<sup>82</sup>
- In transition societies, the *lack of transparency* is a peculiar problem. Thus, the law can be undermined by non-transparent procedures of the tax authorities responsible for distribution of tax allocations according to the taxpayers' indications. Almost all of the advantages listed above can only become real in case the process of the state administration of the taxpayers' funds is fair and transparent. Again, as I am trying to show in my entire thesis, goodwill and the positive attitude of the state plays an important role here.

### Civil Fund in Hungary – Civil Fund for Kazakhstan?

As it was shown in the previous section, transparency is an important factor that needs to be ensured when adopting the percentage legislation. Thus, it is very easy to undermine the taxpayers' trust if the funds are not distributed properly by the Tax authorities. If this was the case another instrument of democratic participation could become corrupt. The Hungarian example of dealing with this issue of transparency is interesting enough to take it into account when advocating for the introduction of percentage legislation in Kazakhstan. Further on in this Chapter I will analyze the work of the Civil Fund in Hungary, assess its impact and consider the opportunities of a similar organ for Kazakhstan.

As mentioned above, the Hungarian 1% law was entirely a government initiative: the majority of Hungarian NPOs did not take part in the development of the law itself, but only knew about it when it was adopted.<sup>83</sup> The creation of the Civil Fund in 2003 was another Government initiative designed for the improvement of the civil sector environment. Talking about possible introduction of a similar system in Kazakhstan, we should note that, despite the fact that the state has expressed its willingness to cooperate with the civil sector at the Civic Forum in 2003 and adopted its policy towards NPOs, it is still difficult to ensure that it takes the necessary steps to provide a fair treatment of NPOs, not preferring the pro-governmental NPOs over independent ones.

The idea of creating the National Civil Fund was first introduced in Hungary by Parliament in 2002 and was then adopted by 2003 Law in order to provide institutional support to NPOs from the funds designated. The Civil Fund was created for the distribution of the funds that NPOs were designated by taxpayers' through 1% law. The Fund is composed of elected representatives of not-for-profit organizations and state officials.

The creation of National Civil Fund came as a solution to a problem that was debated in Hungary since the 1% Law came into force. Namely, the discussion circulated around the fate of unused 1% amounts, when a taxpayer did not use their right to designate a part of their income or when a designation is invalid due to a mistake.<sup>84</sup> Before creation of the Civil Fund, the Parliamentary Committee on NGO Affairs was distributing these funds. This arrangement was sparking debates as to fairness and transparency of distribution. Thus, the Civil Fund came up as another technique that was meant to increase the transparency of distribution of public funds and add to development of citizens' democratic participation. Moreover, it is another kind of state-NPO cooperation, which promotes dialogue between the two.

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<sup>82</sup> *News from Hungary - 10 billion forints from 1% scheme in 2003*. Percentage Philanthropy Project (September 2003) <<http://www.onepercent.hu/news.htm#NCFacc>>.

<sup>83</sup> Conference, Balazs Gerencser. *From Hungary's 1% Law to a National Civil Fund*. (October 2003) <[http://www.onepercent.hu/Dokumentumok/Chapter\\_3\\_Gerencser\\_Hu.pdf](http://www.onepercent.hu/Dokumentumok/Chapter_3_Gerencser_Hu.pdf)>.

<sup>84</sup> *Id.*

So, in 2004, two years after the announcement of the idea, the first election of the members of the National Civil Fund (NCF) was conducted, which allowed it to actually start its activity. Thus, 2004 is the first year when the NCF will manage the funds designated by the taxpayers, namely, 7 million HUF.<sup>85</sup> It is almost impossible to judge on the impact of the work of the fund on not-for-profit sector in the first year of its operation. There are debates as to the effectiveness of the Fund: some fear that the “traditional” state support to NPOs will diminish when the Fund starts distributing money, others are hopeful about NPOs’ new financial situation. Such factors as fair and effective distribution of the funds and the procedure of election of NPO representatives to the NCF can contribute to positive or negative results. Assuming that the procedures are fair, the amount of money collected can definitely contribute to the financial development of NPOs. Also, the fact that the Government itself initiated the creation of the Fund and followed up on its legal establishment promises hope for its positive impact. Some checks must be provided though: as Ferenc Bardos notes, reporting can make the work more transparent and prevent possible abuse.<sup>86</sup> It is already being said that the Fund will, along with 1% law, further contribute to NPOs working towards good public image. Besides, the argument that 1% benefits only some of NPOs over others, can be outweighed by the fact that Civil Fund combines the designations from all NPOs.

The composition of the Fund is such as to make sure that the NPO representatives are in all bodies of the Fund: thus, there are NPOs in the Fund’s Council and Colleges, and the President of the Fund, Ferenc Bardos is a President of an Environmental Association. The Colleges of the Fund are accepting and deciding on the applications for funding from NPOs, they are elected bodies situated in the regions, whereas the Council makes strategic decisions, distributes resources and establishes the procedural rules. NPO representatives form majority in the composition of the Fund: there are 12 people, 5 from national organizations and 7 from regional NPOs, along with 2 representatives of Parliamentary Committee on Civil Society and 3 Ministers.<sup>87</sup>

### Summary and Recommendations

After analyzing the research made by Hungarian and international authors<sup>88</sup> on development and impact of 1% legislation and subsequent creation of the Civil Fund, I came to a conclusion that the similar system in Kazakhstan would be welcomed as a tool for ensuring the NPO sustainability, and public trust in the civil sector and the Government. Most importantly, this system would be extremely useful for increasing public participation, which is not well accepted in Kazakhstan. First, it will raise the citizens’ awareness about NPOs that work in their communities, and, second, it will make NPOs work on improving their own image in public.<sup>89</sup>

When thinking about creation of similar organ for fair and transparent distribution of funds in Kazakhstan, several points should be taken into account:

- First, the ***NPO participation should be ensured*** at all stages of establishment of such an organ, starting from the initiation to actual composition. For that, NPOs need to be constantly consulted by

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<sup>85</sup> News from Hungary - Does the State decide on the money? What does the National Civic Fund accomplish? Percentage Philanthropy Project (October 2004) <<http://www.onepercent.hu/news.htm#NCFacc>>.

<sup>86</sup> *Id.*

<sup>87</sup> *Hungary’s National Civil Fund: Building on the 1% Law*. SEAL (Autumn 2003) <<http://www.efc.be/cgi-bin/articlepublisher.pl?filename=HI-SE-10-03-1.html>>.

<sup>88</sup> For a detailed studies of the impact of 1% law and National Civil Fund, see [www.niok.hu](http://www.niok.hu).

<sup>89</sup> Some authors, as, for example, Kuba Wygnanski, describe possible “side-effects” of such expectation, when NPOs start to compete with each other to win the taxpayer’s attention and activate themselves closer to the deadline of the tax declarations. This problem, however, does not arise in case of small communities, where the people know NPOs. In numerous Kazakhstani cities with little population this could prove realistic.

the Government and they should be active themselves. Umbrella organization for NPOs, such as Confederation of the Non-governmental Organizations created recently in Kazakhstan, can play an important role in uniting the organizations. Furthermore, the Ministry of Education and Culture that drafted the 1% Law was focusing on supporting the national institutions and contacted mostly them.<sup>90</sup> NPOs in Kazakhstan start to be more involved with drafting the legislation now, when the Cooperation Councils were created in provinces to advise the Government on their relations with the civil society.<sup>91</sup> Three NPOs are included to the National Council to advise the President of Kazakhstan. All this promises hope for more Government-NPO cooperation.

- Secondly, clear **reporting/accounting requirements** should be officially set to prevent unfair distribution of funds and create public trust to such an organ.
- Third, NPOs **should be given a decision-making role** in such an organ. Right now, the Government makes all decisions connected to financial status of NPOs, including tax exemptions, economic activities, allocation of grants and concluding contracts on the result of tenders. More independence should be given to NPOs in distribution of public money.
- To avoid the competition among NPOs, their **representatives should be elected**, not appointed by any governmental organ.
- Finally, and most importantly, as I am trying to show throughout my work, the **Government** should refrain from top-down exercise of power and voluntarily give out its duties to NPOs, **acting in a good will**. This would be the most difficult task in Kazakhstan, which is why it is necessary to assess whether Kazakhstan is prepared to take up such an initiative, and if not, start preparatory activities before choosing this option.

To conclude, the 1% is not a panacea to all the problems related to fair distribution of finances among NPOs. In Hungary, it is still not clear whether there is a close link between percentage law and development of philanthropy. However, the general improvement of NPOs' public image, their public relations and their financial situation is obvious. Whereas Kazakhstani legislation is said to be unprepared for the introduction of percentage law, I believe that preparation should nevertheless start, and it should be done taking into account all the issues relevant to Hungary after 1996, when the percentage law was adopted. There are clear benefits for all the actors involved in the process: NPOs receive additional sources of income, raise public awareness about themselves and develop their skills. The state can decentralize its functions, and improve its public relations through increasing the level of public trust. Generally, the philanthropic culture is developed: even if not entirely voluntary, 1% affects the people's perception of charity and giving towards more attention to NPOs.

As for the Civil Fund, this model was a peculiar Hungarian development resulting from the work of 1% legislation. Whereas the possible forms of such an organ can vary, the main idea is the following: Kazakhstan should have an organ comprising NPO representatives and Government who would jointly decide on the distribution of funds. At that, the principles of transparency and acting in a good will should be followed. The idea should be communicated to advocacy NPOs, who are active in trying to establish the dialogue with the state.

To develop the present research, more studies should be done in the sphere of state financial support to NPOs in transition countries. The peculiar Kazakhstani political and cultural situation with lack of culture of giving and public distrust to Government should be taken into account. As the percentage legislation is being adopted in more and more countries of former socialist block, its effects and specialties should be carefully considered in order for Kazakhstani Government and NPOs to be equipped with knowledge when introducing the similar system.

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<sup>90</sup> Balazs Gerenger, Zsuzsanna Piko. *From Hungary's 1% Law to a National Civil Fund*. SEAL (Summer-Autumn 2004) Vol.7, No.1.

<sup>91</sup> Vsevolod Ovcharenko see *supra* note 36.



# COUNTRY REPORTS

## INTERNATIONAL

### THE ROLE OF RELIGIOUS NGOS IN THE INTERNATIONAL AID SYSTEM

BY IJCSL STAFF

A major conference on the role of religious NGOs in the international aid system was held in Oslo, Norway on 7-8 April 2005. The host of the conference was the Norwegian Institute for International Affairs with assistance from the Comparative Research Program on NGOs (CRPN) at the University of Bergen, and the International Society of Third Sector Research. Paul Opoku-Mensah of CRPN was the conference chair.

#### BACKGROUND OF THE CONFERENCE

1. The Comparative Research Programme on NGOs (CRPN) and the NGO and Civil Society Research Network organized the conference in response to the neglect by mainstream NGO and civil society scholarship to adequately address the roles of Religious NGOs. Historically the activities of religious NGOs – Christian, Islamic, Jewish, Buddhist, etc. – predate the global associational revolution, and the NGO/civil society emphasis in development discourse. Currently these organizations constitute a significant force in the international arena not only because of their development and welfare activities, but also because they are important policy instruments and actors in a period where religious faith and sentiment is at the center of public policy and discourse, and society is said to be characterized by a historic clash of civilizations. Against this background, understanding these organizations and their activities becomes an issue of immense theoretical and policy interest.
2. This need to understand the roles of religious NGOs in development provides the immediate context and justification for the conference. While it aims to understand the various developmental roles of religious NGOs, it places particular emphasis on the integration of these organizations into the aid system. This is because while religious NGOs have related to the aid system in the past, the past decade has witnessed a historically significant trend of increased interaction between religious NGOs and the institutions of the aid system. Indeed an extensive web of relations, growing in complexity with interests and activities that are diverse and cross cutting has developed, presenting theoretical and practical challenges. Paradoxically, scientific knowledge on the changing nature of the relations remains scanty, indeed. A focus on the aid system thus provides an opportunity to explore these emerging relations that constitute, perhaps, one of the important changes in current development thinking and practice.
3. The conference included analytical and detailed discussions of these issues. It also established an institutional platform for collaborative and sustained research on the topic.
4. Further details on the conference, the participants, and the plans for publishing the papers can be found at <http://www.svf.uib.no/sfu/ngo/conference2005/programme.htm>.

## ASIA & ASIA PACIFIC

### CHINA UPDATE

BY IJCSL STAFF

Developments with regard to the legal environment for NPOs and religious organizations in China have been occurring with regularity in recent months. In this note we update our readers about them and give links to vital information.

1. **Accounting regulations.** On January 1, 2005, new accounting regulations for NPOs went into effect. The *minjian fei yingli zuzhi kuaiji zhidu* -- System for Accounting of NPOs -- is available in Chinese at <http://www.shcia.org.cn/policy/show.asp?nid=204>. A translation is being prepared and will be available from ICCSL.
2. **New “*min fei*” rules.** On February 4, 2005, the Ministry of Civil Affairs (MOCA) published a new set of internal governance rules for *minban fei qiye danwei*, which are currently not on the MOCA website. The rules are being translated into English and will be made available by ICCSL.
3. **Religious Affairs Ordinance.** On March 1, 2005, the new religious affairs ordinance became effective. It permits officially recognized religious organizations to hold religious activities, discuss religious issues, and even invite foreign guests to officially approved locations. The Ordinance to Regulate Locations for Religious Activities, passed by the China State Council in 1994, was simultaneously repealed. See *IJCSL-N* for March for further details.
4. **Volunteer Service Regulation in Shenzhen.** A new regulation in Shenzhen encourages work units that are hiring and are choosing between candidates with equal qualifications to favor those candidates with experience in volunteer service. Statistics show that more than 3 million citizens of Shenzhen have participated in volunteer service work. See [www.law-lib.com](http://www.law-lib.com) for March 2.
5. **“Dual management” of NPOs.** The Minister of Civil Affairs Li Xueju said in early March that “non-governmental organizations must maintain their links to government agencies under amendments that will be made to the regulations governing the registration of NGOs. Mr Li said on the sidelines of the National People's Congress that the long-awaited amendments to the Regulations for Registration and Management of Social Organizations would be announced in the next three months.” See *SOUTH CHINA MORNING POST* for March 7, 2005.
6. **Beida Forum.** The NPO Law Center of Peking University Law School held a major international forum on NPO laws and regulations at Xiang Shan conference center outside Beijing in late March 2005. Attended by experts from six countries outside China (Germany, India, Japan, the Netherlands, the Philippines, the United States)<sup>1</sup> as well as about 50 Chinese officials, NPO practitioners, scholars, etc., the conference offered a wonderfully interactive opportunity to discuss developments on NPO law in China and elsewhere.

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<sup>1</sup> Germany – Rupert Graf Strachwitz of Maecenate Institut of Humboldt University; India – Prof. Ishwara Bhat of Mysore University; Japan – Mr. Tatsuo Ohta, CEO of Japan Association of Charitable Organizations (JACO); the Netherlands -- Prof. Tymen van der Ploeg of the Vrije Universitet; the Philippines – Prof. Ledivina Cariño of University of the Philippines; the United States – Prof. Karla Simon of the Catholic University of America and Prof. Leon Irish of Central European University.

The forum offered an opportunity to reflect on a major new report written by the Research Team of the NPO Law Center. The Center's Director Prof. Wei Dingren and the Executive Director, Prof. Chen Jin Luo, introduced the concepts developed by the Research Team.<sup>2</sup> The report was presented in draft form for comments, and it will be published in both English and Chinese (along with all the papers presented at the conference) after revision and editing.

The report represents a fairly academic approach to NPO law reform for China, at least at this stage of the discussions. For one thing, the report would do away with the "dual management" system, which the leadership of MOCA has suggested must remain in place, at least for awhile. But the proposals made in the report would help to create a clearer legal framework for NPOs than currently exists. The basic idea would be to have one general law for both associations and corporate legal persons (which would include the current foundations and the *min fei*); there would also be specialized rules for each legal type to the extent necessary. For example, associations would have special membership rules, while foundations would have rules about endowments. In addition, under the proposals contained in the report, "dual management" would be replaced by a regulator of NPOs similar to the Charity Commission of England and Wales.<sup>3</sup> One clear reform effort that was recognized by the Research Team is the need for stronger internal governance requirements, which are necessary if the sector is to operate properly.

The first large international conferences on the topic of NPOs laws for China were held in 1999, one under the auspices of Tsinghua University and the other under the auspices of the China Youth Development Foundation. Subsequent conferences, study tours, etc., have helped to refine the thinking of both the scholars and of government officials. On the other hand, the new developments discussed at the conference suggest that it is important to move beyond large international conferences (where little is learned from foreign guests who know nothing about the legal framework for NPOs in China) to actual work on new regulations or even an "NPO Law."

In terms of developments in that regard, it is useful to note several papers presented at the Forum by Chinese officials and researchers. For example, Dr. Zhao Yong of MOCA suggested in his paper that the current possibility of "reasonable returns" for "investors" in *min fei* should be abolished. Dr. Xie Haiding of CASS suggested that the "filing system" approach proposed by some<sup>4</sup> as a replacement for "dual management" could result in additional restrictions on freedom of association. And Mr. Li Xinmiao of MOCA's office in Gansu Province stressed the fact the "dual management" is simply not working at the provincial level – experiments are being carried out to reduce the requirements for registration of local social organizations so as to make it easier for NPOs to get into the system.

The international dimension of this conference was not as well-constructed as it might have been in part because the researchers report was not translated into English in advance. However, the organizers have pledged to send a revision to the international participants as soon as possible.

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<sup>2</sup> The Research Team also includes Prof. Deng Guosheng, Associate Director of the NPO Research Center at Tsinghua University; Assoc. Prof. Ge Yunsong of Beida; Assoc. Prof. Jia Xijin, of Tsinghua University; Dr. Jin Jinping, a post-doctoral fellow at the Chinese Academy of Social Sciences; Dr. Liu Peifeng, post-doctoral research fellow at Tsinghua University; and Dr. Qi Hong, lecturer in law at University of Politics and Law, Beijing. Dr. Jin presented the report.

<sup>3</sup> Note the similarity of this proposal to the ideas being discussed in Japan and reported on in the January 2005 issue of *IJCSL*.

<sup>4</sup> One of the key proponents of this is Prof. Yang Tuan of the Chinese Academy of Social Sciences. She and Prof. Wang Ming of Tsinghua advanced the idea at a major conference sponsored by the China Charity Federation in October 2004. See <http://www.china.org.cn/english/features/poverty/109398.htm> for more details about the conference.

ICCSL is helping to facilitate a more comparative discussion about several issues raised by the report, together with Beida. The setting for the forum – which was relaxed and informal -- did allow time for inputs from the various international guests on issues relevant to China, and many participants felt they learned a good deal from the discussions.

Follow-up to the conference will include a book publication in English and Chinese; some of the conference papers will also be published in other fora, including *IJCSL*.

## **KOREA**

### **SUPPORT BY THE GOVERNMENT OF THE REPUBLIC OF KOREA FOR THE NOT-FOR-PROFIT SECTOR**

BY IJCSL STAFF

Although it has been widely recognized that the development of civil society in Korea has received broad state support in recent years, relatively little has been written about the topic in English. During a trip to Seoul in January 2005 (accompanying a delegation from the Government of Viet Nam on a Study Tour), two excellent presentations were made describing the support provided by the government.

- At the policy level, the Prime Minister's Office includes a Secretary for Civic Affairs, who supports various initiatives for civil society. Included among these is working with the Committee on the Development of Civil Society, which is comprised of 22 members and 1 technical expert; of these 12 members are from civic organizations, 7 members from academia and relevant fields, and 3 members from the government. The Committee develops policy objectives for government support to civil society
- At the project implementation level, the Ministry of Home Affairs and Government Administration (MOGAHA) administers a program of financial support for civil society organizations in accordance with the Non-Profit Private Organization Support Act of 2001 (Provision 7 of Article 6) as well as other special subsidies. The 2005 budget includes an allocation of 10 billion Won for this program, to be administered one-half by MOGAHA and one-half by local governments. In connection with this subsidy scheme a 15 member Committee to Select Public Interest Projects has been set up – 12 of the members of the committee are from CSOs, while 3 are from the National Assembly.

These two programs of support are described in the following papers, which were prepared by the staff of the Committee for Development of Civil Society in the Prime Minister's Office, on the one hand, and the Participatory Innovation Division of MOGAHA, on the other. IJCSL is grateful for this opportunity to bring these papers to the attention of its readers.

# SUPPORT FOR THE DEVELOPMENT OF CIVIL SOCIETY IN THE KOREAN GOVERNMENT

OFFICE OF THE PRIME MINISTER

27 JANUARY 2005

## 1. Overview of the Office of the Prime Minister

### The Office of the Prime Minister and Civic Organizations

- Organization
  - Prime Minister is supported by the Office of the Prime Minister and the Office for Government Policy Coordination
    - \*The Office of the Prime Minister: 80 employees work for the Senior Secretary for Political Affairs, Senior Secretary for Civil Affairs, Senior Press Secretary, Protocol Secretary, and Secretary for Administrative Affairs.
    - \* The Office for Government Policy Coordination: 300 employees work for Vice Minister for Public Policy Coordination, Vice Minister for Social Policy Coordination, and Assistant Ministers for economic policy coordination, policy analysis and evaluation, regulatory reform, improvement of water quality, and others.
  - The Secretary for Civil Affairs under the Office of the Prime Minister is related to civic organizations.

### Secretary for Civic Affairs

- Objectives
  - Maintaining channels of direct communication and cooperative relationship with civic organizations
  - Collection of opinions and policy support for development of a healthy civil society
- Duties
  1. Hosting of informal meeting with top and working-level members of civic organizations.
    - \*Actively collect opinions of civic organizations on national issues and major policies, and maintain constant channels of communications for promotion of understanding and cooperation in implementing national policies.
    - \*Informal meetings of top-level representatives hosted by the Prime Minister to be held every quarter, and meetings for working-level members to be held as necessary.

2. Hosting and supporting civic organizations' seminars

\* Host and support academic seminars jointly with representative organization of civic organizations (Korea Solidarity Network) and related academic society (Korea NGO Society) for research on issues including plans to create a cooperative system between civic organizations and the government.

3. Management and support for the Committee on Development of Civil Society

\*Search for desirable direction for development of Korean civil society in the 21<sup>st</sup> century, and collect opinions on improving the relationship between the government and civil society, and also amendment of existing laws and system.

\*Secretary of Civic Organizations actively supports investigation and evaluation activities of the Committee members, and collects recommendations to be reflected in government policies.

**2. Korean Government and Civic Organizations**

**History and Recent Developments**

- Past Governments and Civic Organization
  - During the period of repressive regimes in the past, the relationship between Korean government and civic organization was either 'dependent,' or 'confronting.'
  - \* Dependent Type: organizations supporting government policies, which in turn received privileges
  - \* Confronting Type: organizations mostly in anti-government, anti-establishment movements
- Expansion of Civic Organizations' Capabilities
  - The rapid growth of citizens' movements in the late 1980s has contributed heavily to the democratization and promotion of human rights across society.
  - \* More than 25,000 active organizations as of 2002.
  - After a period of rapid growth, civic organizations in Korea have become a key sector leading Korean society, along with the government and market sectors.

\* A number of leaders from major civic organizations employed in key government positions, and/or participating as members of committees in various ministries, exerting influence on government policies.

## **Government Support**

- **Government Support for Civic Organizations**

- Support for civic organizations is provided via diverse channels according to different laws of ministries.

\* However, government support is limited to assisting activities of civic organizations – personnel and working expenses are borne by civic organizations.

- **Support from Ministries**

- Ministry of Government Administration & Home Affairs: Non-Profit Private Organization Support Act, selection of winner by an open, competitive bidding to carry out projects.
- Ministry of Gender Equality: Framework Act on Women's Development, support for women-related organizations.
- Ministry of Environment: Natural Environment conservation Act, support for environment-related organizations.
- Government Information Agency: Non-Profit Private Organization Support Act, project to create a democratic action community.
- Committee on Youth Protection: Juvenile Protection Act, projects related to education of youth, etc.

\* In addition to national government, local governments also support civic organizations based on local laws and ordinances (e.g., City of Seoul's participation in city affairs project).

## **Emergence of the Necessity for Cooperation with Civic Organizations**

- **Modern Society and Social Issues**

- Today's social problems ranging across society, environment, welfare and other fields cannot be dealt with by effort of either the government or corporations alone.
- Therefore, the importance of civic organizations as a partner in conducting state affairs increased, to reduce the probability of government policy failure.

- Government's Search for Cooperation
  - The relationship between civic organization and the government is a creative yet a tense one, involving both cooperation and criticism from civic organization depending on issue at hand.
  - Korean government has perceived the necessity of deriving a desirable cooperative model between the government and civic organizations – for example, the necessity of research on successful cooperative relationships in advanced countries.
    - \* In United Kingdom and Canada, the government and civic organizations have signed agreements to facilitate public-private cooperation.
    - \* In the U.S.,
      - In 1980, the Reagan Administration formed a presidential committee led by the private sector, to utilize the capabilities of civil society for better society and to develop various policies and programs to strengthen public-private partnership.
      - In 1994, the Clinton Administration formed a central coordination organization encompassing 25 departments in the government and civic organizations for communication and cooperation.

### 3. The Committee on Development of Civil Society in the Office of the Prime Minister

#### Overview of the Committee on Development of Civil Society

- Background
  - **May 30, 1994** Democratic Liberal Party (Ruling Party) announces legislation on supporting private organizations.
  - **Feb. 21, 1995** National Assembly's Home Affairs Committee hosts legislation public hearing (abolished due to end of Assembly session)
  - **Oct. 22, 1997** The Millennium Democratic Party (Opposition Party) submits Legislative Bill for Supporting Private Organization Movement (Abolished).
    - \* Proposes establishing committee on Supporting Private Organization Movement under the Office of the Prime Minister to support private organization movements.
  - **Apr. 24, 2003** Representatives of civic organizations propose establishment of the organization in an informal meeting hosted by the Prime Minister.

- **June 14, 2003** Agreed to establish the organization under the Office of the Prime Minister in Policy Meeting to Promote Civil Society at working level.
  - **June 27, 2003** Prime Minister recommends establishment of the Committee on Development of Civil Society.
  - **Aug. 22, 2003** Directive by the Prime Minister issued (Committee on Development of Civil Society Provisions)
- **Objectives**
    - Established as an advisory committee to the Prime Minister to create a foundation for development of Korea's civil society in the 21<sup>st</sup> century, and to comprehensively research & improve issues relevant to activating civic organizations.
    - Committee Members: 22 members, 1 technical expert
      - \* 12 members from civic organizations, 7 members from academia and relevant fields, 3 members from the government.
- **Scope of Research**
    1. Issues related to establishment of a desirable relationship between the government and civil society.
    2. Issues related to amendment of laws and system pertinent to activities of civic organizations.
    3. Issues necessary to activate civic organizations.
    4. Other issues deemed necessary by the Chairman of the Committee.

### **Accomplishments of the Committee on Development of Civil Society**

- **Overview of Activities**
  - Hosting of committee meetings (15 times, once every month), hosting of sub-committees (9 times)
  - Field investigation of local civic organizations (18 regions), collection of opinions.
  - Submission of first list of recommendations to the Prime Minister
  - Publication of Masterplan booklet: The Masterplan for the Development of Korea civil society, to be published in October 2004.

- **First List of Recommendations (6 Items)**

1. Acknowledgement of Personnel Expenses in Government-supported Projects.

\* Proposed acknowledgement of personnel expenses that can be characterized as working costs in addition to transportation and food expenses in the public interest activity support budget for non-profit private organizations.

2. Acknowledgement of Multi-year Project

\* Proposed to include multi-year projects, since current project support which lasts for only 1 year lacks continuity.

3. Allowing Use of Public Buildings by Private Sector

\* Proposed to allow use of public buildings by small civic organizations, as space for education, seminars and other activities.

4. Exchange Programs for Government Employees and Activists.

\* Proposed including NGO graduate schools and educational institutions operated by civic organizations in the list of training institutions for government employees, and allow enrollment of civic organization activists in government training institutions.

5. Support for Informatization of Small Civic Organizations

\* Proposed supporting creation of websites for informatization of civic organizations and provision of joint computer server.

6. Further Reduction in Postage Rates and Simplification of Procedures

\* Proposed to simplify administrative procedure to request reduction of postage rates, as well as to increase the reduction rate from 25% to 50%.

- **Implementation of the First List of Recommendations by Ministries**

1. Acknowledgement of Personnel Expenses in Government-supported Projects.

\* Beginning in 2004, personnel working expenses acknowledged within certain percentage (2-5%) of total project support amount.

2. Acknowledgement of Multi-year Project

\* Beginning in 2004, pilot multi-year projects will be selected and conducted in a separate competitive process – and will be implemented in a larger scale after review of this year’s results.

3. Allowing Use of Public Buildings by Private Sector

\* Recommended national and local governments to publicize the availability and procedures for use of public buildings and facilities by private organizations.

4. Exchange Programs for Government Employees and Activists

\* NGO educational institutions have been included in the list of institutions for government employees, and enrollment of civic organization activists is now allowed in government educational institution (National Institute of Professional Administration, Korea Institute for Defense Analyses).

5. Support for Informatization of Small Civic Organizations

\* Budget for informatization project of public interest – private organization has been allocated for fiscal year 2005, to be included in government-supported informatization projects of the Ministry of Government Administration & Home Affairs.

6. Further Reduction in Postage Rates and Simplification of Procedures

\* Research project to improve postage reduction system is underway, and the improved procedures will be publicized in postal offices.

**Further Agenda for the Committee on Development of Civil Society**

- Check the Implementation of The Masterplan for the Development of Korea’s civil society (Planned)
- Office of the Prime Minister Website:  
[www.opm.go.kr](http://www.opm.go.kr)
- Members of the Civil Affairs secretariat
  - Sung-Soo SONG/Director: [songsong1010@korea.com](mailto:songsong1010@korea.com)
  - Do-Yon KIM/Director Civil Affairs Division: [kimdoyon@opm.goo.kr](mailto:kimdoyon@opm.goo.kr)
  - Jin-Young CHOI/Deputy Director: [jin7704098@opm.go.kr](mailto:jin7704098@opm.go.kr)

**SUPPORT FOR ACTIVITIES OF NON-PROFIT PRIVATE ORGANIZATIONS  
PROMOTING PUBLIC INTERESTS**

MINISTRY OF GOVERNMENT ADMINISTRATION  
AND HOME AFFAIRS (MOGAHA)

January 2005

**I. Overview**

**Basis for Support**

- Non-Profit Private Organization Support Act (Provision 7 of Article 6)
- Act on the Budgeting and Management of Subsidies (Applied Correspondingly)

**Project Objectives**

- To support voluntary activities and healthy growth of non-profit private organizations
- To promote activities of non-profit private organizations for public interests and progress of democratic society
- To create a mature, harmonious civil society by achieving participatory democracy

**Support Guidelines**

- Guarantee fairness and transparency in reviewing, selecting, and evaluating projects to be supported
- Accept diverse requests from private organizations, and increase effectiveness in project support
- Avoid concentrating resources on few, specific organizations, and provide opportunities of participation to a larger number of organizations

**2005 Budget: 10 Billion Won**

- National Project (Administered by MOGAHA): 5 Billion Won
- Local Project (Administered by Local Governments): 5 Billion Won

\* Criteria for Distribution among Regions: Basic Expenses 40%, Number of Registered Organizations 30%, Population 30%

## History

- January 1999 Provision of subsidies to non-profit private organizations began
  - A total of 85 Billion Won (15 Billion Won every year, 10 Billion Won for 2004) provided between 1999 and 2004
- Enactment of Non-Profit Private Organization Support Act (lawmaker-proposed legislation): January 12, 2000 (Enforcement Decree: April 17, 2000)
- Formation of Committee to Select Public Interest Project (15 Members)
  - 3 members recommended by the National Assembly, 12 members recommended by private organizations

### <1999 ~ 2004 Subsidies Provided to Private Organizations>

(Unit: Number of Project/Hundred Million Won)

	1999		2000		2001		2002		2003		2004	
	No. of Project	Amount	No. of Project	Amount	No. of Project	Amount	No. of Project	Amount	No. of Project	Amount	No. of Project	Amount
Total	1,838	150	1,612	150	1,790	150	1,890	150	1,806	150	1,440	100
Min. of Gov. Admin. & Home Affairs	140	75	195	75	216	75	237	75	237	75	154	50
Local Government	1,698	75	1,417	75	1,574	75	1,653	75	1,569	75	1,286	50

\* Average amount per project in 2004: 31 million Won (Min. of Government Administration & Home Affairs), 3.9 million Won (Local Government)

## II. Implementation & Project Category

### Implementation

- National Project: Administered by the MOGAHA
  - Conducted by organization registered in national government, and project scope ranges across more than 2 cities and/or provinces.

- Conducted by organization registered in city/provincial government, and project implemented by a consortium across more than 3 cities and/or provinces.
  - \* Organizations participating in the consortium must be distributed in more than 3 cities and/or provinces.
  
- Local Project: Administered by local government
  - Conducted by organization registered in the local city/provincial government, and project area lines within a single city or province.

Registration Conditions for Non-Profit Private Organization (Article 2)	
•	Project beneficiaries are many and unspecified persons
•	Profit from project is not distributed among members
•	Does not in effect support specific political party or candidate for elected position, or aims to disseminate religious doctrines
•	Number of members exceeds 100 at all times
•	Has record of activities for public interest within 1 year, etc.

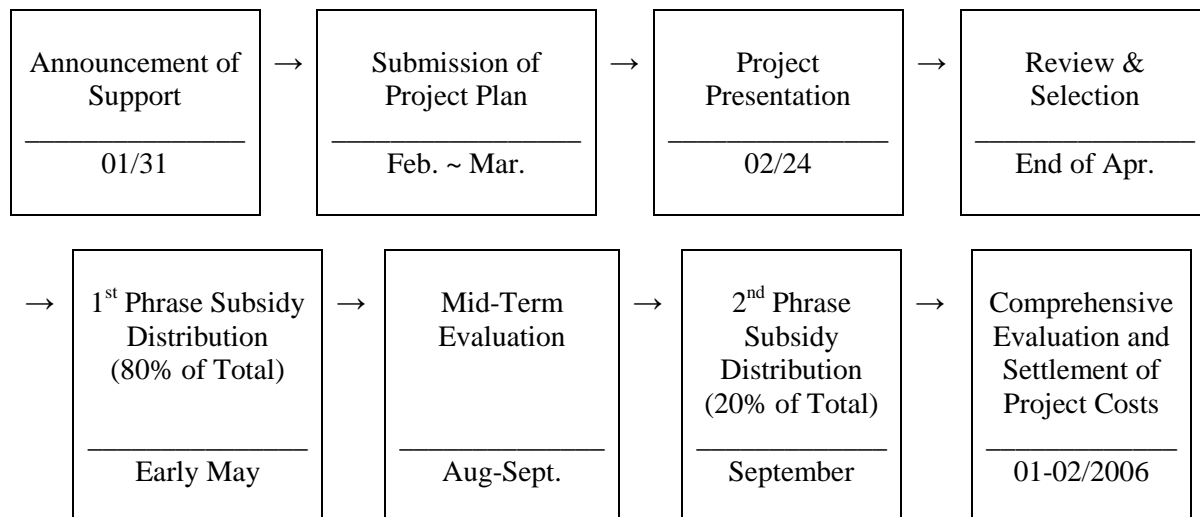
**Project Category (Article 7 and Enforcement Decree Article 5)**

\* Reflected suggestions from private organizations surveyed in December, 2004.

1. Social Integration: promotion of a sense of community, reduction of regional conflicts, assistance to Koreans in need, peace movement, cooperative activity between North and South Korea, etc.
2. Building a Cultural, Civil Society: courtesy, order, and hygiene-related movement, improvement of public toilets, lifestyle reform, development of cultural consciousness, etc.
3. Volunteer Activities: exhibition of volunteer activities, program development, management of volunteers, establishment of private social safety net, etc.
4. Public Safety: disaster prevention activity, safety culture, education/training/public relations, disaster rescue, etc.
5. Promotion of Human Rights, Protection of Weak Classes: promotion of human rights, protection of women, children, youth, senior citizens, disabled, foreign workers, etc.
6. Saving Resources Conserving Environment: reduction of food wastes, recycling of hidden resources, nature conservation campaign, etc.
7. Building foundation of NGO's Expansion of Citizen Participation: education of democracy for citizens, public-private partnership, participation of citizens in local community, networking, etc.
8. Promotion of International Exchange and cooperation: international exchange and cooperation activities, volunteer, medical, and relief activities abroad.

### III. Project Support Procedures

<2005 Work Flow for Project Support of Private Organizations>



#### **Announcement of Support** (provision 4 of Article 7, Enforcement Decree Article 9)

- Method of Announcement: 2 major daily newspapers, NGO Times, The Official Gazette, website of the Ministry of Government Administration and Home Affairs, etc.
- Contents of Announcement: eligible organization, project category, required documents and submission period, review and selection, manner of subsidy distribution, project evaluation and settlement of costs.

#### **Submission of Project Plan** (Article 10, Enforcement Decree Article 10)

- Submission Period: Feb. 1 ~ Mar. 31 (2 months)
- Required Documents: project application form, introduction of organization, project proposal

#### **Review & Selection** (Provision 2 of Article 7, Enforcement Decree Article 8)

- Determine selected project and subsidy amount fairly and transparently in the Committee to Select Public Interest Project, according to the Review Chart for Selection of Project.
- Points of Considerations for Project Selection
  - Uniqueness, economic feasibility, extensiveness of impact, whether the project effectively addresses a social problem, satisfaction of citizens

- Reasonableness of applied budget, ratio of amount borne by organization, evaluation of project from previous year
- Organization's expertise, sense of responsibility, development capability and records of recent activities for public interest, etc.

\*Weight given to each criterion to be determined by the Committee to Select Public Interest Project.

- Check with other ministries whether duplicate support has been provided (Other ministries in national government including the Government Information Agency, as well as local governments)
  - If project scope is identical, (extensively similar) revoke selection (excluded in the selection process) or withdraw subsidy.
- Announce the review and selection results on the press and MOGAHA website.

### **Distribution of Subsidy**

- In principle, distribute subsidy in 2 phases
  - 80% following review and selection (May), 20% after mid-term evaluation (Aug. ~ Sept.)
- For short-term project, distribute 100% following the review and selection process.

### **Mid-Term Evaluation** (Evaluation of Progress)

- Evaluation Period: August ~ September (When project progress is around 30 ~ 40%)
- Evaluation Items: Achievement of project goals, appropriateness of project management and accounting method, examination of difficulties and problems in project implementation, etc.
- Evaluation Method: Evaluation of Documents (Step 1), Interview (Step 2), On-site Inspection (Step 3), etc.
- Evaluation Result: Determination whether 2<sup>nd</sup> Phase Subsidy will be distributed.

### **Comprehensive Evaluation** (Final Evaluation)

- Evaluation Period: January – February, 2006
- Evaluation Items: achievement of project goals, public benefits from the project, appropriateness of accounting method, etc.

- Evaluation Method: Evaluation of Project Report (Step 1), Interview and Workshop (Step 2), Exhibition of Achievements (Step 3)

### **Settlement of Project Costs**

- Settlement Period: January – February, 2006
- Settlement Items: Determination of remaining amount, focusing on inspection of accounting regarding the use of subsidies - whether any conditions for subsidy distribution have been violated
- Settlement Results: Collection of inappropriately spent amount

## **KEY POINTS IN THE NON-PROFIT PRIVATE ORGANIZATION SUPPORT ACT**

### **Definition of Non-Profit Private Organization**

- An organization whose primary purpose is to conduct activities for public interest (Article 2)
- An organization registered at relevant Ministry of national government or city/provincial government (Article 4)
- Registration Conditions: Non-profit, non-politic, non-religious, more than 100 members. Record of Public Interest Activities for more than 1 Year.

### **Government Support**

- Direct Support
  - Subsidy for public project expenses of registered non-profit private organizations distributed by the MOGAHA or head of city/provincial government (Article 6)
- Indirect Support
  - Tax reduction as stipulated in the Restriction of Tax Reduction and Exemption Act and other tax laws (Article 10)
  - Partial reduction in postage rates for projects for public interest (Article 11)

### **Guaranteeing Fairness and Transparency in Government Support**

- Formation of Committee to Select Public Interest Project, with members mostly experts from the private sector (Article 7)

- Committee includes 3 members recommended by the Speaker of the National Assembly and experts recommended by the registered non-profit private organizations
- Project to be supported are selected via an open competition
- Project proposals prepared voluntarily by private organizations are submitted by the end of March of the fiscal year (Article 8)

### **Responsibility and Punitive Rules for Organizations**

- Upon completion of the supported project, a project report must be submitted by the end of January of the next fiscal year (Article 9)
- Presentation of a false project proposal shall be punished by imprisonment for not more than 3 years or a fine up to 10 million Won. Inappropriate use of subsidy shall be punished by imprisonment for not more than 1 year or a fine up to 5 million Won. (Article 12)

## **MONGOLIA**

### **UPDATE**

BY IJCSL STAFF

In connection with ICCSL's work throughout Asia, the organization has been by asked by the NPO Law Working Group to provide comments on the proposed new NPO law, as well as other developments regarding the legal framework for NPOs in Mongolia. Accordingly, ICCSL is posting a draft of the new NPO law to the website in order to solicit assistance with the effort to provide comments. The deadline for input is May 31, 2005. Please direct all comments to Karla Simon at [simon@law.edu](mailto:simon@law.edu).

## VIETNAM

### NEW CIVIL CODE FOR VIET NAM RULES FOR NOT-FOR-PROFIT LEGAL PERSONS

COMMENTS OF THE  
INTERNATIONAL CENTER FOR CIVIL SOCIETY LAW

MARCH 2005

**Introduction.** The International Center for Civil Society Law, ICCSL, is pleased to have been invited to provide comments on the proposed Civil Code of Viet Nam with respect to the provisions affecting not-for-profit organizations (NPOs).<sup>1</sup> Having worked in Viet Nam on the development of the legal framework for NPOs for over ten years, the current opportunity to interact with legal experts, Vietnamese NPOs, and foreign donors on this subject is quite important. The suggestions made in these comments are aimed at improving what are already progressive provisions for NPOs in the draft Civil Code.

#### **A. Background of NPO regulation in civil law countries.**

Viet Nam is a country whose laws reflect both the civil law tradition and the socialist law tradition. Like China and Cambodia, Viet Nam is now seeking to modernize its Civil Code to take account of the needs of a developing socialist market economy. Efforts to revise the civil codes in these three countries will have results that are more consistent with the Western, Japanese, and Korean civil codes of the current era. Thus, a bit of background on civil code and other legal treatment of not-for-profit legal persons will help to set the stage for the specific comments on the NPO provisions in the current draft.

In civil law countries, the legal system has traditionally recognized two types of private, voluntary NPOs, which are seen as being distinct from public institutions, on the one hand, and private commercial organizations (corporations of all types, partnerships, etc.), on the other. Some of the NPOs carry out activities for the benefit of their members, while others carry out activities for public benefit. The two traditional types of NPO recognized in the civil law are:

organizations of persons (individuals), typically called “associations;” and  
organizations involving the dedication of material resources, typically called “foundations.”

In the civil codes of most civil law countries, the chapter on persons includes a subchapter on legal or juridical persons. It is in the “legal persons” subchapter of the civil code where the division into two not-for-profit legal forms is found, although some civil codes now recognize additional forms in the not-for-profit sphere, such as public benefit or noncommercial companies. In addition to setting out the general rules on types of legal persons, the legal persons subchapter of a civil code also typically sets out specifics with respect to each type of organization provided for, such as the method of establishment, governance structures, and procedures for termination, etc. The traditional typology of private juridical entities operating for noncommercial purposes has its roots in Roman Law -- associations were called *universitas personarum* and foundations were called *universitas rerum* or *bonarum* -- and they have existed in most civil law countries since the time of the Code of Justinian.

#### **B. Influence of French law on NPO regulation in Viet Nam.**

In 1901 the French Parliament passed the Loi d'Association, which actualized the freedom of association in the country. Despite the fact that the Constitution of 1790 had guaranteed the freedom of association,

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<sup>1</sup> The draft changes are attached as Appendix A to this paper.

this sub-constitutional legislation was viewed as very significant for the protection of this freedom, not only for France but also for its colonies. Many countries that were French colonies were subject to the legislation as *départments* of France, and when they became independent, it was traditional for them to adopt a similar law. In Viet Nam this was done in 1957, with the adoption of the Law on the Right to Establish Associations.

### **C. Influence of socialism on the development of NPO regulations in Viet Nam – the early days.**

In countries that have or have had a socialist legal system, the typology of legal persons is a bit more complicated than in other countries. Because of the ideology of strong state control of all forms of activity, evolving civil codes in socialist and post-socialist legal systems have had to pay considerable attention to properly delineating between the public and private spheres. In Viet Nam the effort at modernizing a socialist approach to legal forms has taken place against the backdrop of profound social and economic change, initiated by the adoption of the *doi moi* reforms in 1986. Like many socialist and formerly socialist countries, Viet Nam has undertaken an exploration of how to fit its understanding of the role and purpose of private entities with public benefit purposes into a modern legal system, which recognizes that private entities can have both commercial and noncommercial purposes.

The first Civil Code in Viet Nam was adopted in 1995, and went into effect in 1996. Like modern civil codes in the Germanic (but not the French) legal tradition, it provides for rules with respect to legal persons. Articles 94 – 115 contain a description of the types of legal persons, their capacities, etc. The five different types of legal persons provided for in the 1995/96 Civil Code are as follows:

1. state organs and units of the armed forces;
2. political and socio-political organizations;
3. economic organizations;
4. socio- and socio-professional organizations;
5. social and charity funds; and
6. other organizations eligible to the conditions stipulated in Article 94.

Of these, only two are distinctly NPOs in the sense of being nongovernmental, not-for-profit, and nonpolitical — “social and socio-professional organizations” and “social and charity” funds. It is arguable that political and socio-political organizations are also NPOs; indeed political parties are generally simply associations of like-minded people with the same political views. And in many Western civil law countries, which have only two legal forms, political parties are registered associations, subject to additional regulation because of their political features. This paper, however, addresses only the non-political NPOs, which fit together structurally and which are differentiated from all political organizations in Viet Nam.

Subsequent to the enactment of the Civil Code, the Government of Viet Nam enacted two regulations, which provide specific details with respect to the clearly NPO legal persons set out in the Civil Code – the 1999 Regulations on the Organization and Operation of Social Funds and Charity Funds (Fund Regulations), and the 2003 Regulations on the Organization, Operations, and Management of Associations (Association Regulations). Thus, the work on the proposed Civil Code provisions for NPOs must take account not only of the 1995/96 Code provisions but also of innovations made in the regulations, which serve to clarify and make specific some additional requirements. It is important to address the proposed NPO provisions in the Civil Code with that in mind, because the revision of the two sets of regulations will also be necessary once the Civil Code is enacted.

### **D. The current legal framework for NPOs – some problems of definition and operations**

**Associations.** As indicated, the 1995/96 Civil Code provisions create two distinct types of NPOs – “social

and socio-professional organizations” and “social and charity funds.” This suggests that associations may be set up for social purposes (such as a chess club or a community association to clean up garbage in a local community) or for professional purposes (an association of doctors). Such treatment is typical of associations in civil law countries – associations may perform purely social functions in addition to carrying out other more public-spirited activities.

One of the aspects of the current Association Regulations that is puzzling, however, is the fact that they state that an association “shall be recognized as a socio-political as well as a socio-political-professional association.” This is misguided – associations should be permitted to be established to accomplish purely social aims, with no political perspective or role whatsoever. In China, for example, social organizations or *shetuan* are permitted to carry out activities in furtherance of both mutual and public benefit purposes. In Japan the situation is slightly more complex – under the Civil Code of 1896, only public benefit associations and foundations (*koeki hojin*) were permitted. In 2001, the Diet adopted new legislation permitting so-called “in between” organizations to be formed (*chukan hojin*). The proposed civil code revisions that will be introduced in 2006, will unify the treatment of associations and foundations, permitting each to be established for both mutual and public benefit.

**Funds.** One of the requirements in the Fund Regulations that is somewhat inconsistent with good practice is the provision that funds spent on management activities may not exceed 5% of the revenues (presumably annual revenues of the fund). Again, this is inconsistent with modern practice – the limit is much too low. In China, for example, the current foundation regulations set the limit at 10%.

## **E. The proposed new provisions of the Civil Code**

### **1. Articles 86 and 101 Types of legal persons**

- a. The revision of the types of legal persons specified in the new definitions includes one new type of political organization – the “political socio-professional organization.” It is therefore the view of the commentators that Articles 86 and 101 of the new Civil Code should be clear that there is a distinction between social organizations, on the one hand, and political organizations, on the other. There can, of course, be such organizations as political socio-professional organizations, but not all associations have a political dimension. Associations should not be required to have a political character unless they so desire.
- b. The names of the organizations might be changed to take into account modern terminology. It might, for example, make sense to refer simply to “associations” and “foundations” instead of “social organizations and socio-professional organizations,” or “social and charity funds.”
- c. It is good to permit, as the definitional sections do, both associations and foundations to be formed by juridical persons in addition to natural persons.

### **2. Article 105**

- d. This article should be clarified to ensure that associations may be formed for mutual benefit (benefit of the members) and public benefit purposes.
- e. This provision should also clarify that an association is a not-for-profit legal entity.
- f. It is good to require that a public benefit organization not be permitted to distribute any assets to members upon dissolution, but that is not true of an association that has been set up with members’ own funds, has received no tax or other benefits, etc. The Association Regulations recognize this crucial difference (see Article 30 (1)(b)), which suggests that the Civil Code provision should be conformed to the Association Regulations.
- g. German law provides, for example, for both registered and unregistered associations – it may be useful to consider adopting a similar rule in Viet Nam.

### **3. Article 106**

- h. There is a closer coordination between the definition found in this Article and the one used in the Fund Regulations. But it would be good to make the language entirely consistent and to have a longer list of public benefit purposes (for example, promoting the environment or historical preservation might be included).
- i. Since only public benefit foundations are permitted, it is appropriate to require that the assets distributed in dissolution go only to public benefit purposes.

**Conclusion.** Much work has gone into the proposed Civil Code revisions in Viet Nam, and much progress has been made in devising a more modern code that reflects current economic, social, and political realities. The suggestions made here are aimed at improving what are already progressive provisions for 21<sup>st</sup> Century realities.

## **Appendix A**

### **CIVIL CODE - Chapter four: Legal person**

#### **Article 84. Legal person** (modified and supplemented)

An organization shall be recognized as a legal person when it meets all the following conditions:

1. Established legally;
2. Has a well-organized structure;
3. Possesses property independent from other individuals and/or organizations, and bears its own liability by such property;
4. Independently enters into legal relationships under its own name.

#### **Article 85. Establishment of the legal person** (modified and supplemented)

A legal person may be established on the initiative of an individual, organization, or in accordance with a decision of the competent State authority.

The establishment of a legal person must comply with the procedures stipulated by law.

#### **Article 86. Types of legal person** (modified and supplemented)

1. State agencies, units of the armed forces;
2. Political organization, socio-political organization, political socio-professional organization;
3. Social organization; socio-professional organization;
4. Economic organization;

5. Social fund, charitable fund;
6. Other organizations which meet all the conditions provided for under Article 84 of this Code.

**Article 87. The civil legal capacity of a legal person** (modified and supplemented)

1. The civil legal capacity of a legal person is the capabilities of the legal person to have civil rights and obligations which are consistent with its purpose of operation.
2. The civil legal capacity of a legal person shall arise as from the point of time when the legal person is established legally, and shall be terminated at the point of time when the legal person ceases to exist.
3. The legal representative or the mandated representative of the legal person shall act in the name of the legal person in civil relations.

**Article 88. The name of a legal person**

1. A legal person must have its own name in the Vietnamese language, which shall clearly indicate the legal person's organizational form and distinguish it from other legal persons operating in the same domain.
2. A legal person must use its own name when engaging in civil intercourse.
3. The name of a legal person is recognized and protected by law.

**Article 89. The headquarters of a legal person**

The place where the managing office of a legal person is located shall be the headquarters of the legal person.

A legal person may choose other locations to serve as its liaison address.

**Article 90. The statute of a legal person** (modified and supplemented)

1. Where the law stipulates that a legal person must have a statute, the statute of the legal person must be approved by the founding members or a convention of the members; the statute of legal person shall be approved by the State agency that establishes the legal person.
2. The statute of a legal person shall have the following principal contents:
  - a/ Name of the legal person;

b/ Purpose and scope of operation;

c/ Headquarters;

d/ Statutory capital (if any);

e/ Organizational structure, the procedures for elections, appointments, assignments and dismissals; duties and powers of the titled positions in the management body and other bodies;

f/ Rights and obligations of the members;

g/ Procedures for amending and supplementing the statute;

h/ Conditions for consolidation, merger, separation and dissolution of the legal entity.

3. Amendments and supplements to the statute of the legal person must be approved by competent State authorities if stipulated by law.

**Article 91. Representative office(s) and branch(es) of a legal person** (modified and supplemented)

1. A legal person may establish representative office(s) and branch(es) at a place different from his/her headquarters.

2. The representative office shall be a dependent entity of the legal person and shall have the duty to represent under commission the interests of the legal person and to assure the protection of such interests.

3. A branch shall be a dependent entity of the legal person and shall have the duty to perform all or part of the functions of the legal person, including commissioned representation.

4. Representative office(s) and branch(es) are not legal persons. The head of the representative office(s) and/or branch(es) shall perform his/her duties in accordance with the mandate of the legal person.

5. Legal persons shall have the civil rights and obligations arising from civil intercourse established and performed by the representative office(s) and branch(es).

**Article 92. The managing body of a legal person**

1. A legal person shall have a managing body.

2. The organization, duties and powers of the managing body of the legal person shall be prescribed in the statute of the legal person or in the decision to establish the legal person.

**Article 93. The representative of a legal person** (modified and supplemented)

1. The representative of a legal person may be a legal representative or a mandated representative. The representative of a legal person shall respect articles on representative stipulated in Chapter VII, Part 1 of this Code.
2. The legal representative of a legal person shall be stipulated in the decision to establish the legal person or in the statute of the legal person.
3. The legal representative of a legal person may delegate other persons to perform the representative duties on his/her behalf.

#### **Article 94. Civil liabilities of a legal person**

1. A legal person shall bear civil liabilities for the exercise of its civil rights and performance of its civil obligations established and performed by the representative in the name of the legal person.
2. A legal person shall bear civil liabilities with its own property; shall not bear civil liability for a member of the legal person with respect to the civil obligations established and performed by such member not acting in the name of the legal person.
3. A member of the legal person shall not bear civil liabilities on behalf of the legal person with respect to civil obligations established and performed by the legal person.

#### **Article 95. Consolidation of legal persons** (modified and supplemented)

1. Legal persons of the same category may consolidate with one another to form a new legal person in accordance with the decision of the competent State authority or in accordance with the agreement of the legal persons.

The consolidation of legal persons must comply with the procedures as prescribed by law.

2. After the consolidation, the former legal persons shall terminate; the civil rights and obligations shall be transferred to the new legal person.

#### **Article 96. Merging of legal persons** (modified and supplemented)

1. A legal person may be merged (referred to as the merged legal person) into another legal person of the same category (referred to as the merging legal person) in accordance with the decision of the competent State authority or in accordance with the agreement of those legal persons.
2. After the merger, the merged legal person shall terminate; the civil rights and obligations of such legal person shall be transferred to the merging legal person.

**Article 97.- Division of a legal person** (modified and supplemented)

1. A legal person may be divided into more than one legal person in accordance with the decision of the competent State authority or the decision of the competent body of the legal person as stipulated in the statute of the legal person.
2. After the division<sup>7</sup>, the divided legal person shall terminate; the civil rights and obligations of such legal person shall be transferred to the new legal person.

**Article 98. Separation of a legal person** (modified and supplemented)

1. A legal person may be separated into more than one legal person in accordance with the decision of the competent State authority or the decision of the competent authorities of the legal person as prescribed in the statute of the legal person.
2. After the separation, the separated legal person and the separating legal person shall perform their powers and responsibilities in accordance with the operation purposes of that legal person.

**Article 99. Dissolution of a legal person** (modified and supplemented)

1. A legal may be dissolved under the following circumstances:
  - a/ By decision of the competent State authority;
  - b/ By the statute of the legal person;
  - c/ Upon the expiry of the term of operation stated in the statute or in the decision of the competent State authority regarding the establishment of the legal person.
2. Before dissolving, a legal person must perform its property obligations and get the approval of a competent State authority.

**Article 100. Termination of a legal person** (modified and supplemented)

1. A legal person shall terminate under the following circumstances:
  - a/ The consolidation of legal persons, the merging of legal persons and the division of a legal person in accordance with the provisions of Article 95, Article 96 and Article 97 of this Code;
  - b/ Dissolution in accordance with Article 99 of this Code;
  - c/ Declaration of bankruptcy in accordance with the law on bankruptcy.

2. The legal person shall terminate from the time its name is removed from the legal person registry or from the time stated in the decision of the competent State authorities.
3. In the termination of the legal person, its property shall be settled in accordance with the stipulations of law.

## **Section 2**

### **TYPES OF LEGAL PERSON**

#### **Article 101. Types of Legal Person** (modified and supplemented)

1. State agencies, units of the armed forces;
2. Political organization, socio-political organization, professional socio-political organization;
3. Social organization; socio-professional organization;
4. Economic organization;
5. Social fund, charitable fund;
6. Other organizations which meet all the conditions provided for under Article 84 of this Code.

#### **Article 102. A Legal person who is a state agency or unit of the armed forces** (modified and supplemented)

1. A State agency or unit of the armed forces which has been allocated property by the State in order to perform the functions of State management, and other functions which are not for business purpose, shall be legal persons when participating in civil relations.
2. A State agency or unit of the armed forces shall bear civil liabilities related to the performance of its functions and obligations with funds allocated by the State budget.
3. Where a State agency or unit of the armed forces performs activities generating income in accordance with the stipulations of law, it shall bear civil liabilities related to the generating-income activities with the property resulting from such activities.

#### **Article 103. A legal person who is a political organization, socio-political organization or professional socio-political organization** (modified and supplemented)

1. A political organization, socio-political organization or professional socio-political organization which manages, uses or disposes of property under its ownership for the purpose of fulfilling political or social objectives in accordance with its statute, shall be a legal person when participating in civil relations.
2. The property of a political organization, socio-political organization or professional socio-political organization cannot be divided up among its members.
3. A political organization, socio-political organization or professional socio-political organization shall bear civil liabilities with its own properties, except those which according to the stipulations of law cannot be used for bearing civil liabilities.

**Article 104. A legal person who is an economic organization** (modified and supplemented)

1. A State enterprise, co-operative, limited liability company, joint-stock company, enterprise with foreign invested capital and other economic organizations which meet all the conditions stipulated under Article 84 of this Code, shall be legal persons.
2. An economic organization shall have a statute.
3. An economic organization shall bear civil liabilities with its own property.

**Article 105. A legal person who is a social organization or socio-professional organization**

1. A social organization or socio-professional organization which has been permitted to be established and has had its statute approved by the competent State authority, and has as members individuals or organizations that voluntarily contribute property or membership fees for the purpose of supporting the common needs of the members and purpose of the association, shall be legal persons when participating in civil relations.
2. A social organization or socio-professional organization shall bear civil liabilities with its own property.
3. Where the social organization or the socio-professional organization terminates its operation, the property of the organization shall not be divided up among its members but must be resolved in accordance with the stipulations of law.

**Article 106. A legal person who is a social fund or charitable fund**

1. A social fund or charitable fund which has been permitted to be established and has had its statute approved by the competent State authority, operating for the purpose of promoting the development of culture, science, charity and other social and humanitarian purposes which are not for profit making, shall be a legal person when participating in civil relations.

2. The property of the social fund or charitable fund shall be managed, used and disposed of in accordance with the stipulations of law and in accordance with the purpose of operation of the fund as stipulated by its statute.

3. A social fund or charitable fund shall be permitted to carry out only the activities stipulated in the statute approved by the competent State authority and within the limit of its property, and must bear civil liabilities with such property.

4. The organization which establishes a social fund or charitable fund shall not bear civil liabilities with the property under its ownership with respect to the activities of the fund, and may not divide up the property of the fund in the course of the fund's operation.

When the social fund or charitable fund terminates its operations, the property of the fund shall not be divided up among its founding members but must be resolved in accordance with the stipulations of law.

## **LATIN AMERICA & CARIBBEAN**

### **MEXICO**

#### **NON-PROFIT LAW IN MEXICO**

##### **INTRODUCTION**

The following articles give an update on non-profit law in Mexico. The first article summarizes the state of Mexican federal non-profit law, and the second article gives a timeline of legal developments in the non-profit sector in Mexico from 1991 to the present.

#### **FEDERAL LAW FOR THE PROMOTION OF CIVIL SOCIETY ORGANIZATIONS IN MEXICO**

BY CONSUELO CASTRO\*

The bill to advance Mexican Non Profit Organization's regulation promoted in Congress by CEMEFI with other organizations was finally enacted after ten years under the title of "Federal Law for the Promotion of the Activities Conducted by Civil Society Organizations." This new law was published in the Mexican Official Journal on February 9, 2004.

The recognition of non profit organizations in this Law is expected to lead to the systematization of the federal government incentives or to the creation of new ones. For instance, it is expected to motivate fiscal authorities in order to consider tax exemptions to organizations dedicated to human rights and sports.

The new law creates a federal registry of nonprofit organizations and an information system. It will take some time for organizations to register as they have to make some changes in their bylaws (statutes) among other factors.

With this system, transparency is enhanced in a twofold way as not only information on organizations will be available to the public in general but also the public funds granted to them will have to be disclosed. For this purpose, a web page has already been launched:

<http://www.corresponsabilidad.gob.mx>.

An Inter-Ministry Commission was formed by the Ministry of Social Development, the Ministry of the Interior, the Finance and Public Credit Ministry, and the Ministry of Foreign Affairs and its main function will be to design, implement, and follow up on the promotional actions of the federal government. A Technical Consulting Council comprised with representatives mainly from the non profit sector was also formed.

We are confident that the new regulatory framework as an important basis for the coordination of organizations efforts and the federal government that will have on the long run a positive impact in the social development in Mexico.

The Board was elected on December 9, 2004. It will comprise nine representatives from civil society organizations; four from the academic, scientific, and cultural sector; and two members of the House of

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\* Consuelo Castro is a legal adviser to the Mexican Center for Philanthropy (CEMEFI) and a member of the Advisory Council of the International Center for Not-for-Profit Law.

Representatives. This Board will provide feedback to the Inter-Ministry Commission regarding implementation of the registry and promotion activities. For the time being, members are elected to serve for staggered terms--one year, two years, or three years--so that not all members will be up for renewal at the same time. Nine alternates to the members were also chosen in case of resignations.

A federal registry of nonprofit organizations has been created, as well as an information system. The rules for this registry were published in the Official Journal of November 23.<sup>1</sup> The registry is free and voluntary, and the process of registering can be initiated online. The benefits of registering are still being created. For example, in order to apply for “federal conversion funds,” which will be given next year by the Ministry of Social Development, organizations must be registered. In the future, other ministries will gradually impose the same requirement on nonprofit organizations seeking such support as subsidies, grants, tax exemptions, and funds.

It will take time for nonprofit organizations to register, because doing so will often require changing their bylaws. Many tax-exempt organizations now provide in their bylaws that, in case of dissolution, all assets will be transferred to another tax-exempt organization. In order to register under the new law, an organization's bylaws must stipulate that the recipient of assets upon dissolution will also be registered under this law. Organizations will need to document the bylaw change with a Public Notary, which will incur a cost. The Ministry of Social Development has signed an agreement with the Public Notaries Association in order to reduce the costs for organizations changing their bylaws in this fashion.

The information system implemented from this registry will give organizations visibility as well as provide transparency of the mechanisms and incentives that the federal government dedicates to nonprofit organizations. INDESOL as a matter of fact has already established its web page, <http://www.corresponsabilidad.gob.mx>.

In the long term, the registry is expected to simplify governmental procedures at different ministries. Registration may even be deemed a special kind of ID. For instance, in order to give tax-exempt status, the Ministry of Finance now requires that the nonprofit activities of the organization be certified by a public entity--depending on the subject, either the Ministry of Health or the Ministry of Culture. However, it is difficult to get this certification because the governmental entities have neither offices nor rules for certification. With the registry, the possibility exists for the federal government to establish one “window” for all governmental procedures that nonprofit organizations need. This may require great coordination as well as a genuine commitment to fostering the work of the nonprofit sector. We anticipate a long process, which has just started.

The importance of this law resides in its ability to serve as a means for enhancing philanthropy and thereby promoting civil society participation in activities that seek to develop our country.

## **RECUESTO DE LOGROS EN GESTIONES DEL CEMEFI DE 1991 A 2005**

BY LIC. CONSUELO CASTRO SALINAS

1991

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<sup>1</sup> In Spanish, Reglamento Interno del Registro Federal de las Organizaciones de la Sociedad Civil.

A partir de 1991 a 1993, el CEMEFI. participó como representante del sector filantrópico mexicano en las negociaciones relativas al capítulo sobre organizaciones no lucrativas exentas del Convenio de Doble Tributación

1992

En Octubre de 1992, el CEMEFI logró que se eliminara la disposición fiscal publicadas en enero de ese año que limitaba del porcentaje de deducibilidad de los donativos.

1993

El Centro Mexicano para la Filantropía (CEMEFI), la Convergencia de Organismos Civiles, el Foro de Apoyo Mutuo, la Fundación Miguel Alemán, al cual en adelante se llamará "Grupo Promotor de la Ley de Fomento" se integró para elaborar una ley marco que promoviera las acciones del sector y se iniciaron los trabajos en el seno de la Universidad Iberoamericana, como apoyo académica.

1994

El Centro Mexicano para la Filantropía, A. C. formó parte del recién creado Consejo Asesor para la Determinación del Destino de las Mercancías que pasen a propiedad del Fisco Federal de la Secretaría de Hacienda y Crédito Público (SHCP).

1995

El CEMEFI, la Convergencia de Organismos Civiles, el Foro de Apoyo Mutuo, la Fundación Miguel Alemán presentaron a la Cámara de Diputados el proyecto de iniciativa de Ley bajo el nombre de "Ley de Fomento a las Actividades de Desarrollo Social" ante la Comisión de Participación Ciudadana, entonces presidida por la Lic. María de la Luz Lima Malvido.

1996

A) Autorización a las Asociación Civiles para denominarse "Fundaciones".

Cuando se constituye una organización legalmente, uno de los pasos consiste en solicitar ante la Secretaría de Relaciones Exteriores (SRE) el permiso para la denominación de la organización. En 1996, la Secretaria de Relaciones Exteriores (SRE) empezó a denegar el permiso a las asociaciones civiles para llevar el nombre de "Fundación", término que únicamente era permitido a las Instituciones de Asistencia Privada. Esta cuestión fue resuelta en septiembre de 1996 a través de las gestiones del CEMEFI ante el Gobierno del DF y la SER puesto que no existe ninguna norma legal que reserve este término a las instituciones de asistencia privada.

B) Inicio de promoción de exenciones del Distrito Federal

En octubre 1996, se inició la promoción para lograr que las exenciones sobre impuestos y derechos del Gobierno del Distrito Federal se extendieran a las Asociaciones Civiles y no solamente a las instituciones de Asistencia Privada, cuestión que tuvo éxito hasta 1999.

C) Autorización Automática a Donatarias

En noviembre de 1996, se logró que las autorizaciones para recibir donativos deducibles del impuesto sobre la renta se realizaran en forma automática. Por primera vez, el CEMEFI promovió un acercamiento

de las necesidades de las donatarias autorizadas con la SHCP al lograr de la participación de esta Secretaria de Hacienda en seminarios sobre regulación fiscal de las organizaciones

1997

A) Clarificación sobre el procedimiento para solicitar la autorización.

Se logró clarificar el procedimiento para solicitar la autorización conforme al Convenio para Evitar la Doble Tributación y su otorgamiento mediante de su publicación en el Diario Oficial.

B) Eliminación de la limitación para Construir Patrimonios

En abril de 1997, el CEMEFI solicitó a la Secretaria de Hacienda y Crédito Público que se eliminara la disposición a la limitación que las organizaciones no pueden recibir ingresos excesivos por concepto de arrendamiento intereses y dividendos o por actividades relacionadas con su objeto social señaladas en el inciso c), de la fracción I, del artículo 70-B de la Ley del Impuesto sobre la Renta. Se hizo ver a las autoridades que con esta disposición se impedía a las organizaciones a formar un patrimonio por lo que se aclaró que solo se aplica a aquellas organizaciones autorizadas conforme al Convenio de Doble Tributación.

C) Ampliación de Objetos Sociales

A partir del 1 de enero de 1997, se adicionó en la Ley del Impuesto sobre la Renta como objeto social susceptible de recibir donativos deducibles a las organizaciones que se dedican a llevar a cabo actividades de preservación o de investigación de la flora, fauna silvestre y acuática conforme a la fracción XVIII del artículo 70 de Ley del Impuesto sobre la Renta. Este se concretó particularmente con la creación del Fondo Mexicano de la Conservación de la Naturaleza, tema que contó con el apoyo del CEMEFI para lo cual se sostuvo incluso anteriormente una audiencia con el entonces subsecretario de Ingresos.

D) Ley de Asistencia Social

Durante 1997, el CEMEFI participó en el Consejo Consultivo de la Comisión de Asistencia Social como apoyo a los trabajos del Senado en la modificación a la actual Ley de Asistencia Social. Buscando sobre todo que esta iniciativa no fuera discordante con la Ley de Fomento.

E) Simplificación SIEM

En septiembre de 1997, se logró que las organizaciones no lucrativas, no tuvieran que darse de alta en el Sistema de Información Empresarial Mexicana de la Secretaria de Comercio y Fomento Industrial ya que en principio no realizan actividades comerciales.

1998

Junto con el grupo promotor de la Ley se continuó con la promoción de la Ley de Fomento en la LVIII Legislatura.

1999

Con el Ing. Cuauhtémoc Cárdenas, el Gobierno del Distrito Federal dio respuesta a la solicitud del CEMEFI de que se otorgaran reducciones de impuestos y derechos locales a aquellas organizaciones

constituidas como Asociaciones Civiles. Este acuerdo fue publicado en la Gaceta Oficial del Distrito Federal el 28 de enero de 1999.

Se apoyaron los trabajos de la Asamblea Legislativa del Distrito Federal con el “grupo promotor la Ley” para la elaboración de la Ley de Fomento en el Distrito Federal.

2000

El Gobierno del DF tomó en cuenta la solicitud del CEMEFI en cuanto a la necesidad de contar con una simplificación administrativa en la solicitud de estos subsidios al instrumentar que se pudiera presentar dicho trámite ante cualquier oficina de Tesorería Adicionalmente, las reducciones de impuestos y derechos del Gobierno del Distrito Federal fueron incorporados al Código Financiero para el Distrito Federal.

La Ley de Fomento a las Actividades de Desarrollo Social para el Distrito Federal fue publicada el 23 de mayo de 2000 en la Gaceta Oficial del Distrito Federal.

2001

El CEMEFI participó en el “Programa de Intercambio de Deuda Pública en apoyo de Proyectos de Alto Impacto Social”, conocido como “Swaps Sociales” que fue vuelto a implementar por la Secretaría de Hacienda y Crédito Público.

2002

#### A) Ampliación de Actividades en la Ley del ISR

El CEMEFI promovió que se incorporaran en el artículo 95 de la Ley del impuesto sobre la Renta las organizaciones que se dedican a las actividades que a continuación se describen para que puedan acceder a la autorización para recibir donativos deducibles del Impuesto sobre la Renta para sus donantes:

- Orientación social, educación o capacitación para el trabajo.
- La promoción de la participación organizada de la población en las acciones que mejoren sus propias condiciones de subsistencia en beneficio de la comunidad.
- La prevención y control de la contaminación del agua, del aire y del suelo, la protección al ambiente así como la preservación y restauración del equilibrio ecológico.

Estas modificaciones se publicaron en el Diario Oficial del primero de enero del 2002 (segunda sección página 47 a 52).

#### B) La Ley de Fomento fue aprobada por la Cámara de Diputados.

El “grupo promotor de la Ley” continuó alentando a la Comisión de Participación Ciudadana en la LVIX Legislatura y finalmente se emitió el Dictamen favorable publicado en la Gaceta Parlamentaria de la Cámara de diputados, número 1148 con fecha del 10 de diciembre de 2002 con el título de "Ley de Fomento a las Actividades de Desarrollo Social de las Organizaciones Civiles". Fue entonces turnada

2004

A) La Ley de Fomento fue publicada en el DOF

El “grupo promotor de la Ley” dio seguimiento al proceso de la Ley de Fomento hasta la conclusión del mismo con su publicación en el Diario Oficial de la Federación del 9 de febrero de 2004.

Una vez promulgada la Ley, el grupo promotor ha apoyado la labor del INDESOL en los trabajos que siguieron para dar cumplimiento a la Ley a través de consultas, información a las OSC con relación a diferentes temas como: la integración de bases para la selección e integración del Consejo Técnico Consultivo, órgano representativo de las OSC.

## URUGUAY

### URUGUAY CREATES A MINISTER OF SOCIAL DEVELOPMENT

BY IJCSL STAFF\*

On the 21<sup>st</sup> of March 2005, the new Uruguayan parliament approved the creation of a Minister of Social Development. One of the principal tasks that the Minister will assume is the implementation of the Plan of National Attention to Social Emergency (PANES, using its Spanish acronym). The plan of Emergency is a temporary proposal that will last two years. It focuses on the areas of nutrition, health, housing, work, and education, and will consist of seven basic programs. The objectives include guaranteeing coverage of the basic necessities of the most vulnerable social sectors and creating paths out of indigence and poverty.

Law N°17.866, which created the Minister of Social Development, abolished the Minister of Sport and Youth and established that the Executive Power will redistribute their powers between the Minister of Social Development and the Minister of Tourism. The National Institute of Youth and the National Institute of the Family and the Woman will also be under the Minister of Social Development. The National Institute of the Child and the Adolescent of Uruguay (INAU in its Spanish acronym) will relate to the Executive Power through the Minister of Social Development.

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\* Summarized from the website of the Instituto de Comunicación y Desarrollo (ICD) 2002 - 2005  
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<[http://lasociedadcivil.org/img-uploads/presidencia\\_uruguay.gif](http://lasociedadcivil.org/img-uploads/presidencia_uruguay.gif)>

## NEW INDEPENDENT STATES

### RUSSIA

#### UNREGISTERED RELIGIOUS GROUPS

BY FORUM 18\*

Despite its claim to uphold a constitutional guarantee of equality before the law for religious associations (obyedineniya), Russia's 1997 religion law divides them into organisations (organizatsii) and groups (gruppy).

A religious group has significantly fewer legal rights than a religious organisation. Defined as operating without state registration, it has the right to worship at premises provided by its own members (that is, not held as the property of or rented by the group in an official capacity) and teach its existing followers. It does not enjoy the following rights: 1) to request deferment from military service for its clergy; 2) to create educational institutions or to give extra-curriculum religious instruction to children in state schools; 3) to invite foreign citizens for professional purposes or to have a representative body of a foreign religious organisation attached to it; 4) to conduct religious rites in hospitals, prisons, children's and old people's homes; 5) to produce, acquire, export, import and distribute religious literature, printed, audio and video material and other articles of religious significance, or to create organs of mass media.

While state registration is not compulsory, a religious group wishing to register and so obtain the full legal personality status of a religious organisation must either prove 15 years existence in its locality or affiliation to a central religious organisation of the same creed. (A central religious organisation is made up of at least three local religious organisations.)

This categorisation of religious associations has had a negative impact upon religious freedom, although far less than originally feared. In the immediate wake of the law's adoption, hundreds of Protestant communities founded since the abolition of Soviet restrictions enrolled into centralised Protestant unions as the only protection against the reduction of legal rights under the 15-year "probationary period". Some have told Forum 18 that the unions concerned have allowed them to retain de facto independence. Others, however, resent having had to jettison theological opposition to hierarchical structures, as well as the sometimes considerable membership fees levied by such unions.

The main reason for the much-reduced impact of the 15-year rule is that successive constitutional court rulings in 1999, 2000 and 2002 determined that it did not have retroactive force. Consequently, its limitation of legal rights now applies to the far narrower category of religious communities who either: 1) were founded or sought initial registration after the adoption of the 1997 law and are not in a position to join a centralised religious organisation; or 2) reject state registration on principle.

In time, though, the impact of this 15-year rule can only increase as new groups are founded.

Forum 18 has encountered few instances of either category. However, in an example of the first, the True Orthodox parish of St Elijah in the republic of Chuvashiya was denied initial registration in late 2003. While a local court noted the group's claim that it "existed in private flats from 25 March 1988 because their confession was persecuted under the communist regime," it concluded that "confirmation by organs of local government of the existence of a religious group for no fewer than 15 years is possible only after 15 years has elapsed from the moment when they inform [the authorities] of the creation of the group."

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\* Forum 18 News Service (reproduced here with the kind permission of Forum 18 News Service).

The authorities thus deemed the 15-year period to have begun when the parish first formally contacted them in spring 2003. Due to the issue of disputed apostolic legitimacy, the community has no Orthodox central religious organisation which it could join as an alternative.

While other True Orthodox and some Old Believer groups are unregistered because they reject all contact with the state on theological grounds, they are able to function unimpeded because they are inconspicuous. Baptist communities belonging to the Council of Churches, however, who similarly refuse to register on principle, routinely report fines and property confiscation when they stage evangelisation campaigns, even though the 1997 law does not state explicitly that a religious group may not preach in public. In early 2003 a large Moscow congregation belonging to the Council of Churches Baptists - who refuse on principle to register with the state authorities in CIS countries - had a long-running rental contract cancelled on the grounds that it did not hold state registration, even though the official commentary to the 1997 law specifies that an individual member may rent worship premises on behalf of a group.

Sometimes religious groups are denied the full rights of a legal personality despite being affiliated to central religious organisations. While affiliated to the Spiritual Directorate of Muslims of Karachai-Cherkessia and Stavropol Region, for example, 39 out of 47 Muslim communities in Stavropol region have not been granted state registration. One, a Pyatigorsk mosque visited by Forum 18, was five times asked for additional information in its registration application rather than issued an outright refusal against which it could mount a legal challenge. Founded in 2000 and affiliated to a federal Pentecostal union, Victory Chapel Church in Yuzhno-Sakhalinsk has been refused registration four times since 2001 and was obstructed from holding and advertising public evangelisation events in 2003 on the grounds that it was a religious group.

Absence of legal personality status has proved an impediment to claiming historical places of worship confiscated by the Soviet state. Denied registration - despite being part of the Catholic Church in Russia - the Catholic parish in Belgorod has been unable to claim a small former Catholic church in the city centre, which has meanwhile been transferred to the local Orthodox diocese. While often elderly Old Believer communities have found the 1997 law's bureaucratic registration requirements an impediment, the Russian Orthodox Church (Moscow Patriarchate) has had no difficulty in registering its parishes and has successfully claimed some Old Believer historical church property as a result.

On the other hand, many religious groups have chosen their unregistered status as it avoids potentially intrusive and bureaucratic contact with the state. As described above, a group's rights are not usually restricted - despite the letter of the law - unless it is conspicuous. Access to prisons, for example, normally depends more upon personal relations with the institution's administration rather than whether a religious community is registered. State registration is not in itself a guarantee of full rights in any case, as disfavoured religious organisations may be obstructed, for example, by being denied permission to acquire land or build. Another indication of a lack of systematic application of the 1997 law is that, while the 2004 ban of the Moscow Jehovah's Witness community should mean a complete prohibition of its activity, it has by and large been allowed to function as a religious group.

The head of a government working group drafting proposed amendments to the 1997 law, Andrei Sebentsov believes that the 15-year rule is a violation of the Russian constitution and should be removed. One of the law's major lobbyists, Metropolitan Kirill (Gundyayev) of the Russian Orthodox Church (Moscow Patriarchate) last year publicly rejected this call, insisting that society must be allowed 15 years to see whether or not a religious group was harmful: "This is not the time or the place to experiment upon our people." It remains unclear which argument will prevail. In this context it should be noted that the 1997 law still gives religious groups a key space to operate because it allows home worship and does not

make registration compulsory, unlike in Belarus, where the current religion law was also successfully lobbied for by the Russian Orthodox Church (Moscow Patriarchate).