The International Journal of Not-for-Profit Law

Volume 8, Issue 1
November 2005

Letter from the Editor ......................................................... 2

SPECIAL SECTION: HELPING CIVIL SOCIETY FLOURISH

Toward An Enabling Legal Environment for Civil Society ....................... 3
Statement of the Sixteenth Annual Johns Hopkins International Fellows in Philanthropy Conference, Nairobi, Kenya

Implementation of NGO-Government Cooperation Policy Documents: Lessons Learned
By Radost Toftisova ............................................................... 11

Strengthening Civil Society in the South: Challenges and Constraints – A Case Study of Tanzania
By Jared Duhu ................................................................. 42
Response
By Emeka Iheme ............................................................... 54

ARTICLES

Civil Society Law Reform in Afghanistan
By David Moore ............................................................... 63

Rational Exuberance: An Exploration of the Adaptation by California’s Charitable Sector to Changing Governance Standards — Notes from the Field
By Thomas Silk ............................................................... 71

A Common, Global Framework of Nonprofits as Players in Civil Society
By Herrington J. Bryce ........................................................ 77

By Pablo Eisenberg ........................................................... 81

Responses
By Diana Aviv ............................................................... 91
By H. Peter Karoff ........................................................... 93
By Arthur Drache ........................................................... 96
By Susan Raymond .......................................................... 99
By Bill Landsberg ........................................................... 100
Letter from the Editor

This issue of the International Journal of Not-for-Profit Law features a special section on helping civil society flourish. We open with the Statement of the Johns Hopkins International Fellows in Philanthropy Conference on fashioning an enabling environment for civil society. Next, Radost Toftisova comprehensively examines NGO-government cooperation agreements, or "compacts," their history to date, and some of the lessons learned through experience. Using Tanzania as a case study, finally, Jared Duha considers some of the challenges facing those who seek to strengthen civil society in the South; Emeka Iheme offers a response.

Our other articles open with a report by David Moore on pathbreaking reforms of civil society law in Afghanistan. Thomas Silk follows with a look at how the charitable sector has responded to recent regulatory legislation in California. Herrington J. Bryce outlines a global framework for analyzing nonprofit organizations and their role in civil society. Next comes a lively and informative debate on the future of American nonprofits, featuring an essay by Pablo Eisenberg and responses from Diana Aviv, H. Peter Karoff, Arthur Drache, Susan Raymond, and Bill Landsberg.

We gratefully acknowledge the generous assistance of the University Press of New England, Lester M. Salamon of the Center for Civil Society Studies at Johns Hopkins University, HTML wizards Kareem Elbayar and Erin Means, IJNL volunteer Sabrina Querubin, and, especially, our expert authors.

Stephen Bates
Editor
International Journal of Not-for-Profit Law
sbates@icnl.org
SPECIAL SECTION: HELPING CIVIL SOCIETY FLOURISH

Toward an Enabling Legal Environment for Civil Society

Statement of the Sixteenth Annual Johns Hopkins International Fellows in Philanthropy Conference
Nairobi, Kenya

Preamble

Though they pursue public purposes, civil society organizations are fundamentally private organizations. Yet, the ability of these organizations to carry out their special functions depends importantly on the legal environment within which they operate, and this, in turn, depends on actions by the state. Indeed, establishment of an enabling legal environment is one of the most important contributions governments can make to the development of civil society organizations.

In many parts of the world, however, the legal framework for civil society activity is uncertain and incomplete at best, burdened with contradictions or out of date in light of current civil society needs. While some organizations have managed to thrive despite an unfavorable legal environment, improvement of the legal environment for civil society has become a growing priority around the world.

Clearly, there is no single “right” way to design civil society laws and regulations. Legal traditions, as well as traditions of civil society activity, differ widely among countries. Significant variations can thus be expected in how legal systems handle the crucial issues that civil society operations entail.

Despite such variations, however, it is possible to identify some general principles or rules of good practice that can usefully guide the development of civil society law around the world. The purpose of this Statement is to articulate these general principles or guidelines. The Statement emerged from the work of the Sixteenth Annual Johns Hopkins International Fellows in Philanthropy Conference held in Nairobi, Kenya, in July 2004. Over 100 civil society activists and experts from East Africa and more than 30 other countries around the world took part in the deliberations that led to this Statement. The present Statement represents a synthesis of their work. More specifically, after articulating some fundamental caveats and assumptions, the Statement addresses four issues that are especially critical to the development of civil society organizations: first, the basic legal standing of civil society organizations and the registration procedures that help to define it; second, the tax treatment of civil society organizations and philanthropy; third, transparency, disclosure, and accountability standards for civil society organizations; and fourth, the involvement of civil society in advocacy and civic engagement.

* Copyright 2005 by Lester M. Salamon, Director of the Center for Civil Society Studies, Institute for Policy Studies, Johns Hopkins University.
I. Caveats and Assumptions

Certain fundamental convictions and assumptions have guided the thinking embodied in this Statement. Among these are the following:

1) While the state and its laws are ultimately responsible for ensuring an enabling legal environment for civil society organizations, responsibility for such an environment does not rest with the state alone. The business community, development partners, other stakeholders, and the civil society sector itself also have important roles to play in creating an environment conducive to effective civil society operations.

2) A healthy and vibrant civil society sector requires a healthy and vibrant state committed to the rule of law and to basic democratic processes. The guidelines outlined here will work best in the presence of such democratic conditions. In addition, however, adherence to these guidelines can help promote the rule of law and basic democratic processes where these are not yet fully in evidence.

3) A well-designed system of civil society law and regulation requires a reasonable balance between the privileges these organizations are accorded and the responsibilities they are expected to exercise. Legal structures that impose excessive restrictions can undermine the freedom that civil society organizations need and deserve, whereas those that provide insufficient safeguards can undermine the public trust on which these organizations ultimately depend.

4) For the purposes of this Statement, we define civil society organizations broadly as any organizations, whether formal or informal, that are not part of the apparatus of government, that do not distribute profits to their directors or operators, that are self-governing, and in which participation is a matter of free choice. Both member-serving and public-serving organizations are included. Embraced within this definition, therefore, are private, not-for-profit health providers, schools, advocacy groups, social service agencies, anti-poverty groups, development agencies, professional associations, community-based organizations, unions, religious bodies, recreation organizations, cultural institutions, and many more.¹

II. Formation and Legal Status

The right to form civil society organizations is a fundamental human right that belongs to individuals and is not bestowed by government. This right derives from the basic rights to free speech and association, which should be enshrined in the fundamental law of a country. As such, this right cannot be conditioned on the consent of a public authority and cannot be subject to undue restrictions, such as restrictive asset or membership requirements.

While civil society organizations have an inherent right to exist and operate as informal organizations, however, a crucial part of the enabling legal environment for civil society organizations involves arrangements for such organizations to incorporate and

¹ Political parties are also often considered to be civil society organizations, especially when they embody social movements and are not simply campaign organizations seeking political office. Such organizations are not covered by this statement, however.
thus acquire formal “legal personality.” Such incorporation and its resulting grant of “legal personality” status to civil society organizations protects the principals of such organizations from personal liability for the affairs of the organizations and allows the organizations to enter into contracts, incur debt, sue and be sued, and engage in other transactions in the name of the organization without putting the personal assets of their trustees, directors, or officers at risk.

Governmental action is crucial to the extension of legal personality status to civil society organizations and is often accompanied by some form of registration and regulation. A number of crucial principles should govern the design and execution of these incorporation and registration procedures. Most important among these are the following:

1) Legal provisions allowing civil society organizations to incorporate and thus obtain legal personality status should be made easily available. The criteria for obtaining legal personality and limited liability should be clear and unambiguous and not be unduly restrictive.

2) While provisions for civil society organizations to incorporate should be made easily available, these provisions should not be mandatory. Informal, unincorporated organizations also make important contributions and should be allowed to operate.

3) The right to associate and to form civil society organizations carries with it the right of these organizations to the fundamental rights that apply to natural persons, such as the rights of freedom of speech and association, and the right to petition the government.

4) Governments may choose, as a condition of incorporation, to register civil society organizations. Such registration can help clarify the status of these organizations and bolster public confidence in them. Any such registration provisions should adhere to the following guidelines, however:

   a) Registration should be conducted by independent authorities not bound by the policies of particular governments, which may change from time to time. Examples of such independent bodies include courts, chambers of commerce, and special registration bodies.

   b) Registration procedures should be uniform wherever conducted, and registration with one competent authority should suffice for the entire country.

   c) Procedures and criteria for registration should be publicly available, clear, and straightforward; fees should not be prohibitive; registration processes should be expeditious; and registration should not be refused if all requirements for registration are met.

   d) Any denial of registration must be subject to court review.

   e) Registered organizations may be required to present by-laws specifying the governance structure of the organization and the responsible officials. Requirements for such by-laws can usefully specify minimum numbers of board members, rotation of officers, and other features of good governance as appropriate.
f) Governmental authorities should maintain a record of registered organizations that contains information that is useful to the public. This record should be publicly accessible and reliable and therefore should be kept updated.

III. Tax Privileges

Because of the contributions civil society organizations often make to community life, to the resolution of public problems, and to the strengthening of democratic processes, it is in the government’s interest to encourage such organizations. One efficient way to do this is through special tax concessions made available to the organizations themselves and to those who make voluntary contributions to them. The following principles can usefully apply to the design and operation of such tax concessions.

1) All types of civil society organizations should be eligible for tax relief, though the form and extent of such relief may vary by type of organization. To avoid arbitrary exclusions, however, any such variations in tax relief should apply to broad classes of organizations (e.g., more generous tax concessions to organizations serving a broad public interest rather than to those serving the mutual interests of particular members).

2) As a general rule, all forms of civil society organization income, including that from commercial activities, should be exempt from income taxation so long as such income is used to support the basic purposes for which the organization was granted tax exemption. In the event commercial income becomes significant, however, countries may choose to exempt from taxation only that portion derived from activities closely related to the exempt purpose of the organization. Income earned from “unrelated businesses” would then be subject to taxes at rates equivalent to those paid by regular business enterprises.

3) In addition to exempting the income and purchases of civil society organizations themselves from taxation, special provisions should be made to allow deductions for charitable contributions to such organizations. Preferably, this should be done through a system of *tax credits*, in which tax liabilities are directly reduced by some proportion of the amount of the charitable gift. Alternatively, the more indirect method of *tax deductions* can be used, in which taxable income is reduced by the amount of the gift before applying the applicable tax rate.

4) Charitable tax concessions can be limited to a reasonable share of the income of affected taxpayers. Limitations ranging from 20 to 50 percent of income have generally been considered reasonable.

5) Tax concessions for charitable contributions should be available to corporations as well as individuals, though the share of profits against which such concessions can be claimed may be lower than those applicable to individuals.

6) Charitable tax concessions should be available for contributions of both cash and property, though valuation methods for property contributions must be worked out in advance.

7) Charitable tax concessions should be available for a wide variety of charitable giving mechanisms (e.g., payroll giving, donor advised funds, telephone solicitation).
Charitable giving laws and tax concessions should be designed to facilitate and encourage these various forms of giving.

8) The administration of the tax concessions for civil society organizations, both those affecting the income and purchases of the organizations themselves and those applicable to charitable contributions to these organizations, should be clear, widely disseminated, and as automatic as possible, with limited discretion left to administrative officials and some form of independent appeal procedure in case of disputes.

IV. Transparency, Reporting, and Accountability

To retain public trust, civil society organizations must be transparent in their operations. Such transparency can be achieved voluntarily by organizations through regular reports and communication with their various stakeholders. However, public authorities may legitimately mandate such transparency by requiring regular reports from registered civil society organizations. Several principles should apply to the design of such public reporting requirements, however:

1) Reporting requirements should serve valid public purposes, not be unduly burdensome, and, where possible, be harmonized with reporting requirements from other public and private bodies.

2) Government should establish procedures for receiving and storing required reports from civil society organizations, and for making such reports available to the public in an easily accessible manner. The latter can include village notice boards, web sites, and information centers through which information on civil society organizations can be accessed easily by all organizational stakeholders.

3) Coordinating bodies, such as NGO Councils, should be encouraged to assist organizations in meeting public registration and reporting requirements. In addition, public authorities should look to such bodies for help in providing access to such reports and should consider compensating them for this service.

V. Advocacy and Civic Engagement

Civil society organizations are not simply service providers. They are also, very critically, vehicles for advocacy and civic engagement. This function derives from the fundamental right of association and free speech and as such should be enshrined in the fundamental law of a country. The advocacy and civic engagement functions of civil society organizations raise particularly sensitive legal and political issues, however. The following principles should guide the resolution of these issues:

1) The basic right of nonprofit organizations to engage in advocacy and lobbying should be confirmed in substantive legislation. Such legislation should make clear that this right should be broadly construed to embrace a wide variety of forms of civic engagement and involvement in the policy process; and to include advocacy and lobbying on the part of civil society organizations not only vis-à-vis public authorities but also vis-à-vis private and quasi-public institutions, such as private corporations and communal institutions like the traditional Kadhi Courts.

2) While confirming the basic right of civil society organizations to engage in advocacy and lobbying, governments can limit civil society advocacy to nonviolent means,
encourage credibility on the part of civil society organizations, and restrict civil society organizations from engaging in political campaign activity on the part of particular parties or candidates.

3) No limits should be placed on the resources that civil society organizations can devote to advocacy and lobbying activities.

4) To facilitate civil society organization advocacy and lobbying, civil society organizations should be ensured reasonable access to government decision-making processes and information.

5) Countries may choose to distinguish between advocacy and lobbying, and between organizations receiving and not receiving charitable contribution tax concessions, in setting the conditions for civil society organization lobbying and advocacy. Any such differentiation should still preserve the basic rights of all civil society organizations to engage in advocacy and lobbying to a meaningful extent, however.

6) To safeguard the fundamental right of civil society organizations to engage in advocacy and lobbying, specific mechanisms should be put in place. Among other things, civil society organizations should have standing to challenge public authorities in courts of law over access to government information and to the processes of policy decision-making.

Conclusion

Civil society organizations perform important public services by responding to human needs and promoting the health of communities. Regrettably, however, the legal position of such organizations is often highly precarious or unclear. Too often, government perceives civil society as a threat and acts to limit its discretion and role. But government has an important responsibility to create the legal conditions that enable civil society organizations to perform their important missions. This requires a balance between equipping civil society organizations with privileges and burdening them with responsibilities. It is our hope that the principles outlined here will help governments strike this balance in a responsible yet enabling way.

Agreed to this 8th day of July 2004, Nairobi, Kenya

SIGNATORIES

The following individuals took part in the deliberations that led to the development of this Statement and generally concur with its observations and conclusions. They do so in their individual capacities and not as the representatives of any organizations with which they may be associated or that may have supported their work.

Australia
Neilma Gantner, The Myer Foundation
Helen Morris, Civil Society Consultant
Genevieve Timmons, Genevieve Timmons & Associates

Chile
Marcela Jimenez De La Jara, Ministry of Planning
India
Pankaja Kulabkar, Researcher

Italy
Elena De Palma, ISTAT: Italian National Institute of Statistics

Kenya
Dr. Pius S. Achola, NGO Council
Elijah Agevi, IDG
Francis Angila, NGO Council
Erika Anttila, Chambers of Justice
Donald Deya, East Africa Law Society (EALS)
Dennis Kabaara, Independent Consultant
Karuti Kanyinga, IDS
Wangui Kibe, Consultant
Sophie Kiguta, Kenya Youth Group
Leah Wambura Kimathi, Africa Peace Point
Alice Kirambi, Christian Partners Development
Faith Kisinga, Ufadhili—Centre for Philanthropy and Social Responsibility
Mwalimu Mati, Transparency International
Dorothy McCormick, IDS–University of Nairobi
W. Milan, WOWESOK
Winnie V. Mitullah, IDS (Institute for Development Studies)
Abby Muricho, NGO Council
Wangombe Muthoga, Pana Press
Njeri Mwangi-Kinyocho, Action Aid Kenya
Mwenda Mwongeda, Kenya National Commission for Human Rights (KNCHR)
Mavis Nathoo, CIDA
Philip Ndeta, Learning and Development Kenya
Haron M. Ndubi, Kituo Cha Sheria
Elkanah Odembo, Ufadhili Trust
Hilda A. Orinba, WOWESOK
Janet Ondieki, African Institute for Health and Development
Jonathan Ondieki, African Institute for Health and Development
George Onyango, Slums Information Development and Resource Center (SIDAREC)
Aloys Opiyo, UNDUGU Society
Lernard Ouidei, UNDUGU Society of Kenya
Ambassador Orie Rogo-Manduli, NGO Council Acting Chairperson
Abdul Hamid Slatch, Young Muslim Association
Richard Wamai, University of Helsinki

Poland
Leslaw Werpachowski, Marshal Office of the Province of Silesia

Netherlands
Wino J.M. Van Veen, Amsterdam Baker & McKenzie

Mexico
Paula Parra Rosales, Bradford University, UK
Rosa Maria Fernandez, Corporate Social Responsibility Consultant

**Romania**
Mihai Lisetchi, Agency for Information and Development of Non-governmental Organizations (AID-ONG)
Cristina Nicolescu, Pro Vobis National Volunteer Center
Dana Nicolescu, Opportunity Associates Romania

**Russia**
Elena Abrosimova, TACIS Corporate Governance Facility Project
Alexei Bodungen, Golubka Training Center
Oleg Kazakov, Nonprofit Sector Research Laboratory
Marina Nikitina, Aids Foundation East and West (AF EW)

**Tanzania**
Olive Luena, Tanzania Gatsby Trust
Dennis Muchunguzi, AFREDA
Ruta Mutakyahwa, Romme Centre
Mary J. Mwingira, TANGO
Veronica Shao, Kilimanjaro NGO Cluster on HIV/AIDS and RH Interventions

**Turkey**
Ayla Goksel, Mother Child Education Foundation

**Uganda**
Nakirya Roselyn Etyono, ICSW
Cannon Grace Kaiso, Uganda Joint Christian Council
Professor Kwesiga, DENIVA
Peace T. Kyamureku, The National Association of Women Organisations in Uganda (NAWOU)
Enock Mugabi, Uganda National NGO Form
Jane Nabunnya, DENIVA

**United Kingdom**
Tony and Frances Myer, The Myer Foundation
Samuel Obeng-Doky, Fullemploy
Judy Wilson, Consultant

**United States**
Joyce Moody, Johns Hopkins University
Lester Salamon, Johns Hopkins University
Howard Schoenfeld, PricewaterhouseCoopers
Sandra Schoenfeld
Carol Wessner, Johns Hopkins University
SPECIAL SECTION: HELPING CIVIL SOCIETY FLOURISH

Implementation of NGO-Government Cooperation Policy Documents: Lessons Learned

By Radost Toftisova

I. Introduction

1. What is a “compact?”

A decade ago, the term “compact” would have raised very few if any associations in the world of non-profit, non-governmental organizations (“NGOs”), their role in public life, and their cooperation with government. The first compacts appeared in 1998 in the United Kingdom and were defined as agreements “between government and the voluntary and community sector in England to improve their relationship for mutual advantage.” In the years since, governments have been persuaded or even impelled to initiate negotiations with NGOs on cooperation documents because of NGOs' expanding and more constructive role in developing good political processes, delivering high-quality public services, and otherwise contributing to the public’s well-being.

These documents may be known by different names:

- “compacts” in the England, Wales, Scotland, and Northern Ireland;
- “Program for Cooperation with Non-governmental Organizations (NGOs)” in Croatia;
- “Concept for the Development of Civil Society” (“EKAK”) in Estonia;
- “Accord” in Canada;
- “NGO Charter” in France;
- “Charter for Interaction between Volunteer Denmark and the Public Sector” in Denmark; and
- “Government Civil Society Strategy” in Hungary.

For ease of reference, we will call all such documents compacts.

The public party to the document can be represented by the government (England) or Parliament (Estonia). The documents can be comparatively short (UK) or detailed (Estonia). They can be followed by Codes of Good Practice and local compacts (UK) or remain predominantly a national process (Croatia). As explained more fully below, not

---

1 Radost Toftisova is a consultant to the International Center for Not-for-Profit Law with expertise in the laws relating to NGO-government partnerships. Special thanks and acknowledgments for their help and support to this research to ICNL staff Douglas Rutzen and Cathy Shea, ECNL staff Nilda Bullain and Katerina Hadzi-Miceva, as well as Richard Fries, Susan Phillips, Jeremy Kendall, Joseph Proietti, Sladana Novota, and Kristina Mand.

2 http://www.thecompact.org.uk.
all compacts are “agreements” between the state and the sector; in some cases, compacts come about as a result of unilateral action by one party, usually the government (Hungary).

What all such documents share are an expression of mutually recognized principles and values of cooperation between the public and the non-profit sector and an outline of the structure of their future work together. The documents represent an effort to institutionalize the two sectors’ relationship in order to improve public participation in political decision-making and to raise the quality of public services by improving NGOs’ opportunities to participate in service delivery. The state’s recognition, either implicit or explicit in the document, of civil society and its place in public life is certainly important. But the real value of cooperation documents lies in their practical impact and their ability to bring the public and non-profit sectors together for the benefit of society.

Seven years after the first compacts, the focus has changed. It is no longer on compact initiatives themselves, although several countries are starting negotiations or preparing draft documents. Rather, what deserves particular attention today is the effect of compacts. Did they achieve the intended outcomes, and, if so, how? What facilitated that process? What hampered or obstructed it, and how can these challenges be overcome?

This article will address the lessons learned from the implementation of compacts in a number of countries, predominantly in Western and Eastern Europe. It will examine the factors that contributed to successful implementations as well as those that led to failures. The objective is to provide information that may aid governments and NGO sectors that are considering compacts or re-evaluating existing ones. We hope that the findings and examples presented here will help governments and NGOs develop effective documents beneficial to society.

2. What is “implementation?”

What is meant by “implementation” of a compact? The history of compacts is too brief to provide a complete picture of a good, effectively implemented compact. All of the compacts adopted to date are still being implemented. Even so, this process has yielded clear-cut results, both positive and negative, all with potential as sources of learning.

To put the concept of implementation in concrete terms, consider these examples of how NGOs and governments have partnered in developing activities to put their commitments into effect. All of these activities have been undertaken to fulfill the parties’ commitments in their compacts – to increase the NGO sector’s financial sustainability, develop new enabling legislation supporting NGO activities, facilitate grant-making and application procedures, provide tax benefits to NGOs, etc.

- In England, the Government
  - developed guidance for its departments on the delivery of small grants;

---

passed legislation (Companies (Audit, Investigations and Community Enterprise) Act 2004 and the Community Interest Company Regulations 2005) establishing a new legal form, the Community Interest Company, through which social enterprises can use their profits and assets for the public good – these companies benefit from a simplified procedure for formation and greater operational flexibility, but are subject to additional reporting and other requirements to ensure that they are acting for the benefit of the community; and

launched ChangeUp, a strategy developed jointly with the NGO sector to build sector capacity and infrastructure, with an initial investment of £80 million and another £70 million allocated for the fiscal years 2006-2007 and 2007-2008.

Also in England, the Compact led to intensified efforts to amend the legislative framework for charitable giving as a means of promoting the independence of the NGO sector (or, as the Compact calls it, the “community” sector). The Gift Aid Program was reformed in 2004, and a modernized Charities Bill was introduced in Parliament (although the Bill was not approved by the Queen and was later reintroduced). It is estimated that these changes brought about an increase in charitable giving of £580 million in 2003-2004.

In response to Scotland’s Executive Direct Funding Review of 2001, the Scottish Executive planned to reform the arrangements for direct funding of the voluntary sector. A key goal is to help voluntary organizations to apply for funding through such measures as posting funding opportunities on the Scottish Executive website, publishing an annual summary of funding opportunities, and introducing standard funding criteria.

In Estonia, the Joint Committee charged with drafting the EKAK (the Estonian compact) also developed an Implementation Plan. In addition, an earlier effort to promote citizen initiative and encourage charity through the tax policy led to exemptions from income tax and customs duties (among others) for nonprofit associations and foundations.

---

4 For additional information, see [http://www.dti.gov.uk/cics/](http://www.dti.gov.uk/cics/).
6 Idem.
• The Canadian Government introduced more than 60 changes in the regulatory framework for the voluntary sector following adoption of a compact.9

• In Croatia, compact implementation led to legislative reforms benefiting NGOs, including
  o a new Law on Associations,
  o a Lottery Law that dedicated lottery proceeds to finance NGO sector activities,
  o draft laws on volunteerism and foundations,
  o a draft code of good practice in grant-giving,
  o tax law amendments providing deductions for donations to NGOs,
  o tenders for funding NGOs under the new laws and the compact, and
  o a multiyear financing scheme to replace the prior system of single-year funding.10

• In Denmark, the Government-NGO Charter signed in 2001 led to a better balance in international development funding between large and small NGOs, with funds for large groups reduced by 5 percent and redistributed among a greater number of smaller organizations.11

Nonetheless, a balanced account of the record of compact implementation to date would have to acknowledge setbacks in fulfilling commitments made in various documents:

• Fewer than 40% of voluntary organizations in England believe that the Compact has had a positive impact on their relationships with government offices.

• Estonian NGOs remained silent as the Parliament passed a Gambling Act that did not dedicate funding to the voluntary sector.

• Hungarians failed to adopt a proposed program for cooperation with NGOs, the Civil Strategy of the Government, as both sectors failed to arrive at a joint position on the matter. (As discussed below, though, the draft program has had a considerable and positive impact on government-NGO relations.)

• In Scotland, government and the voluntary sector developed separate guidelines for implementing the Compact. This led to divergent implementation

---

9 Based on input from Marie Gauthier, Director of Social Development Canada, Non-Profit and Voluntary Sector Affairs Division, presentation at the conference on Civil Society Excellence, March 3-5, 2005, Tallinn, Estonia.

10 Based on input from Cvjetana Plavsa-Matic, Director of the Foundation for Civil Society Development in Croatia.

11 http://www.um.dk/Publikationer/Danida/English/DanishDevelopmentCooperation/AWorldOfDifference/kap03_1.asp.
approaches, low awareness of Compact values and principles by both parties, and a general lack of compliance with Compact provisions.

a. Definition

The implementation process fulfills the commitments made in the compact by the public sector, either alone or together with the voluntary sector, in order to improve the relationship and foster cooperation between the two sectors. Implementation involves a series of specific actions designed to achieve the main objectives of the compact. These actions are usually designed to produce particular outcomes, which may include the following:

- more effective delivery of public services,
- better systems for consultation between the two sectors,
- improved funding mechanisms to support the third sector in its public benefit activities, and
- more extensive dialogue on draft legislation affecting civil society.

Ultimately, the public benefits from higher-quality services, a more democratic system allowing for greater participation in political decision-making, and greater opportunity to enjoy the fruits of citizenship and the basic freedoms it implies. A report by the Scottish Compact review group underlines that the ultimate goal of implementation is to improve public well-being: “the Scottish Executive and the voluntary sector work in partnership to build a better Scotland.”

Effective compact implementation, therefore, requires the relationship between the two sectors to reach a higher level. But how does one assess effectiveness? Plainly, there is a need to consider measures. As discussed below, establishing indicators to gauge the success of implementation in practical terms has presented challenges that the public and civil society sectors continue to negotiate.

The importance of using specific indicators to measure implementation is illustrated by the case of England. The English Compact was the first policy document developed, signed, and implemented, so the implementation process should now be smoothly advancing. In reality, there is a lot more to do, according to recent studies using indicators tied to specific commitments in the Compact (e.g., the number of local compacts signed, the amount of funding provided to the voluntary sector, the number of government agencies that have developed actual strategies on financing the voluntary

---

sector, and the level of awareness of Compact goals and achievements on both sides).
This finding led researchers to recommend more extensive promotion, dedication of more
resources to Compact implementation, and regular reviews and monitoring to ensure that
the Compact is, as intended, a milestone on the path to an improved relationship between
the sectors, and not the end of the journey.13

In response, in April 2005, the English government announced a new program to
further promote the voluntary sector as a key partner in building a “healthy society” and
in delivering public services. Plans include the launch of “Compact Plus,” a new and
simplified implementation scheme; the creation of “Capacity Builders,” an agency that
will manage partnership funds backed up by a £70 million funding commitment through
2008; and a further monetary investment during the same period for Futurebuilders, a
government investment fund intended to promote participation of the voluntary sector in
delivering public services. Perhaps as important, the program identifies reasons for past inefficiencies and proposes new measures to meet the challenges of implementation.14

b. The continuous nature of implementation

A compact is often considered a process because the purpose for which the docu-
ment is adopted – improving relations between the sectors – is ongoing in nature.
Inasmuch as the public-voluntary sector relationship always is open to improvement, we
can argue that in practice no compact can be considered fully implemented; a document is
always in the process of implementation. Each phase of implementation must therefore
be viewed in the context of the whole process, contingent on current priorities yet related
to previous and upcoming activities and commitments.

Take, for example, Estonia’s special Joint Commission, made up of representa-
tives of the government and civil society. The Commission, created in October 2003, was
envisioned by the Civil Society Development Concept, or EKAK. Its work enabled the
two sectors to reach a higher level of collaboration. The establishment of the Commission
was neither a one-off activity nor the final objective; rather, it was meant to advance
other implementation goals. Among other things, the Commission was assigned to
evaluate the degree to which the parties have fulfilled the commitments they undertook in
the EKAK, as well as to develop an Implementation Plan for future action. Thus, while
created in execution of the EKAK, this body has served as a link between various stages
of the adoption and implementation processes.

The Scottish Compact, adopted in 1998, provides another example that demonstra-
tes the continuing nature of implementation. After an initial assessment of the
Compact’s implementation, the Scottish Executive/Voluntary Sector Forum agreed that
the document should be “reviewed with a particular focus on identifying ways in which it
might be more effectively implemented by both the Executive and the voluntary sec-
tor.”15 A joint review group was created to report on implementation problems and to

13 “The Paradox of Compacts: Monitoring the Impact of Compacts,” Home Office Online Report,
recommend solutions, demonstrating the need for periodic reexamination of a compact and its implementation.

The reporting group on the English Compact reached a similar conclusion – that the Compact should not be a “dead” paper but a “living” compact – and recommended that its implementation should be ensured “through regular reviews.”

c. **Compliance and implementation**

Implementation can be considered within the broader context of compact adherence or compliance.

The term *compliance* suggests a comprehensive requirement for the parties to fulfill a compact in its entirety, but each and every word cannot be implemented. Along with the parties’ commitments, a compact also includes “static” clauses that either establish outset positions – such as who represents one party or the other – or recognize existing circumstances or relations between the parties. For example, article 2.1 of Chapter 2 of the Voluntary Sector Scheme of Wales contains a definition of the term “voluntary sector” that the two parties agree to respect: “voluntary organizations, community groups, volunteers, self-help groups, community co-operatives and enterprises, religious organizations and other non for profit organizations of benefit to communities and people in Wales.” Another example: the Assembly of Wales, representing the public sector, undertakes “to recognize, value and promote the voluntary sector” and to build a partnership with it (art. 2.2 of the Voluntary Sector Scheme).

Further on in the Scheme, we find a provision in which the Assembly “designates the First Secretary to have overall responsibility for the Voluntary Sector Scheme” and commits to maintain “a Code of Practice for funding the voluntary sector” (art. 2.11). While the first provision is a statement that allocates one party’s responsibilities to a particular entity within it, and as such requires general compliance in a manner subject to the parties’ interpretation, the latter is a more specific commitment that requires particular action. Compacts include both general statements and concrete provisions in order to improve public-NGO relationships, and both types of statements require observance if the compact’s objectives are to be reached. Only the specific commitments, however, are likely to require action by the parties. The parties will have to do something – adopt a document, develop a mechanism, organize an event, take an initiative, etc. – to fulfill these commitments.

d. **Impact of national priorities on compacts and their implementation**

Experience has shown that compacts have potential both where the NGO-government relationship is strong – they “cement and secure” it – and where the parties have faced problems in working together – “the Compact might act as a lever for change.” The implementation process and the degree to which it can be considered

---

16 Supra note 13.
17 [http://www.wales.gov.uk/themesvoluntarysector/content/voluntarysectorscheme/index.htm](http://www.wales.gov.uk/themesvoluntarysector/content/voluntarysectorscheme/index.htm).
18 Supra note 13, p. 9.
19 Supra note 13, p. 10.
successful follow from the policy document itself (the drafting and negotiation process, content, momentum, etc.) as well as the objectives it establishes. In the end, though, the success of implementation should always be assessed against the specific goals of the compact.

Each national and local compact is a product of particular circumstances and designed to meet specific societal needs. The differences in circumstances and needs explains the varying values and objectives of compacts as well as the varying processes for adopting them. Not surprisingly, all of these factors affect implementation.

For example, the Croatian Program for Cooperation was developed with the primary objectives of hastening ongoing NGO legal reform. Following years of war and ethnic conflict in Croatia, the Program naturally focused on such values as non-violence and equal opportunity. However, as discussed below, historical factors and an unstable governmental interest in the Program led to implementation problems, in particular a failure by the government to respect its commitments.

In Estonia, by contrast, the priorities were sustainability, accountability, and transparency mechanisms for civil society, subjects viewed with enthusiasm by both civil society and a committed Parliament. The result: the Estonian EKAK is among the most advanced in implementation. It has its own Implementation Plan, and the implementation schedule is followed strictly by both parties.

The national priorities are reflected in EKAK implementation activities, which are designed to address issues of great concern to both the public and voluntary sectors, including legislation regulating citizen initiatives, involvement of citizens and citizens' associations in decision-making processes, financing of citizens' associations, compilation of statistics on the NGO sector's size and activities, civic education, and public awareness. The necessary bodies, including joint committees, have formed and started work so that the national priorities can be realized more quickly and comprehensively, with the aim of building “a civil society and a social economy in Estonia with the active participation of its citizens.”

For example, in the area of civic education, university programs are being developed to expand knowledge of the third sector legal framework and values among students at law and other faculties at the University of Tartu and the University of Tallinn. In the area of citizens' involvement, the State Chancellery, the coordinating body for public involvement in governmental institutions, has collected information about and encourages new practices, such as using electronic media to promote civic engagement, training public servants in public participation methodologies, and initiating consultations and working groups on best practices.

Similarly, in other countries, national priorities are reflected in the compact implementation process. In Denmark, NGOs have traditionally provided international aid, and the Danish Charter for Interaction focuses on this aspect of voluntary sector activity. For example, the government stopped channeling funding for international aid exclusively through large NGOs, and began funding small NGOs as well, to respect its

---


21 Based on input from Kristina Mand, Executive Director of NENO, presentation at the conference on Civil Society Excellence, March 3-5, 2005, Tallinn, Estonia.
commitment “to make sure that the Danish NGOs have the necessary strength and legitimacy by virtue of their popular rooting.” In Germany, the focus is on poverty alleviation. The compact pioneers in England sought to improve the system of funding the third sector; consequently, the English Compact requires Codes of Good Practice, including a Code on Funding and Procurement whose objective is to improve funding and procurement relationships.

e. International sharing of lessons learned

Given their strongly national character, no compact can be duplicated in its entirety. Each national example remains unique. Most European compacts developed first at the national level, for example; in Poland, by contrast, local documents for the third sector’s engagement in delivering public services developed years before a national cooperation document was considered. As a general matter, the scope, objectives, legal force, and priorities of a national compact are specific to the country, and their wholesale transfer to another country could be not only difficult and pointless but also potentially dangerous.

The partial transfer of expertise and experience, however, can be extremely useful. Since the first compacts were signed, an intense process of international exchange of concepts, principles, models, and – lately – experiences has been going on, and it has influenced practices.

Mechanisms for such international exchange should be encouraged. One example of such an exchange is the international conference on Compacts Implementation that took place in Estonia in March 2005. The conference served as a forum for sharing implementation successes and problems from England, Estonia, Canada, and other countries. The advantages of such an exchange became evident as experts from countries with final or draft compacts cited prior examples of previous cross-border transfers of information: among others, the Canadian Accord was drafted on the basis of the English Compact, Estonians studied the four UK compacts in order to develop their EKAK, and Romanians have sought to learn from other countries’ experiences to help launch a successful compact campaign.

How should a successful implementation process be structured?

“Compacts don’t work all by themselves as if by magic.” Implementation requires substantial effort if a compact’s objectives are to be achieved.

---


23 Based on input from Douglas Rutzen, President of ICNL, presentation at the conference on Civil Society Excellence, March 3-5, Tallinn, Estonia. See also http://www.un.org/esa/agenda21/natinfo/wssd/germany.pdf.

24 http://www.thecompact.org.uk/C2B/document_tree/ViewACategory.asp?CategoryID=44. This Code, which is useful for anyone seeking or using public funds, was published in 2000, shortly after the Compact was signed, and revised and republished in 2005.

25 See www.ngo.ee.

The initial period of enthusiasm following the adoption of a compact often gives way to difficulties in implementation that far exceed the problems associated with preparation and signing of the policy document itself. The focus turns to recommending actions, identifying good practices (and bad practices that provide valuable learning points), proposing schedules, allocating responsibilities, and establishing mechanisms to monitor what has been achieved and what remains to be done. Joint groups and committees are formed to review and monitor how the parties fulfill their undertakings. Reports summarize major obstacles and recommend future strategies.27

For example, the Report Group on the Scottish Compact found that the Compact should have been implemented better by both parties, awareness of the Compact must be raised, stronger leadership and political commitment are essential, capacity building across both sectors needs further attention, and enhanced monitoring and evaluation are crucial. The group proposed a three-year strategy in light of these findings, taking advantage of momentum toward good implementation.28

These types of strategy papers assist in the practical realization of compact objectives and promote systems for measuring progress and identifying obstacles. In other words, they help assess where the two sectors stand on the road to a better society, what has been done and what remains to be attended to.

In England, where compacts have the longest history, the National Council for Voluntary Organisations (NCVO) convened a working group to develop a Mini-guide on Local Compacts Implementation. The Mini-guide offers specific advice on how to prepare and achieve successful compact follow-up at the local level. The guide emphasizes several objectives: raising awareness (making the compact known through publications, Internet postings, briefings, etc.), identifying good resources and allocating responsibilities (finding competent staff, organizing discussions, etc.), making the best application and use (good planning, briefing, developing local codes, etc.), ensuring compliance (setting up monitoring, dispute resolution, and mediation systems), and undertaking evaluation (holding review meetings, revising the texts, etc.).29

In subsequent sections, we will consider the elements of a successful implementation process, keeping in mind that the process often runs more smoothly if implementation is considered at the time the compact is negotiated. Among other things, we will address the following:

- What factors most affect successful compact implementation?
- At which stage of the compact process should these factors be considered, and how, in order to avoid later difficulties in implementation?

---

29 Idem.
• Who should be involved in implementation and what role should each participant play?

• What systems of monitoring and review are most effective, and what difficulties have been encountered in administering these systems?

The timely and comprehensive consideration of these factors will, we hope, help build a working mechanism to achieve a compact’s objectives, to the parties’ mutual benefit and for the well-being of society.

1. Mutual interest of the parties

The success of implementation to a certain extent follows the path of drafting, negotiating, and adopting the compact. Experience demonstrates that the adoption of a compact is, as a rule, contingent upon the goodwill of the parties and a favorable set of circumstances – such as an event of national importance affecting the third sector, successful negotiations between the public and the voluntary sector on another issue, the arrival of a new government whose members are personally well-inclined toward NGOs, or the adoption of a compact in a neighboring or otherwise close country. As most compacts are not legally binding, successful implementation often depends on the goodwill of the parties to honor the commitments that they have undertaken.

If the parties are to remain committed to implementation, they must have a mutual interest in doing so, which is frequently reflected in the compact itself. The mutual expectations of the parties – including the contributions they are ready and willing to make and the outcomes they hope to achieve – must be clearly outlined. Where the compact focuses on an agenda that is “owned” by both parties, the chances that it will be realized greatly increase.

Scotland’s compact presents an example of how a lack of commonality undermined implementation. In the Scottish compact, the public sector undertakes to apply best funding practices and flexibility in the use of financial resources to support the voluntary sector, and the voluntary sector undertakes to promote good management practice and monitor and report on the use of public funds. However, rather than come to agreement, the two parties decided to develop and use separate guidelines on implementing the Compact for their respective stakeholders. The Scottish Executive drafted Good Practice Guides covering issues of funding, consultation, and working partnerships available to the public bodies involved in Compact implementation. The Scottish Council of Voluntary Organizations (SCVO), representing the third sector, issued its own Implementation Guidance to Voluntary Organisations. The existence of two separate guidelines as well as a change of Executive in 1999-2000 delayed promoting and implementing the Compact. This was acknowledged as a setback by both parties, and they set up a joint review group to address the problem.

The Compact Plus scheme – the new program recently launched by the English Government – acknowledges lack of “ownership” as among the obstacles to good implementation. Each party thought that the other should take the lead. Other challenges

---

30 Idem.
noted include the diversity of views and priorities within the voluntary sector.\textsuperscript{32} To overcome these problems, the scheme includes plans, among other things, to create “Capacity Builders” – an independent agency that will ensure “a sector lead focus” on partnership programs, fund management, coordination, and successful implementation of the ChangeUp program. The increased capacity of the NGO sector is expected to help organizations take the lead in their own reform and in service delivery, and to enhance their participation in policymaking. The promise of the scheme is that successful reform is more likely if the sector fully understands and leads reform rather than having it imposed by the government.\textsuperscript{33}

2. Planning

Effective implementation requires separate planning, monitoring, and reporting, often initiated at the time the document is negotiated. In Estonia and Scotland, the parties developed separate implementation strategies with the objectives of reviewing compact achievements, examining difficulties, and outlining future actions. An implementation plan may also be drafted as a part of a compact. For example, the Croatian Program for Cooperation includes a short section on implementation.

Both approaches have potential for success, and the choice depends on national and political traditions and preferences. Planning implementation at the time of compact adoption ensures that the parties agree on general guidelines for future actions. A more detailed implementation strategy developed after the compact’s adoption facilitates the allocation of tasks and responsibilities as well as development of specific steps to implement the compact’s provisions, based on data gathered from assessment and the initial implementation experience. Under either approach, the implementation plan may be periodically reviewed and amended, either as part of the process of revising the compact or separately.

Various mechanisms have been introduced to ensure effective planning, both during compact negotiation and later, during implementation.

- English governmental agencies have formed their own action plans, and the Compact itself provides for annual reviews and planning.
- A separate working group or entity can be created as part of a planning scheme for compact implementation. For example, in England a special body has been formed to coordinate the two parties’ efforts, the Active Community Unit (ACU). Its role is “to promote the development of the voluntary and community sector, and to encourage people to become actively involved in their communities,” including through “development and implementation of the Compact.”\textsuperscript{34} The existence and the work of the ACU are of considerable importance in implementation, monitoring, and coordination.


\textsuperscript{33} Idem.

\textsuperscript{34} \url{http://www.homeoffice.gov.uk/about-us/organisation/directorates-units/communities-group/ecd/acu?version=1}. 
• In Scotland, voluntary sector liaison offices were created within the Executive at the outset and assigned responsibility for implementation of the compact.

• Estonians established a Joint Committee consisting of the two sectors’ representatives, which elaborated an Implementation Plan for EKAK. Specific targeted events (discussions, meetings, etc.) have also been organized to meet the EKAK commitments.

• In Canada, the Voluntary Sector Initiative launched in 2000 encompassed the adoption of the Accord as well as the institutional framework for its implementation, monitoring, and evaluation.35

These experiences, diverse as they are, suggest that planning is essential at the outset of the compact process. At the same time, the parties should be flexible during implementation so as to adapt to a changing environment, including new priorities, obstacles, and players.

a. How early?

The question of how early the implementation process should be considered appears rhetorical: it is impossible to start preparations too early. It is only logical that implementation of a compact should be considered as soon as the concept of an agreement is introduced. For example, the English Compact includes implementation provisions that were discussed and adopted together with the rest of the document.36 However, attitudes as well as implementation mechanisms may change over time. The lessons learned from practice should be applied to adapt implementation to the current political, social, legislative, economic, and/or cultural environment.

Estonia provides a very good example of such flexibility. The Estonian EKAK37 resulted from bilateral initiatives and nationwide public discussions. Initially, the implementation process proved slow and difficult, but both sides responded with renewed initiative. By 2003, a Joint Committee formed, with representatives of government (8) and non-profit organizations (14). In August 2004, the Estonian government adopted the 2004-2006 implementation plan for the EKAK on the basis of the work of the Committee. This was the first use of a separately developed document in connection implementing a compact. The EKAK implementation plan formulates goals, activities to achieve each goal, and specific indicators to measure achievement. It allocates responsibilities and fixes a schedule. Although the implementation plan was drafted in pursuit of the EKAK’s short-term priorities,38 it also came as a result of the government and the non-profit sector's joint efforts and understanding of the essential aspects of civil, legislative, and economic life in the country and the importance of adopting a comprehensive approach to solving problems in these areas.

3. The influence of a compact’s provisions on successful implementation

36 Supra notes 2 and 3.
The content and scope of a compact depends on a number of factors, including national political and legislative traditions, the current political and social environment, timing, models used in the drafting process, particular features of the discussion and negotiation process, and personal preferences of the drafting team. One approach to drafting a compact is not necessarily superior to another in terms of assuring good implementation; England and Estonia achieved similar results despite differing approaches.

In England, the Compact is a comparatively short document outlining the general framework for future cooperation. By contrast, in Estonia, the EKAK is detailed, addressing many aspects of cooperation and elaborating means for implementation. Yet in both countries, compacts have been publicized and have substantially progressed toward effective implementation. Significantly, both countries have implementation plans of local, national, and maybe even international importance: the Mini-guide on Local Companys Implementation in England and the EKAK Implementation Plan. The former lists the main steps to take and proposes a checklist of activities at the local level, whereas the latter is, like the EKAK itself, more detailed and instructive, including schedules and specific tasks and responsibilities. These are two different but equally successful approaches toward the follow-up stages of a compact, which illustrate that differences in the contents of compacts do not necessarily produce different probabilities of successful implementation.

Regardless of the specificity and detail in the compact, experience demonstrates that the text should provide clear guidelines on implementation. These guidelines can provide for the following:

- Formation of working groups, as in Estonia;
- Development of follow-up documents;
- Codes of Conduct, as in England;
- The process for review and revision, as in almost all compacts adopted in Europe;
- Specific deadlines, as in the Estonian EKAK;
- Space for flexibility, as in the Croatian Program;
- Allocation of general responsibilities, as in the Scottish Compact; and
- Allocation of specific responsibilities regarding implementation, as in the EKAK.

However, the approach toward formulating a compact should not be carved in stone. New circumstances may call for reconsidering the contents of a compact. In England, for example, the Government recently adopted a program called “Strengthening Partnerships: Next Steps to Compact.” The program acknowledges that the Compact might not have worked as well as it could have because, among other reasons, both the agreement and the Codes are too lengthy – about 140 pages together. As a result, both the government and the community sector may have had difficulty complying with the terms of these documents. To overcome this problem, the new “Compact Plus” is designed to
be a much simpler and “more succinct tool” that will enable organizations to evaluate their compliance more easily.\textsuperscript{39}

4. Dissemination of information on the policy document

Almost every country with a compact has experienced the need, sooner or later, to convey information about compacts and implementation to all players and to the public. Given that a key objective of these documents is ordinarily to encourage participation in political life and to raise the level of services delivered to the public, the public must be included in the awareness-raising campaign. Moreover, the commitments established in a compact cannot be fully met if the document is relegated to the folders of those who have signed it, so the parties must also be targeted by the campaign. Awareness-raising has been recognized as crucial in facilitating implementation; it is considered among the most important next steps in implementation in Estonia, Canada, England, Wales, and Scotland.

The English Mini-guide on Local Compacts Implementation advises that a compact should be publicized in every way possible: websites, events, publications, interviews, etc.\textsuperscript{40} It also underlines the importance of the emotional aspect of publicity with the advice: “Communicate your Compact imaginatively and with enthusiasm.”\textsuperscript{41} Communicating competence and optimism is perhaps a secondary but still indispensable element of awareness-raising.

Many factors contribute to an effective publicity campaign. One key element is a working system of statistics analysis and research. The collection and targeted distribution of data can play a crucial role in successful implementation. Experts from various fields who have participated in compact development can assist in awareness-raising by using such data to explain the compact and its implementation.

Even in England, where compacts originated (and reputedly one of the best countries for follow-up activities and implementation), awareness of the Compact’s existence is still considered low.\textsuperscript{42} The lack of broadly applicable mechanisms for Compact promotion may account in part for the low level of awareness. For example, on the public side, some government departments were very active, with senior officials visiting regional offices, publishing materials, running workshops, discussing compacts at internal events, and mentioning them on any available occasion. Others, however, were not, instead relying on one “champion” (see section 6-b, below) or treating the compact as irrelevant to their work. Some of these attitudes changed with the launch of new policies demanding a more diversified range of service-providers and, therefore, wider participation of the voluntary sector in government decision-making and closer cooperation between government departments and voluntary organizations.

\textsuperscript{40} http://www.thecompact.org.uk/module_images/MG6%20Implementation.pdf.
\textsuperscript{41} Idem.
\textsuperscript{42} Based on input from Richard Hebditch, NCVO, presentation at the Conference on Civil Society Excellence, Tallinn, Estonia, March 3-5, 2005.
Internet sites are a modern means of information dissemination – easy, accessible to a broad audience, and frequently rich in content. NGOs’ websites, sites specifically created to offer updates on compact implementation, and government sites can all be used. For example, England has a website containing information on the national and local compacts. The data are recent and reliable. As a result, the site achieves its objective of making available comprehensive information about the compacts – their drafting and adoption, discussions, review, revisions, practice, and contacts. This method works well in Estonia too, where the site of the Roundtable of Estonian NGOs offers the texts of EKAK and the Implementation Plan as well as activity reports and other interesting information. A special website that is part of the Voluntary Sector Initiative in Canada includes the text of the Accord and related initiatives, the institutional framework, reports, research and statistics, etc. It is regularly updated as well.

Organizations that work in more than one country and thus have access to comparative information regarding compacts also assist in creating awareness. The International Center for Not-for-Profit Law has posted on its website not only descriptions of and articles on compacts (e.g., from France, Croatia, Estonia) but comparative research on related issues as well.

Other technological means can also be deployed in raising awareness: CD-ROMs and video presentations have joined workbooks and training sessions in the toolbox used by the Canadian government and the voluntary sector in implementing the Accord and the Codes of Good Practice.

Disseminated information requires regular updates. Changed circumstances and any revisions to compacts mean that publicity must change. This applies to websites as much as to other means, as neglect in keeping a site up to date may render it useless or misleading. In 2001, the French government created a site on “vie associative” and posted data relevant to the newly adopted NGO Charter. The site contains the text of the document, descriptions of the commitments by the government and the third sector and developments relating to these commitments, contact information, and several additional legislative and political documents, speeches, and news reports. This information is no longer up to date, however, and has lost much of its value. Similarly, in Croatia, the site dedicated to the Government Office for Cooperation with NGOs and the Program for Cooperation with NGOs offers material posted in 2002 that, except for the text of the Program, is no longer relevant. (To some extent, the gap is filled by the site

---

43 Supra note 2.
44 www.vsi-isbc.ca.
45 www.icnl.org.
49 http://www.uzuvrh.hr (in Croatian).
of the new National Foundation for Civil Society Development, created to replace the Office.  

One example of awareness-raising that could serve as a model is England's “Compact Week,” “an annual awareness raising week to highlight how the Compact can help voluntary and community organizations in their relationships with central and local government.” During Compact Week, each component of the two parties is asked to undertake at least one activity to promote the Compact or to learn more about it.

### a. Dissemination of best practices

Dissemination of best practices – cases where the government-NGO relationship has improved as a result of a well-implemented compact – is an essential aspect of implementation, closely related to publicizing the compact. Again, the English Compact serves as a good example: the website dedicated to the compact includes a section on “sharing good practices,” featuring success stories on government and NGO practices in publicizing the Compact, heeding its principles, establishing and developing cooperative relations, and building good partnerships on the national and local levels.

Despite some achievements in disseminating good practices, though, England has no set mechanism to identify such practices or to “highlight behaviour which is not compliant with the Compact,” as the Government recently acknowledged. Because a compact is generally not a legally binding agreement, sanctions for noncompliance cannot be imposed, which can diminish its effectiveness. Compact Plus (see above) does attempt to sanction noncomplying parties that have declared their full adherence to elements of the compact.

The Croatian National Foundation for Civil Society Development offers awards to mayors who have promoted good practices in cooperation with the civil society sector. The Foundation took over many of the functions of the Government Office for Cooperation with NGOs, which (with the leadership and initiative of the former Director of the Office and current Manager of the Foundation, Mrs. Plavska-Matic) organized and coordinated the drafting, discussion, and adoption of the Croatian Government Program for Cooperation with NGOs. The mayoral award announcements are posted on the website of the Foundation and provide not only a forum for sharing best implementation practices, but also an incentive for local administrations to seek NGO partners.

---

50 [http://zaklada.civilnodrustvo.hr/](http://zaklada.civilnodrustvo.hr/)


53 [http://zaklada.civilnodrustvo.hr/news/](http://zaklada.civilnodrustvo.hr/news/)
An interesting success story was publicized through the website of the English Compact.\textsuperscript{54} This was the Leicester case, which some consider a legal precedent on the Compact. When the city council reduced their funding, the voluntary organizations took the council to court. The court decided that fair consultations had not taken place and issued a judgment obliging the Leicester Council “to consult again with local groups after funding cuts were proposed.” The High Court ordered the council to reinstate funding to the voluntary bodies that had not been consulted about the cuts.

The importance of the Leicester case is threefold. First, by taking account of Compact principles, it underlines the force of the local compact as a document with which both voluntary organizations and local authorities should comply. Second, it serves as a reminder that a compact is not a partisan political paper; rather, it reflects commitments of governments, central and local, that cannot and should not be neglected even when the party in office changes. And third, the case demonstrates the practical necessity of abiding by compact commitments; if the council had consulted fairly with NGOs, it could have avoided paying the case costs and facing the embarrassment “of having decisions quashed by a judge.”\textsuperscript{55}

5. Parties’ involvement: joint implementation strategy

All parties to the discussion and adoption of a compact must be involved in preparing a sound implementation scheme. Even when the compact is unilaterally adopted or is not legally binding, commitments are more likely to be respected by parties that have participated in drafting the agreement. In addition, experience with drafting helps establish a more consistent and long-lasting practice of meetings, discussions, and joint work, which has proved to be one of the basic prerequisites for a well-prepared, efficient, and well-implemented cooperation document.

David Carrington, a member of the English ACU, emphasizes that a joint strategy increases the chances for successful implementation because it takes advantage of the strengths of both sides.\textsuperscript{56} The Estonian implementation plan, for example, was developed by experts from government and the third sector through a Joint Committee and shared chairmanship of the working groups. According to participants, this approach worked well, and it illustrates the benefits of close and active involvement by both sides. It could also be applied in a flexible manner in other countries to contribute to successful implementation.

Similarly, when the French State-Associations Charter provided for a three-year evaluation of its implementation, the task was assigned to the National Council for Associative Life (CNVA), an entity through which NGO representatives and government members advise the government on issues related to the third sector.\textsuperscript{57}

\textsuperscript{54} Supra note 2.
\textsuperscript{55} \url{http://www.thecompact.org.uk/C2B/PressOffice/display.asp?ID=95&Type=2}.
\textsuperscript{56} David Carrington, \textit{The Compact – the Challenge of Implementation}, April 2002, \url{http://www.davidcarrington.net/articles/docs/ACU-Compact%20Summary.doc}.
\textsuperscript{57} \url{http://www.worldvolunteerweb.org/dynamic/infobase/pdf/2002/FRA020501_charter_state_ngo.pdf}. 
The parties can adopt a “joint” working plan even if it results from the efforts of just one of them. For example, in Croatia, the Program for Cooperation was developed by the government unit for cooperation with NGOs, although the input of numerous organizations (about 30,000 NGOs) was invited and considered.

6. Institutional framework for implementation
   a. Liaison bodies

The implementation process requires an adequate institutional framework to function effectively. Good implementation is often accomplished by specific bodies with defined responsibilities for working with the other sector and carrying out the compact’s terms. Compacts are in the first instance political rather than administrative tools – they are crafted and adopted by politicians and then implemented by civil servants. The creation of specific liaison and implementation bodies can help ensure a successful transition from the political to the administrative realm. The “administrative viability of institutions for ongoing development” is one of the decisive tests of implementation success.

Such bodies have been established primarily in the public sector, which often carries a heavier responsibility for implementation. Much of this is logical – it is mostly governments that have committed to give while the non-profit sector is expected to accept and report. In Canada, a government division responsible for non-profit and voluntary affairs was created at Social Development Canada, part of the Voluntary Sector Initiative. The Division develops policy related to the non-profit sector, coordinates joint initiatives, and facilitates the Accord’s implementation. The process is monitored by a Joint Steering Committee.

The implementation section of the Scottish Compact focuses on governmental commitments to form and maintain an administrative unit to “promote voluntary sector interests” as well as to ensure that all departments within the Executive have such units. The Scottish Executive has appointed officers in its Voluntary Sector liaison offices with responsibilities for the third sector and Compact implementation, review, monitoring, and evaluation.

In Croatia, the Government Office for Cooperation with NGOs not only coordinated the development and adoption of the Program for Cooperation with NGOs, but also launched the initial stages of the Program’s implementation. The Estonian government appointed ministers as members of the Joint Committee that elaborated the EKAK Action Plan.

---


60 [http://www.vsi-isbc.ca/eng/about/vsad.cfm](http://www.vsi-isbc.ca/eng/about/vsad.cfm).


62 Supra note 53.
b. “Compact champions”

Compacts, of course, are implemented by people. For successful implementation, these people must have specific responsibilities, a strong understanding of compact principles, and adequate capacity to carry out their tasks.

There is no such specialty as “compact-drafter” or “compact-implementer.” These skills are acquired through practice. For example, in Estonia, the leaders of two of the biggest NGOs in the country – Kristina Mand (NENO) and Mall Hellam (Open Society Foundation) – have been among the most active participants in compact-development mechanisms since the initial phases of negotiation. More recently, they have served as co-chairs of two of the working groups for the EKAK Implementation Plan. They have become experts on cooperation issues as a result of their experience.

In England, so-called “compact champions” have been designated to promote the Compact or one of the codes adopted under it. These are well-qualified individuals devoted to the Compact’s ideals. At the central government level, these champions were initially senior officials within various departments who were assigned to drive the Compact forward. These appointments had varying results: certain champions who “embraced that responsibility … with enthusiasm” fulfilled their tasks, whereas some champions left Compact promotion to others. Where the assigned minister viewed the Compact as a political priority, other officials followed his or her lead, and the department took active steps (including allocating funds) to implement the agreement. The lesson learned from these experiences is that successful implementation demands understanding and acceptance of compact principles by senior state officials and careful selection of responsible “champions” for implementation.

The importance of the personnel factor is clearly illustrated by the Croatian example. As mentioned above, the Government Office for Cooperation with NGOs has been a leading body in the Program for Cooperation process from the outset. The role of its former director – Mrs. Cvjetana Plavsa-Matic – must be highlighted, as the launch of the program largely resulted from her personal initiative. After Mrs. Plavsa-Matic left the office, however, her position remained unfilled for some time due to the new government’s lack of interest in the Program’s implementation. As a result, the text of the Program has not been revised since its adoption, despite a requirement to the contrary in the Program, and most implementation activities have been “frozen.” Although the lack of political will in the new government is the primary cause, the negative impact of a key player’s departure is beyond dispute.

The role of competent “compact staff” can be essential both for awareness-raising and for fulfilling commitments. In England, government personnel expressed frustration “with the failure of central government to comply with Compact requirements, both on funding and, particularly, on consultation.” In one department, the staff even responded to a central government circular with the comment that it was inconsistent with Compact principles.

64 Supra note 13.
65 Supra note 13.
Formation and training of staff can be part of the compact discussions and drafting. Experts can train those engaged in implementation so that all of them can actively and positively contribute. The English local Mini-guide recommends “training so that people know how to use your Compact.”66 As one of its primary functions, the Croatian Foundation for Civil Society Development has listed training public servants to increase their capacity to implement joint projects with the civil sector.67 Under the Estonian EKAK, training programs for officials should include topics related to civic society. The heads of civic organizations are also involved in the training programs. Civic education in Croatia has been advanced by university programs offering a Master’s degree in Non-profit Management. First-phase priorities of the Canadian Voluntary Sector Initiative have included increasing the capacity of the voluntary sector to “meet the demands placed on it”68 and to serve society, resulting in increased third sector skills and knowledge to manage resources.69

c. The role of experts

In all countries that have launched a compact process, experts have been a logical and inherent part of it. Lawyers, economists, sociologists, and other specialists are usually involved from the outset and can be an asset in the follow-up stages as well.

The experts can play a range of roles. They may provide largely technical guidance, through proposing language for the compact or participating in working and discussion groups. But their contributions can be much greater, both during and after drafting and adoption. By providing advice on the content, experts can influence how the compact’s provisions will affect its implementation. They can also advise on factors that influence implementation, and participate in training in order to ensure that both sectors have competent staff to carry out their implementation tasks.

7. Momentum

A timely kick-off is key to the success of a compact implementation campaign. Equally important is building momentum from the adoption of a compact through the launch of implementation. In other words, the parties should not to wait too long after signing the agreement before beginning implementation. As the English experience shows, lengthy preparations pose a risk that the optimal time for a launch will pass and the issues will become “too cold.”70 A prolonged gap between publishing a compact and starting implementation takes the issues off the agenda. Interest and enthusiasm diminish, and opportunities to initiate activities wane. Once momentum is lost, new activities designed to keep issues hot may become necessary. These may include renewed discussions, publication of explanatory documents, distribution of success stories, or revision and redrafting of the implementation plan where one exists.

67 http://zaklada.civilnodrustvo.hr/foundation/mission_vision_goals/.
68 http://www.vsi-isbc.ca/eng/about/cjt_general.cfm.
69 http://www.vsi-isbc.ca/eng/about/cjt_general.cfm.
The second Annual Review of the English Compact remarked that “[c]ompact development at both national and local level seemed to have lost its momentum.”\textsuperscript{71} This was attributed to insufficient support provided by central government departments “and a decline in support from intermediary organisations such as the Local Government Association….”\textsuperscript{72}

In order to build momentum, implementation and monitoring should be planned alongside the compact itself. A well-implemented compact may in practice depend on political will, culture, and traditions in a given country. However, good monitoring mechanisms and clearly allocated responsibilities at the outset helps to avoid some potential obstacles and strengthens the links between drafting, adopting, and implementing.

The French NGO Charter was signed in 2001 during the celebrations of the 100-year anniversary of the Law on Associations. The year was also declared an International Year of Voluntarism – an ideal time to promote the role of NGOs in political and social life in a country where associative life has strong traditions.\textsuperscript{73} The government undertook to implement some activities, mostly those related to promoting volunteer work and financing mechanisms. A government decree authorized public bodies to enter into multiyear agreements subsidizing NGO programs, and an evaluation guide was drafted and published. Employees received additional rights to take time off to perform volunteer work. Laws were enacted providing for greater tax incentives, particularly to encourage charitable donations. Many of these measures began before 2001, so the Charter did not actually introduce them but rather built on them. With the change of government in 2002, however, the Charter was no longer a priority, and the momentum toward more comprehensive implementation was unfortunately lost.

8. \textit{Review and revision processes}

As mentioned above, chances of successful implementation increase where the parties agree on implementation provisions at the outset and include them in the compact itself. Providing for \textit{review} and \textit{revision} of the compact can be helpful, as a way of demonstrating a commitment to compact ideals even while acknowledging that implementation may take place under changed circumstances. Revising the compact is in itself part of good-faith implementation, because it expresses the parties’ commitment to continue improving their relationship – the main objective of a compact – under changed circumstances.

In practice, it is not easy to separate the processes of adopting a compact, revising it, and implementing it; they are interrelated. Implementation tests the level of precision, timeliness, and comprehensiveness of the compact articles, which may lead to revision – unsuccessful implementation may be attributable to a poorly written compact. A process of revision and amendment of the text may follow, and then an attempt to implement the new content. The Scottish Compact, for example, will be revised due to lessons learned during implementation; a similar process is underway in Wales.

\textsuperscript{71} \url{http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr0205.pdf} (2002).

\textsuperscript{72} Idem.

\textsuperscript{73} Supra note 48.
Review and revision provisions are standard in compacts. In Estonia, the provisions of the EKAK regarding such revisions are quite clear: the government and representatives of the civil society sector (the Round Table of Non-profit Associations) are assigned to prepare annual action plans and create a mechanism “for on-going monitoring and assessing of the implementation process of EKAK.” Reporting on implementation at the parliamentary level takes place every two years, and parliamentary discussions of proposals for amending the EKAK are to be held every five years. All parties concerned have so far complied with their allocated responsibilities, including the Joint Committee, the government, all public institutions, and the civil sector.  

Under the English Compact, implementation review is done jointly by the Compact Working Group, the government, and the Local Governments Association at a regular annual meeting. The participants review progress in implementing the national Compact and local compacts and agree on an action plan to advance the Compact for the coming year. A summary of the meeting’s discussions (together with proposals and concerns raised by the voluntary sector) is submitted to Parliament and posted on the Internet.

The Scottish Compact also confirms the parties’ commitments to monitoring, review, and evaluation procedures and to report to Parliament. In 2003, the Compact was reviewed and revised to ensure that its principles were up to date. Mapping studies, case studies, and best practices are being undertaken as part of a broader evaluation process, which aims to reach conclusions on the progress of implementation and the impact of the document.

The Croatian Program for Cooperation also envisages annual meetings between the government and the civil society sector to “revise and analyse actions within the Program.” The report from these discussions must be made public and submitted to Parliament. However, due to the change of government and its priorities, along with staff changes in the government body responsible for the Program’s implementation, these activities have not taken place; the text of the Program has not been revised and analyzed.

“The Paradox of Compact: Monitoring the Impact of Compacts,” a report from the Home Office in England, emphasizes the importance of compact reviews. In 2002, Her Majesty’s Treasury commissioned and published a review of the role of the voluntary and community sector in service delivery, which “saw the Compact as underpinning the expansion of the sector’s role” and confirmed the Government’s commitment to the Compact. Many interviewees commented that the review had raised the profile of the Compact. In addition, government offices planned several seminars to discuss the review, which were expected to increase awareness of the content and values of the Compact and facilitate its implementation.

---

76 http://www.homeoffice.gov.uk/rdspdfs05/rdsworth0205.pdf.
77 http://www.homeoffice.gov.uk/rdspdfs05/rdsworth0205.pdf.
78 Idem.
9. Monitoring and reporting mechanisms

Virtually all compacts require monitoring. The parties generally recognize this need to monitor their fulfillment of commitments and appoint specific bodies for monitoring and evaluation. Sometimes these are joint institutions, such as the Joint Committee in Estonia or the Joint Steering Committee in Canada. In other instances, they are units formed by a particular sector, such as the specialized unit assigned to the Executive in Scotland.

Most “compact countries” establish mechanisms for parliamentary reporting, whether they function in practice or not. This signifies the importance attached to compact implementation. In certain countries, including Estonia, the Parliament actually takes part in the discussions, whereas in others, it is simply informed about compact-related developments.

In England, parliamentary discussions during the Compact Annual Meeting allow for questions on Compact implementation, to which Government Ministers must respond. The action plan proposed by the working group must be approved by Parliament, thus setting up a system of parliamentary control. Currently, a more active role for Parliament in the Compact process is under consideration.

All compacts establish specific and generally limited deadlines for reporting: two years in Estonia, annually in England and in Croatia. The French State-Associations Charter is reviewed every three years, and the Welsh Compact every four years. A regular review and reporting mechanism appears to be considered essential for effective parliamentary control. Even more effective is Canada's system of public reporting on compact implementation, because the reporting has a wider impact and enhances the possibility that public opinion may influence the implementation process. Joint public reports and separate background papers on Accord implementation are regularly published.

10. Mediation and dispute-resolution system

The adoption of a compact signifies a relatively advanced relationship between public institutions and the civil society sector. Nonetheless, disputes and problems are inevitable. Many compact countries have considered how to resolve these disputes, whether through existing means of dispute resolution or through mechanisms specific to the compact.

The most obvious avenue of dispute resolution is the judicial system. At least in theory, a party (most likely the civil society sector) may take the other party to court and claim a breach of the latter’s obligations under a compact. The Leicester case mentioned above demonstrated that this mechanism can be effective. One problem with the courts, though, is that compacts as a rule are not legally binding. Although the precedential effect of the Leicester case is even greater in the light of the non-binding nature of the Compact, it is still uncertain whether other countries' courts will give similar effect to a compact’s provisions. Alternative means of problem solving therefore need to be developed, preferably of a more flexible and less drastic nature – for example, mediation systems.

England actually has such a system: the Compact Mediation Scheme, funded by the Home Office. The scheme is run by the Centre for Effective Dispute Resolution
(CEDR), which has an extensive experience in resolving disputes on diverse issues, and as of January 2005 had worked on more than 8,000 cases. The Centre has mediated Compact-based disputes between government or local public bodies and voluntary organizations since March 2003. It operates the mediation scheme on behalf of the Home Office’s Active Community Unit. According to the Home Office Minister, Lord Filkin, the “new mediation service provides an independent way of resolving disagreements quickly.” The mediation system in England has great potential, but it has not yet become popular as a dispute-resolution mechanism for compact-related issues.

Also in England, the Program on Compact Advocacy run by the National Centre of Voluntary Organizations offers legal assistance and, through the Compacts Problem Resolution program, provides negotiation, advocacy, and lobbying or campaigning services on behalf of voluntary organizations when a Government department or agency fails to comply with a Compact.

The Parliamentary Ombudsperson is another institution that England uses to provide supplementary resources to the implementation process. It is available to assist citizens who seek redress where a public institution has infringed their rights or neglected its duties, including cases of noncompliance with a Compact (national or local).

The new program “Compact Plus” in England anticipates a novel mechanism for dispute-resolution. The new Compact, which will be shorter and simpler in content, will require membership – public sector bodies and voluntary organizations will opt to join. They will elect a Compact Champion who, among other functions, will adjudicate complaints of Compact Plus breaches. Sanctions will include a publication of the resolution, potential withdrawal of Compact Plus membership, and imposition of penalties or compensation.

What are the indicators of successful compact implementation?

The search for measurable indicators

Now that a number of compacts are in their implementation phases, it is appropriate to ask how to recognize success. How are the parties – and society in general – to be sure that these initiatives have not merely been expensive wastes of time? Are the statements of the government and CSOs that they have begun to work together sufficient?

To answer these questions, compact proponents have worked to develop monitoring and evaluation tools to gauge the progress of implementation against the compact’s goals. This has led to a search for appropriate indicators against which to measure progress. As compacts are still a relatively new phenomenon, there is little information available regarding what progress has actually been achieved. However, a number of countries have begun to develop indicators that will assist in making this determination.

---

79 Before that, CEDR and the National Council for Voluntary Organisations operated a joint mediation service available to all charities and voluntary organizations.


The most appropriate indicators depend on the goal of a particular compact. Where the document seeks to promote public-private cooperation in the delivery of services, for example, improved services (social or other) to citizens on a national or local scale can signal a well-implemented compact. So, to the extent that one could measure the improvement in particular services as a result of compact implementation, it would be a sign of success.

One difficulty is how to measure such improvement – how to quantify the impact. One indicator might be the increase in the number of NGOs delivering public services. Alternatively, where competition exists, it might be possible to estimate the percent of clients who have chosen NGOs as their service provider. However, these indicators, while relatively easy to measure, fail to address a key component of service delivery: the quality of services. Thus, appropriate indicators might include measures of client satisfaction with services – more difficult and probably more expensive to quantify. Moreover, compact results may not appear immediately; and when improvement does appear, it will not always be clear whether it arose from the compact or from other circumstances and events. In either case, results are often difficult to measure.

The search for appropriate indicators affects the parties’ credibility and accountability, both to each other and to the public. The government may say that a compact has resulted in better public participation in legislation, but for true accountability, the improvement must be quantified. For example, it may be demonstrated that fewer draft laws are now adopted without public participation than was the case before the compact. NGOs may claim that the government has not fulfilled its commitment to increase funding for the third sector; however, this could be shown to be false if data indicate the contrary. In Canada, the Accord’s implementation has brought about 70 changes in the regulatory framework for the voluntary sector, and the commitment to increase knowledge about the sector has resulted in the preparation of three national surveys on non-profit related issues — figures that help gauge the concrete impact of the Accord.

The success of implementation cannot be measured solely by fulfilling certain compact provisions. For example, if a compact provides for a government agency or other unit to secure the third sector’s interests, establishing such a body does not necessarily fulfill the underlying objective of raising the sector’s profile. The agency must also achieve results by discharging its responsibilities and advancing the objectives of the compact.

Successful implementation is a process, and a young one at that, so development of appropriate indicators is still underway. In Estonia, the NGO sector led by NENO has undertaken to draft a set of indicators, expected to be ready by the end of 2005. Developing indicators is one of the next steps in Canada’s Accord implementation as well.

---

83 Based on input from Marie Gauthier, Director of Social Development Canada, Non-profit and Voluntary Sector Affairs Division, presentation at the Conference on Civil Society Excellence, Tallinn, Estonia, March 3-5, 2005.

84 Based on input from Kristina Mand, Director of NENO.
There are many possibilities for tangible measurement of implementation, depending on the compact's specific goals:

a. the number of legislative acts adopted using new public participation procedures;

b. the number of public discussions and consultations held on legislative drafts;

c. the number of legislative acts in furtherance of the compact or to facilitate its implementation (tax laws, laws on charity giving, procurement laws, etc.)

d. the number of training sessions organized for civil servants and non-profits on cooperation issues and compact implementation;

e. the percentage of civil servants, NGOs, or the general public aware of a compact’s existence, content, and implementation tools, as established by surveys;

f. the number and scope of structural changes to governmental institutions and non-profits in order to facilitate their relationship, such as national and local liaison offices established on the basis of compact;

g. the number of joint initiatives undertaken by the two sectors on a national or local scale;

h. the amount of public funds transferred to not-for-profits;

i. structural changes in government funding for NGOs, such as the ratio of contract-based funding to grant funding;

j. development, dissemination, and estimated compliance with performance evaluation procedures and rules;

k. the number of contracts for public service delivery signed and implemented between state or local authorities and NGOs; and

l. the quality of public services delivered by NGOs.

Despite some positive examples, more tangible indicators need to be developed. Their preparation and use will require efficient mechanisms for data collection, statistical research, information dissemination, and feedback evaluation.

Is the number of codes of practice or other documents signed on the basis of the compact a good indicator of successful implementation?

Some have suggested that where a compact contemplates a code of good practice, the adoption of such a code can be a measure of successful implementation. The adoption of codes, however, is not likely to serve as a particularly useful indicator.

Codes of good practice have been envisaged by the English Compact and the Canadian Accord. Following up on the Accord, two Codes of Good Practice have been signed in Canada: on Funding and on Public Policy. The English Compact designates five areas within which a code of good practice must be signed: black and minority ethnic

---

85 However, in these first three possibilities it may be argued that the impact of the introduced legislation should also be evaluated – new laws may not be properly implemented or may not produce the desired effect.
groups, community groups, consultation and policy appraisal, funding and procurement, and volunteering.

The adoption of a code of good practice is not in itself a sign of compact implementation. Political culture and traditions explain the existence of codes of good practice in the UK and Canada and not in the countries with a continental legal system. Compacts seek a better and more constructive relationship between the two sectors to the benefit of society.\(^{86}\) This can be achieved by implementing a series of specific measures, through codes or other means. Thus, a code is a means rather than an end in itself. The website of the Canadian Voluntary Sector Initiative recognizes as much: “The Codes of Good Practice are a resource of tangible, concrete ideas about how to take the spirit and guidelines of the Accord and put them into action in both government and voluntary sector organizations.”\(^{87}\) In England, the codes contain specific rights and responsibilities of both parties which should be reflected in their relationship “to make it work.”\(^{88}\)

**Is the number of local policy documents signed a good indicator of successful implementation?**

From the national level, compact negotiations often move to the local level and end with local compacts. This usually – but not exclusively – happens when the national compact provides for future local agreements to be signed. The adoption of local compacts in some countries, such as England, is considered evidence of success in implementing the national compact. Where the national compact explicitly contemplates local compacts, the number of local compacts signed could logically be considered an appropriate indicator of successful implementation. Four years after the Compact was signed in England, there have been documented efforts toward developing local compacts in 94% of the 388 counties.\(^{89}\) At the 2004 Annual Compact Meeting of the Compact Working Group, Government Ministers and Local Governments Association, one of the goals was to set up Compacts in all remaining local authorities by April 2005.\(^{90}\)

The February 2005 English report, however, concluded that the mere *quantity* of local compacts could no longer be considered a test of successful implementation. Rather, the focus turned to *quality* – whether local compacts are well drafted, well publicized, and effectively implemented.\(^{91}\) Therefore, despite the impressive number of compacts signed in the counties and regionally, a new and perhaps more difficult to measure indicator of successful implementation seems to be taking hold – the quality of local policy documents on cooperation. Quality can be evaluated based on the impact of implementation. This means that the process of measuring successful implementation is transferred to the local level.

\(^{86}\) The motto of the Canadian Voluntary Sector Initiative is “Partnering for the benefit of Canadians.” See [http://www.vsi-isbc.ca](http://www.vsi-isbc.ca).


\(^{91}\) [http://www.homeoffice.gov.uk/rds/pdfs05/rdso1r0205.pdf](http://www.homeoffice.gov.uk/rds/pdfs05/rdso1r0205.pdf).
Again, this is an issue closely related to political traditions and culture as well as the compact's particular goals. The means of evaluating local compacts cannot be transferred intact from one to another country.

Croatia recently registered its first “local charter.” In November 2004, the City Council of Rijeka adopted an NGO Charter regulating cooperation between the city and local NGOs. The Charter sets city policy toward NGOs, emphasizing transparency in financing NGO activities. It provides for the creation of a Coordination Committee, to consist of NGO representatives and city government representatives. The Committee will set standards for city departments that finance NGO activities, providing them with templates, procedures, and objective criteria for evaluating grant proposals. Vukovarska County has already followed the Rijeka example, using it as a model for its own NGO Charter. Other local governments are expected to initiate the adoption of similar documents. While the signing of such agreements may not be a valid indicator of the success of a national compact, they are nonetheless encouraging, particularly given the delays in implementing the national Program for Cooperation mentioned above. They also present an opportunity to transfer national negotiations and agreements to the local level.

Local compacts have been particularly important in Poland, where they preceded and were independent of the national agreement. The first agreements between local authorities and the local community sector appeared in the 1990s, seeking to unite the sectors’ efforts to improve public services. Polish local compacts were therefore more limited in scope than many; at the same time, though, they went beyond most other compacts by addressing concrete technical issues of cooperation rather than just principles and values. Terms included the establishment of liaison offices, joint coordination bodies, funding, etc. The Law on Public Benefit Associations now requires local governments to adopt compacts. More recently, an agreement similar to a compact has been signed by representatives of the public, business, and non-profit sectors; this document sets forth shared principles of cooperation for the development of Polish regions and the role of NGOs in that process. Obviously, the adoption of local compacts in Poland has no bearing on the success of the national agreement, since they preceded it. Nonetheless, the Polish situation provides an interesting illustration of how local context must be considered in choosing indicators of success, as circumstances vary so widely.

**Improved relationship and joint follow-up activities by the parties**

The relationship between the public sector and the third sector is difficult to evaluate and measure because it has numerous facets. More frequent meetings and discussions, common projects, or the signing of a local compact may appear to indicate improvements in the NGO-government relationship. But quantifiable measures may not bear this out. The parties need to demonstrate in a more rigorous fashion – to the public

---

93 Law on Public Benefit Activity and Volunteerism (2003), Article 5, paragraph 4.
and to themselves – that their relations have moved from the stage of understanding each other to that of cooperating and working together.

For example, England's Compact Working Group conducts an annual sector survey. In 2003, the survey found a higher rate of improvement in inter-sector relations in communities where local compacts were being developed. “A poll taken at Swale’s Local Compact event six months after publishing their compact gave a 27 per cent net improvement in the council’s relationship with local groups.”\(^95\) Therefore, despite certain problems and difficulties in compact implementation discussed above, the parties have achieved a noticeable improvement in their relationship through working together.

The Charter for Interaction between Volunteer Denmark / Associations Denmark and the public sector illustrates another way to measure improved relations stemming from a compact. As discussed above, a key component of the Danish government’s development assistance strategy, and a moving force behind the Charter, was the need to strengthen small Danish NGOs in providing humanitarian assistance. In the Charter, therefore, the Government committed that “funding made available to NGO projects will to a lesser extent be channelled through a small group of large … organisations”\(^96\) and will instead be distributed to a broader range of organizations. This represented public recognition of the government's need to accept more organizations as partners. The change in the distribution of funding seeks to preserve or raise the quality of assistance to developing countries while at the same time improving flexibility and strengthening popular support for Danish NGOs by broadening the spectrum of funded organizations. By 2004, assistance to the large NGOs has been reduced by 5 percent, and will be reduced by approximately 10 percent in 2006, with those funds allocated to smaller NGOs.\(^97\) The established relationship of confidence made it possible to ensure that relief activities can be launched on very short notice, an important factor in implementing programs for humanitarian assistance.

**Conclusion**

Governments and the non-profit sector have a long history of cooperating and collaborating. Institutionalized relationships supported by a legal framework and based on a policy document, however, are quite recent. Although not indispensable to the public-voluntary sector relationship in all countries, compacts have proved efficient, supportive, and sometimes even crucial to good cooperation in the interest of society. This is true on one condition: the compact does not remain a mere piece of paper, but generates respect and diligent compliance on the part of all concerned.

The lessons learned have come from both positive and negative practices – good experiences have proved equally educational. These lessons include the following:


\(^{96}\) Idem.

\(^{97}\) [http://www.um.dk/Publikationer/Danida/English/DanishDevelopmentCooperation/AWorldOfDifference/kap03_1.asp](http://www.um.dk/Publikationer/Danida/English/DanishDevelopmentCooperation/AWorldOfDifference/kap03_1.asp).
• A compact should be developed only where legal, political, social, and historical frameworks support it and where the government-voluntary sector relationship would benefit from it (England, Estonia, Canada).

• Both sectors should be involved from the very beginning of drafting and negotiating (Croatia).

• Implementation terms and plans should be drafted in tandem with a compact (Estonia).

• Both parties should jointly develop and apply an implementation strategy (which did not happen in Scotland).

• Compacts should be made known to a wide audience, and “champions” who know and “feel” them better can be an advantage in implementation (England, Canada).

• Regular monitoring and review not only help to gauge progress in implementation, but can also evaluate a compact's content and possibly indicate the need to revise it (Scotland, Wales).

• Monitoring, reports, and revisions should begin early and continue throughout implementation (Scotland, Estonia).

• A successful compact can produce results for both big and small stakeholders (Denmark).

• Local compacts can be useful (England, Poland) but are not essential (Estonia).

• Distributing best practices (England) and granting awards for successful compact implementation (Croatia) can help make an agreement work.

• The close involvement of high government officials in compact implementation improves the chances for quick results, particularly in the area of legislative reforms and funding schemes (England).

• Data and statistics form an important element of compact evaluation and implementation (Estonia).

Where compacts have been adopted, the primary challenge now facing the two sectors is to identify tangible indicators to measure implementation. Such indicators will enable both parties to see more clearly how their compact has contributed to a better working relationship. More advanced measurement schemes will help the parties to adapt the compact to new realities. Further, they will assist in faster, simpler, and more effective implementation of all terms by both parties, to the benefit of society.
SPECIAL SECTION: HELPING CIVIL SOCIETY FLOURISH

Donors Strengthening Civil Society in the South:
A Case Study of Tanzania

By Jared Duhu*

For countries in the South, the best way to foster democracy and development is to strengthen institutions, and then let governments make the policies to be implemented through such institutions, with civil society as an important actor in the overall process – that, at least, is what donors commonly say. In my view, they're only half-right. When dealing with many countries in the South, you must go beyond formal institutions and take into account the local logic by which things gets done, sometimes under informal arrangements where institutional policy implementation and patronage are hard to separate.

Tanzania provides an illustrative example. Donors working with civil society there have emphasized strengthening the capacity of civil society organizations (CSOs) to provide “voice” for the poor in the economic and political spheres. This has been done through a number of strategies such as program support, institutional support, technical support, partnerships and coalitions, and conditions attached to aid to governments. These strategies focus on enhancing such elements as civil society's autonomy, representativeness, accountability, sustainability, advocacy roles, skills to monitor government policies, political dialogue, and empowerment so as to pursue democracy and development goals effectively.

Having strengthened these elements, donors expect civil society, through its voice and accountability, to prod the government to make policies that favor the poor. Donors further expect that citizen participation will increase in issues affecting their lives, civil society will be able to monitor government policies, dialogue will be encouraged between the government and civil society, and civil society will deliver services in certain circumstances (including HIV/AIDS and disasters) while most service delivery will remain a responsibility of the government.

Are these expectations realistic? Answering that question requires, first, some historical context.

1961-1985: Single Party and Centralized Economy

Tanzania gained independence from British rule in 1961 under the leadership of the late President Julius K. Nyerere. Because it was one of the first countries to gain its independence in Africa, Nyerere was skeptical about establishing close ties with the West. That skepticism was reinforced by his decision to take the country into the socialist...
bloc when he developed “Ujamaa na Kujitegemea,” a socialist policy to guide development for the newly formed nation.

Power was centralized in the ruling party, Chama Cha Mapinduzi (CCM), as the engine to push the socialist agenda forward. Officials of the ruling party were strong enough to supplant the governmental mechanisms for making and implementing policy. Particularly during the difficult economic conditions of the early 1980s, the state machinery weakened while personal and informal connections grew more important. Although governmental institutions were in place, they held less power than the individuals who held political office. Hence, there was neither transparency nor public accountability (Hyden 2005:13).

Civil society organizations were limited. The state had created umbrella organizations to coordinate all forms of associations and organizations, and CSOs were strongly discouraged, particularly activist ones. As a result, individual and collective initiatives to organize for a common social cause were few. At the same time, foreign ideas, especially those from Western countries, were seen as an intrusion and a potential imposition of neocolonialism. As a result, those in power rarely listened to outside experts, except when it was made a condition of donor aid.

1985-1995: Political and Economic Liberalization?

The 1980s presented great challenges; overall, the socialist policies seemed to produce more failures than successes. As a result, under the leadership of the second president, Mr. Ali Hassan Mwinyi, the divide with the West was bridged. Mwinyi accepted the policy reforms that his predecessor had constantly rebuffed. Toward the end of the 1980s, Tanzania embraced an economic liberalization agenda set by international financial institutions, and multiparty democracy was allowed in 1992.

These changes proved more difficult than they might at first appear. The Western conception of the market economy relies on economic exchanges that are immediate and contractual, but in Tanzania, the situation at the macro-level reflects what takes place at the micro-level – what has been termed the “economy of affection.”¹ In the economy of affection, exchanges often are neither immediate nor precise, and the reciprocal response expected is not explicitly defined (Hyden 2005:8). The result is a continuous give and take that reinforces relationships.

Significantly, the economy of affection operates in politics as well. The patron has more power, and the client seeks the delivery of goods or services, not implementation of policy. At this level, power is the principal means of exchange in which people invest in order to get things done. Therefore, contrary to Western hopes, the period of liberalization did not significantly change the status quo for ordinary citizens – personal relationships remained critical (Hyden 2005:9).

The 1980s, however, did change the CSO environment in important ways. Upon Tanzania’s independence, most CSOs were intertwined with the state as affiliates of the ruling party. During the 1980s, many CSOs cut ties with the political party, and many

¹ Goran Hyden has used the concept of economy of affection to refer to a situation where exchanges are made between people with an expectation of some reciprocal response in the future.
new CSOs formed (ODI 2000, CMI 2000:6, Mogella 1999). A more autonomous civil society, in turn, led to changes in donors' approaches. Instead of channeling funds and support to governments, donors increasingly supported CSOs. This further fueled the growth of CSOs, mostly in the form of NGOs. Most concentrated on economic and social development, environmental conservation, gender issues, human rights, and professional matters (ODI 2000).

At this time, civil society's role in development concentrated on social service delivery. For example, in a study conducted in 1993 by Norway’s Chr. Michelsen Institute (CMI), NGOs in Tanzania ran 61 percent of secondary schools, 87 percent of nursery schools, and 43 percent of hospitals (CMI 2000:6). The study found that in some regions of the country, CSOs did far more social service delivery than the state.

This reliance on CSOs for social services brought many challenges, beginning with accountability: most of these CSOs were NGOs funded by Northern donors, and they were more accountable to their donor agencies than to the people they served. A second challenge was sustainability. These CSOs provided integral support to their communities, but the local base for fundraising was poor; without the support of outside donors, the services might cease. And donors sometimes change their funding priorities – today, in fact, donors are shifting from supporting delivery of services to supporting influence over policy. A third challenge resulted when the government made less effort to allocate resources to areas where social services were being provided by CSOs, effectively sidelining these communities from state benefits and making the CSOs all the more indispensable. A final challenge was empowerment – something that the relationship of giver and receiver does not especially foster. Donors might want local people to participate actively in issues affecting their lives, but the service-delivering CSOs tended to reduce the roles of both government and citizenry.

1995-2005: Donor Confidence Restored, Civil Society Sidelined?

The change of leadership in 1995 brought a third president plus a new commitment to strengthening institutions in the country. President Benjamin W. Mkapa has been hailed for putting Tanzania on track in economic progress and winning donor confidence. Goran Hyden (2005:15) sums it as follows:

If the Nyerere years was a blind race toward a false paradise and the Mwinyi period was a chaotic free-for-all dance in the rediscovered market place, the past ten years under the country’s third president [Mkapa] has been an attempt to a more disciplined march toward specific policy goals.

Results, though, have been mixed. Economic developments in Tanzania have been largely positive – a stabilized currency, reduced inflation – but less progress has occurred in the political sphere. Though the single-party regime is gone, the opposition is weak, the ruling party holds the majority of seats in parliament, and officials still command their power not only because of their offices but because of their connections. The logic of governmental institutions as sources of authority has not yet been enshrined in Tanzania (Hyden 2005:7).

---

2 According to the Chr. Michelsen Institute (CMI), there were 224 registered NGOs in Tanzania in 1993, and 8,499 in 2000.
Though it is not my purpose to discuss the full scope of liberalization in the South, it is important to note that it was not universally limited to the market. The political arena had its own version of liberalization, with many countries embracing democracy and multiparty systems. Important expectations accompanied this political liberalization, including the following:

1) People would freely affiliate in associations and groups through which they can express their interests.
2) Governance institutions would hold decision-making power and act in the interest of the society at large.
3) People would have the right to involve themselves in governance, including affairs affecting their own lives, without political institutions being captured by individual or special interest groups.
4) Citizens would hold those in public positions accountable for their programs and policies.
5) Civil society would educate people on what is expected of them as citizens and what they can expect from the state and political institutions.
6) Civil society would cooperate with political institutions to improve the lives of ordinary citizens.
7) Civil society would help create a democratic culture.

Today, more than twenty years after the adoption of liberal policies, it appears that political change in Tanzania has been limited. The ruling party CCM is still at the helm, and government officials still hold power as individuals rather than as components of institutions. This is reinforced by the fact that most political parties formed in the early 1980s are now entangled in internal crises of leadership and mismanagement as well as lack of appeal to the populace. The result seems to be what has been termed "electoral democracy."

While the relationship between the state and civil society in Tanzania continues to improve, more must be done to institutionalize a non-obstructive environment for civil society to function freely in the country. The country analysis survey conducted by the Overseas Development Institute (ODI: 2000) showed that even after Tanzania has joined many international conventions that guarantee freedoms and human rights, and even though policy-makers laud the importance of civil society to the advancement of democracy and development, laws still constrain civil society. To begin with, the Societies Ordinance of 1954 – used by colonial rulers to suppress civil society and political organizations – remains operational, and the Registrar of Societies can bar registration as well as require organizations to seek permission for rallies, meetings, and celebrations. The state has similarly sought to restrict the operation of civil society groups.

---

3 Tripp shows that electoral democracy results when elections to legislative bodies and other public office positions become the way through which people participate in politics, without necessarily embracing a political culture and strengthening legislature, judiciary, electoral commission, political parties, and other institutions.
through the Tanzania NGO Policy.\textsuperscript{4} Although the government depicts this policy as a means of facilitating NGO activities, in effect it imposes limitations on civil society. For example, the policy requires that NGOs be “non-political” and that they fully account for how they obtain and use their funding through financial and program reports submitted to the government (Prime Minister’s Office 2001:6, 15).

In these circumstances, the challenge for CSOs in Tanzania is how they can effectively foster democracy without being regarded as “political” and thereby risking the loss of registration. The challenge can be exacerbated by donors’ strategies. For example, USAID has adopted a strategy of offering technical support and partnerships to “politically active” CSOs. Will Tanzanian NGOs be shut out? While USAID’s approach is commendable, the state may deregister NGOs that seek to enter the political arena, given that democracy is considered a “political” issue. Resolving this dilemma involves efforts to limit the state’s control over civil society. If such delicate issues are not tackled, achieving the goal of democracy becomes less and less likely. To put it differently, civil society has to figure out just when the “civil” becomes the “political” (Foley and Edwards 1996:38, 39).

The donor community has responded to Tanzania’s economic performance by showing confidence in the government through changing the funding arrangement from project and program support to budget support. An emphasis on budget support is thought to make governments "own" the development process, an idea that has gained prominence in recent times. Donors now provide budget support in many countries. This approach puts the government at the center. Radelet (2005:18), however, suggests that it would be better to draw a distinction: in well-governed countries, governments should be trusted to take the lead, while in poorly governed countries, a large share of donor support should be given through NGOs and civil society groups.

Many donors have parallel funding mechanisms, with general budget support for government and additional funding for civil society; for the majority of donors active in Tanzania, however, no funding is specifically directed to civil society, despite the doubts about the strength and effectiveness of the government.\textsuperscript{5} Budget support leaves much to be desired if, as in Tanzania, the country lacks institutional mechanisms to enforce government’s responsibility and maintain its accountability. In my view, given the history of state-civil society relations in many countries in the South, and Tanzania in particular, exclusive funding for general budget support with no parallel support for civil society will sideline civil society before it is strong enough to contribute effectively to policy.

\textsuperscript{4} In 1997, the government through the Prime Minister’s office developed the national policy on NGOs, which is now operational. According to the government, the NGO policy is intended to “guide the growth and operation of NGOs.” Tanzania does not have a separate policy on civil society, but since NGOs dominate the civil society landscape in the country, the NGO policy affects civil society at large.

\textsuperscript{5} According to the World Bank survey of 2004 on governance indicators, Tanzania has a score of 40.1 in government effectiveness, which is below the mean 50.0 score. Data available at http://info.worldbank.org/governance/kkz2004/mc_chart.asp, accessed on 8/17/05.
Role of Civil Society to Promote Democracy

Despite the restrictive NGO policy, most Tanzanian CSOs involved in advocacy have built their capacity to contribute to the formulation of government policy. This is demonstrated by their influence over government policies on sexual abuse on children, inheritance laws, and land ownership, among others (ODI: 2000). In order to foster democracy, civil society is expected to play additional roles, including the following:

- Providing a checks and balance mechanism on the behavior of the state (watchdog function)
- Enhancing political participation among citizens through civic education (Fowler, 2000:7)
- Providing political leadership and resisting authoritarianism
- Nurturing democratic institutions

Tanzania's civil society organizations are far from being effective in these roles because they lack skills, information, and resources.

Moreover, civil society in Tanzania has on occasion acted to impede democracy. It was reported recently that a few NGOs, under the guise of civic education, were telling people which presidential candidates to vote for. In the same account, some churches and mosques were telling their people to vote on religious lines. Finally, the president, Mr. Benjamin William Mkapa, made a national address to call on Tanzanians to shun religious leaders and NGOs trying to divide people on religious or tribal lines because, in the words of one report (*The Guardian*, September 1, 2005), "Ours is a secular state." Mkapa cautioned voters also to beware of Non-Governmental Organizations and reminded stakeholders of their role when delivering civic education. "They should not teach the voters who to vote for," the President said.

Role of Civil Society to Promote Development that Reduces Poverty

In some respects, civil society is especially suited to promote development that aids the poor and reduces poverty. Civil society can foster such development by assuming the following roles, among others:

- Advocating equity and policies that favor the poor
- Building social capital to effectively organize and act collectively in advancing pro-poor development, in the same way it can promote democracy
- Directly delivering social services, especially where the state is inefficient (Fowler, 2000:7)

---

6 Tanzania had scheduled presidential and parliamentary elections for October 2005, but the elections were postponed until December 2005 after the death of an opposition presidential running mate four days before election day.
Since the traditional role of CSOs and most NGOs in Tanzania has been service delivery, donors must shift their emphasis if organizations are to fulfill the first two of these roles.

Here too, civil society can hinder development. In Tanzania, a survey of NGOs in Kilimanjaro area found that many of the organizations were created by the wives of influential men; the husbands then secured access to prominent benefactors at the national level; and nepotism and “know who” were important factors in determining who received services from the organizations. Such organizations do not benefit the poor as a whole. On top of that, the ruling CCM and the opposition party CUF donated money to Community Development Associations (CDAs) to win political support from those areas (CMI 2000:11). Politics, like nepotism, can prevent the unbiased delivery of social services to benefit the poor. Therefore, donors seeking to strengthen civil society in order to advance development need to consider the vulnerabilities of CSOs in the South and develop strategies to ensure that they effectively address the needs of poor.

A Shortfall for Donor Expectations

Civil society is expected to play an effective role in both democracy and development for many reasons, one being that CSOs are regarded as cost-effective, people-centered, efficient, and able to perform the watchdog function over the state (Fowler 2000:12).

The success of CSOs, though, is heavily influenced by the nature of their relationship with the state (Van Rooy 1998:202, Foley and Edwards 1996:48). The relationship with the state, in turn, can depend in part on civil society's claim to represent the populace. In Tanzania, most CSOs have small memberships and therefore only a limited claim to representativeness. Consider trade unions. Before privatization, many state enterprises allowed trade unions to establish branch offices at the workplace and encouraged employees to become members. But since many of the state enterprises were privatized, the number of members has fallen and the unions have struggled to adjust to dealing with the private sector. This has affected the unions' funding and their effectiveness in advancing the interests of their members. More generally, because most CSOs were formed through a top-down approach, people are unaware of their opportunities to take a frontline role and participate in their activities; the suffocation of independent organizations during the single-party regime altered people’s understanding (CMI 2000:25).

Do donors, through their funding decisions, fulfill their own goals for strengthening civil society? In making funding decisions, donors commonly emphasize such aspects as accountability, representativeness, autonomy, sustainability, advocacy, participation, monitoring, and political dialogue. Generally speaking, they hope their funding will help civil society fulfill such roles as the following:

1) Promoting voice and accountability in policy development and implementation
2) Ensuring citizens' participation in the development of pro-poor policies
3) Ensuring efficient service delivery, with allocated resources reaching the intended recipients
4) Monitoring and influencing government policies, including holding government accountable for its performance in allocating public resources
5) Responding to humanitarian emergencies and HIV/AIDS
6) Opening up dialogue on political issues facing the country
7) Assisting interest groups that lobby the legislature
8) Defending human rights

In Tanzania, both the government and donors have failed to take into account the local factors that are crucial for getting people to participate actively in democracy and development. For example, a survey conducted by Afro Barometer7 in 2001 found that Tanzanians participate heavily in democracy and development activities if they are mobilized from above, but they rarely initiate such activities on their own. Some have suggested that this is a legacy of the single-party system, when people expected the state to “supply” policy without their involvement (CMI 2000:5).

However, despite high expressed support for democracy itself, and for its underlying values, very few Tanzanians are willing to stand up and fight for democracy. When asked what they would do if the government suspended the National Assembly and cancelled elections, almost half (47 percent) say they would do nothing, while 9 percent would join a protest march, and 16 percent would contact an elected representative. The same pattern emerges when we offered the potential scenario in which the government dismisses judges who had ruled against it. Half (49 percent) say they would do nothing; only 7 percent would protest, and 13 percent would complain to an elected representative. Similarly, if the government shut down independent newspapers that criticize it, 45 percent would do nothing, 8 percent would protest, and 14 percent would contact an elected official. This leads one to wonder whether there is a sufficient critical mass that would be willing to stand up and support democratic institutions under threat. Only when the scenario shifts to a potential threat to personal liberties does the picture change. If government stopped people from traveling freely inside Tanzania, 33 percent would remain inactive, while 15 percent would protest and fully 25 percent would speak to an elected official. And if government told people which religion to fol-

---

7 The Afro Barometer survey was conducted by the Dar Es Salaam-based Research on Poverty Alleviation (REPOA) in Tanzania mainland and Zanzibar in 2001.


low, just one-quarter (26 percent) would remain on the sidelines. One-fifth (19 percent) would protest, and another fifth (22 percent) would contact an elected official. (Afro Barometer: 2001)

These results suggest that people are currently unlikely to initiate political demands to the government, and that civil society organizations working to advance democracy might fruitfully seek to boost people’s readiness to mobilize for a common cause. Donor strategies, however, have not reflected such needs. As Ottaway and Carothers (2000:10) put it, donors generally emphasize pre-determined goals, and CSOs try to adjust their activities to match those goals. When the goals disregard local conditions and needs, the results are less likely to advance the donors' broader objectives of promoting democracy or development.

Accordingly, donors' success depends very much on how they define their goals, whether related to democracy or development, and how they work to strengthen the elements in civil society relevant to those goals. The situation is complicated by the fact that the criteria for CSOs to promote democracy sometimes differ from those for CSOs to promote development. Sustainability, for example, may be equally important in both spheres, but representativeness is more important for democracy than for development.

**Donor Aid and Promotion of Democracy: Strengthening or Weakening?**

Aid giving and receiving has operated under the assumption that aid can contribute to democracy in a number of ways. Knack Stephen (2004:251) highlights such methods as technical assistance in electoral processes, strengthening legislatures and judiciaries, promoting a free press, and strengthening civil society overall.

In order to determine whether donor aid succeeds in achieving its goals, one must know who sets the policy agenda, whose ideas and values dominate, and whether those ideas and values fit local conditions (Hyden 2005:6). For example, the World Bank has required countries to have Poverty Reduction Strategy Papers, with governments as owners of the process. Britain's Department for International Development has said it would withdraw funding from governments that significantly violate human rights (DFID, 2005). The European Commission requires an officer in the Ministry of Finance to co-manage work with Non-State Actors, including civil society groups. The American Agency for International Development (USAID) and other donors condition their budget support on such matters as civil liberties, elections, and the rule of law (Knack 2004:252). In the words of Goran Hyden (2005:8):

> Policy without power is a pie in the sky. Power without policy is an unguided missile in the sky. Donors face both these phenomena in their development cooperation. Policies are developed by consultants, approved by donors, negotiated with local partners, and adopted in consultations with little understanding of how underlying power relations will affect the implementation of these policies.

Conditions imposed by donors substantially influence the direction taken by civil society, with, I believe, the effect of weakening civil society. In my view, civil society organizations ought to be free to set their own agendas, based on their assessments of local needs and conditions, with donors backing their decisions.
For instance, while it is generally a good approach for donors to help civil society influence policy, it is also important to assess the realities in the particular country. If policy is not uniformly applied, or if significant power lies outside the policy process, a different strategy may be more effective. As noted above, this is the case in Tanzania: since independence, the institutions responsible for policy implementation have had less power than individuals with influence and connections. Similarly, donors seeking to restore confidence in government have increased their general budget support to government, sometimes without parallel budget support to civil society, based on the assumption that an effective government should lead civil society in (for example) development projects that aid the poor. Given the history of unfavorable state-civil society relations since independence in most countries in the South, this approach is likely to sideline civil society. Yet donors must also recognize civil society's potential to impede democracy and development and take steps to minimize the risks, such as by limiting funding to groups with a demonstrated commitment to aiding a broad cross-section of society.

Overall, donor dependence represents a challenge that is far from being effectively addressed by either the donor community or civil society. As a result, accountability has shifted from people in the South to donors in the North. Likewise, financial sustainability continues to be a challenge for civil society in the South, giving rise to the danger that donors seeking to strengthen civil society will unwittingly weaken it instead.

Several steps, I believe, would substantially help ensure that donors succeed when they set out to bolster civil society.

1) Donors' Assumptions

A donor's concept of civil society may rest on invalid assumptions. For example, donors commonly assume that individuals are independent and autonomous, capable of freely deciding to associate with others to advance the common good. This is not always the case in Africa, where an individual can be closely linked to a host of kin who substantially influence the individual's thoughts and actions.

**Recommendation:** For countries in the South and Tanzania in particular, donors need to recognize that in important respects, individuals are not independent. Any effort to organize them must take into account their links to kin and society.

2) Strengthening Democracy and Development

In making funding decisions to civil society organizations, donors consider such aspects as accountability, autonomy, representativeness, advocacy roles, monitoring skills, sustainability, and political dialogue. Donors believe that strengthening these components will help civil society champion both democracy and development. In fact, distinctions need to be made. Representativeness, for example, may be vital for advancing democracy but not for advancing development.

**Recommendation:** Donors must tailor their funding criteria to their particular broadly defined goals, whether promoting democracy or development, rather than applying the same criteria in all circumstances.
3) Donor Strategies to Strengthen Civil Society

Donor strategies to strengthen civil society are diverse, including program support, institutional support, technical support, creation of partnerships and coalitions, and conditions imposed on aid to governments so as to foster a healthy environment for civil society. These strategies seek to give civil society a greater capacity to influence government policies. More specifically, donors may expect civil society to give voice to the poor, promote citizen participation in the development of policies to alleviate poverty, influence policymaking and monitor policy implementation, deliver services in humanitarian emergencies and in HIV/AIDS response, hold government accountable for its allocation of public resources, open up dialogue on political issues facing the country, and safeguard the interests of the disadvantaged groups in society.

The connection between means and ends, however, is sometimes murky. For example, the European Commission is not clear on how development can be achieved through partnership and coalition building of Non-State Actors, one of them being civil society. In the same way, USAID is not clear about precisely how its program support to CSOs will further democracy and development.

**Recommendation:** Donors need to assess whether a strategy can achieve the intended goal. They must also ensure that their strategies are actually put into practice. Finally, they must be willing to abandon strategies that fail to achieve their goals.

4) Civil Society's Potential Weaknesses

Donors tend to look at civil society as a uniformly positive force. However, in some cases civil society simply reflects the local situation. Depending on the local situation, civil society may pursue undemocratic and unprogressive goals. In a heterogeneous society without a firm grounding in democratic values, similarly, civil society can promote ethnic disputes and patronage, which can impede democracy and development.

**Recommendation:** Donors need to be cautious when dealing with civil society. They should ensure that despite civil society's diverse and sometimes opposing interests, it promotes democracy and development rather than ethnic strife and patronage. CSO groups that emphasize internal democracy, for example, may be better positioned to gain credibility in the eyes of the community and the government.

5) Constraints on Strengthening Civil Society

Among the greatest constraints on strengthening civil society is sustainability. Most civil society organizations in the South are externally funded, with little or no local funding. If donors withdraw their support, civil society activities will probably cease. This issue is largely taken for granted, with little discussion by civil society or donors.

**Recommendation:** Civil society should seek to persuade government to provide steady funding. Just as the government's annual budget includes allocations for different ministries, it should include allocations for civil society organizations. This is especially important now, when government is increasingly viewed as the owner of development process. To be sure, people may question the autonomy of civil society if it becomes dependent on government funding, but I believe that the danger would be lessened by passing a legislative act in parliament that includes an accountability mechanism.
6) Donor Expectations

On the whole, I believe that donors often expect too much from civil society. They expect it to pursue a vast range of different goals, including promoting voice and accountability in policy development and implementation, enhancing citizen participation in the development of pro-poor policies, improving service delivery by ensuring that allocated resources reach the grassroots, influencing and monitoring government policies, opening up dialogue on political issues facing the country, and defending human rights. In Tanzania, civil society simply lacks the skills and capacity to fulfill many of these expectations.

Recommendation: Donors need to be realistic in their expectations, clear-eyed in their assessments of civil society's capabilities, and willing to establish priorities among their goals for civil society.

BIBLIOGRAPHY


Strengthening Civil Society in Tanzania: A Response

By Emeka Iheme *

Although primarily an appraisal of donors’ policies in strengthening civil society in Tanzania, Jared Duhu’s “Strengthening Civil Society in the South: A Case Study of Tanzania” offers an interesting contribution to the discussion of civil society in Tanzania.

Government-civil society relations in Tanzania have been shaped by the history and peculiarities of that country. One key factor is the body of policies and laws regulating civil society organizations. These policies and laws are made by the government and accepted – or at least acquiesced to – by the populace. Thus, the regulations guiding civil society not only shape civil society but also reflect the strength of organized civil society (as the embodiment of non-state actors with their various leanings) vis-à-vis the government. An important aspect of the regulation of civil society organizations relates to how far, if at all, the organizations can be political or embark on political programs, whether by way of mere civic education or direct partisan politics.

In this response, first, I outline the evolution of government-civil society relations in Tanzania, because I disagree with some of Duhu’s observations. Second, I discuss the regulation of civil society organizations in Tanzania up to 2005, as Duhu’s account goes only as far as 1997 and therefore omits the very remarkable developments that have taken place since then. Finally, I briefly explore the issue of how far Tanzanian NGOs can go in political activities. My comments do not address Duhu’s opinions on improving the efforts of donors to strengthen civil society, though I am quite happy to read them. My thoughts focus more on how the people of the South may be roused to organize themselves, lay down the begging bowl, and create sustainable livelihoods.

The Evolution of Government-Civil Society Relations

Late colonial era to immediate post-independence era (1954-63): For much of the colonial era, there was a liberal attitude to associations. As in many other British colonial possessions in Africa, the Lands Perpetual Succession Ordinance liberally facilitated the registration of trustees to hold property on behalf of formally organized associations. More important, associations were not required to register in order to operate legally.

By the early 1950s, the indigenous Africans in the then-British colony of Kenya had begun violent protests – the mau mau rebellion – against alien rule and the expropriation of the best agricultural lands by British settler-farmers. The colonial government responded in a very repressive manner, turning the colony into a police state and enacting the Societies Ordinance. Through the Ordinance, the government imposed elaborate

* Emeka Iheme, a member of the International Center for Not-for-Profit Law’s Advisory Council, is a lawyer and development consultant based in Nigeria.
controls on groups and associations. Groups and associations could not be established or operated unless registered by the government, and the government retained unfettered discretion to withdraw registration at any time and require the group or association to disband. The approach was intended to deny, rather than give effect to, freedom of association. Fearing that the violent anti-colonial protests in Kenya could spill across the border into the trust territory of Tanganyika (Mainland Tanzania), the British authorities in 1954 also enacted the Societies Ordinance into law there. In keeping with the mood of the times, the authorities in 1956 repealed the Lands Perpetual Succession Ordinance and replaced it with the more restrictive Trustees Incorporation Ordinance.

It is noteworthy that while the *mau mau* protests were not replicated in Tanzania, a territory without a significant number of land-grabbing settler-farmers, it was in the year that the Societies Ordinance was enacted that nationalist agitation in Tanzania rose sharply: Julius Nyerere reorganized the Tanganyika African Association, turning that sporting and cultural association into a nationalist organization under the new name of Tanganyika African National Union (TANU). Despite the Societies Ordinance, Nyerere’s TANU was able to mobilize the African population to demand independence. It must also be noted that through the colonial era until the immediate post-independence era, such prominent civil society organizations as free and autonomous trade unions and cooperative societies were permitted to exist even though the Government increasingly saw them as irritants. The Railway Workers Union (RWU) is a prominent example. A handful of small opposition parties also came into legal existence, two examples being the People’s Democratic Party, led by Christopher Kasanga Tumbo, a former RWU leader, and the African National Congress, led by Zuberi Mtumvuu.

After independence in 1961, the Societies Ordinance – an instrument for the oppression of colonial subjects that was clearly unfit for a free and independent people – remained on the statute books. Indeed, by amendment in 1962, the scope of the law widened. So did the ambit of the government's discretion to dissolve any “society” – which now included any company, partnership, or other association set up to conduct lawful business – where the Home Affairs Minister concluded that the organization was conducting activities predominantly for a purpose other than lawful trade. 

---

8 The territory now known as Mainland Tanzania became the German colony of Tanganyika in the 1880s. At the end of the First World War, it was taken from Germany and made a League of Nations trust territory administered by Britain, for all practical purposes, as a colony. In 1961, it became independent as the Republic of Tanganyika. In 1964 the United Republic of Tanzania (*Jamhuri Mungano wa Tanzania*) formed through a union of Tanganyika and the nearby Isles of Zanzibar, also a former British colony.

9 The Trustees Incorporation Ordinance introduced onerous conditions for the registration of trustees and for the conduct of association affairs by trustees. The Written Laws (Miscellaneous Amendments) Act 1999 added still more stringent conditions. In practice, however, the Trustees Incorporation Ordinance has had little effect on civil society organizations, as most of them, until the new laws enacted in 2002-2005, were registered and operated as societies under the Societies Ordinance and did not need to appoint and register trustees.

10 See the Societies Ordinance (Amendment) Act 1962. Further, the Societies Ordinance (Amendment) Act 1969 gave the President power to order the disposal of the assets of any society declared unlawful and wound up, and the transfer of any employees of such society to the society in which the assets became vested.
The 1964-94 Period \(^{11}\): TANU had allied with other independent civil society groups, notably the trade unions, during the struggle for independence. However, when it took over the reins of government upon independence, TANU’s interests ceased to coincide with those of the other organizations. Moves toward swallowing up or otherwise supplanting these organizations began about 1963. On January 12, 1964, the leaders of the African majority in the Isles of Zanzibar overthrew the Arab Sultan and his Arab-dominated government. While the new rulers of Zanzibar retained a tenuous hold on power and worried about a possible Arab invasion to restore the former regime, the Government of Tanganyika is believed to have worried about the destabilizing effect of a possible invasion of or continuing restiveness in Zanzibar, right at its doorstep. The Zanzibar Revolution was quickly followed by an army mutiny in Tanganyika on January 20, 1964. British troops (later replaced by Nigerian troops) were invited to quell the rebellion. On April 26, 1964, Zanzibar joined Tanganyika to become the United Republic of Tanzania.

The events of January 1964 made state security a top priority for the Government of Tanzania, and the state sought to absorb or control all virile civil society organizations. All of the country’s free and autonomous trade unions, which had come together under the umbrella of the Tanganyika Federation of Labor (TFL), were proscribed later in 1964, and in their stead the Government set up the National Union of Tanzania Workers (NUTA), which was promptly affiliated with the ruling party. By constitutional amendment in 1965, the one-party system was introduced and other parties were proscribed.\(^{12}\) The Arusha Declaration of 1967, which formally adopted \textit{ujamaa}, a brand of African Socialism, as the path for the country’s development, brought further impetus for the absorption of civil society organizations into the party-controlled state. In 1968, all voluntary and independent cooperative societies were proscribed and merged into cooperative movements affiliated with the ruling party. The same fate befell independent women’s organizations.

From the foregoing, it is clear that Duhu is not quite accurate in stating that “[u]pon Tanzania’s independence, most CSOs [i.e., civil society organizations] were intertwined with the state as affiliates of the ruling party.” The absorption of these organizations into the ruling party was accomplished after independence, and not by happenstance but by deliberate policy. When this history is viewed in context of the Societies Ordinance, which empowered the Government to proscribe any organizations it disapproved of, the absence of a virile civil society becomes quite understandable.

Duhu further asserts, “During the 1980s, many CSOs cut ties with the political party, and many new CSOs formed.” My understanding is that in the dispensation that began to emerge with political liberalization, the state was compelled to start shedding weight and could not continue to implement – even if it had yet to formally renounce –


\(^{12}\) One party was constitutionally defined, in the case of Zanzibar, as the ruling Afro-Shirazi Party (ASP), and in the case of Mainland Tanzania, as the ruling TANU. Twelve years later, in 1977, ASP and TANU formally merged to become \textit{Chama cha Mapinduzi} (“Party of the Revolution”) (CCM), and the new party inherited the one-party status for the entire country.
the policy of absorbing organizations into the structure of the party-state. The result was that beginning in the late 1980s, citizens were allowed to form many new organizations that were not obliged to be affiliates of the ruling party. However, as the BAWATA case\textsuperscript{13} (to which I shall turn shortly) illustrates, the party-state has resisted the efforts of the typically larger organizations that had been absorbed into the party-state to sever ties with it and become, once again, part of civil society.

In response to loud demands, in February 1991 a Presidential Commission was set up under the leadership of then-Chief Justice Francis Nyalali to collect the views of citizens and make appropriate recommendations on whether the country should adopt a multi-party system. In a final report submitted in January 1992, the Nyalali Commission recommended the adoption of a multi-party system, as well as (among other things) the repeal of the Societies Ordinance and 39 other laws that it considered impediments to a multi-party system and to human rights. Several of these laws have been repealed or amended, but many observers believe that the Government is reluctant to let go of the sweeping powers conferred by these laws.

1995 to date: In this period, the trends that began in the late 1980s have continued – many new civil society organizations have been set up; the state has been reluctant to let go of the organizations that had been affiliated with the party; and while the state has committed itself to reforming the policies and laws regulating civil society organizations, progress has come slowly. All of this is in line with the general trend that Goran Hyden has characterized as “creeping democratization” in Tanzania.\textsuperscript{14}

The Tanzania National Women’s Council, BAWATA, was set up in 1994 by some leaders of the women’s wing of the ruling party.\textsuperscript{15} It registered as a society under the Societies Ordinance and sought to provide a nonpartisan platform for all interested Tanzanian women. In Hyden’s words, “Realizing that their own organization had lost much of its credibility among women, these leaders decided to found a new one. The new organization elected a younger and better-educated generation of leaders, marginalizing some of the CCM [i.e., Chama cha Mapinduzi, the ruling party] women who had wanted to lead the Council and creating tension between women leaders in CCM and BAWATA.”\textsuperscript{16} Alongside its programs in several areas of women’s rights, such as inheritance rights and the right to own land, BAWATA launched a civic education campaign during the 1995 elections that is believed to have contributed immensely to women’s participation in the election. The large turnout of women voters may have enabled opposition parties to gain more votes in some places while helping the ruling

\begin{unenligned}

\textsuperscript{14} See Goran Hyden, \textit{op. cit.}

\textsuperscript{15} The organization’s full name is \textit{Baraza la Wanawake Tanzania} (Tanzania National Women’s Council).

\textsuperscript{16} Goran Hyden, \textit{op. cit.}, p. 150.
\end{unenligned}
party in other places. Yet the ruling party accused BAWATA of being political and pro-opposition. In September 1996, the Government deregistered BAWATA on the ground that it had engaged in political activities and therefore was in breach of its own constitution. The organization went to court to challenge the Government’s decision on due process grounds (the Government had not given it a chance to be heard before deregistering it) and on the ground that the Societies Ordinance is unconstitutional.

The Reform of Policy and Laws Regulating Civil Society Organizations

The reform of the policies and laws regulating civil society organizations, which has been at the center of Government-civil society relations since 1996, deserves to be discussed at some length.

The findings of the 2001 Afrobarometer survey – in Duhu's summary, that “Tanzanians participate heavily in democracy and development activities if they are mobilized from above, but they rarely initiate such activities on their own” – are consistent with the views of several scholars and development workers in the country. There is little doubt that this situation is part of the heritage of 30 years of one-party rule, during which policies and laws did not permit initiatives to come from outside the party-state. To that extent, at least, there was a strong case for reforming the policies and laws regulating civil society organizations.

It may be recalled that at the dawn of liberalization, the state – without formally changing the old policy of absorbing civil society groups into the party-state structure – began to permit the registration of new civil society organizations, mainly NGOs, without seeking to absorb them into the ruling party. Also, it may be recalled that the Nyalali Commission in 1992 had recommended repeal of the Societies Ordinance, among other laws. These developments gave impetus for activists to demand both the formal introduction of a new NGO-friendly policy and the repeal of the Societies Ordinance and its replacement with a law that would enable NGOs to operate freely. The policy-law distinction merits emphasis: Ordinarily, a new policy on NGOs would broadly indicate

---

17 Other possible explanations that run even deeper have been put forward. In the words of Hyden, Associational life in Tanzania is quite weak, even by African standards. One reason for this is demographic. Tanzania is a large country where most of the people live in peripheral regions. While population density is high in some of these regions (as in Kilimanjaro on the border with Kenya), it is still lower than in Kenya. Tanzania’s poorly developed and poorly maintained physical infrastructure makes social interaction difficult. Thus in spite of villagization and rapid urbanization, organized efforts tend to be small-scale and focused on implementing a single project with tangible results. In other words, very few Tanzanians engage in collective action in order to promote or defend a particular idea or cause. Another reason why “social capital” is so weak in Tanzania is people’s lack of trust in each other. The party-state undermined trust by encouraging corruption and theft. Liberalization has not promoted a richer associational life; instead, it has left more and more individuals doing things on their own.

Goran Hyden, op. cit. pp. 149-150.

the attitude of Government but would not by itself be legally enforceable. Thus, a necessary follow-up to a new policy would be a new law.19

In response to demands by activists and the quieter inputs of donors, the Government organized a consultative workshop in May 1996. Attended by representatives of donor agencies, the major NGO umbrella bodies, and Government officials, the workshop set up a National Steering Committee for NGO Policy Formulation. By 1997, the Committee had developed a first draft of the Policy.20 Other drafts were to follow, with each debated in consultative workshops. It was the fifth draft, developed in 2000, that was eventually adopted. While critics have questioned the credentials of some NGO representatives who took part in developing the policy, they concede the importance of the fact that NGO representatives participated at all.21 Remarkably, this was evidently the first major Government-civil society collaboration in policy development in more than 30 years. Accordingly, it probably helped move the Government toward accepting the right of civil society to contribute to policy formulation, and helped civil society actors to build the confidence to engage the Government on other issues.

The Policy proclaims its overall objective to be creating “an enabling environment for the NGOs to operate effectively and efficiently in the social and economic transformation of the country.” To help distinguish NGOs from other bodies, it provides an “operational definition” of NGO, which includes voluntary participation by its members and a prohibition against sharing profits. The Policy also provides that NGOs shall be “non-political,” explained as follows: “NGOs are organizations that do not seek political power or campaign for any political party.” (Paragraph 5.1(v).) It further contains broad provisions on the legal and institutional frameworks for NGOs. As if to underscore its own utility, the Policy states that “Government ministries, state agencies, regional and local government authorities shall adopt policies, practices and guidelines which are in line with the NGO Policy.” (Paragraph 10.0.)

The Government’s commitment to reform was to be tested when the time came to translate the broad provisions of the Policy into specific and enforceable provisions of statutory law. In 1998, presumably in response to the preparation of the initial draft of the Policy the preceding year, the Government prepared a draft NGO Bill. But NGOs protested that the Bill did not reflect the contents of the draft Policy but sought to reenact the old repressive laws. Considering that a final draft of the Policy had yet to be devel-

---

19 This approach is apparent in the National Policy on Non-Governmental Organizations, which the Government eventually published in November 2001. See Paragraphs 1.1.3. and 6.1.: “Many laws governing the registration and operation of NGOs were a cause of confusion…. A new law shall be enacted to cater for the current deficiencies in NGO registration, deregistration, appeals and termination.” The National Policy on Non-Governmental Organizations (Dar es Salaam: Vice President’s Office, November 2001).

20 This first draft is probably what Duhu refers to as the Policy that was developed in 1997.

21 For one such critical opinion, see Tundu Antiphas Lissu, op. cit., p. 12, where the author suggests that the NGO members of the Committee, because they came from large umbrella organizations rather than “the more independent-minded and critical NGOs,” failed to keep the Policy from including a prohibition against NGO political activities.
After adoption of the final draft of the Policy, the task of turning it into a Bill proved difficult. Successive draft Bills failed to reflect clear aspects of the Policy, and the Government showed some reluctance to continue consulting with NGOs. In October 2002, when the Non-Governmental Organizations Bill prepared by the Government was tabled before Parliament, NGOs mounted a very public advocacy campaign that many top Government figures saw as a challenge to their wisdom and authority. In the event, the Non-Governmental Organizations Act 2002, which retained the existing laws and added extra and confusing layers of regulation, was enacted.

For several reasons, notably its own confusing provisions and widespread opposition from stakeholders, the Act of 2002 could hardly be enforced. Meanwhile, a quieter dialogue between the Government and representatives of NGOs began, eventually leading to the amendment of the Act of 2002 by the Written Laws (Miscellaneous Provisions) (No. 2) Act in June 2005.

The June 2005 Amendment, read in concert with the 2002 Act, redeemed the reform process by introducing the following changes. First, by implied repeal, it has made the Societies Ordinance inapplicable to any organization that falls within the definition of NGO. Most NGOs – including the advocacy groups that especially risk conflict with the authorities – come within this broad if wordy definition (to be discussed shortly). Thus, though the Societies Ordinance has not been fully repealed, there is now very little or no prospect of invoking it. Second, although it continues to require NGOs to register in order to operate lawfully, officials no longer have unfettered discretion in determining whether to register an organization. Statutory provisions now specify the permissible grounds for refusing registration, specify a procedure for making the decision, and oblige officials to inform applicants whose applications are refused. Moreover, the Board that makes these decisions now includes substantial NGO representation. Similar provisions govern the process of de-registering organizations as well. Finally, it has given legal personality to registered NGOs.

Apart from these changes, the Act as amended contains some novel provisions and some very difficult provisions, notably those relating to offenses and punishments. In view of the new rapport between NGO representatives and the Government, further amendment seems probable.

**NGOs and Political Activities**

Relying on the Policy’s requirement that NGOs be “non-political” and the power of Government officials to deregister NGOs under the Societies Ordinance, Duhu draws attention to the thorny issue of how far NGOs can go in political activities. Before


23 These statutes, like other post-independence Tanganyika/Tanzanian statutes, are available at the website of the Tanzanian Parliament, www.parliament.go.tz.
discussing the issue in Tanzania, a brief incursion into general principles might be useful.  

Principles of international law generally favor removing restrictions on the freedom of NGOs to engage in public policy advocacy and to speak out or publish their positions, even if such speech “offends, shocks or disturbs” those in authority. In several countries, however, and in spite of what may be the stated policy, “NGOs that get involved in issues on the political ‘cutting edge,’ particularly if they take on a strong advocacy role, can expect to be viewed as disruptive and threatening, with constraining or repressive action coming swiftly behind.” Beyond advocacy, the right of NGOs to engage in political activities is denied or curtailed in many countries. But in some countries, NGOs have the right to engage in political activities not just of the arguably nonpartisan type, such as civic education or lobbying for specific measures, but also in such direct and partisan activities as campaigning for candidates or parties.

The Tanzanian NGO Policy indicates that NGOs shall be “non-political,” which is explained as follows: “NGOs are organizations that do not seek political power or campaign for any political party.” (Paragraph 5.0 (v).) The 2005 amendment to the NGO Act defines NGO as follows:

“Non-Governmental Organization” also known by acronym as “NGO”, means a voluntary grouping of individuals or organizations which is autonomous, non-partisan, non-profit sharing – (a) organized at the local, national or international level for the purpose of enhancing or promoting economic, environmental, social or cultural development or protecting the environment, lobbying or advocating on such issue; or (b) established under the auspices of any religious or faith propagating organization, trade union, sports club, political party, religious or faith organization or community based organization, – but does not include a trade union, social club, a religious or faith propagating organization or community based organization.

Again, the statutes, not the Policy, determine the extent to which Tanzanian NGOs may engage in political activities. From the definition of NGO, it seems that even though an NGO could be “established under the auspices” of a political party, it must remain “non-partisan.” “Non-partisan” is in turn defined as “not seeking political power or campaigning for any political party.” An NGO not affiliated with a political party can easily stay nonpartisan, as defined – but it remains to be seen how an NGO established under the auspices of a political party can qualify as nonpartisan, as defined. The administration of this part of the law will probably be one of the most challenging.

---

24 For an exhaustive discussion, see World Bank Handbook on Good Practices for Laws Relating to Non-Governmental Organizations (Washington, DC: International Center for Not-for-Profit Law, 2000), Chapter G.


26 Ibid.
I would like to end by emphasizing the effect of the political context in which reforms are being pursued. As I noted at the outset, the regulations guiding civil society not only shape civil society but also reflect the strength of organized civil society vis-à-vis the government. One party has ruled Tanzania since independence, a party that has held onto power and remains reasonably popular even as it has completely changed its philosophy from socialism to free market principles. This party, against which neither opposition parties nor organized civil society at large constitutes a countervailing force, knows when to yield in order to survive. The party has been adept, too, at presenting continuity as change and change as continuity, depending on what serves its interests. And the party has achieved remarkable success in adapting to rapid changes in the external environment, while more or less dictating the pace of change in an internal environment that it continues to manage with ease.

As in other areas of democratization in Tanzania, the reform of NGO regulations has come in the form of concessions that the party has more or less carefully made to other internal interests, in order to imply a readiness to undergo a competition for power that, as an entity interested in retaining its grip on power, it has no conceivable reason to encourage. For as long as there is no countervailing force to the ruling party, improvements to NGO regulations and the strengthening of civil society in Tanzania in general will probably continue to come in the form of concessions from the ruling party. Developments in civil society, then, are simply part of the larger phenomenon that Hyden has described as the “creeping democratization” of Tanzania.
Civil Society Law Reform in Afghanistan

By David Moore*

On June 15, 2005, President Karzai signed a new Law on Non-Governmental Organizations. The signing of the Law culminates a three-year process of developing a comprehensive new legal framework for NGOs. It marks a significant step toward creating a more conducive environment for NGOs to operate in Afghanistan and toward repairing relations between NGOs and the Afghan Government.

I. The Rocky Road to Reform

A) Poor Public Image

“The three great evils Afghanistan has faced in its history are communism, terrorism, and NGO-ism.” These words, attributed to President Karzai, capture the intense feelings of suspicion and distrust that surround NGOs operating in Afghanistan. Many in the government and among the general public believe that NGOs are engaged in profit-making activities and siphoning foreign aid money away from the Afghans for whom it is intended.¹ NGOs have become the scapegoat for a wide range of perceived abuses, from wasting billions of dollars of development aid to driving sports utility vehicles, from hiring the most talented local staff to paying inflated salaries to foreign consultants, from living luxurious lifestyles to throwing wild parties and orgies.

As early as August 2002, Minister for Rural Rehabilitation and Development Hanif Atmar claimed that of 1,100 registered NGOs at the time, only about 100 were legitimate NGOs engaged in not-for-profit missions; the others were allegedly taking profit and siphoning aid money away from those in need. The perception that many if not most organizations registered as NGOs are actually businesses masquerading as NGOs is widespread and deep-rooted.

Since August 2002, the public image of NGOs has only worsened. In December 2004, then-Minister of Planning Ramazan Bachardost announced the Ministry’s intent to terminate nearly 2,000 NGOs, a plan that – though never carried out – was generally welcomed by the general public.² The Ministry did, however, successfully place a

---

* David Moore is Program Director for Central and Eastern Europe for the International Center for Not-for-Profit Law.

¹ According to Ministry of Finance information, between January 2002 and September 2004, 45.5% of donor funding went directly to the UN; 28.5% went directly to the Afghan Government; 16.4% went directly to private contractors; and 9.6% went directly to NGOs. These statistics do not reveal the total percentage of donor assistance that ultimately went to NGOs, as the UN or Afghan Government will often re-program funding through NGOs.

² Days after his announcement, on December 13, 2004, Ramazan Bachardost resigned from his post as Minister of Planning. Bachardost told reporters that he decided to resign once he realized that President Hamid Karzai would not support his decision to shut down nearly 2,000 NGOs.
moratorium on the registration of NGOs, which remained in effect for more than six months, until June 2005. Minister of Economy Dr. M. Amin Farhang, who became responsible for NGO registration and supervision in January 2005, soon after described NGOs as “running wild” and repeatedly expressed the need to control their activities.

**B) Poor Legal Framework**

One source of the difficulties during the transition has certainly been the legal framework governing NGOs, which dates back to 2000, when the Taliban regime issued a *Regulation on the Activities of Domestic and Foreign Non-Governmental Organizations in Afghanistan*. This Regulation remained in force until June 2005. Not surprisingly, the Regulation contained numerous deficiencies, both from the perspective of international norms and in terms of practical application. For example:

- NGOs were inadequately defined, leading to confusion about what was being regulated. Even the requirement that no profit be distributed as such (e.g., as dividends) – also known as the non-distribution constraint – was lacking.
- Registration criteria were not clear and were subject to administrative discretion, without time limits for final action or the right to administrative or judicial review.
- Internal governance rules were not prescribed, even by title, and no requirements existed for internal accountability or responsibility.
- Reporting and public accountability rules were draconian in form, but frequently not enforced, a practice leading to uncertainty and potential arbitrary action by the authorities and evasion by the sector.
- Termination provisions were lacking, and liquidation provisions inadequate. Indeed, upon liquidation, NGOs were required to transfer material assets to the government, either free of charge or through a sale.

**C) Poor Timing**

The Government recognized the importance of developing a comprehensive legal framework for NGOs in Afghanistan early on in the reconstruction period. With the support of the United Nations and the Afghan Transitional Government, the International Center for Not-for-Profit Law (ICNL) was invited to assist in drafting a new law. That process was launched in August 2002.  

ICNL secured the support of then-Minister of Planning Mohaqeq to form a legislative drafting group made up of key ministry representatives (Ministries of Planning, Economy, Rural Rehabilitation and Development, Justice, Labor and Social Affairs,

---

3 ICNL’s initial involvement was made possible through funding provided by the Open Society Institute. Continued involvement was financed, in addition, by the Center for International Cooperation, RONCO Consulting Corporation, and the Arca Foundation. ICNL’s work in Afghanistan is currently funded by the U.S. Agency for International Development (USAID).
Finance, and Foreign Affairs) and representatives of the NGO sector (ACBAR\(^4\) and ANCB\(^5\), as well as AWN\(^6\)). Working as an ICNL consultant at the time was Enayat Qasimi, who is currently serving as Minister of Transport. The working group, with ICNL assistance, prepared a progressive draft Law on NGOs, which was circulated widely to NGOs throughout Afghanistan. Based on feedback from NGOs, the draft Law was revised and refined before being submitted to the Ministry of Planning in July 2003. Consequently, the July 2003 draft Law was the product of a broadly inclusive and deeply participatory process, which included both NGOs and government officials. Unfortunately, due in part to the resignation of Minister of Planning Mohaqeq to compete in the presidential elections, and in part to the appointment of Minister of Planning Bachardost, the draft Law was not enacted.

Interestingly, during this process and afterward, certain officials within the Afghan Government prepared and issued alternative draft laws governing NGOs (e.g., in 2002, in March 2003, May 2003, and November 2004). Each alternative draft was woefully inadequate and indeed little better than the existing Taliban Regulation. As time passed without any changes to the regulation of NGOs, tension and distrust grew between the sectors, making it more difficult to approach reform rationally.

The newly elected Afghan Government placed priority on the enactment of a new NGO law. The Ministry of Economy – now responsible for the regulation of NGOs – issued a new draft law in February 2005. The draft Law was based in part on the ICNL-assisted draft of July 2003, but also included significant differences that sought to control and sometimes stifle NGO activity.

The Ministry invited ICNL to assist in further developing the draft Law. ICNL worked closely with local partners, including ACBAR and the NGO community in Afghanistan, to highlight the problems and shortcomings in the draft Law and to recommend improvements. Through meetings with NGO representatives, ICNL worked with ACBAR to ensure that the comment process was as open and inclusive as possible. Through multiple meetings with ministry officials and a series of comments provided over four months, ICNL supported local efforts to improve the draft Law. As a result of this process, the draft Law underwent a series of revisions between February and June 2005. Among the most significant improvements were the following:

- **Improved establishment criteria:** Establishment provisions that required one founder to have a university degree and relevant experience in the field were removed from the Law.
- **Reduced registration fees:** Registration fees were reduced substantially for both domestic (from 30,000 to 10,000 Afghanis) and foreign organizations (from $2,000 to $1,000).

---

\(^4\) ACBAR is the Agency Coordinating Body for Afghan Relief, one of the primary umbrella groups in Afghanistan, based in Kabul. Its nearly 100 members include both foreign and local NGOs.

\(^5\) ANCB is the Afghan NGOs’ Coordination Bureau, an umbrella group made up of some 300 to 400 local NGOs.

\(^6\) AWN is the Afghan Women’s Network, an umbrella group of women’s organizations.
• **Improved reporting requirements**: Where the original draft called for quarterly reports, the Law requires simply semi-annual reporting.

• **Independent audits**: The requirement that all organizations prepare an independent audit of their financial statements was modified in recognition of the fact that not all organizations can afford to do so. The Law now authorizes the government to seek alternative methods for NGOs lacking the financial capacity to prepare audits.

• **Improved liquidation procedures**: The Law provides that after dissolution and payment of creditors, the remaining assets of an NGO be transferred to another NGO with similar purposes, rather than to the government in the first instance.

• **NGOs not excluded from bidding**: The Law removes the blanket prohibition against NGO bidding, but continues to prohibit NGOs from participating in construction projects and contracts, except in exceptional cases.

It was the bidding exclusion – as contained in a late March draft backed by the Cabinet – that brought the draft NGO law into the spotlight (see below for greater detail on this provision). Whatever the intent, the provision (Article 8.8) caused a storm of controversy. With the Afghanistan Development Forum scheduled on April 4 to 6, President Karzai reacted quickly and appointed a joint task force, consisting of government officials and international donor representatives, to develop final recommendations regarding Article 8.8 and the draft law generally.

In early May, the task force recommendations were submitted to the Government. The Government, however, declined to adopt most of the recommendations – nearly all of which were designed to improve the transparency and accountability of NGO activities – and instead revised only a few provisions in the draft. Article 8.8 was among the few affected provisions; as noted above, the article removed the blanket prohibition on NGO bidding but included a prohibition on NGO participation in construction projects. U.S. Ambassador Zalmay Khalilzad, in one of his last acts as ambassador, reportedly asked President Karzai to reconsider the task force recommendations. Apparently it was too late: President Karzai had already signed the new Law, which became effective immediately upon his signature.

**II. The New Framework**

**A) Civil Society Context**

It is important to recognize that the legal form of “NGO” is one of several kinds of civil society organization in Afghanistan. A recent assessment of Afghan civil society concluded that there are three broad categories:

1) Village organizations, which are local aid committees formed by donors to advise or oversee the administration of a particular form of assistance. Village organizations include community development councils, educational

---

7 See Afghan Civil Society Assessment Report 2005, prepared by Counterpart International and available on Counterpart’s website ([www.counterpart.org](http://www.counterpart.org)).
committees, or other development committees. The number of village organizations has increased dramatically in recent years due to the Afghan Government’s National Priority Programs (NPP). Foremost among the National Priority Programs is the National Solidarity Program (NSP), a mechanism intended to provide a block grant of up to $200 per family to communities for infrastructure-related community improvement projects. Applications for the block grants must come through community development councils (CDCs); in response, more than 5,000 CDCs have been created. The CDCs receive registration certificates from the Ministry for Rural Rehabilitation and Development (MRRD). While the MRRD “registration” supports the NSP mechanism, the “registration” is not based on legislation, and such organizations are not necessarily bound by not-for-profit constraints.

2) Shuras/Jirgas, which are traditional local councils that villages or tribes establish, usually for the purpose of self-government but also to represent a community’s interests to other parts of society. Shuras/Jirgas are local decision-making bodies that are arguably the most traditional building block of civil society in Afghanistan. They generally consist of the village elders and operate on an informal basis (that is, as un-registered groups). Any Shura that wants to become eligible for a grant will generally register as a social organization under the Law on Social Organizations.

3) Organizations registered as legal entities, either in the form of “non-governmental organizations” or in the form of “social organizations,” as defined by two separate pieces of legislation.

“Social organizations (communities and associations)” are defined as “the voluntary unions of natural persons, organized for ensuring social, cultural, educational, legal, artistic and vocational objectives” (Article 2, Law on Social Organizations). Social organizations must seek registration with the Ministry of Justice and consist of not less than 10 members (Article 6(1)). While not specifically defined as not-for-profit organizations, the Law does limit the use of their assets to “achieving the goals of the organization” (Article 16). Significantly, however, the Law does not include the non-distribution constraint, which would prohibit social organizations from distributing organizational profit or assets as profit to anyone. Moreover, the Law does not prohibit conflicts of interest, private inurement, or self-dealing. Approximately 300 social organizations are now registered in Afghanistan.

NGOs are defined broadly in the new Law on Non-Governmental Organizations (enacted June 2005) to include both domestic and foreign non-governmental organizations. Unlike the 1977 Afghan Civil Code, however, domestic organizations are not defined according to their specific organizational forms, such as associations and foundations, or their membership and non-membership status. Instead, a domestic NGO is simply “a domestic non-governmental organization which is established to pursue specific objectives” (Article 5.2). To establish a domestic NGO, the Law requires at least two founders, but again makes no reference to specific forms. Thus, the Law seems to leave the door open to a variety of underlying forms, provided they meet the broad
definition of non-governmental, not-for-profit organization under the Law. At the time of the enactment of the new Law, more than 2,300 NGOs (including both foreign and domestic) had been registered in Afghanistan.

**B) The New Law Itself**

The new Law on NGOs replaces the previous Taliban-era *Regulation on the Activities of Domestic and Foreign Non-Governmental Organizations in Afghanistan* from 2000. Unlike the Taliban Regulation, the new Law complies with international standards and good regulatory practices in a number of critical areas:

- NGOs are properly defined as not-for-profit entities and bound by the non-distribution principle, thereby separating them clearly from businesses.
- NGOs are able to pursue a wide range of purposes, including both mutual benefit and public benefit purposes.
- NGOs are able to form umbrella groups and coordination bodies.
- NGOs are able to join international organizations and create branch offices.
- NGOs may be established by both Afghan nationals and foreigners, and by both natural persons and legal entities.
- NGOs may be formed by just two founding members.
- The registration authority must decide on registration applications within 15 days.
- The grounds for denial are limited and objective.
- In case of the denial of registration, the registration authority must issue a written explanation to the NGO.
- NGOs may appeal adverse decisions, such as the denial of registration at the outset or the termination of an operating organization, to a special dispute resolution commission.
- The Ministry of Economy is to maintain a central registry of NGOs.
- NGOs may engage directly in related economic activity, are not prohibited from bidding on government projects, and may receive grants, donations, and other forms of income.

---

8 Interestingly, the Afghan Government, whether consciously or not, followed more of a common law than civil law approach in defining an NGO. Civil law systems generally define NGOs according to their organizational characteristics as membership or non-membership entities (hailing back to the Roman law concepts of *universitas personarum* and *universitas rerum*). Common law systems, by contrast, take little interest in legal forms and use a more functional approach, whereby groups can “incorporate” as not-for-profit entities. How this approach will be implemented remains to be seen.

9 The new Law requires all previously registered organizations to undergo a re-registration process within six months of the enactment of the new Law.

10 When the new Parliament is elected and formed, it will have 30 days to review and approve all existing Cabinet-approved legislation.
• NGOs are subject to record-keeping, financial auditing, and semi-annual reporting requirements.

• The termination of NGOs is subject to notice and the opportunity to respond.

• The assets of a liquidated NGO, after payment to creditors, will be distributed to another NGO working for similar objectives.

Despite these improvements, the new Law still contains gaps, ambiguities, and problematic provisions that could create difficulties for both the Government and NGOs. Foremost among these problems are the following:

Article 8.8: An organization shall not perform the following activities: ... Participation in construction projects and contracts. More than any other provision, Article 8.8 stirred controversy before the enactment of the Law. The language in the original draft (February 2005) excluded NGOs from bidding altogether. The meaning of “bidding” was unclear: Was the intent to exclude NGOs from bidding on Government of Afghanistan projects only or on all donor-supported projects? Did the exclusion apply to bidding for grants or contracts or both? A revised draft issued in early March limited the bidding exclusion to construction projects. Then, in late March, the Cabinet of Ministers issued a new draft, which restored the original language and contained the blanket exclusion from bidding. It was this draft – with Cabinet-level backing – that led to such a strong reaction from NGOs and the international donor community. The joint task force created by President Karzai to address the issue strongly urged the Government to limit the bidding exclusion to bidding on construction projects – and preferably, only to construction projects tendered by the GOA. Thus, it came as a surprise to find language in the final Law that barred NGO “participation” in construction projects – rather than bidding on construction projects.

NGOs engaged in construction activity – especially community redevelopment projects that include the building of a wells, health clinics, or schools – are deeply concerned about this limitation. Although the Law does provide an escape hatch (“In exceptional cases, the Minister of Economy may issue special permission at the request of the Chief of the Diplomatic Agency of the donor country”), it is narrow and exceptions are not based on objective criteria. Moreover, the Minister of Economy has expressed his disinclination to grant exceptions to the prohibition.

Article 23.1: Prior to the commencement of work, and after the examination and assessment of the line department, an organization shall submit committed project documents to the Ministry of Economy for verification and registration. The requirement of advance project approval is deeply troubling. Nor is it clear how this approval process will work in practice. Such a requirement runs counter to good regulatory practices and to international standards. Typically, after registration, there is no further requirement of advance approval. Through regular reports, the government may gather information about NGO activities. To require advance project approval, however, will place a tremendous burden on both NGOs and the Government, and lead to inevitable delays in project implementation. If each of 2,300 registered NGOs has 10 projects, then the Government would have to approve 23,000 projects before they could be initiated. Reconstruction efforts would be hindered significantly. The Government is right to be concerned with
coordinating reconstruction efforts, but the means chosen in the Law will only hinder reconstruction.

Article 24.4: In recruiting foreign workers, an organization shall obtain prior permission from the relevant authorities and shall inform the Ministry of Foreign Affairs in writing of their arrival, commencement and termination of work. The purpose of this provision is unclear. The government should regulate issues relating to foreigners and to hiring practices through immigration law and/or the labor code. With visa requirements established through separate immigration laws and regulations, the government is sufficiently protected from the infiltration of foreign workers. Article 24.4 creates additional burdens without solving any actual problem.

C) Hope for the Future

The enactment of a sound law is only the first step toward an improved operating environment for NGOs. The challenge now becomes the implementation of the Law. In the first four months since its enactment, NGOs have raised numerous questions and concerns, regarding the re-registration process and the issues highlighted above. Implementing regulations issued by the Ministry in the wake of the signing of the Law were prepared by the Ministry without any outside consultation, and they bring additional confusion rather than clarity to many aspects of both the registration process and NGO activity.

To assist both the NGO Department and the NGO community, ICNL has prepared NGO Re-registration Guidelines for NGOs pursuing re-registration. In addition, ICNL has conducted training for the NGO Department staff and is planning additional training for both the Ministry staff and for the NGO community throughout Afghanistan. These implementation and capacity building activities will be ongoing for at least the next two to three years.

Furthermore, other aspects of the regulatory environment will need to be addressed, including taxation and NGO-government cooperation. Thus, while the signing of the Law on NGOs does indeed mark the culmination of the three-year drafting process, equally daunting challenges loom ahead. Nonetheless, one can hope that a corner has been turned and the new Law represents progress toward improved state-NGO relations and a healthier civil society in Afghanistan.
Rational Exuberance:
An Exploration of the Adaptation by California’s Charitable Sector to Changing Governance Standards – Notes from the Field

By Thomas Silk

Senator Charles Grassley, Chairman of the Senate Finance Committee, began the committee’s hearing into charitable law reform on April 5 with a vivid example of donor wrongdoing. It seems that the Washington Post that morning had run an article on a tax scam promoting the notion that one could take a charitable deduction for the cost of a safari in Africa, so long as the taxpayer contributed his mounted game trophy to a charity. Standing before a dusty and tattered stuffed Spring Bok, Senator Grassley said, and I quote:

I have here a Spring Bok from South Africa. Unfortunately, some people think its name is “Free Buck.” The Spring Bok is known for its ability to leap when startled. Boy, were we startled when we learned of this new tax scam. The story in this morning’s Washington Post makes me think that many people think the “tax” in taxidermy is meant to allow them to write off safaris to Africa as tax deductions if they give away a stuffed animal. This type of scam gives new meaning to the term tax “game.”

This bit of low comedy reached a nadir not even attained by last year’s farce when the same committee, also at a hearing on charitable law reform, called on two confidential witnesses who were there to testify to examples of charitable abuse in low-income housing and car donations. They spoke from behind a curtain and through a machine that distorted their voices. They were referred to, of course, as Mr. House and Mr. Car. We are not told whether they were also hooded or whether they now have been given new identities as part of the federal witness protection program.

At the hearings, Senator Max Baucus, Ranking Member of the Senate Finance Committee, stated that “any reform effort needs to be a balance between cracking down on the bad guys, and not unduly burdening the good guys.” As these examples indicate, however, the committee’s hearings have been far from balanced. The committee has made little attempt to showcase the good guys and their stories, yet it gleefully displays examples of wrongdoing and adds theatrical flourishes.

What I want to do today is to take a different approach, to consider a variety of ordinary charitable organizations as they struggle in California with changing standards of governance in the charitable sector — a sector dominated by good people and worthy organizations that are here, in the words of Yale Law School’s John Simon, “to teach us, to heal us, to entertain us, to defend our natural resources and our civil liberties, and ultimately to receive our ashes.”

---

1 Thomas Silk practices law with Silk, Adler & Colvin, a San Francisco firm specializing in the law of nonprofit organizations. Mr. Silk is the editor of Philanthropy and Law in Asia (1999), and he has contributed chapters to Serving Many Masters: The Challenges of Corporate Philanthropy (2003) and The Jossey-Bass Handbook of Nonprofit Leadership and Management (2004). This article is adapted from a talk delivered before the Symposium on Board Leadership for Nonprofit Integrity, held by the University of San Francisco’s Institute for Nonprofit Organization Management on April 22, 2005. Copyright 2005 by Thomas Silk.
California Legislation

In California, Attorney General Bill Lockyer’s staff developed legislative proposal drafts in the fall of 2003, combining a state version of the federal Sarbanes-Oxley Act (SOX) with increased regulation of charitable solicitations.

During the winter, the Attorney General invited representatives of the California Association of Nonprofits (CAN) to review and discuss those early drafts. A fundamental disagreement soon arose between the staff of the Charitable Trust Section of the Attorney General’s office and the delegates from CAN concerning the trigger for mandatory annual audits. The Attorney General’s draft used annual revenues of over $250,000 as the trigger. This was not an arbitrary threshold. It had also appeared in the standards promulgated by the national Better Business Bureau, among others, as a measure of audit suitability. However, CAN representatives argued strongly that such a low trigger would mean that very small human service organizations would be required to increase their annual expenses by audit fees estimated at $7,000 to $14,000, an amount that would imperil vital programs, and they urged a higher threshold be chosen instead.

The draft legislation developed by the Attorney General emerged on February 13, 2004, as SB 1262, introduced by Senator Sher. The audit trigger had been raised to $500,000. By the time of the first hearing on SB 1262, one month later, however, the overwhelming feedback from CAN’s charitable organization constituents throughout California was that $500,000 was still too low. At the hearing before the Senate Judiciary Committee, many witnesses testified against SB 1262 but only three in support of the bill. Most witnesses emphasized the impact of high audit fees on small charities. At the close of the hearings, in an unexpected development, Senator Sher announced he had been persuaded that audit costs could well become an unmanageable burden for small charities, and he agreed, with the consent of the Attorney General’s representative, to amend SB 1262 on the spot, raising the audit threshold to apply only to charities with annual revenues of $2 million or more. Attorney General Lockyer pushed ahead with SB 1262, and it was signed into law as the Nonprofit Integrity Act of 2004 (NIA) in September 2004.

The NIA became effective on January 1, 2005. It addresses three areas of activity of a charitable organization: (1) audits, by mandating financial audits, audit committees, and public disclosure of audited statements by certain charities; (2) salary review, by requiring a periodic review of the compensation package of the CEO and CFO of every charity by the board of directors or board committee and a determination that those benefits are just and reasonable; and (3) fundraising, by requiring charities to establish and exercise control over their own fundraising activities and over fundraising conducted by others for their benefit, imposing mandatory contract provisions between a charity and any commercial fundraiser or fundraising counsel, and prohibiting misrepresentation and other improper solicitation practices.

Education and Training

Why do people obey laws? At least within the charitable sector, a vibrant culture of compliance appears to exist. Our task is to nurture it. We rely on the notion that education and training of directors and officers of charitable organizations will promote compliance far more than exclusive resort to legal enforcement.

The development of changing governance standards in the charitable sector has provided an opportunity to witness different approaches to legal compliance. Early on, New York’s Attorney General Elliot Spitzer introduced a state-SOX bill for New York’s nonprofits. By the end of November 2004, however, his zeal had abated. He announced in a radio interview that he had reevaluated the situation and withdrawn his support for the bill; he now favored educating and training directors and
officers of nonprofit organizations rather than imposing new laws. Some New York colleagues claim that it is also true that General Spitzer was unable to move his bill out of committee.

In California, learning about the NIA has become an opportunity for considering larger governance issues that might otherwise lie dormant. For example, after giving a lecture on the NIA last year, sponsored by the Center for Volunteer and Nonprofit Leadership of Marin, and attended by representatives of 50 or more charitable organizations, I was taken aside by Linda Davis, the Center’s CEO, who explained that the Center would probably have drawn only five or six people had the event been billed as a lecture on bylaws or governance; the new law had provided a chance to talk about a wide-range of governance issues that would not have occurred in the absence of the legislation.

Throughout the state, charitable sector organization directors, officers, staff, and advisers have turned out in large numbers for lectures, workshops, and conferences about the NIA sponsored by community foundations, nonprofit management service organizations, and similar groups. The response has been overwhelming. In San Francisco, CompassPoint held a lecture and discussion on the NIA featuring a joint presentation by Belinda Johns, Deputy Attorney General, and an attorney from the private bar. The crowd of 100-plus exceeded the standing-room-only limit of the hall, and nearly as many were turned away.

This is a new phenomenon. No state or federal tax or corporate law before has generated such an outpouring of interest from charitable sector representatives.

And leading the educational and training effort have been officials from Attorney General Lockyer’s Charitable Trust Section. The Attorney General’s website, www.caag.state.ca.us/charities/index.htmq, quickly became the center of helpful information and interpretations of the NIA. Through that website, charitable organizations and their advisors were invited to contact Belinda Johns (Northern California) and James Cordi (Southern California) by e-mail. As a result, e-mail queries on the NIA have poured into the Attorney General’s offices, resulting in more than 300 e-mail responses or informal rulings so far. Since the effective date of the NIA on January 1, 2005, Ms. Johns and Mr. Cordi have added to their calendars a full schedule of speaking engagements before charitable organizations throughout the state.

Implementation

The examples below are based on actual events, but the names are fictitious.

Some principles of SOX, applicable only to publicly traded companies, may have an indirect impact on large charitable organizations, particularly when corporate officials, steeped in the culture of SOX, sit on the boards of directors. And we learn that once highly motivated directors begin to engage in ethical rule-making, they can be surprisingly strict.

- California Opera, Symphony, and Ballet (COSB) is a large and successful performing arts organization. COSB’s Board includes several directors who are officers of publicly traded companies, and they also serve on COSB’s Executive Committee. At a recent committee meeting, one such director explained that he was awash in SOX training at his company, particularly about conflict of interest policies and codes of ethics, yet at COSB, which he expected to have adopted even higher ethical standards long ago, such policies had not yet even rated a mention on a meeting agenda. Due to the insistence of those directors, the Chair of COSB’s Executive Committee has instructed legal counsel to prepare drafts of a suitable conflict of interest policy and code of ethics. The Executive Committee told its Chair to make sure the code covered employees and volunteers as well as directors – and to add teeth by providing that any director who fails to comply with
the code may be removed from the Board and any employee or volunteer who fails to comply may be put on notice or terminated at the discretion of the Executive Director.

The impact of media scrutiny and concern about unfavorable publicity has become a powerful motivating force to a growing number of boards of directors and is likely to prove a far stronger deterrent to improper conduct than the risk of legal sanctions by regulatory agencies.

• The Board of Directors of Silicon Valley Tomorrow (SVT), a public interest urban planning organization, discussed standards of governance at a recent Board meeting. The Chairman asked whether the sense of the Board was that SVT should follow the legal minimum standard of governance or the highest ethical standards. During the discussion that followed, the Chairman said he saw no reason why the Board would decide to do otherwise than follow the highest standards. His goal was to avoid the slightest scandal at SVT and the risk that his reputation and the reputation of fellow directors would be impugned by an exposé of SVT on the front page in the San Jose Mercury News. The Board then agreed that it would follow the highest ethical standards and directed legal counsel to draft a code of ethics expressly providing that all actions of the Board must not only be legally permissible, they must also reflect the highest ethical standards, as determined in the sole discretion of the Board.

The interplay of state and federal laws is not always transparent. There is a growing trend for charitable organizations to comply with the highest standard of accountability and transparency – whether or not required by law.

• The Sierra Economic Opportunity Commission (SEOC) was formed as a charitable organization shortly after the enactment of the Economic Opportunity Act of 1964 to administer or coordinate programs to combat poverty in communities located in the Sierra foothills of California, such as Head Start, Migrant Services, and Homeless Services. SEOC’s 15-person Board of Commissioners is divided evenly between representatives of three constituencies: local governmental agencies, low-income persons, and business/labor. SEOC’s funding is substantial, far above the $2 million annual gross revenue threshold set by the NIA. But the NIA excludes from the calculation of that threshold funds received as grants or contracts with governmental agencies, which is the case with SEOC. Those governmental agencies have required SEOC to obtain an annual independent audit of its financial statements. Even though California law does not require an audit, it does require disclosure of any audited statements, whether or not required. Although neither federal nor state law requires that SEOC appoint an Audit Committee, the Board of Commissioners has decided that the Board and SEOC would benefit from the involvement of such a committee. The Board has begun a search for individuals with financial expertise, from one of the three constituencies, who would be interested in joining the Board and the Audit Committee.

One consequence of the continuing discussion among directors and officers of charities in California about changing governance standards is that some charities are finding themselves adopting governance practices that are not only beyond the law but also beyond accepted best practices.

• The Smith Family Foundation has assets of $50 million. Claire Smith, the new Chair, represents the youngest generation to take office. After checking with her colleagues at other foundations, she was surprised to learn that despite all of the publicity in California about the mandatory audit requirement of the
NIA, that requirement will not apply to many charitable funders with substantial assets because the audit trigger is based on revenue rather than assets. Thus, the Smith Family Foundation, despite an asset base of $50 million, is not subject to the mandatory financial audit because its annual gross revenue, taken from line 12 of page 1 of IRS Form 990-PF (consisting of interest, dividends, and capital gains), is less than $2 million. Claire’s colleagues differ about whether foundations should, as a matter of best practices, obtain annual audited financial statements. Nevertheless, Claire explained to her Board of Directors that she did not want to defend the public policy that compelled audits of small charities with a few million dollars of revenues but allowed large charities with assets of $50 million, such as theirs, to escape audits altogether. She also alerted the other directors that any interested person could download the Foundation’s tax returns at www.guidestar.org. The Board agreed, with no dissents, to obtain annual financial audits, and to post the audited statements on the Foundation’s website, beginning with the current fiscal year.

Federal Legislative Activity

In response to corporate scandals at Enron and elsewhere, Congress enacted the Sarbanes-Oxley Act of 2002. Best practice codes for business corporations were soon adopted and promulgated by a wide range of organizations, including NASDAQ, NYSE, the Business Roundtable, the Conference Board, General Electric, and TIAA/CREF.

The media began to scrutinize charitable organizations more closely and articles about scandals within the charitable sector soon began to appear, mainly in the Boston Globe, the Washington Post, and the San Jose Mercury News.

Congressional concern resulted in hearings before the Senate Finance Committee beginning in 2004. In a highly unusual move, the Committee released a Discussion Draft as a staff document, enabling the Committee members themselves to avoid taking any public position on the recommendations for reform in that Draft. The Draft proposes far-reaching and expansive regulation of charities, including mandatory reapplication for an IRS exemption every five years, tightened regulation of private foundations, the application of private foundation restrictions to public charities, a mandatory audit requirement for a charitable organization with annual gross receipts over $250,000, and a compilation and review by an independent accountant if gross receipts are under that threshold but over $100,000. Not to be left behind, the Staff of the Joint Committee on Taxation issued a proposed report in January 27, 2005, entitled “Options to Improve Tax Compliance and Reform Tax Expenditures,” containing over 100 pages proposing extensive reforms of tax provisions applicable to exempt organizations.

In September 2004, the Senate Finance Committee sent a letter to the Independent Sector encouraging it to bring together leaders from the charitable sector to consider actions to strengthen governance, ethical conduct, and accountability within public charities and private foundations. Independent Sector appointed the Panel on the Nonprofit Sector, co-chaired by Paul Brest, former Dean of the Stanford Law School and currently President of The Flora and William Hewlett Foundation, to take responsibility for those tasks. The Panel, with more than 175 charitable leaders and top experts directly involved, has held at least 14 hearings around the country and involved about 1,500 participants in a series of nationwide conference calls. The Panel issued an interim report in March and a final report in June, but it has announced its intention to continue to meet throughout the fall.

The interim report, a 68-page document, attempts to strike a balance between recommendations for action by the charitable sector and by charitable organizations and their boards of directors, recommendations for action by the IRS, and recommendations for legislative action to improve
governance and oversight of the sector. Taking a page from the NIA, the Panel recommends mandatory annual audits of charitable organizations with gross revenues of $2 million or more. The final report of the Panel, however, recommends that federal tax laws be amended to require mandatory financial audits of charitable organizations with annual revenues of $1 million or more and an annual independent review of financial statements of charitable organizations with revenues between $250,000 and $1 million.

**What’s Next?**

Will efforts on the national level result in new legislation, and if so, in what form? Many knowledgeable observers expect that some sort of legislative package will emerge from this extensive public and private effort. The existence of the Panel should serve to comfort the charitable sector. Never before has so large, diverse, and knowledgeable a group served as a translator of the charitable sector to Congress and an advocate of timely governance changes to the sector.

Recently, the *New York Times* carried an article about AIG (American International Group) and the downfall of its CEO, Maurice (Hank) Greenberg. The authors wrote, “How could a man who ruled for almost 40 years see his legacy slip away in a matter of days over events that, at another time, might have been dismissed as immaterial…. ” The answer? The CEO was becoming a throwback to another era – “an executive working in a business world still shaken by the corporate scandals of recent years, but who failed to recognize the swirl of change engulfing him.” The AIG example is about sudden change in corporate culture and about one CEO who just didn’t get it. As we have seen, other CEOs and directors of charitable corporations as well as companies share that disability.

How can the honest director or officer protect herself or himself from becoming engulfed and confused by the “swirl of change” in standards of nonprofit governance? In this unsettled legal environment, charitable organizations and their directors or trustees, officers, and staff are likely to reach the safest harbor if they remain mindful of these principles:

1. Increasingly, charities are expected by the public to take the high road.
2. It is no longer sufficient for a charitable organization merely to comply with the letter of the law or even the spirit of the law. The charity must go beyond the law. The public now looks to charities to act as moral agents.
3. Charitable organizations with the greatest likelihood of satisfying emerging public expectations will be those that take all measures necessary to ensure that the conduct of their directors, officers, and employees reflects the highest ethical standards appropriate to the organizations’ structure and mission.
4. To settle for less is to run the risks that the charitable organization’s reputation for integrity will be weakened, its respect in the community will be diminished, and its ability to fulfill its mission will be imperiled.
A Common, Global Framework of Nonprofits as Players in Civil Society

By Herrington J. Bryce

The worldwide growth of nonprofit organizations has given citizens a greater capacity to improve the quality of their lives and to establish peaceful cross-border networks. But, of course, the legal frameworks within which these organizations operate differ across countries, as well as within those countries with federal or decentralized systems. The laws may vary in such matters as the requirements for incorporation; the restrictions on organizations' operating powers; the rules on reporting, dissolution, and forms of reorganization such as mergers and divestitures; the requirements for public accountability and transparency; the restrictions relating to public support and financial transactions; the designated measures of performance; the extent of political participation allowed; the fiscal benefits, such as tax exemptions and eligibility for government grants, available to some or all nonprofits; and the scope of formal and informal penalties that can be imposed on organizations, their leadership, supporters, and members.

Is there a single conceptual lens – one that operates regardless of an organization's mission, capacity, and location – through which we can view NGOs, craft model laws, assess their performance, and thereby render common assistance? What is the common platform upon which all of this might be built?

The underlying commonality cannot be that they are charities, for some nonprofits are not. It cannot be that they do not have a profit motive, for increasing numbers of them do--although, by American law, this cannot be a principal motive for their existence. Some nonprofits (cooperatives, for example) even pay “dividends” of a sort to their owner-members.

In this article, I seek to articulate a common feature of nonprofits, applicable to nonprofits of all types, whether in developed or underdeveloped countries, and whether in long-established democracies, newly emerging democracies, or non-democratic countries. A common feature might help us develop a framework for making meaningful cross-cultural comparisons of NGOs and the legal frameworks in which they operate, transferring lessons, and, in general, providing a common theoretical basis for analysis.

1 Herrington J. Bryce, herrington.bryce@business.wm.edu, is Life of Virginia Professor of Business Administration at the College of William and Mary, Williamsburg, Va. 23185. This article is based on his recent book, Players in the Public Policy Process: Nonprofits as Social Capital and Agents (New York: Palgrave Macmillan, 2005), http://www.palgrave-usa.com/catalog/product.aspx?isbn=1403968292. He is also the author of the comprehensive legal and operational guide, Financial and Strategic Management for Nonprofit Organizations, (San Diego, CA: Jossey Bass, 2000). Bryce has worked or lectured on nonprofits in Russia, Estonia, the Republic of Georgia, Romania, China and South Korea.

In my recent book, I argue that that common underlying features of all nonprofits are that (a) they are social capital assets, (b) they exist to be agents of the public, (c) they advance their purposes through the public policy process, as explained further below, and (d) their purpose and their performance are best viewed through the principal-agent concept from contract and employment law. Thus, every nonprofit can be described as a social capital asset and agent of the public in a structured (principal-agent) relationship with the public it serves. Let me explain.

**All Nonprofits Are Social Capital Assets**

All nonprofits are social capital assets in several distinct senses. They are “social” because their assets (and the benefits that flow from them) are owned by a group, a community, or a society, and not a single private person. They are, therefore, social in a property rights sense. This element carries implications involving control, alienability, transferability, and rules that allow an NGO to serve beneficiaries who are not necessarily the community or group that collectively founded, operates, or funds it.

They are also “social” in sociological and political senses. They are endowed with sociological and political social capital that differentiate them in behavior, capacity, brand, and effectiveness from other entities. These forms of social capital include networks, common adherence to a mission ("pursuing a common good"), and common adherence to norms of interaction that facilitate transactions, expectations, communication, production, and cross-border linking.

**All Nonprofits Are Public Agents for Public Purposes**

Incorporated nonprofit organizations obtain a charter to perform a specific purpose or a specific class of purposes (for example, education). These purposes are, without exception, intended to promote a public interest – either directly, as in the case of organizations holding status under Section 501(c)(3) of American tax law, or indirectly, as in the case of associations and other nonprofits. These latter (such as medical associations) act on behalf of their members, but with a traceable public benefit (better public health) as the end objective.

How is the nonprofit empowered as an agent of the public? A charter is an instrument of empowerment – a license, so to speak to perform a specific class of functions. Hence, all nonprofits, through the act of seeking and receiving a charter, offer and promise to perform the functions specified therein--their mission. These purposes in turn are specified in legal codes as among those serving the general public’s interest, thus justifying tax exemption and other benefits conferred on the organization with not-for-profit status, as opposed to a for-profit organization. Put otherwise, these benefits can be seen as consideration for the nonprofit’s promise to perform the public purpose specified in its charter on behalf of the general public. Every nonprofit is therefore a voluntary agent of the public.

---


4 Unincorporated organizations such as trusts may have deeds requiring the same thing. Other “unorganized” organizations may not have such papers, but the contract is implicit and understood.
All Nonprofits Operate through the Public Policy Process

Nonprofits carry out their missions principally through the public policy process, just as firms carry out theirs mainly through markets. The public policy process in which nonprofits are engaged covers the breadth of public decision-making and action. In the United States, for example, political parties and political action committees are tax-exempt nonprofits under Section 527. Only these organizations may engage in politics—defined in the Code as affecting election outcomes. Their exclusive purposes are to propagate and influence political philosophies, and to work to choose and elect political candidates. The successful candidates proceed to make public policy.

Through the exercise of their First Amendment rights, all nonprofits retain lobbying powers. These lobbying powers are defined in the Code as the power to influence policies (domestic and foreign), the naming of public administrators, the crafting of bills, the passage of laws, and the rules by which laws are implemented and adjudicated. Through lobbying, hence, nonprofits help to shape the policies of those whom they (or their rivals) helped to elect and appoint, and the environment and fashion in which those policies will be implemented.

This is the case because other nonprofits are doers—implementing programs or purposes specifically defined in the Code as advancing the public welfare. According to the Code, this public welfare might relate to science, religion, culture, health, education, welfare, the arts and culture, and even sports. Nonprofits operate in times of war and peace. In short, from beginning to end of the public policy process, nonprofits are significant players.

The Principal-Agent Paradigm, Contract and Employment Law, and the Nonprofit as an Agent

The principal-agent paradigm is the framework in which the nonprofit performs as social capital and public agent. In a democracy, the people (as a collectivity or the public) are the principal, and the government is an agent of the people. When the government grants a charter to the nonprofit and oversees compliance, the government takes on the role of managing agent for the public, with all nonprofits being operating agents of the public.

This relationship is modified but not nullified when the nonprofit has a specific contract (say, to feed the poor) with the government.\(^5\) Note that the nonprofit in such an instance is an agent of the government, whereas in the absence of a specific government contract, the government (as an instrument of the people) merely licenses the nonprofit to work for the people. In either case, the public is the ultimate principal.

Every contract constitutes a promise that is proffered and is accepted. The mission statement, then, is a contractual promise, voluntarily entered into by the nonprofit, with the expectation of compensation of some sort, such as donations from individuals and organizations, exemptions from particular taxes, and eligibility for government grants and

\(^5\) The government holds the ultimate power of involuntary dissolution in both cases. For a discussion of the differences in governmental powers, see *Players in the Public Policy Process*, especially pp. 54 and 71-72.
contracts. A specific contract, of course, will entail additional consideration or payment for performance of particular acts.

A nonprofit's mission has all of the ingredients of any other contractual promise when accepted by a principal. In exchange for the nonprofit's promise, the principal – that is, the government, acting on behalf of the public – confers implied, expressed, derived, and inherent powers and discretion, generally accompanied by obligations and restrictions. The powers and discretion conferred have all sorts of potential consequences.

Thus, this question is always germane: Is the nonprofit serving the public? This question crosses borders and missions and differs only in its details.

Consequently, Some Common Challenges

The most important concept in this universally applicable lens is that the nonprofit is a form of social capital\(^6\) asset that exists exclusively to serve the public’s interest, through the process in which that interest is collectively determined, formulated, attended to, and disposed of – the public policy process. The nonprofit in a democracy is not an agency of the government, not part of the government’s process at all, but rather a part of the public’s process of determining priorities and outcomes. Unlike government agencies, consequently, nonprofits are not in a master-servant relationship with the government; rather, they are in a principal-agent relationship with the public--the citizens who voluntarily created them and on whose behalf they serve. If all nonprofits fit the basic mold described in this article, then all nonprofits share particular systemic challenges regardless of mission, purpose, or location.\(^7\)

A common, universal challenge of legal codes, therefore, is to enable nonprofit organizations to accumulate social assets, devote them to public purposes, and participate in the public policy process as agents of a group, community, or society to whom they are ultimately responsible by the terms of their creation. From this common purpose and paradigm, perhaps, can emerge a shared platform for international cooperation and sharing.

Certain concepts are given fresh and powerful meaning in a principal-agent paradigm. These include responsibilities of agents to perform specifically as expected by the principal and the remedies available to the public when the organization as agent fails. Also reinforced are custodianship, stewardship, accountability and the utilization of organizational capacity as duties; and support is compensation or incentive to provide a public service rather than a mere "subsidy." These concepts have common and universal applicability in understanding and elevating the role of nonprofits. While space does not permit their exploration here, I deal with them in the book I cited.

\(^6\) In this short article, I have not defined “capital.” But the word is used consistently with “capital” as a long-term benefit-producing asset. See ibid., esp. pp. 33-58.

\(^7\) For a discussion and illustration, see ibid., pp. 121-79, 219-35.
Looking Ahead: 
What Is the Future for the Nonprofit World?

By Pablo Eisenberg*

The nonprofit sector has experienced rapid changes in its composition, size, values, nature, and finances over the past few years. This transformation can be expected to accelerate in the next two or three decades. Yet its practitioners and researchers have done little or nothing to anticipate and prepare for these developments. Instead of looking hard at the future, they have chosen to bury their heads in the sand, avoiding some of the tough analyses and choices they invariably will have to make to keep the sector healthy and worthy of the public trust.

Not since the Commission on Private Philanthropy and Public Needs issued its report in 1976 has the sector collectively attempted to assess its current status – including both its achievements and problems – and to recommend changes in policies and practices. Organizations like Independent Sector, a coalition of some 600 national nonprofit groups and donor institutions, and the Council on Foundations, which represents 2,000 grant makers, were established to serve and protect the interests of their members, but they have failed to exercise their responsibility to look at the future.

Academics and researchers in the nonprofit field have reinforced this tendency by avoiding the toughest and most controversial issues – the ones whose implications and consequences will be most important to nonprofits in the future. They have paid a great deal of attention, for example, to such issues as voluntary action and volunteers, the history of foundations and nonprofit organizations, and management practices, and, most recently, they have been studying efforts to build the management capacity of nonprofit groups. They are paying very little attention to such matters as the governance of major institutions, excessive compensation of nonprofit officers and executives, sweetheart deals that provide financial benefits to nonprofit officials, and conflict of interest problems. Nor are they doing much to deal with the lack of public accountability by nonprofit organizations, government oversight, nonprofit advocacy, ties between universities and corporate America, the effect on nonprofits of the sector’s rapidly growing commercialization, and the impact of privatization on government-financed programs.

* Pablo Eisenberg is a senior fellow at the Georgetown University Public Policy Institute and the author of Challenges for Nonprofits and Philanthropy: The Courage to Change (Tufts University Press/University Press of New England). He has been leader of the Center for Community Change, one of the nation's most highly regarded poverty-fighting organizations, and founded the National Committee for Responsive Philanthropy, of which he is chairman emeritus. For the past decade he has been a regular columnist for The Chronicle of Philanthropy. Excerpt from Challenges for Nonprofits and Philanthropy: The Courage to Change, by Pablo Eisenberg, edited by Stacy Palmer. Copyright 2005 by the Trustees of Tufts University. Used with permission from University Press of New England, www.upne.com.
While it may be difficult to attract money to conduct research on these issues because of the reluctance of donors to sponsor “risky” topics, they are, nevertheless, the burning issues that are key to the nonprofit sector’s future. Our research community will be doing an enormous disservice to all of us if it continues to avoid these issues by seeking shelter in safe projects. Through a more germane and gutsy research agenda, it could provide us with a useful road map for productive change.

**Public Accountability**

What are the major areas of concern with which the nonprofit community must begin to grapple? The most important by far is the pressing need for transparency and public accountability. Foundations, which to date have been relatively unaccountable, depend on enormous tax benefits for their donors and for their operations. Ultimately, they answer to the elected politicians who represent American taxpayers. Nonprofit organizations depend entirely on charitable contributions, which, in turn, are based on one and only one factor: the public trust. Without it, nonprofit organizations cannot raise money and, therefore, cannot exist. Both sets of institutions ultimately depend on public esteem and support for their existence.

During the past couple of years the public trust in the nation’s nonprofit groups has been shaken by a series of scandals, excessive compensation, shoddy practices, corruption, ethical lapses, and poor board oversight. While our nonprofit apologists argue that the problem lies with just a few bad apples in the barrel, the prevalence of such behavior is far more widespread than we believed several years ago. There are many bad apples in the nonprofit barrel.

A Georgetown Public Policy Institute study of foundation trustee fees issued in September 2003 – of which I was an author – revealed that a high percentage of the foundations in its sample gave their individual trustees compensation, many well in excess of $25,000. In 1998 the 238 foundations in the study actually paid their trustees $33 million for their charitable activities, money that might otherwise have gone to financially strapped nonprofits. These payments contrast sharply with the policies of nonprofit organizations that do not pay any fees to their board members. The study also found that neither the Internal Revenue Service nor the state attorneys general had the resources, staff, or political will to oversee and police the foundation community.

These findings have been echoed by the growing revelations of foundation abuses in newspapers across the country. Not only have the media detailed the huge amounts paid in trustee fees at many foundations, but they have also spotlighted self-dealing activities, conflicts of interest, falsification of information on IRS reporting forms, a lack of transparency, and the absence of any federal and state oversight.

Such problems are not confined to foundations. They are prevalent among nonprofit organizations as well. There are many nonprofits that pay excessive compensation to staff members; do not pay taxes on their earnings from businesses unrelated to their missions, as required by law; do not provide information about their operations or boards; engage in board activities that are self-dealing; and conduct questionable fund-raising practices.
What’s more, embezzlement is not infrequent. The most publicized cases are merely the tip of a much larger mass of charities. Harvard University’s Hauser Center for Nonprofit Organizations reported, in November 2003, that top charity executives in a selected 152 nonprofit organizations stole or misused at least $1.28 billion from 1995 to 2002. The report was careful to point out that its findings were not a comprehensive assessment of charities’ fraudulent activities.

As the news media pay increasing attention to the nonprofit sector, the list of suspect organizations is likely to grow, bringing with it a decline in public confidence in our charitable organizations.

The abuses in the sector are compounded by the lack of oversight and enforcement on the part of federal and state regulators, as well as by the absence of tougher regulations that could assure greater public accountability.

Congress must bear a great deal of responsibility for this abysmal situation. It has largely ignored the operations of the nonprofit sector, content to let its problems slide as long as public scandals are minimal. Lawmakers focused little attention on the needs of the IRS’s tax-exempt division and never imparted to the regulators a sense that oversight was an important public matter. Until Congress, the IRS, and state attorneys general get their act together, the news media will remain the only reliable accountability mechanism we have.

The substantial federal excise tax paid by private foundations on their net investment income has never been used for its intended purpose – the oversight and policing of the nonprofit sector. While some organizations like Independent Sector, the National Council of Nonprofit Associations (representing statewide coalitions of nonprofit groups), and the Council on Foundations have gone on record supporting congressional action to target at least a portion of the excise tax for oversight, they have spent little or no time, energy, and resources to lobby for legislation that would give the IRS and state regulators the resources they urgently need. Had the large foundations and the Council on Foundations spent one-fifth of the time and money for this purpose that they expended in their recent efforts to kill the congressional measure to eliminate administrative costs from the calculation of foundations’ minimal payout requirements, at least a portion of the excise tax might have been channeled to oversight activities.

If the nonprofit world is to prosper and better serve civil society, it will have to deal with the problems of transparency and public accountability. Jealous of their independence and fearful of government intrusion, nonprofit executives for years have claimed that self-reform is the path to sectoral sanctity. Their rhetoric is strong and, sometimes, convincing, but their efforts have been minimal and unproductive. The truth is that self-reform rarely works, not at the New York Stock Exchange or among other nonprofits.

The reports filed annually with the IRS by both nonprofits and foundations currently are not an adequate mechanism for assuring transparency and public accountability. These reports need to be strengthened by requiring more data about self-dealing, conflicts of interest, excessive compensation, and trustee activities.
For example, the 990-PF forms that foundations are required to submit annually to the IRS do not ask specifically for the amount of time spent on foundation work by trustees; for a breakdown of allowances and other expenses, including travel, received by trustees; or for the relationship of trustees to contractors and service providers. The anti-self-dealing provisions in the regulations provide a huge loophole that has been exploited by foundations. They permit trustees and foundation managers to receive payment for services to their foundations that are “reasonable and necessary to carrying out the exempt purpose of the trust . . . and . . . not excessive.” As the Georgetown Public Institute study observed, “Because the standards are so unclear, the judgment of what is reasonable, necessary, and not excessive has essentially been left to the foundations themselves.”

Requiring nonprofit groups of a certain size to provide annual or biennial program and financial reports could supply additional information, so that the public can better evaluate nonprofit performance of at least the larger organizations. Small organizations often can’t afford to spend the time and money on extra paperwork, nor can government regulators keep up with all the nonprofit groups that exist – so focusing on the largest ones makes most sense. In addition, federal regulations governing self-dealing, compensation, and ethical behavior need tightening.

While more effective regulations and clearer criteria for evaluating nonprofit abuses are urgently needed, a major defect of the oversight system now in place continues to be the lackadaisical enforcement measures by both federal and state regulators. The number of audits of nonprofits conducted by the IRS remains minimal. Slightly more than 1 percent of groups are audited, as the IRS has done little to increase the number of staff members who monitor charities, even though the number of charities more than doubled in the past decade. The criteria by which the IRS assesses excessive compensation often appear to be driven by corporate standards. And only a minuscule number of nonprofits have been fined or punished by the agency for excessive-benefits transactions. Several states don’t even have a tax-exempt unit in the attorney general’s office; with few exceptions the offices of the attorneys general have neither the resources nor the interest to pursue charity abuses.

Whether the IRS is the proper agency to oversee the nonprofit sector or should be replaced by a new quasi-public entity like Britain’s Charity Commission for England and Wales, which acts as application clearinghouse, adviser, and investigator, has been a subject of discussion among researchers. Such an agency could oversee charity officials, in much the way securities dealers here are regulated by quasi-governmental agencies under the supervision of the Securities and Exchange Commission. While the IRS needs restructuring, I think it would be unwise to delegate responsibility for oversight to anything but a government entity that has a vested interest in ensuring that tax-subsidized nonprofit groups are working in the public interest.

Public or Private?

Recent congressional efforts to increase the amount of money private foundations are required to distribute each year triggered an energetic public debate, the first time in decades that such a discussion extended beyond closed-door conversations between foundations and legislators.
Gone are the days when matters concerning philanthropy or nonprofits could easily be hidden in the shadows. That is one of the major reasons foundations were so disturbed by the efforts of some nonprofits and lawmakers to bring the payout issue into the open. It also explains the anxieties of some nonprofits about divulging the names of their supporters. Transparency is the cornerstone of accountability; it is a trait that Congress must require of all tax-exempt organizations.

Foundation assets are not the only endowments that require further inspection. Donor-advised funds, which operate like charity checking accounts, should be subject to a minimum payout requirement. Now donors can keep putting money away in donor-advised funds year after year, claim their tax deduction, and never give away a cent until they die.

Nor are universities or other nonprofit groups that have endowments required to distribute any of their assets. Should these institutions be permitted to accumulate vast sums of money at taxpayer expense without distributing an adequate amount of money for charitable purposes, such as scholarships and programs to serve society? If not, what minimum percentage of their endowments should they distribute each year?

**Are Too Many Organizations Given Tax-Exempt Status?**

To many observers, the composition of the nonprofit sector doesn’t make much sense. It includes such disparate institutions as hospitals and universities, social service agencies, grassroots activist groups, cemeteries, trade associations, a few insurance companies, co-operatives, and fraternal organizations.

Should they all continue to be lumped into the category of tax-exempt groups governed by some of the same rules, or should the sector be more narrowly defined? Hospitals and higher-education institutions account for roughly two-thirds of the operating revenue of all organizations categorized as charities under the tax-exempt section of the Internal Revenue Code. Should such organizations be placed in a separate category of nonprofits? Why should the New York Stock Exchange have any type of tax-exempt status, since it serves profit-making entities on Wall Street and provides compensation to its executives that can only be described as excessive by nonprofit standards? Why are professional sports associations and corporate trade associations that lobby for profit-making corporate interests allowed to have tax-exempt status?

One of the distinguishing characteristics of nonprofit organizations is their mission of serving the public interest. Many would argue that some of the groups that have tax-exempt status do not meet that test.

Far more attention needs to be given to what types of organizations the IRS approves as charities. Under the current system, applications for tax-exempt status are almost automatically approved. The IRS simply doesn’t now have the resources to do a more thorough job of examination.

As one might suspect, a number of questionable organizations have slipped through this screening, including a number of charities that are at least as much political as charitable. One example is an organization called Celebrations for Children established by the House of Representative’s majority leader, Tom DeLay. Its purpose was to help throw parties and trips for legislators attending the 2004 Republican National Convention...
in New York. Though Mr. DeLay claims some of the money the charity raises will be spent for needy children, the primary purpose of the organization is political. In short, it is a sham nonprofit that doesn’t deserve charity status. Other highly political organizations have been approved as charities in the past. The sector needs to assess this practice and take measures to stop it.

**Growing Commerciality**

Under pressure from declining public revenues and increased competition for scarce philanthropic dollars, a large number of charities are charging fees for services and starting profit-making enterprises. The growing privatization of publicly financed social programs, formerly the almost exclusive dominion of nonprofits, has pushed charities to become more corporate in nature to remain competitive. The line between what is nonprofit and for-profit has become even more fuzzy than it was.

The corporatization of a large number of nonprofit organizations has opened institutions to questionable practices: an undermining of standards and ethical practices; an increasing focus on the bottom line; the weakening of organizational mission; special attention to the CEOs, with their high salaries and special perks; and an aversion to policy activism and risk-taking. Many nonprofits are in danger of losing what Paul Light of the Brookings Institution has called their “nonprofitness.”

For many years the IRS has required nonprofit organizations to pay taxes on their for-profit enterprises that are deemed to be not “business-related” – that is, not intrinsic or connected to their charitable missions. But the criteria by which the agency decides what is or is not related remain vague and uncertain, an imprecise guideline for nonprofits to follow. Many nonprofit-run businesses can be called “related” only by the stretch of one’s imagination. The Metropolitan Museum, for example, sells items found in its museum shop in New York in a number of shopping centers outside the city and does not pay taxes on a share of the money made in those stores. That ruse enables many charities to avoid paying taxes that they should have to pay as part of their responsibility to be good citizens. As public funds diminish and charities desperately seek new sources of support, they will increasingly turn to the creation of new business ventures as a way out of their financial crises. All the more reason that the IRS, with assistance from the nonprofit sector, must more clearly define the line between what is and is not “business-related.”

Neither the regulators nor the nonprofit community can afford to postpone facing and resolving this issue. It has festered for too long a time. Until clarity is provided, many individual and institutional donors will hesitate to give their money to nonprofit organizations that look as though they have become more a business than a charity.

Charities increasingly seem to be lowering their ethical standards as part of their fund-raising strategies. Local Boys and Girls Clubs, for instance, put soda machines in their buildings in exchange for a huge donation to the Boys & Girls Clubs of America by Coca-Cola. Money appears to have trumped a concern for the health of the children who attend the clubs. Similarly, the selling of billboards at university stadiums to companies willing to pony up large contributions, or deals between sports equipment firms and university basketball or football officials, send a message that institutions of higher learning can be bought by whoever is willing to pay the price.
The selling of nonprofit America is a trend that endangers the sector’s “nonprofit-ness.” Can we prevent the further erosion of nonprofit values? How? It is a matter that doesn’t lend itself easily, or at all, to government regulation and oversight.

But here, surely, is an issue that can test the sector’s desire for self-reform. Will the chancellors and presidents of our universities and colleges be willing collectively to stop the selling of their institutions to corporate and other financial interests? Will nonprofit organizations voluntarily adopt a code of ethics and conduct that will give top priority to organizational mission instead of fundraising at any cost? Will the major nonprofit associations be willing to organize a mass effort to promote and enforce among their members higher standards of conduct and ethical behavior? And will foundations, much in need of reform themselves, support such efforts financially?

And what about the problems of unethical behavior and conflicts of interest in the nonprofit world? For example: board members who have close ties, financial and family, to companies that provide services to their organizations; highly paid staff members of nonprofits who moonlight for other organizations; and the selling of mailing lists to commercial enterprises. Can we do something about these disturbing practices?

Clearly, some large nonprofit organizations like AARP can have an inherent conflict of interest between the services they sell to their members, the public-policy positions they take, and the profit-making enterprises they operate. A growing number of universities are accepting substantial corporate donations in exchange for corporate influence on their faculties and research efforts, including, in some instances, the right to review research findings before publication. Where do you draw the line? What is an acceptable balance between an organization’s mission and its business interests?

The answers to these questions will determine the extent to which the nonprofit sector is capable, in John Gardner’s words, of renewing itself.

**Promoting Democracy**

An even greater challenge to our nonprofit institutions will be their collective ability to promote and strengthen democratic institutions and practices.

From its earliest days, a primary mission of the nonprofit sector has been the preservation and strengthening of American democracy. This role has taken many forms: protecting civil liberties and individual rights; leveling the playing field for all citizens; building strong democratic institutions; providing a social safety net for the neediest members of society; and assuring a competitive free-enterprise system. Writing in the 1830s, the astute French observer of American society, Alexis de Tocqueville, noted that voluntary associations were at the heart of American democracy. Were he writing today, would he give such high marks to our voluntary sector as an effective promoter of American democracy?

The inequities in wealth and income have grown exponentially over the past two decades. The rich are richer and the poor are poorer than ever before in our history. The differential in pay between top executives of American corporations and the average worker in these corporations rose from a ratio of 72:1 in 1989 to 310:1 in 2000. The social safety net has been shredded if not entirely destroyed by our lawmakers. The minimum wage adjusted for inflation is lower today than it was 25 years ago. For many
Americans – the poor, people of color, the disabled, and other disadvantaged populations – the playing field is not level.

The enormous expansion of foundation assets in recent years has added to the inequities in American life. As public support for social programs, job training, affordable housing, and projects to feed the poor and temporarily house the homeless have been reduced, the burden for such responsibilities has increasingly fallen on private individual and institutional philanthropy. Public responsibilities are becoming a matter of private charity. An elite, growing, and unrepresentative group of private foundations are now making decisions about the allocation of funds for social welfare. In a sense, “noblesse oblige” is slowly taking over what should be public decision-making.

Far from leveling the playing field, civil society appears to have acquiesced or, at worst, abetted a national policy that has slowly made it more difficult for many citizens to enjoy equal opportunities and, at the same time, made it easier for wealthy citizens to assert greater control over society. Nowhere is this more evident than in the enormous abuse of power and influence that corporate America has exercised in recent years, both in the public and private sectors. Few checks and balances are in place to stem this corporate force. This was a role nonprofits were supposed to play, assisted by government and our political elites. Whatever the reason, it is imperative for the nonprofit sector to resume this role, to serve as a watchdog against further corporate abuses as well as government excesses.

Research, monitoring, and advocacy by citizen groups are the weapons that can provide the institutional balance between government, corporations, and civil society that is essential for democracy. Whether nonprofits will have the vision, resources, and courage to wage this important struggle will depend on two major factors: their acceptance – a departure for the large majority – of this role and a willingness to broaden their program agenda; and the willingness of foundations to end their reluctance to support the type of monitoring and advocacy that is needed to do the job.

Nonprofits have another major responsibility in assuring the vitality of our democracy: strengthening a political system that has become corrupted by big money, and rebuilding the credibility of government, especially the federal government, from which many citizens have become alienated. That is a tall order, but one for which the nonprofit sector is well suited. Its hundreds of thousands of organizations have the capacity to support and sustain campaign-finance reform measures; to promote greater civic engagement, especially by our young people; to encourage greater voter turnout through voter registration and education initiatives; to make certain that our schools teach American history and citizenship; and to make certain that their own organizations remain democratic, reaching out to those they represent so that their members may become more involved in organizational governance and programs.

**Making Nonprofit Groups More Democratic**

That task, what may be called the democratic renewal of nonprofit organizations, probably poses the most difficult challenge. During the past 25 years, the large national nonprofit organizations have lost much of their former membership. In a number of
cases, their chapters have lost influence; new large organizations have emerged without chapters.

Professional staff members and lobbyists have assumed responsibilities once exercised by members. Many people have become less engaged in community affairs. For so many, civic engagement now means writing a membership check. Many nonprofits have thus lost their real base in the community. Do they continue to speak for the people, for the community? If they want to be a greater force for influence and change, nonprofits need to reengage with their members, their constituents, and their communities. In a real sense, they have to become more democratic.

Who speaks for nonprofits? Large organizations, some actually trade associations, have been established to be a voice for their nonprofit members. Independent Sector purports to represent the views of nonprofits on sector-wide issues. Similarly, the Council on Foundations attempts to reflect the interests and opinions of the foundation world. And the National Council of Nonprofit Associations is a voice for the 40 or so state associations of nonprofits. But do they and the other significant associations really reflect the views of the sector as a whole?

Independent Sector, for example, does not have any local or state members. A substantial portion of its membership comes from foundations that represent only a tiny sliver of the nonprofit world. The nonprofit organizational members represent the most established, large nonprofits in the country; this membership doesn’t include many organizations that reflect the interests of activists, women, union members, youths, or low-income people. It is, in short, not a diverse group. While it has been a force for good on several national issues, its influence will be limited until it reaches out to encompass more diverse organizations and listens more carefully to what the field is saying. As long as such a large number of its members are foundations, the organization will find it difficult if not impossible to steer an independent course on philanthropic issues. Its missteps have come from too great a dependence on a small coterie of board members.

In protecting and promoting our democracy, civil society must be careful to assure that its own nonprofit institutions govern and act democratically. Many nonprofits and their umbrella organizations have not had the time or inclination to join together in an effort to study their sector, analyze its problems, and suggest ways to strengthen and improve its work.

It is time for a national commission – like the Commission on Private Philanthropy and Public Needs, headed by John Filer – to undertake this task and look seriously at the future. Composed of representatives from a cross-section of society, supported by an outstanding staff of researchers, policy analysts, and practitioners, this commission could not only provide useful data but also suggest a blueprint for civil society’s renewal and change. For several million dollars a year over a two- or three-year period, it could be one of the best investments ever made by our foundation community. There is nothing to lose and much to gain by such an effort.

A Sense of Perspective

In building for the future, finally, nonprofit practitioners must try to regain their sense of humor. Not too long ago, it was impossible to attend a conference of nonprofits
or philanthropists without hearing jokes and funny stories from featured speakers and other presenters. Laughter was an important ingredient of our work then, balancing our hard, sometimes frustrating efforts with a light touch that reminded us not to take ourselves too seriously.

Today, there is little humor in our conferences or among our personal interactions. We seem often to be driven by a puritanical streak that seals off our lighter side. Aren’t we, after all, doing good in the public interest, the Lord’s work as it were, plugging the dikes that protect our society? Is it such serious business that there is no place for laughter? Is it surprising, therefore, that some view us as self-righteous prigs, cocooned in our little solipsistic world? There is, unfortunately, a good deal of truth in this observation.

Sometimes we tend to forget that fun is part of our job. We need to enjoy our organizational responsibilities, our colleagues, our competitors, our opponents, and our benefits as nonprofit workers. We need to take our challenges, successes, and mistakes in stride. We have to understand the tensions and ironies that undergird our activities with a willingness to laugh at ourselves, not only at others. Joy and laughter – those are the elements that can provide a wholesome balance to dedication, zeal, hard work, and perseverance. A healthy sense of humor is the link that connects both sets of ingredients. It is what the nonprofit world desperately needs as it struggles to meet the challenges of the future.
What Is the Future for the Nonprofit World?
Responses

Diana Aviv is the President and CEO of Independent Sector, http://www.independentsector.org, a Washington-based nonprofit, nonpartisan coalition of more than 500 organizations that leads, strengthens, and mobilizes the charitable community:

Pablo Eisenberg has identified one of the key problems facing the charitable sector today: accountability. It is unfortunate that his accuracy declines so sharply when he claims that the people who work at and volunteer for America’s nonprofit organizations have been “burying their heads in the sand” on this issue. Nothing could be further from reality.

The most recent illustration of our sector’s work to strengthen governance, transparency, and ethics came in the tax reconciliation bill the Senate passed just before Thanksgiving. This legislation included reforms to areas such as donations of property, donor-advised funds, and Type III supporting organizations. Independent Sector and organizations across our community have worked hard in support of such provisions, which help correct abuses by taxpayers who claim excessive deductions and by individuals who use charitable organizations for personal gain.

This legislation continues our community’s longstanding dedication to accountability. The most striking and comprehensive example of this active engagement is the Panel on the Nonprofit Sector, which Independent Sector convened more than a year ago to examine ethics and accountability. The Panel has been a remarkable collaboration among thousands of people involved with charities – staff, board members, volunteers, donors, and government officials. It brought together people from all types and sizes of organizations, from across the country, and from a wide range of perspectives, all of whom volunteered their time in order to come up with ways to improve the conduct of all organizations.

The experts, practitioners, and academics who participated in this work recognized how vital the maintenance of high ethical standards is to our sector. Our success depends in large part on maintaining the public's trust, which we will receive only if we demonstrate that we are responsible stewards of the time and money donated to support the missions of our organizations.

The culmination of the Panel's detailed discussions and analyses came in the Final Report it released in June. The report – available at www.nonprofitpanel.org – recommends more than 120 closely integrated actions to be taken by charitable organizations, Congress, and the Internal Revenue Service. It recognizes that successful reform must include all three of those actors, and no single action can achieve the necessary results by itself.

The recommendations embody a series of important principles:

- They emphasize transparency and the importance of giving government officials and the public the information needed to make thoughtful decisions. For
example, they call on the government to make electronic filing mandatory, and on organizations to make tax and other financial information available to the public through the web and other methods.

- They strike the proper balance between providing oversight and protecting the independence that is a key element of the charitable community’s effectiveness. It is possible – in fact, it is essential – to stop abuses without stifling innovation.

- They also take into account the differences in size and capacity among the various charities and foundations. The thousands who participated in the development of the Panel’s recommendations agreed that every charitable organization should be expected to operate ethically and serve as a worthy steward of the resources entrusted to it. Fraud or abuse cannot be condoned in any organization, for any reason, since each breach of the public trust can damage the reputation of the entire sector. But the methods we require to demonstrate compliance with high standards of ethical conduct should be commensurate with the size, scale, and resources of the organization.

The Panel’s work has already led to improvements in how charities and foundations operate, and we know that others are now considering how to implement similar changes. The Panel is also completing a set of supplemental recommendations on issues such as unrelated business income and charitable solicitation.

Our sector must continue to work on these areas. Senator Grassley has already announced his intention to offer more legislation next year, and we expect that some state legislatures will be considering their own bills in these areas. Our organizations need to continue to work with lawmakers and explain to them how new rules can either support our efforts or impede them.

Charities and foundations also must continue to improve their practices. One theme that ran throughout the Panel’s field meetings was the desire of people across the country to learn how to strengthen their organizations’ governance. Independent Sector’s website already offers many resources, including a checklist for accountability and a model code of ethics, and we are developing model policies for areas such as audits and whistleblowers. We are far from alone in this effort: scores of organizations offer model policies and assistance to charities and foundations interested in improving their practices.

Our sector is taking these steps for one basic reason: so we can better fulfill our missions. Our organizations nurture our spiritual and creative aspirations, care for vulnerable people, protect our natural and cultural heritage, spread democracy, and find solutions to medical and scientific challenges. We are the launching pads of civic engagement and the architects of a decent society. And dedicating ourselves to maintaining the highest possible ethical standards is central to fulfilling those missions.

While not every critic is a visionary, every visionary is by definition a critic, unsatisfied with the status quo, who aspires to a better world. Pablo Eisenberg is just such a person. His “Looking Ahead” is made more interesting and relevant for all of us because the context and substance for his vision for a better world flows out of what he perceives as the failures of philanthropy and the nonprofit sector. What is that vision? It can be defined with one word – democracy, and more of it! Eisenberg is a Walt Whitman Democrat, like the one we meet in the opening lines of Leaves of Grass:

One self I sing, a single separate person,
Yet utter the word Democratic, the word En Masse!

All of the negative elements that Eisenberg criticizes within the nonprofit field – lack of public accountability and transparency, abuses and (in a few cases) corrupt practices of private foundation trustees and nonprofit managers, lack of oversight by the field and outside regulators, and increasing commercialization – represent a collective drift away from, and violation of, the fundamental “democratic” mission of the sector.

The dramatic and growing gap between the rich and the poor in the United States and around the world is a massive equity issue. Curiously, the same rich-poor issue is reflected in the two tiers of the nonprofit world, which is made up of wealthy institutions and small, struggling organizations. Wouldn’t it be interesting if, following Eisenberg’s suggestion, university endowments, some of which have grown to fabulous levels, were required to fulfill a five percent payout factor? It would be.

I agree with Pablo and his notion of civil society as the defender, advocate, and champion of a level playing field. Some of the changes that he advocates, in fact, are beginning to happen. For example, the Senate Finance Committee will certainly recommend that donor-advised funds make minimum pay-outs. Many of his laments, however, are not being addressed.

What Eisenberg wants is more openness on all levels and a new dimension of influence. It can be compared with the phenomenon that has its roots in the technology world and is called by many names: Open Source, Open Space, and the Flat World, for instance. At its core, it is characterized by an openness and transparency that allows ideas, data, services, products, and markets to flow more seamlessly across an ever-widening and inclusive landscape of participants. That flow is exactly what Eisenberg and others are looking for.

There is a growing movement, for instance, of “cooperative studies,” led by Howard Rheingold at Stanford, that is based on the notion that cooperative arrangements, interdependencies, and collective action in areas such as biology, technology, commerce, sociology, and society are propelling alternative ways of thinking and acting.¹ There is a

¹ Howard Rheingold at Stanford is now teaching a course on “cooperative studies,” and some of the references here are taken from his syllabus.
real resonance in these themes with themes of the Open Society, a term that expresses, for Eisenberg and many of us, the way we want the world to be – a world that acknowledges and combines counterintuitive elements and interdependencies. The question for those of us interested in how philanthropy and nonprofit organizations work toward social change and a better world is, What does this phenomenon teach us, and is there an opportunity to rethink the way we do things?

The economics of peer production, of collective action, especially the power of distributed computing, have radically shifted the knowledge-economic equation. The big example, of course, is the Internet, which is owned by no one yet provides the platform for immense economic development and wealth creation, and changes the way we live. Founder Steve Case, who I met in the heady early days of AOL, talked passionately about his vision of how the Internet could become a transformational force for the common good. Pierre Omidyar, founder of eBay, spoke with me more recently about how eBay from inception considered itself a community more than a marketplace. In fact, the Omidyar Foundation changed its name to the Omidyar Network to reflect this interconnectedness. The proliferation of blogs and the increase in web-based political and community organizing are evidence and instruments of what many people believe is a new wave of democratization.

Eric von Hippel, an economist and head of the innovation and entrepreneurship group at MIT’s Sloan School, offers a variation on the Open Source phenomenon-revolution. The leading edge of innovation in manufacturing is increasingly coming from users, not from manufacturers. This represents a huge shift. His examples range from surfboards to kites to surgical equipment. When Lego came out with a new embedded micro-chip product, users went wild and created a free website that quickly advanced the technology far beyond anything Lego had envisioned. The company had three engineers working on the product; all of a sudden there were thousands of “user engineers” conducting what von Hippel calls “personal fabrication.” That Lego had no idea how to respond was not surprising.

Von Hippel envisions “user-centered innovations developed by users transforming processes, business models, and even government policy, with research subsidies and tax-credits to support it.”

The analogue for social policy, philanthropy, and the way nonprofit organizations operate is quite direct. Major foundations more often than not have viewed themselves as the source of innovation, “the manufacturer,” with little if any input from recipient organizations and communities, “the users.” Strategic and Venture Philanthropists likewise often view themselves as crucial to innovation. It is assumed that the nonprofit organization recipients and programs will not, cannot, perform without them. Nonprofit organizations, which are often intermediaries between funders and communities being served, are sometimes guilty of the same patronizing assumptions about constituencies and clients. But for good reason, the trend is away from such centrally controlled assumptions. The potential for social change can only be diminished when the range of creative energy and thinking is narrowed or neglected.

Open Source philanthropy, with its user-centered theme, has become central to a new book I am laboring over, *The World We Want*. Interviews with a wide range of
people – Lucy Bernholz from Blueprint, Pierre Omidyar, Steve Case, Bill Drayton from Ashoka, Elyse Cherry from Boston Community Capital, Steven Melville from the Melville Charitable Trust, Dave Bergholz formerly of the Gund Foundation, Phil Cubeta of the Nautilus Group, Shirley Strong from Project Change, Peggy Dulany from the Synergos Institute, John Abele from Boston Scientific and Argosy Foundation, and Henry Izumizaki from TEAMS – all illustrate, even if the language is somewhat different, von Hippel’s thesis. The leading edge of innovation is on the ground, and it is upstream from the established order. It exists in what the Harvard physicist Lisa Randall calls the extra dimension, the place where genuinely new theoretical developments originate, often in parallel worlds to the established order – a theory of change that may very well fascinate Pablo Eisenberg.

So hang in there, Pablo. These new forms of inclusion and access are democratic to the core. Let’s figure out how to ride them!
Arthur Drache, Chairman of the Board of the International Center for Not-for-Profit Law, is a Canadian lawyer specializing in the tax treatment of charities and not-for-profit organizations, a regular contributor to *The Financial Post*, and the editor of *The Canadian Taxation of Charities and Donations*:

It is difficult for a non-American to make substantive comments on the Eisenberg article except to note that it raises issues which are potentially international in scope. But the fact of the matter is that Eisenberg’s observations about what is happening in the United States are not mirrored in Canada.

We do not, for example, have any scandals concerning overpaid trustees and directors, because the basic rule for charities (as opposed to non-profits, a much larger group) is that directors serve without remuneration, a position which hearkens back to the common law. While there have been cases of embezzlement, these have been very few and far between, and the reported cases involve comparatively small amounts of money. And we do not have serious problems of economic competition between private sector businesses and charities.

One reason, of course, may be that in Canada the state has had a major role in operating and funding large parts of what we would call the third sector, most notably in the area of health care and education, where “private” operations are, to say the least, unusual. There is also the common law role of the state in all matters involving “public” charities, a role undertaken to a greater or lesser extent through provincial attorneys general offices.

And while recent changes in the laws in Canada have attempted to make “charities” transparent, we have never seen much of a public demand for this. Indeed, while all registered charities (now about 85,000) have had to file public information returns that are found on the regulator’s website,\(^1\) such information has been available for almost 30 years for the asking. But anecdotal evidence suggests that the only ones who asked before the website posting were academics and individuals looking for “dirt” on organizations they didn’t like. In 30 years, we never had a potential donor who did such a search as a prelude to making a gift.

The main point, however, that I want to make is this.

The examples Eisenberg uses and refers to seem to be huge organizations, either in terms of operations or in terms of endowments. But in Canada (and, we suspect, in the United States as well), the vast majority of registered charities range from small to minuscule in size and are operated by volunteers. These include individual houses of worship, local daycare centers,\(^2\) single-issue local organizations (e.g., help for the homeless), and so on.

---

1. [www.cra-arc.gc.ca/dchmf/haip/srch](http://www.cra-arc.gc.ca/dchmf/haip/srch). The main federal regulator is the Canada Revenue Agency, known as the CRA. Some provinces do engage in limited regulation, primarily over such matters as fundraising.

2. Which are of course subject to oversight by provincial and municipal governments.
In Canada, we have a trend (which I suspect would be supported by Eisenberg) of increased reporting and financial oversight, along with government demands for still more transparency. The fundamental problem is that all such proposals are meant to apply to all registered charities.

It is fair to ask, for example, why the corner church with, say, 100 families as members has to produce the same detailed public reporting form as a multi-million-dollar international aid organization. Typically, the church raises funds only from its members, though it may run the occasional bazaar or bake sale open to others. It is typically run only by volunteers, and the only paid person is usually the member of the clergy who runs the services. The international aid organization, on the other hand, has scores if not hundreds of workers, raises funds from the public, and deals in millions of dollars annually.

Should these two organizations, both of which are “registered charities,” be subject to the same level of transparency and the same level of both public and private reporting? The knee-jerk answer is that donors to both organizations get tax relief for donations, and so the state has a right (or obligation) to exercise its oversight function. But what public good is there in letting somebody living 3,000 miles away get information about a church with which he or she has no connection at all?

The broader issue, it seems to me, is that while much can be said for high levels of oversight for very large organizations, legislators tend to enact rules that apply to everybody. Certainly they may ask for substantially more information from a private foundation with an endowment of hundreds of millions of dollars than from a smaller organization, but in practical terms the demand for information and the increasing complexity of the rules bear much harder on the small groups than on the large ones.

A small charity often cannot afford accounting or legal services – or if it retains professionals, ends up paying a disproportionate amount for services that are meant only to satisfy government, not its members.

Certainly in Canada, the trend is to keep demanding more information and more detail. And every “reform” proposal ends up creating burdens falling on the small organizations much more heavily than on the large ones.

Part of the political problem is in fact one that Eisenberg refers to: the issue of who speaks for the sector. In Canada, we have had a five- to seven-year exercise of consultation with the government, primarily through a body funded by government. This segued into a sectoral group, the Voluntary Sector Forum. But while both of these groups are well meaning, the main complaint from many in the sector is that they do not represent the “little guys” – who remain without much of an effective voice in policy-making issues.

Of course, this is understandable, given the problems of making contact with small organizations that are staffed only by volunteers. But the issue remains that whatever the problems of representation, these umbrella groups are not truly representa-

---

3 The Voluntary Sector Initiative, [http://www.vsi-isbc.ca/eng/about/index.cfm](http://www.vsi-isbc.ca/eng/about/index.cfm).

tive; consequently, the “solutions” to problems are often, at least as implemented, a burden to the small groups.

One lesson anybody involved in ICNL learns very quickly is that it is seldom appropriate to try to impose one country’s “solutions” to problems in the third sector on another country. The best we can do is to try to lay out for policy makers what is being done in other jurisdictions, with the hope that some aspects may be of use within the country in question.

This being the case, it is hard for a non-American to critique an article that focuses on U.S. problems. But I do believe that in assessing both problems and solutions, targeted legislation should be the name of the game, bearing in mind that in all likelihood, the problems and issues identified by Eisenberg apply only to a comparative handful of organizations, not to the sector as a whole.

The problems may be troublesome, but the solutions should take into account the fact that the vast majority of organizations are far from troublesome. It is bad policy to subject everybody to an onerous regime where only a few should be targeted.

Mr. Eisenberg’s article lays out an integrated set of challenges to the American nonprofit sector. The true problem, however, lies at a deeper level.

The nonprofit sector represents something approaching 10 percent of the American economy. Annually it receives on the order of $1.4 trillion of annual revenues and controls on the order of $2.5 trillion of assets. And that covers only the 40 percent of nonprofits that report fully to the Internal Revenue Service. Of course, removing health care and education from the equation deflates those figures considerably; $1.4 trillion becomes less than a hundred billion dollars. Still, a billion here and a billion there, and the total starts to add up.

The true problem, however, is that there are no reliable data about the sector. Without data, we are left with what Mr. Eisenberg has put forward – hypotheses and illustrations. The illustrations illuminate the hypotheses, but they do not prove them. He may be right; we suspect he is in some ways. He may be wrong; we suspect he is in other cases. The problem is that there is no way to know.

To put it another way, we cannot accurately prescribe therapy if we cannot diagnose. And we cannot diagnose without data.

What the sector needs is not a polemic. What it needs is data. If the Independent Sector and the Foundation Center truly want to make a difference, they do not need to hold meetings. What they need to do is forge multi-year partnerships with the five leading business schools in the nation and develop (a) a method for collecting data; (b) a longitudinal repository for that data; and (c) the results of original research. Such an effort is not needed at a single point in time; it is needed as a continuous flow. When the flow builds, donors, government, corporations, and the public will begin to expect the data. When expectations build, there will be no turning back, and the data platform under the nonprofit sector will be sustainable.
Bill Landsberg is an attorney and the Executive Director of The Pikes Peak Foundation for Mental Health:

Reading Mr. Eisenberg’s article reminded me again of the special yet fragile position that nonprofit organizations hold in our society. He asks if too many organizations are given tax-exempt status and notes that “such disparate institutions as hospitals and universities, social service agencies, grass roots activist groups, cemeteries, trade associations, a few insurance companies, cooperatives in fraternal organizations” are all included in the nonprofit sector. As Mr. Eisenberg points out, one of the distinguishing characteristics of the nonprofit sector is “missions that serve the public interest.” He notes that many of these organizations today do not meet that test.

I agree. Traditionally, we in the United States have valued nonprofit organizations for providing our society with the services that are considered vital yet unprofitable and therefore of no interest to the for-profit sector, or those that lack a sufficient political constituency and are therefore of no interest to the government. Organizations that do not fit within these parameters, yet seek tax exempt status, are attracting the scrutiny of government regulators more than ever and, in the process, threatening the sector as a whole.

We in the nonprofit sector are feeling the pressure from both houses of Congress articulated by Senator Charles Grassley and IRS commissioner Mark Everson. Recent and proposed legislation and the administration of substantive tax laws as they relate to nonprofit tax-exempt organizations make this an era of enforcement not seen since the beginning, when tax dollars were first permitted to be diverted away from the Federal Government and placed in the hands of nongovernmental organizations. While the tax reform act of 1969 represented a response to a relatively limited number of perceived abuses, primarily in the area of private foundations, this new era of enforcement seems more broadly hostile and skeptical, and fueled in large part by the media’s perception of abuse.

We make a grave mistake if we forget the traditional nonprofit models and their advantages to society, and allow nontraditional models to dilute and distort our sector. It is within these traditional models that nonprofit organizations possess their intellectual, moral, and practical effectiveness. Here, nonprofits provide services recognized by our society as vital. The American public will continue to value and support the nonprofit sector as long as it satisfies these needs.

I take slight exception to Mr. Eisenberg’s assertion that the nonprofit sector is paying little attention to matters of governance, excessive compensation of officers and executives, conflicts of interest, and lack of public accountability. The nonprofit executives and board members I know are acutely aware of this hostile atmosphere and are scrambling to deal with possible abuses in the areas of “commerciality,” “private benefit,” and “private inurement.”

Mr. Eisenberg claims that nonprofit leaders such as Independent Sector have failed to exercise their responsibility in these areas. I would refer him to Mark W. Everson’s letter of March 30, 2005, to Senate Finance Committee Chairman Charles
Grassley. In that letter, Mr. Everson praises the Independent Sector, the sponsor of the National Panel on Nonprofits, for a “thoughtful and constructive report to our committee,” which encouraged government enforcement of the law and called for tougher rules for charities and foundations.

Mr. Eisenberg cites transparency and public accountability as the most pressing need in the nonprofit sector. However, Mr. Everson, in the same letter, claims that a positive development in recent years is the improvement in “transparency” within the tax-exempt sector. Specifically, he praises increased press and public scrutiny of nonprofit organizations’ tax Forms 990.