



**INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW**

**VOLUME IV ISSUE 3**

**JULY 2006**

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## LETTER FROM THE EDITOR

Dear Readers,

It is with great regret that I must report to you that our loyal friend and colleague Frits Hondius has passed away. He was a remarkable individual, and this issue of the INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW is dedicated to him. Because his death was so recent and the email attaching this letter is the first news that many of you will have of it, please feel free to send additional eulogies for Frits, and we will post them on our site. You can address them to me at [simon@law.edu](mailto:simon@law.edu). We have already posted one eulogy – from Lester Salamon -- and we hope to have many more to send to his children within a few months.

Our work with Frits goes back a long way – and it is only fitting that we should dedicate this issue of IJCSL to him. He was one of the people we consulted as we began to bring together the individuals who eventually participated with us in forming the International Center for Not-for-Profit Law (ICNL) in 1992. His wise council has remained with us throughout the intervening fifteen years, and we hope at some point, as we begin to look back on those years of discovery and innovation with the current ICNL staff, to be able to chronicle Frits' involvement with our endeavors to create an organization that would be dedicated to creating a more enabling legal environment for civil society.

I certainly remember well the letter he asked us to read into the record at the first [“Regulating Civil Society” conference in Sinaia, Romania in 1994](#) (ICNL's first regional conference). He admonished us then, as he would continue to do throughout the years, that civil society itself will not thrive if it is too heavily regulated. Yes, he said, there is need for regulation of the organizations that comprise civil society in order to ensure that they act appropriately and do not harm the rights of others, but this should only go so far.

These are wise words, and it is important to bear them in mind as we look at the state of civil society “regulation” in the world today. Some regimes are involved in what Frits would regard as over-regulation. There are various reasons for this – some people cite to the “color” revolutions, which clearly were instigated in part by democracy promotion funds from Western governments. Others cite to terrorism threats in various countries, and there is no question that such threats have restricted civil society activities, even in Western countries. Still others mention the corporate governance scandals, both in the for-profit and the not-for-profit sector, as leading to the creation of more rules and processes of enforcement.

While this all seems by no means to have put an end to the [“global associational revolution” that Lester Salamon described in his Foreign Affairs article in 1994](#), it does represent a retreat from the heady views expressed at the beginning of the 1990's, after the fall of the Berlin Wall and the end of apartheid in South Africa. The view from 2006 is more nuanced—it recognizes accomplishments in the field but it also addresses the strains felt because of terrorism, the backlash against strident Western democracy promotion efforts, and the fact that there is a real and not unwelcome feeling that the organized civil society sector should be better regulated after corporate governance scandals.

The articles in this issue of IJCSL present this more nuanced view of what is going on with respect to state-civil society interaction at the present time in various parts of the world.

- In his paper on the “Islamization of Democracy,” Dr. Mohamed Between discusses the ways in which Muslim countries can use their own values and perspectives to

democratize. Obviously such an approach to a confounding issue of the time is one that needs discussion and analysis. Dr. Berween provides us all assistance in beginning or continuing a valuable dialogue on such issues.

- In her paper on “The IRS Political Activities Enforcement Program for Charities and Religious Organizations,” Kay Guinane raises important questions and concerns about whether the IRS is over-stepping its bounds in a zealous effort to regulate political speech by the sector that is arguably not forbidden “electioneering.”
- In the Special Section on China, we present two papers that address the current legal environment in that country in different ways—
  - Susan Kaur’s paper “The Third Sector: The Law in China and Non-profit Organizations” presents important new research on the way in which the sector is growing in response to the current legal rules and government oversight mechanisms that affect it.
  - Prof. Berthold Kuhn’s paper, on the other hand, takes a more practical approach to the issue of state-CSO relations in China; in “Government-NGO Cooperation in the People’s Republic of China – Experiences from Yunnan,” he highlights three case studies that deal with actual cooperative projects in service provision.
- Our Student Article, by recent graduates of the Catholic University of America’s Social Work Program, looks at volunteerism in the United States. As part of their paper “Volunteerism in the United States – An Analysis of Volunteering in Not-for-Profit Social Service Organizations,” Michelle M. Powell and J. Christie Wrightson explore examples of current volunteer activities and projects, followed by the presentation and analysis of the methods and results of a survey conducted by them to underpin the theories they present in the paper.<sup>1</sup>
- We also present a Country Note, written by Dr. Otmar Oehring, which discusses increasing concerns about the freedom of religion in Turkey and what that issue means for Turkey’s accession to the EU; as well as a Book Review by myself of the new book published by the Verlag Bertelsmann Stiftung, entitled The European Foundation.

All in all this is an exciting issue, and one I am sure that Frits is happy to have dedicated to him! It includes papers that address some of his most important concerns, written by authors from a variety of backgrounds. All of us on the Editorial Board hope our readers enjoy reading the issue as much as we have enjoyed putting it together.

Best wishes,

Karla W. Simon  
Editor-in-Chief

PS: As noted in April, this is the first issue for which Kevin Schwartz serves as Managing Editor. If you have any questions about reproduction rights, etc., please do not hesitate to be in touch with him at [schwartz.ijcsl@yahoo.com](mailto:schwartz.ijcsl@yahoo.com).

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<sup>1</sup> The paper was written for the first inter-disciplinary course in Comparative Civil Society Law offered in the United States. The course has been part of the curriculum of the Catholic University of America School of Law and the Center for International Development for five years.

## IN MEMORIAM:



**Frits W. Hondius**  
1927 – 2006

Dr. Frits Hondius had a long and varied career in law and development.

- He was the first Secretary of the [Institute of Social Studies \(ISS\)](http://www.iss.nl) in the Netherlands, which he recalled in the following essay published by ISS in its Newsletter in 2001. The entire text is available at <http://www.iss.nl/devissues/issnews31.pdf>.



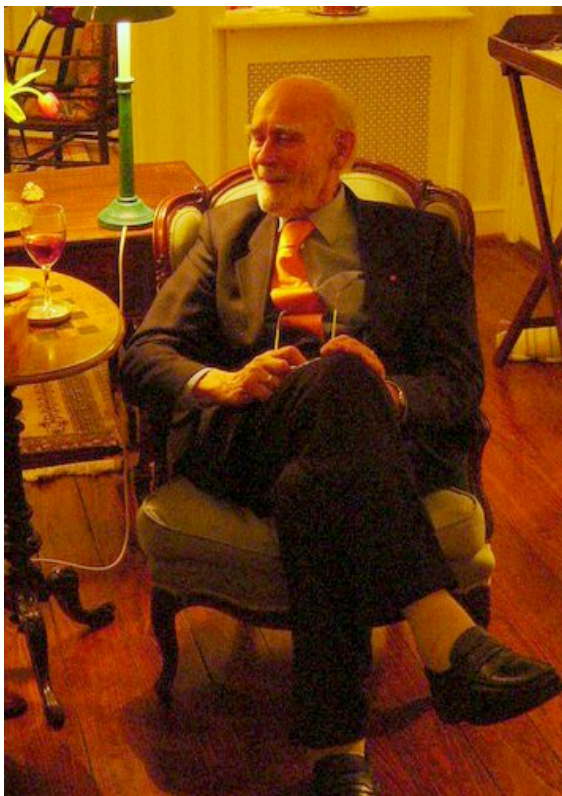
### **50 Years of the ISS - The First 10 Years by Dr. Frits Hondius**

*On Friday, 10 October 1952, the Institute of Social Studies was opened by Prince Bernhard of the Netherlands with a witty speech in which he measured the growing interdependence between the world's nations by the speed with which he was able to get delivery of his favourite Italian wine. The ceremony followed practically the same pattern as the Dies Natalis programme which has been an annual event on the Institute's calendar ever since. Members of the board of trustees and a bevy of ambassadors and Dutch notables in the front rows. Behind them the rank and file of academic and administrative staff and the first crop of course participants, then simply called 'students'. Drinks to follow. (The cover of the invitation is included above.)*

- He worked for the [Council of Europe](http://www.coe.int) for many years, in its legal department and held a variety of posts, including as Deputy Director of Legal Affairs. He worked on issues such as privacy and data protection, legal ethics, the environment, and the legal framework for civil society. Dr. Hondius was also first Secretary to the [Steering Committee on the Mass Media \(CDMM\)](http://www.cdmn.nl), which was formed in 1981.
- He was involved with Interphil and Europhil, two organizations that were pre-cursors to CIVICUS in their promotion of global civil society.

- In his capacity as Assistant Secretary General, [International Commission on Civil Status](#) (ICCS) [Netherlands], he served for many years as member of the Executive Council of the [Union of International Associations](#).
- He was a representative of [Transparency International to the Council of Europe](#). TI was officially granted NGO consultative status with the Council of Europe, effective 21 December 2001.
- He was a noted author of books and articles; his most recent work (with Paul Bater and Penina Lieber) was: THE TAX TREATMENT OF NGOS: LEGAL, FISCAL AND ETHICAL STANDARDS FOR PROMOTING NGOS AND THEIR ACTIVITIES.
- At the time of his death, Dr. Hondius was working with ICCSL, as Roving Reporter for Europe; his most recent article appeared [in the July 2005 issue of IJCSL](#) (on the Warsaw Summit of the COE).

#### **Frits Hondius at the ICSL Reception February 2006**



#### **EULOGIES FOR FRITS:**

According to *Dr. Lester Salamon*, “[Frits] was an unbelievable character, full of energy and spirit, an unusual mixture of old-world charm and modern savvy, and with a deep and abiding interest in civil society in all its manifestations. I’m delighted that he made it to one of our Fellows conferences so that his memory will live on in this unique global family of civil society activists and scholars.”

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## IJCSL EDITORIAL POLICY

July 2006

Dear Reader,

**CONTENT – The IJCSL publishes articles on a variety of topics**, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed herein do not necessarily reflect the views of the IJCSL or its editorial staff.

**STYLE – The IJCSL publishes articles by contributors from around the world.** Therefore, the IJCSL uses a flexible editorial policy regarding questions of style. Articles submitted by persons for whom the English language is native are edited based on the author's original syntax and spelling. Articles submitted by persons for whom the English language is not native are edited according to American English style.

Occasionally, the IJCSL publishes articles in languages other than English. In those instances, articles are published as submitted and the IJCSL provides an English-language summary.

**QUESTIONS & COMMENTS – The IJCSL welcomes readers' questions and comments** on items it publishes. If you have a question or comment, please contact:

Karla W. Simon, Editor-in-Chief    [simon@cua.edu](mailto:simon@cua.edu)  
Kevin Schwartz, Managing Editor    [schwartz.ijcsl@yahoo.com](mailto:schwartz.ijcsl@yahoo.com).

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

We look forward to hearing from you, and thank you for your interest in the IJCSL.

Sincerely,

The IJCSL Editorial Staff and Editorial Board

PLEASE CITE AS

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



## ARTICLES

### THE ISLAMIZATION OF DEMOCRACY:

#### THE POLITICAL REQUISITE OF DEMOCRACY IN THE MUSLIM WORLD

BY MOHAMED BERWEEN, PH.D.\*

#### ABSTRACT

This paper begins by asserting that despite the attractiveness of the concept of democracy across the globe, it is still an ambiguous and difficult term to define. Literally, it means the rule of the people, but what this exactly means is not clear. For instance, whereas president Abraham Lincoln defined it as “government of the people, by the people, for the people,” President James Madison, the father of the American Constitution and the first political scientist in America, described democracies, in the Federalist No. 10, as: “... ever ... found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.” Which one is correct? Maybe Winston Churchill, the former prime minister of Britain, who once said that “democracy is the worst form of government except for all the others” is the most correct.

In this paper I will define democracy as a political system which is based on choice, competition, respect for human rights, and the rule of law. And I define democratization as the process by which a political system changes from a non-democratic to a democratic one.

Further, I argue that the process of Islamizing democracy in the Muslim countries faces seven substantial challenges over the coming years. These challenges are as follows: (1) providing choice; (2) establishing constitutionalism; (3) creating competition; (4) building strong institutions; (5) solving the crisis of political leadership; (6) demilitarizing politics; and (7) minimizing external influences.

For successful democratization of the Muslim countries, the Islamist groups must be able to participate freely and fully in the political process. The democratization process must come from Muslims themselves, otherwise it will not succeed. I will conclude this paper by emphasizing the following points: (1) In order for democracy to succeed in the Islamic countries, it has to be Islamized – meaning, it has to be redefined in Islamic terms and make it acceptable to the Muslim masses; (2) Islamizing democracy is the best way to stabilize the Muslim world and to get rid of extremism; (3) There is no question that

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\* Associate Professor of Politics and Administration, Department of Social Sciences, Texas A&M International University, 5201 University Boulevard, Laredo, TX. 78041 USA, [Mbenruwin@tamiu.edu](mailto:Mbenruwin@tamiu.edu). This paper was presented at the Center for the Study of Islam and Democracy’s 7th Annual Conference “The Challenge of Democracy in the Muslim World. Held May 5-7, 2006 in Washington, D.C.

the vast majority of Muslims desire justice, liberty, peace, and representative political institutions: (4) I agree with all those who argue that Islamizing democracy is still a work in progress and that a great deal of hard work remains; (5) It has to be understood that democratization in Muslim countries will not be easy, nor will it be cost-free – people will die and dictators will become more brutal; and finally, (6) If the West and the United States are sincere in their support for freedom and democracy in the Islamic countries, they have to stop supporting dictatorship in these countries. They must open dialogue with the Islamists who believe in respecting the rule of law and be willing to accept modern, democratic Islamic states.

The Muslim masses, like everybody else, love freedom, equality, peace, justice, and democracy, but most of them are frustrated and angry because they do not enjoy these values in their own societies. The main reason for this anger and frustration is that the Muslim World has been ruled since its independence by various forms of authoritarian regimes where the state has controlled all aspects of its citizens' lives. The purpose of this paper is twofold: First, to define the concepts of democracy and democratization; and, second, to argue that there are seven substantial challenges facing the process of Islamizing democracy in the Muslim World over the coming years.

#### **A. THE CONCEPTUAL PROBLEM: DEMOCRACY AND DEMOCRATIZATION**

Let me start by asserting that despite the attractiveness of the concept of democracy across the globe, it is still an ambiguous and difficult term to define. Literally, democracy means the rule of the people, but in reality, it means different things to different people. For instance, whereas president Abraham Lincoln, in his Gettysburg address in 1863, described it as “a government of the people, by the people, for the people” (McClenaghan, 1994, p.13), President James Madison, the father of the American Constitution and the first political scientist in America, described democracies as: “[having]... ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths” (James Madison, *The Federalist* No. 10).

Which one is correct? Maybe Winston Churchill, the former prime minister of Britain, who once said that: “democracy is the worst form of government except for all the others”(Sorensen, 117). Or maybe professor Robert Dahl who offers the most generally accepted listing of what he terms the “procedural minimal” conditions that must be present for modern political democracy (or as he puts it, “polyarchy”) to exist. These conditions are: (1) control over government decisions about policy is constitutionally vested in elected officials. (2) elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon; (3) practically all adults have the right to vote in the election of officials; (4) practically all adults have the right to run for elective offices in the government; (5) citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined; (6) citizens have the right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law; and (7) citizens have

the right to form relatively independent associations or organizations, including independent political parties and interest groups (Dahl, 1982, p. 11; Quoted also in: Schmitter and Karl, 1991), pp. 75-87.).

In this paper I will define democracy as a political system which is based on choice, competition, respect for human rights, and the rule of law. I will define democratization as the process by which a political system changes from non-democratic to become democratic. In other words, it is the process by which a political system changes from non-democratic to a more free, competitive, open, and participatory system.” Or as professor Charles Hauss puts it: “the establishment of a democratic political regime.” (Hauss, August 2003).

## **B. THE POLITICAL REQUISITE OF DEMOCRACY IN THE MUSLIM WORLD**

There are seven substantial challenges facing the process of Islamizing Democracy in the Muslim countries over the coming years. These challenges are: (1) providing choice; (2) establishing constitutionalism; (3) creating competition; (4) building strong institutions; (5) solving the crisis of political leadership; (6) demilitarizing politics; and (7) eliminating (or at least minimizing) external influences.

### **1. Providing Choice**

The first challenge facing the Islamic countries is how to allow all citizens the freedom to choose. If there is not the freedom to present all sides of an issue, can there be a real choice? Here, I would argue that there is no idea that is more central and important to Muslim values than the concept of choice. To Muslims, choice means the right to be free. And since citizens – in every modern society – are the most distinctive elements in the state, they must have the right to choose: what, when, how, and who, should govern them in order for a democracy to succeed and survive. This means that citizens constitute a community of equals (symbolized by "one man, one vote"). It means, also, giving people other choices such as economic and cultural choices. Providing a choice means that there are certain things government cannot and should not do. For instance, the government must explicitly be prevented from denying citizens the right to practice the religion of their choice and the right to say and write whatever they please. But since choices have no universal meanings and are not absolute, they might be sometimes restricted. These restrictions however must be determined by relative existing conditions stated in a social contract – usually called a constitution – accepted by all citizens. Finally, the principle of providing choice is closely linked to a major principle that government should be limited: governmental powers should be defined and limited by a constitution.

### **2. Establishing Constitutionalism**

The second challenge facing the Islamic countries is how to establish constitutional rule based on Islamic Sharia and the rule of law. A constitutional system is one that organizes government, places limits on its scope, defines rights, responsibilities, and duties of

citizens, and sets due processes for individuals should the government exceed its authority. In order to achieve this the Islamic countries must include, in their constitutions, at least the following provisions:

*a. The supremacy of Sharia and the rule of law*

In the Islamic countries there would be no substitute to relying on Sharia in making laws. By the supremacy of Sharia I mean that all laws passed by a government and its branches must not contradict the fundamental principles of Sharia. We need to understand that what distinguishes Islamic democracy from Western democracy is not that the latter is based on the concept of popular sovereignty, in which political authority rests ultimately in the hands of the people, while the former is not. Rather, it is in the understanding of the relationship between religion and state. Generally speaking, there can never be a total separation of religion and state in any country, for even the United States does not have a complete separation of religion and state. For example, in the United States: "...The House of Representatives unanimously passed a resolution that the motto 'In God We Trust' be placed behind the Speaker's Desk in the House Chamber" (Stephenson at el, 1992, p. 109). This motto 'In God We Trust' is also placed on the U.S. Dollar. Both houses of the United States Congress also have chaplains who pray at the beginning of each day's session; and both include "So help me God" in their oath taking. Also, both use the Bible to make oaths by placing the right hand on the Bible.

The idea of constitutional rule refers also to the rule of the law. It means equality before the law, or equal subjection of all citizens in the society to the laws of the land. The main point here, I would like to emphasize, is that in the Muslim countries there is a lack of respect by the ruling elites for the rule of law. In other words, the Muslim countries have a constitutional crisis, which means that they do not have a nation based on the rule of law. Muslims are eager to have a government of laws and not of men. The challenge here is not in writing a constitution, rather it is in implementing it and making it a reality. The very existence of a written constitution does not imply the rule of law. Actually, almost all Muslim countries have written constitutions, but do they respect and abide by them?

*b. The principle of separation of powers*

In addition to having a constitution; a popular control over government; and, a freedom of choice, the Islamic countries need to implement the principle of separation of powers. In the Federalist (No. 51), James Madison – the principal architect of America's separation of powers and checks and balances system – "... identified two major threats to liberty: (i) "factions" (or interest groups) who seek their own good at the expense of the common good, and (ii) the excessive concentration of political power. Madison's solution was the creation of a strong national government with separation of powers and checks and balances" (Tannahill and Bedichek, 1988, pp. 46 - 47).

This principle has been implemented as the division of powers among the three branches of government – the legislature, the executive, and the judicial branches, with

the legislative branch making laws, the executive applying and enforcing the laws, and the judiciary interpreting (or upholding) the laws. The reason for this system is to provide protection against political tyranny. It is to ensure that no one branch of government holds too much power and to reduce the risk that a single branch might act independently and abuse power. Or as James Madison stated it: “there can be no liberty where the legislative and executive powers are united in the same person ... [or] if the power of judging be not separated from the legislative and executive powers ....” (Lowi and Ginsberg, 1992, p. 88).

*c. The principle of majority rule and minority rights*

The reconciliation of majority rule with minority rights is one of the great dilemmas of democracy. This principle means that a government follows the preferences of the majority of voters but protects the interests of the minority. The preservation of minority rights does not, of course, mean that the policies of the minority must be accepted by the majority. Rather, it means that the minority must be granted certain basic freedoms. At his first inauguration in 1801, the U.S. President Thomas Jefferson described the relationship between majority and minority this way: “bear in mind the sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect” (Volkmer, 2004, p. 9). In a democracy, majority rule is legitimate only if it respects and protects the rights of the minority.

3. Creating Competition

The third political requisite for democracy to succeed in the Islamic World is establishing a competitive political system, a political system that will enable citizens to get what they want out of their governments and allow free competition among all groups in the society. To achieve this there must be genuine competition for all elected offices in the society. This means that public offices should be open to all talented and ambitious citizens, whatever their social origins or status.

The ultimate goal must be to establish a political system that allows all political elites that accept the state's constitution to compete for all governmental positions through a free and open electoral process. Professor Robert Dahl offers the most generally accepted listing of what he terms the “Procedural minimal,” or conditions that must be present, for modern competitive political democracy to exist. These conditions are: (1) control over government decisions about policy is constitutionally vested in elected officials; (2) elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon; (3) practically all adults have the right to vote in the election of officials; (4) practically all adults have the right to run for elective offices in the government; (5) citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined; (6) citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law; and, (7) citizens have the right to form relatively independent

associations or organizations, including independent political parties and interest groups (Dahl, 1982, p.11; Quoted also in: Schmitter and Karl, 1991, pp. 75-87).

#### 4. Building Strong Institutions

The fourth challenge facing the Islamic countries is how to create strong, independent, and modern political institutions. To be practical, democratic principles have to be translated into actual institutions. It is obvious to every political observer in the Islamic countries that the Muslim world lacks strong and independent political institutions. Unfortunately, the military is the only strong, modern, and powerful institution that has been established in the Islamic countries since their independence. Therefore, I would argue that to Islamize democracy we must establish strong political institutions that provide reasonable expectations and enable all citizens to exercise their constitutional rights. When this situation exists all political elites will feel free and become engaged constructively in the political process. As George Sorensen states it: "elite groups will support democracy only insofar as they feel certain that their interests will be looked after under more democratic conditions" (Sorensen, 1998, p. 29). Some political scientists, such as professor Samuel Huntington, conceptualize the whole political development as the institutionalization of a society. He defines institutionalization as the process by which organizations and procedures acquire value and stability. "... And the level of institutionalization of any political system can be defined by the adaptability, complexity, [and] autonomy of its organizations and procedures." (Huntington, 1965, p. 394). The institutionalization of a society is also essential for political representation. One could argue that it would be very doubtful that any modern democracy would survive without political representation. The question is not whether or not there will be political representation, but how these representatives are chosen and then held accountable for their actions or nonactions. All this would not be accomplished without strong and modern political institutions. Therefore, the institutionalization of the society is a must to consolidate and strengthen democracy.

#### 5. Solving the Crisis of Political Leadership

The fifth challenge facing Islamic countries is how to solve the crisis of political leadership. The main barrier to a transition from authoritarianism toward democracy in the Islamic countries is fundamentally the lack of political will by the current political leaders of these countries. It is often true that when a collective action is successful, it is the top leaders who often are mentioned in the history of nations. For instance, Stevenson (1984) argues that American history is largely the history of the American presidency. It is a history of men rising to the demands of their time in an office that afforded them power to govern: Lincoln preserved the Union and freed the slaves; the Roosevelts are remembered for war and reform; Truman for a political and economic world order; and Kennedy for the space program and the Cuban missile crisis (Stevenson 1984, 18).

Unfortunately, the Islamic World today faces a crisis of political leadership and it is essential to solve it in order to Islamize democracy. Effective political leadership permits a ruler to take advantage of his country's economic and military capabilities and lead his

country toward a prosperous future. Gabriel Almond argues that “democratization can occur whenever the leaders, pressured or influenced by democratization elsewhere, begin moving in the democratic direction” (Almond, Gabriel, et al, 2002, p. 195).

## 6. Demilitarizing Politics

The sixth political requisite for democracy to succeed in the Islamic World is the demilitarization of politics. Unfortunately, the military is the only strong, modern and powerful institution that has been established in the Islamic countries since their independence and a new democratic government needs to be able to govern without military interference. Professor Fawaz Gerges describes this challenge as follows: “...The fact that the new elite that assumed power after the end of colonialism came mostly from the military-security apparatus, one that is deeply hierarchical, rigid and authoritarian.”(Gerges, April 30, 2005).

I would argue that the biggest threat to Islamizing democracy is the role of the military in politics. In order for democracy to flourish, in the Islamic countries, new democratic institutions need to be able to govern without military interference. This means that civilian control over the military is essential for democracy to succeed. Direct military intervention in the political process should be the exception rather than the rule in the modern state.

I would also argue that the demilitarization of politics could be achieved by, at least, the following: (1) strengthening the political civil institutions in the society – this will decrease the probability of military intervention in politics. The military may be welcomed as a means of ridding the state of the old corrupt and inefficient politicians. Therefore, the failure of the existing political institutions to establish a legitimate base and to win the respect and support of the citizens and the powerful groups within the state is a particular problem for new nations that might lead to military intervention. (2) Legitimizing civilian control over the military. The probability of military intervention increases as the legitimacy of the political system decreases. (3) Prohibiting the military from interfering in domestic politics and limiting its role to the maintenance of national security against external threats. This is, for instance, what characterizes the role of the British military throughout its recent history. The primary domestic political activity of the British military is to convey its needs and interests to the government. Because of this clear role of the British military, the most recent military intervention in British politics occurred in the seventeenth century, when the revolt of the army brought about a military dictatorship under Oliver Cromwell, which lasted only twelve years (Roth and Wilson, 199, p.323). In the United States, since its independence in 1776, the military intervened in domestic politics only once, during the civil war of 1861–1865.

In addition, demilitarization of politics could be achieved by (4) the formation of rival military groups to counterbalance the traditional military; (5) relocating all the military bases and barracks outside the cities, especially the capitals – there is no constructive and rational reason for allowing the government to establish military barracks inside the major cities; and, (6) the depoliticization of the military. This simply means that politics

should be taken out of the military. One of the main things that needs to be emphasized here is that soldiers should not be partisan. They must be neutral and focus on their main goal of protecting the state's sovereignty and constitution.

## 7. Eliminating (or at Least Minimizing) External Influences

The seventh and final political requisite for democracy to succeed in the Islamic World is to eliminate (or at least minimize) external influence. For this to be achieved, the following is necessary: (1) the United States and the West must stop supporting dictatorship in the Islamic countries. This is one of the main challenges facing the Islamic countries. Or as Fawaz Gerges puts it: "...Like their counterparts elsewhere, Arabs and Muslims have struggled to free themselves from the shackles of political authoritarianism without much success, thanks partly to the support given by the West, particularly the United States, to powerful dictators." (Gerges, April 30, 2005). (2) The Islamists must be allowed to participate freely and fully in the political process, otherwise, these countries will continue to have a participation crisis, which is a conflict that occurs when the governing elites view the demands or behaviors of individuals or groups seeking to participate in the political system as illegitimate. It is a crisis that takes part in the making of governmental decisions. In other words, the democratization process must come from Muslims themselves otherwise it will not succeed. What the United States and the West need to recognize is that the Islamists, as Carrie Wickham puts it: "...do not reject the principle of democratic reform per se; on the contrary, in their official programs and public statements, they claim to be among its staunchest advocates. What such leaders object to is not so much the content of the U.S. reform initiative as the ulterior motives alleged to lie behind it." (Wickham, 04 November 2004).

We need to remember that it is not the Islamists but the exploitation of the fear factor that has precluded the democratization of Islamic countries. Actually, there is nothing unique or intrinsic about Islam that inhibits democratic governance. (3) The United States and the West need to show their good intentions to the Muslims. They have to demonstrate that they are in the region to help the Muslim masses to get their liberty and determine their destiny. I agree with professor Fawaz Gerges when he states that "...still, in the minds of many Arabs and Muslims, liberal democracy remains synonymous with Western political hegemony and domination."

Democracy tends to be seen as a manipulative tool wielded by Western powers to intervene in Arab/Muslim internal affairs and to divide and conquer" (Gerges, April 30, 2005). Most of the Muslims see the U.S. democracy initiative, led by president Bush, as part of a larger war against Islam. (4) If the United States and the West are serious about democratizing the Islamic world then they have to abandon the Western concept of secularism. In the Muslim countries it will be impossible to separate politics from Islam and the best solution for these countries is to Islamicize democracy. Unfortunately, according to Michael Hirsh:

"...Lewis's Kemalist vision of a secularized, Westernized Arab democracy that casts off the medieval shackles of Islam and enters modernity at last, remains the core of George W. Bush's faltering vision in Iraq. His administration's official goal is still dictated by the



“Lewis Doctrine,” as The Wall Street Journal called it: a Westernized polity, reconstituted and imposed from above like Kemal's Turkey, that is to become a bulwark of security for America and a model for the region”

(Hirsh, 05 June 2005). If this is true then I would argue that the American democratization process in the Islamic countries is destined to failure and ensure that the time for establishing secularized and Westernized democracy, in the Islamic World, is gone.

## CONCLUSION

Let me conclude this paper by emphasizing the following: first, in order for democracy to succeed in the Islamic countries it has to be Islamized – meaning, it has to be redefined in Islamic terms, concepts, and make it acceptable to the Muslim masses. Second, when the Islamizing of democracy takes place, it will lead to stabilization and get rid of extremism. Enabling the Islamists, who accept the rules of the game and respect the state's constitution, is the best and most effective way to curb the growth of extremism. Third, there is no question that the vast majority of Muslims desire justice, liberty, peace, and representative political institutions. Fourth, I agree with all those who argue that “Islamicizing liberal democracy is still a work in progress; a great deal of hard work remains.” (Gerges, April 30, 2005). Or as professor Fawaz Gerges puts it “...Muslim and Islamic democrats have been trying to Islamize democracy and modernity and strip them of their Western clothing. Although they have come far, the journey is just beginning.” This means that time should be our friend, not our enemy. The main thing is to start this process and make sure to do it right.

Fifth, it has to be understood that the democratization process in these Islamic countries will not be easy or cost-free, people will die and dictators will become more brutal Sixth, and finally, if the United States and the West are sincere in their support for liberty and democracy in the Islamic countries then they have to stop supporting dictatorship in these countries and open genuine dialogue with all Islamists who respect the rule of law. The United States and the West must also be ready, and willing, to accept modern and democratic Islamic states. Let me conclude by re-stating that Islam is compatible with democracy, or as Professor Daniel Pipes puts it: "there is nothing in Islam that necessarily contradicts democracy" (Pipes, 2005). There will be no genuine democracy in the Islamic countries without allowing full participation to the Islamists. Marginalizing the Islamized, by limiting their participation, is the wrong approach to ruling the Islamic countries.

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# THE IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS: QUESTIONS AND CONCERNS

BY KAY GUINANE\*

## EXECUTIVE SUMMARY

The Internal Revenue Service's (IRS) new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech. The Political Activities Compliance Initiative (PACI), has resulted in unresolved audits and lingering questions about the standards used. This report summarizes the new program procedures, new compliance guidance from the IRS and raises issues and questions that must be addressed to ensure charities and religious organizations can continue to play their essential role in public policy debates. There are two supplements to the report: one detailing the agency's 2004 enforcement program, and one describing known cases that are currently or have been under investigation.

## QUESTIONS AND ISSUES ABOUT THE IRS POLITICAL ACTIVITIES COMPLIANCE INITIATIVE

### *Vagueness of the Facts and Circumstances Test and the Reasonable Belief Standard*

Charities, educational institutions, and religious organizations are among tax-exempt organizations described in Section 501(c)(3) of the Internal Revenue Code. They are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. But tax law lacks clear rules defining prohibited intervention in elections, instead considering the "facts and circumstances" of each case.

### *Is the Political Activities Compliance Initiative a Solution in Search of a Problem?*

The answer is far from clear. IRS statements exaggerate the level of noncompliance by charities and religious organizations. The IRS claimed 74 percent of cases investigated involved violations, a figure based only on cases that were not dismissed after two rounds of investigation. A closer look at the IRS data reveals a very different picture. In all, no violation was found in 64 percent of all completed investigations.

### *Is the IRS Program Effective Enforcement or an Unconstitutional Infringement on Speech?*

Several factors, when taken as a whole, raise constitutional concerns around the PACI program:

- *The vagueness of the "facts and circumstances" test;*

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- *Secrecy regarding enforcement actions;*
- *IRS statements regarding its intent to prevent repeat violations before an election;*
- *The threat that an organization's tax-exempt status will be revoked; and*
- *The lack of deadlines for closing cases.*

#### *Uneven Enforcement and Harassment Issues*

A lack of transparency creates confusion and uncertainty about the enforcement process. Section 6103 of the tax code protects the privacy of individual charities and religious organizations. It also has prevented the IRS from adequately informing the public of the agency's interpretation of the law. Absent a bright line test, the most useful information for avoiding noncompliance comes from details of specific cases. So far what has come to light raises concern about unevenness in how the IRS treats similar fact situations.

Also, publicity around the PACI program could lead to a flood of retaliatory and harassment complaints in the 2006 election year, unless the IRS develops standards to screen out such abuses of its procedures.

#### *Sanctions: Should the Law be Changed?*

IRS staff has recommended changes in the law that would provide them with more enforcement options. But what sort of legislative modifications are anticipated? No specific proposals have been made public. Congress could devise a bright line test, add intermediate sanctions, such as advisory letters, to the IRS enforcement tool box, or both.

## **CONCLUSION AND RECOMMENDATIONS**

The IRS's new approach to enforcement could hamper nonpartisan issue advocacy and voter education and mobilization efforts. Our concerns derive mainly from the lack of a bright line rule defining what is partisan and what is not, coupled with "fast track" procedures.

Our review of the program has led us to conclude that:

- *The IRS should make clear that a charity's right to criticize elected officials is not suspended because an election is taking place. There is not widespread violation of the ban on intervention in elections.*
- *Concrete guidance, bright line rules defining partisan intervention, and/or safe harbors should be considered so that charities can know what is and is not allowed.*
- *The IRS must ensure that charities and religious organizations and IRS agents have clear, specific guidance to promote evenhanded enforcement. It should develop complaint standards and investigate how other agencies deal with harassment situations.*
- *Nonprofits should consider what types of changes in the process, including sanctions, are best for the sector and be ready to respond if Congress acts.*

We hope the nonprofit sector and government officials, including the IRS and Congress, will engage in a thoughtful discussion of ways to overcome these challenges and take action accordingly.

## **HISTORY OF THE PROGRAM**

Since the 2004 election, the Internal Revenue Service (IRS) has stepped up its enforcement of the ban on partisan electoral activity by charities and religious organizations through a controversial new program. The result has been a number of unresolved audits and lingering questions about the standards used. This report intends to educate nonprofits about the new IRS procedures and call attention to the issues and problems they raise. There are two supplements to the report: one detailing the agency's 2004 enforcement procedures, and one describing known cases that are currently or have been under investigation.

On Feb. 24, 2006 the IRS released its assessment of the 2004 program to the public. The report found that a significant number of organizations investigated had violated the ban, but only three were serious enough to justify revocation of tax-exempt status. At the same time, the agency released guidance that includes detailed examples based on situations that led to investigations in 2004, and published new enforcement procedures for expedited handling of referrals alleging violations. According to the documents, the agency's goal is to deter any ongoing violations.

Charities, educational institutions, and religious organizations are among tax-exempt organizations described in Section 501(c)(3) of the Internal Revenue Code. They are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. Consequently, these organizations cannot endorse any candidates, make donations to their campaigns or become involved in any other activities that, directly or indirectly, may be beneficial or detrimental to any particular candidate. Even activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria violate the political campaign prohibition of Section 501(c)(3).

Tax law lacks a clear set of rules defining prohibited intervention in elections, instead considering the facts and circumstances of each case. Facts emerging from the 2004 audits indicate the IRS may be blurring the line between partisan intervention in elections and legitimate issue advocacy. This has a chilling effect on charities and religious organizations that want to express a point of view on current issues of interest to their constituencies. The 2006 enforcement procedures, called the Political Activities Compliance Initiative (PACI) fail to address this problem; their implementation in early 2006 has, in fact, raised additional questions.

It is important to enforce the current rules that prohibit charities from engaging in partisan electioneering. However, the implementation of the "facts and circumstances test" on an expedited basis has resulted in unresolved audits, unsubstantiated complaints, and ultimately, a chilling of charities' free speech.

## **JULY 2006 REPORT**

### **Introduction**

The new Political Activities Compliance Initiative (PACI) procedures apply to the 2006 election season and beyond. According to IRS officials, its goal is deterrence, and action "while the issue remains prominent, so that there are no reoccurrences and so correction could occur prior to the relevant election." The IRS also says it wants to educate charities and religious organizations and to give notice about the program. The major change is the timing of investigations. The IRS will no longer wait for an annual return [Form 990] to be filed or the tax year to end before beginning



an examination. However, no timeframe is given that spells out how long an IRS agent has to complete an investigation. The IRS refers to this as an “expedited” or “fast track” process.

The IRS will treat PACI cases “on a priority basis” by sending them to a Referral Committee, which will decide whether to proceed after reviewing the information. A majority vote (2 of the 3 members) will be needed to continue the investigation.

If an investigation proceeds, the Referral Committee will assign it to one of three categories:

- *Type A: single issue/non-complex, that the IRS expects to resolve through correspondence with the organization.*
- *Type B: multiple issue/complex, that involve more than one organization and/or issue and will require site visits by IRS examiners.*
- *Type C: egregious/repetitive: requires immediate action by IRS. Examples given for this category include widespread advertising supporting a candidate, political contributions that could drain a group’s treasury, or “clear and continuing support or opposition of a candidate.”*

Non-religious groups under investigation will be sent form letters and information document requests (IDRs) that will list details of the alleged misconduct and request an explanation. Copies of referral information from public sources will be enclosed, along with a notice from the IRS explaining the rules prohibiting intervention in elections. In Type C cases the initial contact letter will be sent within five days of receipt from the Classification Unit and give the organization seven days to respond.

Examinations of religious organizations are governed by special rules, as required by Section 7611 of the tax code. The Director of Exempt Organization Examinations must personally review the complete case file and approve what the IRS calls a “church tax inquiry” and examination letters. As with non-religious organizations, IRS agents are given no deadline for completing their work.

## **1. NEW ENFORCEMENT PROCEDURES FOR 2006**

A PACI case may be resolved by written advisory “if the taxpayer exhibits an understanding of the IRS’s position that a prohibited activity occurred, the violation was a one time, isolated, unintentional event, the organization corrected the violation (e.g. recovered funds), and the organization is not likely to violate the prohibition again.” The written advisory must include a warning and pertinent facts. The organization is not obligated to admit wrongdoing. The procedures state that when an organization does not agree that a violation has occurred “depending on the nature of the violation, if it is clear the organization intends to continue the activity, revocation and/or excise tax under section 4955 should be considered.”

The plan includes internal procedures for the IRS to reclassify a case if, after further investigation, it uncovers facts that make the case fit another category. Information on PACI cases that are closed with advisory letters, assessed excise tax or have revocation proposed will be kept for five years to “ensure that previous violations are considered on current referrals.”

The new IRS Fact Sheet 2006-17 “is intended to help organizations understand what they can and cannot do when an election campaign is underway.” The guidance covers activities that brought on IRS scrutiny during the 2004 election, including voter mobilization, individual

activities by leaders, voter guides, candidate appearances, issue advocacy, business activity, web sites and combined activities.

The guidance notes that the tax code's prohibition on partisan activity by charities and religious groups (501(c)(3) organizations) applies to candidate elections at the local, state and national level. It stresses that prohibited intervention includes "any and all activities that favor or oppose one or more candidates for public office. The prohibition extends beyond candidate endorsements." The IRS will use all facts and circumstances to determine whether political intervention has occurred.

### Specific Activities

#### *Voter Education, Voter Registration and Get Out the Vote Drives*

These activities are permissible "if they are carried out in a nonpartisan manner." Two examples illustrate extreme fact situations, but the circumstances of most permissible nonprofit voter mobilization will fall somewhere in between the examples.

#### *Individual Activity of Organization Leaders*

The IRS notes that high-level organizational officials can speak on important public policy matters, or on partisan electoral matters as individuals. It advises organization leaders to "clearly indicate that their comments are personal and not intended to represent the views of the organization."

## **2. NEW GUIDANCE**

#### *Candidate Appearances*

The fact sheet notes that candidates can attend a group's events in many capacities, as a candidate, a public official, expert or member of the general public. The IRS warns that "the candidate may not be familiar with the organization's tax-exempt status and that the candidate may be focused on compliance with election laws that apply to the candidates' campaign rather than the federal tax law that applies to the organization." Therefore, organizations should make their own determination about how to handle candidate appearances. When a group invites a candidate, the IRS says it should:

- *Provide all candidates seeking the same office an equal opportunity to appear, including consideration of the nature of the event and manner of presentation;*
- *Not indicate support or opposition to any candidate, and explicitly state its neutral position when the candidate is introduced and when publicizing the event; and*
- *Not allow any campaign fundraising during the event.*

#### *Speaking or Participating as a Non-candidate*

The IRS says when a candidate appears at events in some other capacity, such as officeholder or expert, or attends an event open to the public, the event is not automatically considered partisan.

IRS Fact Sheet 2006-17 provides many examples illustrating its guidance. For instance, it explains that permissible candidate forums can include separate appearances by candidates made at similar meetings where each has an equal opportunity to address questions on a wide variety of topics and the publicity had no comments on candidate qualifications. Where one candidate declines to appear, an organization must note that the order of candidate appearances is random

and that the absent candidate declined to participate. The sole example of an impermissible forum involves a group asking just one candidate to appear.

#### *Issue Advocacy vs. Political Campaign Intervention*

Unclear distinctions between advocacy on issues, including criticism of public officials, and the endorsement or opposition of candidates became a controversial issue under the IRS's 2004 enforcement program. This section of the fact sheet states that "501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office..." but "must avoid any issue advocacy that functions as political campaign intervention." Further, it notes that "[a] communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election." It then ambiguously adds that "[n]evertheless, the communication must still be considered in context before arriving at any conclusions."

The IRS explains that investigations will consider all facts and circumstances to determine whether issue advocacy or partisan electoral activity has taken place, including whether a communication:

- *Identifies one or more candidates;*
- *Expresses approval or disapproval of one or more candidates' position on an issue or an action taken;*
- *Is made close to the date of the election or refers to voting and the election;*
- *Raises an issue that distinguishes candidates;*
- *Is part of an ongoing series on the issue that are not timed to the election; and*
- *Is timed to influence a non-electoral event, such as a vote on specific legislation.*

#### *Voter Guides*

The guidance stresses that voter guides must not focus on a narrow range of issues or be structured to reflect bias. Key questions cited for determining if a voter guide violates the prohibition on campaign intervention are:

- *Are the questions and descriptions of issues clear and unbiased in both structure and content?*
- *Are the questions in the guide the same as the ones sent to the candidates?*
- *Do candidates have a reasonable amount of time to respond and explain his or her position in their own words?*
- *Are the candidates' answers unedited and published in close proximity to the questions?*
- *Are all candidates running for an office included?*
- *Do the questions cover most issues of interest to the electorate as a whole?*

"If the organization's position on one or more issues is set out in the guide so that it can be compared to the candidates' positions, the guide will constitute political campaign intervention", according to the IRS. In addition, the IRS notes that distribution of biased voter guides prepared by other organizations can still amount to a violation of the ban on partisan activity.

#### *Other*

When a charity or religious organization sells or rents mailing lists or leases office space to candidates, or accepts paid political advertising, it must make these services available to all candidates and charge its usual rates. The IRS points out that statements on websites will be treated in the same way as print statements. It notes that links to candidate materials are not

prohibited intervention if all candidates are represented or there is an exempt purpose served by offering the link. All facts and circumstances will be taken into account.

The IRS's new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech. While the program's stated intention is to address infractions before relevant elections, IRS investigations take time and are not necessarily completed before an election. In cases where no violation has occurred, this approach could result in silencing legitimate, constitutionally protected speech.

In the agency's report on its 2004 enforcement effort, the IRS acknowledged that the PACI procedures present "unique challenges," including:

- *"concerns regarding freedom of speech and religious expression";*
- *the fact that there is "no bright line test for evaluating political intervention";*
- *media reports on a small number of organizations that "create an impression of widespread noncompliance";*
- *the IRS's limited options for sanctions when violations occur; and*
- *privacy laws that limit the IRS' ability to discuss enforcement action.*

(See **Supplement A: The 2004 Enforcement Program: Procedures and Results**)

We would add the potential chilling effect on advocacy and voter education and mobilization activities to this list. The new agency guidance, however, does not adequately address these "unique challenges." The chief problem may be the lack of a bright line test for charities and religious organizations to determine when their advocacy or voter mobilization work could be considered partisan electioneering. This problem compounds the negative impact of the other challenges cited by the IRS.

This section raises issues and questions that must be addressed to ensure charities and religious organizations can continue to play their essential role in public policy debates.

### **3. LEGAL AND POLICY QUESTIONS**

#### **Is the Political Activities Compliance Initiative a Solution in Search of a Problem?**

IRS statements regarding the results of its 2004 enforcement program give an exaggerated impression of the level of noncompliance by charities and religious organizations. The 2004 effort only dealt with 127 new referrals for investigation. Sixty-four cases were already pending, and 20 of those were leftover from the prior year. The total number of cases investigated in 2004 involve only 191 of the more than one million 501(c)(3) organizations recognized by the IRS.

The agency's report on the 2004 program claimed to have "found some level of prohibited political activity by section 501(c)(3) organizations in nearly three-quarters of the cases reviewed." However, this 74 percent figure was based only on cases that were not dismissed after two rounds of investigation. A closer look at the IRS data reveals a very different picture. Overall, 59 of the 191 cases were dismissed immediately, leaving 132 to be forwarded to the field for further inquiry. At that stage another 22 were dismissed as not meriting further investigation. That left 110 for full investigation, just 61 percent of the original referrals.

The IRS has completed 82 of the remaining 110 examinations, finding that partisan activity occurred in 58 of them. That means that, to date, violations were found in only 30.3 percent of all referred cases, and 35.5 percent of completed investigations, including dismissed cases. Only three, just over 1 percent, of these were serious enough to warrant revocation of tax-exempt status. In all, no violation was found in 64 percent of completed investigations.

At the time of the report's and new procedures' release, IRS Commissioner Mark Everson told the City Club of Cleveland that more enforcement was needed, citing "a dramatic increase in the amount of money financing politics." He asked the audience, "Are we going to let these political activities spread to our charities and churches?" He then made a call to action "before it is too late."

Everson's claims mix apples and oranges, by referring to the increase in contributions and expenditures by 527 organizations, which are recognized political action committees, to justify stepped-up enforcement against 501(c)(3) organizations. Confusion about categories of tax-exempt organizations and the different rules that apply to them already abounds. This kind of statement only worsens that confusion.

Research data demonstrates that charities and religious organizations are well aware of the prohibition on partisan electioneering. In 1999, Tufts University, OMB Watch, and the Center for Lobbying in the Public Interest launched a research project to investigate the public policy role of charitable organizations. The project's findings were based on a national survey of a random sample of 1,738 tax-exempt public charities, the survey respondents' IRS Form 990, interviews, and focus groups.

The survey found that 87 percent of charities are aware that they cannot endorse candidates for office. In fact, many have an overly restrictive understanding of the tax rules with 43 percent believing they could not sponsor a candidate debate or forum. According to these findings, charities and religious organizations understand the rule, and if anything, are overly cautious. Although the IRS found a misperception among some nonprofit and church leaders that they only have to avoid open endorsements of candidates, most know better.

The known cases (which are summarized in **Supplement B: IRS Political Activity Investigations: Publicly Disclosed Cases**) demonstrate that some groups are, in fact, testing the limits of what is allowed. Their actions, however, do not amount to widespread noncompliance that justifies expedited action that may silence perfectly legal communications and voter education by charities and religious organizations.

*Conclusion: There is not widespread violation of the ban on intervention in elections. The IRS should provide greater clarity in future statements on this issue.*

### **Is the IRS Program Effective Enforcement or an Unconstitutional Infringement on Speech?**

The IRS has made clear in several statements that the purpose of its enforcement program is to deter repeat violations of the ban on partisan intervention in elections. While this sounds like good law enforcement policy, in light of a number of factors, PACI procedures raise significant First Amendment issues. In addition, the expedited procedures are inconsistent with the Internal Revenue Code and IRS regulations, according to the NAACP, which is currently challenging them.

Several factors, when taken as a whole, raise constitutional concerns around the PACI program:

- *The vagueness of the “facts and circumstances” test used by the IRS to determine what constitutes prohibited partisan activity.*
- *The lack of clear rules makes it difficult for charities and religious organizations to know how the IRS will view any particular communication or activity, and the IRS has extremely broad discretion in applying the test.*
- *Secrecy regarding enforcement action. Because Section 6103 of the tax code prohibits the IRS from disclosing information about its investigations, the exact facts and circumstances the agency believes constitute partisan electioneering remain a mystery.*
- *IRS statements regarding its intent to prevent repeat violations before an election imply an expectation that organizations notified of pending investigations cease the activities in question, even though no determination of wrongdoing has been made.*
- *The threat that an organization’s tax-exempt status is more likely to be revoked if it continues the activities in question while the IRS investigation is pending.*
- *Lack of deadlines for closing cases once a group has been contacted by the IRS. Long investigations that remain open in subsequent election cycles leave organizations unsure about how the IRS may view current activities. Cases involving the NAACP and the California-based All Saints Church are among 22 still open from 2004.*

In nearly two-thirds - 64 percent - of the political activities enforcement cases from 2004, it was determined that no illegal intervention had taken place, and many of the discovered violations were minor. From these circumstances, an important question for 2006 arises: should charities and religious organizations have to cease legitimate activities while the IRS investigation is pending, despite no clear IRS definition of what is considered partisan?

The totality of factors surrounding the PACI program may well add up to a system that allows censorship through intimidation. Although the IRS has not explicitly forbidden groups it investigates from continuing the activities under scrutiny it has been clear that continuing the activity increases the risk of revocation of tax-exempt status.

The Supreme Court has held that “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (See *Bantam Books v. Sullivan* 372 U.S. 58 (1963)). The Court has dealt with this issue in the context of news publications, control of obscene material and regulation of meetings and parades. In the cases involving media, the high court noted that the fact that a bad actor may abuse the system does not justify prior restraint. The same principle should apply to IRS enforcement of the ban on partisan electoral activity by 501(c)(3) organizations. Cases involving parades and meetings upheld permit systems, under which the decision-maker had clear limits on his or her discretion. Under the PACI program, the IRS has extremely broad discretion in applying the facts and circumstances test and no timeframe for when it must act, further contributing to the program’s prior restraint problem.

Concerns have also been raised that groups that disagreed with the IRS finding of partisan intervention in the 2004 election may have felt pressure to admit wrongdoing, in order to get advisory letters rather than risk revocation of their tax-exempt status. IRS action in the All Saints case suggests this has happened. In that case, the IRS told church officials, if they admitted wrongdoing and agreed not to allow sermons critical of public officials during future election seasons, the IRS would not pursue the case further. All Saints rejected the offer, and its case is still pending.

Have other groups felt forced to accept advisory letters and cease activities, rather than run the risk of losing their tax-exempt status? There are no appeal rights at this stage of an investigation. A group that wishes to challenge the IRS adverse finding must either wait and contest revocation of exempt status, or pay an excise tax and seek a refund in order to force the case to court, as the NAACP has done.

The agency's 2006 procedures acknowledge that, in some cases, a group being examined will not agree that a violation occurred. According to those procedures, "In these situations, depending on the nature of the violation, if it is clear the organization intends to continue the activity, revocation and/or excise tax under section 4955 should be considered."

The new expedited process is not specifically authorized by the tax code or IRS regulations. The NAACP argues that the IRS must wait until a group files its annual Form 990 before taking adverse action. In cases of flagrant violations, the IRS already has the power to invoke Section 6852 of the Internal Revenue Code, which gives the agency the authority to seek an injunction, ordering the 501(c)(3) organizations to cease the activity immediately. This process, while forcing a charity or religious organization into court, at least provides it with some form of due process and a guarantee of impartiality. Under the PACI program, on the other hand, the IRS becomes prosecutor, judge, and jury.

*Conclusion: In order to avoid a chilling effect on legitimate activity, the Political Activities Compliance Initiative should include clear timelines for completion of investigations and due process rights for organizations under scrutiny. The "fast track" process should be reconsidered.*

#### **Vagueness of the Facts and Circumstances Test and the Reasonable Belief Standard**

IRS Fact Sheet 2006-17 states "all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office." The agency will use all facts and circumstances to determine whether political intervention has occurred. While rulings and fact sheets provide some guidance for nonprofits, in the end the IRS has a great deal of discretion in making determinations. The problem of vagueness also is apparent in the first step in the investigation process. The IRS uses a "reasonable belief" standard to determine whether to proceed with an investigation, but the IRS has not defined this standard.

A complaint against the Pennsylvania Pastors Network (PPN), described in **Supplement B** to this report, illustrates the difficulty created for all concerned by the program's lack of definition or clear criteria. In that case, the network of religious groups sponsored an event aimed at getting out the vote for a ballot initiative, which is permissible as a lobbying activity. The public official they invited to speak, Sen. Rick Santorum, was also running for re-election and numerous references to the election were made. Was the event promoting Santorum, the ballot initiative, or both? How could PPN plan its event in a way that ensures it will not be subject to an IRS investigation? What factors will the IRS consider as it reviews the complaint filed against PPN?

Something more than a "smell test" is needed, especially with First Amendment rights involved. IRS Revenue Ruling 2004-06 indicates some of the factors the agency will use to distinguish issue advocacy from partisan electioneering. The IRS, however, has wide discretion in weighing these factors. In contrast, the IRS letter to the NAACP explained in plain language that the group was being investigated because "in a speech made by Chairman Julian Bond, Mr. Bond

condemned the administration policies of George W. Bush on education, the economy and the war in Iraq.”

Simple opposition to an elected official’s policies or positions has never previously been considered opposition to that official’s reelection. In the absence of clear standards defining what constitutes intervening in an election or what amounts to a “reasonable belief” that a violation has occurred, charities and religious organizations are left wondering whether the IRS has not unilaterally expanded the law and contracted their speech rights.

*Conclusion: Concrete guidance, bright line rules defining partisan intervention, and/or safe harbors should be created.*

### **Uneven Enforcement and Harassment Issues**

The IRS report on its 2004 program was a rare, if incomplete, glimpse into the enforcement process. The report revealed more about the agency’s internal procedures than the criteria it used to judge what facts and circumstances led to the determination that partisan electioneering had occurred. Still, it was a start. We strongly encourage the IRS to continue to report on the types of activities it finds violate the law and provide greater detail. For example, redacted versions of advisory letters or notices of revocation of exempt status would give charities and religious organizations a clearer idea of what activities they should avoid.

The enforcement process’s lack of transparency creates confusion and uncertainty. While Section 6103 of the tax code protects the privacy of individual charities and religious organizations, it also has prevented the IRS from adequately informing the public of the agency’s interpretation of the law. Absent a bright line test, the most useful information for avoiding noncompliance comes from details of specific cases. Currently, we only know the facts of specific cases presented in the public statements of groups filing complaints and those willing to disclose that they have received notice that they will be examined. We learn of these cases mainly through the media. So far what has come to light raises concern about unevenness in how the IRS treats similar fact situations.

For example the IRS launched its investigation of All Saints Episcopal, based on a 2004 sermon that criticized both candidates for president and the war in Iraq, causing Americans United for Separation of Church and State to question the IRS’s impartiality. Executive Director Rev. Barry Lynn told reporters that, while he could understand why the IRS might question the All Saints sermon, he could not understand “why the tax agency did not take the same view about an even more partisan sermon by a Baptist pastor in Arkansas who preached on the successes of George Bush.” The *Arkansas Democrat-Gazette* reported that the IRS had declined to pursue an investigation of the church, even though the sermon praised Bush and criticized Kerry.

Similarly, the slow pace of IRS action in the case of two Ohio churches, World Harvest and Fairfield Christian, is out of step with the 2006 PACI procedures. The expedited procedures that apply in cases involving religious organizations outline seven steps that should take no more than 54 days. The complaint in this case was sent to the IRS on Jan. 17, 2006, so some action was expected by mid-March. The IRS has yet to contact the two churches, leading many to wonder if no decision on whether to investigate has been made, because the IRS is behind on its PACI deadlines. If the IRS’s silence on the case means a decision was made not to take action, serious questions about equitable application of the PACI program—in this case, whether a “reasonable belief” that a violation has occurred exists—need to be asked.



From these cases and others, the question arises: how can there be consistency in enforcement without defined standards? Are IRS employees being trained to look for facts that indicate a non-electoral purpose in an activity? What kinds of checklists are being used? Absent a bright line rule, at the least, a more formal process is in order.

The IRS's Fact Sheet 2002-10 explains how the agency treats complaints from third parties and what procedures they take to ensure "compliance programs are not improperly influenced by outside intervention." All referrals, regardless of their source, are treated the same, according to the fact sheet. However, the procedures do not establish any criteria to filter out referrals that are intended to harass groups on the other side of an issue. Given the contentious nature of policy debates and political campaigns, complaints motivated by a desire to harass or weaken an opponent are likely to be numerous, and anecdotal evidences suggests this could be the case.

Publicity around the PACI program could lead to a flood of retaliatory and harassment complaints in the 2006 election year, unless the IRS develops standards to screen out such abuses of its procedures. Two complaints filed in early 2006 illustrate the potential for abuse inherent in the IRS's reliance on referrals from the public for leads in its enforcement programs. On March 14, 2006, Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint against Americans for Tax Reform (ATR) and Americans for Tax Reform Foundation (ATRF), alleging activities that "may violate IRS regulations and require a revocation of their tax-exempt status." The following day, ATR filed a counter-complaint against CREW, alleging that CREW, a 501(c)(3) organization, engages in prohibited partisan activity because the majority of its ethics complaints have been filed against Republicans.

ATR also cites as evidence of partisanship, the facts that CREW Executive Director Melanie Sloan worked for Democratic members of Congress prior to joining CREW and that other CREW staff members have worked for liberal groups. If the IRS allows past employment or personal associations of staff to be considered in PACI investigations, it will open the door to highly questionable evidence and guilt by association. The IRS should not allow its limited enforcement resources to be wasted in this way.

*Conclusion: The IRS should develop standards for complaints and investigate how other agencies deal with harassment situations. It should ensure that charities and religious organizations and IRS agents alike have clear, specific guidance that will promote evenhanded enforcement.*

### **Sanctions: Should the Law be Changed?**

The tax code spells out only two possible sanctions for violating the ban on partisan activity: revocation of exempt status and/or imposition of excise taxes on the organization and its managers. The written advisory letter process used by the IRS in its 2004 enforcement program is not specifically authorized. However, it serves a very useful purpose by addressing one-time or minor violations in a way that allows the organization to correct errors and continue its charitable or religious work.

The IRS evaluation of the 2004 program said the general approach in cases resolved through written advisories (warnings) should be re-evaluated in the future. "Additional measures may be needed if a significant number of these organizations are found to engage in political intervention in future years," according to IRS staff. They now strongly recommend stricter enforcement, suggesting that "the IRS increase its use of revocation in cases that warrant this sanction," raising a red flag for nonprofits. While IRS officials and agents involved in the PACI program generally believe more guidance for both IRS agents and the public would be helpful, it has been suggested

by some among them that “legislative modifications may be necessary to ensure our ability to effectively regulate in this area.” What sort of legislative modifications are anticipated? No specific proposals have been made public. Congress could devise a bright line test, add intermediate sanctions, such as advisory letters, to the IRS enforcement tool box, or both.

*Conclusion: Nonprofits should consider what types of changes are best for the sector and be ready to respond if Congress acts.*

We fear the IRS’s new approach to enforcement of the ban on partisan intervention in elections by charities and religious organizations could hamper nonpartisan issue advocacy and voter education and mobilization efforts. These concerns derive mainly from the lack of a bright line rule defining what is partisan and what is not, coupled with “fast track” procedures. While Revenue Rulings and fact sheets provide general guidance, the day-to-day experiences of charities and religious organizations can be much more complex than anything covered in such documents. An organization may well find itself asking whether to speak out on pending legislation, a perfectly legal act, if an elected official that will vote on the bill is also running for reelection.

#### **4. CONCLUSION AND RECOMMENDATIONS**

Our review of the program has led us to conclude that:

- *The IRS has taken an important and constructive step forward by publishing a report on its 2004 enforcement program and providing more guidance in its new fact sheet. The IRS should also make clear that a charity’s right to criticize elected officials is not suspended because an election is taking place.*
- *There is not widespread violation of the ban on intervention in elections. The IRS should be more accurate about the facts in its future statements on this issue.*
- *Concrete guidance, bright line rules defining partisan intervention, and/or safe harbors should be considered.*
- *The IRS should develop standards for complaints and investigate how other agencies deal with harassment situations. It should ensure that charities and religious organizations and IRS agents alike have clear, specific guidance that will promote evenhanded enforcement.*
- *Nonprofits should consider what types of changes in the process, including sanctions, are best for the sector and be ready to respond if Congress acts.*

We hope that the nonprofit sector and government officials, including the IRS and Congress, will engage in a thoughtful discussion of ways to overcome these challenges and take action accordingly.

## **SUPPLEMENT A: RESULTS AND PROCEDURES OF THE 2004 ENFORCEMENT PROGRAM**

This is a supplement to the report *The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns* that details the agency's findings on its 2004 enforcement procedures.

In 2004, the IRS created new procedures to review, and expedite enforcement of, allegations of improper partisan electoral activities by 501(c)(3) organizations. The 2004 program stirred controversy when the National Association for the Advancement of Colored People (NAACP) revealed that it was being investigated because its chairman, Julian Bond, criticized President George W. Bush's policies on the war in Iraq and other issues during a speech at its annual convention. The NAACP accused the IRS of having partisan motives, after the agency sent them notice in September 2004 that it would be audited. The group had been conducting get-out-the-vote activities at the time.

In response to these accusations, the IRS asked the Treasury Inspector General for Tax Administration (TIGTA) to investigate. The results of this investigation were revealed in February 2005, when TIGTA published its *Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations*. It describes the process established in June 2004 to "fast track" referrals and prevent recurring violations by 501(c)(3) groups.

Thirty-four of the random sample of 80 groups selected for examination by TIGTA were religious organizations, and slightly more pro-Republican groups than pro-Democratic groups were selected for further investigation, according to the TIGTA report. TIGTA found no indication that the cases it reviewed were handled inappropriately. However, the report did not address whether the IRS has the authority to "fast track" these cases absent a flagrant violation, nor did it identify the types of fact situations that lead to examinations.

In response to concerns expressed by nonprofits and members of Congress, the IRS published a report on the results of the program, but acknowledged that it intended to expand its enforcement effort in 2006.

### *IRS Report on 2004 Program: Procedures and Findings*

The IRS evaluation of its 2004 program, titled *Final Report: Project 302 Political Activities Compliance Initiative*, describes the intent of the new approach to enforcement, the procedures themselves, and results of the investigations to date. The report also makes recommendations for the 2006 election year enforcement program.

Prior to 2004, political intervention cases were not expedited. The regular enforcement process, described in the Internal Revenue Manual, allowed the IRS 60 days to evaluate referrals, and had no deadline for completing a case. However, because of the political tension surrounding the 2004 election, the IRS expected an increase in the number of referrals of potential violations. The IRS initiated the expedited process in June 2004, according to the report, because the agency wanted the program to serve as a deterrent.

Under the 2004 program, referrals were reviewed by three career civil servants knowledgeable in tax law. Each member reviewed the file independently and documented his or her recommendations. The cases were then reviewed jointly, and two of the three committee members had to agree to refer a case for examination before any further action was taken. If one

member dissented his or her view was included in the file. This process occurred weekly rather than the usual monthly review. The standard for determining whether to proceed was whether a “reasonable belief ” existed that a violation had occurred, although the report does not define “reasonable belief.” Once a case was selected for further investigation, the next steps were to be made within 7-10 days instead of the normal 30-90 days.

In 2004 there were 191 PACI cases, divided into three categories:

- *Already being investigated (44 cases);*
- *Pending evaluation in Jul. 2004 and received through Nov. 30, 2004 (127 cases), 68 of these were selected for examination; and*
- *Pending from the prior year (20 cases).*

The procedures and timetable for processing cases depended on their level of seriousness and complexity. Type A cases were “non-complex, usually single issue cases” and Type B cases were “more complex, multiple-issue cases.”

The method used to process cases varied depending on the type of 501(c)(3) organization in question and the facts of the case. Section 7611 of the tax code requires a closer examination of religious organizations prior to making contact, unlike non-religious groups.

There were 191 cases in the 2004 program. Of these, 132 were forwarded to the field for further investigation. IRS field agents then dismissed 22 more cases, resulting in 110 total examinations for the PACI program. These included 40 Type A cases (33% of total) and 34 Type B (31% of total). Thirty-six pre-existing cases accounted for 33% of the total.

The IRS has completed 82 of the 110 examinations, finding partisan activity occurred in 58 of reviewed cases. Of these only three warranted revocation of tax-exempt status. In the remaining 55 cases the IRS issued written advisories and, for one organization, an excise tax. Appeals are pending in four of the 82 closed cases.

**Table 1: 2004 IRS Political Intervention Program Examinations**  
(110 Total Examinations)

	Religious Groups	Percent	Non-Religious Groups	Percent	Total Examinations	Percent Total 110
Type A	29	72%	11	28%	40	36%
Type B	5	15%	29	85%	34	31%
Preexisting	13	36%	23	64%	36	33%
Total	47	43%	63	57%	110	100%

**Table 2: 2004 IRS Political Intervention Program Closed Cases**  
(82 Total Completed Examinations)

	Religious Groups	Percent	Non-Religious Groups	Percent	Total Examinations
Type A	26	79%	7	21%	33
Type B	3	14%	19	86%	22
Preexisting	11	41%	16	59%	27%
Total	40	49%	42	51%	82

The most common fact situations that led to findings that groups had crossed the line into partisan activity were:

1. *Distribution of printed materials that encourage members to vote for a candidate (24 alleged, 9 determined);*
2. *Endorsements from the pulpit (19 alleged, 12 determined);*
3. *Support for a candidate on the organization's website (15 alleged, 7 determined);*
4. *Distribution of partisan voter guides or candidate ratings (14 alleged, 4 determined);*
5. *Campaign signs displayed (12 alleged, 9 determined);*
6. *Preferential treatment given some candidates to speak at events (11 alleged, 9 determined); and*
7. *Cash contributions to a political campaign (7 alleged, 5 determined).*

**Table 3: Violations Found in IRS Political Activity Examinations by Activity Type**  
(58 Total Violations Found)

Activity Type	Alleged	Violations	% Violations of Allegations
Preferential treatment given some candidates to speak at events	11	9	82%
Campaign sign displayed	12	9	75%
Cash contributions to a political campaign	7	5	71%
Endorsements from the pulpit	19	12	63%
Support for a candidate on the organization's website	15	7	47%
Distribution of printed materials that encourage members to vote for a candidate	24	9	37%
Distribution of partisan voter guides or candidate ratings	14	4	29%

The results show that distribution of printed materials and voter guides are the least proven problem areas for enforcement. In contrast, preferential treatment of candidate speakers at events has the highest rate of violations, indicating a need for clearer guidance in this area. The next two most frequent types of violation- displaying campaign signs and making cash contributions to campaigns- involve concrete actions that can be easily proved or disproved, with little or no need for the IRS to use its discretion in applying the “facts and circumstances” test. However, these two activities combined only account for 19 of the overall allegations, and 14 of the overall violations. This means that, in the vast majority of cases, the IRS uses a subjective test to determine whether violations have occurred.

The results of the 2004 examinations point to the need for better guidance and/or clearer rules, especially given the severity of possible penalties. However, in 2004 the IRS did not seek revocation of tax-exempt status in most cases. Instead, the IRS issued written advisories when the intervention was “of a one-time, non-recurring nature, or was taken in good faith on advice of counsel or was otherwise shown to be an anomaly,” and corrective measures were taken, including “steps to prevent any future political intervention.” In most cases excise tax was not an available sanction because there were no expenditures involved in the alleged transgression.

## **SUPPLEMENT B: IRS POLITICAL ACTIVITY INVESTIGATIONS — PUBLICLY DISCLOSED CASES**

The Internal Revenue Service's new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech.

This is a supplement to the report *The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns* that describes known cases that are currently or have been under investigation.

IRS investigations, audits, and resolutions are confidential, and the IRS cannot publicly comment on specific cases. Therefore, few details are known about the examinations in the Political Activities Compliance Initiative. Organizations under investigation or people that file complaints with the IRS, however, may and sometimes do publicly disclose information about their specific cases.

This supplement provides details of ten known cases gathered from news reports and complaints, sorted by the type of activity investigated. Taken together, these stories are the best available information about how the IRS is currently interpreting and applying the law.

### *Statements About Candidates*

**All Saints Episcopal Church (CA):** In Nov. 2004, the IRS initiated an audit into anti-war remarks delivered during a church sermon two days before the 2004 general election. On Oct. 31, 2004, the Rev. George F. Regas delivered a guest sermon at All Saints, beginning with the disclaimer, "I don't intend to tell you how to vote" and noting that, "Good people of profound faith will be for both George Bush and John Kerry..." The sermon went on to envision what Jesus would say to both candidates about the issues of peace, poverty and the impact of poverty on abortion choices. Regas closed his sermon by urging the congregants to "bring a sensitive conscience to the ballot box," and "vote your deepest values." The imagined statements of Jesus sharply criticized the war in Iraq, nuclear weapons and noted both candidates "failure and the failure of so many political leaders to help uplift those in poverty..."

On June 9, 2005, the IRS sent All Saints officials a letter notifying them that "a reasonable belief exists that you may not be tax-exempt as a church..." The letter cited a Nov. 1, 2004 Los Angeles Times story that characterized the sermon as a "searing indictment of the Bush administration's policies in Iraq." It requested information about church operations and notified church officials of their right to discuss the case with the IRS before the examination began. All Saints hired as counsel the former director of the IRS Exempt Organizations Division, Marcus Owens of Caplin and Drysdale.

A Sept. 22, 2005 conference call was held to allow IRS representatives, church officials and their counsel to discuss the allegations. In a follow-up letter to the IRS, Owens wrote that the IRS action was unsupported by the facts and threatened the church's core values. Addressing the difference between issue advocacy and partisan electioneering, Owens wrote, "the church takes issue with your suggestion that the mere mention of candidates' names, coupled with statements regarding the speaker's personal values, is sufficient to constitute prohibited campaign intervention." The letter stated that the IRS told All Saints that the sermon may be an implicit

intervention in the election, despite the fact that Regas explicitly said he was not telling people how to vote and that criticism was directed at both candidates.

Following the call, the IRS offered a deal: if the church would admit wrongdoing and agree not to hold similar sermons in the future, the IRS would not pursue the case further. All Saints rejected the offer, with Rector J. Edwin Bacon explaining, “We have a responsibility to articulate our core values... The IRS is arguing implicit endorsement, and that’s a slippery slope that could do away with the freedom of speech and freedom of religion.”

Leaders in the faith community, from all points on the ideological spectrum, have spoken out against the IRS action. Ted Haggard, president of the conservative National Association of Evangelicals, told the *Los Angeles Times* that his group will work with other church organizations “in doing whatever it takes to get the IRS to stop.” Robert Edgar, general secretary of the National Council of Churches said the IRS action “appeared to be a political witch hunt on George Regas and progressive ideology. It’s got to stop.” A statement from Progressive Christians Uniting said the case “raises important questions about how much latitude IRS field offices have been given to initiate these cases based on murky criteria and no clear understanding of what does or does not constitute impermissible electioneering.”

In December 2005 publicity about the All Saints investigation prompted three members of Congress to call for an investigation by the Government Accountability Office. Rep. Adam Schiff (D-CA), whose district includes All Saints, was joined by Reps. Walter Jones (R-NC) and Joseph Pitts (R-PA) in making the request. To date the GAO has not begun any investigation.

The IRS informed the church in an October 2005 follow-up letter that the agency would be sending a document information request in the near future. Church officials have not heard from the IRS since that time, so All Saints wrote the IRS on March 29, 2006 inquiring as to whether the church was still under investigation.

**Charles Street African Methodist Episcopal Church (MA):** On April 4, 2004, the Rev. Gregory Groover of Charles Street African Methodist Episcopal Church introduced Sen. John Kerry from the pulpit during the Palm Sunday service as the “next president of the United States.” According to the *Washington Times*, Groover said, “We’re thankful that there’s going to be a revolution in this country ... a new movement...And we say, God, bring him on, the next president of the United States.”

A lawyer for Charles Street, Frederick E. Dashiell, said the complaint was dismissed after the Roxbury church told the IRS that the introduction was not intended as an endorsement. Dashiell called it “a bit intimidating” that the church would be investigated for what he called “an inadvertent statement.”

**First Baptist Church of Springdale (AR):** The IRS investigated a July 2004 complaint filed by Americans United for Separation of Church and State arising from a 4th of July sermon given by the Rev. Ronnie Floyd, in which the pastor endorsed President Bush for re-election. The complaint was reportedly dismissed.

In the sermon in question, Floyd outlined Bush’s positions on such issues as “God-ordained” marriage and abortion, and described how faith in Christ helps Bush in government service. Floyd also outlined the positions of Bush’s Democratic opponent, Sen. John Kerry of Massachusetts. He did not name the candidates but photographs of them appeared on screens as he described their political stances. He then encouraged church members to register and vote “the way we say we

believe, by the authority of God's word, Christian values, convictions and beliefs. In other words, we must vote God." An attorney for First Baptist, Matthew Staver, said Floyd never told anyone to vote for Bush, so he was never worried about the IRS complaint. Staver said the IRS asked a few questions last fall, to which the church responded. He told the *Arkansas Democrat-Gazette*, however, that it was obvious who Floyd endorsed in the presidential election, referring to Bush. "If he stood at the pulpit and said nothing, you knew who he was going to vote for," Staver said. "You'd have to be an idiot not to know who he was going to vote for, because the positions the church takes on issues and the positions of the candidates."

Staver told the newspaper in July 2005 that First Baptist had not received written notice that the complaint was dismissed, but the church has been "advised verbally they don't have any desire to pursue this further."

**Friendship Missionary Baptist Church (FL):** On Feb. 15, 2005, the IRS notified Friendship Missionary Baptist Church that it was under investigation for engaging in partisan political activity. The investigation stemmed from an October 2004 appearance by Democratic presidential candidate Sen. John Kerry (D-MA) at a Sunday service.

In a 10-page letter to the church, the IRS wrote, "a reasonable belief exists that [the church] engaged in political activities that could jeopardize its tax-exempt status as a church." Included with the letter was a 21-question inquiry regarding the pastor's alleged endorsement of Kerry, coordination with the Kerry campaign, and solicitation of contributions.

The inquiry was prompted by an Oct. 13, 2004, request to the IRS by watchdog group Americans United for Separation of Church and State. The IRS, in its letter to Friendship Missionary, also cited an Americans United press release in the publication *Tax Analysis*. The Rev. Gaston Smith informed his congregation of the inquiry. He stated that visits by political candidates are nothing new and the 75-year-old church did not violate the tax code. He noted that during the previous week, Miami-Dade mayoral candidates Jimmy Morales, a Democrat, and Carlos Alvarez, a Republican who was later elected, made campaign stops there.

According to Friendship Ministry, the service was nothing out of the ordinary. The service schedule consisted of praise and worship, followed by Smith's sermon and altar call. Kerry then spoke for approximately five minutes and was followed by the Rev. Jesse Jackson and the Rev. Al Sharpton. However, a conflicting report by Americans United stated, "During the service, the church's pastor ... introduced Kerry as 'the next president of the United States' and told the crowd that 'to bring our country out of despair, despondency and disgust, God has John Kerry.'"

While Friendship Ministry declined to ponder the motivation of the IRS inquiry, Rep. Kendrick Meek (D-FL) charged that the complaint came from outsider groups that may be specifically targeting black churches. In a *Miami Herald* article, he stated that two other Miami-area churches received inquiry notices last year, but declined to name them or discuss the probes. In late Dec. 2005 the IRS told Guy Lewis, attorney for Friendship Missionary Baptist Church, that the case would be closed and resolved favorably for the church. Before the investigation, the church had reduced its formal policy regarding candidate appearances to writing, which helped convince the IRS that there was no attempt to favor one candidate over another, and therefore, no political intervention.



## *Voter Mobilization*

**Pennsylvania Pastors Network (PA):** On March 22, 2006 a complaint filed against the Pennsylvania Pastors Network (PPN) alleged a get-out-the-vote training it held improperly featured Sen. Rick Santorum (R-PA), without inviting his opponent. PPN, a coalition of four conservative organizations, sponsored get-out-the-vote training held March 6, 2006, in Valley Forge, PA. The network's mission is "to help educate the church regarding the key social and cultural issues of the day." Included in the training agenda were speakers on a variety of church issue advocacy efforts and Santorum, who is running in 2006 for re-election to the U.S. Senate. Bob Casey, his Democratic opponent, was not present or listed as an invited speaker.

Santorum spoke to the 125 participants in a seven-minute video presentation, urging pastors to be vocal on a proposed constitutional ban on same-sex marriage. PPN then gave out copies of Santorum's new book, *It Takes a Family*, which master of ceremonies Colin Hanna praised. One of the speakers, the Rev. Frank Pavone of Priests for Life, stressed that control of the Senate is important when Supreme Court vacancies occur, and "this particular president needs the kind of support that he has today but might not necessarily have after 2006." A few days later, PPN announced that it will hire 10 full-time organizers to help churches get out the vote this year. PPN is comprised of two 501(c)(3) organizations (the Pennsylvania Family Institute and the Urban Family Council) and two 501(c)(4) organizations (Let Freedom Ring and the Pro-Life Federation). A 501(c)(4) group, unlike a 501(c)(3) group, can endorse candidates, but a joint effort that includes a 501(c)(3) organization must be nonpartisan. The situation is complicated, since work on ballot initiatives is considered lobbying and is permissible for 501(c)(3) organizations.

The training was recorded by a member of Americans United for Separation of Church and State, which gave the tape to the *New York Times*. On March 21, Americans United issued a statement, calling the training an "under-the radar" drive to support Santorum. The following day, Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint against PPN, asking the IRS for an investigation and saying PPN "may be engaged in prohibited electioneering by openly endorsing candidates for public office." The complaint noted that the IRS 2004 compliance program found that nine organizations had violated the electioneering prohibit by giving "improperly preferential treatment to certain candidates by permitting them to speak at functions."

**World Harvest and Fairfield Christian Church (OH):** On Jan. 16, 2006, 31 Ohio religious leaders filed a complaint with the IRS against two Ohio mega-churches and their affiliates, alleging a violation of the tax law's prohibition on partisan electoral activity. The religious leaders alleged that the mega-churches have been carrying out activities intended to help Republican Secretary of State Kenneth Blackwell in his bid for Ohio's governorship. Lead by the Rev. Eric Williams of the North Congregational Church of Christ in Columbus, the pastor's group sent a 13-page letter to IRS Commissioner Mark Everson, implicating World Harvest and its affiliates

Reformation Ohio and the Center for Moral Clarity; and Fairfield Christian and its affiliate the Ohio Restoration Project. All five groups are 501(c)(3) organizations. The letter requested an IRS investigation into whether the groups' tax-exempt status should be revoked; it also called on the IRS to seek an injunction to stop further flagrant violations. Three categories of activity were cited:

1. *Sponsoring events featuring Blackwell but no other candidates;*
2. *Partisan voter registration drives; and*
3. *Distribution of biased voter guides.*

The Revs. Rod Parsley of World Harvest and Russell Johnson of Fairfield Christian denied their actions were partisan, accusing the complaining pastors of an “unholy alliance” with the secular left. Williams countered, saying, “The law allows church involvement in issues. This goes beyond issue-involvement to partisan politics and we’re simply asking the IRS to uphold the law.”

The pastors filing the complaint acquired assistance from Marcus Owens, an attorney with Caplin and Drysdale in Washington, D.C. and a former director of the IRS-exempt organizations division. On Jan. 16, 2006, Owens told the *Columbus Dispatch* that the complaint was extensively documented, noting, “You have a number of churches and charities involved with a number of road trips for Mr. Blackwell, all of which seem to be aimed at gaining him visibility for his political campaign.”

The day after the complaint was filed the *Columbus Dispatch* reported that Blackwell told the pastors to ignore it, calling the 31 religious leaders who signed it “bullies.” The following day, Blackwell was the only candidate invited to speak to 450 pastors at a luncheon in Canton sponsored by the Ohio Restoration Project.

The complaint cites nine events where Blackwell was a featured speaker but no other candidates were invited. (Democrat gubernatorial candidate Brain Flannery said he has never been invited to an event organized by the churches or their affiliates.) For example, at an October 2005 event at the Ohio state-house sponsored by Reformation Ohio, Parsley shared the dais with Blackwell and called for registration of 400,000 new voters statewide. In addition, Fairfield Christian let the Fairfield County Republican Party Central Committee meet at its facility without charge, with Committee Chair Carl Tatman saying, “The church was nice enough to volunteer the space as a donation.” A Republican fundraiser was held at the church a month later. The IRS requires 501(c)(3) organizations to charge market rates for political use of their space.

On Apr. 7, 2006 the 31 pastors again wrote a letter to the IRS citing further incidents of partisan activity and inquiring as to why no action had been taken. This time they were joined by an additional 25 pastors. As of April 7, 2006, the IRS had not yet contacted the organization about the complaint, according to *The New York Times*. The next day Rev. Parsley told the Canton Repository that his church had no plans for a radio campaign and would not be targeting conservative voters in their registration drive.

### *Issue Advocacy*

**National Association for the Advancement of Colored People (NAACP):** In October 2004, the NAACP announced that the IRS had launched an investigation into the organization’s tax-exempt status because Chairman Julian Bond criticized Bush administration policies in his speech to the group’s July convention. The NAACP received a notice from the IRS on Oct. 8, 2004, saying that an examination of “whether or not your organization has intervened in a political campaign” was commencing. The IRS notice read: “We have received information that during your 2004 convention in Philadelphia, your organization distributed statements in opposition of George W. Bush for the office of presidency. Specifically in a speech made by Chairman Julian Bond, Mr. Bond condemned the administration policies of George W. Bush on education, the economy and the war in Iraq.” (It should be noted that charities have a constitutionally protected right to

criticize administration policies.)The IRS letter also noted a tax of 10 percent can be imposed on the group for “political” expenditures and a tax of 2.5 percent on any manager who agreed to it, a direct threat of personal sanctions for the NAACP’s 64 board members.

Immediately after the NAACP announcement of the IRS audit, several members of Congress contacted IRS commissioner Mark Everson to remind him that charities have a right to “discuss or oppose various aspects of the Bush administration’s policies.” Rep. Charles Rangel (D-NY) went a step further and issued a statement saying, “This is a tactic of a police state if I’ve ever seen one.” The same day, Senate Finance Committee ranking Democrat Max Baucus (D-MT) also wrote to Everson asking several questions, including whether the “political activity” limitation imposed on 501(c)(3) organizations had been broadened, what steps led to the decision to examine the NAACP, and if groups critical of Bush’s opponent have also been examined.

On Nov. 12, 2004, IRS Commissioner Mark Everson responded to the letter from Sen. Max Baucus. Everson’s letter said the IRS had not received any request to audit any group from the executive branch, but that two members of Congress requested “we look at one or more organizations in this area.” Everson wrote that those requests were treated the same as any other third party referral. The letter further denied political motivation, saying that “career employees determine whether specific information we review warrants further action.”

Everson went on to describe the IRS enforcement program to oversee the ban on partisan activities by charities, the first time the public was made aware of the program. Everson further noted changes in the law since the Nixon era to prohibit politically motivated audits. Any White House request for IRS action must be signed by the president and reported to Congress’s Joint Committee on Taxation (Internal Revenue Code Section 6103(g)). Executive branch employees and cabinet heads are prohibited from making such inquiries by Section 1105 of the IRS Restructuring and Reform Act of 1998.

The IRS issued an audit summons on Jan. 14, 2005, seeking information from the organization that is normally reported in its annual nonprofit IRS return, Form 990. On Jan. 27, 2005, the NAACP informed the IRS that it would decline to respond, maintaining that the IRS did not follow proper procedures and the agency’s actions are politically motivated. The IRS denied any political motivation and referred the allegation to the Treasury Department’s Inspector General for Tax Administration.

The NAACP responded that the summons was not issued for a legal reason because it was not yet due, noting, “It appears that political pressure, rather than any sound legal authority, motivated the Service to ignore the statutorily-mandated procedures for initiating an examination.” The letter noted the IRS can only take action prior to filing Form 990 if it meets the requirements of Section 6852 of the Internal Revenue Code, which gives the IRS authority to act on flagrant violations. The NAACP wrote, “While criticism of an administration’s policies might constitute intervention under some set of circumstances, it hardly rises to the level of a ‘gross violation’ or a ‘flagrant’ expenditure. Indeed, criticism or praise of government policy is First Amendment speech of a high order in a democratic society.”

On Feb. 23, 2005, the IRS wrote to attorneys for the NAACP that the agency has legal authority to proceed and enforce the summons, setting a date for the NAACP to respond to the summons, and suggesting a March 2, 2005 meeting to discuss the case. In a letter to the IRS following up on that meeting, Marcus Owens, of Caplin and Drysdale, attorney for the NAACP, stated the NAACP continued to object to the summons and declined to attend a March 11 meeting. The letter asked the IRS to close the case immediately and issue a letter stating the

NAACP continues to be exempt under 501(c)(3) of the tax code. It noted that the IRS had already indicated the NAACP's exempt status is not likely to be at risk.

To force a resolution, the NAACP has paid what it estimates it would owe if the IRS found it had violated the ban on partisan activity. The excise tax rate is 10 percent of the cost of a prohibited communication. In this case the NAACP estimated it spent \$176.48 to disseminate Bond's speech, so it sent the IRS \$17.65. NAACP General Counsel Dennis Hayes said this in no way represents an admission of wrongdoing. Instead, the NAACP has filed for a refund of the \$17.65. If NAACP officials have not received the refund within six months, they will go to court for a review of their claim. The case will test the legality of the new IRS expedited enforcement approach.

**Texans for Public Justice (TX):** In 2003, Rep. Sam Johnson (R-TX), a member of the House Ways and Means Committee, which oversees the IRS, sent a letter to the agency requesting an investigation of Texans for Public Justice. The group, founded in 1997, tracks the influence of money on politics in Texas and publishes detailed reports on campaign spending and corporate lobbying. The group's 2003 report on illegal corporate spending in the 2002 reelection campaign of Rep. Tom DeLay (R-TX) led to a criminal indictment of Delay. The 2003 IRS examination of Texans for Public Justice, which included two auditors reviewing its books, found no violations. Founder Craig McDonald said the audit was "political retaliation by Tom DeLay's cronies to intimidate us for blowing the whistle on DeLay's abuses."

#### *Published Endorsement*

**Falwell Ministries:** Two complaints led to IRS investigations of Jerry Falwell Ministries, a 501(c)(3) organization, but both have been dismissed by the IRS. The first complaint, filed by the Campaign Legal Center, claimed that an endorsement of President Bush appeared in the *Falwell Confidential* newsletter on the Falwell Ministries website during the 2004 campaign, violating both tax and election laws. The newsletter was also widely circulated in an email that included a solicitation of donations for and link to a conservative political action committee, the Campaign for Working Americans. Americans United against Separation of Church and State also filed a complaint with the IRS over the *Falwell Confidential* endorsement.

The complaint was dismissed because the communication was paid for by a 501(c)(4) organization, the Liberty Alliance and because Falwell was speaking as an individual and publisher and was thus legally entitled to express his views. The communications were made using corporate facilities, including the groups' shared website, which does not clearly distinguish between the 501(c)(3) and 501(c)(4) entities. It bears the name of the Jerry Falwell Ministries, the 501(c)(3), but in the About Us section says it is a project of the Liberty Alliance, the 501(c)(4). Matthew Staver, an attorney for Falwell, said Falwell should not lose his editorial free speech rights simply because he is also a preacher.

The second complaint, filed by Americans United for Separation of Church and State, alleged Falwell gave a speech at the Southwestern Baptist Theological Seminary in Aug. 2004 endorsing President George W. Bush. In dismissing the complaint, the IRS seems to have given latitude for speakers at organizational events in which they are expressing personal opinions.

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### **Additional Resources**

FROM THE INTERNAL REVENUE SERVICE

Final Report, Political Compliance Initiative 302  
[http://www.irs.gov/pub/irs-tege/final\\_paci\\_report.pdf](http://www.irs.gov/pub/irs-tege/final_paci_report.pdf)

Fact Sheet  
<http://www.irs.gov/newsroom/article/0,,id=154712,00.html>

Charities, Churches, and Educational Organizations - Political Campaign Intervention  
<http://www.irs.gov/charities/charitable/article/0,,id=155030,00.html>

Memo, Political Compliance Initiative Procedures  
[http://www.irs.gov/pub/irs-tege/paci\\_procedures-feb\\_22\\_2006.pdf.pdf](http://www.irs.gov/pub/irs-tege/paci_procedures-feb_22_2006.pdf.pdf)

Report on IRS Review of Alleged Political Campaign Intervention  
<http://www.irs.gov/charities/article/0,,id=135406,00.html>

Tax Talk Today  
<http://www.taxtalktoday.tv/>

IRS Publication 1828, Tax Guide for Churches and Religious Organizations  
<http://www.irs.gov/pub/irs-pdf/p1828.pdf>

Nonprofit Groups  
NPAction.org  
[www.npaction.org](http://www.npaction.org)

OMB Watch  
[www.ombwatch.org](http://www.ombwatch.org)

Alliance for Justice  
[www.afj.org](http://www.afj.org)

Center for Lobbying in the Public Interest  
[www.clpi.org](http://www.clpi.org)

OMB Watch is a nonprofit research and advocacy organization dedicated to promoting government accountability, citizen participation in public policy decisions, and the use of fiscal and regulatory policy to serve the public interest: OMB Watch, 1742 Connecticut Ave. NW, Washington, DC 20009, 202-234-8494, Fax 202-234-8584, [info@ombwatch.org](mailto:info@ombwatch.org), [www.ombwatch.org](http://www.ombwatch.org)

## SPECIAL SECTION: CHINA

# THE THIRD SECTOR: THE LAW IN CHINA AND NON-PROFIT ORGANIZATIONS

BY L. SUSAN KAUR \*

## 1. INTRODUCTION

As China develops and forges ahead with Deng Xiaoping's economic reforms, it is fitting that there is a corresponding growth in non-profit organizations (NPOs)<sup>2</sup>, which is indicative of a maturing society that has citizen participation. With the further growth of these NPOs, it is essential that there is clarity of laws and regulations in the establishment, governance and oversight of NPOs,<sup>3</sup> including fund raising activities and tax exemption. This will then mirror the impressive development of laws and regulations as well as legal system with respect to the commercial, banking and financial sectors.

This paper will outline the development of NPOs, the corresponding laws or regulations that were created and exist today and what further reforms are needed to have more effective and efficient NPO governance, so that productive energies are invested in meaningful activities rather than in ascertaining what the right procedure is for registration, whether fund raising is allowed and under what circumstances, or whether there is tax-exemption status for NPOs and for what categories of NPOs. This seems so obvious, but one needs to be aware of policy preferences as well as the historical perceptions and reasons why Chinese authorities seem to give conflicting signals through contradictory policies or regulations. On the one hand, the government is keen to facilitate the development of NPOs as they take on its burden in the care of and services for the population, especially those focused in rural areas and the western region, and on minorities as they have not been able to benefit as much from Deng's economic reforms as their coastal or urban cousins. With increasing rural social unrest in recent years, partly because of being left behind in Deng's "to get rich is glorious" program and partly because of corruption, the Chinese

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\* I would like to thank Professor Karla Simon, Professor of Law and Co-Director, Center for International Social Development, Catholic University of America for her guidance and patience in clarifying certain aspects of the law relating to NPOs in China. Special thanks also go to Dr. Carol Lee Hamrin, Consultant and Research Professor, George Mason University and Mr. Thomas McCallie, Executive Director & President of Maclellan Foundation for their help in providing information and their willingness to dialogue with me as I worked through my thoughts about this paper. However, any mistakes made in this paper are my responsibility alone. Last but not least, I would like to thank Professor Susan Weld, my instructor at Johns Hopkins SAIS for facilitating interesting discussions in class, which increased my knowledge of the Chinese Legal System. The author was formerly the Chief Representative for China of a foreign NPO and is currently an independent consultant.

<sup>2</sup> See Nonprofit and Voluntary Sector Quarterly, Vol 31, No. 3, September 2002, *The Governance of NGOs in China Since 1978: How Much Autonomy?* by Ma Qiusa. In China, the government prefers the term NPO over NGO because the word *fei* in *feiyingli*, meaning non-for-profit or *feizhengfu* meaning non-governmental, can also be taken to mean "anti", not just "non". So, in this paper, the term "NPO" or "NPOs" will primarily be used to refer to NGOs as well.

<sup>3</sup> See Karla Simon's oral testimony before the Congressional Executive Committee for China (CECC) at <http://www.cecc.gov/pages/roundtables/032403/Simon.php>.

government welcomes NPOs, especially those that provide grass-roots health, educational and other social welfare services.<sup>4</sup> On the other hand, it is cautious because of its memory of the 1989 Tiananmen Square Incident and how the development of a civil society made it possible for such a huge demonstration to take place. The government is aware that as it divests some of its responsibilities to NPOs, it is also inevitably losing some of its grip on power to the private citizenry, something that it may not find palatable at this time. In addition, its neighbors like Russia and other breakaway states such as the Ukraine had their “Orange Revolutions” before transitioning into a democracy. This has made China wary of NPOs, especially international NGOs because they have often been linked to the “Revolutions”. The more recent activities of the Falun Gong, its de-registration and subsequent illegal existence in China have also made the government more cautious toward faith-based NPOs. Hence, its conservative and sometimes conflicting approach to the development of NPOs are explicable in the current context.<sup>5</sup>

This paper will not deal with NPO tax issues in detail, as those are very complicated, and it would require another paper to cover them. Quasi-government public institutions<sup>6</sup> will also not be covered in detail, as they do not fall strictly within the category of NPOs under existing laws and regulations except for taxation purposes since they are allowed to accept donations.<sup>7</sup>

Commendable though the effort has been to improve the governance of NPOs, continued reform must take place in the third sector, as the NPO sector is often known, for a healthy society to grow in China in tandem with its economy and knowledge. Clarity of the laws and regulations will not only be welcome by potential and existing NPOs, but also by the Bureaus that often act as sponsors in providing the required supervision to these NPOs in the local areas. It will go a long way towards transparency, predictability, consistent implementation of the law and a healthy civil society with Chinese characteristics.

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<sup>4</sup> Chen Guangyao, Deputy Bureau Director, NGO Administrative Bureau, Ministry of Civil Affairs, Beijing, China in an address on *China's Non-governmental Organizations: Status, Government policies, and Prospects for Further Development* reprinted in the *International Journal of Not-for-Profit Law*, Volume 3, Issue 3, March 2001. He mentions eight areas the government wants help in, such as research, solutions to social problems, public service and charity work.

<sup>5</sup> Ma Qiusha in her oral testimony to the Congressional-Executive Commission on China entitled “To Serve the People: NGOs and the development of Civil Society in China” on *Non-governmental and Non-profit organizations and the Evolution of Chinese Civil Society* refers to the official attitude as “inconsistent and self-contradicting, volleying between encouragement and restraint.” See <http://www.cecc.gov/pages/roundtables/032403/qiusha.php>.

<sup>6</sup> Karla Simon addresses the issues relating to the quasi-government public institutions (*shiye danwei*) in *Reform of China's Laws for NPOs: A Discussion of Issues Related to Shiye Danwei Reform* at [http://www.iccsl.org/pubs/China\\_paper\\_for\\_Bei\\_Da\\_final.pdf](http://www.iccsl.org/pubs/China_paper_for_Bei_Da_final.pdf). Other related articles may also be found on the website of the International Journal of Civil Society Law at [http://www.iccsl.org/pubs/index\\_journal.html](http://www.iccsl.org/pubs/index_journal.html).

<sup>7</sup> See Leon E. Irish, Jin Dongsheng & Karla Simon's article on *Tax Rules For Non-For-Profit Organizations* at [http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO\\_tax\\_En.pdf](http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO_tax_En.pdf) for a more detailed discussion on tax issues in China.



## 2. DEFINITIONS & CATEGORIES

In China, the terms non-profit organizations and non-governmental organizations (NGOs) are used interchangeably. NGOs are non-governmental and their activities are not motivated by an intention to generate profit, but rather their principal purpose is to contribute to the public good and to be of service to society. Because of this, NGOs are also called not-for profit organizations.<sup>8</sup> After the restructuring of the NPO sector between 1998 and 2004, there are three sub-categories of NGOs or, in Chinese, “popular organizations,” namely:

- Social organizations or SOs (*shehui tuanti*)
- Foundations (*jijinhui*)
- Civil non-enterprise institutions or CNIs (*minban feiqiye danwei*).<sup>9</sup>

Under other Civil Codes, NPOs are either associations or foundations. In China, the SOs are like associations. The government-sponsored NGOs are often considered top-down NGOs while privately financed NGOs are considered bottom-up NGOs. Many of the local SOs are actually government-initiated and funded. These are commonly known as GONGOs in the literature on the sector.<sup>10</sup>

NPOs in China, unlike in the West, tend to operate in a manner that is more common in East Asia. For instance, instead of being independent of the government, they not only receive government funding but also seek to have close ties with the government. The NGOs are expected to support government policies, not oppose them. “NGOs cannot depend on the Chinese legal system for protection when subjected to obstruction or suppression by the government. That is why Chinese (and foreigners)<sup>11</sup> are obliged to cultivate powerful patrons or friends in the government who can provide them with the necessary protection should the need arise.”<sup>12</sup>

As mentioned above, quasi-government public institutions (*shiye danwei*) are a sort of hybrid entity, which currently does not fall within the definition of an NPO, as it does not come under the purview of the NPO-related laws; such organizations are not registered with the Ministry of

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<sup>8</sup> Quoting Chen Guangyao, Deputy Bureau Director, NGO Administrative Bureau, Ministry of Civil Affairs, Beijing, China, op. cit.

<sup>9</sup> Karla Simon, op cit., p. 27. Karla Simon refers to the *minban feiqiye danwei* as the civil non-enterprise institutions or CNIs. Similarly, Qi Hong in her article, *The Current Legal Framework For Voluntary & Not-For-Profit Activity in China – A 2003 Update*, Vol. I Issue III July 2003, International Journal for Civil Society Law, pp. 93-100 at [http://www.iccs.org/pubs/03-07\\_IJCSL.pdf](http://www.iccs.org/pubs/03-07_IJCSL.pdf) also uses the term CNIs. The CECC and Ma Qiusa refer to them as non-governmental non-commercial enterprises or NGNCEs. Axel Berkofsky, a senior policy analyst at the European Policy Center refers to them as private non-enterprise units. The Philanthropy and the Third Sector in Asia and the Pacific project refers to these as private non-commercial institutions or PNCIs.

<sup>10</sup> GONGOs are government organized NGOs.

<sup>11</sup> I include foreigners in parenthesis because the regulations apply the same restrictions to domestic and foreign groups. See the CECC website citing the China Daily of 16 December 2005 as the source at <http://www.cecc.gov/pages/virtualAcad/index.phpd?searchtype=searchstory>.

<sup>12</sup> Quoting Lu Yiyi, Senior Researcher at the Royal Institute for International Affairs in London in an Asia Times article dated 5<sup>th</sup> May 2005 at <http://www.atimes.com/atimes/China/GE05Ad02.html>.

Civil Affairs (MOCA). However, because of certain tax regulations, they are sometimes grouped together with the other NPO categories for grant-related purposes.<sup>13</sup>

NPOs come under the oversight of the MOCA<sup>14</sup> and the NPO or NGO Affairs Bureau (part of MOCA) overseas the registration of NPOs. All SOs must be registered with MOCA but there are three types that may be exempt from registration<sup>15</sup>:

- The mass organizations such as the All China Women's Federation, the All China Federation of Trade Unions, and the All China Federation for Returned Overseas Chinese;
- Organizations approved by the State Council, such as the All China Association for Journalists and China Society for Laws and Regulations; and
- Organizations approved by government agencies.<sup>16</sup>

The 1998 laws and regulations do not apply equally to foreign NPOs, but Sun Weilin, director general of the Bureau of NPO Administration at the Ministry of Civil Affairs (MOCA), said on December 14, 2005, that the State Council is currently examining revised civil society regulations that will apply the same registration requirements to domestic and foreign organizations.<sup>17</sup>

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<sup>13</sup> One example is the *USIG Report on China* dated July 2005 at <http://www.usig.org/countryinfo/china.asp>. For further discussion on this, see Karla Simon, op. cit. The public institutions include public universities and hospitals, which are not the same as local health or education departments.

<sup>14</sup> See the report *Legal Environment Governing Third Sector in China* that was drafted by Ding Yuanzhu, Qi Xin, Chen Tingzhong, China Country Research Team, and Research Center for Volunteering and Welfare, Peking University, dated January 28, 2004 at p. 59. At pp. 75-77, they outline the major responsibilities of MOCA, ranging from formulation of regulations, policies and guidelines to guiding of village elections to the repatriation of international refugees.

<sup>15</sup> Article 3 of the Regulations for Registration and Management of Social Organizations 1998. Notice or Rule 256 issued by MOCA on 1st December 2000.

<sup>16</sup> Quoting *Philanthropy & the 3rd Sector in Asia & The Pacific* on "China: Third Sector Legal Environment: Incorporation", last updated 31 January 2006 – "The third are the internal social organizations with scope of activities limited within their supervising organizations. Such social organizations should be mainly entertainment or sports organizations. Their supervising organizations may be institutions, enterprises, registered social organizations, agencies of the Party and government. Once examined and approved by the line agency, i.e. the functional supervising authority, a proposal for the establishment of a social organization can be placed for formal registration. The civil affairs departments of the government at various levels are registration authorities for third sector organizations. National social organizations must register with the Ministry of Civil Affairs. Local social organizations should register with the local departments of civil affairs, while cross-regional social organizations should register with the appropriate department of civil affairs. The supervising agencies have authority and responsibilities over its affiliated social organizations in terms of their organization, political and ideological works, personnel arrangement, accounting affairs, and other major activities."

<sup>17</sup> See <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=34283#id34283> which cites its source as the *China Daily* dated 16 December 2005. However, the recent Regulations for Administration (or Management) of Foundations 2004 apply to foreign foundations as expressed in Arts 13 & 14. There are also specific regulations on sino-foreign CNIs.

### 3. BACKGROUND & HISTORY<sup>18</sup>

The history of NPOs in China goes as far back as the Tang (618-907 AD) and Song (960-1279 AD) Dynasties. Many of the SOs in feudal societies were guilds for craftsmen, set up to protect their interests. In the Ming (1368-1644) and Qing (1616-1911) dynasties there were:

- Cliques and guilds for mutual help and self-defense; and
- Secret societies and political factions, e.g., eunuchs coming together as a clique.<sup>19</sup>

The modern third sector could be said to have been established in 1908 when the Qing Dynasty government installed people's freedom to associate. The 1911 Republic of China Interim Constitution (1911-1949) granted Chinese citizens the freedom of association and NPOs were permitted to be engaged in commercial, academic, professional, religious and philanthropic activities. Private NPOs were allowed to survive and operate during this time. On the eve of the collapse of the Nationalist regime, there were an estimated 80,000 NPOs in China.<sup>20</sup> After the People's Republic was founded in 1949, the Interim Provision on the Registration of SOs (*shehui tuanti*) was adopted in 1950.<sup>21</sup> Article 5 gave people the freedom to associate while Article 4 banned all counter-revolutionary organizations. Hence all organizations backed by the Nationalist government were banned.

Between the 1950s and 1960s, the SOs were reorganized and required to re-register and co-opted for the purposes of the Communist government. The number of national SOs rose from 44 in 1950s to about 100 in 1965 and there were an estimated 6,000 local SOs.<sup>22</sup> During the Cultural Revolution between 1965 and 1977 no SOs were allowed, but only mass organizations, which were under the government's control. Between the 1950s and 1980s, all NPOs were in reality believed to "belong to the state or Party."<sup>23</sup> Most were top-down and created by the Party or the government, such as the All China Women's Federation and the All China Youth Federation. It was only after Deng's 1978 "Open Door" policy and economic reforms that civil society started to develop again. Hence only after 1978 was there a revival of SOs in China.

From the early 1980s to the early 1990's, there was a dramatic rise in the number of SOs and an increase in volunteerism, but with some setbacks. It was in 1986, when the General Principles of the Civil Law of the PRC was promulgated, that social organizations were made legal entities. There were about 1,600 national SOs and 200,000 local SOs in 1989. Only 1,200 of the 1,600

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<sup>18</sup> Several sources were used for this section: *Philanthropy & the 3rd Sector in Asia & The Pacific* dated 4th October 2005; Karla Simon, op. cit. pp. 1-26; Zhao Liqing of the Institute of International Strategic Studies in Beijing wrote an essay, *The nature of partnerships with NPOs that contribute to the balanced and sustainable social, economic and environmental development in Mainland China* at <http://www.efc.be/ftp/public/CPI/Essay%20by%20Professor%20Zhao.pdf> in which he addresses the development of NPO networks and the functions of the China NPO Network; and Chen Guangyao, op. cit.

<sup>19</sup> See *Philanthropy & the 3rd Sector in Asia & The Pacific* dated 4th October 2005 at [http://www.asianphilanthropy.org/countries/china/history\\_third.html](http://www.asianphilanthropy.org/countries/china/history_third.html).

<sup>20</sup> See *Philanthropy & the 3rd Sector in Asia & The Pacific* dated 4th October 2005 at [http://www.asianphilanthropy.org/countries/china/history\\_third.html](http://www.asianphilanthropy.org/countries/china/history_third.html).

<sup>21</sup> Karla Simon, op. cit., p. 15 where she refers to the Provisional Measures on the Regulation of Social Organizations.

<sup>22</sup> See *Philanthropy & the 3rd Sector in Asia & The Pacific* dated 4th October 2005 at [http://www.asianphilanthropy.org/countries/china/history\\_third.html](http://www.asianphilanthropy.org/countries/china/history_third.html).

<sup>23</sup> Karla Simon, op. cit., p. 17.

national SOs and 180,000 of 200,000 local SOs were allowed to register. The Tiananmen demonstrations of 1989 rolled back the openness. New regulations were drafted and the SOs were governed by the 1989 Regulations for Registration & Administration of SOs. The State Council also promulgated the regulations in 1988 on foundations. There were tight controls and oversight of the both SOs and foundations (*jijinhui*) in 1988/9.

It was not until 1992, when Deng took his southern tour and the country forged ahead with reforms and greater openness, that more NPOs began to appear. From the 1990s to the present, there has been a real exponential growth of NPOs and in 1998,<sup>24</sup> there was the emergence of a new category of NPO, the CNIs or also known as the private non-commercial institutions (PNCIs). In 1999, after the CNI was created as a new category, there were only 5,901 of them, but by 2005, there were 146,432 CNIs.<sup>25</sup> The CNIs are self-governed, formed by private entities, and they do not have access to state funds. CNIs provide public services like education and health, which used to be exclusively provided by the state in the past.

Traditionally, networking was allowed only vertically, that is, between the NPOs and the authorities, but horizontal networking was allowed beginning in 1998. The catalyst to this was a research project launched by the China Youth Development Foundation. Its mandate was to examine issues and problems NPOs faced, explore the development for NPOs and study the issues of policy and law to promote the healthy growth of the third sector. This resulted in the formation of two university-based NPO Research Centers.<sup>26</sup> In addition, the Information Network of Foundations was formed in June 1999 to promote exchange and understanding of NPOs at home and abroad.<sup>27</sup> This was the predecessor to the China NPO Network whose current activities include networking, capacity building, and training in management and best practices for NPOs.

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<sup>24</sup> See *Philanthropy & the Third Sector in Asia & The Pacific*, op. cit. Deng's tour of the south encouraged openness in the economy which overflowed into other aspects and made it possible for privately created NGOs like Friends of Nature and the Global Village of Beijing in 1996 to be established - both environmental protection NGOs. Some CNIs were de-registered, e.g., the Falun Gong, because of non-compliance of government guidelines or going beyond their declared scope of activities. But Falun Gong still operates illegally in China.

<sup>25</sup> These figures are available at the MOCA website, <http://www.mca.gov.cn> or also at <http://www.chinanpo.gov.cn>. See Table 1 below.

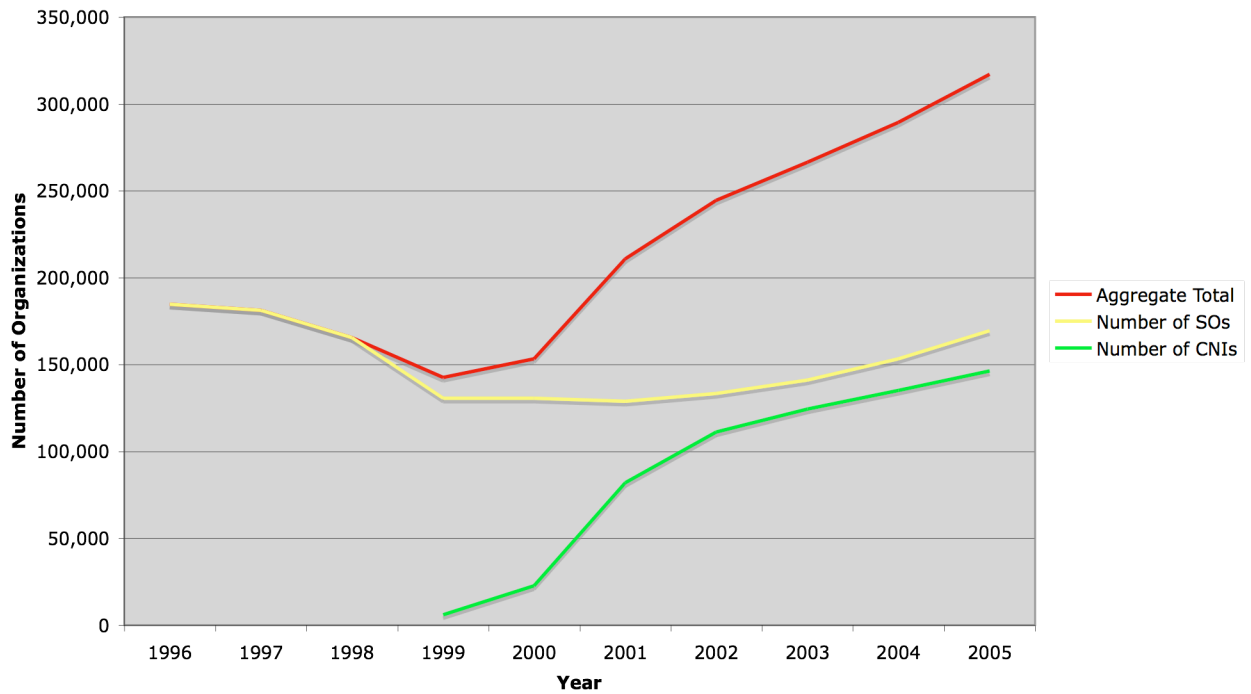
<sup>26</sup> The Peking or Beida University NPO Law Research Center and Tsinghua or Qinghua University NPO Research Center. The Tsinghua or Qinghua Center was founded in 1998. See [http://ggbg.cic.tsinghua.edu.cn/ggbg\\_en/board2/boardlist.jsp?boardid=1301&bid2=130105&pageno=1](http://ggbg.cic.tsinghua.edu.cn/ggbg_en/board2/boardlist.jsp?boardid=1301&bid2=130105&pageno=1). The Beida Center was launched in 2005.

<sup>27</sup> See the background paper on China dated July 2001 of the Asia Pacific Philanthropy Consortium, p. 8 at <http://www.asiafoundation.org/pdf/APPC.China.pdf>.

<sup>28</sup> See <http://www.npo.org.cn/en/other/mission.htm> for its mission. It is led by Prof. Shang Yusheng, a well-known NPO activist.

#### 4. GROWTH & COMPOSITION OF NPOs, SOs & CNIs

**Figure 1 Number of SOs, CNIs and Their Aggregate Total Between 1996-2005**



There has been considerable growth in the number of NPOs in the past ten years. In Figure 1 above, a slight dip in numbers is observed between 1998-2000 because of the restructuring and reorganization of NPOs as the new regulations of 1998 were implemented. But after 2000, the statistics indicate a rapid rise in numbers of both SOs and CNIs. The exponential rise in the number of CNIs between 2000 and 2001 is indicative of the growth of citizen initiatives, as these are strictly private and voluntary institutions. Table 1 below shows a breakdown of the different categories of NPOs over a ten-year period from 1996-2005. All the graphs and charts are based on statistics made available at the MOCA website.<sup>29</sup>

**Table 1 Showing A Breakdown of The Categories of NPOs For 1996-2005**

Year	Aggregate Total	No. of SOs	No. of CNIs	No. of Foundations
1996	184,821	184,821	-	-
1997	181,318	181,318	-	-
1998	165,600	165,600	-	-
1999	142,665	136,764	5,901	-
2000	153,322	130,668	22,654	-
2001	210,939	128,805	82,134	-
2002	244,509	133,297	111,212	-
2003	266,612	141,167	124,491	954
2004	289,432	153,359	135,181	892
2005	317,000	169,533	146,432	1035

<sup>29</sup> The source of all these statistics is from the MOCA website. From 1996 to 2005, see <http://www.chinanpo.gov.cn> while the statistics released in 2006 for 2005 is at <http://www.mca.gov.cn/news/content/recent/200642182431.html>.

Figure 2 below shows the composition of NPOs in 2005. There were 169,533 SOs, 146,432 CNIs and 1,035 foundations. Foundations were subsumed under SOs until 2002, so it is hard to track the growth of foundations prior to 2003. However, it is obvious from Table 1 that the number of foundations is growing gradually. They are likely to become grant-making organizations.<sup>30</sup>

**Figure 2 Composition of NPOs in 2005**

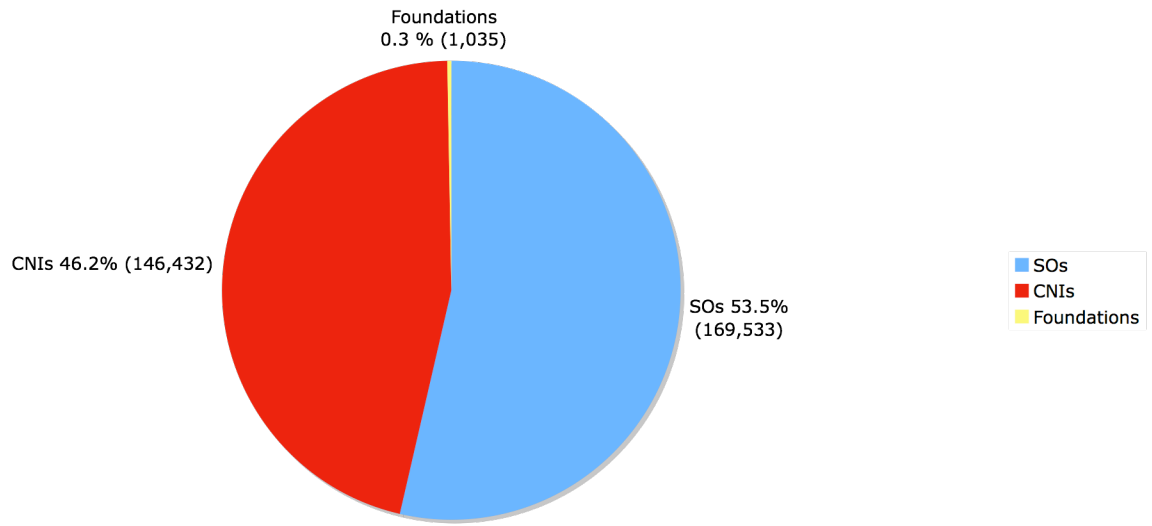


Figure 3 below provides a breakdown of the composition of SOs. In 2005, there was a total number of 171,150 SOs, of which 50,328 were professional SOs, such as the China Association for Lawyers, which is not required to register with MOCA. Social welfare organizations fall within the category of professional SOs. There were 53,004 industry-related SOs, e.g. China Association for Industry & Commerce, which is also exempted from registration. 39,640 were education-related such as the Social Policy Research Center while 23,961 were other SOs of which the All-China Federation of Returned Overseas Chinese is an example.

<sup>30</sup> Karla Simon, op. cit., p. 26.

**Figure 3    Composition of SOs in 2005**

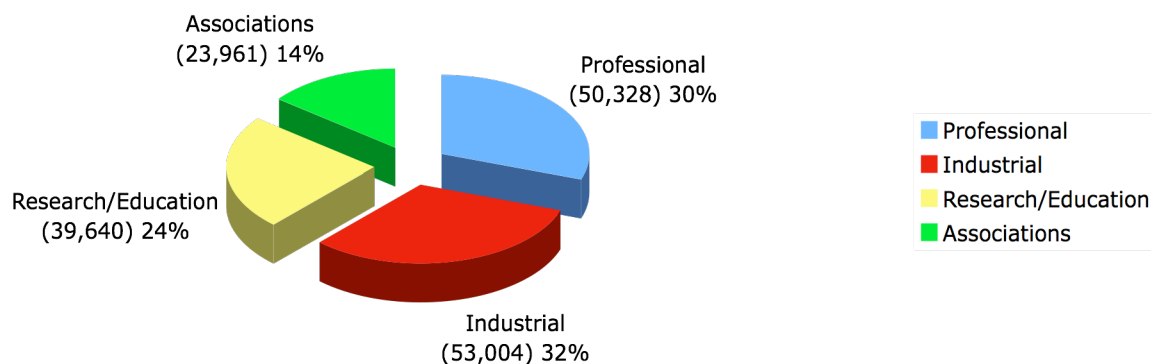
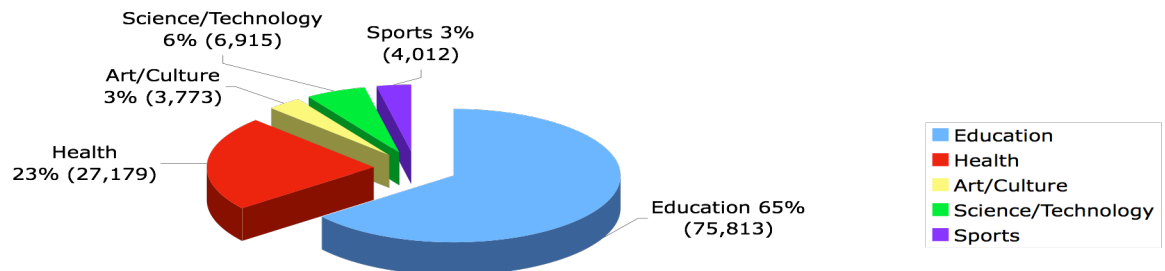


Figure 4 below shows the composition of CNIs in 2005. Education takes the lion's share, while health comes in second. This reflects the greatest needs in society due to the insufficient state investment in these sectors. But, NPOs and in particular, CNIs have been formed to meet the increasing social needs of the population.

It is interesting to look at MOCA's categories of registered SOs and note that sports is given its own category. A reasonable conclusion is that with the Beijing Olympics coming up in 2008 and a rise in disposable income so that the Chinese are able pursue leisure activities or sports, it would not be surprising to find more sports-related NPOs registered.

**Figure 4 Composition of the CNIs in 2005**



## 5. LAWS RELATING TO SOCIAL ORGANIZATIONS

These laws primarily relate to domestic NPOs, but mainly the same laws also govern foreign NPOs.<sup>31</sup> Many NPOs operate informally if they cannot register or do not want to go through the burden of registration because, for example, they cannot find a suitable sponsor. Some register as businesses since that is simpler but they then have to pay heavier taxes. The most relevant laws and regulations are as follows:

- The Constitution (1982)
- Regulations for Registration and Administration of Social Organizations (RASO) 1998
- Provisional or Temporary Regulations for Registration and Administration for Non-Commercial Institutions (TRACNI) 1998
- Public Welfare Donations Law 1999
- Trust Law 2001
- Regulations on the Administration of Foundations (RAF) 2004
- Accounting System of NPO 2004 (Best Practices)
- Tax Regulations like Property Tax Regulations (found in various pieces of tax-related regulations but no specific piece of legislation or regulation dealing with this issue.)

It would be impossible to deal with every regulation in detail, but a few selected provisions will be used as examples to show the existence of a right or hindrances to the development of

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<sup>31</sup> As mentioned above in footnote 11, see <http://www.cecc.gov/pages/virtualAcad/index.php?searchtype=searchstory> which cites its source as the *China Daily* dated 16 December 2005.



NPOs and some new provisions will be highlighted. Ding Yuanzhu et al, Karla Simon and Zhao Liqing and Qi Hong deal with the various deficiencies in the law in detail.<sup>32</sup>

First, Article 35 of the Constitution states that the “citizens ... enjoy freedom of speech ... of assembly, of association ....” The right to associate is therefore a basic right in China. Articles 10 and 11 of the RASO of 1998 deal with the establishment and registration of SOs. The RASO also redefines SOs<sup>33</sup> as not-for-profit associations, voluntarily consisting of Chinese citizens, and organized for common purposes. The TRACNI 1998 defines CNIs as organizations providing social services in a voluntary, not-for-profit manner.<sup>34</sup>

From 1989 until now, there continues to be a “dual management” process carried forward from the 1950 regulations. A sponsor or “mother-in-law” (*yewu zhuguan bumen*) is required before a potential NPO can be registered. These sponsors have virtually no incentives to engage in sponsorship, because they undertake many responsibilities for the NPOs that come under their supervision with little reward in return. Hence, it makes it difficult for new NPOs to find sponsors, which in turn forces NPOs to cultivate good relations with Bureaus in order to maintain their registration. In some provinces like Yunnan, the registration process has been simplified somewhat through an intermediary agency known as the Yunnan International NGO Society (YINGOS).<sup>35</sup> But the procedure is still not uniform across the provinces.<sup>36</sup> Without clear laws and regulations, it makes it very difficult for NPOs to maintain their registration or new ones to register, so some may then operate without registering or register as business enterprises instead.

Third, the tax exemption provisions are far from clear and are spread over several regulations and there is no one coherent regulation that deals specifically with the tax issues of NPOs. This makes claims for tax exemptions rather arbitrary and uncertain and the NPOs that should benefit are unable to do so.<sup>37</sup>

Last, the latest related regulation is the RAF 2004. It is an attempt to channel resources in the economy into addressing social problems by defining a framework for both private and public institutions. The foundation like the SO must find a sponsor in order to be registered which restricts the independent development of the NPOs, but the RAF does provide some liberalization. For example, unlike the SO Regulations, the RAF do not contain the restriction on the registration of more than one organization addressing the same issue. In addition, the provisions relating to fund raising are also unclear. Hence, there is some positive change, but the overall tenor is still one of firm government control.<sup>38</sup>

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<sup>32</sup> Ding Yuanzhu, op. cit., pp. 77-79; Karla Simon in her oral testimony to CECC mentioned above; Zhao Liqing, op. cit., pp. 8-10; and Qi Hong in her article, *The Current Legal Framework For Voluntary & Not-For-Profit Activity In china – A 2003 Update*, pp. 93-100.

<sup>33</sup> Karla Simon, op. cit., p. 25.

<sup>34</sup> Karla Simon, op. cit., p. 24.

<sup>35</sup> See the China Development Brief <http://www.chinadevelopmentbrief.com/node/296>, which answers some frequently asked questions.

<sup>36</sup> See the China Development Brief <http://www.chinadevelopmentbrief.com/node/296>, which answers some frequently asked questions.

<sup>37</sup> See Leon E. Irish, Jin Dongsheng & Karla Simon’s article on *Tax Rules For Non-For-Profit Organizations, Part I* at [http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO\\_tax\\_En.pdf](http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO_tax_En.pdf).

<sup>38</sup> See the CECC 2004 Annual Report on Civil Society for a more detailed discussion at <http://www.cecc.gov/pages/virtualAcad/CivilSociety/annRpt04section.php>.

An interesting note is that in many countries religious institutions are treated like NGOs or NPOs in other jurisdictions or more specifically as associations.<sup>39</sup> But in China, as in many East Asian countries,<sup>40</sup> religious institutions are treated separately from other NPOs. Religious organizations in China do not come under the Ministry of Civil Affairs and are not treated as SOs. Instead, they come under the Religious Affairs Bureau, which comes under the State Administration for Religious Affairs (SARA). SARA reports directly to the State Council.<sup>41</sup> Religious institutions and faith-based NPOs are subject to greater scrutiny because of the sensitivities and the spillover from the view that religion is the opiate of the masses, and especially after the Falun Gong demonstrations.

## 5. THE GOVERNMENT'S ATTITUDE TOWARD NPOs<sup>42</sup>

As the state is crucial in driving the speed of the reforms, it is also essential to know the government's attitude toward the sector, not just what is stated in the regulations. One may describe the relationship between the government and NPOs as one of suspicion and distrust and yet, "it cannot live without them". The government knows it needs all these foreign and domestic NPOs to help meet socio-economic needs, especially in education and health. It cannot provide for 1.3 billion people, in particular the 700,000 to 800,000 in the rural areas. With increasing challenges such as unemployment, income disparity between the east coast and the western region, between the urbanites and the peasants, between the Han and minorities, and increasing international responsibilities, the government knows it needs all the help it can get to address the many needs in society. Yet, it uses the regulations to control the NPOs because of the fear that they would foment dissent and social unrest, especially if they gather political capital by bringing genuine benefit to the people, who would then look to the NPOs instead of the Communist Party as their benefactor.

Nonetheless, some speeches made by officials at conferences bring hope that there will be greater changes ahead, which allow the development of a more independent third sector. For example, Chen Guangyao's address at the World Congress of Association Executives on 12 August 2000<sup>43</sup> raised the possibility that greater reforms are in the offing. On the other hand, the

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<sup>39</sup> Countries with a common law background like England, Canada and Australia treat religious institutions as associations and charities. See *Australian Charity Law Reform Proposals* by Professor Myles McGregor-Lowndes, pp 1-3 at [http://www.icnl.org/JOURNAL/vol5iss1/ar\\_myles.pdf](http://www.icnl.org/JOURNAL/vol5iss1/ar_myles.pdf).

<sup>40</sup> For example, in Japan there is a special religious corporation law.

<sup>41</sup> Karla Simon, op. cit. p. 19, footnote 65. See Carol Hamrin's oral testimony to the CECC on faith-based organizations at <http://www.cecc.gov/pages/roundtables/032403/Hamrin.php>. From my personal knowledge, one foreign NGO faced similar problems though they cannot be seen to be in the same category of the Falun Gong. They were not involved in any demonstrations and certainly not operating at a national level and actually were only providing medical and other social welfare services. But perhaps because people they worked amongst became practising Christians, they were seen as "dangerous" and engaged in religious activities. Their registration was not renewed and their workers were forced to operate in a legal but very inconvenient way. This is a common means of control over the foreign and local volunteers.

<sup>42</sup> Ma Qiusha, op. cit. and her oral testimony before the CECC mentioned earlier provides a good explanation of the government's attitude towards NGOs and NPOs. She also provides a good overview of the NPO system and structure in China and argues that the rise of NPOs between 1978 and 1988 shows that the government has been slowly relinquishing responsibility and power to the citizens.

<sup>43</sup> Chen Guangyao, op. cit., especially sections 2 and 3.

more recent “color revolutions” have caused some officials to be more suspicious, especially of foreign NPOs.

One additional factor to consider is that public perception of domestic NPOs is not very positive, making it is harder for a domestic NPO to raise funds. One reason is the problem of corruption especially if leaders in the NPO are ex-officials, who are often suspected of bribe-taking or merely because new domestic NPOs have yet to earn credibility.<sup>44</sup> The public has a better perception of international or foreign NPOs because most of these NPOs bring in funds from outside the country and are known as credible international organizations, especially if they have a proven track record. Since many of these foreign NPOs have to be registered or sponsored by some government department, they are seen to have greater accountability to the government.

The China NPO Network’s mission is to promote best practices and better governance of domestic NPOs, and it can use relations with foreign organizations to bring such practices to the attention of a wider group of Chinese NPOs. Thus, international NPOs and the China NPO Network working together, can play a role in modeling or instituting best practices and training NPO management personnel to raise the standard of NPOs operating in China. This will be discussed further in the next section.

## 7. NEED FOR REFORM<sup>45</sup>

Most writers and researchers in Chinese NPO-related law agree that the following recommendations for reform are the most essential:

- Removal of the requirement for a sponsor and the dual-administration system;
- Unified and rational legislation since the regulations are piecemeal;
- Clarity in the law so that it is a little more specificity. (The purpose of such reform is to reduce the wide discretion given to the local government, which encourages arbitrariness. In addition, matters relating to finance and staff social security are unclear);
- Tax exemption - Coherent legislation rather than many pieces of regulations;
- Fund raising - Rules are not clear; and
- A system to promote governance, capacity building and best practices in NGOs.

As mentioned in the section above, the requirement of a sponsor or the “mother-in-law” supervision is cumbersome and obstructs the full development of NPOs. Instead, the state should focus on how to improve fiduciary governance and protect the public from corrupt practices. Chen Guangyao, then Deputy Bureau Director of the NGO Administration Bureau of MOCA<sup>46</sup> made an encouraging statement in 2001 about the possible removal of this requirement for registration of NPOs. This was reiterated when Qiao Shenqian, Assistant Director of MOCA

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<sup>44</sup> See Andreas Edele’s report on *Non-Governmental Organizations in China*, Centre for Applied Studies in International Negotiations, dated May 2005, pp. 25-26, at [www.casin.ch/web/chinafinal.pdf](http://www.casin.ch/web/chinafinal.pdf). In my own conversations with some domestic NPOs that try to raise funds, the reason given for the difficulty they face is often that corporate or individual donors have a lack of trust in little known domestic NPOs especially in the provinces.

<sup>45</sup> See Karla Simon’s oral testimony before the Congressional Executive Committee for China at <http://www.cecc.gov/pages/roundtables/032403/Simon.php>; Ding Yuanzhu et al op. cit., pp. 77-91 Zhao Liqing, op. cit. and Qi Hong, op. cit. discuss the areas of reform in greater detail.

<sup>46</sup> Chen Guangyao, op. cit.

suggested the same in a Beijing News report of 18 October 2004. But a later Southern Weekend report dated 20 May 2005 and a more recent 2006 report, seem to indicate that there will be more stringent evaluations and scrutiny of NPOs, which signals that this requirement will not be removed in the near future.<sup>47</sup>

There is a lack of transparency in the regulations as well as a lack of rationalization in the rules and regulations. They are numerous and jumbled and their stipulations are sometimes rather confusing. China's labor and social security laws, the legal status of properly registered Chinese NPOs and their employees are also unclear. For example, it is not entirely clear what happens to an NPO's property on dissolution. There need to be revised laws that deal with these issues coherently.

Chinese tax laws grant NPOs broad tax-exempt status but no regulations specify which types of organizations may obtain tax-exempt status, and individual tax bureaus have the discretion to do so on a case-by-case basis, which leaves too much discretion to the implementing body. In addition, tax laws only permit deductions for contributions to a handful of approved NPOs and laws passed take a long time for implementation. In 2001, China passed a law granting income tax deductions for gifts to charity. As of Fall 2005, only eight GONGOs had been granted the right to give tax-deductible receipts.<sup>48</sup> There needs to be clear tax regulations that provide tax exemption for NPOs and incentives for the private sector and individuals to give to charity.

There needs to be better accountability systems and training of local NPO personnel. The China NPO Network is already working with international consultants to provide training, capacity building for NPOs and encouraging best practices in NPOs. This can also be done through a partner system whereby a credible international or local NPO works alongside the learning NPO and provides mentoring or hands-on training while the China NPO Network, which has taken concrete steps to provide capacity building, training and best practices, continues to develop tools and training to help raise the standard of NPOs in China.<sup>49</sup>

In addition, there should be clear regulations on fund raising, management of funds with good accounting standards,<sup>50</sup> so that members of the public, donors and beneficiaries of donations are protected.

There are other aspects to the needed reforms, but the most pressing are the above-mentioned reforms. Reforms are needed not just in the formulation of laws and regulations, but also in its implementation so that there is a marked reduction in the arbitrariness and inconsistent application of the law, as is the case with many laws in China.<sup>51</sup>

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<sup>47</sup> See the reports at

<http://www.cecc.gov/pages/virtualAcad/index.phpd?searchtype=searchstory>;  
<http://www.cecc.gov/pages/virtualAcad/index.phpd?searchtype=searchstory>, and more recently, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingl=49325#id49325>.

<sup>48</sup> Information from a contact who works with the China NPO Network. See Leon E. Irish, Jin Dongsheng & Karla Simon's article on *Tax Rules For Non-For-Profit Organizations*, para. 1.5.4 at pp. 36-37 at [http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO\\_tax\\_En.pdf](http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO_tax_En.pdf), where they state that the preferential tax treatment is only for a few privileged NPOs.

<sup>49</sup> See their website at <http://www.npo.org.cn/en/member/event/detail.php?id=7#>.

<sup>50</sup> It is not clear to what extent the new NPO Accounting Standards have been effectively applied.

<sup>51</sup> The laws and regulations are often not clear or rationalized and their implementation is not uniform because of the lack of structure and system in the legal system, and a lack of qualified

## 8. CONCLUSION

Although the law in this sector is at an early stage, it is a step in the right direction. But the speed of legal reform for the third sector is unlikely to parallel that for the commercial or financial sectors in part because of the sensitivities around what NPOs do. In addition, there is no equivalent of an international organization like the World Trade Organization (WTO) to apply pressure for an improvement in China's laws, regulations and legal system in the third sector. Nonetheless, there are spill-over effects that can be reasonably expected.<sup>52</sup>

First, from past observation, economic openness and rising income<sup>53</sup> usually brings about greater citizen participation and a relaxation of control on the part of the government over aspects of a citizen's life. Second, the spillover effects of the WTO's pressure for China to have a stronger rule of law will encourage more NPOs, especially for those that are trade, commerce, or industry-related.

It is a long road to an effective and efficient legal system in relation to NPOs, but at least there is regular dialogue and the government is open to input from research groups which comprise both local and foreign experts, namely at:

- Tsinghua or Qinghua University NGO Research Center;
- Peking or Beida University NPO Law Research Center;
- the China NPO Network; and
- the Chinese Academy of Social Sciences (to a lesser extent).

If the growth of NPOs is taken as a good proxy of the growth of civil society and citizen participation, it is encouraging to see the rapid growth of both local and foreign NPOs in China since 1997. The steps and policies taken by the government are indicative of the government's decision to allow the development of the NPO sector, but as usual, gradually. Projecting from the past behavior of its national leaders and barring any unexpected events, it is likely that liberalization and reform in the NPO sector in the PRC will be no different and will follow the same controlled path forward.

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legal professionals including judges. But the state has made tremendous progress from a completely planned economy with almost no rule of law as is understood in many developed jurisdictions, to a market economy with some rule of law in 30 years. It has also made great efforts in increasing the enrollment in law schools and the number of trained judicial personnel. Developing the personnel resource and good administration to have a solid legal system will of course take time.

<sup>52</sup> It would have been interesting if I could have obtained figures of collective contributions in terms of monetary as well as non-monetary contributions such as time and professional skills made by all foreign and local NPOs towards the economy of China. So, a stronger argument could be made for reforms in the third sector based on loss caused by ineffective or inefficient laws and regulations in the NPO sector. It may not match the income from trade and commerce, but it must be considerable.

<sup>53</sup> Ding Yuanzhu, *op. cit.*, p. 21 which shows that SOs increased with the increase in the GDP from 1987 to 2001

**GOVERNMENT-NGO COOPERATION**  
**IN THE**  
**PEOPLE'S REPUBLIC OF CHINA**  
**EXPERIENCES FROM YUNNAN PROVINCE**  
BY BERTHOLD KUHN<sup>54</sup>

**ABSTRACT**

The purpose of this paper is to analyze cooperation practices among Non-Governmental Organizations (NGOs), state agencies, and international organizations, and to critically review the existent regulatory framework for such cooperation in the Peoples Republic of China (PRC). The paper has been drafted following visits to NGOs, state institutions, and meetings with German Government supported CIM<sup>55</sup> experts in Yunnan province in Southwest China.<sup>56</sup> The interviewed NGOs and groups represent various types of formal and informal arrangements between NGOs and state institutions that are active in the field of natural resource management, environmental protection, and rural development.

NGOs have in many ways demonstrated their ability in accessing indigenous communities, introducing participatory approaches, and tapping international resources for development work in Yunnan province. Provincial and local authorities as well as NGO representatives are eagerly looking at good practices of development partnerships in other countries and regions that may be multiplied and adjusted in Yunnan province.<sup>57</sup> Government agencies and state-sponsored institutions have entered into various types of partnerships with international and local NGOs. Government policies show an increasing responsiveness to concerns voiced by NGOs. However, there are multiple challenges for policy makers, NGOs, and the academic community in the present reform context in the PRC. A regulatory framework for NGOs and NGO-Government cooperation conducive to facilitating a wide range of cooperation models with smaller and larger community-based and citizen-initiated organizations has yet to be enacted.

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<sup>55</sup> The Centre for International Migration and Development (CIM) is the human resources placement organization for German Development Cooperation. CIM places experts and managers in key positions worldwide and supports their work by topping up their local salaries, [www.cimonline.de](http://www.cimonline.de)

<sup>56</sup> The visits took place in March/ April 2006 and were supported by CIM.

<sup>57</sup> NGOs, provincial and local authorities have invited researchers from the NGO Research Center of Tsinghua University, including the author, for participation in workshops, exchange and research activities. For an analysis of NGO-Government cooperation models and practices with reference to policy dialogue, programs and projects in different countries and regions, see: Kuhn, Berthold 2005: *Entwicklungspolitik zwischen Markt und Staat. Möglichkeiten und Grenzen zivilgesellschaftlicher Organisationen* (Development Politics between Market and State. Potentials and Limitations of Civil Society Organizations), Frankfurt a.M.: Campus Publishers.

## 1. OVERALL ANALYSIS

Government-NGO cooperation is constantly growing in most provinces in the PRC, and it certainly is in Yunnan province, which is characterized by ethnic, cultural, and economic diversity. Twenty-five officially recognized minority groups comprise one third of the total population of 44 million. This ethnic and economic diversity is matched by the natural biodiversity inherent in Yunnan's varied—but almost invariably mountainous—landscapes.<sup>58</sup> Yunnan is but one outstanding province where international NGO activities and Government-NGO cooperation have rapidly developed over the past decade. This section focuses on the general environment for such activities.

Yunnan province is considered by civil society groups and development experts to be one of the most progressive provinces in China in terms of freedom and scope for NGO activity. Government agencies in Yunnan have demonstrated their commitment to various kinds of international and local partnerships. The Yunnan Great Rivers Project, started in 1998, is a cooperation between the Nature Conservancy, the world's largest private, international conservation group and the Yunnan Provincial Government. Many rural schools have been built with energy efficient technologies under this project.

It is still difficult, however, for some more advocacy-oriented organizations in Yunnan to get full recognition if they focus on critical environmental issues. For example, the internationally well connected and largely foreign funded NGO Green Watershed, which pursues a proactive and protest-oriented campaign approach, has experienced some interference by government authorities. Local partner NGOs of the international NGO Oxfam have also recently reported some interrogations by security officials.

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<sup>58</sup> Young, Nick/Young, James 2005: A Provincial Profile and Situation Analysis, Report of China Development Brief, December 2005.



The regulatory scope for NGOs is still somewhat opaque. There is an array of regulations governing NGOs in the PRC, including regulations on social organizations (membership-based organizations), foundations, non-profit enterprises, and non-commercial institutions.<sup>59</sup> There is also a trust law that is not operational.<sup>60</sup> Some provincial authorities have issued their own guidelines, as is the case with Yunnan. More recent government policies generally aim to bring NGOs under the umbrella of the Civil Affairs Department, which implies a proper registration as an association or foundation. This is also the case in Yunnan province. However, many NGOs in Yunnan still hold a registration as non-profit enterprises with unclear tax status and accounting and auditing guidelines. Some have been denied renewal of their operations as non-profit enterprises without having yet been able to register under the new regulations for foundations (2004) or the expected revised regulation on associations.

On the other hand, the Chinese government has in many locations, including in Yunnan, adopted a pragmatic approach towards the activities of local initiatives and NGOs. Activities of NGOs are tolerated and sometimes supported by government offices. This holds true even for groups that are not properly registered and for NGO activities that may be considered to infringe upon existing regulations, as for example in the field of micro-finance.<sup>61</sup>

Some innovative development activities have started to operate in “grey areas” and without proper registration and governmental backup. They have subsequently sought official approval. Government officials have sometimes recognized such initiatives as contributions to China’s overall objectives and government declared slogans of achieving greater social harmony and advancing innovations and technological development.

In some cases, local project initiatives have been incorporated into larger programs that have secured major national and international support. One outstanding example is the rural education Candle Light Project in Shanxi province that began with an initiative of a Chinese researcher living in the United States and local retired teachers. This project, started in 1994, secured follow-up support from World Vision and developed four years later into a fully-fledged project structure of the state-sponsored China Charity Foundation.<sup>62</sup>

International donor support plays an important role in facilitating partnerships between Government and NGOs. The growing number of jointly funded and implemented projects, especially in Yunnan province, has familiarized many Chinese decision-makers and development

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<sup>59</sup> [www.chinadevelopmentbrief.com](http://www.chinadevelopmentbrief.com) has translated key regulations. For a discussion of Chinese law for NPOs see: Simon, Karla 2005: Reform of China’s Laws for NPOs - A Discussion of Issues Related to *Shiye Danwei* Reform, in: Zeitschrift für chinesisches Recht, pp. 71-89.

<sup>60</sup> The Trust Law was enacted in 2001 following a long process of consultation (see Zhaoping, Zhu and Gebhardt, Immanuel (eds.) 1999: The Chinese Trust Law, Beijing: Publishing House of the Supreme Court. The law provides for both private trusts and public benefit or charitable trusts. It establishes a non-exhaustive list of charitable purposes. Approval and supervision by a relevant government or party organ is needed. The law has not yet been used as an instrument for establishing development oriented NGOs. Trusts have not been registered under the law due to perceived concerns of political nature. German Technical Cooperation (GTZ) is currently considering analyzing the reasons for the failure of the trust law.

<sup>61</sup> World Vision supports micro-finance activities in Yunnan. The growing interest of local communities in financial services challenges existing limitations for provision of financial services by non-banking institutions.

<sup>62</sup> Liu Xiaohua 2002: Overview of Educational Needs and Philanthropic Opportunities in China, paper published for the International Community Foundation, San Diego, California, USA [www.icfdn.org/publications/...](http://www.icfdn.org/publications/...)



planners at different levels with state-of the-art project designs, notably in the field of social development and environmental protection.

One common point of agreement between many foreign and Chinese development and civil society experts is the need to adopt a more orderly, systematic, and law-based approach towards the growing number and variety of NGOs in the PRC. The current regulatory framework of the PRC is not considered conducive to the establishment of smaller grassroots organizations. Registration as a social organization/ association currently requires a minimum membership of 50 persons and a partnership with a governmental agency, the professional leading unit (*yewu zhuguan bumen*). Thus, many community-based organizations are not registered and operate in project contexts. Efforts to bring smaller organizations under the umbrella of a legal framework with proper management, tax and accounting guidelines would facilitate monitoring and evaluation by government authorities. Such steps are under consideration but have yet to be implemented.

Generally speaking, the confrontational approach of NGO activists that is found in some Western societies is not prevalent amongst NGOs in Yunnan. Diversity and competing values are less pronounced in the political and development discourse in mainland China than in the West. Interpretations may of course differ on the reasons for the more prudent, but often well-focused, advocacy work in the PRC. Nevertheless, it is largely undisputed among the development community in the PRC, and especially in Yunnan province, that the Government and state institutions show some increasing overall responsiveness to critical and sensitive topics in the field of social development and environmental protection and even human rights issues.<sup>63</sup>

This may come as a surprise to some “China-bashing” activists, mostly based in the USA or Great Britain, that have become increasingly detached from the high-paced reform process in the PRC.<sup>64</sup> Differences of opinion and conflicts between NGOs and Government mainly occur in the context of dam construction projects, licensing of polluting industries, and HIV-AIDS policies. It remains evident in the PRC, however, that the government administration, as in most countries, favors NGOs that complement or contribute the overall government agenda rather than those viewing their role as agents of check and balance against excessive government powers. The number of initiatives and registered NGOs that complain about the lack of legal certainty and political freedom is relatively small, but they do exist. Service-oriented NGOs enjoy more support and cooperation than advocacy-oriented NGOs involved in international campaigns and networking.

Many international and local NGOs are active in the Yunnan NGO Forum. The Forum is an informal get-together of more than 300 organizations for information exchange, sharing of experiences, and provision of ad-hoc training. Cooperation with the growing Beijing-based umbrella and training organization Chinese Association for NGOs (CANGO), which is affiliated to the China International Center for Economic and Technical Exchange (CICETE) and supported

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<sup>63</sup> This is evident from the growing number of conferences on poverty and environmental issues, CCTV news reporting, articles of Beijing Review ([www.bjreview.com.cn](http://www.bjreview.com.cn)) and China Daily ([www.chinadaily.com.cn](http://www.chinadaily.com.cn)). The Government has also issued a Democracy White Paper in October 2005. The document, titled Building of Political Democracy in China, points out the problems the country has to overcome and major steps to be taken in the reforms of its political system. It includes a section on "grassroots democracy in urban and rural areas" and one on "respecting and safeguarding human rights." The paper is available at [www.china.org.cn](http://www.china.org.cn)

<sup>64</sup> China-bashing activists include members of political and sectarian groups in exile but also renowned scholars from the London School of Economics, the Centre for the Study of Democracy, University of Westminster and the National Endowment for Democracy (NED), see NED report: <http://www.ned.org/publications/reports/backlash06.pdf>.

by German Development Cooperation, has not yet developed. Dialogue and exchange exists with the China NPO Network. International and domestic NGOs all await forthcoming national legislation that will regulate the registration and operations of international and foreign NGOs.

## **2. CASE STUDIES OF GOVERNMENT-NGO COOPERATION IN YUNNAN PROVINCE**

The case studies in this section are based on brief visits and interviews. The outline of the cases is meant to illustrate the variety of institutional arrangements and NGO practices that have emerged in Yunnan province. The following cases are presented:

- An international NGO working through a locally registered NGO partner (section 2.1);
- A local NGO functioning as project management partner of a state institution (section 2.2);
- A local NGO with predominantly foreign funding support registered as an association at the local level (section 2.3); and
- An organization without legal status set up by an international organization and a research institute (section 2.4).

### **2.1 THE CASES OF THE YONGSHENG RURAL DEVELOPMENT ASSOCIATION AND WORLD VISION**

The case of the Yongsheng Rural Development Association partnership with World Vision shows how a local NGO and local government authorities have benefited from cooperation with a major international NGO following an earthquake in Yunnan in 1996. The experimental cooperation that was extended to World Vision by brave local government authorities in the absence of an overall government policy on NGO cooperation is considered a success story worth replicating and multiplying in other areas. While the cooperation experiment has been successfully extended from relief work to the provision of child and community development services, World Vision has not yet obtained a proper legal status in Yunnan. The long-term sustainability also remains an issue of concern for the local NGO partner, the Government and World Vision, which is planning for a gradual withdrawal and handing over of responsibilities to its local affiliates. Research efforts are currently involved in analyzing and exploring successful fundraising approaches, with international outreach, and continued local cooperation between government and NGOs in Yunnan in order to sustain the project financially when World Vision withdraws.

Yunnan province received international development assistance following an earthquake in February 1996. The earthquake affected the million-person city of Lijiang and the city of Yongshen, south of Lijiang, with a population of around 80,000. World Vision was one of the major international donors to the victims of the natural disaster in Yunnan. The organization is inspired by Christian values but it does not follow a religious missionary approach.<sup>65</sup> World Vision is one of the largest international NGOs, working in nearly 100 countries and receiving donations worth 1.547 billion in cash and goods (2004). World Vision has so far implemented about 88 relief and development projects in 16 provinces/municipalities across China. From 1989 to 2004, funds worth 636 million Yuan (USD 77.6 million) were used in different projects in China, out of which 30 million RMB went to Yunnan province.

Following the relief work in Yunnan province, World Vision aimed at making its contribution to the relief and rehabilitation work sustainable. World Vision launched medium- and long-term

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<sup>65</sup> See [www.worldvision.org](http://www.worldvision.org)

oriented development activities, notably the Child Sponsorship Program that receives support from World Vision Hong Kong and other country offices of the organization. The launch of the program in 1997 was effectuated in cooperation with its locally registered NGO partner and government authorities. Other NGOs, such as Plan International, followed with similar programs.

The Yongshen area became one of the focal areas of World Vision China. World Vision enlarged its work from 34 to 54 natural villages reaching out to 11,000 people. The Yongshen Rural Development Association came into existence with the support of World Vision. It was established on 8 August, 2003 and registered as a social organization (*shehui tuanti*), the equivalent to an association, under the local Civil Affairs Bureau. World Vision itself is registered in Hong Kong but has not yet been able to obtain registration in China's mainland provinces.

The local government considers the cooperation with World Vision and its local affiliate as "a window to the world." The cooperation promotes international exchange in the form of visits of foreign experts, volunteers, and researchers. The ten-year anniversary workshop of the cooperation arrangement that took place in 2006 with guidance from the NGO Research Center at Tsinghua University, Beijing, highlighted some comparative advantages but also critical issues of NGO-Government cooperation. The Government perceived the participatory and bottom-up working style of the NGO as a positive aspect. It also praised the ability of the NGOs to reach out and interact with minority and most-vulnerable groups.

Issues of concern were the relatively high staff turn-over of government officers and the lack of incentives for their cooperation in high-paced project work with NGOs. Finding qualified staff with local language skills and identity for such internationally networked projects constitutes another challenge for the partners. However, government as well as the NGOs seem to accept the challenge to make the positive experience sustainable and replicable by focusing on skill development and capacity building and mobilization of additional and alternative financial resources. Funds from the corporate sector are one of the targets but business philanthropy still has a long way to go in the PRC.<sup>66</sup>

## **2.2 THE CASE OF THE YUNNAN ENVIRONMENTAL DEVELOPMENT INSTITUTE (YEDI).**

The cooperation between the Yunnan Environmental Protection Bureau (EPB) and the local NGO Yunnan Environmental Development Institute (YEDI) demonstrates positive effects of complementary environmental activities between a state institution and an NGO initiative in Yunnan province. The partnership has contributed a great deal to gradually influencing and changing the working culture of a state institution from a local policing approach to a comprehensive strategy that responds more to the needs of local populations. International funding has provided the provincial administration with state-of-the art knowledge and good-practices in environmental project design and management. The environmental work of the EPB is now more oriented towards prevention-, analytical- and action-based interventions.

YEDI is a non-profit enterprise (*minban fei qiye danwei*) registered in the Kunming Municipality. It came into existence in 2003. The initiative was launched by environmentally concerned people working in different departments/units in Kunming and a German expert supported by CIM, working in YEPB. YEDI is registered with the Civil Affairs Office at Kunming and supervised by the Science and Technology Bureau at Kunming municipality. YEDI provides technical advisory services in the field of water pollution, ecological sanitation, and related environmental and social issues.

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<sup>66</sup> See Yeh, Andrew 2006: Chinese philanthropy yet to take off, Financial Times, June 2 2006. The article points out that China's not-for-profit sector is hindered by a shortage of domestic donations and inefficient ways of channelling funds to grassroots groups. It refers to a research work by McKinsey consultants.

The process of registration was rather smooth in the Chinese context but still took several months. The Science and Technology Bureau inspected the office facilities and the lease contract before officially approving the application. YEDI drafted statutes that subsequently required some amendments following changes in regulations at the government level and also following changes of the office address of YEDI.

YEDI had registered to both local tax bureau and state tax bureau right after getting the approval of the local Civil Affairs bureau. The cooperation with the tax authorities has been rather unorthodox. The tax authorities did not consider the income of the organization as potentially very significant. The organization also did not receive guidelines for accounting and payment of taxes. YEDI stated that it was de-registered with the tax authorities.<sup>67</sup> The Science and Technology Bureau contents itself with receiving an Annual Report that includes financial statements.<sup>68</sup> The cooperation is, overall, seen as beneficial for all parties. EPB was able to attract major international funding with the support of, and through its partnership with, YEDI. The staff of the NGO in turn enjoys government patronage when organizing workshops and other events and was able to gain a good reputation for its responsive and competent services. Other NGOs in Yunnan engage in dialogue and networking cooperation with YEDI and EPB. The local NGO YEDI may also act as a host structure for international development initiatives seeking an institutional non-governmental affiliation in China that enjoys government support. YEDI is currently considering a partnership with the "Living Lakes" network of the Global Nature Fund<sup>69</sup> that promotes voluntary international collaboration among organizations that carry out projects benefiting lakes, wildlife, and people.

YEDI has won a prize awarded by the SwissRe, one of the world's largest reinsurance companies, for its work in the field of sustainable watershed development. The shared prize money of initially US\$50,000 came with an agreed upon option for receiving another US\$50 000, subject to submission of a relevant project proposal. The annual turnover of YEDI has steadily increased over the past years reaching around 500 000 RMB in the year 2005.

Environmental protection has received increased attention and more resources in Yunnan province following the establishment of YEDI. EPB was able to mobilize more international funding support and to engage in more networking with other NGOs. YEDI has a lean and flexible management structure. It mainly works with part-time staff and local consultants, and accesses the expertise available at EPB. The governmental organization EPB itself lacks some

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<sup>67</sup> The organization stated that it has not been sufficiently aware of regulations in aspects of tax management and sought advice from government officers. The unclear tax status has then bothered the organization and the respective tax officer for some time. An officer of the local tax bureau eventually paid a visit to the YEDI office to learn about the status and the activities of the organization. During the inspection, YEDI was required to show its license, explain its activities and funding sources. The officers came to the conclusion that, in the absence of clear regulations on income of organizations like YEDI, the donations should not be regarded as taxable income. After some negotiations, the officers agreed that the organization may be deleted from the register of the tax authorities. YEDI submitted an application for de-registration. It was advised to give "disbandment of the organization as reason for the desired deregistration. The application for deregistration was approved and duly stamped.

<sup>68</sup> Before 2005, NGOs used the financial report corresponding with format of industry enterprises or commercial enterprises. The Ministry of Finance issued guidelines for accounting of NGOs, which became effective from 1st January 2005. According to this new system, there are three standard format sheets for financial report for NGO, including "Balance Sheet" "Business Activities Report" and "Cash Flow statement". There is no request for auditing.

<sup>69</sup> Global Nature Fund is a public benefit foundation with headquarters in Radolfzell, Germany ([www.globalnature.org](http://www.globalnature.org))

flexibility and faces administrative constraints for meeting the requirements of international donors such as, for example, opening a separate project account for smaller projects.

### **2.3 THE CENTER FOR BIODIVERSITY AND INDIGENOUS KNOWLEDGE (CBIK)**

The case of CBIK demonstrates how local organizations have been able to make use of existing regulatory provisions for setting up internationally well-networked NGOs. The organization itself faces new challenges to relate more to the public and to adjust to a changing context of donor priorities.

CBIK was established in 1995 in Kunming under the regulations for social organizations (*shehui tuanti*) corresponding to the legal type of membership associations that are typical for civil law countries. CBIC re-registered in 1998 under the revised regulations for social organizations; this involved a shift from the Science and Technology Bureau to the Civil Affairs Department with the Forest Department as technical supervisory government partner. CBIK enjoys tax privileges. Donations to CBIK are officially deductible, following a long process of negotiations.<sup>70</sup>

CBIK has a membership assembly of more than 100 members and a national governing body of 13 members and several standing committees. The initially established international governing body has ceased to convene. CBIK carries out activities in the field of promotion of indigenous knowledge for conservation issues, community livelihood programs and watershed governance programs. It currently implements ten projects supported mainly by international donors (around 90 percent) and state research funds. The Ford Foundation provides core funding; other donors include international NGOs (Oxfam, Misereor, Action Aid, Conservation International) and bilateral cooperation agencies such as GTZ and InWent. The organization has an annual budget of around US\$50,000, 20 full-time staff and 23 staff in total. It also employs international advisers. CBIK has gained a good reputation in the field of participatory methodologies and has been invited to provide consultancy like inputs to various projects and workshops.

CBIK is in the process of reorientation. It currently enjoys continued support of donors but expects possible decline of international aid due to China's rapid economic growth and recent trends in shifting priorities closer to the Millennium Development Goals (MDGs). The MDGs relate to poverty eradication and environmental activism but less to CBIKs long-time focus on natural resource management at the community level. The organization wants to increase its visibility in the national context through media contacts and national networking. It has gained a good reputation for producing documentaries. A separate section within the organization is in charge of this. Another section is also concerned about growing corporate philanthropy in China and how the organization can access such funds. The organization does not currently solicit funds from the public due to perceived legal restraints. The regulations on social organizations do not provide for a specific mention on public fund raising.

### **2.4 THE CENTER FOR MOUNTAIN ECOSYSTEM STUDIES**

The case of the Center for Mountain Ecosystem Studies (CMES) serves as an example of how a well-established research institution and an international partner organization have developed a joint initiative, the CMES, to better interact with local groups in the field of subtropical natural resource management and to set up a structure that may ultimately take over the activities of the

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<sup>70</sup> In general, deductions can be taken only for contributions to certain named community benefit and relief undertakings, or as agreed by the Ministry of Civil Affairs. See, Leon Irish, Jin Donsheng, and Karla Simon, China's Tax Rules for NPOs, A Study Prepared for the World Bank, available at [http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO\\_tax\\_En.pdf](http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO_tax_En.pdf), at page 16 ff

World Agroforestry Centre once sufficient national expertise and capacities have been built up in the PRC.

The World Agroforestry Centre operates under a bilateral agreement with the Ministry of Agriculture in China. It was created in the mid-1970s and joined the Consultative Group on International Agricultural Research (CGIAR) in 1991. In 2002 the Centre acquired the brand name the 'World Agroforestry Centre' but the 'International Centre for Research in Agroforestry' remains the legal name and it continues to use the acronym 'ICRAF'. The mission of ICRAF is to advance the science and practice of agroforestry to help realize an Agroforestry Transformation throughout the developing world. The Center for Mountain Ecosystem Studies is a joint set up of the World Agroforestry Centre operating in the PRC under the name of ICRAF in Kunming, and the Kunming Institute of Botany (KIB), established under the Chinese Academy of Sciences. The Center for Mountain Ecosystem Studies carries out its activities on the premises of ICRAF without having a separate legal identity and its own employees. Its current function consists of promoting innovative thinking and strengthening local linkages of ICRAF in natural research management.

ICRAF itself operates with international funding from well-equipped premises and enjoys close cooperation with the KIB. ICRAF facilitates interaction among village communities, local line agencies, NGOs, provincial and national researchers and policymakers, and international researchers and donors. Activities are based on three thematic principles: natural resource management (dissemination of technology and information), people (training, education and facilitation) and governance (institutional development, administration and policies).

### **3. CONCLUDING REMARKS**

As these case studies illustrate, Yunnan Province represents a place of growing international partnerships, networking, and cooperation among Government agencies, NGOs, activists, and researchers. The overall positive cooperation among the various state and non-state stakeholders may contribute to growing support for developing a less restrictive and burdensome form of NGO regulation at different administrative levels in the PRC. The Government maintains reservations against horizontal linkages of NGOs while it seeks to encourage institutional affiliations of NGOs to government authorities and to foster a culture of mainstream embeddedness of NGO activism.

The case studies show that various forms of adaptation to legal restrictions permit a certain degree of flexibility of operations, when the local government is willing to recognize the ways in which it can be assisted by NGOs.

As indicated in Part 1, NGOs need a mandatory affiliation with a technical supervisory government institution in the PRC. In Yunnan province, such affiliation does not seem to mean major interference by government in the day-to-day affairs of NGO management. In most cases, the so-called technical parent organization has exercised its supervisory and control function in a limited way. Many creative initiatives have emerged, as can be seen in Part 2.

There are some remaining drawbacks, however. Network and umbrella organizations still face registration restrictions under the current legislative framework in China. Cooperation among NGOs would be expected to benefit if such restrictions were removed. In addition, because of a lack of good incentives and a fear of possible corruption, private business has not yet developed a high profile of corporate social responsibility and philanthropy in the province.

International funding has greatly facilitated the rise of NGOs in Yunnan and their growing cooperation with state agencies. Research institutes and their staff play an important role in fostering a culture of innovation and international exchange that facilitate joint projects.

Government as well as NGOs expressed overall satisfaction with such cooperation arrangements. Both parties do not lack ideas for future initiatives. In order to achieve more success, it is clear that the legal framework for cooperation and for NGO registration and operations should be clarified. According to information from various sources, including the national media, a revision of the regulatory framework for NGOs is underway in the PRC, including new regulations for international/foreign NGOs. One of the new features of such a regulation may ease the process of registration and operation of grassroots NGOs by exempting them from the upheld standard requirement of teaming up with a professional leading unit. Those developments will serve to provide a more sustainable platform for the cooperation initiatives described here.

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## **STUDENT ARTICLE**

# **VOLUNTEERISM IN THE UNITED STATES: AN ANALYSIS OF VOLUNTEERING IN NOT-FOR-PROFIT SOCIAL SERVICE ORGANIZATIONS**

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## **ABSTRACT**

This analysis will begin with a brief history of the role of volunteerism in the United States, followed by a summary of current volunteer rates as reported by the Bureau of Labor Statistics of the United States Department of Labor and the National Center for Education Statistics. The paper will continue with an analysis of the theoretical underpinnings of volunteerism as well as a discussion of the benefits and challenges of volunteering from the perspectives of volunteers themselves and not-for-profit organizations that make use of volunteers. Examples of current volunteer activities and projects will also be discussed, followed by the presentation and analysis of the methods and results of a survey conducted by the authors. The survey assessed the use and training of volunteers by not-for-profit social service organizations in the Washington, D.C. metropolitan area that provide various social services to needy populations in the District of Columbia. Finally, this analysis will conclude with a discussion of conclusions and suggestions generated in response to the findings of this research.

## **VOLUNTEERISM IN THE UNITED STATES**

Volunteerism was a part of American life even before the colonies gained their independence from Britain. While settling in America, British colonists retained certain aspects of the Elizabethan Poor Law, including the principle of local responsibility for the care of the community's needy (Trattner, 1999). Although direct alms-giving to the poor was disapproved of during early colonial times, colonists did recognize some need for charity based on this principle. Typically, families took responsibility for their relatives and friends so the burden would not land on society as a whole (Ellis & Noyes, 1978). However, when this was not possible, families within a community volunteered to take turns caring for a poor person for part of the year (Trattner, 1999). This kind of charity was considered to be virtuous from a religious perspective and was therefore encouraged (Ellis & Noyes, 1978).

As the population of the colonies increased, this informal welfare system became inadequate, resulting in the establishment of almshouses. These homes were largely dependent on volunteers, which soon gave rise to the development of various clubs, societies, and fraternal orders based primarily on performing benevolent service for the community. These voluntary organizations began responding to the needs of the community that were not being adequately addressed by local governments. This type of group involvement approach had historical roots with English religious dissenters who served the community in areas where neither the Church nor the government were effectively responding (Ellis & Noyes, 1978).

In the early 1800's, labor organizations were established primarily to grant direct assistance, such as through the provision of sick benefits to workers. They also encouraged public support of laborers, such as free education for working children. However, by the 1830's, these associations began to take on an increasingly protective role as members became increasingly involved in attempting to change the labor environment. This shift in focus helped to bring volunteerism into the realm of labor. Throughout this time, a number of voluntary organizations were being developed in response to numerous social welfare needs, such as "female charitable societies" and "ladies benevolent societies" (Clarke, 1996). According to Olasky (1992), who wrote on the history of American philanthropy, such groups were committed to building relationships with the poor and needy through their work, and were therefore inclined to have personal contact with their beneficiaries rather than simply donating money to their cause. One particular example is the establishment of the first volunteer visiting nurse program for the sick poor by the Ladies' Benevolent Society in Charleston, South Carolina in 1813 (Ellis & Noyes, 1978).

In the 1830's, the French writer and politician, Alexis de Tocqueville, wrote *Democracy in America* after visiting the United States to conduct a research project. This work presented his experience of the American benevolent spirit and the willingness of Americans to make sacrifices on behalf of the common good. He also noted that Americans are joiners and tend to establish voluntary organizations for purposes that would most likely be served by the governments of other countries. These remarks continue to shape America's identity to this day (Clarke, 1996).

Throughout the 19<sup>th</sup> century, the American tradition of mutual aid continued and led to the development of many of today's greatest American volunteer organizations, such as the Salvation Army, the National Parent Teacher Association (PTA), and the American Red Cross, which was founded in 1881 by Clara Barton to supply aid during wartime and respond to natural disasters. In addition, most of the volunteering in the United States during the 19<sup>th</sup> century was performed by private and religious charitable groups such as these (Clark, 1996).

By the early 1900's, the Settlement House Movement, founded by Jane Addams, and the Charity Organization Movement were two well established, but differing, approaches to addressing social welfare issues, particularly poverty reduction. The Settlement House Movement responded to the needs of poor immigrants by developing live-in communities made up of both poor and middle-class residents. The middle-class residents accepted the poor for who they were and preserved their self-respect, rather than judging them or imposing a new way of life on them. Collectively, the residents of the settlement developed programming based on identifying the needs of the community. Typically these services were then opened up to community members outside the settlement house. In addition, many people spent time in settlements to conduct sociological research (Trattner, 1999).

The Charity Organization Movement, on the other hand, was based on the belief that the poor were lacking in morality and must be cured through Christian education. This approach to poverty reduction was dependent on volunteers, known as "friendly visitors", whose job it was to visit the poor in their homes, identify which moral lapse was causing the problems of the individual or family, and provide guidance to correct that lapse (Trattner, 1999). Although the Settlement House and the Charity Organization Movements took very different approaches to the alleviation of poverty, both took a scientific approach to solving problems. As a result, they contributed to the development of scientific charity, which relies on an objective, factual approach to answering social questions. As established service organizations began to adopt this approach, casework quickly evolved as a scientific technique to provide services and conduct research:

“[Over time,] it became increasingly clear that the gathering and interpreting of factual material, the technical character of many of the services that had to be performed, and the consistency of effort required in case treatment could be achieved only by fulltime workers with education, experience, and professional discipline”

(Trattner, 1999, p. 103). As a result, training schools were created to educate charity workers, which led to the rise of the social work profession and the near end of volunteer service as the sole means of providing social welfare (Trattner, 1999).

During the first half of the twentieth century, discussions of a national volunteer service began as a result of dramatic fluctuations in the US economy. In 1933, President Roosevelt created the Civilian Conservation Corps (CCC) along with a number of additional programs that made up the structure of the New Deal. The CCC sent unemployed men to work in rural areas to perform construction and conservation projects. At this point, the American public became divided in their opinions of the appropriate level of government involvement in charity. Those who opposed government involvement worried that it threatened the charitable impulse of the American people. This tension became apparent when conservatives began to oppose the anti-poverty policies initiated under the New Deal (Clark, 1996).

In 1961, the Peace Corps was created by President John F. Kennedy, which continues today to provide opportunities for US citizens to volunteer abroad (Clark, 1996). Three years later, the Economic Opportunities Act was passed under President Lyndon Johnson's Great Society platform, which created, among other things, the Volunteers in Service to America (VISTA) program which is a domestic volunteer program modeled after the Peace Corps (Clark, 1996; Trattner, 1999). At this point, tensions surrounding government involvement in social service arose again in response to various policies enacted under the Great Society program and an increase in the government's involvement with charitable foundations and not-for-profit organizations. As referenced by Clarke (1996), Richard Cornuelle wrote one particular critique of the government's expanding role in charity work in his book *Reclaiming the American Dream: The Role of Private Individuals and Voluntary Associations* published in 1965. In this work, Cornuelle openly criticized the charitable sector's increased dependence on government and other bureaucratic agencies.

Throughout the 1980's, the activities of volunteers in the United States began to change somewhat as hunger and homelessness became issues that, for the first time, were specifically targeted by volunteers. A number of national volunteer programs were also created over the course of this decade, such as the Youth Service America program and the Student Literacy Corps (Clarke, 1996). In 1980, the Independent Sector, a coalition of voluntary organizations that is still in existence today, was founded in Washington, DC. According to the organization's website, the Independent Sector serves as “the leadership forum for charities, foundations, and corporate giving programs committed to advancing the common good in America and around the world” (Independent Sector, 2006).

Political debate regarding the government's role in encouraging volunteerism continued in the 1990's. During this time the government continued to promote volunteering through additional legislation and publicity campaigns. In 1990, President George H. W. Bush signed the National Community Service Act, which created a commission to study community service practices throughout the nation (Clark, 1996). The Points of Light Foundation was also founded in 1990 with the mission “to engage more people and resources more effectively in volunteer service to help solve serious social problems” (Points of Light Foundation & Volunteer Center National Network, 2006). Currently, the Points of Light Foundation, which has merged with the

Volunteer Center National Network, works with more than 79,000 organizations and connects more than 2.5 million people to over 500,000 volunteer opportunities throughout the United States (Points of Light Foundation & Volunteer Center National Network, 2006).

In 1991, the Points of Light Foundation partnered with USA Weekend magazine to create national Make a Difference Day to encourage volunteering throughout the United States. Since then, this “national day of doing good” has taken place on the fourth Saturday of every October and has inspired the development of thousands of volunteer projects in hundreds of towns across the United States. According to the official promotional website for Make a Difference Day, three million people volunteered on that particular day in 2004 (Make a Difference Day, 2006). On September 21, 1993, President Clinton signed the National and Community Service Trust Act, which provided educational scholarships to Americans who volunteer through community service programs, such as AmeriCorps (Clark, 1996). The first group of AmeriCorps members began their year-long volunteer assignments throughout the United States in 1994 (Clark, 1996).

In addition to these laws, a number of federal policies have been developed to manage and promote various aspects of volunteerism in the United States, such as the Domestic Volunteer Service Act, which was initially passed in 1973 and has since undergone seven amendments.<sup>71</sup> Collectively, this legislation has contributed to Chapter 66, entitled Domestic Volunteer Services, of Title 42 of the U.S. Code. (Title 42 U.S.C. § 4950 defines the federal policy on volunteerism.) This policy clearly defines the intentions of Congress to promote the tradition of volunteerism in the United States by encouraging all Americans to become involved in voluntary community service projects aimed at helping disadvantaged and vulnerable populations. In addition, 42 U.S.C. § 4950 states that the Corporation for National and Community Service is responsible for carrying out this mission through the utilization of various domestic volunteer programs. Six subchapters of Chapter 66 detail additional aspects of domestic volunteer services and programs (United States Code of Law, 2006).

Despite the various government-sponsored volunteer programs and legislation discussed above, Putnam (2000) presents evidence of a decline in charitable donations and in rates of volunteering in the United States since the 1960's. (It should be noted, however, there was a brief rise in donations during the 1980's as a result of temporary changes to the federal tax code that impacted taxable donations.) In response to this continued decline, President Bill Clinton organized a three-day Presidential Summit for America's Future in Philadelphia in April 1997. The summit was sponsored by the Corporation for National and Community Service and the Points of Light Foundation and focused on encouraging Americans to volunteer. Chaired by retired General Colin Powell, the summit included speeches from Former Presidents Jimmy Carter, Gerald Ford, and George H. W. Bush, Former First Lady Nancy Reagan, and President

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<sup>71</sup> 42 U.S.C. § 4950:

- (a) Because of the long-standing importance of volunteerism throughout American history, it is the policy of the Congress to foster the tradition of volunteerism through greater involvement on the part of both young and older citizens.
- (b) The purpose of this chapter is to foster and expand voluntary citizen service in communities throughout the Nation in activities designed to help the poor, the disadvantaged, the vulnerable, and the elderly. In carrying out this purpose, the Corporation for National and Community Service shall utilize to the fullest extent the programs authorized under this chapter, coordinate with other Federal, State, and local agencies and utilize the energy, innovative spirit, experience, and skills of all Americans.

United States Code of Law (42 U.S.C. § 4950). (2006).

<http://www.gpoaccess.gov/uscode/index.html> (accessed July 7, 2006).

Bill Clinton, all of whom encouraged Americans to volunteer to help the nation's children (Winslow, 1997a).

Despite the media's positive coverage, the summit did receive criticism from the public in response to the apparent hypocrisy of the administration in spending \$27 million on an initiative to encourage volunteering while at the same time making large cuts to the budgets of a number of domestic welfare programs ("The Volunteer State", 1997). The summit also brought up a number of concerns surrounding volunteerism, such as the division of society into a recipient class and a provider class, the failure to recognize that remedies to social problems can and do exist in low-income communities, and the need to pass legislation that supports social welfare programs in addition to encouraging volunteerism (Winslow, 1997b).

On June 18, 1997, President Bill Clinton, signed into law the Volunteer Protection Act of 1997, P.L. 105-19 (VPA), which aims "to provide certain protections to volunteers, nonprofit organizations, and governmental entities in lawsuits based on the activities of volunteers" (Volunteer Protection Act, 1997, p. 1). This legislation was developed in response to findings reported by Congress that individuals are being deterred from volunteering because of the potential for liability actions taken against them while volunteering. The VPA (1997) notes that the resulting decrease in volunteerism has increased the cost of running various existing programs and therefore reduced the number of programs that many organizations are able to provide on limited funding. By limiting lawsuits against volunteers through the enactment of the Volunteer Protection Act, legislators expected to see a rise in volunteer rates, which would decrease the costs of providing certain social services and allow organizations to develop additional programs (Runquist & Zybach, 1997).

Critics of this law note that the effects of the VPA will not be drastic or far-reaching because the VPA does not offer a statute that would completely prohibit an organization from bringing a lawsuit against a volunteer and pass all liability to the organization. Instead, it only provides a defense for a volunteer in the case that he or she is sued (Runquist & Zybach, 1997).

"[Presently,] the act does not apply to an action brought by the organization against the volunteer, nor does it limit the liability of the organization itself, to the extent it would otherwise be responsible for the act of the volunteer...Unfortunately, any statutory scheme which merely 'tailors' liability will not decrease lawsuits"

(Runquist & Zybach, 1997, p. 1, 3).

Recommendations by experts in this field of study advocate stronger language that would require the State to provide more protection by indemnifying the agency for any liability that may arise in regards to volunteers. According to Runquist & Zybach (1997), language should be included to better clarify the definition of what a volunteer is in regards to the law. For example, questions exist about whether or not an unemployed person can be considered a volunteer and at what age a person can be considered to be a volunteer and thus would be eligible to be held liable for actions against an organization. The VPA is the most current legislation in the United States that applies specifically to the issue of volunteer and organizational liability.

## CURRENT VOLUNTEER RATES IN THE UNITED STATES

According to a 2005 report<sup>72</sup> on volunteering in the United States conducted by the U.S. Department of Labor (p.1), “65.4 million people volunteered through or for an organization at least once between September 2004 and September 2005”. This represents 28.8 percent of the U.S. population, which is consistent with the percentage of the population that volunteered during both 2003 and 2004 (United States Department of Labor, 2005).

The Department of Labor study (2005) study also reported volunteer rates based on a number of demographic characteristics. During the year that ended September 2005, women volunteered more than men across all age groups and education levels. Of the total population of women in the United States, 32.4 percent volunteered over the course of that year, while only 25 percent of all American men did volunteer work. These percentages are also consistent with data from the previous two years.

In regards to age-related statistics, the highest rate of volunteering occurred among people between the ages of 35 and 44 (34.5 percent), followed closely by 32.7 percent of 45 to 54 year olds and 30.2 percent of people between the ages of 55 and 64. Teenagers reported a high rate of volunteering (30.4 percent) compared to people in their early twenties (19.5 percent), which was the lowest rate of all of the age groups studied. Finally, 24.8 percent of people 65 years and over volunteered during the time period studied, showing a decrease in volunteering as the age of subjects in this category increased (United States Department of Labor, 2005).

Whites volunteered at the highest rate (30.4 percent) of any racial or ethnic group, followed by African Americans (22.1 percent) and Asians (20.7 percent). Only 15.4 percent of people of Hispanic or Latino ethnicity volunteered during the year ending September 2005. College graduates were also found to volunteer at a higher rate (45.8 percent) than people with less than a bachelor's degree (33.7 percent), a high school diploma only (21.2 percent), or less than a high school diploma (10.0 percent). People who are married were more likely to volunteer (34.1 percent) than people who had never been married (23.0 percent) or people with other marital statuses (23.1 percent). In addition, 37 percent of people with children under the age of 18 volunteered, versus 25.5 percent of people without children under age 18. Finally, employed people volunteered at a higher rate (31.3 percent) than people who were unemployed (26.4 percent) or not in the labor force (24.4 percent) (United States Department of Labor, 2005).

This report also gathered data on the type and extent of volunteering that was done throughout the United States between September 2004 and September 2005. The median number of hours spent on volunteer activities over the course of the year was 50 hours, which was slightly lower than the medians reported over the three previous years. The median annual hours spent volunteering was 50 hours for women and 52 for men. People age 65 and over spent 96 hours volunteering over the course of the year, which was the highest number of hours among all age groups, while the lowest median hours were reported for those 16 to 19 years old and 25 to 34 years old (United States Department of Labor, 2005).

Of those who volunteered during the year studied, 69.9 percent were involved with only one organization and 18.9 percent reported involvement with two organizations. In addition, the main

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<sup>72</sup> The results of this study are based on data collected from a supplement to the Current Population Survey in September 2005. These data include only volunteers who did unpaid work through or for an organization, not those who may have volunteered more informally or independently (US Department of Labor, 2005).

organization, or that for which people spent the most hours volunteering over the course of the year, was most commonly religious or related to education and youth service, 34.8 percent and 26.3 percent of all volunteers, respectively. Social or community service organizations accounted for 13.4 percent of the main organizations of those who volunteered, followed by hospitals or other health organizations accounting for 7.7 percent and civic, political, professional, or international organizations accounting for an accumulated 6.4 percent of main organizations. Additional types of organizations that represented smaller percentages of the total were environmental or animal care organizations, public safety organizations, and sport, hobby, cultural, or arts organizations (United States Department of Labor, 2005).

Of the 13 types of volunteer activities identified by the survey, the most commonly reported activities were fundraising (29.7 percent), collecting, preparing, distributing, or serving food (26.3 percent), engaging in general labor or supplying transportation to people (22.5 percent), and tutoring or teaching (21.3 percent). As can be expected, the types of activities performed by volunteers were impacted by the volunteer's educational level. People reporting higher levels of education were also more likely to report participation in volunteer activities such as professional or management assistance (including serving on a board of directors or committee), tutoring or teaching, mentoring youth, coaching, refereeing, or supervising sports teams, and providing counseling, medical care, fire/EMS, or protective services (United States Department of Labor, 2005).

Finally, the study reported information about how people became involved with the organizations for which they volunteered and the reasons why people chose not to volunteer. Over 40 percent of those who volunteered over the course of the study period became involved with the main organization for which they did volunteer work by approaching the organization itself. Slightly more (42.8 percent) were asked to volunteer by someone else, most likely by someone from that organization. People who had volunteered in the past, but not during the year studied, most commonly gave "lack of time" as the reason for not volunteering (45.6 percent). The next most common reasons given for not volunteering over the course of the year studied was "health or medical problems" and "family responsibilities or childcare problems" (9.3 percent).

In 2003, the National Center for Education Statistics within the United States Department of Education published a research report on volunteer rates for young people from high school through young adulthood. The study relied on interviews with a sample of 12<sup>th</sup> grade students who were asked about their volunteer involvement between 1990 and 1992 and then tracked and reinterviewed in 1994 and 2000. The study shows that there was a steady decline in volunteering once students finished high school. Between 1990 and 1992, students volunteered at a 44 percent rate, while 38.7 percent of young adults volunteered two years later and only 32.8 percent volunteered eight years after high school. This is a 25 percent decline in volunteering among young people between high school and young adulthood. In addition, only 12 percent of those studied reported volunteering at all three of the time periods studied, compared to 68 percent of young adults who reported volunteering during at least one of the three study periods (Planty & Regnier, 2003).

Another interesting finding from this study is that students who volunteered during high school were twice as likely to volunteer two years after high school in 1994 than students who did not volunteer during high school. Individuals who volunteered as high school students were also more likely to volunteer eight years later in 2000 than students who did not volunteer between 1990 and 1992 as high school students, 44 percent versus 26 percent respectively (Planty & Regnier, 2003).

## **BENEFITS OF VOLUNTEERISM**

Considering the controversies and conflicts that have surfaced over volunteerism throughout the history of the United States, it is important to consider the aspects of volunteerism that continue to lead over a quarter of the current U.S. population to volunteer annually. In attempting to identify the benefits of volunteerism, social capital is an important concept to define and explore. Social capital, as defined by Putnam (1994), refers to “the features of social organization, such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions” (p. 163). This is to say that social capital can take various forms but that the benefit lies in helping to make society more efficient. According to this definition, key ingredients in social capital are what Putnam refers to as norms and systems of trust, which offer regulation and validity to the social relationship (1994).

Not-for-profit social service organizations can benefit from fostering and relying on various systems of social capital, such as relationships with community members who may serve as volunteers for the agency. Putnam (1994) classifies volunteerism in the social capital category known as social networks. He notes that social networks can be horizontal in nature, meaning that everyone in the network belongs to the same social class and has the same level of power within a society, or vertical in nature, wherein the individuals that make up the social network span various levels of power and influence. Volunteerism in social service agencies encompasses both of these types of networks. Vertical networks can be formed through contracting with volunteer board members to occupy positions of power within the organization, thus bringing invaluable contacts and even other forms of capital to the agency. Horizontal networks can consist of groups of volunteers from the same social group or community who join together to support an organization or common cause.

A study conducted in Kenosha County, Wisconsin examined how social capital helped or hindered the development of people, not-for-profit organizations, and churches in the African-American and Latino populations of the Kenosha community (Schneider, 2003). The study found that social capital did have an effect on the extent that African-American and Latino individuals in this region were able to access vital social services from not-for-profit organizations which enabled them to better support and provide for their families (Schneider, 2003).

This study has a number of implications for not-for-profit social service organizations hoping to benefit by building social capital through the formation of volunteer networks. Some of these implications include:

- Relationships between and among not-for-profit organizations, volunteers, and clients of the organization must be based in mutual trust in order to break down any suspicions that one group may have of another (Schneider, 2003).
- Successful social capital is developed by involving individuals from both vertical and horizontal networks.
  - The Kenosha County study determined that it is necessary for individual volunteers in a vertical network (perhaps an organization’s board of directors) to help connect the organization to additional networks of social capital, thus expanding the organization’s opportunities for growth and development.



- It can also be beneficial for key individuals in an organization's social network to move across closed social capital lines to involve members of a different network.
- Finally, this study claims that beneficial social capital will only occur when trust exists across the various networks that have been fostered by these personal contacts and relationships (Schneider, 2003).
- Organizational strategies for building social capital must take into account "local culture and community practices". An organization's recruitment of and relationship with volunteers and others within its social network must reflect this cultural awareness (Schneider, 2003).
- Social capital can be extremely beneficial in assisting organizational change, if trust has been established among the social network. Organizations using networks of volunteers may have more opportunities to "expand into new territory" by developing additional programs or increasing the number of clients who are able to benefit from existing programs (Schneider, 2003).

The results and implications from the Kenosha County study illustrate the benefits that social capital can provide when it is developed based on trust and standard norms. As a result, the fact that volunteerism contributes to the creation of diverse networks of social capital may be one of the reasons that volunteerism has persisted in the United States and continues to be utilized throughout the not-for-profit sector.

Social capital illustrates the effects that volunteering has on the agency or the community, but it fails to explain the impact that volunteering has on individuals who volunteer. A number of studies have focused on the benefits that individuals gain from volunteering, both on a subjective and objective level. Wilson (2000) reports that volunteering has a positive impact on volunteers' "life-satisfaction, self-esteem, self-rated health, and for educational and occupational achievement, functional ability and mortality (p. 215)". Studies of youth volunteers also report that children who volunteer are less likely to engage in problem behaviors, such as school truancy and drug abuse, than children who do not volunteer (Wilson, 2000). Another study, conducted by Thoits and Hewitt (2001), found that volunteer work enhanced six different social and physical aspects of an individual's well-being. Consequently, individuals who have a greater sense of well-being were shown to invest more hours in volunteer work.

Individual motivations for volunteering should also be considered in this discussion. One theory states that many individuals see volunteerism as tied to values, morals, and beliefs and "activities that seem to be truly selfless are the most esteemed" (Cnaan, Handy & Wadsworth, 1996, p. 259). Individuals may also be motivated to volunteer by the opportunity to broaden their own social network and thus build social capital for themselves. This theory explains why certain groups of individuals, including those of a higher socioeconomic status, those who are married and who are parents, and those who are more religious, volunteer more frequently. Individuals with these characteristics tend to have more social contacts as a result of greater community involvement than others and consequently have more to gain by volunteering (National Association of Secretaries of State, 1999; Wilson & Musick, 1997).

## **ISSUES RELATED TO VOLUNTEERISM**

Despite the many benefits of volunteering, it is also important to consider the potential disadvantages and negative consequences of utilizing volunteers. Although there is a significant amount of positive sentiment in the United States regarding the practice of volunteering, there are

groups that are opposed to volunteering based on theoretical and moral ideals. One such organization is the Ayn Rand Institute, whose members claim:

“Volunteerism is anti-American because: It substitutes altruism for the Founding Fathers' moral premise of the right of Americans to pursue their own happiness. It rejects individualism, adopting instead the idea that one's life belongs to others, the moral creed that underlies every dictatorship. It promotes service, obedience, and duty as the standard of morality, not virtues such as honesty, productivity, or independence” (Benson, 1999).

The organization is concerned with upholding the founding ideals of the United States, such as the right to pursue one's own happiness. Members of the Ayn Rand Institute believe that volunteerism replaces this ideal with altruism (Benson, 1999).

Other disadvantages to volunteering that should be considered are more practical and can impact the organization, individual volunteer, and/or the clients of the organization. First, the potential disadvantages to the organization will be discussed. Volunteering is often more than an affiliation but rather a collaboration of the organization and individual volunteers. Reilly (2001) notes that collaborative “relationships require comprehensive planning, a shared vision, and frequent and well-defined communication” (p.53). As it applies to volunteering, comprehensive planning by organizations should take into account the possible social, emotional, and legal ramifications associated with volunteering. Equally valuable to the volunteer process are the importance of volunteers sharing a commitment to the organization's mission and vision and the need to establish strong and consistent lines of communication between volunteers and key agency staff members.

The social relationship between the individual volunteer and the organization has the potential to be beneficial or detrimental to an agency's mission or programmatic goals. If a volunteer does not feel needed by the organization or motivated by the organization's mission, then the outcomes can be very negative. In response, volunteers may impede the projects with which they are involved and/or threaten the reputation of the organization by discussing their negative volunteer experience in the wider community. On an extreme level, this could potentially hinder future agency growth and funding (McCurley and Lynch, 1998; Reilly, 2001). Perhaps most importantly, the organization can lose valuable time and money as a result of paid employees spending time initially training the volunteer, in addition to the time spent doing or redoing the work that was initially assigned to the volunteer (McCurley and Lynch, 1998).

Relationships between volunteers and staff members can be integral to predicting the success of a volunteer experience (Scheirer, 1993). Because volunteers can be assigned to work with all types of staff members and participate in various functions that are critical to the survival of the agency, well-planned volunteer management is essential to avoiding negative relationships between volunteers and paid staff members (Liao-Troth, M.A., 2001). Recruiting, screening, motivating, recognizing, retraining, evaluating, and firing are all functions that staff members must practice in the management of volunteers (Macduff, 1996). Failing to appropriately perform any of these activities in the volunteer relationship may result in a variety of negative outcomes, including any number of the scenarios previously discussed. In order to properly administer these activities, not-for-profit organizations that utilize volunteers may benefit from hiring a full or

part-time staff member with the primary task of coordinating and managing volunteers and volunteer opportunities.

Volunteering also involves risks that can specifically impact individual volunteers. Generally, individuals choose to volunteer their time or skills to a specific agency because they share the mission and vision of the organization or they can identify some way in which volunteering could benefit them personally (Macduff, 1996). When considering the various elements that can factor into volunteer recruitment and management, it becomes clear that there are many opportunities for the individual volunteer to replace initially positive feelings with negative impressions (McCurley and Lynch, 1998). In particular, negative relationships with staff members may affect an individual's feelings of self-worth and their motivation to continue volunteering at the organization (Pearce, 1993).

Finally, it is important for both the organization and the volunteer to be aware of the fact that either one could possibly become liable for any negative outcomes of the volunteer experience. Litigation is expensive and can quickly drain the limited funds of a not-for-profit organization. Without appropriate regulations and protections in place for organizations and volunteers, agencies may choose not to make use of volunteers based on the heavy risk involved. Likewise, should liability issues arise, volunteering can also entail a great deal of risk for an individual, including the risks of losing money, possessions, and respectability in the greater community (McCurley and Lynch, 1998). The Volunteer Protection Act attempts to develop liability protections for volunteers, but, as previously discussed, it has not proven to be as useful as hoped. As a result, organizations need to take great care to plan for the avoidance of various volunteer-related issues. Appendix C includes a list from the Volunteering Legal Committee of the International Foundation of the Red Cross and Red Crescent Societies, which describes additional contexts and issues that should be considered by agencies that employ volunteers.

## **VOLUNTEER USE BY SOCIAL SERVICE ORGANIZATIONS IN THE WASHINGTON, D.C. AREA**

In order to more fully explore the use of volunteers by not-for-profit social service organizations and the benefits and disadvantages experienced by such organizations, the authors conducted an online survey of a variety of organizations. The purpose of this study was to investigate the volunteer practices and protections utilized by these agencies.

### Methods

For the purposes of this study, the authors selected 13 different social service not-for-profit organizations in the Washington, D.C. metro area. The organizations that were asked to participate in the survey vary significantly in size, scope, and target population. They include large agencies that depend on significant amounts of public support to small, grassroots organizations that employ no more than four or five employees. Organizations that were solicited for participation serve a number of at-risk and vulnerable populations, including: foster children, refugees and immigrants, homeless and low-income individuals and families, juvenile offenders, individuals with mental-health needs, the elderly, terminally-ill, incarcerated and formerly incarcerated women and their children, and victims of crime and domestic violence.

The authors developed a survey instrument that could be accessed online (See Appendix B), and an online link to the survey was distributed to each organization via e-mail. In each case, the authors were able to direct the survey to a staff member who was identified as having knowledge of the organization's volunteer practices. Participants were aware that responses to all questions were confidential and would not be linked to their particular organization. Participants were also given the authors' contact information in the case that they had further questions or wanted to offer additional information. The final results of the study were made available to all participants upon request.

## Results

As previously stated, 13 organizations were invited to participate in this study. Seven of these 13 agencies responded, a 53 percent response rate. In response to the first survey question, 100 percent of respondents reported using volunteers. The respondent organizations detailed a variety of uses of their volunteers, including the following functions: working one-on-one with clients, administrative tasks, serving as board and committee members, fundraising, event planning and preparation, and collecting, organizing, and distributing in-kind donations.

When asked whether or not organizations had established specific policies and procedures that apply directly to volunteers, 57.1 percent responded affirmatively. Furthermore, 75 percent of those organizations that do have specific volunteer policies and procedures note that they have a volunteer handbook that details these guidelines. Specific volunteer policies detailed by these respondents include the following: confidentiality procedures, boundaries with clients and agency staff, minimum volunteer time commitments, communications with individuals outside of the organization, training in regards to mandatory reporting, age requirements (one agency requires volunteers to be at least 18 years of age), and behavioral expectations.

In regards to volunteer training, 57.1 percent of respondent organizations provide training for their volunteers. Organizations that provide training noted that the training covers not only the agency policies and procedures but it also includes a general orientation to the organization's missions and functions, expectations, goal setting exercises, and a discussion of how discipline issues will be handled among volunteers. Agencies that do not provide training noted that they do not have a training curriculum because they do not use volunteers on a constant basis or that the training curriculum differs for individual volunteers and is done informally through the different departments in which the volunteer will be placed.

Concerning liability issues, 100 percent of respondents detailed that they have had no experiences with liability issues and they are not aware of issues having occurred in the past. One respondent noted that he/she believes confidentiality among volunteers is a concern, and another noted that agency volunteers are trained in legal ethics and are constantly supervised.

Recruitment did not seem to be an issue of concern for the respondents. All of the respondent organizations noted that they do not have problems in recruiting volunteers and multiple respondents noted that they have relationships with a number of established groups from which they can draw volunteers, including churches, businesses, and schools that regularly support their organization. One respondent stated that his/her organization does not have problems with volunteer recruitment but it often encounters problems with keeping volunteers engaged and retaining long-term volunteers, particularly when the work is administrative or requires a specific skill set. Another respondent reported similar difficulties in finding volunteers with particular skills that are needed to work on specialized tasks.

## **CONCLUSIONS AND RECOMMENDATIONS**

A number of conclusions can be made based on the results of this study. According to multiple responses, it can be concluded that these organizations do not have problems recruiting volunteers and do not suffer from a shortage of people who are willing to volunteer for them. However, agencies have encountered a number of challenges linking the skills of volunteers to the appropriate tasks. A related issue is the difficulty that a number of organizations have had engaging volunteers in the kinds of tasks they would like their volunteers to complete. As a result, a common dilemma facing many not-for-profit organizations occurs when a volunteer is not qualified for or is not interested in working on a particular volunteer project or opportunity.

In response to these conclusions, it is important for organizations that utilize volunteers to put steps in place for volunteers to be assigned to fitting tasks and trained appropriately to complete these tasks. Keeping in mind that every person who is willing to volunteer does not have the same interests and talents, it is important for organizations to improve the tools they use to assess and identify strengths and interests of prospective volunteers. Information gleaned from these assessments should be better used to match volunteers with appropriate tasks. This technique can also be utilized to identify connections that volunteers may have to the community and other potential volunteers.

In addition, organizations should attempt to creatively identify volunteer projects that may not typically be associated with volunteering, such as volunteer advocacy campaigns targeting particular policies. With this in mind, it may be helpful for agencies to identify volunteer tasks that benefit the organization while also providing educational opportunities that can engage volunteers in learning a new set of skills. It is very important, however, that employees prioritize their projects in order to prevent volunteers from picking up the slack by being assigned to tasks that should be delegated to paid staff positions. In addition, although the organizations surveyed did not report a shortage of volunteers, they may benefit from implementing additional outreach methods in order to recruit volunteers with particular skills and abilities.

Finally, training is a very important recommendation for organizations to consider when utilizing volunteers. Although the organizations studied offered varying degrees of volunteer training, it is essential that all organizations that utilize volunteers provide appropriate educational opportunities that apply specifically to the agency and the type of work in question. For instance, if volunteers will be working in a setting where they will be interacting with at-risk or vulnerable clients, they should be trained in confidentiality procedures, staff-client boundaries, and mandatory reporting requirements. In addition, volunteers interacting with clients should have the opportunity to receive appropriate supervision from a trained supervisor. In many events, the provision of this level of training and supervision may also prevent certain accidents and situations from occurring that could lead to liability issues and potential lawsuits. The consideration and application of these recommendations may prove to be valuable to varying types of not-for-profit social services organizations that utilize volunteers.

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## **APPENDIX A**

The following survey has been developed as a data-gathering tool for a case study of the use of volunteers by non-profit social service agencies. Responses to the following questions will remain confidential and results will not be linked to your agency. Final results will be available by May 10, 2006 and will be distributed to all agencies that have participated in this study. Please respond to each question to the best of your ability and attach an extra sheet if more space is needed. Thank you in advance for taking the time to complete this survey.

1. Does your agency make use of volunteers?
2. If no, please detail why not. If yes, in what capacities?
3. Has your organization established specific policies and procedures that apply directly to volunteers?
4. If you answered yes, does your agency have a volunteer handbook for these policies and procedures?
5. Please detail some of the specific policies and procedures your agency employs in regards to volunteers?
6. Does your organization provide training for volunteers?
7. If no, why not? If yes, did your organization create its own training curriculum or does it depend on a previously established one? If you have a curriculum, please provide a brief outline.
8. Has your organization had any previous experiences with volunteer liability issues? If so, please explain.
9. Has your organization found it more difficult to recruit volunteers today than in the past? If so, how and when did you notice the difficulties? Why do you think this may be?
10. We ask that you please detail your organization point of contact below. Please note that this information will not be correlated with your responses. It may be used by the researchers for further qualitative research and will remain confidential. Please enter your organizational name, contact person, phone, and email in the space provided below.

Thank you!!! You have completed the survey. Thank you very much for taking the time to assist us in this study! Your efforts are appreciated!



## APPENDIX B

### Volunteering Legal Committee

#### International Federation of Red Cross and Red Crescent Societies, Geneva

Committee Members: **Kirsti Pohjankukka**, Finnish RC, **Frank Mohrhauer**, Legal Affairs Department, **Grace Lo**, Health Department, **Christer Leopold**, Organizational Development Department (Chair).

#### Volunteering Legal Issues List

May 10, 2001. This list is produced by the Volunteering Legal Committee and is regularly updated with new information when available. Comments and ideas are welcome.

#### Legal issues related to the volunteer

- Volunteer vs. member
- Member rights?
- What are the implied contracts?
- Service volunteer vs. board volunteer
- “Agent” of the NS and the liabilities inherent in that (compare to employee as agent)
- Does a volunteer legally represent the NS?  
In most cases, yes.
- Does status change if some money is given?
- Sues against NS: You cannot defend against being sued, but you must do your everyday work in such a way that you can win the case.
- All “agents” should be trained and should be known. This is more important in ongoing programs than in acute disasters.
- Paying volunteers
- Tax implications of money given as reimbursement of costs (legal form for that)
- other
- Conflicts with laws / regulations / trade unions on minimum salaries
- Other implications of money given
- Creating a job contract?
- Conflicts of interest, especially at board level
- Volunteers personal use of car, food etc.
- Indemnification
- Cover costs for board members being sued
- Cover costs for volunteers being sued
- Suits against front-line volunteers
- Laws
- Personal income tax
- Employment
- Workers protection / work environment
- “Good Samaritan” laws
- Legal obstacles regarding what volunteers can do
- Competition law (EU)
- Work in social and medical field

- Age restrictions
- Restrictions against people getting unemployment benefit
- Other...
- What happens legally if the person is volunteering his/her professional skills (such as licensed nurses doing volunteer nursing)?
- Liability waivers
- Value of this?
- Liability: Volunteers are private persons; if they break the rules of the NS and / the program, who is responsible?
- Accidents
- Insurance
- Volunteer
- NS
- beneficiary (example: are the persons you transport covered by insurance?)
- third party
- Volunteers in war zones: if killed, liable?
- Youth
- Parental permission
- restrictions in work laws

#### Legal issues related to Volunteer Management

- Proper recruitment and selection:
- Screening of volunteers, especially in situations in which a volunteer will work alone, or in a private home, or with a child, or with money at start, at new assignments, at promotion

#### Legal issues related to the Volunteer Programs

- Accident to volunteer
- Accident to recipient
- Harm done by volunteer
- Harm done to volunteer
- Are we putting volunteers in difficult situations without proper training and support?

- Risk
- Evaluation
- Management
- Prevention planning
- Designing volunteer programs and tasks to avoid exposing volunteers to unacceptable risks (example: work in teams)
- Avoidance
- Risk of doing nothing may outweigh the risk of legal problems of doing something
- Could be a powerful RC standpoint that we act...
- In Germany a person is liable for not helping someone in need; in other countries you are liable if you act.
- Trade unions relations
- Who has final authority at what level?
- Training: Sufficient? Consistent? Accurate?
- If something happens, can you document that the volunteer was trained? (On what, where, when?)
- Client rights
- How informed are they?
- Laws, regulations

- UBIT and unfair competition with businesses

#### **Legal issues related to partnerships with other organizations**

- Liabilities for actions of volunteers from partner organization
- Liabilities for actions against volunteers from partner organization
- Other risks involved in having “unknown” volunteers from partner organization

#### **Legal issues related to the Volunteer Organization**

- Legal statutes of Chapters/branches?
- What does it mean for board members at this level?
- Legal foundation of volunteer organization
- Tax
- Unrelated business income tax (USA: Tax free from main business, but not for other things.

International Federation of the Red Cross and Red Crescent Societies. (2001). *Volunteering Legal Issues List*. Retrieved May 1 2006, from <http://www.ifrc.org/voluntee/development/legal.asp>

## COUNTRY NOTE

### TURKEY: LITTLE PROGRESS ON RELIGIOUS FREEDOM

BY OTMAR OEHRING\*

The Turkish parliament has now departed for the holidays – without approving the new Law on Foundations as it had been expected to do. The proposed Law would regulate how “community foundations” – the organisations allowed to some non-Muslim ethnic/religious communities – own and recover property. Parliament said it would come back early from holiday and reconvene in September, rather than October, to consider this proposed law and other laws aimed to bring Turkish laws into line with European Union (EU) norms. The aim is, reportedly, to approve at least the Foundations Law before the EU reports again on accession in early October.

Although politicians and the EU are concentrating now on the Foundations Law, this focuses only on one fairly narrow issue: what to do with buildings and other property taken from religious communities by the government and sold to third parties (see F18News 13 December 2005 <[http://www.forum18.org/Archive.php?article\\_id=704](http://www.forum18.org/Archive.php?article_id=704)>). The government cannot now give these properties back, so it will have to offer compensation. However, it is not willing to do so and parliamentary deputies think Turkey should not offer such compensation. As the European Commission is telling the Turkish government it must do so, the issue is deadlocked.

Despite the urging of the European Commission's Enlargement Directorate-General that Turkey should use the good offices of the Council of Europe, both to help it understand what needs to be done in the area of religious freedom and to help draw up laws on religious freedom and the status of religious communities, the Turks are reluctant. In April 2006, the Turkish government contacted the European Commission to ask for specialists who could advise on these issues. The EU was willing to send three experts, two from the Council of Europe as well as a French expert on “laicism.” But to the astonishment of those involved, the day before the experts were due to travel the Turkish government informed them there was “no need” to come.

The involvement of the Council of Europe in helping Turkey's transformation is very tricky. Its Venice Commission – which advises on how constitutions and other fundamental laws could conform to European democratic standards – could help Turkey on religious freedom, but can only get involved if Turkey invites it to do so. But Turkey is not interested.

### OFFICIAL RELIGIOUS AFFILIATION RECORDS

One small step has been taken in the way the state records individuals' religious affiliation. A new Personal Status Law approved on 25 April 2006 gives citizens for the first time the possibility to ask the authorities to remove information about their religious affiliation (or presumed religious affiliation) from their official records. However, the law is contradictory: while Article 35 paragraph 2 allows individuals to ask for their religious affiliation to be removed from their records or amended, Article 7 paragraph 1(e) specifies that citizens have to provide such information.

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\* Dr. Otmar Oehring, head of the human rights office of Missio, a Catholic charity based in Germany – <http://www.missio-aachen.de/menschen-kulturen/themen/menschenrechte> – contributed this comment to Forum 18 News Service. It is reproduced here with permission.

Yet despite discussion for at least the past decade, Identity Cards still carry a section giving the holder's religion. One of the major contributors to the debate was Ahmet Necdet Sezer, who is now Turkey's President, in his former capacity as Chief Justice of the Constitutional Court. A committed secularist, he argued that, in a secular state, an individual's religion should not be mentioned in official documents. Changing religious affiliation on an individual's personal records was possible before, but required an individual to do this through the courts. Fear of social ostracism or hostility meant that few did this.

Although the new Personal Status Law appears to be a positive step, this is not the case. In practice, individuals trying to change their religious affiliation in their official records could still face problems. For a start, they would have to tell officials - who could just record that the individual had requested to change their religious affiliation without actually changing it. At least this Law offers the possibility to remove any religious affiliation from individuals' Identity Card, but if this does not become common any official or police officer would then ask an individual why no religion was given. Giving no religion would be tantamount to an admission that the individual is possibly a Christian or a Jew - the only faiths apart from Islam allowed to be listed.

It remains unclear how many people have asked to change the affiliation on their official records since the new law came in. In the past, individuals did of course change their religion, but were not always prepared to do so publicly through the courts. The authorities have given conflicting numbers of such converts. In February 2005 the Interior Ministry's Directorate-General for Administration of the Provinces told parliament that 344 people had converted from Islam to Christianity between 1997 and 2004, while six had converted from Islam to Judaism. No converts to other faiths were mentioned. However, Minister of State Mehmet Ayd, quoting figures from the government's Presidency of Religious Affairs (Diyanet) said 368 people had converted "under the influence of missionary activities." (see F18 News, 12 October, 2005 <[http://www.forum18.org/Archive.php?article\\_id=670](http://www.forum18.org/Archive.php?article_id=670)>).

There is much hostility to the peaceful sharing of non-Islamic beliefs, which may have been a factor in the murder of Fr Andrea Santoro (see F18News 9 February 2006 <[http://www.forum18.org/Archive.php?article\\_id=724](http://www.forum18.org/Archive.php?article_id=724)>).

The way officials record religion on personal records is predictable. Children born to parents who are recorded as Muslims are automatically recorded as Muslim. De facto, only three religions are permitted in the records: Islam, Christianity and Judaism. Atheist or non-believer are not in practice allowed as options. Nor are Baha'is or Jehovah's Witnesses, to take two other examples. It remains unclear whether this has now changed, though in practice the whims of the official are likely to override any official decision. And if an individual asks to change the religion on their identity card, there is no guarantee officials will also change it on their personal record on the national register. And when you need any official document, the first place officials look is on the register.

## **ISLAM, ISLAMIC MINORITIES, AND CITIZENSHIP**

In the Muslim world, there is a tradition that the nationality is Islam: the nation is the umma, the body of Muslim believers. The concept of citizenship separate from religion is not known in Islamic law and tradition. Despite the government's insistence that it is "secular," Turkey remains a deeply Islamic society so these views have a strong hold on the population.

For almost a quarter of a century, Alevi Muslims have been pushing for recognition as a distinct community able to organise themselves in accordance with their own beliefs. But in May, Professor Ali Bardakoglu, the head of the government's Diyanet <<http://www.diyanet.gov.tr/english>> - which controls

all official Muslim life in Turkey, despite the claimed secularism of the state - declared once again that Alevis are de facto Sunni Muslims. This is like saying that all Protestants are Catholics. Predictably, Alevis were unhappy over this statement, which means that in practice, the government does not recognise that Alevis and Sunnis are different. The government maintains that Cem Houses, where Alevis worship, are not considered places of worship but cultural centres. "We're not against Cem Houses, but they're no alternative to mosques," is the government message.

The Alevis are divided as to how to respond to the government's attitude - some groups are broadly pro-government, some anti-government and some pro-Kurdish. The Republican Education Foundation, which is under Alevi control, is regarded as more ready to work with the government. It says it does not want to see a separate government body to handle Alevi affairs, but argues that taxes from Alevis are being used (or misused) solely on Sunni mosques and imams. It insists that as Alevis are Turkish citizens and taxpayers it wants to see their taxes used to support Alevi structures.

Islamic groups that do not regard themselves as being under government control - such as the Islamic brotherhoods (the Sunni Nakchibendis, Mevlevi and others as well as the Shi'ite Bektashis) or new Islamic movements (such as the Nurcus and Suleymancis) - are in practice left alone. Yet there is no chance that the government will recognise Muslim differences, even though Turkey has Sunnis, Alevis and a small Shia minority. This indicates that the government is not just Muslim, but specifically Sunni Muslim, despite its proclaimed secular nature.

## **NATIONALISM IN EDUCATION**

Discussion continues over changing the school curriculum to treat all faiths in Turkey in a new way. The Alevis - like other religious minorities - complain that no progress has been reached for their teachings to be mentioned in school curricula. Further, Alevis have warned that if the government does not introduce separate religious education for Alevi children, they will lodge a case against it at the European Court of Human Rights in Strasbourg - to which Turkey is subject, as a member of the Council of Europe.

Education remains very nationalistic (see F18News 12 October 2005 <[http://www.forum18.org/Archive.php?article\\_id=670](http://www.forum18.org/Archive.php?article_id=670)>). Some officials of the EU and of EU member states have complained of what one privately described as "massive nationalistic indoctrination" in schools. So it is highly unfortunate that the Education and Culture chapter (Chapter 26) in the EU accession negotiations was opened and closed on the same day, without addressing this central point. Without change in the curriculum and teaching, there can be no progress in a society whose nationalism has a noticeable impact on social attitudes (see F18News 19 January 2006 <[http://www.forum18.org/Archive.php?article\\_id=716](http://www.forum18.org/Archive.php?article_id=716)>).

## **NON-MUSLIM MINORITIES**

Meanwhile, tensions for religious minorities remain high, as evidenced by the murder of one Catholic priest and attacks on other priests this year. Speculation persists that the "deep state" - the nationalist circles in the army, police, National Intelligence Organisation (MIT) secret police and state administration which regard themselves as the custodians of the Atatürkist ideology - might have been behind the murder in February of Italian priest Fr Andrea Santoro in his church in the Black Sea port of Trabzon, an area well known as a nationalist stronghold. Other factors behind the murder are also suggested (see F18News 9 February 2006 <[http://www.forum18.org/Archive.php?article\\_id=724](http://www.forum18.org/Archive.php?article_id=724)>). Such attacks on priests could spread to other nationalist areas. Some Catholic leaders still have police outside their residences, though

how an unarmed, plainclothes police officer could offer any protection remains unclear. Some wonder whether they are there more to listen to what those leaders are saying than to protect them.

Of course, all religious minority leaders remain under government surveillance, forcing them to be very cautious in everything they say – or to be willing to pay the price for their frankness. They know their telephones are occasionally tapped and mail is sometimes opened before it is delivered. “Walls have ears,” religious minority leaders say. Secretive officials occasionally come to visit them to ask questions – people speculate that they are from the MIT secret police.

In what is seen by Turkish Christians as a continuing humiliation, all Christian Churches - whether their leaders and members are Turkish citizens or not - are regarded as foreign. This attitude persists, even though Christian communities were present on the territory of what is now Turkey many centuries before the Turkish state, its ancestor the Ottoman Empire, and Islam. Discussions between Christian Churches and the state are normally handled by the Foreign Ministry, or sometimes by another state authority chosen by the government. This humiliation is clearly deliberate.

Nothing has happened about plans for the Ecumenical Patriarchate to be able to reopen its seminary on the island of Heybeliada (Halki in Greek) in the Sea of Marmara, once famed for its scholarship throughout the Orthodox world. Closed in 1971, Turkey has grudgingly promised to reopen it under US and EU pressure, but that now seems further off than ever. Discussion has now fizzled out, though Patriarch Bartholomew always tries to raise the issue whenever he can. The Armenians saw their Holy Cross seminary in Istanbul closed at the same time, but have given up any hope to be allowed to reopen it as a separate institution. Armenian Patriarch Mesrop has instead proposed inaugurating a chair of Armenian Studies at one of Istanbul's state universities - so far with no result.

## **POPE BENEDICT’S PLANNED VISIT**

The planned visit of Pope Benedict XVI, due in November 2006, could also raise tensions. Benedict is scheduled to meet the Turkish President and government in Ankara, and address a selected public in the capital. Presumably, the Pope will want to talk about relations between the Christian and Islamic worlds and seek to overcome ideas about the “clash of civilizations.” The Turkish public is unlikely to be present. Any views they might have of the speech will be formed by how the local media covers it. In Istanbul, Benedict will meet the Ecumenical Patriarch, the Armenian Patriarch and other local religious leaders, as well as the Catholic community.

Most Turks either do not want the Pope to visit, or are indifferent to his visit. Some Western-oriented Turks welcome it, as they think it could help Turkish society better understand both the Catholic Church and western views of Islam. Some of these Turks also hope that the visit will help Turkey understand the progress it needs to make on religious freedom. But nationalists who strongly oppose Europe and accession to the EU - who are growing more influential - could cause headaches for the police during Benedict's visit.

The government too will be closely scrutinising the Pope's words for any hint of anything that could be interpreted as anti-Turkish and anti-Islamic. As soon as any comments are linked to Turks as a people and a society, problems will arise. The Pope will doubtless be very delicate.

The row stirred up by remarks about the Armenian genocide in the final years of the Ottoman Empire made by the Armenian Catholicos, Karekin II, on a visit in June is ostensibly related to a historical ethnic conflict dating back ninety years. But it is relevant to a discussion on religious freedom, especially as the Istanbul prosecutor's office decided to investigate the remarks for a possible prosecution of the Catholicos for “anti-Turkish remarks.” The very prospect of a criminal case over these remarks shows the lack of

freedom of speech. But whenever religious leaders are prosecuted there is a knock-on effect on the rights of the religious community. The Armenian Apostolic community - the largest of Turkey's Christian communities by far - was embarrassed by Karekin's remarks, knowing they will make their already precarious existence more difficult.

## **WHAT PROSPECTS FOR THE FUTURE?**

The prospect of Turkey's EU accession seems to be the only thing capable of driving change in the area of religious freedom and human rights more widely. Yet the government is now not willing to enact change. Indeed, it is becoming ever more nationalist - even if this might simply reflect the AKP's need for votes from the nationalist constituency. It is careful not to show too openly that it is Islamist, as this would cause problems with the President and the military.

All this could change after the next parliamentary elections (due in late 2006 or early 2007) and the presidential election (due next year), if the current ruling Justice and Development Party (AKP) wins. If the current Prime Minister Recep Tayyip Erdogan - or a puppet - succeeds in becoming President, the Ataturk legacy could be changed. There will then not be a President willing to veto laws that contradict this legacy. This would definitely lead to a worsening climate for religious freedom. The position for Sunni Muslims would improve, while for Alevis the situation would remain as restrictive as it is now. Despite the religious differences with the majority population, the Sunnis are still seen as Turks. For other minorities - especially Christians - the situation would be worse.

Government officials sympathetic to the ideal of secularism - and secularists more widely - are growing increasingly concerned. They fear that, if the AKP substantially increases its vote at the next election, it would be strong enough to change the Constitution - even against the wishes of the opposition. It could also install a President from its ranks, who would not then veto laws deemed to be part of an Islamist agenda, as the current President has done.

Secularists in particular are afraid for the future. Turkish diplomats - who are already concerned over the changing mood among state officials as an increasing number of AKP supporters fill official positions - are very afraid of a fundamental change in the country's course. Many believe any sweeping AKP victory in the next national elections would speed up the replacement of state officials with AKP loyalists.

The old establishment is seeking to build up political forces attractive to the electorate, in a last-ditch bid to head off the AKP challenge. However, it remains unclear if the electorate will back them. Voters threw out the old establishment in disgust at its corruption and ineffectiveness. The AKP has been careful to be on its best behaviour during its current period in office.

Although there is much talk of a military coup in the event of such fundamental changes, no one knows if the majority of army officers still support Ataturk-defined secularism - or if they would be prepared to back such an anti-Islamist coup.

## **PROSPECTS FOR EU ACCESSION**

The level of optimism or pessimism over the future depends on who you talk to. Western-oriented Turks still hope EU accession negotiations will continue and that Turkey will eventually join the EU. They hope desperately that the process will generate its own momentum that would force the government, the administration and the army to look forward and support reforms. This could happen, but it looks unlikely.

As the general election looms, the government is doing nothing that could be seen as a positive step towards the reforms the EU would welcome.

Many observers are not optimistic. They do not believe the Turkish side - whether the current AKP government or the "deep state" - is interested in seeing such reforms. Many Turks have not even understood what religious freedom - for example as defined in the rights set out in Article 9 of the European Convention on Human Rights (ECHR) - actually means (see F18News 13 December <[http://www.forum18.org/Archive.php?article\\_id=704](http://www.forum18.org/Archive.php?article_id=704)>). Or they understand it - but reject it. Turkey ratified the ECHR in 1954, but over 50 years later has yet to abide by it.

Ataturkists fear that granting religious freedom as outlined in the Convention would give power to the Islamists. Yet Paragraph 2 of the ECHR's Article 9 prevents the abuse of religious freedom by freedom's enemies. This states that "freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Indeed, Article 9 would safeguard a real separation of religion and the state, as the Ataturkists claim to want.

This fear is also felt on the EU side, which means that it too is increasingly reluctant to clearly advocate religious freedom along the lines of the ECHR. EU governments also fear such rights would open the doors to Turkey's Islamist groups. Although EU officials involved in the accession process are interested in seeing religious freedom promoted properly - indeed, they regard it as the second most important issue after recognition of Cyprus - they seem to know that this is seen as a political issue which is over their heads.

Many believe the accession negotiations will fail this autumn, not over democratisation and human rights, but over the Turkish government's refusal to recognise the government of Cyprus in Nicosia. Many Turks would not be unhappy at this. Yet if the EU suspends the accession negotiations, the Turks will feel insulted and spurned by Europe. Some believe the European Commission is therefore trying to manoeuvre to find a way for Turkey itself to suspend the negotiations.

## **POSSIBLE IMPACT ON RELIGIOUS FREEDOM**

Yet any suspension will have a very negative impact on religious freedom - indeed, the position for religious minorities could end up being worse than when the negotiations started. Suspension would incite nationalist feelings and many Turks would openly say that the negotiations and even membership of the EU itself would not benefit Turkey. Then a hunt would begin for those who had caused the mess. Most Turks would not point to their own government but to the Ecumenical Patriarchate, the Armenian Patriarchate, the Catholic Church, the Protestants, and other obvious symbols of the outside world.

The only hope many can see for progress towards religious freedom is that the EU accession negotiations continue. If EU negotiations stop completely, no hope for religious freedom will remain. Yet even if the negotiations stagger on, it is doubtful that the majority of the population is prepared to change its attitude to nationalism and religion, and even consider accepting Alevis and non-Muslim Turks as full Turkish citizens. The only other possible hope is that the reform process will gather its own momentum independent of the EU. However, at present, there is little sign of this happening.



## BOOK REVIEW

BY KARLA W. SIMON<sup>\*</sup>

**THE EUROPEAN FOUNDATION**, (Klaus J. Hopt, W. Rainer Walz, Thomas von Hippel, and Volker Then, eds.) (Bertelsmann Foundation 2005).

This book, which appeared earlier this year, contains a proposal for a Draft Statute for a legal form of “European Foundation” (sometimes, hereinafter, EF) resulting from a multi-year project financed by the Bertelsmann Stiftung, the Compagnia di San Paulo, and the ZEIT-Stiftung Ebelin and Gerd Bucerius. The team of “distinguished comparative law experts from across Europe” that produced the book (which included some individuals who are not lawyers) was led by Dr. mult. Klaus J. Hopt, Director of the Max Planck Institute of Foreign Private and Private International Law, and Prof. Dr. W. Rainer Walz, Director of the Institute for Foundation Law and the Law of Charitable Organizations at the Bucerius Law School. Dr. Thomas von Hippel joined the project as senior researcher, and he was largely responsible for the coordination and substantive editing of the final work product. In this review the project will be referred to as the Bertelsmann Project, because that foundation was the main organizer of the project and its outputs.

As befits a project with such illustrious personnel, the end product -- the book -- is unusually good. It contains, first and foremost, a Draft Statute for the legal form of a European Foundation that can and should be considered by the European Commission as part of its explorations of the feasibility of creating such a legal person within Europe. It also includes well-researched and documented analysis, including comparative analysis, of the key provisions of the proposed legal and fiscal rules that would govern an EF. What this review will explore then, is the not just the book produced by the project, but also the leading thinking that has gone into the need for the creation of a legal person known as a European Foundation and the details of how such a legal person would be governed. Because it is not intended to be a scholarly work as such, the review will largely dispense with footnotes; the various references that are omitted here can be found in the book itself.

### IMPETUS FOR THE BERTELSMANN PROJECT AND COMPARISON WITH THE EFC PROJECT

As any lawyer familiar with the legal issues affecting foundations in Europe knows, the laws of the various countries are not consistent throughout the Continent. Some, for example, require foundations to be public benefit entities; some do not. Some require foundations to seek permission for registration; some do not. And so forth. Thus, the European Commission has recognized that, as with the European Company (Societas Europea or SE) and other new European forms, the EF may well be a solution to problems in both civil law and tax law (discussed in more detail below) resulting from a lack of harmony among the laws of the various jurisdictions.

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The Bertelsmann Project, like a similar one sponsored by the European Foundation Centre (but which has considerable differences in detail), proceeds from two premises:

1. That harmonization of the foundation laws of the various EU member states is impossible; and
2. That a “European Foundation would be the best policy solution to the challenges awaiting the sector, and would best serve the purpose of promoting philanthropy in Europe.”<sup>73</sup>

While I definitely concur in the former premise, I am not altogether convinced of the latter. Although the book cites to inefficiencies of operations related to the fact that foundations must currently organize themselves under the laws of various separate jurisdictions, one of the least explored aspects of the book is the way in which such issues are confronted in the United States and Canada, each of which addresses problems of multi-jurisdictional oversight of both civil and tax laws in different ways that might well be considered in Europe. I will come back to this issue later on.<sup>74</sup>

Assuming for purposes of discussion, however, that an EF is the way to go, it is important to stress that the proposal of the Bertelsmann Project is a great deal better than that of the EFC and is thus the one that the EC should most carefully consider. This is so for several reasons:

1. The Bertelsmann Project does not require a “European dimension,” which seems eminently sensible if what one is trying to do is facilitate the growth of the not-for-profit sector and philanthropy in Europe; that requirement of the EFC proposal is unduly restrictive;
2. The EFC proposal relies too much on regulation and not enough on self-regulation (the Bertelsmann Project proposes enhanced standing rules to question whether boards are acting properly); and
3. There is a need to more fully develop the tax provisions, as has been done by the Bertelsmann Project; this is true because tax rules are crucial to the underlying premise that an EF is a desirable development to encourage philanthropy in Europe.

## Structure of the book

One of the key benefits of the book produced by the Project is its structure. After an introduction in which the entire draft legal form for a European Foundation is set out, the book then contains a detailed analysis of each of the provisions. First, there is an analysis section by section of what it contains; that is followed by an excellent comparative analysis, which shows not only the differing treatments of some of the issues in various European countries but also the ways in which other countries (e.g., the US and China are frequently referenced) deal with some of the same issues.

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<sup>73</sup> THE EUROPEAN FOUNDATION, page 48.

<sup>74</sup> Although some people who worked on the project were said to be experts in the legal situation in the United States, there is no reference to Canadian experts. In addition, although the work most frequently cited for the situation in the United States is excellent (Marion Fremont-Smith’s *GOVERNING NON-PROFIT ORGANIZATIONS*, which I am reviewing for the *Nonprofit and Voluntary Sector Quarterly*), it is clear that the group would have benefited significantly from including at least one North American comparativist in its discussions.

The comparative analysis is useful for two reasons: First and foremost it has the purpose of enabling the European legislator to think things through in relation to problems in Europe. Secondly, this is an analysis on which comparativists such as myself can build, because it is a very careful and scholarly approach to the issues. This is crucial to the book's use in other countries considering similar reforms of their legislation affecting NPOs or for regions looking toward greater integration of their law to promote philanthropy.

On the other hand, the comparative analysis simply does not go far enough from time to time. For example, with regard to the choice for an EF of three-person boards of directors all the members of which must be unrelated, there is no mention of South Africa, which is revising its Companies Act to require five-person boards, three of whom must be unrelated (which may be a better solution). Perhaps it is too much to be expected that all jurisdictions with relevant experience would be consulted (South Africa may well be quite relevant in that it has elements of both "Roman-Dutch" law and common law in its rules for NPOs and PBOs), but this is one of those areas in which involving additional people with greater comparative knowledge might have helped the end product of the Bertelsmann Project.<sup>75</sup>

The only other problem with respect to the format is that all positions taken, even the most controversial, are presented as consensus positions, with no dissents. I rather imagine that the decision in Article 1.3 to allow split-interest endowments to qualify for EF status must have provoked at least a little discussion, if no downright dissents. Sometimes it is good to present a more nuanced position for the legislator to consider, and not to paper over differences, if they exist.

## KEY ISSUES IN CIVIL LAW

The substantive proposals for the civil law of the EF are many in number and detailing them all would require the reviewer to re-write the book. But several deserve emphasis in this review as they have a bearing not only in Europe but also in comparison with developments in other countries.

1. Nondiscretionary registration – as the book points out, the system of registration for foundations in Europe varies, and in some jurisdictions (mainly those that follow the French civil code tradition) registration is discretionary with the registering authority; the EF would do away with that. This is consistent with developments in other countries, e.g., Japan, where the newly adopted laws will do away with discretion.
2. Creation of a dual governance structure, which is permissible for smaller foundations and required for larger ones, is highly important (and represents an advance in the thinking by some members of the expert group, who have in the past opposed supervisory board

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<sup>75</sup> In that regard, it is also surprising that the book does not cite in the Literature Review the principal international comparative book in this area, Leon E. Irish, Robert Kushen, and Karla W. Simon, *GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS* (Open Society Institute, 2004), which has been available on the web and free from OSI during the course of the Bertelsmann Project.

structures). Again, it is consistent with developments in other countries (e.g., Japan and some states in the United States).<sup>76</sup>

3. A European Foundation must be a public benefit organization and must have an endowment. This means that entities not meeting these criteria may still be organized under national laws, but they would not receive the special designation of EF. The requirement of public benefit is reinforced, as it usually is, by the imposition of the non-distribution constraint. In addition, a European Foundation is expected to last a significant period of time, which requires a rule with regard to adequate distributions of revenues but not of the endowment. These requirements for the EF are consistent with those under current discussion in several countries.
4. A European Foundation must not have members. This will ensure that foundations meet the ancient traditions of the Roman Law, differentiating between associations and foundations in terms of whether or not the legal form has members, and more nearly equating civil law foundations and charitable trusts in the common law countries of Europe.<sup>77</sup>
5. A European Foundation will be subject to supervision by a State supervisory authority in the EU Member State where it has its registered office and in other EU Member States where it has offices. This is particularly significant because it involves the issue of multi-jurisdictional supervisory issues so often confronted in such federal jurisdictions as the United States and Canada. In Canada, unlike the US, it is possible to permit an entity to incorporate under the Canada Corporations Act instead of the provincial legislation, with the option of thus being regulated by only one supervisory authority. In the United States, where federal incorporation is impossible, much has been done to simplify reporting and supervision for entities operating across state borders. The discussion with regard to Articles 7 and 9 (which deals with the applicable law for conflict of laws questions) is quite sophisticated in the way in which it addresses the issues, but it does so in the European context without much discussion of solutions used in other types of federal or federated jurisdictions.

## KEY ISSUES IN TAX LAW

As noted by the book, the Bertelsmann Project has a much more fully developed set of proposals related to taxation of European Foundations than the proposal of the EFC. In that regard, as previously noted, it is far preferable, because such issues as taxing commercial activities, VAT rebates, and deductibility of cross-border donations also need discussion. These proposals must,

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<sup>76</sup> One of the important studies that should have been consulted with regard to governance is the American Law Institute's development of Principles of the Law of Nonprofit Organizations, which has been much consumed with governance issues in light of the NPO and corporate scandals in the United States.

<sup>77</sup> In practical terms, a trust is like a public benefit foundation in that legal ownership of the assets is separated from their beneficial ownership. The common law trust, which forms the basis for institutions such as the University of Oxford and Merton College, is thought by scholars to have been transported into legal thinking in England during the Crusades in the 13<sup>th</sup> Century as a form similar to the Muslim *waqf*. See Timur Kuran, *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW AND SOCIETY REVIEW 841 (2001); see generally, Andrew White, *The Role of the Islamic Waqf in Strengthening South Asian Civil Society: Pakistan as a Case Study*, 4 INT'L J CIVIL SOC. L. 3, at 7 (April 2006), available at [http://www.iccs.org/pubs/06-04\\_IJCSL.pdf](http://www.iccs.org/pubs/06-04_IJCSL.pdf).

however, be considered in a context of non-harmonization, for, as the learned experts point out, “harmonization is not realistic.”<sup>78</sup>

According to the proposal made for European Foundations, various rules would apply:

1. Donations made to foundations set up for a “closed list” of public benefit purposes would be deductible. The rationale for using a closed list for the tax law as opposed to an “open list” for the civil law is that the drafters thought it would be inappropriate to allow discretion to determine whether a purpose is for public benefit to be in the hands of “such a mighty state authority.” As an American who is familiar with both the U.S. system and the Canadian system, where the authority to determine what is “charitable” rests with the revenue authorities, I view such a decision with utmost skepticism. By and large, both Canada and the United States have fared well with the determinations of what lies in the public interest being vested in the tax authorities.
2. European Foundations would be exempt from tax on the earnings from their capital assets. This accord with good practice around the world.
3. European Foundations would be able to apply for a rebate of irrecoverable VAT. This solves the tax problem that is the most important one for most NPOs, in that they generally do not pay income taxes.<sup>79</sup> Heretofore, European countries have resisted such rebates, as they are in fact subsidies. But Canada has long experience with partial GST rebates, and it is good to see that the proposal has picked this up as an area for reform.
4. Donors would be entitled to deductions or tax credits for donations to any EF, even if it is not one that is located in the jurisdiction in which the donor pays taxes; these deductions or credits would be subject to the nationally determined limits. This proposal emphasizes the European nature of the new legal form, but it allows each Member State to deal with issues regarding the cost of fiscal incentives within its own taxing jurisdiction. Curiously, however, the proposal for tax benefits for donors does not deal with the issue of tax designation schemes that have become all the rage in Central and Eastern Europe.<sup>80</sup>
5. The EF would not ordinarily be subject to tax on related business income; but it would be subject to tax on unrelated business income above a threshold amount. While this rule generally accord with practices in most of the European countries and in North America [and South Africa], it is in practice not the same as applying the rather elegant “commerciality test” developed in France.

As this Review indicates, the new book on the European Foundation is by and large incredibly impressive and represents a very thoughtful attempt to deal with issues that need attention in the context of creating a better enabling environment for philanthropy in Europe. All scholars and practitioners who work in the field of comparative civil society law owe an incredible debt to the funders of the project, the Bertelsmann Stiftung, the Compagnia di San Paulo, and the ZEIT-Stiftung Ebelin and Gerd Bucerius, and to the experts whom the funders thank for their efforts “beyond the call of duty;” this reviewer can imagine that is very much a true statement of how hard they worked.

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<sup>78</sup> It is nevertheless interesting that this Review is being published in an issue of IJCSL which is dedicated to Dr. Frits Hondius, one of the leading proponents of forms of harmonization. See Bratislava Declaration of 17.12.1996.

<sup>79</sup> Foundations, on the other hand, pay well pay more taxes than other NPOs in that they may have retained earnings from commercial activities that would be subject to tax under mandatory distribution rules.

<sup>80</sup> See [www.onepercent.hu](http://www.onepercent.hu).

It remains to be seen, of course, to what extent the European Parliament will be able to take this work product and translate it into a new legal form. If it is successful in doing so, one can well imagine that other regional groupings, such as the East African Union and MERCOSUR, might well look back to this distinctive book on THE EUROPEAN FOUNDATION and use it as a basis for their own research. I would certainly like to think they will.