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## LETTER FROM THE EDITOR

April 30, 2007

Dear Readers:

Once again it is spring and against the backdrop of the warming weather, blooming flowers, and singing birds we bring out our April issue, dedicated to student work. It contains three interesting and stimulating articles by budding lawyers/scholars in the field of civil society law. We are particularly pleased to offer articles by people from three different continents – from the Republic of Georgia, from Israel (writing about the Arabic-speaking countries of the Middle East and North Africa), and from the United States (writing about South Africa). Thus the approaches taken and the issues addressed are quite diverse.

Shawn Fields is an American law student finishing his degree this May. His closely argued analysis of the question of whether “restorative justice” theory supports the offering of conditional amnesty, as was done in South Africa under the Truth and Reconciliation Commission, draws on numerous sources of the theory as well as the theories behind amnesties themselves. He suggests that among the reasons why “restorative justice fails as a satisfactory justification for amnesty” when offered by a state are that it “embodies a private concept of reparation and healing that cannot effectively be administered by the state;” that it “seeks primarily to promote healing by meeting the needs of individual victims, while amnesty often cannot meet these needs;” and that “the rights and needs of others in the community who were not “directly” affected by the criminal act” are overlooked.

Noa Nof-Steiner, an Israeli lawyer who wrote the article as part of her studies for a Master’s Degree in Public Policy from the University of Bologna, analyzes issues surrounding women’s associations and the problems they face in six Muslim countries in the Middle East/North Africa. Each country section contains a short introduction to the legal system and the status of women, followed by an “in-depth analysis of the local law on associations and its effect on the operation of women’s associations.” Her article is based on first-hand research into and information obtained from Bahrain, Egypt, Iran, Iraq, Lebanon, and Yemen. Ms Nof-Steiner’s conclusion that laws do not necessarily make for a vigorous and active civil society is not a surprising one, but her important contribution to the discussion involves analysis of the situation regarding a largely unexplored part of the sector in an under-researched region of the world.

Babutsa Patariaia’s article takes a look at the question of whether the current tax incentives granted by the 2005 Tax Code to charitable organizations in the Republic of Georgia are sufficient to make many organizations seek that status. Her well-researched article is the first to look at this issue against a back-drop of what she calls an “undeveloped” charitable sector. Her thesis is that it is a lack of good tax benefits that cause the sector’s underdevelopment, not other socio-economic causes. And she proves the thesis by a painstaking and clear analysis of the problems with the legislation. The extent to which her thesis will be borne out as organizations become familiar with the new legislation cannot be foreseen. Nonetheless, some of the proposals for immediate reforms should surely be heeded by the Georgian Parliament as it seeks to create a stronger charitable sector in the country.

Our April issue also contains one Case Note not authored by a student, and we make it available here so that our readers can have access to analysis of a recent case from Canada involving the sweeping anti-terrorism legislation adopted in the wake of the events of September 11, 2001. Terrance S. Carter and Sean S. Carter argue that the “*Khawaja* Decision Offers Little

Relief for Charities.” Their piece is reprinted from the December 20, 2006, issue of the Carters Professional Corporation Anti-Terrorism and Charity Law Alert No. 11 and is reprinted here with permission.

We are also very grateful to Kumi Naidoo and Clare Doube for their Country Update on the Crisis in Zimbabwe. This timely and important piece describes much about the situation in general in terms of the multi-faceted crisis. It also speaks with the passion of people who have spent a lot of time in Zimbabwe in recent months to show solidarity with the people facing the repressive Mugabe regime's threats to their rights and their livelihoods. We were especially touched, recently, to see a photo in the New York Times of our old friend Sekai Holland, whose body, battered by thugs of Zanu-PF, was being loaded on a stretcher to be transported to hospital in Johannesburg.

We would like to thank the student authors for submitting their articles to us for publication and assisting us in the continuation of the fine tradition at ICCSL of publishing student work. We would also like to thank Terrance and Sean Carter for continuing to allow us to reprint the excellent work done by Carters. Finally, our special thanks this month go to the retiring Student Editors – Kevin Schwartz, our Managing Editor, is graduating in May, as is Associate Editor Alison Shea. It has been a real pleasure to work with them. We wish them well in their new endeavors and look forward to staying in touch over the years as the IJCSL family continues to expand every year. The new Editors will be introduced in July and October, when they will be joining the staff.

Happy Reading and Happy Spring!

Karla W. Simon  
Editor-in-Chief

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## IJCSL EDITORIAL POLICY

April, 2007

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:

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**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

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

## STUDENT ARTICLE

# PRIVATE CRIMES AND PUBLIC FORGIVENESS: TOWARDS A REFINED RESTORATIVE JUSTICE AMNESTY REGIME

BY SHAWN FIELDS\*

## I. INTRODUCTION

In the wake of South Africa's Truth and Reconciliation Commission, the academic and international community has begun rethinking the concept of amnesty and its place in the criminal justice system.<sup>1</sup> Many previous amnesties granted full reprieves to criminals, either as a necessary precondition for securing a cease fire and restoring peace (as in Haiti in 1994) or as a way for dictators to hand over power without threat of prosecution (such as the blanket amnesties Augusto Pinochet granted himself and his military commanders).<sup>2</sup> However, the South African model granted a form of "conditional amnesty" that neither gave perpetrators of *apartheid* a full reprieve nor held them fully accountable. Rather, South Africa's newly elected government gave members of the old regime the opportunity to apply for amnesty, conditioned on their sworn testimony fully disclosing their involvement in human rights abuses.<sup>3</sup> Under this system, Archbishop Desmond Tutu and others hoped to achieve a form of "approximate justice" that both restored victims' dignity and allowed the long divided country to reunite through a process of reconciliation.<sup>4</sup>

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\* Shawn Fields is a J.D. Candidate at Boston University School of Law, and a visiting student at Northwestern University School of Law.

<sup>1</sup> Numerous scholars have explored the concept of "conditional amnesty" and its effectiveness in South Africa following that country's Truth and Reconciliation Commission hearings. See, e.g., Rosemary Nagy, *Violence, Amnesty, and Transitional Law: "Private" Acts and "Public" Truth in South Africa*, 1 AFR. J. LEGAL STUD. 1, 1 (2004) ("This article assesses the extent to which South Africa's amnesty fulfilled th[e] normative goals [of justice and reconciliation]"); Stuart Wilson, *The Myth of Restorative Justice: Truth, Reconciliation, and the Ethics of Amnesty*, 17 S. AFR. J. ON HUM. RTS. 531, 531 (2001) ("This article . . . suggest[s] that restorative justice – as conceived by the TRC – failed to take full account of the values of retribution, and the meanings of forgiveness and reconciliation"); Peter A. Schey, et. al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325, 325 (1997) ("In the process of reaching the goal of reconciliation, the goals of justice and redress were largely sacrificed. . . [by] the deal that the African National Congress [ANC] made with the previous white government . . ."); Emily H. McCarthy, Note, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. RACE & L. 183, 183 (1997) ("This Note examines the origin and nature of the [Promotion of National Unity and Reconciliation] Act, how it is being applied, and whether it is meeting the dual goals of 'truth' and 'reconciliation.'").

<sup>2</sup> See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L. L.J. 1, 8-9 (1996); Andreas O'Shea, *Pinochet and Beyond: The International Implications of Amnesty*, 16 S. AFR. J. ON HUM. RTS. 642, 642-43 (2000).

<sup>3</sup> Michael P. Scharf, *The Amnesty Exception to the International Criminal Court*, 32 CORNELL INT'L. L.J. 507, 510 (1999) (explaining that, "[u]nder this process, amnesty would only be available to individuals who personally applied for it and who fully disclosed the facts of their apartheid crimes").

<sup>4</sup> See generally RICHARD A. WILSON ET AL, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (Cambridge University Press 2001). Howard Zehr uses the term "approximate justice" to describe the type of "partial . . . recovery and closure" one can

Archbishop Tutu and others advanced many justifications for granting amnesty to people who had perpetuated this system of injustice for so many years.<sup>5</sup> Many argued that, because the crimes were so widespread and implicated so many South Africans, a nationwide “forgiveness and reconciliation” was needed to move the country forward out of the era of *apartheid*.<sup>6</sup> Others suggested that, given the realities of the situation, offering amnesty in exchange for truth was the best justice one could offer.<sup>7</sup> Because *apartheid* violence had been carried out under such a veil of secrecy, many perpetrators would have to come forward with the truth before successful prosecutions could proceed. Yet without a promise of amnesty, no one would have an incentive to offer such information. Thus, given the choice between watching criminals walk free and knowing nothing of their misdeeds and watching criminals walk free but knowing what had taken place, the government had to choose the latter.<sup>8</sup> Still others have pointed to documents suggesting that amnesty was somewhat necessary to prevent a bloody and protracted civil war from breaking out across South Africa.<sup>9</sup>

One might be able to justify conditional amnesties like the ones in South Africa under any of these rationales. However, this paper examines a further justification offered by the South African TRC, namely that the amnesty served the interests of “restorative justice,” a recently formulated alternative theory of criminal punishment. Restorative justice theory holds that criminal activity violates both the victim and the victim’s relationship with the offender, and that communities should focus more on repairing these individuals and relationships than on simply punishing the offender.<sup>10</sup> This paper discusses the merits of employing restorative justice as a justification for granting conditional amnesty.

#### A. THESIS

State actors cannot justly defend grants of amnesty as furthering the goals of “traditional” restorative justice.<sup>11</sup> There are three main reasons why restorative justice fails as a satisfactory justification for amnesty. First, restorative justice embodies a private concept of reparation and healing that cannot effectively be administered by the state. Second, restorative justice seeks primarily to promote healing by meeting the needs of individual victims, while amnesty often cannot meet these needs. Third, using amnesty to meet the goals of restorative justice unfairly

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experience through restorative justice systems like the South African TRC. HOWARD ZEHR, CHANGING LENSES 188 (Herald Press, Scottsdale, PA 1990).

<sup>5</sup> RAYMOND G. HELNICK & RODNEY LAWRENCE PETERSEN, EDs., FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY, AND CONFLICT TRANSFORMATION, ix-xiv (foreword by Archbishop Desmond Tutu) (Templeton Foundation Press 2002).

<sup>6</sup> Wilson, *supra* note 1, at 17 (“On this account, the TRC was a tool of individual and national forgiveness and reconciliation between victim and violator . . .”).

<sup>7</sup> *Id.*, at 553-55.

<sup>8</sup> One scholar has called this justification the theory of “moral remainder.” *Id.*

<sup>9</sup> Scharf, *supra* note 3, at 510 (1999) (“Most observers believe the amnesty in South Africa headed off increasing tensions and a potential civil war.”); Martha Minnow, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 55 (Beacon Press 1998) (“[South African leaders] decided that the commitment to afford amnesty was the price for allowing a relatively peaceful transfer to full democracy”).

<sup>10</sup> ZEHR, *supra* note 4, at 181-82.

<sup>11</sup> By “traditional,” I mean the view of restorative justice that crime involves private violations of private relationships between individual victims and offenders. *See id.* Contrast this “classical” view with my refined conception of a “public-based” restorative justice that defines the victim more broadly to encompass the surrounding affected community. *See infra* Parts IV and V.

overlooks the rights and needs of others in the community who were not “directly” affected by the criminal act.

## B. A NOTE ON SCOPE AND STRUCTURE

Both restorative justice and amnesty involve complex and controversial issues that lend themselves to lengthy analysis.<sup>12</sup> Likewise, the nexus between restorative justice and amnesty offers a wealth of interesting topics that have and undoubtedly will continue to be discussed and debated.<sup>13</sup> However, this paper is necessarily limited in its scope. Consequently, this paper will not address the legal legitimacy of amnesty, nor will it address the moral contours of amnesty beyond those implicated by restorative justice. Similarly, this paper will not examine the merits of alternative justifications of amnesty. While the scope of this paper does not lend itself to a historical discussion of amnesty, the South African experience will serve as a general case study. Finally, this paper will not directly assess the merits of restorative justice as a theory of criminal punishment, although some of the criticisms implicitly involve criticism of restorative justice theory.

This paper will focus on the specific use of restorative justice as a basis for granting conditional amnesty. To that end, Part II will briefly discuss the difference between conditional and unconditional amnesty, and explain why unconditional amnesty can never serve the interests of restorative justice. Part III examines the restorative justice model, both as a general theory of criminal punishment and as applied to amnesty situations. Part IV critiques the use of classical restorative justice as a justification for amnesty, focusing largely on the South African experience. Part V offers recommendations for a refined restorative justice amnesty regime, and Part VI concludes with a brief summary.

## I. UNCONDITIONAL VERSUS CONDITIONAL AMNESTY

Amnesty arises in many different contexts and has taken many different forms throughout history.<sup>14</sup> Deriving from the Greek word *amnestia*, meaning oblivion or forgetfulness, amnesty is an “act of the legal sovereignty voluntarily extinguishing certain ‘criminal’ acts against the state.”<sup>15</sup> The early Greek and Roman states often granted amnesties to citizens politically affiliated with groups that had attempted to overthrow the existing government.<sup>16</sup> This practice

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<sup>12</sup> See, e.g., Camita Ernest, A Quest for Truth and Justice: Reflections on the Amnesty Process of the Truth and Reconciliation Commission of South Africa, Paper presented to the Conference on Ten Years of Democracy in Southern Africa: Historical Achievement, Present State, Future Prospects, University of South Africa, Pretoria, Aug. 23-25, 2004; Madeleine Fullard & Nicky Rousseau, *Who Gave the Orders? Tracing Accountability in the TRC's Amnesty Process*, in TRUTH AND RECONCILIATION. DID THE TRC DELIVER? (Audrey Chapman & Hugo van der Merwe, eds., (Forthcoming 2007); BARAT RAMIREZ ET AL., SEEKING RECONCILIATION AND REINTEGRATION: ASSESSMENT OF A PILOT RESTORATIVE JUSTICE MEDIATION PROJECT, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, <http://www.csvr.org>; Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L. L. 173 (2002).

<sup>13</sup> See, e.g., Slye, *supra* note 12..

<sup>14</sup> See generally Norman Weisman, *A History and Discussion of Amnesty*, 4 COLUM. HUM. RTS. L. REV. 529 (1972).

<sup>15</sup> Harrop A. Freeman, *An Historical Justification and Legal Basis for Amnesty Today*, 1971 LAW & SOC. ORDER 515, 517-18 (1971). See also Weisman, *supra* note 14, at 529.

<sup>16</sup> *Id.* at 518 (“Most historians view amnesty’s clearest beginning in the act of Thrasylbulus (403 B.C.), who, after the expulsion of the Tyrants from Athens, forbade further action against citizens for previous political acts, and required an oath of amnesty to erase all political strife from memory.”).

became increasingly common in Roman law as the Empire grew in size, mostly as an attempt to appease the growing numbers of discontents within Rome's borders.<sup>17</sup> Early modern European states frequently granted amnesty following an internal uprising to restore peace and quell violence.<sup>18</sup> Following World War II, many countries granted amnesties to enemies either as a way of forgetting the past and moving forward, or because the sheer numbers of potential criminals overwhelmed the occupying powers.<sup>19</sup> For example, the United States granted over one million amnesties each to prisoners of war in Japan and Germany in early 1946.<sup>20</sup>

All of these grants are examples of "unconditional" amnesty, meaning that those granted amnesty had to do nothing in return. The state simply dropped any pending criminal charges and promised not to bring any future charges for past criminal behavior.<sup>21</sup> Thus, the state "forgot" the crimes and allowed the individuals to continue living freely in society as if nothing had ever happened. Another type of unconditional or "blanket" amnesty became popular in Latin America in the 1970's and 1980's, although these amnesties arose in a significantly different context from those described above.<sup>22</sup> For much of the 1970's, many Central and South American countries were ruled by brutal dictators who committed grave human rights abuses, often torturing, raping, and killing political dissidents.<sup>23</sup> As these leaders' power structures began crumbling, they decided to grant themselves blanket "self-amnesties" before handing over power to legitimate authorities.<sup>24</sup> These amnesties, though universally denounced, were seen as necessary to securing a peaceful transfer of power, and were reluctantly recognized by successor governments.<sup>25</sup> Between 1974 and 1994 leaders in Bolivia, Argentina, Uruguay, Chile, El Salvador, Haiti, and Honduras granted themselves blanket amnesties before handing over power to democratically elected officials.<sup>26</sup>

No unconditional amnesty, whether granted out of necessity or reconciliation, can be justified as serving the goals of restorative justice. Restorative justice aims to restore the victim of a crime to the position she occupied before the violation, typically through some form of restitution, or through an offender's act of contrition or simple acknowledgement of responsibility.<sup>27</sup> Yet unconditional amnesty, by definition, requires nothing from the offender – thus, it provides

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

<sup>18</sup> Weisman, *supra* note 14, at 530.

<sup>19</sup> Weisman, *supra* note 14, at 532 (discussing President Truman's "pardon" grants for all nonmilitary federal crimes to all honorably discharged veterans, and his consideration of a "general amnesty" for military members).

<sup>20</sup> Freeman, *supra* note 15, at 519; 1 ENCYCLOPEDIA BRITANNICA *Amnesty* 808 (1971).

<sup>21</sup> Gwen K. Young, *Amnesty and Accountability*, 35 U.C. Davis L. Rev. 427, 433-34 (2002).

<sup>22</sup> *Id.* at 439-40 (describing the "current context of amnesty" as one marred by self- and blanket amnesties like those granted in Chile and other Latin American countries).

<sup>23</sup> See Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM RTS. Q. 843, 846-60 (1998) (detailing the tragic histories of abuse in Chile, El Salvador, Guatemala, Honduras, Peru, and Argentina).

<sup>24</sup> *Id.*

<sup>25</sup> Young, *supra* note 21, at 440 ("A self-amnesty is . . . often viewed as necessary to governmental transition.").

<sup>26</sup> See *supra* note 23, at 855-57; Schey et al, *supra* note 1, at 332-38 (discussing the amnesties and largely unsuccessful truth commissions in Bolivia, Uruguay, and other countries); Scharf, *supra* note 2, at 8-9 (describing the pressure the United States and the United Nations put on Haitian leaders to grant amnesty to war criminals in exchange for peace).

<sup>27</sup> Restorative Justice Online, *Introduction: Amends*, maintained by Prison Fellowship International, <http://www.restorativejustice.org/intro/values/amends> (last modified Dec. 9, 2004) (explaining that the offender can restore the victim through making amends, which includes four elements: "apology, changed behaviour, restitution, and generosity").

nothing to the victim.<sup>28</sup> Therefore, only an amnesty conditioned on some act or forbearance on the offender's part can further the purposes of restorative justice.

Many such conditional amnesties were granted in South Africa beginning in 1994. Teetering on the brink of civil war, the military and political leaders of South Africa's thirty-four year old *apartheid* government negotiated a peaceful transfer of power to a democratically elected government in exchange for amnesty.<sup>29</sup> But rather than granting unconditional amnesties, Archbishop Desmond Tutu and his newly formed government offered a form of "conditional amnesty."<sup>30</sup> The South African Parliament created a Truth and Reconciliation Commission (TRC), which only granted amnesty to "individuals who personally applied for it and who fully disclosed the facts of their apartheid crimes."<sup>31</sup> Thus, amnesty was conditioned on public truth-telling, or more specifically, on the full public disclosure of one's criminal participation in *apartheid*.<sup>32</sup> Controversially, applicants for amnesty were not required to express remorse for their actions or apologize to their victims.<sup>33</sup>

While South Africa's model provides one example of conditional amnesty, states can certainly condition amnesty on any number of things, including payment of restitution or reparations, agreement not to hold positions of public trust, and public and personal apologies for criminal behavior. Of course, states justifying grants of conditional amnesty on the basis of restorative justice would do well to take into account the needs of the victims when creating their own amnesty commissions.<sup>34</sup> Many argue that South Africa's failure to adequately take victims' needs into account when developing its Truth and Reconciliation Commission demonstrates why restorative justice provides no justification for the amnesties granted to *apartheid* officials in the 1990s.<sup>35</sup> Indeed, as this paper illustrates, South Africa's TRC neglected to respond to many victims' basic needs, including the needs for acknowledgements of wrongdoing, for apologies, and for retribution.<sup>36</sup>

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<sup>28</sup> Ronald C. Slye, *supra* note 12, at 240-41 (2002) (explaining that unconditional, or "amnesic" amnesties "have no procedural requirements, nor do they . . . place burdens on recipients. [Further], amnesic amnesties provide no relief to victims . . .").

<sup>29</sup> See *supra* note 9, at 515.

<sup>30</sup> Emily H. McCarthy, *supra* note 1, at 189 (noting that "South Africa's process forces the apartheid regime to admit its abuses publicly and requires perpetrators to reveal and discuss their crimes").

<sup>31</sup> See *supra* note 3, at 518.

<sup>32</sup> McCarthy, *supra* note 1, at 190.

<sup>33</sup> Wilson, *supra*, note 1, at 549 (2001) (observing that confessions of participation in apartheid, "whether or not they were accompanied by expressions of remorse, were enough to secure public absolution from the TRC . . ."); McCarthy, *supra* note 1, at 244 ("Notably absent from the amnesty criteria is a contrition requirement.").

<sup>34</sup> The most pressing concern from a restorative justice standpoint is the concern for the victim's immediate needs. ZEHR, *supra* note 4, at 186 (explaining that "the first goal of justice . . . ought to be restitution and healing for victims").

<sup>35</sup> See, e.g., Wilson, *supra* note 1, at 547 (arguing that "The amnesty on offer from the TRC actually denied . . . the restoration of dignity to victims who participated in the Commission's process"); McCarthy, *supra* note 1, at 245-46 (contending that demanding a "public apology and a renunciation of past crimes will strengthen democracy and foster a human rights culture" while lamenting that the remorseless testimonies of some apartheid members who were granted amnesty "have done little to foster reconciliation").

<sup>36</sup> See *infra* Part IV. For an account of the basic needs a crime victim that has immediately following a violation, see CHARLES FIGLEY, *STRESS AND THE FAMILY: COPING WITH CATASTROPHE* Ch. 1 (New York: Brunner/Mazel 1983).

### III. THE RESTORATIVE JUSTICE MODEL

While restorative justice has been invoked to justify state-sponsored grants of amnesty in South Africa and elsewhere, the concept itself was created as an alternative theory of criminal punishment. The term “restorative justice” first emerged in the criminal context in a 1977 article written by Albert Eglash.<sup>37</sup> In the article, Eglash defined what he viewed as the three basic types of criminal justice:

- a. *Retributive justice* – justice based on punishment
- b. *Distributive justice* – justice based on therapeutic treatment of offenders
- c. *Restorative justice* – justice based on restitution, compensation, and on “making right the wrongs done”<sup>38</sup>

In other words, if retributive theory demands punishment of the offender based on some moral imperative, and distributive (or rehabilitative) theory seeks to cure the offender of his disposition to commit crime, restorative justice seeks to make the victim whole and return to her something that was unjustly taken. In that sense, Eglash had created a new model of criminal justice more closely aligned with American civil law than with traditional Anglo-American criminal law.

Howard Zehr refines the theory of restorative justice by distinguishing it from the retributive model he claims dominates the current American legal system.<sup>39</sup> Through the “retributive lens,” says Zehr, we view crime as “a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.”<sup>40</sup> By contrast, the “restorative lens” views crime as “a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”<sup>41</sup> These definitions highlight two of the primary characteristics of restorative justice that distinguish it from traditional criminal justice theories: that criminal behavior primarily violates a personal relationship between victim and offender rather than an abstract relationship between the offender and the state, and that justice is best achieved by first focusing on the needs of the victim as well as the wrongs of the offender.<sup>42</sup>

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<sup>37</sup> Albert Eglash, *Beyond Restitution: Creative Restitution*, in RESTITUTION IN CRIMINAL JUSTICE 91 (J. Hudson & B. Galaway, eds., Lexington, MA: Lexington Books 1977); CHARLES COLSON, JUSTICE THAT RESTORES 122 (Tyndale House Publishers 2001).

<sup>38</sup> Eglash, *Beyond Restitution*, RESTITUTION IN CRIMINAL JUSTICE 91.

<sup>39</sup> See ZEHR, *supra* note 4, at Ch. 10.

<sup>40</sup> *Id.* at 181.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 182-83. See also David Van Ness, *Justice That Heals*, Slideshow presentation maintained by Prison Fellowship International: Restorative Justice Online, [http://www.restorativejustice.org/intro/slideshows/justice\\_that\\_heals/justiceheals1.html](http://www.restorativejustice.org/intro/slideshows/justice_that_heals/justiceheals1.html) (last viewed Apr. 28, 2006).

## A. THE PRIVATE NATURE OF CRIME<sup>43</sup>

Traditional criminal justice theories view crime as a violation of the relationship or “social contract” between the offender and the state. Thus, criminal trials are prosecuted by the state and not the victim. However, restorative justice suggests that crime “represents a ruptured relationship between the victim and offender. Even if they had no previous relationship, the crime creates a relationship.”<sup>44</sup> Restorative justice theorists recognize that crime also harms communities and violates social norms larger than the individual victim, but considers this violation ancillary to the harms done to the victim and to the interpersonal relationship between victim and offender.<sup>45</sup> Thus, “[c]rime is not first an offense against society, much less against the state. Crime is first an offense against people, and it is here that [criminal justice] should start.”<sup>46</sup>

This private conception of crime creates an interesting (and often problematic) situation for states seeking to achieve restorative justice through amnesty. As a matter of moral and legal right, only states have the authority to grant amnesty to criminals.<sup>47</sup> However, the state’s role in a restorative justice regime is somewhat truncated, because the initial focus is on the private individuals involved in the crime (the victim and the offender) and not on the state or the citizenry it represents. Thus, a state can only further restorative justice goals through amnesty if it serves the interests of the victim – and to a lesser extent, the offender.<sup>48</sup> The state plays the role of facilitator (much like in U.S. civil law) and does not represent society as a party to the proceedings.<sup>49</sup> This limited state role can present problems when amnesty does not adequately address the victim’s needs, or when the victim uses amnesty to leverage negotiations with the offender.

## B. THE FOCUS OF RESTORATIVE JUSTICE

As the name implies, restorative justice seeks to restore the individual to the just condition she enjoyed before the offender committed the crime and created injustice.<sup>50</sup> Generally, crime creates a wrong (an injustice), and restorative theorists ask, “What can be done to make things right (or

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<sup>43</sup> The community remains involved in a restorative justice regime insofar as it defines the wrong and helps define an appropriate remedy/response by creating a restorative justice system. By the phrase “private nature of crime” I refer to the restorative justice view that the crime itself is a private act that harms primarily private individuals (victim and offender), and only secondarily harms the “public community.” *See id.*

<sup>44</sup> ZEHR, *supra* note 4, at 181.

<sup>45</sup> Albert W. Dzur & Susan M. Olson, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC’Y REV. 139, 139 (2004) (explaining that restorative justice “decenters the focus of criminal justice from the offender breaking a law of the state to the harm caused the victim and community”).

<sup>46</sup> ZEHR, *supra* note 4, at 182.

<sup>47</sup> *See generally* Michael P. Scharf, *supra* note 3; Douglas W. Jones & David L. Raish, *American Deserters and Draft Evaders: Exile, Punishment, or Amnesty?*, 13 HARV. INT’L. L.J. 88 (1972).

<sup>48</sup> John Braithwaite, *Standards for Restorative Justice*, Prison Fellowship International: Restorative Justice Online, <http://www.restorativejustice.org/resources/docs/braithwaite> (last modified Aug. 26, 2005) (emphasizing that, for a model to do more than “masquerade as restorative justice,” it must allow all stakeholders to have their voices heard and interests genuinely considered).

<sup>49</sup> One might argue that democratically elected state actors represent society by creating the restorative justice amnesty proceeding in the first place. This argument misses the point. By creating a certain judicial system, the state reflects society’s preferences for how to rule on a given matter; it does not reflect society’s preferences for what that ruling should be.

<sup>50</sup> *See also* Van Ness, *supra* note 42.

just)?”<sup>51</sup> It is important to recognize, especially in the context of amnesty, that the answer to this question is not always, “We should punish the offender.” More specifically, restorative justice focuses first on repairing the harm done to the victim and to the relationship between victim and offender before considering the needs of the offender or of the state.<sup>52</sup> This approach reflects the restorative theorist’s priorities regarding which harms are most in need of repair. Zehr explains that crime creates four basic types of harm that should be addressed in descending order:

- a. Harm to the victim
- b. Harm to the interpersonal relationship (between victim and offender)
- c. Harm to the offender
- d. Harm to the community<sup>53</sup>

Restorative justice strives to address and repair each of these harms, but Zehr recognizes that no solution can adequately heal all of these wounds in all circumstances.<sup>54</sup> In those cases, we should aim to achieve “approximate justice” by focusing on each harm in order of priority.<sup>55</sup> This hierarchical view of harm should especially inform states seeking to achieve restorative justice through amnesty, as amnesty almost always represents an acknowledgement that full justice is unattainable. Thus, amnesties based on a theory of “approximate restorative justice” should, at a minimum, ensure that amnesty will repair the harm done to the victim.

What harms, then, has the victim suffered, and what needs does she have? Obviously, victims’ needs differ with the individual and with the circumstances, but some common needs exist among nearly all violent crime victims.<sup>56</sup> The most obvious and tangible need is for compensation for loss, whether that compensation is financial, material, or symbolic.<sup>57</sup> Some compensation (payment of medical expenses) may be more tangible than others (repayment for psychological scarring), but all forms of assistance can help the victim recover. Beyond compensation, some studies suggest that violent crime victims most immediately need answers.<sup>58</sup> “What actually happened? Why me? Did this person have something personal against me? Is he or she coming back? What happened to my property?”<sup>59</sup> Gathering this information can help victims make sense of the assault and “provide an entrance on the road to recovery.”<sup>60</sup>

Along with compensation and information, victims need “opportunities to express and validate their emotions: their anger, their fear, their pain.”<sup>61</sup> These feelings encompass and

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<sup>51</sup> ZEHR, *supra* note 4, at 186.

<sup>52</sup> *Id.*; Ron Claassen, *Restorative Justice 1*, <http://www.fresno.edu/pacs/docs/restj1.html> (last viewed Apr. 16, 2006) (creating a restorative justice goals hierarchy that places the needs of the victim ahead of the needs of society).

<sup>53</sup> ZEHR, *supra* note 4, at 184.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 188. See also John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *Crime & Justice* 1 (1999) (acknowledging that restorative justice oftentimes cannot completely restore the victim, rehabilitate the offender, and mend society).

<sup>56</sup> For example, most crime victims feel a basic need for justice, because it “provides a framework of meanings that make sense of experience.” Michael Ignatieff, *Imprisonment and the Need for Justice*, address to Canadian Criminal Justice Congress, Toronto, Canada (1987). See also FIGLEY, *supra* note 36, at Ch. 1.

<sup>57</sup> ZEHR, *supra* note 4, at 26-27.

<sup>58</sup> Kim Book, *Making Victims’ Voices Heard*, Prison Fellowship International: Restorative Justice Online, <http://www.restorativejustice.org/editions/2006/feb06/victimsvoces> (last modified Jan. 30, 2006).

<sup>59</sup> *Id.*

<sup>60</sup> ZEHR, *supra* note 4, at 27.

<sup>61</sup> *Id.*

express the harm caused by the violation, and being able to verbalize this harm helps begin the recovery process. Similarly, victims need to feel empowered.<sup>62</sup> Violent crime degrades victims and damages their dignity and autonomy. A very tangible method of empowerment involves creating a safe environment so that the victim no longer feels under threat of attack.<sup>63</sup> As part of regaining personal power, the victim needs to feel in control of her environment, and safety helps in that endeavor.<sup>64</sup>

Perhaps most prevalent in victims is the need for justice.<sup>65</sup> This need can take many forms, including the need for vengeance, the need for acknowledgement of the act's wrongness, or the need to be heard and affirmed – to have one's self-worth validated through "truth-telling."<sup>66</sup> No matter how a victim defines her "need for justice," implicit is the need to know that steps are being taken to rectify the situation and ensure that it does not recur.<sup>67</sup> This need for justice derives from our inherent need to make sense of the world; random violent acts turn the victim's world upside down, and "justice provides a framework of meanings that makes sense of experience."<sup>68</sup>

### C. THE GOAL OF RESTORATIVE JUSTICE: RESTORATION

With all of these needs in mind – restitution, answers, validation, empowerment, justice – how does restorative justice meet these needs? At the heart of restorative justice is the belief that a criminal justice system can only meet these needs by healing the victim and restoring her to her original state.<sup>69</sup> Theorists use several metaphors to make this point. Dave Worth talks about the wound crime inflicts, explaining that "[n]ew tissue must grow to fill the space where the old was torn away."<sup>70</sup> Wilma Derksen states that "[c]rime creates an emptiness, so justice is filling a hole."<sup>71</sup> In other words, true justice sees how much damage has been done to the victim and restores her to the position she was in before the crime occurred.

As important to this description of what restorative justice does is what it does not do. David Van Ness explains that traditional justice systems "seldom deal with the wound. We try the offenders when we catch them. And we sometimes send them to prison . . . So now we have two wounds

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<sup>62</sup> Book, *supra* note 58..

<sup>63</sup> Minnesota Department of Corrections, *Meeting Victims' Needs Post-Conviction Study Group*, available at <http://www.clarityfacilitation.com/postconviction/> (Jun. 2003).

<sup>64</sup> Many victim / survivor support organizations stress the need to regain control following a violent assault, because "[t]he assailant stepped into the victim/survivor's life and took control." The Aurora Center for Advocacy and Education, *Common Feelings of Victims/Survivors Who Have Been Sexually Assaulted*, available at [www1.umn.edu/aurora/commonfeelings.pdf](http://www1.umn.edu/aurora/commonfeelings.pdf) (last viewed Apr. 28, 2007). Safety is a necessary precondition of regaining control, because "[h]ealing cannot start until [the victim] begins to feel safe." The Center for Global Education, SAFETI On-line Newsletter, *Treatment of Sexual Assault in College Students Studying Abroad*, available at [http://www.globaled.us/safeti/usc\\_art2.html](http://www.globaled.us/safeti/usc_art2.html) (last viewed Apr. 28, 2007).)

<sup>65</sup> See *supra* note 56. Michael Ignatieff, *Imprisonment and the Need for Justice*, address to Canadian Criminal Justice Congress, Toronto, Canada (1987).

<sup>66</sup> ZEHR, *supra* note 4, at 28.

<sup>67</sup> *Id.* See also Book, *supra* note 58.

<sup>68</sup> See Ignatieff, *supra* note 56.

<sup>69</sup> Prison Fellowship International: Restorative Justice Online, *Introduction*, <http://www.restorativejustice.org/intro/> (last Jun. 22, 2005).

<sup>70</sup> ZEHR, *supra* note 4, at 189; see Dave Worth et. al., *The Green Manual (MCC Pilot Project)*, <http://www.restorativejustice.org/articlesdb/articles/6053> (last viewed May 1, 2006).

<sup>71</sup> WILMA DERKSEN, *HAVE YOU SEEN CANDACE?* 22 (Tyndale House Publishers 1992).

and no healing.”<sup>72</sup> Restorative justice theorists believe that the traditional regime of focusing time and money on finding, apprehending, and punishing the offender is inefficient, because it both ignores the needs of the victim and “wounds” the offender.<sup>73</sup> Instead of healing the one wound that the crime created, traditional criminal theorists create a second wound by incarcerating the offender.<sup>74</sup>

This reasoning highlights why restorative justice has been so closely linked with amnesty.<sup>75</sup> The restorative justice rationale only sees benefit in punishing the offender when the punishment addresses the victim’s needs; if punishment does not restore the victim, resources should be used more productively to help the victim and potentially repair the relationship between victim and offender.<sup>76</sup> In the case of mass atrocities (war crimes, crimes against humanity, genocide), this rationale frees up lots of resources that would otherwise be used to put together a lengthy and complex prosecution, to gather evidence, and to try many hundreds or thousands of people.<sup>77</sup> Through restorative justice, states can grant amnesty and focus on the truly important part of the crime – the victim.

#### IV. CRITIQUE OF RESTORATIVE JUSTICE AS A JUSTIFICATION FOR AMNESTY

Restorative justice theorists recognize the importance of holding criminals accountable, but deny that punishment is the most effective method of accountability.<sup>78</sup> Moreover, they see this task of holding criminals accountable as less important than repairing any harm suffered by the victim. Amnesty provides a way for states to sidestep the obligation to punish offenders and focus on the primary goal of restorative justice – restoring the victim. However, amnesty often fails to address the victim’s needs, and in many cases amnesty actually frustrates rather than furthers the goals of restorative justice.<sup>79</sup>

##### A. STATES CANNOT EFFECTIVELY ADMINISTER TRADITIONAL RESTORATIVE JUSTICE

The essence of restorative justice defines crime as a violation of a private relationship that exists between two individuals – the victim and the offender. While the criminal may have committed a wrong against society or ruptured the relationship between him and the state, these harms are considered secondary to the harm done to the victim and to the relationship between victim and offender.<sup>80</sup> Thus, restorative justice aims to heal the victim by meeting her individual needs and

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<sup>72</sup> David Van Ness, *supra* note 42.

<sup>73</sup> *Id.* (“the prisoners who are being released discover that the community cannot accept them as . . . ex-prisoners, so they hide that part of themselves. More wounds.”).

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., Desmond Tutu, *The Truth and Reconciliation Process: Restorative Justice*, The Third Longford Lecture, Westminster, U.K. (2004).

<sup>76</sup> See Van Ness, *supra* note 42.

<sup>77</sup> Minnow, *supra* note 9, at 37-42 (remarking that prosecuting large scale war crimes like those committed in Rwanda, wherein 120,000 prisoners await trial for genocide, would take untold amounts of resources and would likely lead to patently selective and arbitrary prosecutions).

<sup>78</sup> Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 42 CRIM. L. FORUM 251, 251 (1993) (observing that dissatisfaction with traditional criminal justice regimes lends credence to the argument that restorative justice systems may best hold offenders accountable and heal victims).

<sup>79</sup> Wilson, *supra* note 1, at 547 (noting that, “by forgoing retribution, restorative justice denies victims an important right to determine and engage in morally condonable processes aimed at restoring their dignity”).

<sup>80</sup> ZEHR, *supra* note 4, at 188.

repairing the broken relationship through understanding, forgiveness, and reconciliation.<sup>81</sup> A conditional amnesty grounded in these restorative justice principles would address both the needs of the victim and those of the relationship between victim and offender. Depending on the needs of the victims (and thus, the conditions of the amnesty), it would empower victims by ensuring their safety, allowing them to receive restitution, and giving them an opportunity to get answers and be heard. The amnesty would also facilitate reconciliation of the relationship between victim and offender, likely by facilitating voluntary meetings between the two parties to discuss their respective hostilities.<sup>82</sup>

Whether or not placing these sorts of conditions on amnesty actually meets the needs of victims, these amnesty structures suffer from a procedural defect. Restorative justice inherently is about the private needs of two individuals, and as a theory that “deals with the essentially private concepts of forgiveness and the will to reconcile . . . it is hard to see how restorative justice can work as a public concept, or how it can be ‘administered’ by an organ of the state.”<sup>83</sup> If the state determines that an offender should not receive a traditional punishment as soon as the offender meets a certain number of conditions, then restorative justice can only be achieved if completion of those conditions restores the victim. It follows, then, that restorative justice can only be achieved in the amnesty context if the victim’s needs do not include a retributive desire for incarceration.<sup>84</sup> Thus, restorative justice through conditional amnesty can only be achieved if the victim is willing to forgive the offender and forswear punishment.<sup>85</sup> While the state remains involved inasmuch as it authorizes restorative justice and gives discretion to commissions to impose flexible sanctions, the victim’s act of forgiveness is a purely private one that does not involve the state or the community – precisely because the harms done to the state and the community are not immediately relevant. How, then, can a public entity like the state act to forgive an offender on behalf of the victim? Unlike in the traditional criminal justice context, where the state acts on behalf of the community to assert that the criminal has wronged the entire society, restorative justice defines crime in private terms without regard to society.<sup>86</sup> Therefore, the state should not forgive the offender on behalf of the victim, but simply provide the victim with an opportunity to forgive.

Proponents of South Africa’s Truth and Reconciliation Commission argue that the TRC merely facilitated private forgiveness by placing the victim and the offender together in a mediation.<sup>87</sup> From there, the victim asserted her needs, the offender expressed remorse (or not), and the victim forgave the offender (or not).<sup>88</sup> In reality, however, many victims claimed they were pressured by the state to forgive their attackers, thus creating the public appearance of

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<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, WESTERN CRIMINOLOGY REVIEW 1 (1998) (available at <http://wcr.sonoma.edu/v1n1/umbreit.html>).

<sup>83</sup> Stuart Wilson, *supra* note 1, at 544-45.

<sup>84</sup> Victims often feel an intense desire for retributive justice, and often want to see their attackers incarcerated to give them a “sense of safety.” See ZEHR, *supra* note 4, at 26-27.

<sup>85</sup> This ability to forgive “will clearly not be in every victim’s power to achieve.” Wilson, *supra* note 1, at 538 (“Forgiveness involves a conscious mastery of anger; it marks a moral transformation on the part of the victim . . .”).

<sup>86</sup> See generally *supra* Part III.

<sup>87</sup> DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 118 (Doubleday 1999) (emphasizing that the Commission mediations between victim and offender showed that “we can indeed transcend the conflicts of the past, we can hold hands as we realize our common humanity”).

<sup>88</sup> McCarthy, *supra* note 1, at 244-46.

personal forgiveness<sup>89</sup> While the Commission never directly commanded victims to forgive their attackers, “the ostensible – almost fanatical – promotion of forgiveness and reconciliation by the Commissioners could not but give victims the impression that forgiveness was hoped for, perhaps even expected of them.”<sup>90</sup>

This type of heavy handed state coercion can be expected once the state takes over the execution of “private forgiveness.” Just as a traditional criminal justice system aggressively competes to “ferret out crime” and punish the offenders, a restorative justice system will aggressively pursue a policy that nets the highest possible total of reconciled relationships. In a results-centric democratic polity, especially when politicians are responding to widespread human rights abuses like *apartheid* or genocide, this type of coercive pressure is likely to be expected.<sup>91</sup>

## B. AMNESTY OFTEN FAILS TO MEET VICTIMS’ NEEDS

This tension between the TRC’s justifications and actual practices highlights a very real problem with defending amnesty through restorative justice. Although restorative justice claims to promote healing by focusing on the needs of the victim, in reality the victim’s needs are often not met by granting amnesty to her attacker.<sup>92</sup> On the contrary, many (if not most) victims of violent crime feel the “need” for some kind of retributive justice.<sup>93</sup> By punishing the offender, the state acknowledges the wrongness of his actions and the inherent self-worth of the victim.<sup>94</sup> Many victims describe this acknowledgement of their dignity as instrumental in their recovery from the abuse they suffered.<sup>95</sup> Amnesty, however, neither acknowledges the immorality of the offender’s actions nor the dignity and self-worth of the victim. This failure is most acute when the state grants amnesty despite the offender’s refusal to admit wrongdoing and the victim’s refusal to forgive.

Other victims express the need to feel safe again, at least from their attackers.<sup>96</sup> Often a victim’s first, most natural response to crime is the need “to feel like life makes some sense and that they are safe and in control.”<sup>97</sup> Traditional punishment meets this need by incapacitating the

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<sup>89</sup> Wilson, *supra* note 1, at 548 (pointing out that forgiveness often appeared on the TRC’s agenda “before the given perpetrator had even been identified – let alone confessed and given an opportunity to show remorse”).

<sup>90</sup> *Id.* See also RICHARD WILSON ET AL, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 120 (Cambridge University Press 2001) (recalling examples of the TRC, and often Archbishop Tutu himself, praising victims’ lack of “anger or desire for revenge” when forgiving attackers).

<sup>91</sup> The problem of coercion may not be as prevalent in more localized restorative justice regimes. See Albert W. Dzur & Alan Wertheimer, *Forgiveness and Public Deliberation: The Practice of Restorative Justice*, 21 CRIM. JUSTICE ETHICS 3 (2002) (focusing on the experiences of Vermont’s restorative justice program in arguing that forgiveness is a public good that has communicative and social dimensions and can be advanced through public mediation). The Vermont experience shows that the public, through local government, can legitimately advance the interests of restorative justice without pressuring victims to forgive. But the threat of coercion certainly is more pronounced in the highly public, closely scrutinized, and nearly always controversial context of state-sponsored amnesty.

<sup>92</sup> McCarthy, *supra* note 1, at 250 (noting that “more than half [of victims] believe the ‘perpetrators’ testifying before the Commission should stand trial. This sentiment is particularly strong among Black South Africans.”).

<sup>93</sup> *Id.*

<sup>94</sup> This is true, at least from a retributive perspective.

<sup>95</sup> Figley, *supra* note 36, at Ch. 1.

<sup>96</sup> ZEHR, *supra* note 4, at 27-28.

<sup>97</sup> *Id.*

offender, thus providing the victim with absolute assurances of safety. Amnesty, on the other hand, gives offenders the right to live freely and reintegrate into society as he sees fit. This damages the victim in two principal ways. Most acutely, it deprives the victim of the feeling of safety that she so desperately needs in the immediate aftermath of a violation.<sup>98</sup> But amnesty also exacerbates the already overwhelming feeling that life makes no sense. Many victims of abuse complain that their experience has left them feeling that life is random and senseless.<sup>99</sup> The notion that a just, democratic society would allow a violent attacker to walk free and participate in the social order with innocent people (including the victim) simply perpetuates this feeling.

One might suggest that a partial or probationary amnesty could sufficiently give victims a sense of safety, particularly if the probation called for harsh punishments for recidivists. This type of “partial punishment” might also serve as official acknowledgement of the act’s wrongness and the victim’s self-worth. However, it would no longer be amnesty. Amnesty, by legal definition, refers to “an act of sovereign power immunizing a person from criminal prosecution for past offenses.”<sup>100</sup> By immunizing the offender from punishment, the state forever loses its ability to penalize him for his actions. Moreover, amnesty “obliterates an offense before conviction; and in such case, he stands before the law precisely as though he had committed no offense.”<sup>101</sup> By contrast, probation both recognizes the fact that the offender has committed the offense and exacts punishment for that offense, minor as it may be.<sup>102</sup> A state might require an offender to serve a probation as a precondition to amnesty, but it would be the probation – and not the amnesty – that provides safety and acknowledgement of wrongdoing for the victim.<sup>103</sup>

### C. TRADITIONAL RESTORATIVE JUSTICE UNFAIRLY IGNORES THE RIGHTS AND NEEDS OF THOSE NOT “DIRECTLY” AFFECTED BY THE CRIMINAL ACT

Restorative justice conceptualizes crime as primarily a violation of the private relationship between victim and offender, and only secondarily as a violation of the relationship between the offender and the larger community.<sup>104</sup> Unlike traditional criminal prosecutions, restorative justice programs are not arranged as adversarial proceedings between the offender and the community (the state); indeed, the community is not officially represented at all.<sup>105</sup> While the state may facilitate a restorative justice program, only the offender and the victim (if she so chooses) actually participate.<sup>106</sup> Thus, other members of the community who were not “directly” affected by the criminal act have no official standing to have their voices heard and their opinions considered.

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<sup>98</sup> *Id.*

<sup>99</sup> See McCarthy, *supra* note 1, at 250-252.

<sup>100</sup> Gwen K. Young, *Amnesty and Accountability*, 35 U.C. DAVIS L. REV. 427, 482 n.20 (quoting Michael P. Scharf, *supra* note 3, at 508).

<sup>101</sup> Harrop A. Freeman, *An Historical Justification and Legal Basis for Amnesty Today*, 1971 Law & Soc. Order 515, 525 (1971).

<sup>102</sup> Of course, the state retains the right to punish for the offense if the probation contains provisions for harsh punishments in the event of recidivism. ZEHR, *supra* note 4, at 188. If the punishment is determined in part by reference to the past offense, the offense certainly has not been “obliterated.”

<sup>103</sup> This concept of “partial amnesty” accompanied with probation sounds more like an official pardon. For a discussion distinguishing amnesty from pardon, see Freeman, *supra* note 100, at 524-27.

<sup>104</sup> See *supra* Part III.

<sup>105</sup> Braithwaite, *supra* note 48, at 35-43 (describing restorative justice as a system that involves participation among all “stakeholders,” including victim and offender, but not state).

<sup>106</sup> *Id.*

This failure to acknowledge the impact the crime has on the larger community unfairly ignores the needs of those “indirectly” affected by the act, specifically the need to feel safe from future criminal activity. Under a traditional punishment scheme, incarceration creates a safer situation for all members of the community by temporarily incapacitating the offender, thus making it impossible for him to commit crime. In a restorative justice regime, however, the state does not incapacitate the offender, and only the victim has the opportunity to express whether this alternative to punishment creates a sense of safety.<sup>107</sup> The victim may feel safe enough to let the offender go free (possibly because she gained the offender’s trust through a face to face meeting), but the victim’s relative sense of safety says nothing about the safety of the larger community. This especially is true when one considers that no community representatives had similar opportunities to gain the offender’s trust; some might feel more trusting of the offender after observing a restorative justice meeting, but neither the victim nor the facilitators of the meeting officially act as proxies for the community interest.

The South African government similarly structured its Truth and Reconciliation Commission without adequately recognizing the needs of non-victim individuals in the community.<sup>108</sup> While the hearings themselves were made public for the community to see, only the offenders and the victims participated.<sup>109</sup> Offenders applied for amnesty and publicly disclosed their involvement in *apartheid*, victims often made statements, and then Commission officials determined whether to grant amnesty. No other individuals participated in the hearings, nor were they parties to the amnesty deliberations.<sup>110</sup>

One might consider restorative justice, at least in the context of a broad, state-sponsored amnesty program, as employing a group-based conception of the “victim” that incorporates both the actual victim and the larger community that was implicitly victimized by the act. Thus, in some small way the actual victims represented and acted on behalf of the entire community, and determined the best course of action for the community. This argument has merit, but it requires that one adopt a looser form of restorative justice that recognizes more than the needs of the immediate victim.<sup>111</sup> If one is to acknowledge the victimization of the broader community, one must allow representatives of the “indirectly affected” victim group to participate in the hearings, deliberations, and decisions. While actual victims and indirectly affected victims share some characteristics, they have distinct relations to the offender and the criminal act. These distinct relations create different needs; thus, a truly group-based restorative justice regime requires input and consideration of all these victims’ different needs.

## V. TOWARDS A REFINED RESTORATIVE JUSTICE AMNESTY REGIME

The above discussion highlights some of the problems with justifying an amnesty regime like South Africa’s on traditional restorative justice theory. States have difficulty adequately

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<sup>107</sup> For example, AZAPO, a mostly Black anti-apartheid movement, frequently spoke up on behalf of the Black South African community in opposition to grants of amnesty because “it is like turning the knife after the initial blow to the heart.” However, no members from AZAPO who were not immediately victimized by the amnesty applicants were granted the opportunity to speak at the hearings. See McCarthy, *supra* note 1, at 252.

<sup>108</sup> *Id.* See also *supra* Part IV.

<sup>109</sup> Some have argued that “the truth commission’s mandate misidentified the main victims . . . of apartheid by narrowly focusing on individual acts of extraordinary violence.” Nagy, *supra* note 1, at 13 (citing Mahmood Mamdani, *Reconciliation Without Justice*, SOUTH AFRICAN REVIEW OF BOOKS 46 (1996)).

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

<sup>111</sup> Restorative justice recognizes the needs of the offender and the needs of society, but only *after* recognizing the needs of the immediate “victim.” See ZEHR, *supra* note 4, at 188.

administering a private conception of justice through such a broad public program as amnesty. These programs often fail to address victims' needs, which is the primary goal of restorative justice, and they rarely address the needs of others in the community who, though not directly victimized, were affected nonetheless. Only a refined theory of restorative justice – one that both redefines “victim” broadly to encompass the surrounding community and allows victims to direct amnesty proceedings – can justify a conditional amnesty.

#### A. ALLOW VICTIMS, NOT OFFENDERS, TO APPLY FOR AMNESTY

A state administering a restorative justice regime will work just as hard to achieve success as one administering a retributive justice regime. In turn, the state might be given to manipulating victims to manufacture reconciliation. This type of pressure to forgive in South Africa's TRC has been well documented.<sup>112</sup> To limit this sort of heavy handed state coercion, states should give victims greater control over the amnesty process.

One can envision an amnesty regime in which the victim, not the offender, applies to forgive her offender as a precondition to the offender's attainment of amnesty. This way, the victim ensures that the state does not ignore her need for traditional justice (punishment); if she does not wish for the offender to receive amnesty, she need not apply. It also creates incentives for offenders to work closely to meet the victim's needs, including paying restitution and providing answers. Moreover, this system helps to weed out disingenuous expressions of remorse more effectively than a system in which the offender applies for and receives amnesty after acknowledging the wrongfulness of his conduct. After the victim's needs have been met and she is sufficiently willing to forgive the offender and repair her relationship with him, the state can step in and grant amnesty. This system achieves the restorative justice goal of meeting the victim's needs without the threat of victim manipulation by the state; the real restorative work is done in private between victim and offender, and the state steps in merely to facilitate the restoration.

One problem with this regime is the risk of blackmail. If a citizen's freedom from state confinement rests solely in the hands of the victim, one must begin to seriously worry about the potential for abuse. For instance, the victim may claim that her wounds have not sufficiently healed until her offender's bank account has been emptied, or until the offender has been repeatedly publicly shamed in a way that is tantamount to torture. While the state can certainly set limits on the scope of private mediation and the demands of victims within them, offenders are likely to accede to whatever demands the victim has when his very freedom is the thing being held from him. States can attempt to cap the amount of financial restitution victims receive, but states cannot legitimately achieve restorative justice by forcing victims to agree to forgive and grant amnesty to their attackers. Thus, the carrot (freedom) remains in front of the offender, and the stick (blackmail) remains largely unchecked.

#### B. ALLOW “INDIRECTLY AFFECTED” VICTIMS TO HAVE THEIR VOICES HEARD

State controlled amnesty proceedings risk ignoring victims' needs, and thus failing to achieve the goals of restorative justice.<sup>113</sup> Yet, victim controlled proceedings like the one described above contain the potential for blackmail. One way to ensure that victims both have their needs met and are restrained from abusing the system is to expand the definition of “victim” to include those in the community who were indirectly affected by the criminal behavior. Traditional restorative

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<sup>112</sup> Wilson, *supra* note 1, at 548-49.

<sup>113</sup> See *supra* Part IV.

justice mediations, as well as amnesty proceedings like South Africa's, invite all "stakeholders" to participate and have their voices heard, but only recognize the offender and the directly violated victim as legitimate stakeholders.<sup>114</sup> By acknowledging that others in the community are negatively impacted by crime and inviting community representatives to participate in amnesty proceedings, the state can limit the directly affected victim's ability to blackmail the offender. Community members, while shaken up by the crime, will not have suffered as significant a harm, and thus will likely have less incentive to abuse the offender. Moreover, any financial restitution given to the "community victims" likely will be nominal in comparison to that received by the immediate victim, creating even less incentive for blackmail.

This group-based conception of the victim also more completely addresses the goals of restorative justice, at least with respect to amnesty. Amnesties are often granted in response to widespread, public atrocities that affect nearly everyone in the community; to deny community representatives the opportunity to express their needs as victims in amnesty proceedings would be to give an incomplete account of the "wounds" created by the crime.<sup>115</sup> This, in turn, would cause the state to address only some victims' needs, leaving others wounded. By employing a refined, group-based restorative justice amnesty regime, the state can more effectively address the needs of victims, and thus, the requirements of restorative justice.

## VI. CONCLUSION

Traditional restorative justice views crime as a private violation between individuals, and contends that the wounds of crime can best be healed through mediations focused on the private stakeholders involved, rather than the state or the larger community. This private conception of justice seems an uneasy fit for a state sponsored and administered proceeding like amnesty. Indeed, trying to incorporate traditional restorative justice ideals into an amnesty regime creates many problems, both conceptual and practical. States have difficulty facilitating the private acts of forgiveness inherently needed in restorative amnesty systems, and these systems often fail to adequately address the needs of victims – both the immediate victims and those within the larger community.

However, a refined restorative justice that employs a group-based conception of victim-offender mediation can effectively address victims' needs in amnesty proceedings, especially when victims have more direct control over the proceedings themselves. By allowing victims to apply to grant amnesty to their attackers, the state can ensure that victims' needs are being both heard and met. And by including community representatives in the amnesty deliberations and decisions, states can more completely address victims' needs and reduce the potential for abuse. Only through this public conception of restoration can states legitimately grant amnesty in the name of restorative justice.

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<sup>114</sup> See Braithwaite, *supra* note 48, at 35-43.

<sup>115</sup> Ronald C. Slye, *supra* note 12, 175 ("Most recently . . . amnesties have been used to protect individuals from accountability for some of the worst human rights atrocities in the history of humankind.").

# THE MULTI-FACES OF ISLAM: A COMPARATIVE REPORT ON WOMEN'S ASSOCIATIONS AND ASSOCIATION LAWS IN MUSLIM COUNTRIES

BY NOA NOF-STEINER\*

## INTRODUCTION

To the Western eye it may seem that the status of women in all Muslim countries is identical: due to cultural, religious and political reasons Muslim women are always treated as inferior to men and most of their lives are dominated by them. Similarly, when thinking of women's associations<sup>1</sup> operating in the Muslim world, it is often unjustly assumed that such entities are subject to hostile governmental treatment and that they are consequently weak and insignificant.

A closer look into the state of affairs in several Muslim countries reveals that the reality is far more complex and diverse. Muslim countries differ quite widely in their behavior towards women and women's associations that operate under their respective jurisdiction. The reasons for this apparent diversity vary, as they are affected by specific economic features, cultural differences between countries, interrelations between religious groups within Islam, and historic factors.

This article evaluates laws on associations and deals with the status of women's associations in six different Muslim countries. Its objectives are to examine the multiple faces of Islam when it comes to women in general and women's associations in particular. To illustrate the diversity of approaches towards women within Islam, this article will focus on six representative Middle Eastern countries, each with a different political regime and, of course, a different outlook on women and their role in society.

Based on first-hand information obtained from Bahrain, Egypt, Iran, Iraq, Lebanon, and Yemen, this article compares the achievements and challenges faced by women's organizations in those countries. Each section portrays a short introduction to the legal system and the status of women, followed by an in depth analysis of the local law on associations and its effect on the operation of women's associations.

## EGYPT

Egypt enjoys extensive political influence among the Middle East countries, and its capital, Cairo, is a center of commerce and culture. Ever since being the first Arab country to sign a peace accord with Israel in 1979, Egypt's relations with the West have grown stronger. Today Egypt

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<sup>1</sup> By women's associations this article refers to women non governmental organizations (NGOs) advocating for women's rights.

serves as a valuable ally to Western states, as well as a mitigating force in various regional conflicts.

Egypt is ranked as a “not free” country, with a high level of corruption and an extensively centralized presidential regime.<sup>2</sup> In theory, Egypt’s Constitution guarantees many civil liberties. In practice, however, they are severely restricted by the government due to a constant state of emergency, which enables state security to perform arbitrary arrests, detain suspects or those deemed dangerous, and search individuals or places – all without following the Criminal Procedure Code. The Emergency Law (Law No. 162 of 1958) also allows the military ruler to monitor and ban the publication of newspapers and establishes a separate judicial system of state security and military courts, where those accused under the Law are tried without due process. Despite extensive protests from civil society and human rights organizations, the Emergency Law was extended again on April 30, 2006 for a period of two years until it will be replaced by an anti-terrorist law.<sup>3</sup>

Women’s status in Egypt is complex and contradictory. On the one hand, Egyptian women have made notable advances during the last few decades through the work of an active civil society and women's rights advocates. Recent developments in women’s status include the passing of the Khul' Law, which allows a woman to divorce her husband without his consent; the establishment of a family court, expected to protect women and children’s rights; and the amendment of Egypt's nationality law which extends nationality rights to the children of Egyptian mothers married to non-Egyptian fathers.<sup>4</sup> Egyptian women occupy key positions, such as ministers, ambassadors, media heads and university professors. They take an important part in Egypt’s public and private labor markets and compose almost half of the students in Egypt’s public universities.

Despite these notable achievements, the status of Egyptian women is still far from ideal. The political and social environment in Egypt is patriarchal and deeply affected by religious extremists who object to the empowerment and independence of women. Although granted equality before the law by the Constitution, women do not enjoy the same civil liberties as men. This is attributed mainly to incoherent legislation regarding women’s personal status, as well as the unwillingness of government officials to enforce women’s equal access to public institutions. In this respect, although the Egyptian government ratified international conventions calling for gender equality (among which, the Convention on the Elimination of All Forms of Discrimination against Women in 1981) and is an active actor in pro-women conferences, it refrains from performing the necessary legislative reform. According to The Egyptian Center for Women Rights (ECWR), Government support of women is only a façade, put together in order to satisfy Egypt’s Western allies, while in reality it opposes groups that advocate greater participation of women in the political system.

In everyday life, Egyptian women face widespread gender discrimination. For instance, they have limited access to political organizations and they are impeded when trying to run for public office. When turning to justice, women are discriminated against by judges and officials who often apply different standards for men and women.

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<sup>2</sup> Freedom House, Freedom in the world 2006 - Egypt Country Report, <http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6956>.

<sup>3</sup> Egypt Center for Women’s Rights, May 2006 update, *available at* <http://www.ecwregypt.org>.

<sup>4</sup> Freedom House, Women's Rights in the Middle East and North Africa: Citizenship and Justice: Country Reports - Egypt, <http://www.freedomhouse.org/template.cfm?page=172>. [hereinafter Freedom House, Woman’s Rights - Egypt].

Egyptian authorities and society regularly overlook violence against women, both inside and outside the home. Most violence towards women is domestic, and neither it nor marital rape are considered crimes under Egyptian law.<sup>5</sup> Wife beating is condemned only if it leads to serious injury and most rape cases are not prosecuted since the victims are required to provide medical reports of bodily harm as proof. Moreover, the police encourage rape victims to marry their rapist and drop charges against him.

Honor crime, namely, the killing of a woman in order to protect family honor from her misbehaviour, still exists in Egyptian society. These cases of murder are often not reported by the families or communities, and if reported are not investigated properly by the police. Although the offence of murder carries a sentence of death or a life-sentence, cases of honor crimes are mitigated in favor of men and the full penalty is not applied.<sup>6</sup>

Female Genital Mutilation (FGM) is an ancient custom performed on girls between 7 and 10 years old or on women as a pre-ceremonial ritual. Several sources attribute the origin of FGM to ancient Egypt, and although the custom is associated with Islam, FGM is in fact a local practice, confined to countries within the Nile valley or under its influence and in West Africa.<sup>7</sup> Although declared outlawed and punishable by the Egyptian government in 1996, FGM is still practiced in Egypt, by Muslims and Christians alike, and is positively referred to as “Tahara” – a physical purification of the woman’s body – due to the wide support it receives from religious leaders. Government’s efforts to eradicate this phenomenon or reduce its harms by issuing decrees demanding that the act must be performed by physicians at public hospitals has not been able to root it out. FGM is performed on fifty percent of women in urban Egypt and on ninety-five percent of women in rural areas, mostly by medically untrained women without any antiseptic techniques or anaesthesia, thus causing severe damage to the women’s physical and mental health.<sup>8</sup> Thus, it seems that not only the government is discriminatory with respect to women, but also society itself seems not ready for a reform in women’s rights and position.

## **EGYPT ASSOCIATION LAW**

Egypt enjoys an active and vibrant civil society of over 17,000 organizations. The scope of Egyptian NGOs is wide and diverse, ranging from community day cares to the advancement human rights, social and educational development, micro-finance etc. The Egyptian government encourages the establishment of NGOs and benefits from the fruits of their work; they are perceived as skilled partners for services and policy implementation, and their work for the development of Egyptian society is highly appreciated.

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<sup>5</sup> According to a survey conducted by the Center for Egyptian Women's Legal Assistance, 67 percent of women in urban areas and 30 percent in rural areas had been involved in some form of domestic violence at least once between 2002 and 2003.

<sup>6</sup> Freedom House, Woman’s Rights – Egypt, *supra* note 4.

<sup>7</sup> N. J. Kassamali, *When Modernity Confronts Traditional Practices: Female Genital Cutting in Northeast Africa*, in *WOMEN IN MUSLIM SOCIETIES – CIVILISITY WITHIN UNITY* 39, 41-47 (Herbert L Bodman & Nayyirah Tawhidi, eds., 1998).

<sup>8</sup> *Id.* at 40, 48

The law governing the work of NGOs in Egypt is Law No. 84/2002 on Non-Governmental Organizations, and the Executive Statute on Law 84 of 2002,<sup>9</sup> clarifies the provisions of the Law. Although highly anticipated by civil society organizations after its restrictive predecessors,<sup>10</sup> Law 84/2002 enacted a set of bureaucratic impediments which enable the supervising authority (the Ministry of Social Affairs – hereafter, "MOSA") to control and restrict the activities of NGOs. Unfortunately, NGOs advocating for women's rights and political equality suffer extensive governmental intervention through these legal mechanisms.

### *Legal forms of NGOs*

Law 84/2002 recognizes four kinds of NGOs: First are the “regular” Associations and Associations of Public Benefit, both established for non-profit reasons. The latter operates for the realization of “*general interest*” and gains its status due to a presidential decree.<sup>11</sup> The vague term “*general interest*” could well apply for regular associations as well. In fact, however, it allows the President broad discretion to deny certain groups the advantages of being an Association for Public Benefit, meaning the protection of their properties and funds by the Law.<sup>12</sup> The other legal forms created by Law 84/2002 are NGOs, which can be established by one or more natural or juridical persons,<sup>13</sup> and Unions, obligatory apex organizations.<sup>14</sup>

### *NGOs’ Establishment*

In order to operate, Egyptian NGOs need to obtain a license from MOSA by first paying a fee to the governmental Fund for Support of Associations and Non-Governmental Institutions.<sup>15</sup> The law does not specify the exact amount of money, but rather uses the term “*up to and not exceeding 100 Egyptian Pounds,*” leaving the exact evaluation to the bureaucrats. After receiving all the necessary documents of incorporation, MOSA has 60 days to accept or deny the license. If 60 days pass without a response from MOSA, the registration is considered approved.<sup>16</sup> However, according to Egyptian NGOs, MOSA does not always comply with the 60-day requirement but registration does not follow automatically.<sup>17</sup> A substantial number of organizations have been forced to register by appealing MOSA’s conduct to the Administrative Court.<sup>18</sup>

Although MOSA has to issue a reasoned decision when denying registration, the grounds for refusal are broad and vague, such as “*posing a threat to national security,*” or “*violating public morals*”<sup>19</sup> MOSA also has the right to “*object to whatever it considers as violating the law in the*

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<sup>9</sup> Law no. 84 of 2002 on Non-Governmental Organizations [hereinafter Law 84/2002], and the Executive Statute on Law no. 84 of 2002 (Ministry of Insurance and Social Affairs Decree No. 178 of 2002)

<sup>10</sup> Law no. 32 of 1964 on Associations and Private Institutions [hereinafter Law 32/1964], and Law no. 153 of 1999 on Non-Governmental Organizations [hereinafter Law 153/1999].

<sup>11</sup> Law 84/2002, arts. 1 and 49. Chapter 5 sets forth specific provisions regarding Associations of Public Benefit.

<sup>12</sup> *Id.* art. 50.

<sup>13</sup> *Id.* art. 57.

<sup>14</sup> *Id.* ch. III.

<sup>15</sup> *Id.* art. 5.

<sup>16</sup> *Id.* art. 6(1).

<sup>17</sup> The International Center for Non for Profit Law, “Information about the NGO’s law in Egypt and its implementations,” available at

<http://www.icnl.org/knowledge/library/showRecords.php?country=Egypt&subCategory=4>

<sup>18</sup> Art. 6(4) grants the right to appeal MOSA’s decisions.

<sup>19</sup> *Id.* art. 11(2).

*association's articles of incorporation or as regards the founders.*"<sup>20</sup> If an NGO appeals MOSA's decision, MOSA can ask the Administrative Court to rule immediately for the removal of the violation or to suspend the NGO's activity until the case is decided.<sup>21</sup>

Existing NGOs were obliged to re-register according to Law 84/2002 within a year of its entry into force (June 2003).<sup>22</sup> The Egyptian Center for Women Rights (ECWR) reports that many NGOs advocating human rights have been refused when trying to re-register under the new Law. As a result, NGOs which endured the former registration process, (a process that could take up to 2 years, according to ECWR's experience), had to face yet again the new bureaucracy of Law 84/2002. Such was the case of the New Women Research Center (NWRC), a long-established organization advocating women's political, social and economic rights, which was denied re-registration by the Security Directorate in Giza for "security reasons"<sup>23</sup> After their attempts to meet with MOSA officials and discuss its right to registration, NWRC filed an appeal to the Administrative Court, which ruled in favor of the organization, forcing MOSA to acknowledge its existence.

As it turns out, although state security is not officially a part of the registration process according to the Law, a considerable number of registration decisions are in fact determined by it. Thus, most NGOs that are denied registration receive a letter from MOSA with a state security refusal attached to it. State security also issues its own requirements for registration, some of which are legal – like a description of activities that would be sponsored by foreign funds – and some of which are illegal – like the demand that made of ECWR to provide the authorities with lists of all visitors to their office, including signatures, dates, time, and reasons for the visits.

Due to the burdensome registration process, a lot of NGOs chose to register as companies (profit companies, law offices, etc) rather than go through the exhausting licensing procedure, thus denying themselves the tax exemptions and subsidies that the Law provides.<sup>24</sup>

### *Government supervision of NGOs*

Law 84/2002 prohibits associations from engaging in any political activity.<sup>25</sup> Egyptian authorities use this provision to arrest women activists under the accusation that advocating women's equality is a political activity. For instance, in May 2006 three female activists were arrested while peacefully demonstrating for political participation and democratic transition of women.<sup>26</sup> According to ECWR, the last months have seen an escalation in the approach of Egyptian authorities towards women's associations, as more frequent and severe security measures were taken against them. These measures range from massive use of power during demonstrations to the full cancellation of the Women's Day Celebration, a multi-NGO initiative aimed at raising awareness for women's rights, which was due to take place in May 2006. The Center also reported that following the 2005 elections NGOs and activists suffered tighter control by the

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<sup>20</sup> *Id.* art. 8(1).

<sup>21</sup> *Id.* art. 8(3)

<sup>22</sup> *Id.* art. 4 of the Preamble.

<sup>23</sup> The International Center for Non for Profit Law New Women Research Center, Case Study on an NGO Refused by the Authorities in Egypt (2005), *available at* <http://www.icnl.org/knowledge/library/download.php?file=Egypt/refusal.pdf>.

<sup>24</sup> The International Center for Non for Profit Law, Information about the NGO's law in Egypt and its Implementation 2005, *available at* <http://www.icnl.org/knowledge/library/download.php?file=Egypt/info.pdf>.

<sup>25</sup> Law 84/2002 art. 11(3)(3).

<sup>26</sup> Email to organization and ECWR update, May 2006, June 2006, *available at* <http://www.ecwregypt.org>.

authorities, such as attempts to restrict NGO's access to their funds, seizure of computer hard drives, etc.

In addition to risking arrest by state security, NGOs members can also face imprisonment for up to 6 months for failing to follow the provisions of Law 84/2002, regardless of the gravity of violation.<sup>27</sup> Chapter V, which deals with penalties for violations of the Law, establishes the offences and sets forth imprisonment periods ranging from 3 months to a year, not always in proportion to the offences.

NGOs are obliged to inform MOSA of general assembly and board meetings and to provide copies of minutes and resolutions. Moreover, MOSA is free to send its representatives to board's meetings<sup>28</sup> and to require an NGO to withdraw a decision it considers as a "violation of the law or its articles of incorporation", and to remove board nominees if "the person decided to be removed for non-fulfilling the nomination requirements."<sup>29</sup> The law does not specify what the exact nomination requirements are, but a lack of obedience by the NGO to MOSA's decision would bring the case before a special committee and afterwards to the Administrative Court.<sup>30</sup> An example to MOSA's discretion was of its refusal to permit advocate Safaa Murad to serve on the board of the Arab Women Alliance (AWAA). Murad, a feminist lawyer and human rights activist who had served on the board of AWAA ever since 1997, but in 2003, after she campaigned against the US war in Iraq, she was excluded from the election to the board due "for security reasons."<sup>31</sup>

NGOs may collaborate with foreign organizations located outside Egypt only if they receive permission from MOSA.<sup>32</sup> A violation of this clause can lead to the dissolution of the NGO by MOSA and to the imprisonment of its members for a period of up to 3 months.<sup>33</sup> A similar requirement (and sanction, with the risk of imprisonment for up to 6 months) obliges NGOs to seek MOSA's approval before using foreign donations they received.<sup>34</sup> If 60 days pass without a response from MOSA the NGO is allowed to use the money. On March 1<sup>st</sup> 2005, as a mean of increasing its control over NGOs' activities leading up to the 2005 elections, state security issued a clarification of this provision, requiring written and explicit permission from MOSA in order to enable NGOs to use the foreign funds. As a result, reports ECWR, the approval for many political activities was withheld until after the elections, effectively preventing some NGOs' from operating and sometimes forcing them to dissolve due to lack of funds.

Law 84/2002 gives MOSA the power to dissolve an NGO, discharge the board of directors, or halt its activities due to a "*serious violation of the law, or the public order or morals,*" or when MOSA finds it poses a threat to national security<sup>35</sup> The broad language of Law 84/2002 places a substantial burden on an NGO in case it appeals from an MOSA decision, because it would have to demonstrate that its alleged activities do not fall under the broad terminology of the Law, NGOs can also be dissolved by a court decision if they engage in military or political activities, or if they threaten national unity, violate public order or morals, or call for discrimination between

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<sup>27</sup> Law 84/2002 art. 76(2)(A).

<sup>28</sup> *Id.* arts. 25(d), 26 and 38(3).

<sup>29</sup> *Id.* art. 23 and arts. 34(1), (2).

<sup>30</sup> *Id.* art. 34(3).

<sup>31</sup> Mariz Tadros, *Matters of Permission*, AL-AHRAM WEEKLY ONLINE, 5-11 June 2003, <http://weekly.ahram.org.eg/2003/641/fr2.htm>.

<sup>32</sup> Law 84/2002, art. 16.

<sup>33</sup> *Id.* arts. 42(1)(4) and 76(3)(B).

<sup>34</sup> *Id.* art. 17.

<sup>35</sup> *Id.* arts. 42(1)(3) and art. 63.

citizens.<sup>36</sup> According to ECWR's experience, organizations often do not suffer from direct dissolution attempts by MOSA, but rather from increasingly impossible bureaucratic measures that prevent it from conducting its activities without actually closing it down.

### *Government support of NGOs*

NGOs that satisfy the requirements of Law 84/2002 are entitled to enjoy several benefits, including exemption from contract registration fees as well as from various taxes, like postal and customs taxation, a reduction of 25% in traveling costs, the special telephone tariff, and a reduction of 50% in water, gas, and electricity tariffs.<sup>37</sup> Foreign donations and gifts are exempt from customs tax only if MOSA and the Minister of Finance recommend that the Prime Minister issue a decree granting the exemption.<sup>38</sup> The Law also allows donors a tax deduction of up to 10% of income.

Another mechanism is the provision encouraging governmental agencies to outsource their duties to The Association for Public Benefit.<sup>39</sup> Such duties include the task of running an institution attached to a Ministry or local government unit, or implementing some of their projects and plans. This provision could increase the involvement and impact of NGOs in society, but if an NGO fails to realize the purposes, activities, or projects assigned to it, MOSA can withdraw the outsourced project – temporarily or permanently – and even remove the board of directors.<sup>40</sup>

Law 84/2002 also establishes the Fund for Support of the Associations and Non-Governmental Institutions<sup>41</sup> The Fund, under the management of MOSA, designs recommendations and policies regarding NGOs' financing, and controls the distribution and allocation of governmental donations to NGOs. No criteria are set up for this allocation, but it is probable that donations will be distributed only to NGOs that do not clash with the government's agenda.

## **LEBANON**

Lebanon is a modern and pluralistic country whose citizens enjoy an up-to-date society. Once perceived as the "Switzerland of the Middle East", Lebanon of today is still recovering from a harsh civil war (1975-1990), years of Syrian occupation, and the latest war with Israel – all of which left the country in ruins and pain. Although the civil war is long over, Lebanon still experiences political turbulence. Five anti-Syrian figures were assassinated in Lebanon in the last two years, including the former Prime Minister Rafik Hariri and Pierre Gemayel, a rapidly rising anti-Syrian cabinet minister. Hariri's assassination on February 2005 evoked mass demonstrations against the Syrian occupation and led to the withdrawal of Syrian troops from Lebanon and to parliamentary elections that brought into power the anti-Syrian opposition.

The establishment of an international tribunal for the investigation of Hariri's assassination inflamed violent riots against the government, led by the Shiite Hezbollah organization. Being an agent of Iran and Syria, this terrorist organization plots to overthrow the liberal Lebanese

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<sup>36</sup> *Id.* art. 76(1)(2).

<sup>37</sup> *Id.* art. 13.

<sup>38</sup> *Id.* art. 13(c).

<sup>39</sup> *Id.* art. 52.

<sup>40</sup> *Id.* art. 53.

<sup>41</sup> *Id.* ch. IV.

government and implement strict Islamic codes while serving Syrian political aspirations. Meanwhile, the tension concerning “the Syrian connection” keeps escalating and threatens to result in a second Lebanese civil war.

Another factor adding to the fragility of the political situation is the division of the Lebanese population into 18 officially recognized religious sects (various Christians and Muslim groups, as well as Druz). The delicate balance between the religious and ethnic sections forced the formation of a complicated sectarian political structure that grants a parliamentary quota to each religious sect and divides the higher positions between among the dominant groups.

The Lebanese Constitution grants citizens many civil liberties, among which are freedom of assembly, press, association, and expression.<sup>42</sup> Lebanese authorities usually respect these rights, especially since the Syrian troops left the country. By contrast, prior to Hariri’s assassination security forces violently banned any demonstration against the Syrian occupation.

The status of women in Lebanon is quite advanced. Lebanese women are significantly involved in political, economic, and social activities, they regularly work outside their homes, and they occupy respectable positions such as parliamentarians, judges, and university professors. Women are entitled to assemble and are free to advocate for their rights, albeit with only meagre assistance from the government in resources or funding.<sup>43</sup> Nevertheless, argues Dr. Haidar from the Lebanese Council of Women (LCW) – an umbrella organization for more than 140 organizations – women’s rights in Lebanon are not as progressive as they may seem. In reality, they are influenced more by traditional social norms and strict religious rules than by pro-women civil legislation.<sup>44</sup> Women’s progress in Lebanon has been held back for years by the civil war and the Syrian occupation that ended in 2005, but the true reason for the discrimination against women and the overall patriarchal attitude in Lebanon are the various religious laws that govern the issues of personal status.<sup>45</sup>

Although women are granted full equality under the Lebanese Constitution,<sup>46</sup> there is no article specifically prohibiting gender discrimination. Consequently, legislation under the Constitution often ignores its spirit and creates discriminatory laws, as well as inconsistency regarding women’s rights. Such laws, for example, are the Citizenship Law and the Nationality Law that grant Lebanese citizenship only to persons born in Lebanon or to a Lebanese father. Acquiring a citizenship through the mother is restricted to cases where the father dead or has disappeared. The same occurs in the various status codes that govern marriage, divorce, guardianship, child custody, adoption, and inheritance – all of which discriminate against women in one way or the other.<sup>47</sup> Many women’s associations are arguing that the Lebanese government should make more efforts to change the current legal situation regarding women’s rights and create homogenous legislation that will prohibit gender discrimination.<sup>48</sup>

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<sup>42</sup> LEB. CONST. art. 13.

<sup>43</sup> Freedom House, Women’s Rights in the Middle East and North Africa: Citizenship and Justice: Country Reports - Lebanon, [www.freedomhouse.org/template.cfm?page=176](http://www.freedomhouse.org/template.cfm?page=176). [hereinafter Freedom House, Woman’s Rights - Lebanon]

<sup>44</sup> Email from Dr. H. Haidar, “*Civil Rights and Women in Lebanon*”, produced by The Lebanese Council of Women. (on file with author).

<sup>45</sup> *Id.* Lebanon contains 15 separated codes and courts for personal and family matters that further impede the necessary uniformity of religious legislation with the civil one.

<sup>46</sup> LEB. CONST. art. 7.

<sup>47</sup> Freedom House, Woman’s Rights - Lebanon, *supra* note 43.

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

Barriers to women's rights are posed not only by the government but also by Lebanese society itself. Being still an essentially patriarchal society, it is affected by social customs and cultural traditions, as well as by the fears of a change in sensitive religious issues.<sup>49</sup> Thus, by petitioning to the authorities, a woman's family can stop her from travelling abroad or filling a position that requires her to work late or leave her home. Women still suffer from domestic violence and take a smaller part in the labor market, although they have equal rights for education and owning property or a business.

While the Lebanese government might be inclined to take more tangible steps in order to change the laws and policies that govern women's status, Lebanese civil society has been working for years towards equality between the genders. Indeed, women are active members of the Lebanese vibrant civil society, be it associations that advocate for women's empowerment or associations promoting children rights, family issues, education, environment, poverty etc. Due to their efforts, Lebanon ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1997, followed by the amendment of the Commercial Code and Labor Law to ban gender discrimination. The Penal Code was amended to include an offence of honor crimes, and public awareness has been raised with respect to issues like sexual harassment in the workplace and domestic violence. Consequently, both Muslim and Christian courts recognize a husband's physical abuse of his wife as grounds for divorce or separation.

### **LEBANON ASSOCIATION LAW**

Lebanon possess one of the least restrained civil societies in the region, mainly thanks to the role it played during the civil war by filling the place of the dysfunctional public sector and state authority. More than 3,000 NGOs are registered in Lebanon, most of which operate inside their religious group. Nevertheless, confessional lines are crossed many times, especially when concerning women organizations and environmental and professional associations, which naturally prefer to operate on a national level.<sup>50</sup>

Officially, Lebanese civil society is governed by the 1909 Ottoman Law on Associations – an archaic document that still refers to gold coins as currency and to authorities of the Ottoman Empire. De facto, the provisions of the Ottoman Law are mostly ignored by the Lebanese government, since the limitations they set over the rights of free speech and assembly are considered unconstitutional. Therefore, NGOs in Lebanon are free to operate almost entirely as they like.<sup>51</sup> In an effort to update and systematize civil society legislation, a draft for a new association law is currently being studied by a parliamentary committee in charge of modernizing the old law.

#### *Legal forms of NGOs and their establishment*

The 1909 Law refers to the establishment and work of “Associations” – “*a group composed of several individuals who unite their information and efforts in a permanent fashion and the goal of which is not to divide profit*”.<sup>52</sup> The Law also defines Associations Serving the Public Welfare,

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<sup>49</sup> Haidar, *supra* note 44.

<sup>50</sup> *Id.*; Carnegie Endowment for International Peace, “Arab Political Systems: Baseline Information and Reforms – Lebanon” available at [www.carnegieendowment.org/arabpoliticalsystems](http://www.carnegieendowment.org/arabpoliticalsystems); UN Development Program on Governance in the Arab Region – Lebanon, available at <http://www.pogar.org/countries/civil.asp?cid=9>.

<sup>51</sup> Email to Dr. Haidar, Consultant to the President, The Lebanese Council of Women.

<sup>52</sup> Ottoman Law on Associations 1909, Article 1 [hereinafter Ottoman Law on Associations].

which obtain their status through a special decree from the Ministry of Interior (the criteria for obtaining this status are not specified in the Law) and are entitled to financial aid from the government.<sup>53</sup>

In order to establish an NGO, no prior permit is required, and the founders are only expected to notify the Ministry of Interior about the existence of the NGO.<sup>54</sup> According to the Carnegie Endowment for International Peace, this process is not always respected by the Ministry, which at times demands a license from NGOs or transfers the details of the founding members to the security forces.<sup>55</sup> Along with the notification of existence, the founders are required to provide the authorities with the articles of incorporation.<sup>56</sup>

The Lebanese government is supportive of women's associations and allows their licensing and operation with relative ease. Government officials often attend their conferences and the Ministry of Social Services works closely with some organizations, especially with those dealing with day care or elementary schools.<sup>57</sup>

### *Government supervision of NGOs*

As a rule, Lebanese authorities tend not to interfere with the work of NGOs. The police may inspect the meetings and offices of an NGO upon a real need, but only, according to the law, with a signed order from the Ministry of Police in Istanbul, which does not exist anymore.

To maintain good order, NGOs must notify the Ministry of Interior of any amendments to its articles of incorporation or bylaws, as well as of elections for the board of directors.<sup>58</sup> The Ministry has no say in these matters, but it can refuse an amendment if it contradicts the original declared aims of the NGO or the definition of a non-profit organization. In such a case, the NGO will have to change its name and register as a new entity.<sup>59</sup>

### *Government support of NGOs*

The no-interference approach of the Lebanese government has also downsides, meaning the lack of financial support or tax exemption for NGOs. In fact, it has been reported by the Ministry of Treasury that the spending on organizations that work towards the improvement in women's lives is minimal.<sup>60</sup> This is especially unfortunate for NGOs operating in rural areas – where women's status is less advanced – as they are left to face funding problems on their own. The lack of financial supports also prevents NGOs from operating effectively: women's associations compete with each other over foreign funding and media attention instead of collaborating, thus spending energies that could have otherwise been used to promote their goals.<sup>61</sup>

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<sup>53</sup> *Id.* art. 17.

<sup>54</sup> *Id.* art. 2.

<sup>55</sup> Carnegie Endowment for International Peace, Arab Political Systems: Baseline Information and Reforms – Lebanon, available at [www.carnegieendowment.org/arabpoliticalsystems](http://www.carnegieendowment.org/arabpoliticalsystems).

<sup>56</sup> Ottoman Law on Associations, art. 6.

<sup>57</sup> Freedom House, Woman's Rights – Lebanon, *supra* note 43.

<sup>58</sup> Ottoman Law on Associations, art. 6.

<sup>59</sup> Email to Dr. Haidar, *supra* note 44.

<sup>60</sup> Freedom House, Woman's Rights - Lebanon, *supra* note 43.

<sup>61</sup> *Id.*

## IRAN

The status of Iranian women and the history of the country are tightly intertwined; historical changes that followed the 1979 revolution shaped women's status for years to come. The popular revolution of 1979 marked the end of the western-oriented monarchy and led to the establishment of an Islamic republic under the leadership of the exiled leader Ayatollah Khomeini and based on the "noble and universal values of Islam".<sup>62</sup>

Although women took an active part in the 1979 revolution, the immediate post-revolutionary period was characterized by a systematic abolition of every woman's right ever achieved under the monarchy. In only six months the new Islamic regime regulated all aspects of women's life, from clothing to marital rights and sexuality: among others, women were forced to veil their body completely, segregation in public places was introduced, and women working in the judicial profession were fired.<sup>63</sup> The Family Protection Act was repealed, annulling women's rights to obtain a divorce or gain custody over their children and allowing men to take a second wife.

During the establishment of the Republic, political leaders used women's bodies and lives to promote their Islamic agenda and shape public opinion. Women served as the benchmark for the values and norms of the Iranian society – national campaigns dictating women's dress code and public behavior depicted them as the last fortress against Western invasion and corrupted capitalism, forcing them to adhere to strict principles for the sake of the greater good. The image of the Iranian woman was derived from one of the most influential works of the time, "*Fatima is Fatima*", by the Iranian ideologue Ali Shariati, who regarded women's emancipation as a "crisis". Shariati portrayed the ideal woman as 7<sup>th</sup> century Fatima, daughter of the prophet Muhammad, who did not aspire above her domestic terrain, served her father and husband, and gave birth to two sons (who were martyred).<sup>64</sup>

The Iranian Constitution that was adopted right after the revolution specifically addresses the issue of women's rights by stating that "*The government must ensure the rights of women in all respects*", such as "*create a favorable environment for the growth of woman's personality and the restoration of her rights, both the material and intellectual*".<sup>65</sup> In practice, this declaration has been narrowly interpreted according to Islamic criteria, which conceive a woman's primary role as a mother and a wife. Almost every attempt to improve women's status has been rejected by the Guardian Council, an unelected clerical body in charge of interpreting the Constitution, after declaring women's empowerment as unconstitutional.<sup>66</sup> Women who did try to advocate for their rights were executed, imprisoned, or hounded into exile.<sup>67</sup>

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<sup>62</sup> Preamble to the Constitution of the Islamic Republic of Iran [Qanuni Assassi Jumhuri'I Isla'mai Iran] [1980]. See also Z. Mir-Hosseini, *Emerging Feminist Voices*, in *WOMEN'S RIGHTS: A GLOBAL VIEW* 113 (Lynn Walter, ed., 2000)

<sup>63</sup> S. Mohyeddin, "*Iran's Islamic Cultural Revolution : Cultural Authenticity, Revolutionary Ideologies, and Women as Markers of the Nation*", *IRAN ANALYSIS QUARTERLY* Winter 2005, at 31. Available at <http://web.mit.edu/isg/IAQWinter05.pdf>; see also F. Farhi, *The Contending Discourses on Women in Iran*, available at <http://www.twinside.org.sg/title/iran-cn.htm>.

<sup>64</sup> H. Nakanishi, "Power, Ideology and Women's Consciousness in Postrevolutionary Iran", in *WOMEN IN MUSLIM SOCIETIES*, *supra* note 7 at 86.

<sup>65</sup> The Constitution of the Islamic Republic of Iran, art. 21.

<sup>66</sup> The Guardian Council has the power to approve electoral candidates and overrule parliament legislation that isn't in accord with Islamic law.

<sup>67</sup> Z. Mir-Hosseini, *Is Time on Iranian Women Protesters' Side?*, *MIDDLE EAST REPORT ONLINE*, June 16, 2006, available at <http://www.merip.org/mero/mero061606.html>.

The eight-year war with Iraq (1980-1988) allowed women to increase their autonomy somewhat by allowing them to hold public offices or serve as nurses in the frontlines. Several feminine issues were addressed during this period, such as the recognition of women's rights to guardianship of their children in case the husband died in war, (a right previously granted to the family of the husband). Women were also allowed to file for divorce or for economic compensation if the husband initiated separation.<sup>68</sup> The economic distress that followed the war forced the Iranian leadership to abandon some of the previous barriers placed over women in order to attain more employment and productivity. Women were allowed to return to work and occupy juridical positions they had had to leave after the revolution. Various fields of studies, previously prohibited for women, opened up. These changes, it should be noted, were not only a governmental initiative but also an achievement of women activists, who ever since 1980 flooded the parliament with demands for pro-women legislation. Even so, women have not managed to achieve the same status they enjoyed before the Islamic revolution.

The reformist era under the leadership of the liberal President Khatami (1997-2004), saw the establishment of many independent organizations advocating for women's rights. The government declared its commitment to the development of civil liberties and civil society, normalization of the economy and improvement in relations with the outside world.<sup>69</sup> Despite this atmosphere, the government refused to ratify the UN Convention on the Elimination of Discrimination against Women, and only reluctantly gave in to EU pressure to withhold stoning executions of women accused of engaging in infidelity or premarital sex.

The short grace period for women ended abruptly when conservatives regained control over the parliament in February 2004 and hard-line Ahmadinejad was elected as President of the Republic at August 2005. Following these elections, an anti-women regime was formed, declaring female NGOs agents of the West and arresting women activists without charges.

Today, Iranian women are constantly discriminated against by the Islamic courts (Sharia) in matters of divorce, inheritance, and child custody. The weight of a woman's testimony equals to half the testimony of a man, and her family will receive less compensation if she is killed.

### **IRAN ASSOCIATION LAW**

Iran is ranked by Freedom House as a "not free" country.<sup>70</sup> It is ruled by hard-line and corrupt Muslim clerics and its security forces enforce a strict Islamic code of behavior and dress. The government controls all TV broadcasting and media publications and punishments such as whipping and stoning are still practiced.<sup>71</sup> The Iranian Constitution allows for political parties, groups, associations, guilds, Islamic associations, and associations of recognized religious minorities, provided they do not "*violate the principles of independence, freedom, national unity, Islamic standards and the basis of the Islamic Republic*".<sup>72</sup> Broadly drafted, this Article is an important tool in the hands of the authorities when canceling an NGO's registration or suppressing its activities on the vague grounds of Islamic principles.

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<sup>68</sup> F. Farhi, The Contending Discourses on Women in Iran, <http://www.twinside.org.sg/title/iran-cn.htm>.

<sup>69</sup> M. Shekarloo, *Iranian Women Take on the Constitution*, MIDDLE EAST REPORT ONLINE, July 21, 2005, available at <http://www.merip.org/mero/mero072105.html>; Freedom House, Freedom in the world 2006 - Iran Country Report, <http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6982>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The Constitution of the Islamic Republic of Iran, art. 26. art. 27 grants the freedom of assembly.

Iranian civil society faces many restrictions. Although much developed and encouraged during the reformist era, NGOs today are generally regarded by the conservative authorities as agents of the West that are not to be trusted.<sup>73</sup> Four hundred and eighty women's associations registered in Iran in 2005, most of which are divided between various secular and religious camps.<sup>74</sup>

Several general and specific laws govern the work of Iranian NGOs, amounting to a web of complicated and at times contradictory regulations. The complex legal frame is coupled by noncompliance of the authorities with the laws, adding unnecessary confusion to the already cumbersome process of permits, financial grants, and periodic regulations of NGOs.<sup>75</sup> In order to simplify the legal conditions a new law was drafted at 2003 by civil society and government representatives. This law was eventually rejected by the parliament, but some of its provisions were adopted in June 2005 as "Executive Regulations Concerning the Formation and Activities of Non-Governmental Organizations."<sup>76</sup>

### *Legal forms of NGOs*

Iran's Commercial Act defines NGOs as non-commercial organizations, which are divided into profit and non-profit-making organizations.<sup>77</sup> The Law Concerning the Activities of Parties, Associations, Political Associations and Guild Associations, Islamic Associations or the Associations of Recognized Religious Minorities, 1981,<sup>78</sup> further distinguishes between four types of NGOs, being political organizations, trade unions, Islamic associations, and societies of religious minorities.<sup>79</sup>

A "philanthropic" NGO is defined in Article 1 of the Executive Regulations 2005 as an "organization pursuing non-for-profit and non-political objectives and established voluntarily by non-governmental real or legal persons". They are allowed to engage in a wide range of activities, such as voluntary social work, science, culture, and women's activities, as long as they are in accordance with Constitutional values.<sup>80</sup> Political activity, broadly defined as "behaviors and programs that are somehow related to the administration of the state and general policies of the Islamic Republic of Iran," is strictly prohibited.<sup>81</sup> In practice, only charity work remains a safe field of engagement.<sup>82</sup>

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<sup>73</sup> Emails to an Iranian trainer of NGOs (on file with the author).

<sup>74</sup> Mir-Hosseini, *supra* note 67.

<sup>75</sup> N. Katirai, *NGO Regulations in Iran*, THE INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW, September 2005, [http://www.icnl.org/knowledge/ijnl/vol7iss4/special\\_2.htm](http://www.icnl.org/knowledge/ijnl/vol7iss4/special_2.htm).

<sup>76</sup> Executive Regulations Concerning the Formation and Activities of Non-Governmental Organizations, 2005 [hereinafter Executive Regulations 2005].

<sup>77</sup> Executive Regulations Concerning the Formation and Activities of Non-Governmental Organizations, 2005 [hereinafter Executive Regulations 2005].

<sup>78</sup> The Law Concerning the Activities of Parties, Associations, Political Associations and Guild Associations, Islamic Associations or the Associations of Recognized Religious Minorities, 1981 [hereinafter Parties Law].

<sup>79</sup> Parties Law, Articles 1-4.

<sup>80</sup> Executive Regulations 2005, art. 8.

<sup>81</sup> For the definition of political activities, the Executive Regulations 2005 refer to art. 1 of the Parties Law.

<sup>82</sup> Katirai, *supra* note 75.

## *NGOs' Establishment*

Before the enactment of the Executive Regulations 2005, NGOs wishing to register had to obtain a license from either the Ministry of Interior or the governor's office within their province.<sup>83</sup> In reality, the list of authorities that issued permits for NGOs mounted to over ten, among which were different Ministries, universities, and even mosques.<sup>84</sup> According to reports from NGOs, some government agencies, like the Ministry of Interior, used to provide model articles of association which were against the spirit of volunteerism, independence, and self-reliance of NGOs.<sup>85</sup>

The New Regulations simplified the registration process by establishing a three-level body to supervise the registration and work of NGOs: the Township Supervisory Panel, the Provincial Supervisory Panel, and, finally, the State Supervisory Panel, each of which is composed of NGOs and governmental representatives.<sup>86</sup> In order to operate, NGOs must obtain a license from one of these authorities according to their scope of operation -- local NGOs apply to town or state level, whereas NGOs operating nationally or internationally apply to the state panel.<sup>87</sup> However, despite the objective to simplify the registration process, the New Regulations allow other agencies to issue permits if this power is granted to them in other laws.<sup>88</sup> The licensing and supervision of the work of foreign NGOs is carried out by a committee comprised of the representatives of the Ministry of Foreign Affairs, the Ministry of Interior, the Ministry of Information, and a Ministry or governmental body relevant to the area of activity of the NGO.<sup>89</sup>

It takes a minimum of 5 persons, natural or juridical, to establish an NGO, and each of them must be experts in its field of activity.<sup>90</sup> Prior to approval of its request for a license, an NGO must provide the supervisory authorities with a completed application form, a copy of articles of association, founder's identifications, and the minutes of the first meeting of founders.<sup>91</sup> By law the relevant supervisory authority has two weeks to inform the NGO of the outcome of its request, including a reasoned decision in case of a refusal.<sup>92</sup> According to sources familiar with the work of NGOs in Iran, however, receiving a permit depends on the field of activity of the NGO and can take up to three years.<sup>93</sup> Many times the supervising authorities also conduct investigations of the founders of NGOs.

The licensing conditions for NGOs wishing to operate within the same field as a certain governmental body depend on the approval of that governmental agency. The agency has one month to inform the NGO of its opinion, and a failure to do so is regarded as consent.<sup>94</sup> The demand for a multi-agency approval may cause unnecessary delays and inefficiencies in the

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<sup>83</sup> Executive Regulations Concerning the Formation and Activities of NGOs 2003, art. 12.

<sup>84</sup> B. Namazi "Civil society action for good association law: the case of Iran, 2000," *available at* <http://www.worldbank.org/wbi/mdf/mdf3/papers/civil/Namazi.pdf>.

<sup>85</sup> *Id.*

<sup>86</sup> Executive Regulations 2005, art. 1(5)(d) and art. 17.

<sup>87</sup> *Id.* art. 1(5)(d) and art. 10, stating also that an NGO wishing to operate abroad must obtain a permission from the state panel.

<sup>88</sup> *Id.* art. 17.

<sup>89</sup> *Id.* art. 29.

<sup>90</sup> *Id.* art. 18.

<sup>91</sup> *Id.* art. 20-21.

<sup>92</sup> *Id.* art. 22.

<sup>93</sup> Emails to former secretary of the Association for Women Studies in Iran and to an Iranian NGOs' trainer (on file with the author).

<sup>94</sup> Executive Regulations 2005, art. 22(2) and (3).

issuance of permits. Moreover, it gives the government the power to keep NGOs from engaging in certain fields it wishes to keep for itself, since the conditions for its approval are not mentioned. This might result in a monopoly of governmental agencies over certain areas and may diminish the scope of civil society.

The Executive Regulations 2005 grant NGOs the right to appeal the decisions of the supervisory panel within one month according to the three levels of hierarchy: appealing against Township board to the Province panel and then to the State panel. If the state board was the first to deny the permission, the appeal would be filed to the Administrative Court of Justice.<sup>95</sup> This structure limits the number of reviewing authorities compared to the previous system. It also guarantees a balanced and impartial appeal process by including NGOs representatives on the reviewing panels.<sup>96</sup>

In order to establish a network of NGOs or join an international one, NGOs must fulfill a list of conditions, among which are belonging to the network's field of activity, being registered for at least two years, and, finally, that the network includes at least five other Iranian NGOs.<sup>97</sup> This final requirement may prove restrictive for NGOs wishing to join and cooperate with international organizations.

### *Government supervision of NGOs*

Apart from the three-level panels, Article 27(d) states that the Ministry of Interior will also oversee the work of "specialized NGOs," after soliciting the opinion of relevant governmental bodies.<sup>98</sup> The New Regulations do not define "specialized NGO," and it should be regretted that the multiple-agency approach is not adopted again.

NGOs are obliged to provide financial and operational reports to the supervisory authority, as well as publishing a list of their activities for public knowledge.<sup>99</sup> The authorities, in turn, may inspect the offices and records of an NGO only in the presence of NGOs representative. Should they wish to take records out of the NGO's premises, they must provide a judicial order.<sup>100</sup> NGOs may receive foreign funding only after obtaining permission from the relevant authority: First, NGOs must report to the authority in detail about the source of the money, its amount, and the manner of its receipt. Then, the supervisory authority has to receive approvals for the funding from the Ministry of Information, the Foreign Ministry, and the Central Bank of the Islamic Republic of Iran. These bodies are to notify the NGO about the outcomes of the inquiry within a month.<sup>101</sup> No criteria for the approval of the Ministries and Central Bank are mentioned, nor are they obliged to state the reasons for a refusal. Grants from UN agencies, as well as from other official and regional bodies approved by the Ministry of Foreign Affairs, are excused from the provisions of this Article.<sup>102</sup>

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<sup>95</sup> *Id.* art. 22(4)

<sup>96</sup> According to art. 16 of the old Regulations 2003, NGOs could apply to the governor general or to the Ministry of Interior Affairs.

<sup>97</sup> Executive Regulations 2005, art. 19.

<sup>98</sup> *Id.* art. 32(1).

<sup>99</sup> *Id.* art. 5.

<sup>100</sup> *Id.* art. 9.

<sup>101</sup> *Id.* art. 6,(1).

<sup>102</sup> *Id.* art. 6(2).

A violation of the New Regulations may result in suspension of the Organization's operating license for a period of 3 months or cancellation of its license by court order if the NGO fails to cure the breach.<sup>103</sup> Article 31 of the New Regulations refers to the Law of Registration of Non-Commercial Establishments 1958 for further provisions regarding obligatory or voluntary dissolution.

The New Regulations do not deal with the issue of government intervention in the activities of NGOs. In reality, however, the government and security forces closely control the activities of NGOs and prevent them whenever they clash with their policy.<sup>104</sup> Such was the case of women's associations recently trying to demonstrate for women's rights: The summer of 2005 saw several protests by women's associations due to pre-election liberalization. These demonstrations included a sit-down strike of women activists in front of the president's office to protest the prohibition on women to run for president; a march of 100 women activists into a soccer game to break the ban on admitting women to matches; and finally a mass sit-down protest against Constitutional discrimination towards women. Over 2,000 women from more than 90 organizations attended this demonstration, forming the largest independent women's coalition ever since the fall of the monarchy.<sup>105</sup> Although the sit-down was completely peaceful, police eventually stormed in and clashed with the protestors. Another rally organized a year later by women's associations to protest women inequality was stopped by the police and over 70 of its participants were arrested. As described in the press:

All this was carried out by members of the newly created female police force, who grabbed protesters by the hair, squirted pepper spray in their faces, handcuffed them and beat them with batons before dragging them to the police vans. The policewomen proved rougher and more effective than their male counterparts, and protesters did not even get a chance to display their placards . . . .<sup>106</sup>

According to reports from Iranian NGOs, the existing legal institutions are designed to restrain the work of NGOs and place limitations on their ability to interact with their communities and with potential international partners.<sup>107</sup> It is unclear whether NGOs may object to the government's conduct, since the right of appeal in the New Regulations refers only to the licensing process.<sup>108</sup> This situation is even more problematic, given the non-independent nature of the Iranian judiciary system.

### *Government support of NGOs*

In some respects, the Executive Regulations facilitate greater participation of NGOs in society. First, public agencies are obliged to consult NGOs and have regard for their opinions.<sup>109</sup> Second, NGOs may monitor the government's public affairs and governmental organizations must assist and cooperate with NGOs.<sup>110</sup> Additionally, the government has to outsource some of its functions and duties to NGOs according to NGOs recommendations.<sup>111</sup> Article 16 further enhances the role of NGOs by stating that they may file a lawsuit not only regarding their own activities, but also to

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<sup>103</sup> *Id.* art. 28.

<sup>104</sup> Emails to an Iranian trainer of NGOs (on file with the author).

<sup>105</sup> Shekarloo, *supra* note 69.

<sup>106</sup> Mir-Hosseini, *supra* note 67.

<sup>107</sup> Namazi, *supra* note 84.

<sup>108</sup> *See* art. 22(4) of the Executive Regulations 2005.

<sup>109</sup> *Id.* art. 13.

<sup>110</sup> *Id.* art. 15.

<sup>111</sup> *Id.* art. 14.

protect public interest. In reality, NGOs report heavy government pressure that stifles initiative and discourage creativity rather than facilitating it.<sup>112</sup>

The New Regulations are silent regarding subsidies and tax exemptions, but these are granted in the Direct Taxation Act of Iran. It has been reported that registered public interest NGOs enjoy tax-exemption for various financial contributions (such as donations, gifts, membership dues etc.), provided they are used for Islamic purposes such as culture, research, science, invention, exploration, training, and health.<sup>113</sup> According to sources familiar with NGOs activity in Iran, government support depends on their field of activities – those concerned with education or environment will receive governmental funds, whereas those advocating for women’s empowerment or human rights will be denied.<sup>114</sup>

## **BAHRAIN**

The small kingdom of Bahrain is a country in transition. Ever since Sheikh Hamad succeeded his late father in March 1999, Bahrain has experienced a series of legal, political, and social reforms that are slowly transforming it into a “people’s kingdom”.<sup>115</sup>

Although Bahrain is still far from full democracy, the reforms introduced by the King have significantly improved Bahrainis’ civil liberties and lives. The King repealed emergency laws and tribunals that had previously allowed daily violations of human rights. He also released political prisoners and permitted the return of exiled political activists. In 2001 he introduced the National Action Charter, which was overwhelmingly approved by the citizens in a referendum that created a bicameral parliament with one elected and one appointed chamber and a partially independent judiciary. An additional and most important reform was granting women the right to vote and participate in national elections. The amended Constitution prohibits arbitrary arrests and imprisonment without due process and limits state power to violate constitutional civil liberties.<sup>116</sup> It also establishes a government obligation to enhance women’s rights through legislation.<sup>117</sup>

Nevertheless, some major set-backs in the political reforms have prevented Bahrain from further advancing towards the status of a free country.<sup>118</sup> First is the King’s tight control over all government branches, which he exercises through appointments to key positions such as the prime minister, members of the upper house of parliament, and judges. The latter is of particular danger, since it keeps Bahrain judiciary from being independent. In practice, courts are subject to government pressure regarding verdicts, sentencing, and appeals. Second, political parties are illegal in Bahrain, and citizens are only allowed to form political societies. Although a political society is permitted to engage in almost all the functions of a political party (like choosing candidates for election and acting as a parliamentary bloc), its work is limited and sanctioned,

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<sup>112</sup> Namazi, *supra* note 84.

<sup>113</sup> Katiri, *supra* note 75.

<sup>114</sup> Emails to an Iranian NGO trainer (on file with the author).

<sup>115</sup> CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, ARAB POLITICAL SYSTEMS: BASELINE INFORMATION AND REFORMS – BAHRAIN 13 (2005), [http://www.carnegieendowment.org/files/Bahrain\\_APS.doc](http://www.carnegieendowment.org/files/Bahrain_APS.doc).

<sup>116</sup> The Constitution of the Kingdom of Bahrain, art. 31.

<sup>117</sup> *Id.* art 5.

<sup>118</sup> Bahrain was ranked as “partly free” by Freedom House, *see* Bahrain Country Report, *available at* <http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6917>.

especially if it criticizes the government or protests the minority Sunni rule over the Shiite majority.<sup>119</sup> A new Political Association Law that was ratified by the king on August 2005 increased the concern among opposition Shiite groups, for it prohibits the formation of associations on the base of class, profession, or religion and imposes restrictions on foreign funding. It also requires all existing political societies to re-register with the Ministry of Justice.

The government is also criticized for the limitation it imposes on freedom of expression through its control over all broadcast media. In addition, it monitors Internet communications and at times arrests and detains on charges of spreading hatred and presenting false information those who criticize the government or the ruling family.<sup>120</sup> Women's rights advocates are also kept under close watch, as shown by the case of Ghada Jamsheer, head of the Women's Petition Committee, who was charged in June 2006 with publicly criticizing family court judges for their discriminatory behavior towards women.

Bahraini women have witnessed considerable improvement in their status under the rule of Sheikh Hamad. The amended Constitution prohibits discrimination against women as well as providing for their “*equality with men in political, social, cultural, and economic spheres*”.<sup>121</sup> In 2001 the King established the Supreme Council for Women, an umbrella organization created to advise the government and oversee women's rights related work. More women are taking part in the political process and some have been appointed to high positions. In addition, several legislative reforms were introduced, including an amendment to the Passport Law that allows Bahraini wives to obtain a passport without their husbands' permission.

Despite the notable progress, it would be unrealistic to expect an overnight change in women's status in a country that only recently granted women the right to vote. Consequently, widespread political, economic, and social discrimination against women persists. In many respects, Bahrain is still dominated by paternalistic Islamic law, which is well embedded in its legal tradition. Although the amended Constitution undeniably calls for gender equality, it does so subject to Islamic principles.<sup>122</sup>

Islamic law (*Shari'a*) regulates many aspects of the lives of Bahrainis women, like divorce, inheritance, and child custody. The absence of a codified family law allows Bahrain's all-male judiciary to discriminate against women in their interpretation of Islamic law. Islamic leaders, who claim that only religious scholars are qualified to codify family law, constantly block efforts of women's associations to bring about a secular family law. It seems that the public supports these claims, since hundreds of people, including women, participated in a demonstration against a campaign led by the Supreme Council for Women for a secular family law.<sup>123</sup> Although Bahrain ratified the UN Convention on the Elimination of All Forms of Discrimination against Women in 2002, it refrained from ratifying articles concerning family law, equality, freedom of movement, and residence. Consequently, many women's associations have been working towards better education for women regarding their rights under Shari'a and Bahraini law.

Women participation in the political system has been met with fierce opposition from religious leaders and followers. Shiite clerics pressured their flocks to boycott women candidates

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<sup>119</sup> ARAB POLITICAL SYSTEMS: BASELINE INFORMATION AND REFORMS – BAHRAIN, *supra* note 115 at 9.

<sup>120</sup> Bahrain Country Report, *supra* note 118.

<sup>121</sup> The Constitution of the Kingdom of Bahrain, arts. 18 and art. 5(b) accordingly.

<sup>122</sup> *Id.* art. 5(b).

<sup>123</sup> T. Khonji, *Personal law plan rapped*, GULF DAILY NEWS, November 3, 2005, [http://www.gulf-dailynews.com/1yr\\_arc\\_Articles.asp?Article=125901&Sn=BNEW&IssueID=28228&date=11-3-2005](http://www.gulf-dailynews.com/1yr_arc_Articles.asp?Article=125901&Sn=BNEW&IssueID=28228&date=11-3-2005).

for municipal elections on the ground that representatives may be called late at night to help with a municipal problem, which might put an elected female representative in a compromising position.<sup>124</sup> In addition, women were facing strong pressure from their families not to vote for female candidates, and several were even threatened by their husbands with divorce if they disobeyed. According to Dr Al Baharna, the president of Bahrain Women Society, “*Even women fail to support female candidates because they have been brought up to see themselves as second-class citizens, rather than as leaders*”.<sup>125</sup> As a result, a main goal of women’s associations is the institution of quotas for women’s seats in the Parliament.

The criminal system does not offer sufficient protection for women. For example, domestic violence against women is still very common in Bahrain, but these cases are hardly tried, since Islamic courts do not accept the testimony of close relatives or the testimony of one woman. Furthermore, judges often refer to domestic violence as a right guaranteed to fathers, husbands, or brothers by religion and law.<sup>126</sup> Although rape is a punishable offence under the Bahraini Penal Code, the perpetrator is excused if he raped an unmarried woman and marries her afterwards.<sup>127</sup> Marital rape is not punishable under Bahraini law, since the husband’s sexual satisfaction is perceived as the wife’s obligation. The law also provides a reduced sentence for a man who kills or assaults his adulterous wife.<sup>128</sup> This legal atmosphere, coupled by blackmail or threats from the police and judges, as well as family pressure to “keep the dirty laundry at home,” deters many victims from reporting domestic violence.<sup>129</sup> Legal and social counseling centers established by women’s associations have not yet managed to affect women’s willingness to report crimes of this sort.

### **BAHRAIN ASSOCIATION LAW**

Due to the ongoing reforms and the implementation of the amended constitution, Bahrain civil society has been constantly growing during recent years. Three hundred and eighty-six NGOs registered in Bahrain in 2005, many of which advocate for human rights in general and women’s rights in particular.<sup>130</sup> Women’s associations engage not only in legislative reforms, but also in establishing trade unions that protect the rights of female workers, provide job training, and even establish micro-credit programs.<sup>131</sup>

The law regulating the registration and operation of NGOs is Decree-Law 21 of 1989 on Issuance of Law of Social and Cultural Associations and Clubs as well as Private Organizations Working in the Domain of Youth and Sports and Private Institutions (hereafter, “Decree 21/1989”). Unfortunately, it was not possible to find a complete version of this Law (the only one found is incomplete and contains only the first four articles, dealing with legal forms of NGOs). Nevertheless, it is possible to draw a picture of the Bahraini association law and its effect on women’s associations through various reports, as well as emails from the Bahrain

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<sup>124</sup> A. Al-Khaled, *Clerics Biggest Obstacle to Women’s Rights in Bahrain*, KUWAIT TIMES, April 1, 2006, <http://www.kuwaittimes.net/localnews.asp?dismode=article&artid=40889043>.

<sup>125</sup> S. Horton, *Lifting the Veil on Women in Politics*, GULF DAILY NEWS, August 6 2005, [http://www.gulf-daily-news.com/1yr\\_arc\\_Articles.asp?Article=118737&Sn=BNEW&IssueID=28139&date=8/6/2005](http://www.gulf-daily-news.com/1yr_arc_Articles.asp?Article=118737&Sn=BNEW&IssueID=28139&date=8/6/2005).

<sup>126</sup> Freedom House, *Women’s Rights in the Middle East and North Africa: Citizenship and Justice: Country Reports – Bahrain*, <http://www.freedomhouse.org/template.cfm?page=171>.

<sup>127</sup> Bahrain Penal Code (1976), art. 353.

<sup>128</sup> *Id.* art. 334.

<sup>129</sup> Freedom House, *supra* note 125.

<sup>130</sup> ARAB POLITICAL SYSTEMS: BASELINE INFORMATION AND REFORMS – BAHRAIN, *supra* note 115, at 16.

<sup>131</sup> Awal Women’s Society and the Child and Mother Welfare Society grant small loans to low-income women to start their own businesses.

Human Rights Society (BHRS), the main human rights group in Bahrain and a major advocate for women's equality.<sup>132</sup>

Decree 21/1989 is characterized by little tolerance towards civil liberties. Despite the recent reforms, the law has not been changed to meet the more liberal values of the amended Constitution. Consequently, it provides the government with extensive power to interfere in NGOs activities.

### *Legal forms of NGOs*

Article 2 of Decree 21/1989 recognizes three types of nonprofit Cultural or Social Associations or Clubs are defined as “Every group with a constant organization and formed of some natural or legal persons . . . with the aim of practicing a social, special educational, cultural, or charitable activity.” Private Organizations Working in Domain of Youth and Sports are defined as “Every group with a constant organization and formed by some natural or legal persons for the purpose of taking care for youth by providing the national sports services and the related social, spiritual, health and recreational services . . . .” The third kind of organization are Private Institutions, defined as “Funds appropriated for a non-specific period for a humanitarian, charitable, scientific or artistic activity or any other act of charity, social care or public service . . . whether this activity is carried out inside or outside Bahrain”.

The competent administrative authority for all types of NGOs is generally the Ministry of Labor and Social Affairs (MLSA).<sup>133</sup> Youth and sports clubs do not fall under the supervision of MLSA, but are supervised by the General Authority for Youth and Sports. Further, the Ministry of Information supervises national, cultural, and artistic associations that operate in the field of information.<sup>134</sup>

Recent anti-terrorism legislation brought into force in August 2006 was highly condemned by NGOs and human right activists, because it uses broad definitions for terrorist activities while refraining from defining a terrorist organization. This law establishes that any “*political organization opposed to the Bahraini Constitution*” is a terrorist body. This vague term may lead to the criminalization of NGOs.

### *NGOs' Establishment*

Decree 21/1989 requires the registration of all NGOs with MLSA before they start to operate. The law does not provide a time-table for the Ministry's response, but NGOs may appeal to the competent court in case it fails to reply. MLSA has the power to reject the registration of any NGO if it concludes that its services are unnecessary or contrary to state security, as well as for other reasons. For example, the registration of the Bahrain Women's Union (BWU), a federation of women's associations advocating for women's rights, was rejected because the Ministry insisted they change their name to Bahrain Women's Society. BWU objected to the demand because it feared the imposed name would diminish its federal aspirations and prevent it from

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<sup>132</sup> Sources about Decree 21/1989 include ARAB POLITICAL SYSTEMS: BASELINE INFORMATION AND REFORMS – BAHRAIN, *supra* note 115; Freedom House - Bahrain, *supra* note 126; and UN Development Program on Governance in the Arab Region – Bahrain, <http://www.undp-pogar.org/countries/civil.asp?cid=2#sub1>.

<sup>133</sup> Decree 21/1989, art. 2(4)(a).

<sup>134</sup> *Id.* art. 2(4)(c).

engaging in politics as a unionized block. Although a preliminary court has entitled the union to go public, the Ministry can appeal that decision.<sup>135</sup>

### *Government supervision of NGOs*

NGOs in Bahrain may not engage in any political activity. Their public meetings, including national or international conferences, have to be approved by MSLA in advance, especially if they address issues relating to women's rights.

The law also prohibits NGOs from receiving foreign funds and allows MSLA to freely access an NGO's files, dismiss its board of directors, and install directors of the government's choice. MSLA can also dissolve any NGO it chooses. In 2004 the Ministry dissolved The Bahrain Center for Human Rights (BCHR) and imprisoned its executive director, who had criticized the prime minister and the government for their performance on poverty and economic rights. BCHR's appeal from the Ministry's decision has been rejected.

### *Government support of NGOs*

Although the Bahraini government claims it provides financial support for several women's associations, like some family planning societies, in practice women's associations receive little funding from the government, and women's advocacy is viewed as anti-Islamic at times. Consequently, women's associations fail to reach and influence many women and their ability to create a change in legislation is lower.

### *Summary*

The recent social and political reforms in Bahrain had a significant effect over the lives of women. In many respects, Bahraini women enjoy civil liberties that were previously forbidden and are now generally free to advocate for their empowerment. Nevertheless, neither the government nor society provides women's associations with the support they require. Despite several governmental initiatives to enhance women's rights, women are still inferior to men in many areas and viable legislative reform is highly needed, especially in matters of personal status and access to justice. In this respect, a liberalized association law which would facilitate their activities and establish governmental support could notably contribute to the work of women's associations and hence to women's advancement. The legislative reforms would be more effective if accompanied by a change in the Islamic costumes that dominate women's lives and hinder their progress. It is to be hoped that Bahrain will further cease its momentum of transition and create the social change needed to achieve better gender equality.

## **IRAQ**<sup>136</sup>

Iraq's long journey towards democracy started with the invasion of a U.S led coalition in March 2003 and the elimination of the dictatorial Saddam Hussein's regime. Ever since, the country marked some significant achievements, like the first free elections for the Council of Representatives, Iraq's legislative body, in January 2005 and the referendum for the new

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<sup>135</sup> Al-Khaled, *supra* note 124.

<sup>136</sup> This study does not include northern Iraq, where Kurdish militia forces (Peshmerga) maintain security and the status of women is different.

Constitution in October 2005. A constitutionally based federal government has been established and political parties operate freely.

These triumphs however, did not come without a cost – the security vacuum that followed the collapse of Hussein’s regime quickly deteriorated to an all-embracing conflict. Former officials and militants of Saddam’s Sunni rule fight coalition forces and Shiite security forces. Daily attacks include destruction of infrastructure targets; suicide bombs against Shiite civilians and Iraqis viewed as collaborating with coalition forces; executions of humanitarian aid workers and foreigners; and assassinations of prominent Iraqi public figures who support the government.<sup>137</sup> Security forces torture and arbitrarily execute the Sunni insurgents.<sup>138</sup>

Caught amidst the fighting are the Iraqi civilians, thousands of whom have already been killed and many more have been wounded. Unemployment is high, soaring up to 27%, and public services like electricity and water are irregular or scarce.<sup>139</sup> Upwards of two million Iraqis have fled the country and another two million are internally displaced. Oil production, once a main economic resource, is far below its former level due to pipelines’ sabotage. Unfortunately, the unstable environment hinders reconstruction efforts.

Due to the ongoing insurgencies and violence, the Iraqi Prime Minister declared a state of emergency in 2004, allowing for temporary restrictions of certain constitutional civil liberties. There are frequent reports of torture, arbitrary arrests and killings, limitations on freedoms of speech, press, assembly, and association, and high levels of corruption.<sup>140</sup> Although the emergency law provides for judicial review of all decisions and procedures, in practice, the judicial system is immature and lacks capacity.

Women’s rights seem generally to be respected by the government, but in this state of extreme violence, it is very difficult to evaluate the status of women’s rights or the operation of women’s associations. Moreover, Iraqi legislation, including personal status codes and association law, is an ongoing process the direction of which depends on the ruling forces in Iraq. Consequently, any evaluation of women’s status and associations is limited and tentative.

Until the mid-1980s, Iraqi women enjoyed many liberties and gained significant progress in the political, economic, and educational spheres. The Constitution of the secular Ba’ath regime guaranteed equal rights for men and women. State laws were generally nondiscriminatory and secular courts made no differentiation between the genders. The Iraq-Iran war, the first Gulf war, and the economic sanctions imposed by the UN on Iraq in the early 1990s severely affected women’s status. Saddam turned to conservative Islamists for support for his weakening regime and changed a number of progressive laws they opposed. Many of these amended laws are valid today, like the reduced sentence for honor killing of a woman to only six months. Another major setback in women’s rights occurred in December 2003, when the interim government cancelled Iraq’s secular Personal Status Law (1959) and replaced it with a conservative Islamic law that

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<sup>137</sup> Freedom House, Women's Rights in the Middle East and North Africa: Citizenship and Justice: Country Reports – Iraq, <http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6983>.

<sup>138</sup> Country Reports on Human Rights Practices - Iraq, U.S Department of State, Bureau of Democracy, Human Rights, and Labor, March 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61689.htm>.

<sup>139</sup> Iraq State Profile, U.S Department of State, Bureau of Near Eastern Affairs, September 2006, available at: <http://www.state.gov/r/pa/ei/bgn/6804.htm>. According to UN publications 34,000 Iraqis were killed in 2006.

<sup>140</sup> U.S. Dep’t. of State Country reports – Iraq, *supra* note 138.

gives the all-male conservative clerics total power over matters of marriage, divorce, inheritance, and child custody. Many women's associations fear that if conservative Islamists continue to gain power, future legislation would be less tolerant towards women's rights.

Due to the ongoing conflict and years of isolation from the outside world, Iraq's awareness for women's right is relatively low. Women tend not to report cases of assault, like domestic violence or rape, in fear of being stigmatized or harmed by male family members. Cases of domestic assault and honor killings are handled inside the family or community. Even so, the fall of Saddam's regime allowed women to break some of the old norms, and today they are free to organize and advocate for their rights. The government has been more attentive to women's needs and introduced several reforms, like the 25% electoral quota reserved for women on the Council of Representatives and the inclusion of six female ministers in the cabinet.

Women's associations are forming quickly in Iraq. More than 600 NGOs were formed in 2006, and many activists from all religious and socioeconomic levels were participating in their activities.<sup>141</sup> These NGOs advocate for women's full representation in the political process and work to keep the issue of women's rights on the public's agenda. However, these NGOs are incapable of overcoming women's greatest problem in Iraq today – the total state of chaos and breakdown of public order. Increased incidents of abduction, sexual assault, and terrorist attacks have made the lives of Iraqi women intolerable. Islamist extremists have terrorized women with their efforts to enforce strict religious rules. Women who refuse to wear the traditional veil (hijab) have been assaulted with acid or killed, and those working for foreign organizations or coalition forces have been harassed, threatened, and in some cases killed as well.<sup>142</sup> According to Freedom House, 32 women were murdered by Islamic extremists from March 2003 to January 2005 in Baghdad and Mosul alone, and 2-3 women were murdered in Basra each week in 2005.<sup>143</sup> As a result, women's freedom of movement is limited, since many are afraid to leave their homes without the protection of a male relative.

### **IRAQ ASSOCIATION LAW**

The long authoritarian rule of Saddam Hussein restricted the work of NGOs and left Iraqi civil society weak and inexperienced. Although their efforts to relieve the current humanitarian crisis are of great importance, NGOs' development is slow, since resources are scarce and the state of security causes many difficulties. The general distrust and differences of opinion between NGOs and the post-Saddam government has led to additional legislative restrictions and to a more burdensome registration process.

The Coalition Provisional Authority Order Number 45, (hereafter, "Order 45"), replaced the previous association laws of the Ba'ath regime. Drafted in 2003 by the interim government, it poses many constraints on NGOs and diminishes their much needed effect.

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<sup>141</sup> U.S Agency for International Development, Overview on Civil Society and Media Development in Iraq, <http://www.usaid.gov/iraq/accomplishments/civsoc.html>.

<sup>142</sup> Freedom House Country reports – Iraq, *supra* note 137; U.S Dep't. of State, Country reports – Iraq, *supra* note 138; and UN Development Program, *Women in Iraq*, Iraq Living Conditions Survey 2004, <http://www.iq.undp.org/ILCS/overview.htm>.

<sup>143</sup> Freedom House, Freedom in the World 2006 - Iraq Country Report, <http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6983>.

## *Legal forms of NGOs*

Order 45 defined an NGO as any organization or foundation that is organized to undertake certain activities, such as human rights advocacy, community rehabilitation, charitable work, etc.<sup>144</sup> The Order distinguishes between Domestic NGOs, whose registered office and headquarters are inside Iraq, and Foreign NGOs, which were established outside Iraq.<sup>145</sup> The Law requires that all NGOs must be non-profit making, non-discriminatory, and non-political. It is unclear whether NGOs are only prohibited from financing political activities and candidates, as is stated in Section 7(4), or whether they also not allowed to engage in any political activities.

International organizations like the UN and the World Bank are not regarded as NGOs. They are supervised by the Ministry of Foreign Affairs, and they are not required to follow the same process of registration that applies to NGOs.<sup>146</sup>

## *NGOs' Establishment*

All NGOs wishing to operate in Iraq, whether new or already active, must register at the NGO Assistance Office within the Ministry of Planning and Development Cooperation, (now called the State Ministry of Civil Society). The application for a license includes a long list of documents that an NGO has to provide to the NGO Office: detailed information about its members and management; a complete statement of revenue, expenses, assets, and liabilities for the current and previous three years; list of any substantial contributions to the NGO in the current and previous three years, etc.<sup>147</sup> According to the Iraqi Women Network (IWN), technical conditions are often used by the NGO Office to impede the work of NGOs. For example, when an organization applies for a license, it is asked to provide a copy of its lease contract with the Municipal Council -- a demand that may gravely endanger the lives of staff members, since a publication of their location would expose them to terrorist attacks and investigations by state spies. A refusal to comply with this request has led to long delays in registration until all documents were submitted to the satisfaction of the NGO Office.<sup>148</sup>

After receiving all the necessary documents, the NGO Office has 45 business days to issue a written decision. If it requires further information from the NGO, the 45 days count will start anew from the date the information is received. Order 45 does not provide for an automatic licensing if the certifying authority fails to follow the deadline, nor does it provide any process for appealing from the conduct of the authority. The NGO Office will deny registration if the application does not comply with the requirements of Order 45, or if the "*NGO's constitution, conduct or activities would violate Iraqi law or constitute a threat to public order, safety, stability or security in Iraq*".<sup>149</sup> Broadly drafted, this provision is open for manipulation by the authorities. After registration is approved, the NGO must submit a list of all foreign staff members, including their qualifications and responsibilities, and update it quarterly.<sup>150</sup>

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<sup>144</sup> CPA Order 45, §1(1).

<sup>145</sup> *Id.* §1(2).

<sup>146</sup> *Id.* §2(2).

<sup>147</sup> *Id.* § 2.

<sup>148</sup> Email to the IWN (on file with the author).

<sup>149</sup> CPA Order 45, §3(2).

<sup>150</sup> *Id.* §9(5).

### *Government supervision of NGOs*

NGOs are free to merge and dissolve without governmental permission.<sup>151</sup> Those wishing to collaborate with international organizations are required to inform the Ministry of Foreign Affairs, whereas those wishing to collaborate with local NGOs are required to inform the NGO Office of their proposed program and budget.<sup>152</sup> NGOs may own or manage property for the accomplishment of their purposes, but only Domestic NGOs are allowed to purchase or own real-estates.<sup>153</sup> Order 45 is silent regarding foreign donations, except for the requirement to report any substantial donation.<sup>154</sup>

Apart from an annual financial and operational report, no other internal governance mechanisms are imposed on NGOs. The government may inspect an NGO's premises at any time and request it to provide any documentation it finds necessary.<sup>155</sup> If the NGO does not respond within the deadline, the NGO Office may "*draw such conclusions as it deems appropriate*".<sup>156</sup> Due to unannounced visits by state representatives who demanded photos and details of all staff members and their families, several foreign NGOs had to relocate their staff or temporarily close their regional offices.

An NGO's license may be suspended for a defined period or cancelled altogether if the NGO Office finds that the organization's activities were grossly negligent, fraudulent, criminal, or a threat to public order, safety, stability, or security.<sup>157</sup> According to the IWN, many organizations have been accused of terrorism and shut down without real proof of terrorist activity.

A breach of any provision of the law can result in suspension or cancellation of the NGO's license without a prior warning.<sup>158</sup> NGOs may remedy the violation in sixty days and apply for re-registration, but the lack of any judicial supervision prevents them from objecting to the government's discretion. If the NGO continues to operate despite its suspension or dissolution, the government may confiscate all its property and close its premises.<sup>159</sup>

### *Government support of NGOs*

The law is silent regarding tax exemptions or subsidies for NGOs. According to IWN, the government does not support NGOs and regards them with suspicion and distrust. Nevertheless, some efforts to bridge the gaps between NGOs and the government have been made, like consulting NGOs in the drafting process of the Constitution and scheduling regular meetings between NGOs members and Ministers.

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<sup>151</sup> *Id.* §§ 9(3) and 4.

<sup>152</sup> *Id.* § 8.

<sup>153</sup> *Id.* § 7(1) and (2).

<sup>154</sup> *Id.* § 2(4)(xi).

<sup>155</sup> *Id.* § 5(1).

<sup>156</sup> *Id.* §5(2).

<sup>157</sup> *Id.* §§5(3) and (4).

<sup>158</sup> *Id.* §3(6).

<sup>159</sup> *Id.* §6.

## YEMEN

The Republic of Yemen was established on May 22, 1990 with the unification of its southern and northern parts. It underwent several political reforms in order to create a democratic system, including the introduction of a more liberal constitution, the establishment of a bicameral legislature and the organization of regular elections.

In practice, one party rules Yemen's political system (the GPC), the parliament and the judiciary are weak, corruption is widespread and the government may exercise its powers freely. Consequently, Yemen has remained one of the most repressive countries in the Middle East, with serious human rights abuses such as beatings, arbitrary arrests, detentions without charge, and constant monitoring of citizens' activities. Freedom of speech is especially limited, and journalists are often jailed for criticizing the president or other officials. Yemen is also one of the world's least developed countries – its population, mostly agrarian tribes scattered in rural areas, is extremely poor, basic services are not available, and infrastructure is inadequate.<sup>160</sup>

Even though women enjoy the same rights and obligations as men under the constitution, state legislation is discriminatory and reflects the strong Islamic and patriarchal traditions of the country. An increasingly powerful extremist religious movement, which promotes the strictest form of Islam, further impedes any attempt to enhance pro-women legislation. The Personal Status Law, which governs various aspects of women's lives such as marriage, divorce, and child custody, was amended in 1992 in a conservative manner. Among other things, the law obligates wives to obey their husbands and denies them the custody of their children if they remarry after they initiated divorce. It also prevents a woman from marrying a non-Yemeni without the approval of the Minister of Interior and sets limitations over women's freedom of movement by requiring their guardian's permission in order to issue a passport. Government officials, who implement the law as they chose, set further restrictions over women.<sup>161</sup>

Yemeni legislation denies women their status as fully recognized persons in more than one way. For example, the 1992 Evidence Law considers the testimony of a woman as equals to half the weight of the testimony of a man and requires the support of a male witness in order receive her statement. Yemen's 1994 Crime and Penalty Law regards the life of a woman as equal to half the life of a man, so a female victim or her family will receive only half the financial compensation for her injury or death. Honor killings of women are generally tolerated with a minimal punishment, whereas a woman could be detained and imprisoned without investigation or legal procedures for merely meeting a man who is not a close relative. The law offers no legal protection for women against domestic violence, and if a woman wishes to report her husband she must show a physical trace of the violence on her body.

State agents usually implement Yemeni laws and procedures in the worst way while the government turns a blind eye. For example, prison officials often impregnate women detainees or marry them off to men who bribe them. They also refuse to release women who completed their sentences unless they are claimed by a male family member. The high rate of illiteracy among women, as well as the lack of awareness to their rights, prevents them from acting to change their status. Those who try encounter a corrupt and overloaded judiciary, which only impedes their access to justice. As a result, women are bound to turn to informal mechanisms within their

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<sup>160</sup> Freedom House, Freedom in the World 2006 - Yemen Country Report, <http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=7090>.

<sup>161</sup> Freedom House, Women's Rights in the Middle East and North Africa: Citizenship and Justice: Country Reports- Yemen, <http://www.freedomhouse.org/template.cfm?page=186>.

family or community, which usually maintain the tribal culture and patriarchal norms. Although some of these norms contradict state legislation (like female genital mutilation and the marriage of girls before the age of nine), they are still practiced all over the country.

Six thousand NGOs are registered under the Yemeni law, but many of them are inactive or hide a for-profit activity.<sup>162</sup> Active NGOs engage in various fields of civil society, such as human rights, women and youth empowerment, research, development etc. Women's associations suffer from the strong Islamic feelings within the population and are often referred to as heretical. Independent women's rights groups are small and lack the resources and technical skills to reach a national-level effect.<sup>163</sup> Nevertheless, some achievements have been realized, like the appointment of female judges, increasing the awareness for women issues and even the cancellation of a parliamentary decision authorizing the use of force against married women who leave their home.<sup>164</sup>

### **YEMEN ASSOCIATION LAW**

The progressive Law No.1 of 2001 on Associations and Foundations (hereafter, "Law 01/2001") is the result of governmental and NGOs cooperation to create a suitable sphere for the successful operation of NGOs. Being one of the most progressive association laws in the Middle East, its objectives are, among others, to guide and encourage NGOs, increase their positive effect in society, guarantee full freedom of operation, and simplify the procedures of registration and supervision.<sup>165</sup>

#### *Legal forms of NGOs*

Law 01/2001 distinguishes between two types of NGOs: Associations – a non-financial organization aiming to realize a "*common benefit for a specific social group, or to undertake activities/functions that are of public benefit*"; and Foundations – an institution its objectives are to "*benefit the public, without aiming to generate a financial profit, and with its membership confined to its founders only*".<sup>166</sup> To form an association at least 21 persons are required at the time of application, and 41 persons at the constituent meeting. A foundation, on the other hand, can be formed by one or more natural or legal persons. Foreign NGOs are also allowed to operate in Yemen, provided they register according to the Law and that their purposes do not violate Islamic values, the Yemeni Constitution, or any other law in effect.<sup>167</sup>

No NGO is permitted to "*take part in any election campaign or allocate any of its funds for such purposes directly or indirectly*".<sup>168</sup> Beyond this, political activity is not prohibited, meaning that NGOs may address political issues.

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<sup>162</sup> UN Development Program, Civil society country profiles – Yemen, <http://www.pogar.org/countries/civil.asp?cid=22>.

<sup>163</sup> Freedom House, *Women's Rights in the Middle East and North Africa: Citizenship and Justice: Country Reports- Yemen*, available at: <http://www.freedomhouse.org/template.cfm?page=186>.

<sup>164</sup> *Id.*

<sup>165</sup> Law No. 1 of 2001 on Associations and Foundations [hereinafter Law 01/2001], art. 3.

<sup>166</sup> *Id.* art. 2. Further instructions regarding foundations are set forth in Chapter V.

<sup>167</sup> *Id.* art. 79. *See also* art. 80, which allows the citizens of foreign and friendly countries to set up NGOs through which they may engage in cultural, sports and social functions, provided they meet the abovementioned conditions of registration and Islamic values.

<sup>168</sup> *Id.* art. 19.

Law 01/2001 also recognizes three types of NGOs' federations: Governorate Federation – an association of NGOs regardless of their type within the same governorate; Federation of a Specific Type - an association of NGOs of the same type, which seeks to achieve common specific objectives, in a specific area or throughout the Republic; and General Federation – an association of the Governorate Federations and Federations of Specific Types.<sup>169</sup>

### *NGOs' Establishment*

The Ministry supervising NGOs is the Ministry of Pensions and Social Affairs (MPSA).<sup>170</sup> In order to register, an NGO has to provide MPSA with a written application, including a copy of the articles of association and its organizational regulations.<sup>171</sup> If the application is not processed within one month, it is deemed accepted and the NGO is registered.<sup>172</sup> A reasoned rejection of an application must be published in the bulletin board of the Ministry within 10 days of the date of the decision. An NGO may appeal a MPSA's decision within 60 days from the date it was notified of it.<sup>173</sup> According to the Women's Forum for Research and Training (WFRT), a Yemeni women's right organization, the provisions of the Law are respected by the authorities and the registration process took them less than a week.<sup>174</sup>

### *Government supervision of NGOs*

WFRT reports that it enjoys a considerable amount of freedom as long as their activities correspond with law. It experienced no intervention in its activities, apart from occasional monitoring of its presentations abroad by undercover governmental officials followed by some questioning when the presenters are back in Yemen. An analysis of the provisions relating to NGOs' supervision reveals that MPSA's role is not only to oversee NGOs, but more importantly, to assist them to achieve their goals and operate successfully. Consequently, Article 20 states that MPSA is responsible for supervising NGOs' elections and assuring that proceedings are performed in a democratic manner, as well as providing advice and technical assistance upon an NGOs' request.

Subject to MPSA's knowledge, NGOs may receive foreign funds and send donations abroad for humanitarian purposes. NGOs may also undertake any activity based on a request or assignment from a foreign entity, providing MPSA has approved of it.<sup>175</sup> Books, publications, and magazines may be received only if they are not in conflict with Islamic values or laws in effect.<sup>176</sup>

Despite the powers given to MPSA by Law 01/2001, it generally does not intervene in NGO elections or the work of the general assembly and board of directors. MPSA does require that

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<sup>169</sup> *Id.* art. 2. Further instructions regarding federations are set forth in Chapter VI.

<sup>170</sup> *Id.* arts. 2 and 6. Art. 7 further provides that the Ministry of Culture and Tourism and the Ministry of Youth and Culture are responsible for *technical* supervisions over the activities NGOs that deal with these issues.

<sup>171</sup> *Id.* art. 8.

<sup>172</sup> *Id.* art. 9.

<sup>173</sup> *Id.* arts. 10 and 11.

<sup>174</sup> Email to WFRT (on file with the author).

<sup>175</sup> Law 01/2001, art. 23(a), (b).

<sup>176</sup> *Id.* art. 23(c).

each NGO maintain good governance standards.<sup>177</sup> The election of a control committee is mandatory, but its duties and responsibilities are to be determined by the NGO itself.<sup>178</sup>

Law 01/2001 allows NGOs to sustain financial resources with economic and trading activities consistent with the provisions of the Law.<sup>179</sup> These activities include service and productive enterprises, festivals, flea markets, exhibitions, or sports tournaments.<sup>180</sup> All financial resources and transactions are to be monitored in accordance with acceptable accounting standards and any profits must be kept in an account with a recognized bank in Yemen.<sup>181</sup>

The Law limits government's power to dissolve an NGO. Consequently, only a serious breach of the Law or other laws in effect may result in a suit for the dissolution by MPSA, providing the NGO received three notices from the Ministry within six months to remedy the violation but failed to comply. MPSA's decisions are reviewed by a competent court, which has to issue a final ruling for the dissolution to become effective.<sup>182</sup> The Law also provides conditions for the voluntary dissolution, merger, or division of NGOs under the supervision of the Ministry.<sup>183</sup>

Law 01/2001 penalizes *any* violation of its articles with an imprisonment of maximum three months or a fine of maximum 30,000 Yemeni Rials.<sup>184</sup> An NGO may appeal to the competent court "*against any measure taken against it by the Ministry or any other government organ.*"<sup>185</sup>

### *Government support of NGOs*

One of the purposes of Law 01/2001 is to facilitate the work of NGOs, encourage their operation, and increase their positive effect in society. Therefore, Yemeni NGOs enjoy a generous tax exemption, including exemption for all the profits and incomes they realize; exemption from customs duties and fees for foreign funds, imported goods, and other materials that are necessary to achieve their objectives; and a 50% reduction on water and electricity tariffs.<sup>186</sup> Article 18 grants an annual stipend for NGOs that have been active for at least one year with the purpose of serving public benefit and presented MPSA with a copy of their annual financial account.

Another mechanism that aims to increase the role of NGOs in society is stated in Article 21, which enables MPSA to assign NGOs the management of various centers and institutions that are related to it. NGOs that will receive this responsibility will enjoy financial and material support from the Ministry.

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<sup>177</sup> *Id.* ch. III, §§1 and 2.

<sup>178</sup> *Id.* ch. III, §3.

<sup>179</sup> *Id.* art. 39. See also Theodore Nkwenti, *Yemen enacts new law governing associations and foundations*, THE INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW, 2001, [http://www.icnl.org/JOURNAL/vol3iss3/cr\\_nafrica.htm#\\_ftn1](http://www.icnl.org/JOURNAL/vol3iss3/cr_nafrica.htm#_ftn1)

<sup>180</sup> Law 01/2001, art. 42.

<sup>181</sup> *Id.* art. 43 and art. 78.

<sup>182</sup> *Id.* art. 44.

<sup>183</sup> *Id.* art. 45-48.

<sup>184</sup> *Id.* art. 70.

<sup>185</sup> *Id.* art. 71.

<sup>186</sup> *Id.* art. 40.

## CONCLUSION

This article examined the status of women and women's associations in six different Muslim countries. It looked at association laws and analyzed their effect on how women's associations operate. As illustrated, each country reached its own equilibrium with regard to the role of women in society, as well as the balance between Islamic religious values and civil rights.

As far as association laws are concerned, there is great diversity in the laws of the various countries. Different statutory arrangements create legal realities in which civil society plays different roles and fulfills different functions. Among the countries examined in this paper, the association laws of Egypt, Iran, Iraq, and Bahrain are more restrictive than those of Lebanon and Yemen. It is complex to rank the most restrictive association law, as each imposes different limitations on NGOs. For example, the Iraqi association law does not allow an appeal with respect to the registration process. Egyptian law permits such appeals, but at the same time forces NGOs to obtain a written and explicit permission from the supervising authority before they can use their foreign funds. As for the Lebanese and Yemeni laws, it seems that despite Yemen's progressive and well-drafted association law, it is Lebanon's ancient Ottoman regulations that grant the highest degree of autonomy to associations.

The analysis of women's rights reflects various approaches towards women and their struggle for emancipation in Muslim countries. In this respect, Yemen and Iran are the least tolerant towards women, whereas Egypt, and especially Lebanon, show more openness to feminist ideas, even though patriarchal traditions still exist in both countries. Ongoing democratic reforms taking place in Bahrain might lead to an improvement in women's rights. On the other hand, the violence in Iraq has had a devastating effect on women, who are in no position to improve the status of their civil liberties.

The condition of women in each country affects the work and operations of women's associations. Islamic values still shape to a large extent the public view on the role of women and their right to equality. Consequently, the legitimacy of women's associations varies considerably according to the social climate in each country. However, it is important to stress that sometimes association laws do not reflect the national attitude towards women and the role of women's associations. For example, although Egypt is only semi-tolerant towards women and has a harsh association law, its civil society is flourishing and women's associations have achieved substantial success in enhancing women's rights. The situation in Yemen, on the other hand, illustrates that liberal association laws do not always go hand in hand with tolerance towards women.

Despite the accomplishments of women's associations in each country, there is plenty of room for improvement. Obviously, liberalization of association laws will facilitate the work of women's associations and enable them to operate better. However, legislative reforms alone do not suffice in transforming women's status, unless followed by a shift in social norms and changes in customs.

There is ample room for future research that explores the underlying reasons for the diversity among attitudes towards women associations across the Muslim world. For instance the interdependence between association laws and national histories could be explored. It is well known that laws are often affected by historic events, and legal systems tend to borrow from one

another.<sup>187</sup> To this end, the French mandate in Lebanon might explain the liberal Lebanese approach towards women. It is questionable, though, whether the current involvement of the US in Iraq will similarly affect Iraqi women associations in years to come.

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<sup>187</sup> For further discussion of "legal borrowing", see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

# ANALYSIS OF THE STATUS OF A CHARITABLE ORGANIZATION AND ITS TAX IMPLICATIONS UNDER LEGISLATION OF THE REPUBLIC OF GEORGIA<sup>\*</sup>

BY BABUTSA PATARAIA<sup>\*\*</sup>

## EXECUTIVE SUMMARY

The paper researches the legislative regulation of charitable organizations in the Republic of Georgia. The principal thesis of the research is to prove that legislative shortcomings have caused the charitable sector in Georgia to be underdeveloped.

An analysis of the statistical data precedes the discussion of the legal and fiscal framework. That analysis leads the conclusion that many other factors, which in theory could influence the underdevelopment of charitable sector in Georgia, are absent. Hence, the focus is shifted to scrutiny of the provisions of relevant laws of Georgia, namely those governing the rights and obligations of charitable organizations, to discern their impact on the underdevelopment of the sector.

As a criterion for analyzing the legal provisions, the best established practices as reflected in various scholarly works and model laws, are used. The relevant conclusions are made also by taking into consideration the existing situation in Georgia.

Analysis of the provisions governing the rights and obligations of charitable organizations and considering the factual background in the charitable sector throughout the past years shows that the poorly drafted laws in the early nineties caused negative practices and abuse of powers in the sector to develop. Consequently, the most recent reforms in the legal sphere brought strict mechanisms of control over charitable organizations and minimized the offered incentives. It is argued that the outcome of all this has been the misbalanced regulatory framework: harsh control and accountability on one hand and low incentives on the other hand. Thus, there are clear reasons for a diminished stimulus for civil society organizations to apply for the status of charitable organization.

In the end the paper suggests that it is necessary to keep the existing strict accountability and control mechanisms intact at the given moment as they can be seen as increasing the public trust in the charities. In addition, it is suggested that the current system of control is designed well enough to handle an increase in tax incentives, which could be made available for charitable organizations.

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<sup>\*</sup> This paper was initially prepared as a thesis for the degree of LL.M. in Human Rights Law at Central European University.

<sup>\*\*</sup> Babutsa Pataraiia received her LL.M. from CEU in 2006. Her undergraduate degree in law was earned at the University of Tbilisi, Georgia, and she currently practices law in Tbilisi.

## INTRODUCTION

After its separation from Soviet Union in 1991, the Republic of Georgia engaged into its own state-building. It began gradually to build its own legislation and a general legal framework: in 1995 Georgia adopted its Constitution, followed by a series of fundamental and special laws. Despite the fact that by now Georgia has a more or less comprehensive legislative system, there are still areas in laws dealing with the public that are poorly governed or left without regulation at all. In addition, some of the existing normative acts also contain legal defects. One of the poorly governed areas is the previously non-existent not-for-profit sector, which clearly cannot be developed merely by regulating the organizational-legal forms for the entities acting in this sector.<sup>1</sup>

It is notable that the development of the not-for-profit sector is very beneficial to the society, as the entities, especially public benefit organizations (charitable organizations)<sup>2</sup> acting in this sector provide the type of goods and services that neither the private sector nor the government sector is willing or able to offer in sufficient amounts.<sup>3</sup> There is also a recognized assumption that the public and charitable sectors are “mutually dependent in promoting the common good and confronting social problems”.<sup>4</sup> Therefore, it is imperative that state policy support the institutions of the not-for-profit sector.

In the paper I will argue that the insignificant role of charitable organizations in Georgian society is due to the poor legislative framework that exists in Georgia. To prove/disprove my hypothesis I will analyze the provisions of the Georgian legislation that govern charitable organizations, their status (chapter one), tax incentives (chapter two) and state control mechanisms (chapter three). Throughout the entire paper I will bear in mind that for a developing country like Georgia it is of crucial importance to build up a strong charitable sector. As a result of the analysis it will be demonstrated how these provisions work in practice, what types of obstacles (if any) are created by them and in what areas, and whether these provisions contradict other legislative provisions. As criteria for evaluation/assessment I will use the Model Provisions for Laws Affecting Public Benefit Organizations<sup>5</sup> and the works of prominent scholars in the area. Recommendations on how the existing gaps and shortcomings can be overcome will be presented where applicable.

The fact that charitable organizations form an insignificant part of the not-for-profit sector in Georgia, and that their potential is not fully used can be proven by several factors. According to the information obtained from the Department of Statistics of the Ministry of Economic

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<sup>1</sup> Verica Trstenjak, *Civil Society in Countries in Transition: the Need for New Regulations*, 1 INT’L J. CIV. SOC. LAW 1 (2003), <http://www.law.edu/journal/ijcsl>.

<sup>2</sup> For the purposes of this paper “public benefit” and “charitable” carry exactly the same meaning; however, throughout the paper I will use the term “charitable,” as this term is used in Georgian legislation. *See also*, LEON E. IRISH, ROBERT KUSHEN & KARLA W. SIMON, *GUIDELINES FOR LAWS AFFECTING CIVIL ORGANIZATIONS* 54, 56, 61, 85 (Open Society Institute 2004).

<sup>3</sup> Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: a Theory of Risk Compensation*, July 1998, 50 FLA. L. REV. 419, 462; IRISH ET AL., *supra* note 2, at 13-16.

<sup>4</sup> C. Eugene Steuerle, Martin A. Sullivan, *Towards More Simple and Effective Giving: Reforming the Tax Rules for Charitable Contributions and Charitable Organizations*, 12 AM. J. TAX. POL’Y. 399, 399 (2005).

<sup>5</sup> International Center for Not-for-Profit Law (ICNL), *Model Provisions for Laws Affecting Public Benefit Organizations*, (2002) [http://www.icnl.org/knowledge/pubs/law\\_PBO\\_English.pdf](http://www.icnl.org/knowledge/pubs/law_PBO_English.pdf). During 2000-2001 International Center for Non-for-Profit Law (ICNL) invited group of experts from Central and Eastern Europe to create “Model Provisions for Laws Affecting Public Benefit Organizations”.

Development of Georgia, there are 6432 registered not-for-profit organizations (unions/associations and funds) in Georgia as of November 2006, from which 268 use the word “charitable” in their names.<sup>6</sup> Data obtained from the Tax Department of the Ministry of Finance of Georgia, the body in charge of registration and granting the status of “charitable” organization, states that 141 organizations have charitable status of which 31 obtained charitable status in the year 2006.<sup>7</sup> Analysis of statistical data shows that charitable organizations constitute approximately 2 (two) percent of the entire not-for-profit sector, which is a very low percentage. Apart from that it is quite interesting to compare the actual number of charitable organizations to those not-for-profit organizations that use the word “charity” in their name.<sup>8</sup> Despite the fact that it cannot be demonstrated what the interrelation between the two data sets may be, it still can be concluded that there are some (and about two times more) not-for-profit organizations that for various reasons do not possess charitable status, but by calling themselves charitable give society the impression that they are (they want the public to perceive them as charitable organizations even if they are not qualified as such).

Derived from the statistics, it can be concluded that a) a very small number of charitable organizations is operating in Georgia; and b) there are some not-for-profit organizations that wish to be identified as charitable but do not bear that status of “charitable organization.” I think that the main reason for this is the poor legislative framework, as well as the lack of incentives and preferential conditions for charitable organizations. However, there might be some other influencing factors as well: for example, the difficult socio-economic situation, a lack of donors, and the absence of relevant traditional, psychological motivation in the society. It will be demonstrated below that none of these are applicable in the case of Georgia, and that the real cause for the small size of the charitable sector is to be found in the legislative framework.

Special research was conducted on the above-mentioned issues in the fall of 2003 by the Educational Cooperation and Development Center (ECDC)<sup>9</sup> in Georgia. As a result of the research it was established that 80 percent of the respondents (small and large enterprises) make donations to charities on a regular basis; 94 percent of the donors consider that if a company possesses sufficient resources, philanthropy is a must. Companies that do not make donations name two main reasons for doing so: 1) not much income and 2) high tax rates. The study showed that about 90 percent of all the respondents were willing to start donating or to donate more if better tax incentives were offered. In this regard it is notable that around 37 percent requested exemption from VAT for donations, 14 percent of the respondents were interested in deducting the donations from taxable income, and another 12 percent expressed interest in any kind of tax incentive.<sup>10</sup>

The above-mentioned study has also shown that the public trust in charitable organizations is not high. A majority of donors will normally request documentation and guarantees that the donations will be used purposefully by the charities. However, the fact that half of these donors think that they need to know more about the representatives of the charities, and 20 percent of the

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<sup>6</sup> Letter #5/1-06/111 from the Department of Statistics of Ministry of Economic Development of Georgia to Ms. Babutsa Pataraiia.

<sup>7</sup> Interview by Ms. Babutsa Pataraiia with Mr. David Tsekvava, official in Georgia’s Ministry of Finance Department of Information and Analytics in Georgia (Nov. 15, 2006).

<sup>8</sup> According to the Letter #5/1-06/111 issued by the Department of Statistics of Ministry of Economic Development of Georgia in response to the written request of Ms. Babutsa Pataraiia, 144 foundations and 124 unions contain the word “charitable” in their names.

<sup>9</sup> It is noteworthy that ECDC possesses a rich experience (several years of work expertise) in studying philanthropic activities of Georgian business companies.

<sup>10</sup> PILANTROPIA: TEORIA DA PRAQTIKA 149-168 (Education Cooperation and Development Center 2004).

donors say that they need to know the governing officers of the organizations in person, demonstrate the reduced level of public trust in charitable organizations.<sup>11</sup>

It is notable that an indispensable part of Georgian culture is an ancient tradition of helping those in need. This tradition is closely intertwined with Orthodox religion and church. Beginning in the ninth century, the Georgian state legalized the obligation to help the poor (e.g. a special tax “the poor’s portion” was introduced in favor of the poor, and the money collected from the tax was spent for their support).<sup>12</sup> Since Georgia achieved independence after the collapse of the Soviet Union, the government has not created favorable conditions for supporting charitable activities as yet, but the tradition of providing assistance to people in need is still broadly practiced by Georgian society.

Based on the preceding paragraphs, it can be concluded that Georgian society is by nature accustomed to donating and assisting those in need, and that business organizations are ready and willing to make donations to charitable organizations. The only thing that seems to prevent the charities from working with full force is the absence of necessary legislative regulations, lack of tax incentives, and support from the side of the state.

Here I would like to reiterate that it is the aim of this paper to analyze whether the decreased role of charitable organizations in the society is due to poor legislative framework in Georgia. Where applicable, as part of my hypothesis, I will try to demonstrate that legislation directly influences the public trust in charitable organizations, and it is owing to the poor legislative framework that the public trust in charities is reduced in Georgia. As this paper is one of the first studies of the subject of tax incentives for charity under the new Tax Code of Georgia (in force since 2005), its hypothesis and conclusions may not be borne out in practice. One thing the paper will do, however, is identify the pros and cons of the existing legislative framework in regard with charitable organizations and propose reasonable recommendations to facilitate their functioning in Georgia. Thus, additional research can build on the findings of this paper and inform the debate over whether there should be better incentives made available to encourage the development of charity in Georgia.

## **CHAPTER I: STATUS OF CHARITABLE ORGANIZATIONS UNDER GEORGIAN LEGISLATION**

As Georgia does not have a single/separate legal instrument regulating the non-governmental sector, guidelines concerning not-for-profit organizations can be found in various legislative acts. These include the Constitution of Georgia, as well as laws regulating separate features of not-for-profit activities, including tax legislation offering incentives to donors making gifts to such organizations.<sup>13</sup>

The new Tax Code of Georgia came into force on January 1, 2005. Undoubtedly the new law is a big step forward. The basics and foundations of the tax law were transformed through more liberal changes.<sup>14</sup> Yet, despite the fact that the new law is acknowledged as a law of new

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<sup>11</sup> PILANTROPIA: TEORIA DA PRAQTIKA 149-168 (2004)

<sup>12</sup> *Id.* at 57-63.

<sup>13</sup> See Vazha Salamadze, *NGO Legislation in Georgia*, 1 INT’L J. NOT-FOR-PROFIT L 2 (1999), <http://www.icnl.org/journal/vol1issue2/georgia1.html>.

<sup>14</sup> See Mikheil Jibuti, in V. Khmaladze, I. Shavishvili, D. Khatiashvili, SAQARTVELO AAGADASAKHADO KODEQSI KOMENTAREBI 19-21 (Federation of professional Georgian accountants and auditors, 2005)

principles and attitudes when compared to the old Tax Code of 1997, some of its articles have been subject to harsh criticism from legal theorists and practitioners. The fact that more than one hundred provisions of the new code were amended in July 2006 proves that the new code enacted in 2005 was not drafted properly. And even though some changes have already been made, some parts of the Tax Code remain ambiguous. The overall evaluation of the current law is that it is unsatisfactory as it proves to be too pro-state, and lacking in liberal attitudes towards taxpayers.<sup>15</sup>

In this chapter the definition of charitable organization will be analyzed, followed by an examination of the procedures of granting, annulment, withdrawal, and restoration of the charitable status. When discussing the qualification requirements for granting the status, special attention will be paid to the enumeration of charitable activities. Precise and general recommendations will be provided where necessary.

### 1.1. DEFINITION OF “CHARITABLE ORGANIZATION”

“Charitable organization” was defined under the old Tax Code as an “organization established for charitable purposes, registered in accordance with Georgian laws to carry out charitable activities and fulfilling the requirements of Article 21 of the Tax Code.”<sup>16</sup> The same general wording is reiterated in the current Tax Code, under which a charitable organization is defined to be an organization that has obtained “charitable” status pursuant to the requirements of Article 32.<sup>17</sup> From this definition we learn that for an entity to become a “charitable organization” a) it must be an “organization” and b) it must receive the status of “charitable organization.” Before engaging into a discussion of the procedure of granting the charitable status, it is therefore necessary to identify what is meant by the term “organization”.

#### 1.1.1. DEFINITION OF “ORGANIZATION”

The new Tax Code enumerates all the legal entities which are considered as organizations for the purposes of the Tax Code, among them are: public or religious organizations (unions), funds, unions (associations), establishments that are non-entrepreneurial legal entities under the laws of Georgia, or entities established and acting according to the legislation of a foreign state and their representations or any other similar bodies, through which those foreign organizations conduct activities; as well as budgetary organizations, legal entities of the public law, corporations, establishments;<sup>18</sup> international (interstate, intergovernmental, diplomatic) organizations, such as organizations regulated by international law, embassies, councils, representative bodies, foreign non-entrepreneurial organizations.<sup>19</sup> The list is insignificantly broader than that included in the previous Tax Code.

The listed types of organizations do not represent separate organizational-forms of legal entities as categorized in the Civil Code of Georgia. Moreover, the Tax Code of Georgia does not define further the enumerated entities that are considered organizations for purposes of the Tax Code. In order to identify practically in what organizational-legal form charitable organizations

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<sup>15</sup> See V. Khmaladze, I. Shavishvili, D. Khatishvili, SAQARTVELO SAGADASAKHADO KODEQSI KOMENTAREBI, at 37 (2005)

<sup>16</sup> Article 21 Tax Code of Georgia §1 (1997).

<sup>17</sup> Article 32 Tax Code of Georgia §1 (2005).

<sup>18</sup> Article 30 Tax Code of Georgia §1(a) (2005).

<sup>19</sup> Article 30 Tax Code of Georgia §1(b) (2005).

may exist, it is necessary to analyze other parts of Georgian legislation. In Georgia there are two types of private law legal entities: entrepreneurial and non-entrepreneurial. It is unarguable that entrepreneurial legal entities cannot apply for the status of charitable organizations.<sup>20</sup> Therefore the only legal entities that can apply for charitable status are non-entrepreneurial legal entities. Under Georgian legislation locally registered non-entrepreneurial legal persons that are able to apply for charitable status and meet all the requirements of the Tax Code are unions (associations) and foundations.<sup>21</sup>

As a result of some of the language in the Tax Code, it may be stated that if only locally registered legal entities only unions (associations) and foundations may apply for and receive the status of the charitable organizations, foreign organizations may not do so. In theory, however, foreign legal entities may apply for the status as well, but in practice the only active charitable organizations in Georgia are locally registered non-entrepreneurial entities. In a nutshell, the Tax Code does not specify the organizational legal form of legal entities that can acquire the status, by using the term “organizations.” Despite that fact, however, its definition has never posed any problems in practice and can be considered acceptable, as it does not exclude any particular kind of local not-for-profit organization from the possibility of obtaining charitable status.<sup>22</sup>

#### 1.1.2. DEFINITION OF “CHARITABLE ACTIVITIES”

The current Tax Code of Georgia, like the previous one, defines the concept of charitable activities. The new Tax Code develops the definition and provides a more conclusive enumeration of such activities as compared to the old version. The new Tax Code contains the entire old enumeration of charitable activities such as “direct assistance to physical persons”<sup>23</sup> with low income, persons in need of social protection or adaptation, medical care, among them: orphans, elderly, gifted, diseased and disabled persons.<sup>24</sup> In addition, under the new Tax Code the activity is considered to be charitable if it directly supports organizations taking care of the abovementioned physical persons, plus cultural and educational institutions, religious organizations, penitentiary institutions and institutions that have ecological aims.<sup>25</sup>

The new Tax Code complements the previous definition stated in the previous Tax Code, by stating that charitable activity shall represent a “voluntary, gratuitous assistance” and can be conducted either directly or through the third parties.<sup>26</sup> Additionally the list of physical persons in need is more complete, and includes refugees and internally displaced persons, persons without a bread-winner, families with many children and their members, and also persons who suffered from natural or man-made disasters.<sup>27</sup> Article 14 also considers activities to be charitable if the voluntary assistance is performed by the organizations for the benefit of the public in the following areas: “human rights protection, environment protection, development of democracy and the civil society, culture, education, science, medical care, social protection, physical education and nonprofessional sport and art.”<sup>28</sup>

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<sup>20</sup> IRISH ET AL., *supra* note 2, at 103-104, and ICNL *supra* note 5, at 3.

<sup>21</sup> Article 30 Civil Code of Georgia §1 (1997).

<sup>22</sup> ICNL, *supra* note 5, at 9.

<sup>23</sup> Article 10 Tax Code of Georgia §1 (1997).

<sup>24</sup> Article 10 Tax Code of Georgia §2 (1997).

<sup>25</sup> Article 10 Tax Code of Georgia §1-2 (1997).

<sup>26</sup> Article 14 Tax Code of Georgia §1(a) (2005).

<sup>27</sup> Article 14 Tax Code of Georgia §1(a) (2005).

<sup>28</sup> Article 14 Tax Code of Georgia §1(b) (2005).

The list of charitable activities under the Georgian legislation is exhaustive. Despite the fact that all these enumerations of the areas of activity and the persons in need is very broad and at a glance appears to cover all the possible charitable activities, the list should not be closed. Not-for-profit law experts<sup>29</sup> provide strong arguments in support of an open list of charitable activities. They argue that “no list can be comprehensive” especially when “the needs and values of any society change and evolve.”<sup>30</sup> This is particularly appropriate in Georgia, as not only the legal system and Georgian statehood are undergoing an evolution. Georgian society is also in the process of transition, as Western values gradually penetrate Georgian culture and fill the gaps created as a result of collapse of the USSR.

The Tax Code, like the previous one, contains an enumeration of activities that are not to be considered “charitable.” The old Tax Code provided three types of such activities (discussed in greater detail below), only one of which has remained in the current one, and this is assistance provided to support a political party or candidates participating in elections.<sup>31</sup> Together with political parties and candidates the new Tax Code also mentions that activities carried out in support of enterprises cannot be considered charitable.<sup>32</sup> Assistance will also not be considered as charitable if it is defined as a sponsorship under “Law of Georgia on Advertisement”.<sup>33</sup> The new Tax Code also lists certain entities, the activities of which should not be considered as charitable, though listed as charitable in article 14 (1). These entities are government agencies or self-government bodies.<sup>34</sup>

The old Tax Code contained a provision excluding from charitable activities assistance to the poor, etc., if the provider and receiver of the assistance were related persons<sup>35</sup> under the Tax Code.<sup>36</sup> The definition of related persons is extremely broad in Georgian tax legislation, e.g. founders (participants) of the same enterprise, if their total share is not less than 20 percent are defined as related persons.<sup>37</sup> As an example of how this is intended to work, assume that there are two partners of the same joint-stock company, one of them has a very small number of shares, but together in sum they own no less than 20 percent of total shares. Despite the fact that shareholders of the joint-stock company are numerous and it is practically impossible to know all of them, these two persons are deemed to be related persons under the Tax Code. Thus, voluntary and gratuitous assistance between them will lose its charitable character.

The new Tax Code narrowed down the category from related persons to relatives and managerial staff of an organization. Now assistance is not charity if the activity is carried out by a physical person for his/her relative or by a legal entity for its managerial staff or their relatives.<sup>38</sup> Of course this reform should be deemed as a step forward in that it narrows the limitation contained in the old Tax Code.

On the other hand, I think the provision may be somewhat out of place. Generally the definition and enumeration of charitable activities serves only one purpose in the Georgian tax legislation: carrying out charitable activities is a requirement to obtain charitable status. This

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<sup>29</sup> ICNL, *supra* note 5.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> Article 10 Tax Code of Georgia §3(c) (1997); Article 14 Tax Code of Georgia §2(b) (2005).

<sup>32</sup> Article 14 Tax Code of Georgia §2(b) (2005).

<sup>33</sup> Article 14 Tax Code of Georgia §2(c)-(d) (2005).

<sup>34</sup> Article 14 Tax Code of Georgia §2(a) (2005).

<sup>35</sup> Article 24 Tax Code of Georgia (1997).

<sup>36</sup> Article 10 Tax Code of Georgia §3(b) (1997).

<sup>37</sup> Article 24 Tax Code of Georgia §2(a) (1997); Article 23 Tax Code of Georgia §2(a) (2005).

<sup>38</sup> Article 14 Tax Code of Georgia §2(c) (2005).

assumption is discussed in detail in the second chapter concerning tax incentives. Thus, if the definition of charitable activities is provided to define whether an organization is entitled to receive charitable status, then declaring that activities are not charitable if carried out by a physical person for their relatives, does not make any sense, as a physical person is not allowed to apply for charitable status. To my way of thinking, this part of the article is useless and should be removed.

The old Tax Code contained one more provision concerning non-charitable activities. Under the old Tax Code, an activity was not charitable if the assistance triggered a material or non-material obligation for the person receiving the assistance, (except for the obligation to use the received funds or property exclusively as targeted).<sup>39</sup> This requirement preserved charitable activities from abuse and represented a safeguard of voluntary and gratuitous character of charity, and was necessitated by the absence of the term “voluntary, gratuitous assistance” in the definition of the charitable activities; therefore I think that removing this provision does not weaken the current law.

## 1.2. GRANTING THE STATUS OF CHARITABLE ORGANIZATION

The new Tax Code determines the conditions on which the status of the charitable organization may be acquired from the Tax Agency. First, the organization should be registered as a legal entity; second it should be established to carry out charitable activities and have at least one year of experience in carrying out charitable activities.<sup>40</sup>

### 1.2.1. GENERAL OVERVIEW OF THE QUALIFICATION CRITERIA

According to Article 2 of the Model Provisions<sup>41</sup> “A PBO is any not-for-profit organization (NPO) that is: a) registered under [relevant laws]; b) organized and operated *principally* to engage in Public Benefit Activities and c) certified as such by the Public Benefit Commission.”<sup>42</sup> In the Tax Code of Georgia to qualify for the charitable status an organization is required to be established to carry out charitable activities. The word “principally” is missing. This means that the part of charitable activities in the total activities of the organization is not defined by the law and is entirely left to the discretion of the relevant tax agency authorized to grant status of “charitable organization.” There are additional problems with the lack of a definite requirement of the amount of charitable activity that must be performed: it undermines the public trust of the donors in the charitable organizations, as they have no basis to assume to what extent those organizations must engage in charitable activities to the exclusion of economic activities. Accordingly, I believe that the term “principally” should be introduced into the law. It should serve the purpose of stimulating the Tax Agency (the status-granting authority) to develop a test – what are the criteria for defining to what extent an organization needs to be engaged in charitable activities for it to be considered *principally* engaged in charity. Consequently, depending on how the practice develops, and based on a profound study of the activities of Georgian charitable organizations, there can be a flexible approach to establishing the portion of required charitable activities.

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<sup>39</sup> Article 10 Tax Code of Georgia §3(a) (1997).

<sup>40</sup> Article 32 Tax Code of Georgia §2 (2005).

<sup>41</sup> ICNL, *supra* note 5.

<sup>42</sup> *Id.* at 3.

According to the Model Provisions, in order to grant charitable status an organization's involvement in charitable activities should be measured based on other factors as well. The most important among these is that an organization's mere participation in charitable activities is not enough per se, as a result of these activities significant benefits should be achieved for the targeted group or public-at large.<sup>43</sup> Derived from the prior discussion, it can be argued that the law should define not only charitable activities, but also the group of beneficiaries to be served: the public-at-large or a targeted group. The targeted group should be either a disadvantaged class or a class, providing special benefits to which carries significant value to the whole community.<sup>44</sup> The Georgian legislation only requires organizations to be engaged in charitable activities for one year to qualify for charitable status. Nowhere is it provided who should be the beneficiaries of these charitable activities. This creates the risk of abuses of charitable status and a loss of public trust, as in theory it might enable an organization, which promotes economic development only in a prosperous areas, to qualify for the charitable status.

### 1.2.2. STATUS -GRANTING BODY

The status of charitable organization is granted by the Tax Agency in Georgia, according to the location of the given organization.<sup>45</sup> Tax agencies are not considered as effective and high quality bodies for granting the charitable status.<sup>46</sup> First of all, there cannot be PBO representation in tax agencies, and the absence of such representation can cause a reduction in public confidence in the status of charitable organizations. It also may create fertile soil for discriminatory or repressive decision-making.<sup>47</sup> The situation is aggravated by the fact that the Tax Code of Georgia does not clarify whether refusal to grant charitable status is appealable and, if it is, where and how.

The response to the question whether the refusal to grant charitable status is appealable can be found in other legislative acts of Georgia. The refusal of the tax agency to grant the status of charitable organization to an applicant is considered to be an "individual-legal act."<sup>48</sup> The term "individual-legal act" is not defined anywhere in Georgian legislation; however a similar term "individual administrative-legal act" is found in the General Administrative Code of Georgia. According to Article 2.1.d of General Administrative Code of Georgia "individual administrative-legal act" is a legal act adopted by the administrative organ (any kind of state organ or that of the local municipality, or any other person empowered to carry out public authority)<sup>49</sup> and establishing, changing, or terminating the rights and obligations of a person (both legal and natural). It also includes the refusal of an application by an administrative agency<sup>50</sup>, if the decision concerning the given issue falls under the jurisdiction of the administrative agency, constitutes an administrative legal act.<sup>51</sup> As a result, it can be stated that no matter the definition of "individual-legal act" in the Tax Code, refusal to grant charitable status represents an

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<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.* at 10.

<sup>45</sup> Article 32 Tax Code of Georgia §4 (2005).

<sup>46</sup> ICNL, *supra* note 5, at 6.

<sup>47</sup> *Id.* at 7.

<sup>48</sup> Article 3.5 of the Instruction on "Rules of Granting the Status of Charitable Organization to the Organizations and Administering the Registry" approved by the Decree #149 of March 17, 2005 of the Minister of Finance of Georgia.

<sup>49</sup> Article 2.1(a) of General Administrative Code of Georgia (1999).

<sup>50</sup> Article 2 General Administrative Code of Georgia §1(a) (1999), under this code administrative agencies are all the state, local or self-government agencies or institutions.

<sup>51</sup> Article 2 General Administrative Code of Georgia §1(d) (1999).

“individual administrative-legal act” for the purposes of General Administrative Code of Georgia. This is important, as the validity of administrative legal acts (including but not limited to individual administrative-legal acts) can be challenged in the courts under the Administrative Procedure Code of Georgia.<sup>52</sup> The absence of the reference to the right to appeal in the Tax Code, to my way of thinking is a serious shortcoming and represents an undue burden for the claimant to prove its standing before the court by referring to the norms of General Administrative and Administrative Procedure Codes of Georgia. It is noteworthy that a right of appeal does not stem from other provisions of Georgian Tax Code concerning the dispute resolution. The Tax Code offers two ways of dispute resolution for tax disputes based on violation of obligations,<sup>53</sup> namely: dispute resolution in the system of Ministry of Finance and dispute resolution in the court,<sup>54</sup> but neither of these is applicable in the given case.

### 1.2.3. APPLICATION PROCEDURE AND GRANTING THE STATUS

To obtain charitable status an organization should submit an application containing the following information:

- a) name of the organization,
- b) organizational and legal status,
- c) major goals,
- d) basic directions of activities for the past year, and
- e) addresses of main office and branches.<sup>55</sup>

Additional documentation is also required:

- a) a copy of the charter of the organization,
- b) a copy of the registration certificate,
- c) the pervious year’s report on activities, describing undertakings of the organizations (projects, services); and
- d) financial documents for the previous year approved by the independent auditor (balance sheet, profit/loss statement).<sup>56</sup>

This last requirement may seem to be burdensome, as it does not reflect the best practices on the given subject.<sup>57</sup> However, this requirement is a part of the state control mechanism, which is directly linked to the one year qualification requirement of carrying out charitable activities. (Please see the Chapter on State Control for more detailed analysis of the issue).

The Tax Agency is obliged to give a decision with the rationale for the decision, within one month; otherwise the status is automatically granted and comes into effect immediately and is unlimited.<sup>58</sup> The Tax Code does not define the grounds for refusal to grant the charitable status. To my way of thinking, enumeration of the general bases for refusal to grant charitable status will

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<sup>52</sup> Article 22 Administrative Procedure Code of Georgia §1 (1999).

<sup>53</sup> Under the Article 145 of the Tax Code of Georgia §1 (2005), the basis for tax dispute is a violation of the obligation defined by the code. Dispute concerning the application for the charitable status can not be regulated by this general Article of dispute resolution, as in case of refusal of the application, there is no violation of obligation; granting the charitable status is in the discretion of the tax agencies.

<sup>54</sup> Article 146 Tax Code of Georgia §1 (2005).

<sup>55</sup> Article 32 Tax Code of Georgia §5 (2005).

<sup>56</sup> Article 32 Tax Code of Georgia §6 (2005).

<sup>57</sup> ICNL, *supra* note 5, at 15.

<sup>58</sup> Article 32 Tax Code of Georgia §7 (2005).

create additional safeguards from abuse of power by the status-granting body. This is particularly important as the agency consists of tax department officials only, without public sector representation. Moreover, enumeration of grounds for refusal to grant charitable status will be helpful for everyone: it will facilitate decision-making by the Tax Agency; it will assist organizations to argue a case in the courts if they are denied charitable status, and finally it will help the court to deliver the decision. For future changes in the law, Georgian legislators can use the Model Provisions offering the reasons, which should be stipulated in the law, as reasonable grounds for refusal on certification:

- a) a materially incomplete application;
- b) the organization does not meet requirements for charitable organization; or
- c) the organization is accused in grave or repeated violations of laws or regulations.<sup>59</sup>

### 1.3. ANNULMENT, WITHDRAWAL AND RESTORATION OF THE STATUS OF CHARITABLE ORGANIZATION

The new Tax Code envisages two grounds for the annulment of charitable status, one is the request of annulment by the charitable organization and the second is annulment based on withdrawal of the charitable status.<sup>60</sup> Withdrawal of the status can take place if the organization violated requirements of the Tax Code and if the civil registration of the organization was terminated.<sup>61</sup> I think the first ground should be modified in two aspects, one is that the Term “violated requirements” is too broad and includes minor as well as severe violations of the law. In my understanding, such a harsh sanction as withdrawal of the charitable status should be applied only in the case of serious violations. The second problem is that withdrawal of charitable status should be carried out not only for violations of the Tax Code, as it is defined under the article 32, but in general for severe violations of any laws and regulations.<sup>62</sup>

Charitable status may be annulled by the Minister of Finance, based on the recommendation of the Tax Agency.<sup>63</sup> A major shortcoming of this provision is that the decision concerning annulment of the charitable status is made by the Minister of Finance and not by a court. Also, the article regarding annulment does not make any reference to the right to appeal the annulment decision in court. Based on the same logic demonstrated above, the decision may be appealed in court; however, to facilitate the exercise of the right to appeal, it is recommended that a relevant amendment be made to the provision to clarify the right of appeal.

In addition to the annulment of charitable status, when charitable status is withdrawn on the basis of violation of the requirements of the Tax Code by the organization, the organization is obliged to repay the tax benefit derived from its charitable status. The amount of tax benefit to be repaid is to be related to the organization’s violation of the Tax Code requirements.<sup>64</sup>

The second ground for withdrawal of charitable status is termination of the registration of the organization. As it was already discussed in Chapter I, a non-entrepreneurial legal person may have the organizational legal form of union (association) or foundation.<sup>65</sup> Presumably, under the

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<sup>59</sup> ICNL, *supra* note 5, at 16.

<sup>60</sup> Article 32 Tax Code of Georgia §12 (2005).

<sup>61</sup> Article 32 Tax Code of Georgia §13 (2005).

<sup>62</sup> ICNL, *supra* note 5, at 16.

<sup>63</sup> Article 32 Tax Code of Georgia §4 (2005).

<sup>64</sup> Article 32 Tax Code of Georgia §14 (2005).

<sup>65</sup> Article 30 Civil Code of Georgia §2 (1997).

Tax Code, revocation of the registration of union or foundation is meant by the term “termination of registration.” According to Article 35 of the Civil Code, a court may decide to prohibit the activities of a union or foundation. The grounds for such a prohibition under the Organic Law are the following: if the not-for-profit organization aims at overthrowing or forcibly changing the constitutional structure of Georgia, infringing upon the independence and territorial integrity of the country or propagandizing war or violence, provoking national, local, religious or social animosity, creates or has created armed formations; or after the court’s decision on cessation of the activities of charitable organization, because it essentially carried out entrepreneurial activities, the organization continues to carry out economic activities;<sup>66</sup> or if the organization was found guilty of a violation of the Criminal Law of Georgia.<sup>67</sup>

Besides the Organic Law some other grounds of prohibition of activities of a union or a foundation is envisaged by the Civil Code of Georgia, namely: if the organization principally carries out commercial activities; or if the accomplishment of the objectives defined under its charter has become impossible; or on the basis of appeal brought by a tax agency and/or an interested person the court decides cause the cessation or prohibition of the activities of the union or foundation.<sup>68</sup> On the basis of the court decision on prohibition of the activities of the union or foundation the registration of the organization should be annulled.<sup>69</sup>

Other grounds for annulment of charitable status are not foreseen by the law, but in practice there surely are other bases for such an annulment. These might include, for example, the merger of a charitable organization with an organization without charitable status, etc.

After the liquidation of the charitable organization, all the property should be transferred to other charitable organizations with similar goals, and if there is no such organization, then to any other charitable organization on the basis of decision made by authorized agency or person.<sup>70</sup> If the organization holding charitable status is a legal entity of public law, which was established based on the state property, and it is liquidated, its property should be transferred to state ownership.<sup>71</sup>

An organization whose charitable status was withdrawn has a right to apply for the restoration of the charitable status when the minimum one year period has passed after the reasons behind the status withdrawal have been eliminated.<sup>72</sup>

Having reviewed the above mentioned provisions it can be concluded that they are in conformity with established practice in the area.<sup>73</sup> However, as will be discussed in the Chapter Three some of these provisions are designed to assist the exercise of state control, thus creating some unnecessary obstacles for charities, while at the same time, partially strengthening the public trust in them.

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<sup>66</sup> Article 4 Organic Law of Georgia on Cessation and Prohibition of the Activities of Public Unions (1997).

<sup>67</sup> Article 4.1 Organic Law of Georgia on Cessation and Prohibition of the Activities of Public Unions (1997).

<sup>68</sup> Article 35 Civil Code of Georgia §1-2 (1997).

<sup>69</sup> Article 35 Civil Code of Georgia §4 (1997).

<sup>70</sup> Article 32 Tax Code of Georgia §11 (2005).

<sup>71</sup> *Id.*

<sup>72</sup> Article 32 Tax Code of Georgia, §15 (2005).

<sup>73</sup> ICNL, *supra* note 5.

## CHAPTER II: INCENTIVES FOR CHARITABLE ORGANIZATIONS AND DONORS

Enumeration and analysis of the tax benefits guaranteed by the new Tax Code has paramount importance for this paper. An organization receives charitable status and in return undertakes extra obligations in order to enjoy the benefits which are offered by the law. In this chapter I will discuss all the articles concerning tax benefits and will evaluate their importance for the activities of the organization, whether the benefits are significant and make it worthwhile for an NPO to obtain the status of “charitable organization.”

It will be demonstrated below that the tax benefits provided for charitable organizations in the Georgian legislation are very poor. All the tax incentives for the charitable organizations under the new Tax Code of Georgia are provided for in only two articles: exemption from the profit tax and deductions for donations to charity organizations.

### 2.1. EXEMPTION FROM THE PROFIT TAX AND THE DEFINITION OF “ECONOMIC ACTIVITY”

Article 172 of the new Tax Code enumerates profits that are exempt from the profit tax; among them is profit of charitable organizations. Excluded from the exemption is the profit received from economic (commercial and investment) activities.<sup>74</sup> Thus all contributions and gifts received by non-commercial organizations are exempt from the profit tax, but other income is not.

The new Tax Code allows charitable organizations to pursue economic activities, if the activity has an auxiliary character and serves the basic goals of the charitable organization.<sup>75</sup> If an organization carries out an economic activity, the part of its property and activities that are directly connected to its economic activities are recognized to be entrepreneurial activities. Where it is impossible to distinguish the difference between property devoted to charitable activities and property devoted to economic activities, the ratio of economic income to the entire income of the organization is applied to calculate economic activities and economic property.<sup>76</sup>

Economic activities are defined under the Tax Code as any activities conducted in order to gain profit, income or compensation, regardless the results of such activities.<sup>77</sup> Economic activity can be entrepreneurial or non-entrepreneurial.<sup>78</sup> An example of non-entrepreneurial activity is placing monetary assets in banks.<sup>79</sup> Such activities generally are perceived as “passive” activities and according to Guidelines for Laws Affecting Civic Organizations, the income from investments should not be taxed if the organization is a PBO.<sup>80</sup> But under the Georgian Tax Code no tax incentives are provided even for the “passive” non-entrepreneurial, but economic activities.

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<sup>74</sup> Article 172 (a) Tax Code of Georgia (2005).

<sup>75</sup> Article 32 Tax Code of Georgia §3 (2005).

<sup>76</sup> Article 30 Tax Code of Georgia §4 (2005).

<sup>77</sup> Article 13 Tax Code of Georgia §1 (2005).

<sup>78</sup> Article 13 Tax Code of Georgia §3 (2005).

<sup>79</sup> Article 13 Tax Code of Georgia §6(b) (2005).

<sup>80</sup> IRISH ET AL., *supra* note 2, at 57.

In addition, the Tax Code does not differentiate between related and unrelated economic activities when it speaks of such activities for charitable organizations. The Tax Code also does not mention the problem of unfair competition between the charitable and commercial sectors. Presumably these issues have no importance for the legislator, as under the Georgian laws neither related nor unrelated commercial activities of charitable organizations trigger any tax benefits whatsoever.

Certain tax incentives for economic activities would be of paramount importance for Georgian charitable organizations. They would reduce the sector's dependence on donors and vital costs for accomplishment of charitable activities would be financed.<sup>81</sup> While working on the draft of the new Tax Code, the Civil Society Institute offered to the government alternative tax allowances based on the current reality in Georgia.<sup>82</sup> In my view, among the various tax incentives of the profit tax, at this stage, the following combination will be the best.

First, tax allowances, namely income tax exemption for both economic and non-economic activities should be available only for charitable organizations and not for the entire not-for-profit sector. This would control the fairness of an exemption for economic activities of charitable organizations and reduce loss of revenue.

Second, charitable-purpose-related economic activities should be entirely exempt under the law; i.e. economic activities, the income of which is spent on charitable activities. In some cases related economic activities are the means to achieve the charitable purpose/s of the organization.<sup>83</sup> Furthermore permitting related economic activities to be exempt will reduce unfair competition of charitable organizations with the commercial legal persons.<sup>84</sup> This exemption would also extend to investment activities and the income produced by them.

Third, there should be a limited amount of unrelated economic activities permitted, and a maximum non-taxable amount of income received from those economic activities should be determined by law. Additional income earned by the economic activities exceeding the allowed amount should be taxed as economic activities conducted by the commercial legal person. The determination of the exact amount of non-taxable income is not so important at this stage (this amount may have symbolic value and be set down in the law in a range acceptable to the government and taking into account revenue needs). Given the existing situation in the country, priority should be given to the establishment and development of the culture/habits for charitable organizations to engage into economic activities openly. But they must also be encouraged to comply with the relevant filing and accounting obligations.

Finally, it should be underlined that Article 172, stipulating that income raised from non-economic activities is tax exempt, is “fictional and ineffective”<sup>85</sup> as an incentive for charitable organizations, as it does not constitute a tax incentive for them. Because grants, membership fees, and donations are exempt from the tax for the entire not-for-profit sector,<sup>86</sup> charitable

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<sup>81</sup> Concept Paper for Legal Regulation of Charity Activities in Georgia, prepared by Civil Society Institute, 2004, p. 12, on file with the author.

<sup>82</sup> *Id.* at 13-14.

<sup>83</sup> IRISH et al., *supra* note 2, at 58.

<sup>84</sup> ICNL, *supra* note 5, at 19.

<sup>85</sup> Concept Paper for Legal Regulation of Charity Activities in Georgia, prepared by Civil Society Institute, 2004, *op.cit.*, pp. 7-8.

<sup>86</sup> Article 172 (b) Tax Code of Georgia (2005).

organizations do not get any additional benefit under article 172 (1), so this provision should be removed from the Tax Code.

## 2.2. DEDUCTIONS FOR DONATIONS TO CHARITY ORGANIZATIONS

The new Tax Code of Georgia contains a new article concerning tax benefits: Article 186 gives an enterprise the possibility of deducting the amount of a donation from its gross income, if the donation is made to a charity organization. The upper limit on the amount of deductible donations is 8 percent of the sum of gross income minus all applicable deductions (before the deduction of the charitable deduction is taken).<sup>87</sup>

The first issue to be considered is the percentage limitation and whether it seems appropriate in the current law and the current social and economic situation in Georgia. The general theoretical critique is that this kind of (overall) limitation on charitable contributions is inconsistent with both the “tax incentive” and “income measurement” justifications for the deductibility of charitable contributions. According to experts in the area, if deductibility is allowed specifically to encourage donations to charity, it makes no sense to weaken the incentive as the size of the donation relative to income becomes large, and similarly, the size (amount) of the donation is surely irrelevant. In addition, if deductibility of charitable contributions is aimed at improving the measurement of taxable income, limiting the deduction also makes no sense.<sup>88</sup> It is argued that fixed percent limitation serves the following philosophy: “no taxpayer should be able to eliminate his or her entire tax liability through a combination of deductions, credits, and exclusions, no matter how meritorious their purpose.”<sup>89</sup> Usually, the percentage limitation affects only few taxpayers.<sup>90</sup> In Georgia, the 8 percent limitation appears to represent a political compromise between the government and the not-for-profit sector achieved during the lobbying for the new Tax Code at the end of 2004/beginning of 2005.<sup>91</sup> In Georgia, despite theoretical arguments to the contrary, the stipulated 8 percent limit can be considered adequate under the current conditions, as few companies contribute more than the given percentage of their profits to charitable organizations.<sup>92</sup>

### 2.2.1. DEFINITION OF “ENTERPRISE”

Turning back to the general meaning of Article 186, in order to understand correctly its implications, the terms “enterprise” and “donation” need to be explored further. According to Article 186 only an enterprise is able to get deduction from its gross income for a donation it makes to a charity organization. First, it should be determined which entities constitute enterprises under Georgian tax law. Under the new Tax Code “enterprise” is defined as an entity established to perform economic activities; among them legal persons established under the Georgian laws, entities created under the foreign laws and other unions, partnerships, and other legal entities.<sup>93</sup> Individual enterprise is not considered as an “enterprise.”<sup>94</sup>

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<sup>87</sup> Article 186 Tax Code of Georgia (2005).

<sup>88</sup> Steurle, *supra* at 409.

<sup>89</sup> *Id.* at. 411.

<sup>90</sup> *Id.*

<sup>91</sup> Interview with Mrs. Maia Meskhi, Director of the Legal Program, Civil Society Institute (Nov.26, 2006).

<sup>92</sup> ICNL, *supra* note 5, at 20.

<sup>93</sup> Article 25 Tax Code of Georgia §1 (2005).

<sup>94</sup> Article 25 Tax Code of Georgia §2 (2005).

It is obvious then that both physical persons and individual enterprises are left out of this definition and donations made by them to charitable organizations will not be deducted from their income. This appears to be discriminatory, it eliminates an incentive for physical persons to give, and it contradicts the international standards and principles of not-for-profit law.

Denial of a tax deduction for individuals appears to be grounded in the fact that generally physical persons in Georgia do not submit their tax statements to the tax authorities.<sup>95</sup> That is said to make it practically impossible to account for their annual incomes, thus making it difficult to supervise the proper application of the limitation on the deduction and to prevent the abuse of the given tax incentive.

These arguments do not, however, apply to individual enterprises. All individual enterprises, like other commercial entities, must present annual tax statements to the tax authorities. Thus, supervising the validity of the donation is exactly as simple as for donations of other enterprises. In my estimation, exclusion of the individual enterprise from the availability of a tax deduction is caused by the use of different definitions of individual enterprise in the Law on Entrepreneurs and the Tax Code.

The Law on Entrepreneurs defines the organizational-legal forms of entrepreneurial entities.<sup>96</sup> “Individual enterprise” is an organizational-legal form of enterprise,<sup>97</sup> which exercises its business relationships as a physical person; enterprises with other organizational-legal forms constitute legal persons.<sup>98</sup> In contrast with this definition, under the Tax Code individual enterprises are not enterprises for tax purposes.<sup>99</sup> The reason of this differentiation is that individual enterprises have easier and more preferential filing and reporting obligations. They also have different and more privileged tax rates. Although the lower tax rates may be a reason to exclude them from the deductibility of charitable donations, I think that in Article 186 on the deduction of donations the term “individual enterprises” should be added. This would make the tax incentive available to individual enterprise in the same manner as it is provided for enterprises, as defined in Georgian Tax Code, and it would provide more funds for charitable organizations in Georgia.

### 2.2.2. DEFINITION OF “DONATION”

Under the Tax Code of Georgia “donation” is not defined; it is therefore necessary to discover the meaning of the term in other laws. The definition of donation is offered by the Civil Code of Georgia. Under the section entitled “Gift” in the Civil Code, Article 528 bears the title “donation” and states that parties of the gift contract can determine that the validity of the contract is based on fulfillment of certain conditions or on achievement of certain goals. The goals may be for the common-benefit, making the gift a donation but not limiting the goals for which it can be made.<sup>100</sup>

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<sup>95</sup> *Supra* note 85, at 11.

<sup>96</sup> Article 1 Law on Entrepreneurs of Georgia §1 (1994).

<sup>97</sup> Article 2 Law on Entrepreneurs of Georgia §1 (1994).

<sup>98</sup> Article 2 Law on Entrepreneurs of Georgia §6 (1994).

<sup>99</sup> Article 25 Tax Code of Georgia §2 (2005).

<sup>100</sup> Article 528 Civil Code of Georgia §1 (2001).

This can be seen from the remainder of the Article. The wording of the last sentence of the Article does not exclude the possibility of personal-benefit from a donation. Furthermore, under the same Article, in addition to the donor, a person in whose interests a condition reserved may also demand fulfillment of the condition.<sup>101</sup> If the condition is not fulfilled, the donor can repudiate the contract.<sup>102</sup>

Based on the definition of “donation” under the Civil Code, it is clear that a donation does not necessarily have a gratuitous character.<sup>103</sup> Moreover a donation may also be a conditional gift. A conditional gift itself has an economic character, and, as discussed above, economic activity, whatever goal it serves, is never exempted from taxes.<sup>104</sup> I believe that a conditional gift entirely contradicts the essence of donation, for which a deduction is offered by the Tax Code. This shortcoming presents a serious gap in the legislation. According to the existing laws, an enterprise can donate money to a charitable organization in order to receive certain type of support from the organization. Despite the fact such a “donation” would have an economic character, it will be regarded as donation and the amount of money will be deducted from the gross income of the enterprise.

To my way of thinking, the legislator did not mean to make such abuse of Article 186 possible. To overcome this gap, either the Tax Code should define donation for its purposes, especially when the new Tax Code offers range of definitions different from the Civil Code, Law on Entrepreneurs, etc. Alternatively, the term “gratuitous donation” should be used in the Tax Code instead of “donation.”

### 2.3. OTHER INCENTIVES

It is an established practice to exempt from customs duties goods, supplies and equipment imported by the charitable organization and “(i) consumed by it in connection with [charitable activities]..., (ii) used by it for [[at least the predefined period of time]..., or (iii) distributed free of charge in connection with [charitable activities].”<sup>105</sup> Charitable organizations should also be given preferential treatment, or exemption from, import VAT on imported goods or services to be used for charitable purposes.<sup>106</sup> The Georgian legislation, however, does not envisage any specific customs or VAT benefits for charitable organizations.

A general exemption is provided by Article 8 of the Georgian Law on Customs Tariffs of July 25, 2006. Paragraph (f) of that provision states that an import of goods, which is the subject of a grant agreement concluded pursuant to the established rules on grants is exempt from the customs tariff. Paragraph (g) of the same provision also exempts from customs tariff the import

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<sup>101</sup> Article 528 Civil Code of Georgia §2 (2001).

<sup>102</sup> Article 528 Civil Code of Georgia §3 (2001); under the Article 352 (1) of the Civil Code in case of repudiation of the contract, received performance and benefit should be returned to the parties (restitution in kind).

<sup>103</sup> Daniel Csanady, *A Summary of the Evaluation of the Act on Public Benefit Organizations by Parliament Reflektor*, International Center for Non-for-Profit Law, 1998 (Editorial Note: ICNL incorrectly lists this as a 2006 document; it is a paper delivered at a conference in Budapest attended by the Editor), [www.icnl.org/knowledge/library/download.php?file=Hungary/evaluation.pdf](http://www.icnl.org/knowledge/library/download.php?file=Hungary/evaluation.pdf).

<sup>104</sup> Article 172(a) Tax Code of Georgia (2005).

<sup>105</sup> ICNL, *supra* note 5, at 19.

<sup>106</sup> IRISH ET AL., *supra* note 2, at 84.

of the goods, which is financed by a grant or by credits with at least 25 percent of a grant element in them, if the grant is made by a foreign state agency and/or an international organization.

It is a well-known fact that customs duties and import VAT are very difficult issues faced by charities particularly in developing and transition countries, which usually have rich experience in arbitrary use of the benefits by the fake organizations, etc.<sup>107</sup> The situation in Georgia is similar.<sup>108</sup> This is true despite that fact the state possesses a strong enough control mechanism to allow such an exemption for charitable organizations and prevent abuses (please see the discussion in the next chapter). In order to make it less expensive for charities to operate in Georgia, at least a general exemption from the customs duties should be adopted for all imports relate to their activities.

### CHAPTER III: STATE CONTROL OVER CHARITABLE ORGANIZATIONS

In my view, a mechanism of strict control by the state was established due to the past negative experience and abuses by charitable organizations. In 1993, when the Law on Corporate Profit Tax was introduced, a deduction not exceeding 10 percent of the taxable profit was provided for. Unlike the current rule governing the deduction of donations to the charitable organizations, the previous law determined deductions of the donations to various entities including but not limited to charities acting various areas of public life. Due to “poor tax administration and the flourishing of corruption [the law became one of the] most effective means of tax evading.”<sup>109</sup> In 1996 the easiest way of solving the created problem was adopted: the above-mentioned provision was abolished, and was eliminated from the Tax Code of 1997.<sup>110</sup> Hence, it is logical to assume that the inclusion of a similar provision in the new Tax Code of 2005, caused a harsher attitude of providing for a state control mechanism of the charitable sector.

It is unarguable that the state must have some kind of tool to control the enforcement of its laws. The laws are the collection of norms regulating one particular area of public life, and they should be clearly drafted to meet the needs of the society while leaving the state with enough power to control. In this chapter it will be argued that the existing norms governing various government relations with charitable organizations are too strict and protective of the state, though in some places they do serve the interests of the public. The analysis will explore the status qualification requirements, filing and reporting obligations of charities, public involvement, etc. from the point of state control and will further identify what parts of the legislation are unduly burdensome, and what needs to be changed in that regard.

#### 3.1. STATUS QUALIFICATION REQUIREMENTS AND GRANTING PROCEDURE

For an organization to qualify for the status of “charitable organization” it must be 1) registered; 2) it must be established to carry out charitable activities and 3) it shall have at least one year of experience in carrying out charitable activities.<sup>111</sup> When applying for the status, the applicant

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<sup>107</sup> *Id.*

<sup>108</sup> *Supra* note 91.

<sup>109</sup> *Supra* note 85, at 7-8.

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

<sup>111</sup> Article 32 Tax Code of Georgia §2 (2005).

organization must submit, together with other documents, the financial documents for the previous year approved by the independent auditor (balance sheet, profit/loss statement).<sup>112</sup>

In practical terms this means that if an organization is willing to obtain charitable status, it must act like a charitable organization for one entire year before applying for the status. The fact that it has so operated must be approved by an expert, independent auditor. Given that the status-granting body is the state, i.e. the Tax Agency consisting of tax (state) officials only (no external representation permitted), it can be concluded that the state fully controls the status-granting process.

Given the negative past of many charities in Georgia, it can be said that the requirement of one year experience in charitable activities is not a burdensome requirement. It can also be argued that this will have a positive influence on the public trust in charitable organizations, as it will truly filter out the fake ones and prevent them from obtaining the status.

### 3.2. NON-DISTRIBUTION CONSTRAINT AND GOVERNANCE OF CHARITABLE ORGANIZATIONS

Charitable organizations have the following distinct features: the non-distribution constraint and the tax incentives available to them as a result of being subject to the non-distribution constraint.<sup>113</sup> The non-distribution constraint is one of those features that distinguish charitable organizations from business companies.<sup>114</sup> Other benefits, such as tax exemptions, derive from and “are justified by adherence to the non-distribution restriction.”<sup>115</sup> The non-distribution constraint forbids charitable organizations to distribute their profit (income) to any private shareholder or individual.<sup>116</sup> Income in charitable organizations is typically expended (and saved or invested for future expenditure) for its beneficiaries, rather than distributed to shareholders.<sup>117</sup>

Here it needs to be mentioned that the new Tax Code prohibits the distribution of profits and assets of charitable organization to its members, founders, managers and members of the supervisory council.<sup>118</sup> The problem is said to be that the Georgian legislation includes merely a statement of non-distribution, and that it is a declaration with no guarantees. This kind of prohibition of non-distribution is deemed to be insufficient, as it lacks any indication of the results of non-distribution (sanctions). In addition, the Georgian legislation lacks a definition as to what will be qualified as a “distribution of profit,” hence precise elaborated safeguards and sanctions should be adopted.<sup>119</sup>

The Georgian Tax Code does not provide for any requirements as to the organizational structure of charitable organizations – the governance mechanisms for such organizations. Given

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<sup>112</sup> Article 32 Tax Code of Georgia §6 (2005).

<sup>113</sup> Karyn R. Vanderwarren, *Financial Accountability in Charitable Organizations: Mandating an Audit Committee Function*, 77 CHI.-KENT. L. REV. 963, 965 (2002).

<sup>114</sup> Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 501-02 (1981); Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 258 (1999).

<sup>115</sup> Vanderwarren, *supra* note 113.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 966.

<sup>118</sup> Article 32 Tax Code of Georgia §11 (2005).

<sup>119</sup> Csanady, *supra* note 103, at 2,

the absence of such requirements, charitable organizations are free to choose their own forms of governance, as long as this form is compatible with the general organizational structure of fund or union (association) (which are, as indicated in Chapter I, the only two organizational-legal forms of non-entrepreneurial legal entities that can receive “charitable” status) established by Georgian Civil Code. It is unequivocal that effective governance is crucial, because charities are, for the most part, self-regulated.<sup>120</sup>

In Georgia, given the lack of popularity of “charitable organizations” it is especially important to retain the public’s trust, as the failure to do so could have negative consequences for charities, such as decrease in donations. The ability to appropriately govern charities is key to their success.<sup>121</sup> Therefore the administration of charitable organizations must be required to perform its duties at a high level. Here it is notable that the Georgian legislation does not prescribe “fiduciary duties of loyalty and due care”<sup>122</sup> that apply to the directors, trustees, and officers of not-for-profit (including charitable) organizations in many countries. I believe that inclusion of the fiduciary duties of loyalty and due care with regard to charitable organizations (or even all types of not-for-profit organizations) will provide a basis for the establishment and future development of good standards in the governance of charitable/not-for-profit organizations. It is the actual practice that will show how strictly the fiduciary duties are to be interpreted and applied as time goes on.<sup>123</sup>

Analyzing the issue of fiduciary standards and adoption of other self-regulatory mechanisms in Georgia at the present time suggests the following:

- The current Georgian legislation regulates the organizational structure of not-for-profit organizations (association/union and fund) in general, and prescribes no limitation as to the governing bodies thereof. For example, it is permissible to have one person running a not-for-profit organization, and there are no limitations as to the delegation of authority between various governing bodies of not-for-profit organizations. As for the best practice in the area, the governing body of charitable organization should consist of at least five members and the essential part of its authority (approving assets, liabilities, etc.) must not be delegated.<sup>124</sup> It is unequivocal that this is a preventive mechanism of the abuse of powers inside the charitable organization.
- On the other hand, the adoption of amendments to relevant laws of Georgia that would require five member boards may result in creation of a burdensome obstacle for the existing charitable organizations, as they will have to change their organizational structure to fit the new requirements, and that may not be feasible at this stage.

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<sup>120</sup> Vanderwarren, *supra* note 113, at 967; James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 677 (1985).

<sup>121</sup> Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1406 (1998); Vanderwarren, *supra* note 113, at 969.

<sup>122</sup> The ABA Model Nonprofit Corporation Act, §8.30, §8.42 (1987); Brody, *supra* note 121, at 1406; Vanderwarren, *supra* note 113, at 967.

<sup>123</sup> See Eileen M. Evans & William D. Evans, Jr., “No Good Deed Goes Unpunished”: *Personal Liability of Trustees and Administrators of Private Colleges and Universities*, 33 TORT & INS. L.J. 1107, 1115 (1998). For example in the US the duty of due care has been relaxed from its earlier notions, which set much stricter standard of trust and required highest degree of honor and integrity.

<sup>124</sup> ICNL, *supra* note 5, at 17-18.

Therefore, at this stage it is probably sufficient to go with the existing safeguards provided by the Georgian legislation, such as a strict reporting and audit requirements, etc., which are discussed in the next section.

### 3.3. REPORTING OBLIGATIONS AND AUDIT; THE COMMON REGISTRY

Reporting obligations and audit represent a tool in the hands of state to ensure that the charitable organizations are fulfilling their tasks properly, without the abuse of powers by the charitable organization. States usually prescribe the rules governing reporting obligations and auditing in their laws and beyond that stay out of the business of charities unless problems arise and it is appropriate for the state to intervene.<sup>125</sup> It is an established practice not to burden small charitable organizations with weighty reporting and auditing requirements. For example the Model Provisions<sup>126</sup> include no “external reporting” requirements for small charitable organizations and an independent audit report only for big ones. Here, it is the state that assesses which charitable organizations may be considered small or large. The criterion for defining the size is the annual revenue of the organization, the amount of which shall be stated in the law. Those organizations whose revenue is less than the stipulated amount are free from audit and reporting obligations. As we will see, the Georgian legislation does not distinguish between large and small charitable organizations according to their revenues, and sets uniform reporting and auditing requirements for them.

Article 32.9 of the Georgian Tax Code sets reporting obligations for charitable organizations. Every year all charitable organizations “shall submit to the corresponding tax agency the following:

- a) Program report for the activities of the organizations in previous year, indicating description of implemented activities, including economic [ones];
- b) Financial statement on expenditures and income received, indicating income sources and purposefulness of expenditures;
- c) Financial documents for the previous year approved by the independent auditor (balance sheet, profit/loss statement).”

From this provision we learn that organizations having “charitable” status under Georgian legislation are obliged to submit annual reports of their economic and non-economic activities, financial statements, and profit-loss statement approved by an independent auditor. This rule applies to all charitable organizations no matter what the amount of their revenue may be or any other characteristic. The requirement of approval of the annual balance/profit-loss statement by an independent auditor is a well-proven “lowest-cost, most effective way to prevent, or at least detect, executive and employee theft or misuse of funds, and in the long run, maintain and improve the public trust in charitable organizations,”<sup>127</sup> But it also applies to all organizations regardless of size.

The law also requires publication of the required information. The program report, annual balance sheet, and benefit-cost analysis must also be made public and should be accessible for any interested person.<sup>128</sup> The requirement of publicizing the information (reports, balance sheet,

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<sup>125</sup> Brody, *supra* note 121, at 1406; Vanderwarren, *supra* note 113, at 967.

<sup>126</sup> ICNL, *supra* note 5, at 14-15

<sup>127</sup> Vanderwarren, *supra* note 113, at 988.

<sup>128</sup> Article 32 Tax Code of Georgia §10 (2005).

profit-loss statement) about charitable organizations is in essence an enactment of the principle of accountability, which serves as a guarantee of transparency and public accountability.<sup>129</sup>

Apart from the reporting requirements that it administers, the Ministry of Finance also administers the Common Registry for all the charitable organizations, where the following general information is kept: a) name of the organization, b) addresses of main office, branches and representations, c) major goals, d) date of granting the charitable status, e) names and addresses of the members of the major governing body.<sup>130</sup> If a charitable organization makes changes concerning the information provided in the Common Registry, it is obliged to notify in written form the corresponding tax agency within one month period after the changes are made.<sup>131</sup> The existing information in the Common Registry should be available for any interested person.<sup>132</sup>

In Georgian reality, these accountability requirements have stronger implications. As was discussed above, charitable organizations in principle are locally registered funds or unions (associations). If we bear in mind that “any interested person” may bring an appeal in court regarding the cessation or prohibition of the activities of the union or foundation<sup>133</sup> and considering the fact that the information regarding the charitable organizations is “open to interested person,”<sup>134</sup> then it can be concluded that quite a strict mechanism of public control is envisaged in the current legislation. This, to my way of thinking is, at the given moment, a positive step forward, as it truly strengthens the public trust in the charity sector.

## CONCLUSION

Analysis of the articles of new Tax Code concerning charitable organizations has shown all the innovations brought by the Code and identified the remaining shortcomings of the law. This paper constitutes a theoretical and practical assessment of Georgian legislation concerning charitable organizations and can be used by all the interested persons in the field. It is especially important when the interest in this subject has primarily been shown only by not-for-profit sector representatives, and no extensive study of laws on charitable organizations have been conducted since the adoption of the new Tax Code.

The concrete recommendations with regard to the various provisions are provided based on the current situation in Georgia, taking into account the real possibilities of changes and the previous experience of very slow tempo of reforms in this area of the law. The recommendations provided may seem insufficient in some cases or not exactly following the model law provisions or best practices, though they are achievable – and realistic -- at this stage for Georgia from my point of view.

In the first chapter, while discussing the charitable status granting procedure, it was shown that despite the detailed regulations, which at the first sight leave no space for any gaps, serious deficiencies remain. The regulations about the required share of economic activities in the total

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<sup>129</sup> Csanady, *supra* note 103.

<sup>130</sup> Article 32 Tax Code of Georgia §16 (2005).

<sup>131</sup> Article 32 Tax Code of Georgia §17 (2005).

<sup>132</sup> Article 32 Tax Code of Georgia §18 (2005).

<sup>133</sup> Article 35 Civil Code of Georgia §1-2 (1997).

<sup>134</sup> The practice shows that the term “interested person” can be virtually anyone, as the admissibility criteria in this regard is very lenient and requires no serious proof.

activities of the organization, the identification of beneficiaries are both missing. There are also some other weaknesses, e.g. closed list of activities, etc.

In the second chapter concerning the tax incentives, I concluded that only one tax exemption provision is effective, namely the deduction for donations to charitable organization available to enterprises, though this is not available to physical persons and individual enterprises. Having this as the only tax benefit does not make the Georgian tax policy stimulating the development of charitable organizations particularly friendly. Georgian charitable organizations are heavily dependent on foreign or local monetary assistance, to make them more viable and help them in broadening the scope of activities. Given that fact, at least economic activities related to charitable purposes should be tax exempt in certain amounts. It is of vital importance to establish and develop the culture for charitable organizations to engage in economic activities openly and meet the relevant filing and accounting obligations.

The third chapter: on state control over charitable organizations analyzed the obligations of charitable organizations as a tool of state control and proved that some of the requirements are excessive, however acceptable in certain instances. The system of state control should be balanced and burdensome requirements should be removed in exchange for additional directives on governance, which are well-elaborated and experienced by the other countries. These might include defining a charitable organization's governance regulations, defining the fiduciary duties of governing board members, etc.

In sum, it can be concluded that despite all the successful changes that are provided by the new Tax Code of Georgia, the existing legislative framework remains unsatisfactory for the enhancement of activities of charitable organizations. Simply put, the main reasons for that is the inability (or lack of will) on behalf of the state to balance the risks and priorities with regard to charity organizations. The biggest proof of this is the existence of comprehensive state and public control mechanism in the charitable sector on one hand, and the lack of incentives for charities, on the other. There are no persuasive arguments why an NPO seek the status of charitable organization at the present time, as the burdens are too great and the benefits too small. In my view, the state should show its good will to support the prosperity of charitable sector, as the efficiency of this sector and its vital role in promotion of democracy is widely recognized throughout the world.<sup>135</sup>

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<sup>135</sup>IRISH ET AL, *supra* note 2, at 14-16.

## APPENDIX<sup>136</sup>

### Tax Code of Georgia, 2005

#### **Article 14. Charitable Activity.**

1. For the purpose of this Code Charitable activities are:
  - a) voluntary, gratuitous assistance provided to persons in need of such assistance, directly or through the third persons, among them:
    - a.a.) physical persons in need of social protection or adaptation, medical care, physical persons with low income, among them: disabled persons, elderly, orphans, persons without a bread-winner, refugees and internally displaced persons, diseased, families with many children and their members, persons suffered from war, armed conflicts, accidents, natural disasters, catastrophes, epidemics and epizootics;
    - a.b.) organizations, providing nursing or other similar services to children, elderly and disabled persons, among them: orphan's homes, boarding-schools, pre-school and other children's institutions, retirement homes, free canteens, medical institutions and rehabilitation centers.
    - a.c.) charitable organizations;
    - a.d.) religious organizations;
    - a.e.) gifted physical persons for further development of their talent;
    - a.f.) penitentiary institutions for improvement of conditions for caring or medical services to prisoners;
    - a.g.) persons, carrying out activities described in Part 1.b of this Article.
  - b) public benefit activities, carried out by the organizations, in following areas: human rights protection, environment protection, development of democracy and the civil society, culture, education, science, medical care, social protection, physical education and nonprofessional sport, art.
2. Activities listed in the paragraph 1 of this Article shall not be considered charitable if:
  - a) they are carried out by the government agencies or self-governing bodies;
  - b) these activities are carried out in support of enterprises, political parties or candidates participating in elections;
  - c) activities carried out by physical persons for his/her relatives or by a legal person for the managerial staff of the entity or their relatives;
  - d) if the Law of Georgia "On Advertisement" defines it as sponsorship.

#### **Article 32. Charitable Organization.**

1. Charitable organization is considered an organization, which in accordance with this Article, is granted a status of the charitable organization.
2. The status of the charitable organization is granted to the organization, which is established to carry out charitable activities, is registered according to legislation, has at least one year of experience in carrying out of charitable activities and meets requirements defined by this Article.
3. Auxiliary economic activities, serving the major goals of the organization, does not change its charitable nature.

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<sup>136</sup> This appendix includes unofficial translation by the author of the main provisions of various Georgian Laws as used in the present Paper; please note that there is no official translation of Georgian laws in English.

4. The status of charitable organization is granted by the tax agency according to the organization's location, the status of the charitable organization is withdrawn by the Minister of Finance, based on the recommendation of the corresponding tax agency.
5. The status of the charitable organization is granted based on the written application of the organization. The application shall contain following information:
  - a) name;
  - b) organizational-legal form;
  - c) major goals;
  - d) basic directions of the activities of the past one year;
  - e) addresses of the head office and representations;
6. The following shall be attached to the application:
  - a) a copy of the charter of the organization;
  - b) a copy of the civil registration certificate;
  - c) the report of pervious year on activities, describing the conducted activities (projects, services);
  - d) financial documents for the previous year approved by the independent auditor (balance sheet, profit/loss statement).
7. Concerning the application the tax agency adopts the motivated decision within one month period. If the decision is not made within the established deadlines, the status is granted automatically. The granted status is termless. The status comes into effect upon its granting.
8. The organization that has granted the status, receives the status certificate, which includes:
  - a) full name of the organization, indicating the organizational-legal form of the organizations;
  - b) status;
  - c) address of the head office;
  - d) the date of granting the status;
  - e) identification number of the status.
9. Along with reception of the status, under this Code additional obligations and responsibilities are imposed on charitable organizations. Namely, before April 1 of each year, charitable organizations shall submit to the corresponding tax agency the following:
  - a) program report for the previous year activities, indicating description of implemented activities, among them economic activities;
  - b) financial statement on expenditures and income received, indicating income sources and purposefulness of expenditures;
  - c) financial documents for the previous year approved by the independent auditor (balance sheet, profit/loss statement).
10. Program report for the implemented activities and financial report (annual balance sheet, benefit-cost analysis) shall be made public and available for interested persons.
11. The distribution of tangible and monetary assets, as well as profit, between the members of the organization, founders, managerial board and the supervisory council is forbidden. In case of liquidation, the property of the charitable organizations shall be transferred to the organizations with similar goals and activities based on the decision made by the authorized agency or person(s). In case of non-existence of such organization, the property shall be transferred to any other charitable organization. The property of the liquidated legal person of the public law, established with the state property, shall be transferred into the state ownership.
12. The charitable status shall be annulled:
  - a) upon organization's initiative;
  - b) upon withdrawal of the status.
13. The status shall be withdrawn, in case of:
  - a) if the organization has violated requirements of this Law;

- b) if the civil registration of the organization was annulled.
- 14. In case of the status withdrawal, the organization shall repay benefit received due to concessions, established under this law.
- 15. Organization, status of which was withdrawn has a right to apply for the restoration of the status, at least one year after the status withdrawal reason is eliminated.
- 16. The Ministry of Finance of Georgia shall have a single registry of all charitable organizations. The registry shall contain the following information:
  - a) name of the organization;
  - b) addresses of the head office, branches and representations;
  - c) major goals;
  - d) date of granting the status;
  - e) names and addresses of the members of main managerial board.
- 17. In case of changes of the registered information, the organization within one month period after the changes, shall inform in writing the corresponding tax agency about the changes.
- 18. The registry of charitable organizations shall be accessible for all interested persons.

#### **Article 172. Tax Exemption**

The following is exempted from the profit tax:

- a) profit of budgetary, international and/or charitable organizations, except for the profit earned from economic activity;
- b) grants, membership fees and donations received by an organization;

#### **Article 186. Deduction on Donation to Charitable organization**

Amount of donation issued by an enterprise to a charity organization shall be deducted from its gross income, but not exceeding 8% of the sum of gross income, after the deductions from the gross income established by the law is performed (before the deduction according this article is performed).

#### **General Administrative Code of Georgia, 1999**

##### **Article 2. The Definitions of Terms**

- a) Administrative agency – all the government and local self-government agency or institution, legal person of Public law (except for the political and religious union), also any other person, which carries out public law authority based on legislation.
- d) Individual administrative-legal act – Individual legal act issued by the administrative agency according to the administrative law, which establishes, modifies, terminates or approves rights and obligations of person or limited group of persons. Individual administrative-legal act is also refusal of application by the administrative agency, which falls within its jurisdiction, also document issued or certified by the administrative agency, which can trigger legal consequences.

#### **Administrative Procedure Code of Georgia, 1999**

##### **Article 22. Appeal on Revocation and Invalidation of Administrative-legal Act.**

- 1. Appeal can be brought to revoke or invalidate the administrative-legal act.

**Civil Code of Georgia, 1997**

**Article 35. State Control of Activities of the Union and Foundation.**

1. Decision concerning suspension and prohibition of the activities of union and foundation is made by a court according to certain occasions and defined rules under the organic law.
2. If the union or foundation essentially carries out entrepreneurial activities, if the accomplishment of the objectives defined under its charter has become impossible; or on the bases of appeal brought by a tax agency or/and interested person the court decides on cessation or prohibition of the activities of the union or foundation.
3. On the bases of the court decision on prohibition of the activities of the union or foundation the registration of the organization should be annulled by the tax agency administrator of the state registry.

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## COUNTRY UPDATES

### THE CRISIS FOR CIVIL SOCIETY IN ZIMBABWE

BY KUMI NAIDOO AND CLARE DOUBE\*

#### INTRODUCTION

Zimbabwe is in crisis. The phrase has been repeated so regularly that it almost loses meaning – until you visit and see with your own eyes that Zimbabwe *really is* a country in crisis, on so many fronts and of such magnitude that it can't be ignored. The tragedy, though, is that it is being ignored at an official level in too many countries.

CIVICUS: World Alliance for Citizen Participation is an international alliance working to support and strengthen civil society around the world, including in Zimbabwe and many other nations. We have worked with partners in Zimbabwe for the past five years and in that period, have seen the situation tragically worsen. The observations in this article come primarily from two visits to Zimbabwe:

- 1) An African civil society solidarity mission, which CIVICUS facilitated in collaboration with the Crisis in Zimbabwe Coalition in November 2006<sup>1</sup>. This mission was composed of business, media, non-governmental organisation (NGO) and National Human Rights Institution (NHRI) leaders from seven African nations. It provided an opportunity for regional civil society to offer solidarity to Zimbabwean civil society during the country's humanitarian and human rights crisis. Mission members, some of them visiting Zimbabwe for the first time, independently assessed the space for civil society to function, particularly through meetings and discussions with various stakeholders. Discussions were also held on possible responses to the repressive legislative environment for civil society, and assistance that could be provided from the region.
- 2) Our follow up visit in April 2007, following the escalation of violence and repression during March. We travelled to Bulawayo and Harare, meeting with civil society organisations, speaking at a prayer meeting organised in Bulawayo on 14 April, attending a hearing at Rotten Row Magistrates Court in Harare and holding a press conference. Again, the primary purpose of the visit was to offer support and solidarity to our partners in civil society in the country.

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<sup>1</sup> The communiqué released by mission members, and the report of the mission are available at: [www.civicus.org/csw/African.CSO.Visit.Zimbabwe.Final.Report.pdf](http://www.civicus.org/csw/African.CSO.Visit.Zimbabwe.Final.Report.pdf)

## THE NATURE OF THE CRISIS

The complex, multi-faceted and interconnected nature of Zimbabwe's spiralling crisis must be recognised.<sup>2</sup>

That there is a *political* crisis has been well documented, with widespread denial of political rights. This includes the banning of political meetings and the detention and assault of countless opposition activists. On 16 April 2007, we visited Rotten Row Magistrates Court in Harare to attend a remand hearing of some of those who remain detained following the 11 March events.<sup>3</sup> We were informed that as well as the political opposition, the detainees include two civil society activists. Detention conditions are reported to be woeful, and the violence meted out by authorities immediately following 11 March has been seen on television screens around the world. Of particular concern are the estimates of the "disappeared", which have reached 600. Six hundred people whose location and treatment remains unknown, and six hundred families fearing for their loved ones.

It is also an *economic* crisis, with skyrocketing inflation and empty shelves. The fast-widening gap between the official exchange rate and the "real" value of the ZWD on the street is testament to the collapse of the economic system. Saying that the street value for hard currency is 80 times the official exchange rate is one thing, but the impact is brought home when this is compared in real terms – half an hour at an internet café, for instance, might cost around ZWD 30,000 but that could convert either to a reasonable USD 1.50 at the street rate, or to a truly shocking USD 120 at the official rate.

This has an impact on the humanitarian catastrophe that is modern Zimbabwe. It has been said that where Zimbabwe was once the breadbasket of the region, it has become the basket-case. This includes the disintegration of the medical system and virtually non-existent medical supplies, starvation and a phenomenal drop in life expectancy. These have been partly caused, and certainly compounded, by Operation Murambatsvina. This Operation, which has been translated as Operation "Clean out Rubbish" or "Restore Order" was a programme of mass, forced evictions and the demolition of homes and informal businesses which commenced on 18 May 2005. It was reported by the UN Special Envoy on Human Settlement Issues, Mrs. Anna Tibaijuka, that it affected some 700,000 people who lost their homes, their livelihoods or both in a space of six weeks. The effects have been exacerbated by a failure to implement the recommendations for resettlement in the Tibaijuka report.<sup>4</sup>

These inter-linking issues impact widely – from the international level down to the very personal, a human rights crisis at many levels. In this sense, it is also a personal crisis, with the widespread fragmentation of families. As one young man working at reception at our hotel said, "I love my city, and I love my country, but I am leaving next month. I don't want to leave but no one can survive here." Talented, enthusiastic people who are committed to their country but are forced to emigrate for their very survival is a tragedy for them and their families, but also for the entire nation.

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<sup>2</sup> A longer and helpful background paper on the current situation in Zimbabwe, which includes recommendations that are similar to the ones made in this article, was issued by Human Rights Watch on May 2, 2007. The report can be accessed through this link: [Bashing Dissent: Escalating Violence and State Repression in Zimbabwe](#).

<sup>3</sup> See [IJCSL Newsletter for April 2007](#), which describes the "March 11 events."

<sup>4</sup> See Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina, available at [http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe\\_rpt.pdf](http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf).

## THE CRISIS FOR CIVIL SOCIETY

It is also a *civic* crisis with many people being too scared, too tired, or just too hungry to be involved in community activities; or if they do act, often being harassed, threatened or even attacked. Organisations in Zimbabwe are facing growing government threats against their activities and their very existence, legal limitations on their work, particularly in organising public meetings, and a frightening rise in both open and clandestine attacks against peaceful civic activists. This has now become daily reality for activists in Zimbabwe - the fear that the trailing car may pull them into detention, being woken by a jolt of adrenalin when a car stops outside the house at night, the stories of torture and brutality meted out by the authorities, and the pain of saying goodbye to loved ones in the morning, not knowing if you will be returning to kiss them goodnight.

A major challenge faced by civil society is due to the legal framework, particularly the Public Order and Security Act (POSA)<sup>5</sup> and the Access to Information and Protection of Privacy Act (AIPPA),<sup>6</sup> both of which severely limit the legitimate work of civil society organizations (CSOs). There is the potential for this to be made worse by the proposed NGO Bill and the Interception of Communications Bill. Restrictions on freedom of association appeared to be intensifying with a reported statement on 16 April 2007 by the Minister of Information, Sikhanyiso Ndlovu that the government was going to deregister or cancel licenses of all NGOs and then only renew some of their licences.<sup>7</sup> While there appears to be no legal or technical basis for this, the sentiment behind the statement is deeply disturbing.

During our visit in November 2006, one issue raised by a number of groups as a limitation on their work was the requirement to inform the police whenever they plan to hold public meetings. Many groups pointed out that the police have interpreted this to mean that they must grant or deny permission for such meetings and as a result, some meetings had been cancelled when police permission has been denied.

During our recent visit in April, we saw this situation for ourselves, in the organization of a prayer meeting in Bulawayo on 14 April, at which CIVICUS gave a message of solidarity. Civil society representatives explained to us their frustration that they could be required to request permission to hold a meeting that was their right to hold. Permission was initially denied, but in the end the meeting was allowed to go ahead – the fact that negotiations needed to occur however, is a sad reflection on the restrictions on the right to assembly currently existing in the country. This situation is made worse by the orders promulgated by the Zimbabwe Republic Police that prohibit rallies and political gatherings. Following an appeal hearing, the Minister for Home Affairs has fortunately withdrawn two of these orders as they were deemed to be invalid under the terms of POSA; however, others remain in place.

Legislation, rules and orders are only one way that civil society is currently being restricted in Zimbabwe. As is so often the case, it is not just the words on paper, but how they are

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<sup>55</sup> Public Order and Security Act, available at [Kubatana - Archive - Public Order and Security Act \(POSA\) Jan 22, 2002](#).

<sup>6</sup> Access to Information and Protection of Privacy Act, available at [Kubatana - Archive - Access to Information and Protection of Privacy Amendment Bill, 2004 \[H.B. 12, 2004\] - Jun 01, 2004](#).

<sup>7</sup> See Blessing Zulu, *Alleging Foreign Influence, Harare Moves to Deregister NGOs*, available at [VOA News - Alleging Foreign Influence, Harare Moves To Revoke NGO Registrations](#).

implemented or interpreted that limits the space for civil society to function. While the 14 April prayer meeting went ahead, for instance, armed riot police and water cannons had a heavy presence in the area, intimidating people from attending. Even more disturbing was the leaked internal memo from the Police Commissioner, which stated that the police should identify the “ringleaders” of the event and were ordered “not to hesitate to shoot to kill.” They were also to be reassured that the “organisation will take full responsibility and protect its officers in cases of criminal and civil court cases.”

Such instances are used to daunt and intimidate civil society leaders and the general public. Recently, certain organisations, as well as individuals have been publicly identified and some have allegedly been placed on a “hit list”. During April, the Zimbabwe Republic Police released a report entitled *Opposition Forces in Zimbabwe: A Trail of Violence*, which attempts to undermine certain civil society organisations by criminalising their legitimate activities and falsely accusing them of promoting violence. The report, available on the Home Affairs website,<sup>8</sup> unjustifiably states that these organisations’ “defiance campaign for regime change and overthrow of the democratically elected Government of Zimbabwe has resulted in a plethora of criminal activities and political violence in the country.” Those identified in the report include organisations such as the Crisis in Zimbabwe Coalition, Christian Alliance, Zimbabwe Lawyers for Human Rights and Women of Zimbabwe Arise, which we have been working with for many years, and which we hold in the highest regard. That this report goes to such extent as to list names and addresses and identify registration numbers of cars used by civil society leaders is deeply disturbing. While those identified no doubt live in even greater fear than before, as organisations located at a safe distance we must remain ever vigilant and ensure that the authorities are aware that their actions do not go unnoticed.

## INTERNATIONAL ASSISTANCE

Just as the crisis in Zimbabwe has many faces, so too must any response. One of the other speakers at the prayer meeting on 14 April was a priest from Malawi who told a story of a grasshopper being moved only by the collaborative and cumulative efforts of many small ants. We must therefore consider what we, the small ants in Zimbabwe or scattered around the world, can do when faced with a grasshopper.

First, there is the concept of “solidarity”, of people across the globe standing with the people of Zimbabwe in their time of need, and of civil society groups standing with their counterparts. In this, the Southern African region has a particularly strong role to play. At a press conference in Harare on 16 April, Kumi Naidoo spoke not just as Secretary General of CIVICUS, but as a South African citizen when he said: “In our struggle for liberation, we received a lot of support from our brothers and sisters in what is now Zimbabwe. While that solidarity may have been led formally by the government in power at the time, we believe that the debt we owe as South Africans is not simply to the government of Zimbabwe, but to the people of Zimbabwe as a whole.” Countless people thanked us for taking the time to visit and for very briefly putting ourselves at what is in reality a tiny proportion of the danger that they face every day. Actions of solidarity from afar were also applauded, such as the trade union’s march in Johannesburg, South Africa, that was organised to coincide with the stay away in Zimbabwe. These say to the people of Zimbabwe that they are not alone.

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<sup>8</sup> See *Opposition Forces in Zimbabwe: A Trail of Violence*, available at <http://www.moha.gov.zw/trailviolence.pdf>.

Solidarity on the part of civil society, however, is not enough. As someone told us in Bulawayo, “It is government that can make things happen. Where are the strong statements from the governments of the region?” Our governments must stand up for what they profess to believe in: human rights, democracy and the rule of law. It is heartening to read some of their statements that are critical of Zimbabwean government action, but sadly these are few and far between. The response has largely been characterised by silence or mild concern in the face of mounting documentation of widespread human rights violations.

In this context, we must also recognise the relative value of actions by different governments. Partners in Zimbabwe were clear on this point, that to them, the role of African (and particularly Southern African) governments is crucial, but that it is South Africa that truly holds the key to unlocking the crisis. It is therefore fitting that President Thabo Mbeki has been mandated by SADC to facilitate dialogue between the government and opposition, and we wish him well in this challenging endeavour.<sup>9</sup> However, considering that the government and opposition are just two of the many players on the field, we encourage him to also engage the people of Zimbabwe through non-governmental organisations, trade unions and religious groups. This is essential in order to broach the current impasse and move toward sustainable change.

Inter-governmental bodies also need to stand tall. The crisis in Zimbabwe is in fact a crisis for the region and it is to the regional bodies that we look for leadership. Bodies such as the Southern African Development Community (SADC) and the African Union (AU), which are of course run on the taxes of citizens of those respective regions, have a particular responsibility to act with integrity and strength. If they are unable to respond to such a situation, it will only make us all question the viability of the institution as a whole.

In talking about the recent extra-ordinary SADC summit that discussed the situation in Zimbabwe, a Catholic priest in Zimbabwe said to us, “Our greatest disappointment has been the lost opportunities on the part of governments. Mugabe came back from the SADC meeting saying that they had supported his beating of the opposition – and SADC let him get away with it. This makes the government look invincible, which terrifies people and makes them lose hope.”

This underscores the power of information – and of misinformation. In a country where all broadcasters are government owned, there is little hope of unbiased information, particularly in rural areas. There are, however, a number of organisations and individuals in Zimbabwe documenting the situation, often at extreme risk to themselves and their families. There is the case of Edward Chikomba, for instance, the cameraman whose footage of members of the opposition entering court in March with serious visible injuries from their time in custody was seen on television screens around the world. Soon after, he was badly beaten and then murdered,<sup>10</sup> allegedly as a result of releasing this footage, and no doubt as a warning to his colleagues.

It is imperative that those who sit in safety make use of information collected in order to raise awareness of the reality within the borders of Zimbabwe. Ironically, often it is only through international sources that people know what is going on in their own nation. Such violence is only expected to increase in the lead up to any elections, as well as if the notorious Angolan

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<sup>9</sup> A March 28-29 summit of the Southern African Development Community held in Dar es Salaam, Tanzania, mandated Mbeki to “to continue to facilitate dialogue” between Zimbabwean authorities and the opposition.

<sup>10</sup> See [Missing Zimbabwe Journalist found murdered](#), available at [Missing Zimbabwe journalist found murdered](#).

“ninjas” are used<sup>11</sup>. At these times, documentation and dissemination will be particularly essential, both to help prevent further violations as well as to limit impunity.

## CONCLUSION

At other points in history in several countries around the world, it has been essential to support those fighting injustice on the ground. The experience of South Africa offers one such recent example. While democracy and freedom were won largely through courageous efforts within the country, support from neighbouring governments and citizens was crucial. While differences obviously exist between the struggles of South Africa’s anti-apartheid activists and Zimbabweans today, the daily reality is similar, as are the underlying demands – the demands for equality and justice, for the full enjoyment of our human rights and to be treated with respect and dignity. These are not fanciful requests but promises contained within regional and international treaties the Zimbabwean government has agreed to implement. These words linger on paper but are far from the living reality of Zimbabwe.

Today, when our brothers and sisters in Zimbabwe need the same support, our leaders largely stand aside, arguing that the problems can be rectified merely through political party negotiations. Governments in the Southern African region, and regional bodies, founded on the defence of justice and human rights and funded by our taxes, have a particular responsibility to act with integrity and strength. We must look beyond politics and listen to the voices of the people of Zimbabwe. It is imperative that we must all stand up and offer solidarity. This is not a time for indifference, inaction and platitude. Silence is not an ethical option.

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<sup>11</sup> The “ninjas” are an Angolan paramilitary force feared for their brutality. Between 2,500 and 3,000 are expected to arrive in Zimbabwe from April 2007 onwards, although Zimbabwean authorities claim they are only in the country on routine exchange programmes.

## CASE NOTE

### ***KHAWAJA* DECISION AFFORDS LITTLE RELIEF FOR CHARITIES**

BY TERRANCE S. CARTER, B.A., LL.B. AND TRADE-MARK AGENT  
AND SEAN S. CARTER, B.A., LL.B. AND J.D. CANDIDATE

#### **I. INTRODUCTION**

Since the first wave of anti-terrorism legislation was declared in force in late 2001, its shadow has loomed large over Canadian charities and their foreign operations. The case of Mohammad Momin Khawaja, the first person to be charged under the core “terrorism” provisions in Part II.1 of the *Criminal Code* (“*Code*”), presented essentially the first chance to judicially review this controversial law. In *R. v. Khawaja*, [2006] O.J. No. 4245, Mr. Justice Rutherford of the Ontario Superior Court of Justice struck down a portion of a definition of “terrorist activity” in the *Code* that dealt with purpose and motive. The decision, released on October 24, 2006, was met with mixed reviews by anti-terrorism legal commentators, some of whom initially heralded the case as a powerful blow to draconian legislation. However, the impact upon Canadian charities, which are particularly vulnerable to the sweeping “facilitation of terrorist activity” (“facilitation”) provision in section 83.19 of the *Code*, is not encouraging. In fact, the decision offers charities little relief from their susceptibility to unintentional contravention of the law.

#### **II. COMMENTARY**

Mr. Khawaja’s defense counsel raised three main challenges to the provisions of Part II.1 of the *Code*: overbreadth or vagueness; lack of a *mens rea* requirement; and the violation of *Charter* rights by the “political, religious or ideological purpose, objective or cause” portion of the 83.01(b) definition of “terrorist activity”. The particularly troubling part of the decision for charities was the court’s decision to uphold the law in terms of its breadth and the *mens rea* requirement concerning the definition of “facilitation”. In this regard, there are significant risks that a charity involved in conducting aid or humanitarian programs in a conflict area could unwittingly be found to have facilitated a terrorist activity.

Justice Rutherford recognized that there would be situations “in the periphery” that would inadvertently be caught by the sweeping net of the definition, such as a doctor administering emergency aid to a patient involved in a “terrorist activity” or a waitress serving food to members of a “terrorist group”. However, even though the decision recognizes that some humanitarian activities could be caught by the applicable definitions under the *Code*, the law as a whole was upheld because it purportedly would be counterbalanced by a “judicial determination”. Yet, even if a trial judge adopted the same interpretation of the *Code* as Justice Rutherford, the detrimental effect on a charity and its operations would have already occurred once charges had been laid. A charity charged with facilitation could undergo the freezing of its charitable assets, and the charges would likely jumpstart the deregistration process under the *Charities Registration (Security Information) Act*. The fact that these types of charges were being laid in Canada against a charity would likely create a domino effect throughout a charity’s worldwide operations. In addition, these charges would have a disastrous effect on donor confidence and public trust.

The potential for inadvertent contravention of the *Code* by charities was not helped by the fact that the decision upheld the definition of “facilitation”, even though it was found to be in essence devoid of a *mens rea* requirement. This is particularly disturbing because charities are most at risk of unwittingly contravening the legislation in the course of their operations. Justice Rutherford acknowledged the significant concerns that the *mens rea* requirement was significantly diluted or even absent in the definition of “facilitation”. However, likening the *mens rea* in the “facilitation” definition to “conspiracy” provisions in the *Code*, Justice Rutherford suggested that the diluted *mens rea* requirement should be interpreted as a “non-specific guilty mind”. Justice Rutherford recognized that since this definition could conceivably encompass situations and activities not intended by the legislation, he again suggested that a “judicial determination” would temper the negative impact by filtering these charges. As has been discussed, however, exoneration at this stage may be too late for charities and their operations, the damage having already been done.

The definition of “terrorist activity” and its “political, religious or ideological objective or cause” motive requirement was found to be an infringement on an individual’s rights as guaranteed by the *Charter*. In his ruling, however, Justice Rutherford severed this portion of the definition from the rest of the anti-terrorism legislation, declaring the remainder of the anti-terrorism provisions to be in force. Whether the Crown’s case prosecuting a charge of “terrorist activity” will now be easier in the absence of this element remains in question. Most, if not all, of the known perpetrated acts of terrorism in Canadian history would undoubtedly meet the motive requirement, therefore making its inclusion or exclusion irrelevant at best. Justice Rutherford recognized an inherent problem with the motive requirement, specifically that it can lead to racial or religious profiling. However, it is unlikely that vulnerable charities, especially those which are Islamic in purpose, would face less scrutiny by authorities because the motive requirement is now absent from the definition.

### III. CONCLUSION

The spectre of a Canadian charity being investigated and charged under the terrorism provisions of the *Code* is becoming more of a reality. Not only has Canada Revenue Agency recently been given significant resources dedicated to the oversight of the charitable sector,<sup>1</sup> the federal government has recently passed the latest round of anti-terrorism legislation that specifically targets monitoring and investigation of terrorism allegations against charities. Bill C-25 “*An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*” was granted Royal Assent on December 14, 2006. The amendments contained in this Bill will greatly increase the level of information sharing and collection among virtually all federal agencies that would potentially investigate or bring allegations and charges against charities and their directors and officers.

Given the context of recent legislative initiatives that focus on charities and terrorism, the decision in *R. v. Khawaja* does not bode well, particularly for charities that work outside of Canada. Charities have and continue to be treated as “crucial weak points” in the global “war on terror”, and decisions like *Khawaja* underscore the fact that the tremendous burden of compliance

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<sup>1</sup> Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness for Wednesday, May 18, 2005, transcripts available at: <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=117505>

with sweeping anti-terrorism legislation has not yet been lightened and made realistic.<sup>2</sup> However, at least a door has been opened for further judicial review and scrutiny of anti-terrorism laws, as the decision did identify the problems of racial and religious profiling. Until further judicial scrutiny is undertaken, charities need to continue to be proactive in pursuing due diligence measures to try and minimize the risks inherent in the application of the existing anti-terrorism laws in Canada.

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<sup>2</sup> Financial Action Task Force on Money Laundering, “Combating the Abuse of Non-profit Organizations: International Best Practices” 11 October 2002.