

THE LEGAL ENVIRONMENT OF CIVIL SOCIETY

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Introduction

Civil society cannot be reduced to a single definition. It cannot be reduced to legal components. A flourishing civil society depends on the freedom and commitment of individuals pursuing their own chosen ends, whether personal or communal. There is a fundamental tension between civil society and legal systems, perhaps even between civil society activists and lawyers! As the free space between the state and the market, beyond family and the personal (to follow broadly the operational definition employed by the editors of this Yearbook, Anheier, Glasius, and Kaldor 2001: 17), much activity that the concept embraces is informal, not organised into formal structures, and thus is not formed by, or in need of, law. Such activity is of course subject to law in the sense that the law sets bounds to individual action. The state requires its citizens to be law-abiding; civil society does not accept this unconditionally. Acceptance of the law, as an emanation of the state, is conditional, reflecting the defining role of civil society in a healthy democratic society to challenge, as well as cooperate with, the state. A legal framework constrains that freedom and flexibility; yet organisational security depends on a secure legal framework. The aim of this chapter is to unpick the paradox that civil society both needs the law and is threatened by the law. Drawing on worldwide experience, it seeks to demonstrate how an enabling legal environment enhances civil society while a hostile legal environment endangers it.

The threat which law poses for civil society is easy to see. The (oversimplified) notion of civil society as a sphere set apart from the state and holding it to account sets law, a mechanism of the state, against civil society. Legal systems as they apply to civil society take many forms, but registration is a basic element in legal frameworks for civil society organisations. Registration may be with government or the courts—and is thus potentially, and all too often actually, a mechanism of state control. What

purports to guarantee rights and freedoms in practice often undermines the independence of civil society and threatens its freedom to act as a check on abuse of state power or corruption. Provisions which create an organisation in legal terms, thereby enabling its members to operate effectively, may be misused as a mechanism to control what they may freely do.

Civil society has been described (by Barbara Young at the launch of the report of the Commission on the Future of the Voluntary Sector 1996), as a 'loose and baggy monster' encompassing a diversity of forms and activities which defy definition. While world-renowned organisations like the Red Cross are large, powerful, structured institutions, the vast majority of civil society organisations are small, local bodies rooted in their communities, such as tenants' associations or childcare groups. These are at least as important to civil society as their better-known counterparts. Arguably, by expressing and meeting the needs of the community, and by reflecting the diversity of human interests and activities, they form the heart of civil society. Their essence is the free expression and pursuit of the legitimate interests of individuals coming together for their common purposes. There is much evidence from the developing world that such small-scale initiatives are highly valuable to local people, yet invisible to the outsider. In Pakistan, for example, *tanzeems* (citizens associations) are the commonest form of organisation on *katchi abadis* (areas of squatters' housing). The *tanzeems* organise water, sewage, employment, social services, and education for residents, yet are not formally recognised by the authorities (Fernandes and Fernandes 1997).

Such organisations may find that observing legal form is a bureaucratic burden and that registering with the authorities undermines their freedom. And indeed civil society can flourish in adverse conditions, for example in Kosovo before the 1999 war. Despite overt oppression by the Serbian government, Kosovans fulfilled 'the anarchists' dream of collective responsibility, self-help, creativity and self-control' (Knight 1999).

Box 9.1 : Secret schools in Kosovo: between civic action and legal void(s)

Starting the new school year belatedly in January 1992, Albanian pupils greeted their teachers in living rooms, garages, shops, and cellars throughout Kosovo. That year the school bells rang for only a handful of Serbs and Montenegrins: although comprising a 10 per cent minority, they were now almost sole occupants of classrooms in Serbia's disputed province. The application of ethnically discriminatory education and labour laws by Serbia after its forcible abolition of Kosovo's autonomy in 1989 rendered Albanian pupils schoolless and their teachers and administrators jobless.

The number of places for study in Albanian was disproportionately reduced at all levels of education, leaving learning in Serbian the only option for thousands of Albanian-speaking students. In addition, the Serbs took over control of the school curricula for Albanians. When Albanians attempted to defy the Serb-imposed education laws by returning to the classrooms, they were physically prevented from entering their schools and lecture halls.

The clampdown on the Albanian-language education system was only a part of a comprehensive legal assault on Albanians spearheaded by the Serbian state and backed by its repressive security apparatus. It resulted in the Serbs' total ownership of the state, the economy, and the social and cultural sector, and the Albanians' total disenfranchisement in Kosovo. However, it also galvanised the province's marginalised and humiliated Albanian 90 per cent majority into decisive action, prompting a tide of civic initiatives in the post-autonomy period.

Defined by its resistance to the Serbian state, Albanian civil society in Kosovo resorted to self-organisation: from the provision of health care and humanitarian aid to activities aimed at defence of human rights, development of an independent press, and struggle for gender equality. After recovering from

its initial numbness following the ruthless Serbian action, the Albanian community was bustling with action. It was realisation of civic empowerment that triggered the turn-about. Albanian-language education was its showcase.

The cause of learning in the Albanian language mobilised the entire Albanian community in Kosovo as organisers, teachers, parents, students, or home-owners who voluntarily turned their houses into classrooms and schools. The restoration of education in private houses in Kosovo for nearly 400,000 Albanian primary and secondary school pupils and university students, taught by over 20,000 teachers and lecturers, was not just an organisational coup. The education system became a source of Albanian national confidence and pride, but also an embodiment of non-violent Albanian resistance to Serbian oppression in Kosovo.

Albanians' educational efforts thrived on enthusiasm and dedication to civic action, but also on endorsement of the Albanians' national cause over nearly a decade of peaceful struggle in Kosovo in the 1990s. Yet, at the same time, the so-called Albanian parallel education system was being steadily emaciated, to the point where its survival was threatened, by the legal void in which it operated, in relation to both the repressive Serbian state and the Albanian parallel state-in-the-making in Kosovo.

The Serbian state's lack of accountability for human rights violations made Albanian students and classrooms an easy target of violence by Serbian security forces stationed in the province. School lessons were often broken up by Serbian police, students were harassed for carrying school diplomas with the stamp of the self-styled Albanian Kosovo Republic, teachers were beaten and even killed for teaching Albanian national content, and sporting events were interrupted. Random violence made the civil act of education a

Yet legal form gives civil society organisations security through enshrining rights in law; it strengthens their capacity to engage with other organisations and with other spheres, both public and market; and it is the basis for integrity. Civil society manifestations like the *tanzeems*, or Kosovo's parallel system under Serbian rule, have no such security. Thus, while a

hostile legal environment constrains, controls, and undermines civil society, an enhancing legal environment underpins civil society by giving it rights and security. What is the basis for an enhancing environment? What are its principles? And how may it be fostered?

daily exercise of national resistance. The sharp decline in the number of young female primary and secondary school pupils and male university students in the Albanian parallel schools and university was a direct outcome of existential insecurity caused by the impunity of the Serbian state.

At the same time, the nascent Albanian state in Kosovo appropriated civil society's feat in the sphere of education, presenting it as a proof of its existence and competence. However, the Albanian-language education system could not rely on its legal infrastructure. It was to be additionally strained by an incomplete regulatory framework in the self-organised Albanian institutions in Kosovo quite apart from the repressive environment created by the Serbian state.

The Albanian parallel state in Kosovo was reduced to the office of the president and a handful of ministries. Efforts to constitute a clandestine parliament failed due to a volatile security situation. Consequently, active Albanian institutions in Kosovo likewise remained unaccountable to the electorate. Being the most important functioning segment of Albanian society in Kosovo, Albanian-language education was affected by the ambiguity inherent in the Albanian national struggle in Kosovo in the 1990s.

The issue of funding the parallel Albanian society and state in Kosovo is illustrative. What was originally envisaged as a voluntary citizens' contribution to the Albanian organisational effort became an obligatory tax on Albanians in Kosovo and abroad. But, without a legislative infrastructure to enforce payment of the tax, the only sanction available to the Albanian authorities in Kosovo was social excommunication. It proved to be a weak deterrent.

Soon after the launch of parallel education in the early 1990s, Albanian teachers stopped receiving any payment for their painstaking effort to provide

schooling in the native tongue. The tax collection effort faltered at home not only because of the impoverishment of the population but also because of tax evasion. At the same time, the Albanian diaspora failed to deliver funds following a political rift between the Kosovo-based and the diaspora-based institutions of the Albanian parallel state.

Centralisation of funding of Albanian-language education was in line with the Albanian leadership's ambition to pursue national resistance in Kosovo as a state-building project rather than as a national movement thriving on grass-roots action. Similarly, political interference in the appointment of educational administrators aimed at enhancing the power of the Kosovo Democratic League—the largest Albanian party, headed by national leader Ibrahim Rugova—reflected the state's ambition to strengthen itself through the political control of education.

The Albanian state in Kosovo was never fully constituted and its weakness did not widen the field for citizens' action. Civil society in Kosovo suffered from the inability of the Albanian state to provide a legal framework conducive to its flourishing. However, it also suffered from the parallel state's lack of recognition of the power of civic organisation independent from the state and its quest for ultimate control. Nonetheless, the Albanian parallel education system in Kosovo from 1992 to 1999 remains testimony to the power of civic organisation in the face of the repressive Serbian state, and in spite of the weakness of its own, albeit incomplete, Albanian parallel state.

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Human Rights as the Underpinning of Civil Society Law

The basis of civil society is freedom of association, expression, and assembly. The evolution of civil society and its legal basis reflects its changing

engagement with the state through history. Throughout history governments have sought to set limits to citizen association; constitutions have set frameworks within which citizen action may or may not take place. Both in theory and in practice citizen organisation is now underpinned by the international instruments which were developed during the

twentieth century to protect human rights. Central to these is the UN Universal Declaration on Human Rights enshrining basic freedoms, including, centrally, freedom of expression (art. 19), freedom of assembly, and freedom of association (art. 20). Explicitly or implicitly they guarantee the right to form and operate civil society organisations, and provide an international basis for civil society law. The Universal Declaration of Human Rights has a normative effect as a statement of standards to which member states of the United Nations are expected to adhere. This means that, at the global level, the concept of civil society is reflected in the fundamental legal expressions on which civilised society is based. This in turn means that laws and practices at state level which violate these principles breach international standards and are in that sense against the law. This is of crucial importance in promoting civil society globally. The fact that there is a legal basis for civil society at the international level does not, of course, mean that it is enforceable.

The Universal Declaration does not have a direct binding legal effect in itself. Many of its provisions are, however, included in the International Covenant on Civil and Political Rights (ICCPR), which does create direct binding obligations on the 143 countries which are party to it (see Record 8 in Part IV of this Yearbook). At the regional level there are human rights conventions, such as the American Convention on Human Rights, drawn up by the Organisation of American States; the African Charter on Human and Peoples Rights (Organisation of African Unity); and the European Convention on Human Rights (Council of Europe), all of which enshrine the rights of association, expression, and assembly. For countries which have ratified the European Convention on Human Rights, these rights are enforceable through the courts of the individual member states and ultimately through the European Court of Human Rights (ECHR) in Strasbourg.

These rights set the principles for informal civil society activity and for organised activity at the local level. Thus, associations of individuals pursuing common interests, whether they be social, mutual support, sport, or some other activity, are protected by the framework of human rights law. Written constitutions often translate these rights from

international to national level. Securing these rights does of course depend on their being respected by the authorities and upheld by the courts.

Legal Personality

What human rights do not do, even when expressed in national law, is to give voluntary associations a legal personality distinct from their members. Such a personality is desirable as soon as an association reaches even a modest level of complexity. It is therefore necessary for the law to provide a framework which allows for the establishment of legally distinct organisations. Establishing a civil society institution with a distinct legal personality, whether in the form of an association, foundation, or whatever, should be at the discretion of those responsible for the organisation; but it should be a *right* which they can exercise if they so choose.

Legal personality is basic to formal organisation. Groups of like-minded individuals can operate informally. That indeed is the basis of association. Where such groups lack legal personality, the individual members themselves, individually and collectively, constitute the body for legal purposes. This is not normally an inconvenience for small bodies without significant property, let alone legal transactions. But as soon as an organisation requires a continuing identity of its own, it is important that the organisation becomes a legal entity in its own right. Lack of legal personality makes ownership of property and other resources complex and inconvenient. It also makes it difficult to protect members of the organisation from excessive personal liability. Thus, legal form is a basic necessity for civil society activity beyond the simplest scale.

The right to create a civil society organisation with its own legal personality thus brings the benefits of security and identity—part of the richness and diversity of a free society. It also creates a framework for openness and integrity of civil society organisations and indeed for protecting society from abuse by such organisations.

Formal organisation and process may not be necessary for community organisations operating at local level (like the *tanzeems* referred to above), where the people involved and the reputation of

The basis for civil society is freedom of association, expression, and assembly

their organisation are personally known within the community. But the anonymity of more complex societies, and above all global society, where reputation cannot easily be checked, requires formal organisation and processes.

The Law and Global Civil Society

Civil society operates at the global level; but we cannot really talk of a global civil society legal framework, even though, as discussed above, international human rights law provides an indispensable basis for civil society. Much global civil society activity is, from a legal point of view, informal. It consists, that is to say, of alliances, networks, and movements which depend on global cooperation and communication but do not have a global or supranational legal framework. One example combining the local with the global is Slum/Shack Dwellers International (SDI), a network of NGOs and community-based organisations for the urban poor (Patel, Burra, and D'Cruz 2001).

Those parts of organised civil society which operate globally likewise do not depend, and are not founded, on international law. This reflects the fact that most law is based on national, or indeed sub-national, jurisdictions. Not only are legal systems integral parts of individual countries, court systems, and legislatures; the essence of law is enforceability and, with important exceptions, enforcement is through courts rooted in national or sub-national institutions.

Thus, US not-for-profit organisations have their legal basis at state rather than federal level and, wherever they may be active, basic legal enforcement will be through the courts of their state of incorporation. Even international civil society organisations are based in specific jurisdictions. The Red Cross movement is a characteristic example of global civil society, consisting from the legal point of view (and indeed in practice) of a federation of independent but affiliated national Red Cross and Red Crescent organisations. The British Red Cross, for example, is an English-registered charity. The legal status of the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, while guaranteed

under the Geneva Conventions, is governed by Article 60 ff. of the Swiss Civil Code. In other cases, international civil society organisations may be registered in one country with powers to act across the world. For example, Worldwide Initiative for Grantmaker Support (WINGS) (URL) was a project of the US Council on Foundations, but it has a rotating secretariat, now based at the European Foundation Centre, registered in Belgium.

Even where national law is subject to a supranational framework, as for example in the European Union, civil society law remains essentially reserved to national legal systems. There are moves to develop a legal framework at EU level for civil society associations and foundations; thus far, they remain proposals. The European Association Statute, which would give legal standing throughout the EU to associations accepted in any EU jurisdiction, has languished in draft form for many years (European Association Statute 1992; 1993). More recently the European Foundation Centre has been developing a model statute for foundations at EU level (European Foundation Centre). However, there are formidable technical as well as political problems to overcome before such initiatives can be realised, even within a political union as close as the European Union. So, for the foreseeable future, we have to approach the subject of global civil society law, paradoxically, through national legal systems.

Whether, in an ideal world, it would be advantageous to have globalised law or more generally supranational laws at the level of operation is a moot point. At first glance there might be attractions of convenience in having, say, a UN-based—and enforceable—code of law under which civil society organisations could operate with legal standing throughout the world. Whether an 'International Court (and Commission) for Civil Society' would in practice make it easier for civil society organisations to operate globally is doubtful, at any rate for the foreseeable future. Perhaps laws, institutions, and society operate best at the level where they customarily interact. Developments within growing political unions like the European Union may test the potential for supranational law. But, for the

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present, 'civil society of the world' seems as much a metaphor—as opposed to a concrete reality—as 'citizen of the world'.

Balancing Rights and Responsibilities

A framework of law that enhances civil society requires a careful balance between rights and responsibilities; between the entitlement of individuals to come together to pursue their own and the wider community's interests, and the right of society at large to have reasonable reassurance that such organisations are what they say they are, and in particular that they are not covertly abusing their position in ways that go beyond the legitimate exercise of individual freedom.

Balancing rights and responsibilities is an extremely sensitive matter. It has to take account of the nature of the civil society organisation: its sphere of activity; the benefits and reputation its status accords it; the scale of its activities; the power and influence it exercises. Proportionality is a key requirement: the smaller and more personal the organisation, the less the complexity; the larger and more powerful, the more rigorous. Power is of course a relative concept. A body may be extremely influential even though it is small, just because its voice is powerful. It is part of the strength and value of civil society, its contribution to free and diverse societies, that civil society organisations do exert influence. Indeed, some NGOs exert at least as much influence in some international negotiations as small individual states. But this itself creates responsibilities for civil society, in particular to avoid abusing its influence.

Accountability is discussed later in this chapter. At this point it is sufficient to say that the balance between power and influence on the one hand and accountability and responsibility on the other is perhaps more complex and sensitive for civil society bodies than it is for public and market sector organisations. In democratic constitutions, public sector bodies are, in theory anyway, subject to some form of electoral accountability, indirectly if not directly; and market organisations may have

shareholder accountability. Independence is both an essential characteristic and a responsibility of civil society organisations. This means that their legitimacy must be established in different ways from public and market sector bodies. Depending on the benefits accorded by law and government, the legal and regulatory framework should serve to achieve this; but much weight should be accorded to the standards developed by civil society organisations themselves individually and collectively. 'Self-regulation', especially promoted on a peer-group basis, is a vital component of a credible civil society framework.

The relationship of civil society to society at large and to the governmental structure responsible for its overall well-being is a sensitive issue. The role of civil society as watchdog, checking potential abuse of power by state organs, is a fundamental aspect of its place in both open societies and those that lack freedom. The relationship of civil society to the law is thus conditional, dependent on the respect that the law and its enforcement show to the independence of civil society.

Where necessary civil society operates outside the law: for instance, paving the way for the breakdown of Communism through initiatives like Czechoslovakia's Charter 77 (see Box 9.2), Hungary's Civic Forum, and Poland's Solidarity Union.

Freedom depends on the willingness of individuals and groups to counter abuse of state, and other, power. International instruments provide a frame of reference beyond the state to which individuals and groups may appeal in defence of their action against abuse of power. But it places a greater responsibility on civil society to ensure that it operates within the framework of the well-being of society. It ought to be a responsibility of the state, in maintaining a framework of law to support and encourage an independent civil society sector, to set limits to underpin the integrity of civil society. It is easy to exceed these limits. A representative example is Pakistan. The Constitution of Pakistan 1973, following the two previous constitutions, recognises the right of association, but subject to broad-brush 'reasonable limitations'. Article 17 says: 'Every citizen shall have the right to form associations or unions subject to any reasonable restrictions imposed by law in interests of

The challenge to reform is to obtain respect for the basic freedoms. Where that is lacking civil society may have to operate outside the national law

sovereignty or integrity of Pakistan, public order or morality.'

On the other hand, the idea that the exercise of the basic freedoms is automatically good and enriching to society is naive. The diversity of pluralistic democratic societies may be rich and, for the majority, positive. But that stops short of automatic validation of all exercise of freedom and of the organisations to which freedom gives rise. One can, of course, apply the term 'civil society' normatively, as some authors do, to embrace only organisations which do contribute, directly or indirectly, to the well-being of the community (see Anheier, Glasius, and Kaldor, 2001: 15–16, and Howell and Pearce, 2001: 230–1, for discussions of empirical versus normative conceptions). But that introduces a subjective test, on which agreement will be impossible to achieve and which is therefore difficult to subject to legal determination. More seriously, it oversimplifies the range of relationships between civil society organisations of varying types and the public interest. Many civil society organisations are, by their very nature, concerned with the sectional interests of their members. This may contribute to the public well-being, for example, through the protection of the environment or heritage. But it may equally advance the interests of the members at the expense of the interests of others. Thus, associations formed, perfectly legitimately, to pursue the interests of one group in the community, say in the enjoyment of facilities in their area, may conflict with the interests of others. (The issue of the public interest is discussed below.)

The 'dark side' of civil society (discussed in Chapter 7) is an inevitable part of freedom of association. Self-regulation by civil society plays a key role in keeping it committed to the ethos of public well-being; self criticism is an important part of the exercise of freedom of expression. But the law has a role to play in maintaining the integrity of civil society. The freedoms are not absolute. Their exercise at the expense of the freedom of others is unacceptable. Laws giving effect to the freedoms must provide for this. Balancing freedom against constraint in law is of course a delicate matter. For example, the European Convention on Human Rights allows for limitations on a range of specific grounds in the wider public interest; but the European Court on

Human Rights has been rigorous in overturning attempts by states to use that discretion too easily.

Article 11.2 of the ECHR provides that

no restrictions shall be placed on the exercise of the rights of freedom of expression (Article 10), association (Article 11) and peaceful assembly (Article 11) other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others.

This is manifestly a wide range of exceptions. It may be said that it unpacks the concept of 'reasonable restrictions' contained in the Pakistan constitution cited above. It could of course be abused as the pretext for restricting the exercise of the civil society freedoms. Article 13 of the ECHR itself gives protection against such abuse by entitling civic organisations (as well as individuals) to seek redress for violation of the rights protected by the Convention. As Box 9.3 illustrates, cases heard by the European Court have made it clear

How the law should protect society from terrorism without encroaching on the basic freedoms has received added prominence in the post 9/11 world

that civil society organisations are protected from unjustified interference or restriction by state action and Article 11.2 cannot be used except in extreme cases.

Registration and Legal Form

The role that registration of civil society organisations plays, in principle as well as in practice, is complicated. At its simplest it is no more than a mechanism for according legal personality, enabling a civil society organisation to function in its own right. At that level the process requires minimal scrutiny of the organisation by the registration authorities. All that is needed is to ensure that it does not breach the legal constraints on civil society organisations referred to above. In various jurisdictions registration often plays a more complicated role. It can be the basis for accountability—that is, it can check that the organisation is properly constituted and complies with established reporting requirements—and it can be a route to

Box 9.2: Claiming the higher authority of international law: Charter 77

On 1 January 1977, 230 prominent Czech intellectuals signed and published a manifesto announcing the formation of Charter 77, a 'loose, informal and open association of people' committed to human rights. Signatories included the playwright Vaclav Havel, subsequently the first President of Czechoslovakia after the transition to democracy. The manifesto was published in various Western newspapers on 6 January. The Czech authorities arrested several of the signatories the next day, denounced them, and began cracking down on dissident activities. The United States charged Czechoslovakia with violating the 1975 Helsinki Accords on human rights.

While Charter 77 was illegal from the point of view of the Czechoslovak authorities, spokespeople would protest vehemently against being classified as 'illegal' or 'clandestine', insisting that all their activities were strictly lawful and conducted in public. They made use of the Helsinki Accords to try to remind the Czechoslovak and international public that, on the contrary, it was the regime, not Charter 77, that was operating outside the law.

Manifesto of Charter 77

In the Czechoslovak Register of Laws No. 120 of October 13, 1976, texts were published of the International Covenant on Civil and Political Rights, and of the International Covenant on Economic, Social and Cultural Rights, which were signed on behalf of our republic in 1968, reiterated at Helsinki in 1975 and came into force in our country on March 23, 1976.

From that date our citizens have enjoyed the rights, and our state the duties, ensuing from them . . .

We accordingly welcome the Czechoslovak Socialist Republic's accession to those agreements. Their publication, however, serves as a powerful reminder of the extent to which basic human rights in our country exist, regrettably, on paper alone . . .

One instrument for the curtailment or in many cases complete elimination of many civic rights is the system by which all national institutions and organizations are in effect subject to political directives from the machinery of the ruling party and to decisions made by powerful individuals.

The constitution of the republic, its laws and legal norms do not regulate the form or content, the issuing or application of such decisions; they are often only given out verbally, unknown to the public at large and beyond its powers to check; their originators are responsible to no one but themselves and their own hierarchy; yet they have a decisive impact on the decision-making and executive organs of government, justice, trade unions, interest groups and all other organizations, of the other political parties, enterprises, factories, institutions, offices and so on, for whom these instructions have precedence even before the law.

Where organizations or individuals, in the interpretation of their rights and duties, come into conflict with such directives, they cannot have recourse to any non-party authority, since none such exists. This constitutes, of course, a serious limitation of the right ensuing from Articles 21 and 22 of the first-

privileged status with concomitant benefits (limited liability for the organisation's directors or trustees, and in some cases tax privileges reflecting 'public benefit' status).

How the step from informal associational activity to a formal structure with legal personality is achieved varies greatly among legal systems and codes, and especially as between civil and common law systems. (Common law is the Anglo-Saxon form of law based on uncodified principles developed by the courts. This contrasts with the civil law system developed in continental Europe and based on written legal codes.) It may be done by private action. The

Swiss Civil Code, for example, states that 'associations which have a political, religious, scientific, artistic, charitable, social or any other than an industrial object, acquire the status of a person as soon as they show by their constitution their intention to have a corporate existence' (Title II, Chapter II. art. 60 (1)). Almost as easy is to have the founding documents 'notarised' by a public notary. Many civil law countries, however, require a more formal legal process of registration, whether with the courts or with a government department.

The potential for mixing the roles of registration is clear. The registration requirement provides the

mentioned covenant, which provides for freedom of association and forbids any restriction on its exercise, from Article 25 on the right to take part in the conduct of public affairs, and from Article 26 stipulating equal protection by the law without discrimination . . .

Responsibility for the maintenance of rights in our country naturally devolves in the first place on the political and state authorities. Yet not only on them: everyone bears his share of responsibility for the conditions that prevail and accordingly also for the observance of legally enshrined agreements, binding upon all individuals as well as upon governments.

It is this sense of co-responsibility, our belief in the importance of its conscious public acceptance and the general need to give it new and more effective expression that led us to the idea of creating Charter 77, whose inception we today publicly announce.

Charter 77 is a loose, informal and open association of people of various shades of opinion, faiths and professions united by the will to strive individually and collectively for the respecting of civic and human rights in our own country and throughout the world—rights accorded to all men by the two mentioned international covenants, by the Final Act of the Helsinki conference and by numerous other international documents opposing war, violence and social or spiritual oppression, and which are comprehensively laid down in the U.N. Universal Charter of Human Rights.

Charter 77 springs from a background of friendship and solidarity among people who share our concern

for those ideals that have inspired, and continue to inspire, their lives and their work.

Charter 77 is not an organization; it has no rules, permanent bodies or formal membership. It embraces everyone who agrees with its ideas and participates in its work. It does not form the basis for any oppositional political activity. Like many similar citizen initiatives in various countries, West and East, it seeks to promote the general public interest.

It does not aim, then, to set out its own platform of political or social reform or change, but within its own field of impact to conduct a constructive dialogue with the political and state authorities, particularly by drawing attention to individual cases where human and civic rights are violated, to document such grievances and suggest remedies, to make proposals of a more general character calculated to reinforce such rights and machinery for protecting them, to act as an intermediary in situations of conflict which may lead to violations of rights, and so forth.

By its symbolic name Charter 77 denotes that it has come into being at the start of a year proclaimed as Political Prisoners' Year—a year in which a conference in Belgrade is due to review the implementation of the obligations assumed at Helsinki.

We believe that Charter 77 will help to enable all citizens of Czechoslovakia to work and live as free human beings.

Prague, 1 January 1977

authorities with the opportunity to control civil society improperly. Ensuring that the legal and institutional basis for registration is clear and that it supports the right of civil society associations to a secure existence with a minimum of scrutiny is of fundamental importance. If registration serves accountability and/or status functions it is essential that basic legal form is guaranteed with only the necessary minimum of restrictions and bureaucratic formality.

Legal systems and jurisdictions provide for a variety of forms of civil society organisations. The civil law codes are perhaps (at least in principle)

the simplest and most widespread. Common law forms are looser and more complex. Broadly speaking, civil society organisations are divided into two basic types: member-based bodies ('associations') and bodies based on capital without members ('foundations' or 'trusts'). Associations are essentially formed by a group of individuals coming together to pursue a specified purpose or purposes. The focus is thus on the members and their purposes. Foundations, in contrast, are formed by committing resources, generally in the form of a capital sum, to a specified purpose or purposes. Foundations do not have members, but a body of individuals is

Box 9.3: ECHR jurisprudence on legitimate restrictions on freedom of association

The European Court of Human Rights (ECHR) will uphold restrictions on Article 11 (freedom of association and assembly) only if they meet three requirements. First, they must be 'prescribed by law', i.e. not applied without a legal provision to that effect. Second, they must belong to one of four permitted purposes laid down in art. 11.2 ('the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedom of others'). Finally, they must be proportionate in protecting these aims, and hence necessary in a democratic society.

Djavit An, a Turkish Cypriot who was active in the 'Movement for an Independent and Federal Cyprus', which aimed to bring together the two Cypriot communities (Greek and Turkish), was routinely refused permits to cross the 'green line' in order to attend meetings of the Movement. Since there was no basis in law for refusing permits, the restriction on his right to associate was not prescribed by law, and hence constituted a violation of art. 11. (*Djavit An v. Turkey*, 20 February 2003).

One of the most comprehensive considerations of art. 11 by the ECHR is the case of *Sidiripoulos and others v. Greece* (10 July 1998). Sidiripoulos and others had founded an organisation called 'Home of

Macedonian Civilisation', which the Greek courts were refusing to register. Greece defended the refusal as necessary for 'the maintenance of national security, the prevention of disorder and the upholding of Greece's cultural traditions and historical and cultural symbols'. The ECHR held that exceptions to freedom of association must be narrowly interpreted and that that the third of the three aims put forward by Greece did not constitute a legitimate ground for a restriction. But it did accept that the interference at issue was 'prescribed by law' and intended to protect national security and prevent disorder. However, the Court argued, in cases concerning restrictions of freedom of association it was not enough that the state had acted 'reasonably, carefully and in good faith'; the Court had to determine whether the restriction was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it were 'relevant and sufficient'.

There was nothing in the case file to suggest that any of the applicants had wished to undermine Greece's territorial integrity, national security, or public order. Mention of the consciousness of belonging to a minority and the preservation and development of a minority's culture could not be said to constitute a threat to 'democratic society'. Hence the refusal to register the

responsible for overseeing the fulfilment of the specified purposes.

Most jurisdictions also allow other forms. In particular, non-profit distributing companies can be set up in jurisdictions which allow civil society organisations to engage in enterprise activities. In the Philippines, civil society organisations are typically organised as non-stock corporations registered under the Corporation Code. Similarly the Czech Republic recognises 'public benefit corporations' as a specialised form of non-membership, service-providing civil society organisation.

Legislating for the Activities of Civil Society Organisations

The legal framework for citizen action through civil society organisations interacts with a country's general legal and institutional framework. Thus, civil society organisations are subject to laws affecting other forms of organisation. The general criminal law is an obvious example: it is no more acceptable for civil society organisations than for profit-making bodies to commit fraud. More sensitive is the line drawn between free expression and free association on the one hand and the legitimate protection of the community as a whole on the other. The question of how the law should protect society from terrorism without encroaching on these freedoms has received added prominence in the post-9/11 world, with many jurisdictions passing

organisation was disproportionate to the aims pursued and violated art. 11.

In a series of cases concerning political parties dissolved by the Turkish authorities, the ECHR has tested whether such dissolutions were 'necessary in a democratic society' mainly by inquiring whether the party in question advocated violence; and invariably it has found against the government (*United Communist Party of Turkey [TBKP] and others v. Turkey*, 30 January 1998; *Socialist Party and others v. Turkey*, 25 May 1998; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 8 December 1999; *Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey*, 9 April 2002; *Dicle on behalf of the Democratic Party (DEP) v. Turkey*, 10 December 2002).

In *Refah Partisi v. Turkey* (31 July 2001; 13 February 2003), however, another element was introduced: the leaders of the Refah Partisi had declared their intention to institute shariah law, characterised by the Court as 'a system of law that was in marked contrast to the values embodied in the Convention', although they had also 'left in doubt their position regarding recourse to force'. The Court therefore decided that the 'state concerned could reasonably prevent the implementation of such a political programme, which was incompatible with

Convention norms, before it was given effect through specific acts that might jeopardise civil peace and the country's democratic regime'.

The Court has also interpreted art. 11 as containing a 'negative freedom of association', i.e. the right not to be a member of a particular organisation. In *Young, James and Webster v. United Kingdom* (13 August 1981) it determined that the obligation on British Rail employees to belong to a trade union, on pain of losing their job, constituted a violation of art. 11. But in this case also there may be exceptions under art. 11.2. In *Sigurdur A. Sigurjónsson v. Iceland* (30 June 1993), the Court decided that the obligation on a taxi-driver to belong to the Automobile Association was 'prescribed by law', and aimed at 'protection of the rights and freedoms of others', but the measure was 'disproportionate to the legitimate aim pursued' and hence not 'necessary in a democratic society'. Hence, the law making the granting of a taxi licence conditional on membership of the AA was held to be in violation of art 11.

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Sources: The Netherlands Institute of Human Rights (URL); European Court of Human Rights (URL).

laws to strengthen the security authorities' powers over civil society organisations.

British legislation, for example, going back a number of years but strengthened in the Terrorism Act 2000, enables organisations as such to be proscribed. The current list covers organisations adjudged to be involved in terrorism in all parts of the world. The English charities regulator, the Charity Commission, has recently used its powers to remove an imam from a London mosque as 'an employee responsible for misconduct' (Charities Act 1993, s.18 (2) (i)) for 'using his position within the charity to make inappropriate political statements' (Charity Commission for England and Wales 2003). Another example of recent anti-terrorist initiatives is the Canadian Charities Registration (Security Information) Act 2001, under which the Canadian Customs and Revenue Agency takes account of security

information in deciding whether to register charities. The OECD's Financial Action Task Force on Money Laundering launched an initiative on 11 October 2002 to 'combat the abuse of non-profit organisations' for the financing of terrorism (FATF 2002).

In addition to issues of criminal law, civil society law interacts with the legal framework which regulates activity in specific spheres. For example, where civil society organisations provide services relating to children they are rightly subject to the general regulatory requirements relating to children's services. Thus, regulations relating to childcare, fostering, and so on are as applicable to civil society organisations as they are to private or public sector providers. The same applies to all such issues: for example, care for the elderly. But such laws and regulations can develop into yet another avenue for

Box 9.4: Reforming registration laws: Pakistan, China, and Japan

Governments in countries of greatly varying backgrounds are now seeking to encourage voluntary action while often being apprehensive about letting loose an uncontrollable force. Reforming the framework of laws to support the contribution of civil society is part of this process and often reveals the tension between setting civil society free and keeping it under state control.

Pakistan has a confused mix of laws inherited from British rule, especially the Societies Registration Act 1860, and post-independence laws in particular the Voluntary Social Welfare Agencies (Regulation and Control) Ordinance 1961. The Enabling Environment Initiative being led by the Pakistan Centre for Philanthropy has been drawing up recommendations to simplify and enhance the legal framework.

China had some 200,000 'social organisations' registered with the Ministry of Civil Affairs by 1996,

when a moratorium on registration was announced while new regulations were developed. A key issue is the requirement that organisations registering with the ministry have a sponsoring department, which has forced many citizen organisations to operate as companies or outside the legal framework altogether.

Japan inherited nineteenth-century laws which required civil society organisations to obtain the consent of the government department in whose sphere of responsibilities they sought to operate. Many such bodies operated outside the legal system as the Japanese civil society sector grew, especially after the Kobe earthquake. The Non-Profit Organisations Law introduced in 1998 made provision for non-profit organisations to be incorporated at prefecture level, and further reforms to give tax privileges to public-benefit organisations are being developed.

controlling civil society organisations as such. Therefore, requirements to safeguard children, for instance, should be applied and enforced on that basis and for that reason, regardless of the constitutional or legal status of the organisation concerned, whether public sector, market sector, or civil society sector.

Apart from the applicability of general laws to civil society, each jurisdiction tends to have specific laws aimed at regulating civil society activities. The range of activities which civil society organisations undertake is an important factor in determining the legal environment necessary to support and encourage legitimate citizen action. The diversity of roles civil society organisations play is an important feature of civil society, crucial to the richness and well-being of society. It embraces the notion of civil society as a sphere outside government, playing a key part in holding government to account on the one hand and cooperating with the public sector in providing services and meeting community needs on the other. The balance between these poles varies with circumstances and indeed within spheres. In societies lacking basic freedoms, civil society has to play a larger role in challenging abuse of state power, if necessary confronting illiberal laws that seek to

control civil society itself. But, however liberal the legal framework, civil society still has a vital role as critic of the exercise of state power.

The two basic aspects of the role of civil society, meeting needs and upholding integrity (influencing public policy and redressing inequality), mirror two basic respects in which the state may fail: through inefficiency and corruption; and through abuse of power and oppression. A formal legal and regulatory framework enhances the ability of civil society to fulfil these roles; but the practical process of strengthening the law to underpin civil society's service and advocacy roles has to take account of the realities in each jurisdiction, in particular the political situation. The fundamental freedoms are the starting point. National institutions may incorporate freedoms of association, expression, and assembly, but the problem with oppressive regimes is characteristically abuse of power rather than illiberal constitutions. The challenge is to secure respect for the basic freedoms. Where that is lacking detailed laws for civil society may be misused as a means of oppressive regulation. In these circumstances civil society may have to operate outside the national law.

Alongside the roles of advocacy and service delivery, civil society organisations play a key role in

providing independent resources. Civil society organisations rely on a range of forms of fund-raising, grants, and economic activities. The legal framework has to support these. Grant-giving foundations and other civil society organisations which channel funds to civil society activity provide a vital source of support as an alternative to public- and market-sector sources. As Frances Pinter (2001: 214) has noted, governments often view independent funding, especially from foreign sources, with mixed feelings or even suspicion, on the grounds that it threatens their control over the policy agenda for service delivery. The Chronology of Global Civil Society Events (Part IV of this Yearbook) documents two examples in 2002 of governments (Azerbaijan and Egypt) adopting legislation to control the flow of overseas grants to domestic civil society institutions. However, diversity of funding is an important guarantor of the independence of civil society.

The possibility of commercial activity is also important for organisations in many jurisdictions. Enterprise is, however, a controversial issue. Some jurisdictions place restrictions on trading by civil society organisations or prohibit it altogether. In Macedonia, for example, civil society organisations are precluded from directly pursuing 'economic activities', although they may establish business subsidiaries for this purpose.

However, in many jurisdictions the label 'not-for-profit' is misleading since such organisations often engage in trading activities, either as a subsidiary fund-raising activity or in pursuit of their central function. They aim to make a surplus to plough back into their activities. They are thus more accurately described as 'non-profit distributing'.

Public Benefit

The concept of public benefit is important in the arrangements for civil society. It is increasingly widely acknowledged that there is a 'dark side' to civil society, that is to say, there are organisations which clearly fall within the broad notion of civil society with which this chapter began, but which are equally clearly inimical to the well-being of society.

Apart from such bodies, however, civil society as such has been said, by writers from de Tocqueville

(1840/1994) to Putnam (2000), to be of general value because of the diversity and active citizenship which it brings to society as a whole regardless of its specific purpose or scope. There are many social policy controversies surrounding this contention. As noted earlier, a great many civil society organisations pursue the narrow interests of particular groups. Organisations providing health care or social services to a particular group are widespread and important. Communally based organisations may, however, exacerbate tensions within society rather than serving

the interests of society at large (see Chapter 7). The case for an enabling legal environment for civil society does not depend upon a strong view of the value of civil society at large. Whatever value associations whose purpose is specifically to pursue member or sectional interests have for the wider society, a significant part of civil society is specifically devoted to the public interest and bases its claim to privileged status on

those grounds. How the legal and institutional framework underpins this is therefore an important issue.

Most jurisdictions provide tangible privileges to civil society organisations, notably in the form of fiscal relief. This may be a part of tax law and administration, but it has a wider importance as part of the framework for encouraging public-spirited citizen activity. Whether tax privileges are dependent on a specific test of the public benefit contribution of the organisation concerned varies from jurisdiction to jurisdiction. A common form is a list of qualifying purposes, such as the promotion of health and education.

This fundamental principle is shared by civil law and common law jurisdictions. The common law origins of civil society law are, however, distinctive in having a legal concept of charity. The colloquial notion of charity is pretty well universal. In the common law developed in England charity has acquired a technical legal basis different from, indeed much wider than, the ordinary usage. Some jurisdictions, notably England itself, continue to base their civil society law on a legal concept of charity. In essence this covers independent non-profit distributing bodies with a purpose which specifically serves the public benefit. Being a common law system, charity law is not generally accessible as a

Most jurisdictions provide tangible privileges to civil society organisations, notably in the form of fiscal relief

Box 9.5: 'Charitable purposes' according to the Australian Inquiry Report

Probably the most thorough and satisfactory contemporary effort to define charitable purposes within a common law framework is that of the Australian Report of the Inquiry into the Definition of Charities and Related Organisations (Australia 2001). The advice in this report is at present under consideration by the Australian government. It defines charity as follows:

Charitable purposes shall be:

- the advancement* of health, which without limitation includes:
 - the prevention and relief of sickness, disease or of human suffering;
- the advancement* of education;
- the advancement* of social and community welfare, which without limitation includes:
 - the prevention and relief of poverty, distress or disadvantage of individuals or families;
 - the care, support and protection of the aged and people with a disability;
 - the care, support and protection of children and young people;

- the promotion of community development to enhance social and economic participation; and
- the care and support of members or former members of the armed forces and the civil defence forces and their families;
- the advancement* of religion;
- the advancement* of culture, which without limitation includes:
 - the promotion and fostering of culture and the care, preservation and protection of the Australian heritage;
- the advancement* of the natural environment; and
- other purposes beneficial to the community, which without limitation include:
 - the promotion and protection of civil and human rights; and
 - the prevention and relief of suffering of animals.

* Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.

legal code (though Barbados is unusual in having a statute defining charity). In most jurisdictions, it is necessary to refer to textbooks, such as Picarda (1999) on charity in England.

Determining public benefit is a difficult issue. It is a matter both of technical law and of public policy. But so long as the legal framework is open to and supportive of civil society at large, and confines its control to prohibiting purposes and activities inimical to the general well-being, the added test of positive public benefit is in a sense less critical. That is to say, the existence of the body as such does not depend on the determination. It is nevertheless important if benefits and recognition depend on this distinction.

Especially in civil law jurisdictions, a list of public benefit purposes characteristically includes such obvious and uncontroversial matters as health, education, social welfare, recreation, environment, heritage, and the like. The common law tradition has

relied on the development of the scope of charity or public benefit case by case. The well-known judgment of Lord MacNaghten in the Pemsel case of 1891 classified charity as 'the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community'. The last ('fourth head') element is characteristic of the open-endedness of the common law approach, eschewing a closed definition of public benefit and allowing the courts (or determining agency, like the English Charity Commission) to develop the scope of charity. The Pemsel classification is manifestly out of date and there are a number of proposals for creating a more modern framework for the concept of charity. An interesting attempt is that of the Australian Inquiry Report (see Box 9.5).

This approach raises a number of questions about the application of such categorisations. Three in particular may be singled out, expressed simply in the following form:

1. What exceptions are made under each category?
2. How is the question of the public benefiting under each category dealt with?
3. What decision-making process is involved?

The first issue reflects the fact that, while broad categories like education and health are not controversial, the way in which provision is made often is. Take health. The essence of civil society is that people should be able to pursue their own interests in their own way. However, whether particular ways of making health provision are genuinely beneficial is often disputed; strong views are held about alternative forms of treatment. Health regulation protects people from harmful forms of treatment, but the issue of where that line is drawn has to allow for experimentation and disagreement. Determining a particular form of provision to be positively of public benefit is a step further than merely permitting it.

A related issue is whether restricting benefits to a part of the community, rather than opening them up to the whole community, is compatible with the concept of public benefit. Of course, much provision is directed at specific—often quite small—groups, such as sufferers from particular diseases. More controversial is restriction to parts of the community defined by other criteria, typically by area or communal group.

This leads to the third issue: which agency decides whether a particular organisation is pursuing the public benefit under any particular head, and on which criteria. There is something paradoxical, even objectionable, in the notion of a government agency—an emanation of the state—determining whether or not a purpose pursued by an independent civil society organisation is in the public interest and whether, therefore, that body should have a privileged status. Yet that is the well-nigh universal position. Sometimes it is a department of government or, worse, the department responsible for government policy in a particular area (health, education, and so on). Most often it is a branch of the tax authorities. While it may plausibly be argued that the government is responsible for safeguarding the use to which taxes are put, in the sense of tax privileges for public

benefit organisations, having government agencies determine whether or not a particular approach to an issue is in the public interest threatens the independence of civil society. Arguments of liberty may be reinforced by practical considerations: diversity encourages innovation, and government control is inimical to it.

As a matter of principle, therefore, the agency that determines public benefit status for civil society organisations must be autonomous and answerable in an appropriate way to the courts, independently of government.

As a matter of principle, the determining agency for public benefit status must be autonomous and answerable to the courts independent of government

Accountability

There is, superficially, a paradox in holding independent civil society organisations accountable. Accountability is a complex issue, not least in relation to civil society. At its strongest it involves a relationship in which a body or person is accountable to another ('higher') authority which has the right and power to enforce its judgements. Much accountability is weaker than this, and it is important, particularly in the context of civil

society, to be clear about the degree of accountability involved. Accountability may involve enforceable sanctions, for example in relation to breaches of the law; or it may involve a trade-off: compliance in exchange for benefits. The former is characteristic of accountability to the state; particularly in relation to civil society, it should be properly limited, concerned essentially with integrity. The latter is characteristic of donor and stakeholder accountability. Accountability is closely connected to two concepts: legitimacy and credibility. Both are important to civil society, at any rate in its wider role, especially for public benefit organisations (see, for example, Lewis 2001: 143 ff.).

The legitimacy of civil society organisations does depend on a bedrock of proper accountability. But the authority with which civil society organisations act, and in particular raise their voices, depends on wider issues. The legitimacy of NGOs challenging governments of course depends on the accuracy of the facts they present and, even more, on the values they uphold. The right of NGOs to claim to speak for particular groups or interests may be challenged,

particularly if they are based outside the area concerned. Accountability to beneficiaries and other stakeholders is relevant—but beyond the law. In the context of the present chapter on civil society's legal framework, accountability is, rightly, interpreted narrowly.

The best basis for accountability is self-regulation. The more standards of governance, management, and financial controls are developed internally, the less need there is for external regulation. In the Philippines, civil society organisations play a vital role and have a recognised status in public policy. A number of NGO networks came together in 1995 to develop an NGO Code of Ethics, which recognises the roles, responsibilities, and obligations of the non-profit sector and donor relationships (Clark forthcoming 2003).

There are internal and external dimensions of accountability. The internal dimension is of general importance, but especially for membership bodies where it is the members themselves to whom the integrity of the organisation is the priority. The importance of the external dimension is proportionate to the public interest involved. Small membership bodies have essentially only their own membership to satisfy, though if they enjoy public benefit status or depend on external funding their accountability will be that much wider. Larger bodies, particularly if they claim to be authorities on issues of public importance, depend on their reputation for credibility. Integrity is therefore of more than internal significance. A higher level of accountability arises with bodies which receive privileges and status, especially those which claim to serve the public interest.

The relationship between law and accountability is complex. Accounting standards and practices need to be developed by professional bodies and may be promoted on a discretionary basis, as recommended good practice. The legal framework may support this but the key is the extent of the public interest. This is connected to the basis for registration and the purpose it serves.

It is of course, in the post-Enron world, necessary to acknowledge the limitations of formal accounting

processes. 'Creative accounting' is just as much a threat to the reputation and integrity of civil society organisations as to profit-making (or seeking!) companies. The temptation may be based on different motivations: the need to present the most favourable picture to supporters and donors may be as likely to distort accounting as fraud. But the damage to credibility is great. Accounting practices developed independently of the sector are important.

Civil society is no more inherently free of corruption than other sectors. Its 'halo effect', as Lester Salamon has put it, has to be earned. Strengthening civil society is not therefore a guaranteed way of countering the corruption endemic in some societies. But a civil society with commitment and integrity is a powerful force for counteracting corruption. The credibility of civil society is therefore central. The right system of accountability, leaving civil society free but responsible, is thus of critical importance. The promotion of standards within civil society through self-regulation, balanced by appropriate mechanisms of external regulation, is basic.

The basis of internal accountability is laid down in the constitutions of civil society organisations. This does not depend on their having a legal personality; however simple a membership association may be, there must be rules for determining procedures and handling finances. These may be prescribed in law and regulations, or left to internal procedures. In practice, internal governance arrangements—holding of meetings, the election and accountability of office-holders, and the like—are part of the constitution of a civil society organisation and are the basis for its legal status. The legal framework is important in establishing the basis for accountability and integrity, but it should serve the interests of the organisation and its membership, not as a control mechanism unless there is a public interest, and then only as the means of upholding the public interest.

Where there is a public interest in the accountability of civil society organisations—essentially, where they receive fiscal and other privileges as bodies serving the public benefit—legal requirements for accountability are appropriate. In the first place, appropriate

Strengthening civil society is not a guaranteed way of countering the corruption endemic in some societies. But a civil society with commitment and integrity is a powerful force for counteracting corruption

requirements may be laid down for 'transparency'. The public interest is served by ensuring that the activities and finances of bodies serving a public purpose are open to public scrutiny. This is distinct from a control or supervisory mechanism; the reporting requirements which may go with registration are essentially a vehicle for openness. 'Compliance' rather than control is the appropriate mode for the authorities responsible for reporting requirements.

In Hungary, for instance, public benefit organisations must prepare a publicly accessible report that includes a summary of public benefit activities; a financial report; a statement on the use of budgetary support and support received from state/governmental sources; benefits granted to operating offices of the organisations; and other related information (Act CLVI of 1997 on Public Benefit Organisations, s. 9(1)).

More active supervisory arrangements are appropriate only to the extent that there is a public interest in how a civil society organisation is managed. They must ensure that its activities are directed to fulfilling the public purpose from which its status (and associated privileges) derive; and that its resources are used for that purpose and not diverted to private gain. Most systems base the accountability requirements for civil society organisations enjoying privileged status in respect of their public benefit purpose on the tangible benefits, especially of tax, they receive.

Conclusion: Proportionality and Judgement

This chapter has sought to dissolve the apparent paradox of the fluidity and autonomy of civil society and the formality and intrusiveness of law. A number of conclusions emerge. First and perhaps foremost, civil society is nothing if not independent. If the legal framework and/or its application places improper impediments on free exercise of the rights of association, expression, and assembly, civil society has to operate outside the law.

Most often, in the modern world law is intrusive rather than oppressive. The intrusion of state regulation often reflects political and bureaucratic apprehension at the potential power and anarchy of civil society. Confidence that civil society is a potential partner of the state, both responsible and

public-spirited, is the basis for enhancing law reform. The ideal framework might be summed up as follows:

- the constitution enshrines the basic freedoms;
- basic laws exist against crime and threats to public well-being (applying generally, and not differentially to civil society);
- free space exists within this framework for civil society activity at large;
- an enabling framework offers organisational structures for civil society organisations (including registration on a discretionary basis not subject to substantive tests);
- a positive framework encourages civil society organisations which seek to meet a public benefit purpose; and
- accountability processes are proportionate to the public (and state) interest, based on transparency and integrity.

These guidelines accord with the following principles. The freedoms of association, assembly, and expression need to be protected as enforceable rights. The necessary limitations to which they are subject must be strictly confined in both principle and practice to what is necessary for the general well-being. These and other limitations, for example of criminal law, should apply even-handedly throughout society, and not be targeted specifically at civil society. Finally, the legal and regulatory framework for civil society should provide, as of right, an effective institutional basis for the operation of complex civil society organisations, with accountability justified according to the status and privileges received, especially by organisations claiming to serve the public interest and not just a private or member interest.

At the national level, the extent to which states meet these ideal guidelines is uneven. At the global, or indeed the supranational, level, there is hardly the beginning of a legal framework. This chapter has referred to problems which arise for border-transcending activities of civil society organisations. The lack of a legal institutional framework which can support civil society organisations operating beyond national boundaries makes them dependent on the law of the country where they have their legal basis. In addition to questions of recognition in other countries in which they operate, practical issues of fundraising and grant-giving across national boundaries arise.

There are some signs of interest on the part of intergovernmental institutions, and it may be that the UN Secretary-General's initiative in setting up a Panel of Eminent Persons on United Nations Relations with Civil Society will offer a forum in which the importance of an enhancing legal environment can be developed (United Nations 2003). However, there are formidable problems in getting acceptance for any effective legal framework at the global or even any supranational level, let alone a framework which reflects the sensitive balance between the principles of freedom and responsibility presented in this chapter.

This chapter has been prepared with the assistance of the International Center for Not-for-profit Law (ICNL), a Washington-based NGO whose mission is to encourage an enabling legal and regulatory environment for civil society around the world. Information about ICNL can be found on its website <<http://www.icnl.org>>.

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