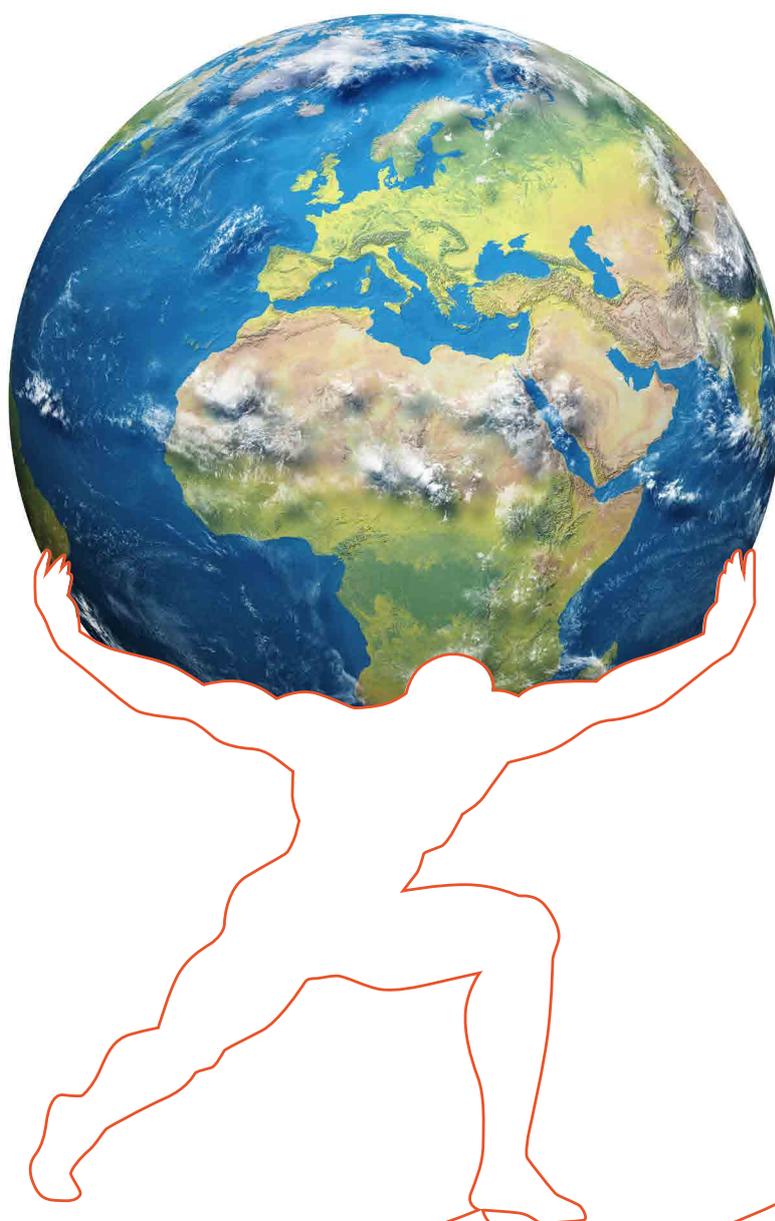


FUTURE WORLD GIVING

Enabling an Independent Not-for-profit Sector

May 2014



About Charities Aid Foundation

The Charities Aid Foundation (CAF) is a registered charity that promotes charitable giving and provides financial services and social finance to not-for-profit organisations. We help donors – including individuals, major donors and companies - to give more effectively whilst providing financial and fundraising solutions for charities in the UK and internationally; helping good causes to manage their resources more effectively. We also have a strong track record in campaigning, policy work and research across a range of issues to ensure the best possible funding environment for charities.

About the Future World Giving project

Future World Giving is an ambitious CAF project with a positive message: that if governments act now the future of philanthropy could be bright, with people all over the world engaging in supporting a vibrant civil society and addressing social needs. During the course of the project we will produce a framework of recommendations to governments on how they can create an enabling environment for widespread engagement in the act of giving. CAF will produce three reports looking at evidence on how policies implemented by governments around the world have helped or held back philanthropic giving in three crucial areas: Building Trust in Civil Society, Supporting an Enabling an Independent Not-for-Profit Sector and Motivating People to Give. This report focuses on the second of those themes.

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Foreword

It might not always be at the front of our minds, but the independence of the not-for-profit organisations that we donate to, volunteer for or benefit from is fundamental to why we support them and why they are able to be effective. That is why this, the second thematic report of the Future World Giving project, focuses on what governments can do to enable the development of a vibrant civil society populated by independent not-for-profit organisations that can act strategically to fulfil their charitable objectives.

Some of the most important achievements of not-for-profit organisations have come about through their tireless work in changing attitudes, representing the voices of marginalised groups and influencing better government policy. The freedom to speak out on issues which relate to their charitable cause is fundamental to the health of civil society and to influencing positive change.

The independent voice offered by not-for-profit organisations is valued by the public. According to research by Globescan¹, 73 per cent of people surveyed in 2012 across 15 countries supported the idea that organisations should call governments to account and 67 per cent believed that not-for-profits have a role to play in influencing government policy. Despite this, not-for-profits around the world are facing an increasingly hostile legal environment for advocacy, with governments moving to restrict their ability to speak out on issues that are relevant to their stated mission.

The relationship between not-for-profit organisations and governments can be an extremely productive one when a balance is struck between the need for effective challenge and the value of collaboration. Whilst a purely antagonistic relationship between civil society and the state has limited benefit, a relationship where the ability to question decisions is lost would be equally fruitless. As such, in an era where many countries are seeing a decentralisation of the state, it is imperative that governments use their role as a funder responsibly to ensure that the critical friend role played by not-for-profit organisations is not lost.

As a provider of financial services to charities, as well as donors, Charities Aid Foundation is committed to offering the freedom to manage resources in the way that best suits an organisations, or an individuals charitable objectives. Governments need to balance the need to ensure that not-for-profits manage their finances in a way that builds donor confidence in the sector with the need to ensure that they retain the freedom to implement a financial strategy that allows them to best pursue their charitable goals.

We are fortunate in bearing witness to one of the greatest social transformations in history, with billions of people predicted to move from a subsistence lifestyle to one of relative affluence within a generation. This presents those of us who believe that charity can contribute to a better world with a one-off chance to ensure that governments put the right conditions in place to encourage a newly empowered generation to engage in charitable giving. I am delighted to present the following report which details how we think policies that enable an independent not-for-profit sector could help us all to meet this historic challenge.



Dr John Low

Chief Executive, Charities Aid Foundation

¹ Data from GlobeScan RADAR 2012 Wave 2: Issues and Reputation

Summary of Recommendations

Recommendations for each Future World Giving report are divided into three 'tiers'. At the end of the project we will bring all these recommendations together. The three tiers represent policy outcomes which are increasingly progressive in terms of creating an enabling environment for not-for-profit organisations. These tiers should help governments and those advocating for improved conditions for civil society to prioritise policy developments, by seeking to implement recommendations in one tier before moving on to the next. Evaluating the policies of different countries against this framework will allow more effective international comparison and help to promote a healthy competition to meet universal standards.

It is important that recommendations are proportionate to the socio-economic context of every country. We believe that all governments should aspire to implementing Tier 1 recommendations, which have only limited resource implications. Governments in countries which have rapidly growing civil societies should prioritise meeting all of the recommendations in Tier 2 to future proof the sector and maximise its potential. Similarly, governments in advanced economies with a strong history and culture of philanthropy should not be complacent about the continuing development of policies which encourage greater public engagement in giving. To this extent, implementing all the recommendations in Tier 3 should be the long term goal for every nation.

Tier 1	Tier 2	Tier 3
Advocacy		
Governments should recognise that enabling not-for-profits to criticise and influence policy adds legitimacy to the State, drives improvement in standards of governance and turns civic disagreement and discord into constructive public debate.		
<ul style="list-style-type: none"> ■ Governments should formally recognise the right for not-for-profit organisations to engage in advocacy, even when it involves criticising government policy. ■ State clearly any limits on advocacy and define prohibited partisan/party political behaviours. ■ Produce clear guidance that outlines how the government will interpret laws relating to not-for-profit advocacy which can be understood by lay audiences. ■ Ensure that the government cannot be defamed in the law. ■ Amend legislation to remove vague and ambiguous terms or provide clarifying guidance on not-for-profit advocacy. 	<ul style="list-style-type: none"> ■ Provide training for politicians on the importance of not-for-profit advocacy and its benefits for government. ■ Create legislation that establishes not-for-profit advocacy, within mutually agreed parameters, as a statutory right 	<ul style="list-style-type: none"> ■ Establish an independent body to arbitrate over government claims of unlawful not-for-profit advocacy. ■ Expect not-for-profits to comply with domestic laws and guidance when operating abroad.

Tier 1	Tier 2	Tier 3
Advocacy (continued)		
<ul style="list-style-type: none"> ■ Ensure that neither civil or criminal law holds sanctions for ‘misinformation’ that does not defame the reputation of an individual or organisation not engaged in government. ■ Ensure that regulation clearly distinguishes between advocacy that addresses issues relevant to the stated cause of a not-for-profit, and the support of a political figure, movement or party. ■ Governments should formally recognise the right for not-for-profit organisations to engage in advocacy, even when it involves criticising government policy. 	<ul style="list-style-type: none"> ■ Collaborate with international partners to agree common freedoms for not-for-profit advocacy. 	<ul style="list-style-type: none"> ■ Where fixed limits on political advocacy expenditure are in place, require the grant making organisation to declare how the funds are to be used and to report funds used for political lobbying.

Tier 1	Tier 2	Tier 3
Financial management		
Policy makers should recognise that however well intentioned, any policy which restricts the freedom of not-for-profits to manage their resources in the way which best achieves their stated mission will ultimately do more harm to the sector than good.		
<ul style="list-style-type: none"> ■ Create statutory guidance preventing the practice of awarding or withholding public funds based on the public support or criticism of government policy by not-for-profits. ■ Allow not-for-profit organisations to carry financial reserves into the next financial year. 	<ul style="list-style-type: none"> ■ Set a minimum time period for the tendering process in public contracts and introduce targets for public bodies for meeting this standard. ■ Create Statutory guidance that prohibits all public institutions from inserting “gagging clauses” into contracts involving not-for-profits. 	<ul style="list-style-type: none"> ■ Require commissioners to undertake analysis of best available providers to establish if grants would be more suitable for funding desired outcomes. ■ Talk to not-for-profits and social investors before putting contracts out to tender to increase preparation time.

Tier 1	Tier 2	Tier 3
Financial management (continued)		
	<ul style="list-style-type: none"> ■ Enable not-for-profit organisations to treat investments as charitable activity and pursue investments which are consistent with their charitable mission. ■ Require organisations receiving full or partial tax exemption to publish financial accounts including investments. 	<ul style="list-style-type: none"> ■ Create a range of financial tools to help not-for-profits to be competitive in the public commissioning process. ■ Allow organisations to put together joint bids for contracts or bid for a portion of the work where appropriate to open up funding for smaller organisations.

Tier 1	Tier 2	Tier 3
A mutually beneficial relationship		
The ultimate goal of leaders with regards to civil society should be to create a mutually beneficial relationship between the State and civil society where cooperation is encouraged and criticisms are heard.		
	<ul style="list-style-type: none"> ■ Introduce a responsibility for government to call for, review and provide redress on evidence from not-for-profit organisations as part of the policy making process ■ Introduce not-for-profit sector awareness training for civil servants with responsibilities for commissioning services or implementing public policy 	<ul style="list-style-type: none"> ■ Agree with not-for-profits a set of principles on advocacy, that are backed up with statutory force. ■ Create a cross sector review panel for arbitration before legal challenge.

Executive Summary

At first glance, the concept of independence might seem detached from the primary concerns of not-for-profit staff, volunteers and donors. Few beneficiaries of charitable action will perceive the help they receive to be greater when provided by an organisation that is manifestly independent. But in this report of the Future World Giving project, we argue that independence is fundamental to understanding the health of a vibrant civil society populated by strong, sustainable and mission driven not-for-profit organisations. Furthermore, we demonstrate that governments have an important role to play in creating a space for independent action and guaranteeing freedoms that underpin a sector that can, when encouraged to forge a strategic course, contribute to social, economic and cultural prosperity for all.

The number of middle-class² people globally is projected to grow by 165 per cent by 2030 according to OECD data, with their spending power set to grow by 161 per cent over the same period.³ 70 per cent of this growth is forecast to occur outside the traditional philanthropic centres of Europe and North America. We believe that if governments put policies in place which help to enable the growth of independent and sustainable not-for-profit organisations, the results could be transformative, not only for their beneficiaries, but for the health of civil society more widely.

When not-for-profits are free to pursue the causes that matter to ordinary people, and are able to represent their concerns and aspirations, they can win the support and legitimacy of aspiring middle class donors. Were the middle classes to donate an average of 1 per cent of their annual spending to charity in 2030, they would contribute an estimated \$550 billion to civil society per year.⁴ But over and above this potential increase in financial resources, a civil society that has the support of the masses can more effectively challenge corruption and abuse to create a governance environment that aids economic and social development that benefits everyone. To bring about this positive future we must act quickly to put the conditions in place that enable such a growth in giving.

The report contains wide ranging recommendations that if implemented by governments would help to ensure that not-for-profit organisations enjoy the independence they need to gain the support of the public and drive improvements in society. These recommendations fit into three broad categories which are accompanied by an overarching principle:

1. **Advocacy** – Governments should recognise that enabling not-for-profits to criticise and influence policy adds legitimacy to the State, drives improvement in standards of governance and turns civic disagreement and discord into constructive public debate.
2. **Financial Management** – Policy makers should recognise that however well intentioned, any policy which restricts the freedom of not-for-profits to manage their resources in the way which best achieves their stated mission will ultimately do more harm to the sector than good.
3. **A mutually beneficial relationship**– The ultimate goal of leaders with regards to civil society should be to create a mutually beneficial relationship between the State and civil society where cooperation is encouraged and criticisms are heard.

² In these calculations we use the definition of middle class given by Homi Kharas of the Brookings Institute: “those households with daily expenditures between USD10 and USD100 per person in purchasing power parity terms [...]. Defined in this way, the global middle class excludes those who are considered poor in the poorest advanced countries and those who are considered rich in the richest advanced country.”

³ Kharas H, Working Paper No. 285, The Emerging Middle Class in Developing Countries, OECD Development Centre, 2010

⁴ Pickering, A, Future World Giving: Unlocking the potential of Global Philanthropy, Charities Aid Foundation, 2013, <https://www.cafonline.org/publications/2013-publications/future-world-giving.aspx>

In assessing the efficacy of current government policies in enabling an independent not-for-profit sector we have identified a worrying trend that is seeing governments restrict the capacity of organisations to engage in legitimate advocacy activities that support their stated charitable mission. Governments in Azerbaijan, Ecuador, Indonesia, Algeria, Canada and the UK, have recently introduced, or are in the process of introducing legislation that will restrict the right of not-for-profit organisations to criticise government policy. This worrying trend only serves to vindicate governments with long-standing restrictions on advocacy such as Vietnam and Saudi Arabia.

The report also finds that many governments are indirectly creating barriers to advocacy, whether intentionally or through the unintended consequences of well meaning policies. Vague legislation creates a sense of uncertainty that has a chilling effect on advocacy in some countries and in others, such as Egypt, an opportunity for increasingly strict interpretations by government. In countries such as Uzbekistan and Venezuela, there are insufficient laws protecting the right of not-for-profits to criticise government whilst in Uganda the laws that do exist have not been implemented. In Cambodia and Thailand, laws which allow not-for-profits to be charged with defamation of government for advocacy activities, raise the personal risk for not-for-profit staff and volunteers to such a level that advocacy is effectively silenced. In addition, a recent trend for governments such as those in Kenya, Russia and Turkmenistan, to impose restrictions on the ability of not-for-profits to receive foreign funds is widely understood to be a response to international support for organisations campaigning on human rights issues.

This report also finds that government policy can have a significant impact on the financial independence of not-for-profit organisations. Government funding for not-for-profit organisations can have a variety of benefits. It can create mutual learning, understanding and partnership between civil society and the State that improves social cohesion and creates social value. However, unless rules and guidance are in place to govern the relationship there is a danger that in an era of decentralisation, governments will come to treat not-for-profits as mere contractees. In such cases, the failure to take into account the financial needs of smaller not-for-profits when designing contracts and the insertion of clauses which prohibit criticism of the funder can limit the independence and sustainability of the sector.

Although attempts by governments to bolster confidence in not-for-profits by imposing constraints on risky financial activities may be well-intentioned, they can have an emasculating effect on the capacity of organisations to mobilise their resources effectively in pursuit of their charitable mission. For example, whilst some organisations may feel that the best way to utilise donor resources is to hold investments which provide the maximum returns, for some organisations certain ethical investments offer the opportunity to pursue their charitable goals even in the way they manage their assets. Guidance on financial management should therefore be permissive, highlighting not only the risks of certain actions, but also the opportunities.

Finally, the report concludes that ultimately, governments should recognise the potential contribution of an independent civil society populated with strong and sustainable not-for-profit organisations by agreeing a set of principles which can underpin a healthy cross sector relationship. Such an agreement should be overseen by a cross sector panel backed up by statutory powers to enable independent judgement on areas of conflict and breaches of principles.

Introduction

Charities Aid Foundation (CAF) believes that everyone has the right to engage in charitable giving and that societies benefit from that engagement. The Future World Giving project looks at what governments can, and must do to create the conditions for a vibrant and thriving civil society that is underpinned by trusted, independent not-for-profit organisations and supported by policies which encourage mass engagement in charitable giving.

Enabling an independent Not-for-profit Sector focuses on the need for governments to ensure that their policies are consistent with fostering an independent but responsible culture amongst not-for-profit organisations. It looks at general trends in government policy that effect not-for-profit independence as well as the efficacy of individual policies and interventions before making recommendations which are divided into tiers to ensure relevance to all levels of government progress in this important area of policy.

Though a wider consideration of the independence of civil society that might include rights to freedom of speech, complaint and redress as well as the right to protest would certainly have merit, by narrowly focusing on not-for-profits we hope to be able to provide a level of depth and insight that allows us to make reasoned and targeted recommendations to governments. These recommendations will contribute to the Future World Giving Framework which will provide a comprehensive comparative tool with which governments and activists can assess the extent to which current policies governing not-for-profit organisations create a sufficiently enabling environment for engaging future generations in charitable giving and for not-for-profits to prosper.

For the purpose of this report we have defined two important areas in which the independence of not-for-profits are particularly affected by government policies and interventions;

Advocacy: The freedom to engage in all legal advocacy activities including non-partisan political activities, providing that those activities directly support their stated charitable mission.

Financial Independence: The freedom to manage resources in the way that best supports an organisation's stated charitable mission and where appropriate, their long term sustainability.

Advocacy

Not-for-profit advocacy performs a crucial role in holding governments to account for their policies, and driving improvements. As tangible and organised bodies within civil society not-for-profit organisations are capable of representing the views, needs and aspirations of citizens who would otherwise lack the platform on which their voices can be heard by decision makers. History shows us that without an appropriate means to voice dissent, disenfranchised citizens will, as Jimmy Carter advised a panel of Latin American ambassadors, “eventually make their grievances known, and it may be in radical and destructive ways”⁵.

Sometimes referred to as ‘campaigning’ or, in increasingly pejorative terms, as ‘lobbying’ or ‘political activity’, advocacy can take a number of different forms. In targeting government officials, certain influential groups or the general public, not-for-profit organisations can engage in a wide range of activities. Margaret Keck and Kathryn Sikkink⁶ offer four principal political advocacy strategies that succinctly summarise what we mean by advocacy.

- Information politics (gathering and providing information, dramatising facts by using testimonies)
- symbolic politics (use of symbolic events and conferences to publicise issues)
- leverage politics (linking issues of concern to money, trade or prestige and persuading more powerful actors such as the World Bank to exert pressure)
- accountability politics (reminding governments or institutions of living up to previously endorsed principles).

The rise of not-for-profit advocacy

The role of civil society in influencing progressive changes to government policy through advocacy is not a new one and it has long been subject to academic examination. Keck and Sikkink demonstrate that international advocacy networks have been influential since the nineteenth century. They cite their successes in supporting abolitionist and anti-Chinese foot binding movements where governments which had previously ignored calls for intervention were influenced by their advocacy. More recently John Clark has chronicled the rise of strategic campaigning by not-for-profit organisations detailing successes in the adoption of a baby milk marketing code, the drafting of an international essential drugs list, trade liberalisation for clothing manufactured in the South, action on rain forest destruction, debt relief to African countries, and the imposition of sanctions to combat apartheid.⁷

However, whilst not-for-profit advocacy is not a new phenomenon it is widely understood to have increased dramatically in recent years. Though a universally accepted definition is surprisingly difficult to pin down⁸, the global spread of democracy, particularly since the fall of the Soviet Union, is easily perceived and is important in the understanding of government policies on civil society advocacy. The proportion of countries classified as ‘Electoral Democracies’ by Freedom House has risen from 41 per cent in 1989 to 60 per cent in 2012⁹ Perhaps more importantly, the globalisation of ideas about

5 Joseph Proietti, *The Promise and Peril of Democracy* (Summary), *The International Journal of Not for Profit Law* Volume 7, Issue 2, (February 2005) citing former U.S. President Jimmy Carter’s speech to a panel of ambassadors to the Organization of American States as the inaugural speaker for the Lecture Series of the Americas, available at http://www.icnl.org/KNOWLEDGE/ijnl/vol7iss2/special_2.htm.

6 Keck, M. E & Sikkink, K, *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca and London: Cornell University Press, 1998

7 Clark, J. (1991) *Democratizing Development: The Role of Voluntary Organisations*, London

8 We have used the Freedom House ‘Freedom in the World Index’ due to its longevity’ but the Economist Intelligence Unit’s ‘Democracy Index’ is often cited.

9 Puddington, A, *Freedom in the World 2013: Democratic Breakthroughs in the Balance*, Freedom house, 2013

human rights has meant that citizens are more likely to demand representation. As a result there are now only a handful of countries whose governments do not claim to be on some level democratic.¹⁰

It is perhaps, then, unsurprising that more citizens feel empowered to engage in advocacy and that countries where government claims of democracy and the reality of representation are furthest apart are seeing the most concerted efforts by governments to suppress advocacy. Equally, it is no coincidence that one of the few states which does self-identify as undemocratic is also one of few countries which is transparent in banning all not-for-profit advocacy. In Saudi Arabia organisations are prohibited from engaging in all advocacy. The only legal organisational form for civil society is the charity or missionary organisation – and the permissible purposes which they can pursue are narrowly defined.¹¹

Research seems to support the idea that as democracy, or the expectation of democratic freedom spreads, the number of not-for-profits engaging in advocacy grows. A 2008 University of Oslo study of new approaches to civil society found that the number of not-for-profit advocacy groups devoted to public interest causes such as the environment, human rights, women's issues and anti-corruption has been "multiplying exponentially in recent years, particularly in countries undertaking democratic transitions."¹²

A growing civic space and infrastructure improvements have led to more domestically-founded not-for-profit organisations in developing nations displacing international organisations as the channels for aid.¹³ The advancement of democracy and political pluralism in emerging economies has thus created a double opportunity for not-for-profit advocacy with domestic organisations having greater resources and an improved civic mandate to campaign. At the same time international organisations are increasingly engaging in international advocacy work as their role as implementers of aid diminishes.

Not-for-profit advocacy and government sovereignty

Attempts by governments to suppress the rising power of advocacy by not-for-profit organisations appear at first glance to be the obvious consequence of the idea that not-for-profits, especially in light of advocacy networks, are increasingly challenging the sovereignty of governments in their capacity to make policy. However, justifying measures by governments to emasculate the capacity of not-for-profits to campaign, lobby and advocate based on the above rationale relies on the false assumption that an increase in the role of such organisations in governance equates to a transfer of power from governments, and in the case of democracy, citizens.

Were that assumption to be true, one could make the case that it amounted to a leaching of democratic legitimacy from elected governments to unelected activists – an argument that can itself be contested by considering de Tocqueville's concerns about the tyranny of the majority and the capacity of civil society to ensure representation of issues affecting minorities. In any case, the

10 117 of 195 countries are defined by Freedom House as Electoral Democracies but Vatican City, Saudi Arabia, Fiji, and Brunei make no democratic claims http://commons.wikimedia.org/wiki/File:Democracy_claims.svg

11 Ibid

12 Liebert, U & Trenz, HJ (eds). *Reconstructing Democracy from Below, New Approaches to Civil Society in Europe*, Centre for European Studies, University of Oslo, 2008

13 Coates, B, David, R, *Learning for change: the art of assessing the impact of advocacy work*, *Development in Practice*, Volume 12, Numbers 3 & 4, August 2002

notion of a transfer of power taking place from governments to not-for-profits falsely assumes that the relationship between both parties is necessarily adversarial and a zero sum-game.¹⁴

The idea of a transfer of power from governments to not-for-profits assumes that there is a finite amount of governance and power to be shared by all parties and that, as such, an increased role in governance for one means a diminished role for another. Whilst it is plausible for the influence of one power base to be challenged by another, it is not clear that this is happening as a result of increased advocacy by not-for-profits either domestically or internationally. Rather, not-for-profits are taking advantage of a global growth in civic space that has resulted from a historic rise in democratic freedoms and advances in communication technologies.

The idea that the relationship between governments and not-for-profit advocacy organisations is adversarial - a view which is too often propagated by not-for-profit organisations as well as governments - is fundamentally flawed. Though there are obvious circumstances which necessitate conflict on certain issues, academics such as Ole Jacob Sending and Iver B. Neuman detail numerous examples of both historical and recent advocacy campaigns which have benefited from support and even funding from governments in order to confer legitimacy to the policy making process. Indeed, where governments are able to provide true redress to the advocacy of not-for-profit organisations having engaged meaningfully with their claims and concerns and taken them into account in the decision making process - the result is often better policy and improved perceptions of the policy making process.

Despite the flawed premise on which they are based, claims that not-for-profit advocacy is un-democratic persist. Whilst it may well be the case that an under-regulated not-for-profit sector could allow vested interests to abuse the system to ends that are not in the public interest, the evidence suggests that globally, advocacy is delivering a valuable civic service.

Recommendations

Governments should formally recognise the right for not-for-profit organisations to engage in advocacy, even when it involves criticising government policy.

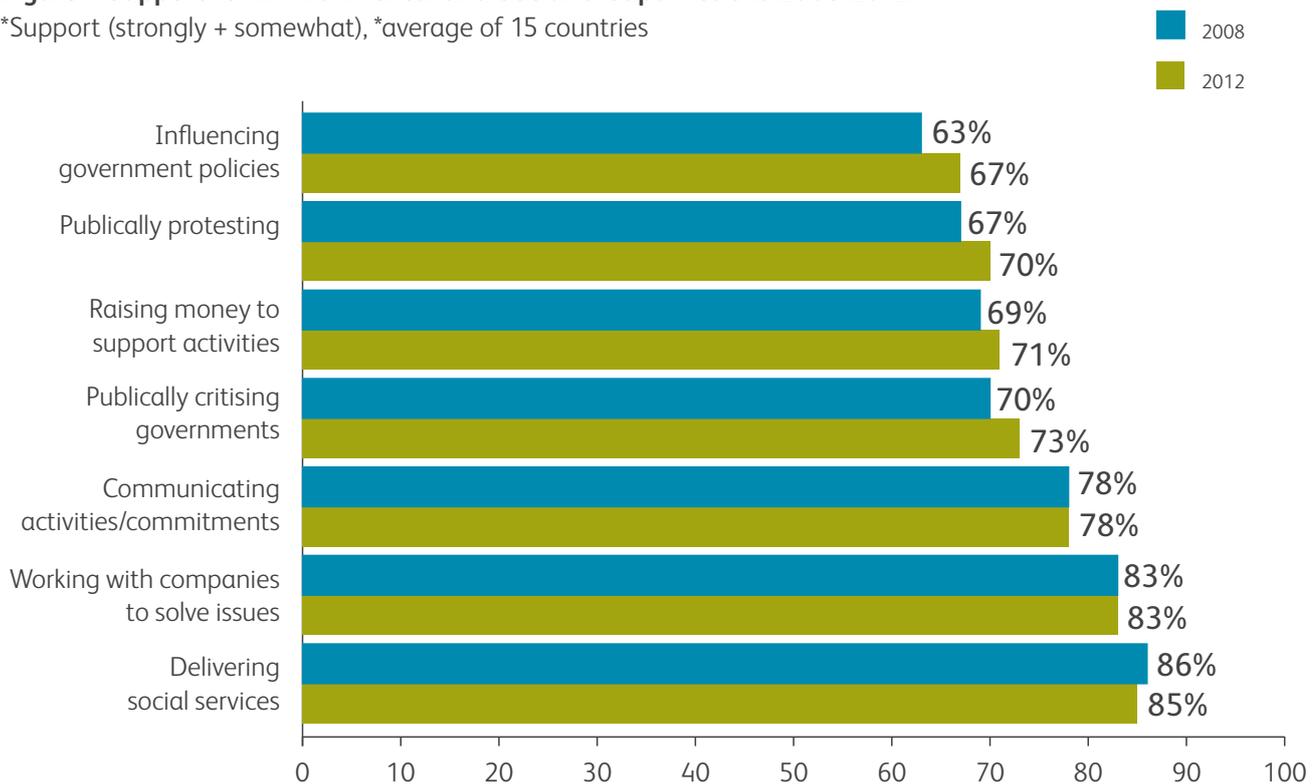
Provide training for politicians on the importance of not-for-profit advocacy and its benefits for government.

14 Sending, O. J. & Neuman, I. B. Governance to Governmentality: Analyzing NGOs, States and Power, *International Studies Quarterly*, 50,651-672, 2008

However, the problem of assessing the value of not-for-profit advocacy work is inherent to its nature. Advocacy that has not yet been successful has no, or at best marginal direct and measurable public benefit. Though advocacy could be said to have intrinsic social value through civic engagement, this is rarely perceived to be tangible by critics. As such we might reasonably expect to see - particularly in light of criticisms from the likes of the American Enterprise Institute¹⁵ and the Institute of Economic Affairs¹⁶ - low and declining public support for not-for-profit advocacy work. Yet research by Globescan shows strong support amongst the fifteen countries surveyed (Fig. 1) for environmental and social groups 'publically criticising government' (73%) and 'influencing public policies' 67%. Indeed, support for these actions increased by 4 per cent and 6 per cent respectively between 2008 and 2012.

Figure 1 Support for Environmental and Social Groups' Actions 2008-2012

*Support (strongly + somewhat), *average of 15 countries



*includes: Australia, brazil, Canada, China, Germany, India, indonesia, kenya, Mexico, Nigeria, Pakistan, Spain, turkey, UK and USA

Data from GlobeScan RADAR2012 Wave 2: Issues and Reputation

15 NGOs--The Growing Power of an Unelected Few, American Enterprise Institute, 2003 <http://www.aei.org/article/foreign-and-defense-policy/international-organizations/ngos--the-growing-power-of-an-unelected-few/> 16

16 Snowden, S, How the government lobbies itself and why, Institute of Economic Affairs, 2012

International crackdown on not-for-profit advocacy

In the era of globalisation of ideas and demands for civic freedoms, allowing not-for-profit organisations to voice their concerns is demonstrably in the interest of governments seeking legitimacy with the public. It is perhaps surprising then that there is a clear, recent and worsening international trend in which governments are cracking down on not-for-profit advocacy through regressive legislation and damaging rhetoric. In reaffirming the universal freedom to advocate for electoral and broader policy changes as guaranteed by the Human Rights Council in resolution 15/21¹⁷, Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association stated:

*“It is a source of serious concern that the term “political” has been interpreted in many countries in such a broad manner as to cover all sorts of advocacy activities; civic education; research; and more generally, activities aimed at influencing public policy or public opinion. It is clear that this interpretation is solely motivated by the need to deter any forms of criticism.”*¹⁸

Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association

Regrettably, too many governments have an extremely low tolerance for not-for-profit advocacy, such as Vietnam where thousands of people are serving prison sentences for breaching ‘national security’ provisions in the Criminal Code such as ‘conducting propaganda’ and ‘disseminating revolutionary ideas’¹⁹ But while the continuation of such policies is of concern to all those who support the advancement of civil society, it is the apparent trend for governments in some countries to be adopting regressive policies that is particularly worrying.

Examples of recent laws restricting not-for-profit advocacy include:

- In Azerbaijan, legislative amendments drafted by the Legal Policy and State Building Committee have been submitted to Parliament (as of January 2014) that would, according to CIVICUS World Alliance for Citizen Participation, “provide Azeri authorities enhanced powers to arbitrarily fine, deny registration to and close down organisations that speak out against government actions.”²⁰ In detailing the difficulties faced in arranging a meeting of the Azerbaijan Civil Society Defence Committee, which has been formed to respond to recent threats to the independence of civil society, Gubad Ibadoglu, the group’s coordinator commented that “representatives are obstructed in not only expressing their thoughts freely but in arranging meetings related to their projects and programs”.²¹
- In Indonesia, CIVICUS report²² that the recent (2013) Law on Mass Organisations (ORMAS Law) bars not-for-profit organisations from propagating ideology that conflicts with ‘Pancasila’ – the

17 Resolution 15/21: The rights to freedom of peaceful assembly and of association, Human Rights Council, Fifteenth session, Agenda item 3, 2010

18 Kiai, M, Rights to freedom of peaceful assembly and of association, Item 69 (b) of the provisional agenda, United Nations General Assembly, August 2013

19 Defending Civil Society: Second Edition, International Center for Not-for-Profit Law (ICNL) & World Movement for Democracy Secretariat at the National Endowment for Democracy (NED), World Movement for Democracy, 2012

20 Civil Society Groups Call On Azerbaijan’s President Not To Sign Restrictive Law, World Alliance for Citizen Participation, January 2014, <http://civicus.org/news-and-resources-127/1954-civil-society-groups-call-on-azerbaijan-s-president-not-to-sign-restrictive-law>

21 Civil Society Defence Committee was restored in Azerbaijan, Civil Society Forum of the Eastern Partnership (European Union programme) January 2014, <http://www.eap-csf.eu/en/news-events/news/civil-society-defence-committee-was-restored-in-azerbaijan/>

22 Indonesian NGO law a setback for freedom of association, Press release, CIVICUS World Alliance for Citizen Participation, August, 2013

principles of official state philosophy of Indonesia – thereby providing government officials with a powerful tool to silence organisations that oppose official policy. The ORMAS Law also prohibits activities falling within the purview of law enforcement agencies and government, curbing activities related to reform of the political, legal and security sectors.

- In Ecuador, a toxic atmosphere for not-for-profit advocacy, characterised by repeated statements by President Correa criticising not-for-profits for political interference, has been exacerbated by a draft law which if enacted, would have a chilling effect on civil society. The law allows for excessive government discretion to dissolve not-for-profit organisations. Grounds for dissolution of not-for-profits include “political proselytizing,” and “compromising ... the interests of the State.” In 2012 Amnesty International expressed their concern²³ to the UN that this decree ‘may be applied in a way that poses obstacles to the work of human rights defenders, unless safeguards are put in place to prevent this from happening.’
- In Algeria, the *Law on Information* (Law 12-05 of 2012) could restrict reporting on areas such as national identity, sovereignty, the economy, and security. The law requires all publications to have prior approval by a media regulatory authority. According to the Committee to Protect Journalists, at least thirty-two provisions can be used to repress free expression, and many are broadly written and could serve as a pretext for unwarranted censorship. Though the primary target is journalists, this will likely have a major impact on not-for-profit campaigning activities.²⁴

One of the most worrying indicators in this global trend is the presence of governments generally considered to be at the vanguard of the drive towards civic freedoms on the list of states implementing regressive policies suppressing not-for-profit advocacy. For instance, the Institute for Economics and Peace’s Global Peace Index, the State of World Liberty Index and the Economist Intelligence Unit’s Democracy Index place Canada fourth, third and eighth respectively but the Canadian not-for-profits have endured increasingly hostile relations with the government in recent years.

CIVICUS reports that anti-not-for-profit advocacy rhetoric is increasing being used by politicians²⁵. Recent changes to rules on political advocacy in Canada as part of the 2011 Federal Budget increased both the level of reporting required from charities – with new requirements on detailing foreign funding for political activities—and the amount of scrutiny by the Canada Revenue Agency of not-for-profit advocacy activities. The 2012 Federal Budget saw a C\$8 million increase of the budget of the Canadian Revenue Authority to audit the advocacy and political activities of charities alone. It also required charities to list funds provided to other organisations that would be used for advocacy activities to be listed as such in the charities’ own accounts.

23 Ecuador: Indigenous Peoples’ rights and harassment of protesters, Amnesty International Submission to the UN Universal Periodic Review, May-June 2012

24 Defending Civil Society: Second Edition, International Center for Not-for-Profit Law (ICNL) & World Movement for Democracy Secretariat at the National Endowment for Democracy (NED), World Movement for Democracy, 2012

25 State of Civil Society 2013: Creating an Enabling Environment, CIVICUS, 2013

When the existing legal framework is taken into consideration, these new requirements on charities and powers for the Canada Revenue Agency amount to an increasingly repressive climate for advocacy by not-for-profits. Under current guidance²⁶ charities may allocate a maximum of 10 per cent of revenue to be used to “oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country”. This definition allows the Canada Revenue Agency considerable discretion in making these determinations and the Voice-Vois coalition have highlighted a number of cases where charities have been threatened with losing their charitable status for activities which appear to be core to their charitable mission.²⁷

The Government of the United Kingdom, another country widely seen as having progressive and enabling laws guaranteeing the independence of civil society, has also recently moved to limit political advocacy. On January 30th the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act²⁸, more commonly known as the Lobbying Act, received Royal Assent. The Act will regulate advocacy activities throughout the electoral cycle following a number of lobbying scandals²⁹ that have engulfed this and previous governments. This desire to weaken the ability of wealthy individuals and powerful lobbyists to subvert the electoral process in pursuit of vested interests is understandable. However, there are fears that the Act could have a chilling effect on legitimate not-for-profit advocacy activities.

The Act will require any organisation that intends to spend more than £20,000 in England (£10,000 in Scotland, Wales or Northern Ireland) on political campaigning in the seven-and-a-half months leading up to a General Election to register with the Electoral Commission. However, until guidance has been produced (not expected before July 2014) it is not clear what advocacy activities will be considered to be “political”. It is feared that in the face of uncertainty about what activities are covered, many not-for-profit organisations will reduce their advocacy at the precise time that they are likely to be most influential.

On January 12th 2014 Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, was moved to write a letter to the Observer newspaper urging members of the House of Lords (upper house of parliament) to reject the Bill that sat before them and warning that it “threatens to tarnish the United Kingdom’s democracy”.³⁰ It is particularly concerning that the Act duplicates restrictions which are already placed on the political activities of “charities”- a legal form of not-for-profit organisation in the UK – which are regulated by an independent regulator (the Charity Commission).

Typology of barriers to advocacy

Governments are hampering the capacity of not-for-profit organisations to engage in advocacy activities around the world through their actions, their policies and their rhetoric. In some cases the

26 Policy Statement CPS-022, Canada Revenue Agency, 2003

27 Examples of punitive interpretations of ‘political activities’ by the Canada Revenue Agency available from the Voice-Vois coalition at <http://voices-voix.ca/en/revocation-of-charitable-status>

28 Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014, Government of the United Kingdom, January 2014 <http://www.legislation.gov.uk/ukpga/2014/4/contents/enacted/data.htm>

29 History of political lobbying scandals, BCC news website, June 2013, <http://www.bbc.co.uk/news/uk-politics-22754297>

30 Kiai, M, Coalition’s lobbying bill threatens to leave a stain on British democracy, Observer, January 2014, <http://www.theguardian.com/commentisfree/2014/jan/12/lobbying-bill-stain-on-democracy>

Recommendations

State clearly any limits on advocacy and define prohibited partisan/party political behaviours.

Produce clear guidance that outlines how the government will interpret laws relating to not-for-profit advocacy which can be understood by lay audiences.

Amend legislation to remove vague and ambiguous terms or provide clarifying guidance on not-for-profit advocacy.

Create legislation that establishes not-for-profit advocacy, within mutually agreed parameters, as a statutory right.

Establish an independent body to arbitrate over government claims of unlawful not-for-profit advocacy.

repression of the voice of civil society is official State policy whilst in others, the silencing of civic criticism is merely an unintended consequence of well-intentioned policy.

1 Vague legislation

In many cases poorly-drafted legislation allows for a wide range of interpretations by governments. Whilst any vagueness could in theory allow responsible governments to use nuance in a positive way to reinforce a reciprocal relationship with the not-for-profit sector, this potential benefit is outweighed by the risk that governments, faced with vociferous pressure from advocacy groups, will be tempted to take advantage of imprecise laws to repress criticism.

In Egypt, the law (Regulations to Law No. 84/2002 on Associations and Non-Governmental Institutions (Article 25)) sets reasonable restrictions on not-for-profit engagement in 'political activities' such as prohibiting "advocating the program of one of the political parties, contributing to electoral campaigns, and putting forth candidates for office." However, an extremely broad interpretation of those activities and a failure to distinguish between partisan political campaigning and public policy advocacy has impinged on the freedom of not-for-profits to voice concerns. The International Center for Not-for-Profit Law (ICNL) reports the case of the Egyptian Association Against Torture who in 2005 were prohibited from commencing an advocacy project to pressure the government to eliminate torture in police stations as even this was considered to be 'political activity'.³¹

2 Lack of protection

As we have shown, there are a number of countries where not-for-profit organisations face legal barriers to engaging in advocacy activities. However, in some countries a lack of protection in the form of laws and guidance guaranteeing the rights of organisations to criticise and lobby government for change, is hampering not-for-profit advocacy. This omission allows governments to suppress criticism from civil society through tactics of intimidation and/or defamation.

Elmer Eric Schattschneider noted as far back as 1971 that due to the asymmetry of power between not-for-profits and governments there must be guarantees that not-for-profits will not be punished for their advocacy. Where such guarantees are not provided (or upheld) the result can be a silencing of criticism that from the outside looks much like agreement.

31 The Legal and Regulatory Framework for Civil Society: Global trends 2012/2013, Global Trend in NGO Law: A quarterly review of NGO legal trends around the world, International Center for Not-for-Profit Law, August 2013

“People are not likely to start a fight if they are certain that they are going to be severely punished for their efforts. In this situation repression may assume the guise of a false unanimity.”³²

Elmer Eric Schattschneider

Examples of where there is a lack, of legislation that protects the right of not-for-profits to engage in advocacy, or failure to implement legislation that should ensure this right, include:

- **Uzbekistan:** there are no official barriers restricting speech or advocacy activity and not-for-profit organisations and individuals are both free, in theory, to criticize the Government. In practice, however, there are constraints on speech and advocacy. A lack of rights and freedoms for civil society have seen not-for-profits engaging in human rights activity or government monitoring, being subjected to harassment or even termination. The fact that these measure are extra-legal makes it difficult to plan advocacy with confidence that it will not be subject to state retaliation.³³
- **Venezuela:** not-for-profits do not face any legal barriers to advocacy or political activities but in practice, organisations that criticise the government have faced informal, personal threats, pressure and excess scrutiny over donors, judicial prosecution of members, and public criticism in the media.³⁴
- **Uganda:** there are no legal barriers or restrictions on the rights of not-for-profit organisations to engage in advocacy. However, the government has a poor track record of intimidating organisations that seek to promote human rights and democracy despite the fact that Article 29 of the Constitution guarantees every person the right to freedom of speech and expression.³⁵

3 Use of defamation law

Striking a balance between the need to facilitate a culture where wrongdoings are exposed in the public interest, but deliberate smears of a person’s reputation are disincentivized is a challenge that all governments face. The long-term trend has been for governments to decriminalise defamation and allow cases to be settled through litigation. But whilst legislating to create a balance between protection and promoting freedoms of expression poses a challenge for policy makers, the challenge becomes one of objectivity when they come to apply it to themselves.

Recommendations

Create legislation that establishes not-for-profit advocacy, within mutually agreed parameters, as a statutory right.

Establish an independent body to arbitrate over government claims of unlawful not-for-profit advocacy.

32 Schattschneider, E.E. “The Semisovereign People”. Wadsworth Cengage Learning: Boston, 1975

33 NGO Law Monitor: Uzbekistan, <http://www.icnl.org/research/monitor/uzbekistan.html>

34 Ibid

35 The Legal and Regulatory Framework for Civil Society: Global trends 2012/2013, Global Trend in NGO Law: A quarterly review of NGO legal trends around the world, International Center for Not-for-Profit Law, August 2013

In recognition of the importance of public criticism in holding government to account, many nations have ensured that government, and individuals in public office, cannot be defamed in the law., Unfortunately, however, the use of laws on defamation and misinformation to restrict criticism of government remains relatively common.

In many nations the criminalisation of defamation of government is effectively used to silence critics.

- In both **Cambodia** and **Thailand** it is possible to be charged with defamation against the government for advocacy which criticises policy. Given that in both countries defamation remains a criminal offence with a maximum penalty of 2 years imprisonment,³⁶ few not-for-profits feel able to take on the risk of speaking out against the State.
- In **India**, state and national governments have used criminal defamation legislation to curb the media and other critical voices.³⁷
- In **Algeria**, laws were amended in 2001 to criminalize defamation of the president, the parliament, the judiciary, and the military and courts are subject to government pressure when adjudicating cases of libel and related offenses. Under the defamation provisions, it is a greater crime to offend the State or its representatives than it is to offend a private individual.³⁸
- In **Guinea**, restrictive press legislation considers defamation and slander criminal offenses and permits the authorities to censor publications.³⁹
- In **Poland**, defamation of public officials, the State, and constitutional institutions are criminal offences punishable by fines and up to two years in prison.⁴⁰

In other nations, such as Pakistan and Greece, criminal cases of defamation of government are increasingly rare but remain legally possible.⁴¹ However, the potential for such charges continue to act as a deterrent to advocacy. Decreasing numbers of criminal defamation cases do not necessarily point to a more enabling environment for not-for-profit advocacy. For civil society to find their voice the legal apparatus for punishing criticism must be removed in order to persuade not-for-profits that they are not risking the needs of dependent beneficiaries, as well as their own personal freedom.

Defamation of the government as a concept in law , along with other legal constructs that aim to raise the legal risk of publishing research – such as in Belarus where the dissemination of “dishonest” information is a criminal offence –undermines democracy. All information, even scientific research, only becomes accepted as accurate once it has been reviewed and challenged. That process, and any resulting conflict or consensus, is the basis on which democratic society thrives.

36 Defending Civil Society: Second Edition, International Center for Not-for-Profit Law (ICNL) & World Movement for Democracy Secretariat at the National Endowment for Democracy (NED), World Movement for Democracy, 2012

37 Press Freedom Index, World Audit <http://www.worldaudit.org/presstable.html#top>

38 Defamations Laws in Algeria, International Defamation Law Database, Kelly/Warner, <http://kellywarnerlaw.com/algeria-defamation-laws/>

39 Press Freedom Index, World Audit <http://www.worldaudit.org/presstable.html#top>

40 Defamation Laws in Poland, International Defamation Law Database, Kelly/Warner <http://kellywarnerlaw.com/poland-defamation-laws/>

41 Press Freedom Index, World Audit <http://www.worldaudit.org/presstable.html#top>

The creative destruction of ideas allows for governments to be held to account for mistakes and pressured to make changes, or to gain the plaudits for achievements that have been independently verified. In addition, where a free market for data and ideas exists, those who consistently offer false or flawed information lose credibility. This organically creates an in-built incentive for quality and drives up standards. In stifling this process, governments are turning their back on a force for innovation and global competitive advantage.

4 Barriers to foreign funding

As stated previously, funders in the traditional philanthropic centres of the developed world are increasingly moving away from implementing aid projects – which are increasingly being delivered by local organisations – to engaging in advocacy.

Observers of international trends in laws relating to civil society organisations have noted a counter trend to the general global advancement in civic freedoms that we have witnessed in the past generation. In 2009 the ICNL identified “Restrictions on NGO Public Policy Activities” as a “Global Trend in NGO Law”⁴². Since 2009 the trend has begun to pick up pace.

Addressing the United Nations Human Rights Council on May, 30, 2013 Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and association highlighted “increased control and undue restrictions”⁴³ on funding, particularly foreign funding, as one of two key concerns (the other being freedom of assembly) as currently being “the most significant ones of his mandate”. Mr Kiai was introducing the latest edition of ICNL’s Global Trends in NGO Law report⁴⁴ which details recent and proposed laws in fourteen countries around the world which will limit access to foreign funds for not-for-profit organisations.

Examples of recent restrictions to foreign funding include:

- In Kenya, the Miscellaneous Amendment Bill 2013, published on October 30, will place a blanket cap on the proportion of funds that can be derived from foreign sources at 15 per cent of income.⁴⁵

Recommendations

Ensure that the government cannot be defamed in the law.

Ensure that neither civil or criminal law holds sanctions for ‘misinformation’ that does not defame the reputation of an individual or organisation not engaged in government.

42 Barred from the Debate: Restrictions on NGO Public Policy Activities, Global Trend in NGO Law: A quarterly review of NGO legal trends around the world, International Center for Not-for-Profit Law, November 2009

43 May 30, 2013, UN Special Rapporteur on the rights to freedom of peaceful assembly and association Maina Kiai presented his second thematic report to the United Nations Human Rights Council. As reported on the International Centre for Not-for-profit Law website <http://www.icnl.org/research/trends/trends4-2.html>

44 The Legal and Regulatory Framework for Civil Society: Global trends 2012/2013, Global Trend in NGO Law: A quarterly review of NGO legal trends around the world, International Center for Not-for-Profit Law, August 2013

45 Ibid

- In Russia, a 2012 Federal Law⁴⁶ is currently being implemented that will require any not-for-profit receiving foreign funds that engages in “political activities” to register as a ‘foreign agent’. The lack of clarity on what constitutes “political activity” creates uncertainty for foreign funded not-for-profits who faced with being labelled as a foreign agent are likely .Though Russian officials have claimed the term ‘foreign agent’ is in fact a legally neutral term, others, including Nils Muiznieks, human rights commissioner for the Council of Europe claims “continuing use of the term ‘foreign agent’ in the legislation and practice in relation to NGOs would only lead to further stigmatization of civil society in the Russian Federation and will have a chilling effect on its activities.”⁴⁷ Since March 2013 government officials have inspected over 2,000 not-for-profits in search of foreign agents.⁴⁸ In October 2012, Russia expelled USAID from the country, accusing it of meddling in politics.⁴⁹
- In Turkmenistan a decree issued in January 2013 by President Gurbanguly Berdimuhamedov ordered the creation of a commission to supervise foreign funded “projects and programs” covering all not-for-profit organisations and their activities. The decree, ‘On State Registration of Foreign Projects and Programs of Gratuitous Technical, Financial and Humanitarian Assistance and Grants’ now means that to gain approval for a programme, donors and beneficiary organisations will have to navigate a prohibitively bureaucratic process involving twelve Ministries.⁵⁰

The trend for regulation and legislation that suppresses not-for-profit advocacy stems from the fact that policy makers believe that the influence of foreign funders on not-for-profit advocacy could threaten state sovereignty. When trying to centralise power to the State, limiting access to foreign funds supporting organisations that campaign against government policy makes logical sense. There is an argument to say that foreign funds for organisations distort the civic culture of a nation and extend the hegemony of donor country culture over domestic values.

Thinkers on the subject of cross-border philanthropy often see the funding of human rights and environmental campaigns as progressing concerns that are shared by everyone. Whilst there may be widespread ethical agreement on the need to address a certain issues, the same consensus may not have been reached in all societies and we must be careful not to assume that all foreign advocacy is necessarily benevolent. Such assumptions may be blinding those in favour of unrestricted access in the funding of foreign not-for-profit advocacy to the potential for malevolent or at least culturally insensitive behaviour. As such we can judge how to balance the desire for liberalism against the need for protectionism by performing a simple thought experiment: Imagine if you can a hypothetical situation in which a global super-power arose with cultural values that you found abhorrent. Would you welcome the funding of not-for-profit campaigning organisations in your country from its wealthy donors and aid agencies without discretion?.

46 ‘Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Function of Foreign Agents’

47 Quote from Nils Muiznieks, Russia should drop ‘foreign agent’ tag for NGOs: rights official, online article, Reuters, July 2013, <http://www.reuters.com/article/2013/07/15/us-russia-ngos-idUSBRE96E0DK20130715>

48 The Legal and Regulatory Framework for Civil Society: Global trends 2012/2013, Global Trend in NGO Law: A quarterly review of NGO legal trends around the world, International Center for Not-for-Profit Law, August 2013

49 Russia expels USAID development agency, BBC website, September 2012, <http://www.bbc.co.uk/news/world-europe-19644897>

50 Turkmenistan: Ashgabat Closing Door on Foreign Donors? EUROASIANET, May, 2013 <http://www.eurasianet.org/node/67011>

As such, to advocate that foreign governments turn a blind eye to foreign funding would be an act of political narcissism. Rather, the international community should establish the expectation that governments lead a public conversation about what actions in not-for-profit advocacy are not deemed consistent with public benefit. Once this has been clearly defined through an open and transparent process it should be possible to create a legal and regulatory framework that works as well for large campaigning organisations funded from overseas as it does for small domestic organisations, without having to create a two-tier system or the problems associated with it.

The most compelling argument for a liberal policy regarding the funding of advocacy activities by foreign funders is that attempts to limit criticism by cutting off foreign funds to not-for-profits can have the opposite effect. As mentioned previously, the suppression of advocacy often leads to civic action which is even less desirable for governments than those which they seek to suppress. Margaret Keck and Kathryn Sikkink's boomerang model⁵¹ provides a framework for understanding how transnational advocacy networks (TANs) develop as a result of the suppression of the advocacy of domestic civil society.

The model states that where not-for-profit organisations are prevented from engaging in advocacy through censorship, incarceration or violence they seek help from organisations operating abroad who do not face the same restrictions and/or risks. These external partners are able to raise the profile of both the barriers to advocacy and the issues which domestic not-for-profits were originally trying to raise. The resulting negative international attention can often be worse than the more narrowly-focussed domestic advocacy which would have occurred without government intervention. Contemporary examples are almost too abundant to mention but the fact that recent suppression of anti-homophobia campaigners in Sub-Saharan Africa has done more to raise the global profile of this issue than any domestic campaign could possibly have hoped to achieve provides a poignant example. As such, government efforts to inhibit domestic advocacy by not-for-profit organisations appear to be counterproductive.

If governments want to limit the disproportionate influence of foreign donors (which in theory could be a legitimate need) they should do so not by quelling advocacy generally or by targeting foreign funded organisations but by creating a legal and regulatory framework that prohibits, in the most specific terms, certain causes which are against the public interest. Indeed, an ongoing public conversation about what issues offend the basic principles which underpin society is a sign of a healthy civil society. Removing barriers to domestic advocacy may well have the effect of reducing the influence of foreign organisations and donors as domestic not-for-profits no longer need to seek help from abroad to have their voice heard.

Recommendations

Collaborate with international partners to agree common freedoms for not-for-profit advocacy.

Governments in net-donor countries could act to challenge the perception by net-beneficiary country governments of hypocrisy with regard to advocacy. By ensuring that organisations operating abroad comply with domestic advocacy rules in their actions overseas, net donor nations could set an important precedent that not-for-profits should not engage in political advocacy abroad that they would not be comfortable with in themselves.

Under- regulation of not-for-profit lobbying

Whilst the global trend in the regulation of advocacy – particularly in relation to the electoral process – has been for heavy handed and regressive policies that suppress the freedom of speech of not-for-profits, it is important to recognise that under-regulation can also damage the reputation of the sector. It should be recognised that when checks on the campaigning of not-for-profits are insufficient, this can open up the potential for party-affiliated political lobbying and the appropriation of philanthropic language for the pursuit of vested political interests.

In recent years the political activities of organisations categorised as 501(c)(4) by the Internal Revenue Service (IRS) in the USA have been the subject of scrutiny and controversy. These organisations are not perceived by the public as in any way charitable and donors to 501(c)(4) organisations do not receive tax benefits. However, 501(c)(4) organisations are nevertheless not-for-profits and receive tax exemption.

With origins dating back to the Revenue Act of 1913 the 501(c)(4) category is thought to have been devised to empower organizations which could not qualify as charitable, educational, or religious, but whose activities somehow benefited the general public.⁵² 501(c)(4) organisations are required to be primarily engaged in “social welfare” activities but they may engage in political campaigns on behalf of or in opposition to candidates for public office provided that such intervention does not constitute the organization’s primary activity.⁵³ This has been interpreted to mean that political activities must account for less than 50 per cent of expenditure, though whether this definition was envisaged by authors of the earlier rulings is unclear. Crucially, this enables 501(c)(4) organisations to engage in party political lobbying does not limit them to advocacy on issues which are directly relevant to their stated cause in the same way that charitable not-for-profits in the USA are.

Over time, successive rulings have loosened constraints on the ability of these organisation to engage in political advocacy⁵⁴ without providing commensurate checks and balances. The loosening of political advocacy rulings combined with the ability to solicit anonymous donations has led to the increasingly

Recommendations

Expect not-for-profits to comply with domestic laws and guidance when operating abroad.

51 Keck, M. E & Sikkink, K, *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca and London: Cornell University Press, 1998

widespread use of 501(c)(4) organisations as funding vehicles for party political campaigning as they allow donors to contravene the principle that donors to political campaigns should be named. Set against the controversy around the political activity of so called Super PACs, (independent expenditure-only committees) which are required to disclose donors, it seems clear that a lack of transparency in 501(c)(4) political spending has obscured public understanding of the size of their role. Contrary to public perception, spending by 501(c)(4) in the 2010 Presidential election campaign outstripped spending by Super PACs by a 3-2 margin.⁵⁵

The Centre for Responsive Politics reports that spending by 501(c)(4) organisations increased from \$2.6 million in the 2004 presidential election to well over \$300 million in the 2012 election.⁵⁶ Organisations have been able to increase the proportion of funds that they allocate to political campaigning by exploiting the vagueness of the political lobbying rules. One way that organisations have done this is by making grants to other lobbying organisations which are not counted in their own financial reports as contributing towards their political lobbying expenditure. Crossroads GPS, a conservative 501(c)(4) organisation donated \$26.4 million to Americans for Tax Reform in 2012 - who subsequently increased their political lobbying expenditure - but did not count that donation as contributing to its lobbying expenditure.⁵⁷ Noting the rise in political lobbying expenditure, in 2010 the IRS withheld a number of applications for tax-exempt status. The Treasury Inspector General for the IRS later found in favour of conservative groups who complained they had been unfairly targeted whilst others have claimed similar targeting of liberal groups.

The failure to provide unambiguous guidance on the political advocacy of 501(c)(4) organisations has allowed a form of not-for-profit to develop which is understood by the public to exist for the purpose of supporting a political figure, movement or party – even if, on paper, it professes to support social welfare. Subsequent attempts to rectify the situation have only served to further the perception that the regulatory system is politically skewed and have undermined the extent to which the public see not-for-profits as independent from the State and from party politics. As of January 2014 proposals to set fixed limits on 501(c)(4) spending on political lobbying and tie up loopholes in the regulation are open for consultation.

Recommendations

Where fixed limits on political advocacy expenditure are in place, require the grant making organisation to declare how the funds are to be used and to report funds used for political lobbying.

Ensure that regulation clearly distinguishes between advocacy that addresses issues relevant to the stated cause of a not-for-profit, and the support of a political figure, movement or party.

52 Laura, Chisolm B. Exempt Organization Advocacy: Matching the Rules to the Rationales, *Indiana Law Journal*: Vol. 63: Iss. 2, Article 1. 1998

53 Reilly J. R, Allen B. A. B, Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations, Exempt Organizations-Technical Instruction Program for FY 2003, Inland Revenue Service, 2003

54 Gershman, J, The History of the 501(c)(4) Exemption, Law Blog, The Wall Street Journal, 2013 available at <http://blogs.wsj.com/law/2013/11/26/the-history-of-the-501c4-exemption/>

55 Nonprofits outspent super PACs in 2010, trend may continue, Joint investigation by the Center for Public Integrity and the Center for Responsive Politics, June 2012, <http://www.publicintegrity.org/2012/06/18/9147/nonprofits-outspent-super-pacs-2010-trend-may-continue>

56 Data taken from the Centre for Responsive Politics website at http://www.opensecrets.org/outsidespending/nonprof_summ.php

57 McKinnon, J. D, Mullins, B and Catan, T., IRS Moves To Restrict Nonprofits' Politicking, The Wall Street Journal, November, 2013 <http://online.wsj.com/news/articles/SB10001424052702304465604579222110598111076>

Financial independence

Recommendations

Where fixed limits on political advocacy expenditure are in place, require the grant making organisation to declare how the funds are to be used and to report funds used for political lobbying.

Ensure that regulation clearly distinguishes between advocacy that addresses issues relevant to the stated cause of a not-for-profit, and the support of a political figure, movement or party.

Independence for not-for-profits, as for individuals, means the freedom to manage their own destiny. As for any organisation, the ability to determine how resources are put to use requires the freedom to plan for a sustainable and prosperous future whilst retaining the flexibility to adapt to changing circumstances. But in an era of globalisation and economic liberalism, the boundaries of the state are becoming increasingly blurred. This has led to public financing models that increase the risk of jeopardising the financial independence of not-for-profit organisations.

With public institutions acting increasingly as commissioning bodies and public services being provided through contracts not-for-profits must adapt. Where not-for-profits are able to bid for, win, and deliver public contracts by demonstrating their social value there are benefits to all. However, if not-for-profits are treated as mere service providers by governments there is a danger that their independence, both in reality and in the eyes of the public, could be damaged. As such, governments must implement policies which guard against the erosion of the very qualities which make not-for-profit organisations an essential part of the fabric of civil society.

Government funding

Governments have funded not-for-profit organisations for almost as long as they have been a feature of civil society. In Victorian Britain, charities that were deemed to be delivering valuable services or to have particular expertise often attracted grants from the state. The success of these projects have had an indelible impact not only on the development of the not-for-profit sector in the United Kingdom, but on the nature of public service. However, in recent years the public funding of not-for-profits in the UK and worldwide has increased in frequency and formality.

The spread of liberal economic policies since the 1980s, but particularly over the past two decades, has led many governments to decentralise. This process has often resulted in the transfer of State-owned assets and services to private companies. However, in the case of some of those assets, and particularly in the case of public services at the local level, governments often see delivery of public services through funding not-for-profit organisations as a preferable option.

As detailed in the previous report of the Future World Giving project – *Building Trust in Charitable Giving* – not-for-profit organisations generally enjoy higher levels of public trust than companies. According to Edelman's global Trust Barometer⁵⁸ 63 per cent of those surveyed trusted not-for-profits compared

58 Trust Barometer, Edelman <http://www.edelman.com/insights/intellectual-property/trust-2013/>

to 58 per cent for businesses, 57 per cent for the media and 48 per cent for governments. Ideological positions aside, it is clear that funding not-for-profits to deliver services is, on paper at least, an attractive option politically.

Indeed, as well as being a more politically saleable, governments are increasingly attracted to the unique qualities that not-for-profits possess. High levels of trust are often gained by not-for-profit organisations from years of working within communities, and in many cases staff and volunteers are drawn from the same communities as their beneficiaries, giving them a deep understanding that adds value to service delivery. A charitable mission drives not-for-profits to continually improve in pursuit of a goal that is in the public benefit, without the need for profit. This can result in high levels of service and efficiency alongside associated, but often intangible environmental and social benefits – often characterised by the phrase ‘social value’.

Government funding for not-for-profits can offer value for taxpayers and beneficiaries. But receiving funds from government can, unless checks and balances are in place, result in an organisation ceding more influence to the government and further skewing the already asymmetrical power balance between civil society and the State. According to ICNL, not-for-profit organisations in Sudan that support the ruling government enjoy “full government backing, including funding, customs exemptions on imports, and participation in government activities, including accompanying official delegates on travel to regional and international events”.⁵⁹ In contrast, those organisations who voice criticisms of government are often “harassed, threatened, and closed down if they voice a position contrary to government views”.

In many nations there has been a decisive shift in the way that governments fund not-for-profits in recent years. Whereas public money has traditionally been allocated in the form of grants with activities to be undertaken being negotiated on an ad-hoc basis, increasingly institutions of the State are moving to a commissioning model in which not-for-profits bid for and deliver contracts. Whilst such funding practices are not intrinsically damaging for not-for-profit organisations, the wholesale move from grants to contracts without due consideration of its effect on civil society has potentially serious, if unintended, consequences for the independence of civil society.

Recommendations

Create statutory guidance preventing the practice of awarding or withholding public funds based on the public support or criticism of government policy by not-for-profits.

59 Ibid

Recommendations

Require commissioners to undertake analysis of best available providers to establish if grants would be more suitable for funding desired outcomes.

Talk to not-for-profits and social investors before putting contracts out to tender to increase preparation time.

Set a minimum time period for the tendering process in public contracts and introduce targets for public bodies for meeting this standard.

Create a range of financial tools to help not-for-profits to be competitive in the public commissioning process.

Allow organisations to put together joint bids for contracts or bid for a portion of the work where appropriate to open up funding for smaller organisations.

Contracts can put not-for-profits in an untenable situation due to the expectation that the organisation bidding for a contract will take on the financial risks resulting from overspend, missed targets or legal challenges. Most organisations do not have the scale required to be able to accept such risks and even those that do might see taking risks that could ultimately result in failure to help beneficiaries as irresponsible.

In the UK, the move to contracting has attracted particular concern in light of recent government initiatives to commission some services on a “payment by results” basis. Contracts that will only release funds if and when targets have been met, require delivery organisations to take on start-up costs from their own reserves with no guarantee of payment. As a result many contracts are won by large companies and not-for-profit organisations can only get involved as sub-contractors. In 2012 Charities Aid Foundation called for commissioners to ensure that contracts contain an appropriate mixture of up-front funding and subsequent success-contingent payments. CAF also recommended that length of the bidding process be extended, in order to allow more time for socially-motivated investors to assess risk and raise capital in support of not-for-profits bidding for contracts.⁶⁰

Governments should also consider innovative approaches to funding capacity building in not-for-profits that deliver high quality services and contribute additional social value but do not meet the pre-qualification requirements for bidding for public contracts. Funding models which provide money up front for not-for-profits to be deducted from future payments would be a financially neutral option whilst the financial case for capacity building grants would be strengthened by taking the wider social and environmental benefits of not-for-profit providers into account in the commissioning process.

The not-for-profit sector in the UK has raised further concerns about the prevalence of so-called “gagging clauses” in contracts. These prohibit organisations that are in receipt of contracts from criticising the contracting body. In its annual review, the UK Panel on the Independence of the Voluntary Sector found that self-censorship was increasing because of “the fear of loss of funding, and loss of capacity because of the move to restrictive contract funding” and that “...direct censorship is also occurring through ‘gagging clauses’ in government contracts.” Such clauses amount to a co-opting of civil society by the State and an emasculation of not-for-profit advocacy by stealth.

For the most part, citizens are supportive of not-for-profits to delivering key services. Fig. 2 shows that in all 16 countries surveyed by Globescan, a majority of people support the delivery of services like education and health care, even in

60 Funding Good Outcomes: Using social investment to support payment by results, Charities Aid Foundation, 2012

countries where those services are currently provided by the State. Furthermore, the majority of citizens in each country were comfortable with the idea of not-for-profits working with companies to help solve environmental and social issues. But while the public might not oppose the idea of cross-sector funding for services, that does not mean that it doesn't affect how they perceive not-for-profit organisations.

Our attitudes to charitable giving are much more complicated than is often assumed, as has been revealed by academic study. The much-vaunted truism that no act of charity can be truly altruistic because the sense of wellbeing resulting from a generous act is its own reward has been updated to provide more utility in assessing donor perceptions to the changing relationship between not-for-profits and the State.

Most donors believe that they are motivated by pursuit of a cause and resist the notion that they derive benefit from giving. Indeed, in many nations people avoid talking about their charitable giving for fear that it will be perceived as a ploy to gain social advantage. However, given that talking about charity to peers has been shown to increase charitable giving, a person committed to the best outcome for beneficiaries would be as open as possible about their generosity. This neatly articulates the conflicting motivations that drive donor behaviour; people value the feeling that their giving is benevolent highly enough that they are willing to give in less impactful ways to preserve it.

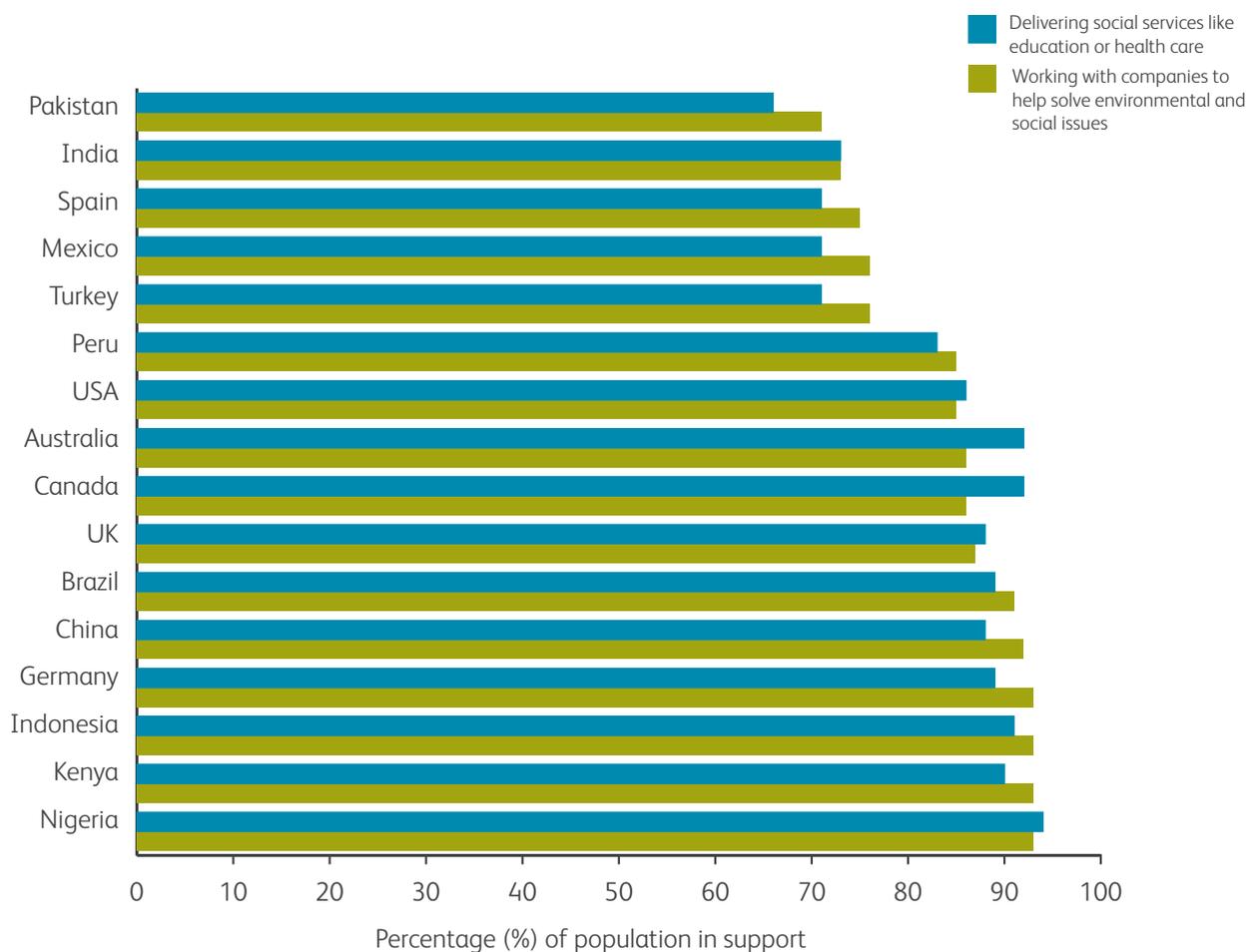
A minority of donors exist at the philosophical poles. Whilst many would self-identify as philanthropic “consequentialists”⁶² – those who are solely focused on the outcomes of their donations, most can be placed along a sliding scale between consequentialism and “virtue ethics”. Virtue ethics – the belief that the right act is the one that a virtuous person would choose – is crucial for understanding donor attitudes to government funding and sub-contracting of not-for-profit organisations. Even if it can be shown that not-for-profits that adapt to be able to deliver contracts for the government are more effective in delivering for beneficiaries than traditional forms of organisation, some donors may feel that the process is less virtuous. Put simply, signing a contract with governments or companies can be perceived by donors as a “Faustian pact” that damages the integrity of not-for-profits.

Recommendations

Create Statutory guidance that prohibits all public institutions from inserting “gagging clauses” into contracts involving not-for-profits.

61 Independence Under Threat: The voluntary sector in 2013, The Panel on the Independence of the Voluntary Sector, 2013
62 Ord. T, Consequentialism and Decision Procedures, University of Oxford, 2006

Figure 2 Public support for not-for-profit organisations delivering social services and working with companies



Recommendations

Allow not-for-profit organisations carry financial reserves into the next financial year.

Produce guidance which explicitly states the importance of financial reserves in mitigating the risk of reduced funding.

Financial management

Financial independence is about more than just access to resources. The ability of not-for-profits to manage their own assets as they see fit is an aspect of independence that is often overlooked in the analysis of international not-for-profit law. The freedom to manage assets and risk is fundamental to establishing the kind of sustainable planning that can bring about positive outcomes for beneficiaries. In addition, organisations that can demonstrate effective and efficient financial management can gain credibility with donors. In this way, empowering not-for-profits to manage their own finances as they see fit can drive a more sustainable and financially accountable civil society.

One area of financial management where it is particularly important for not-for-profits to have autonomy is the ability to maintain financial reserves. Sadly, some governments have seen fit to legislate to restrict the ability of not-for-profits to carry financial surpluses over into the next financial year, based on the misguided logic that this reduces the risk of financial mismanagement. Ironically, rather than reducing such risks, such a policy forces not-for-profits into spending money in an un-strategic manner and prevents them from being able to increase capacity or manage risk.

The effective financial governance of not-for-profit organisations requires an ability to balance complex and often competing objectives. Trustees may feel that they are ultimately accountable to donors and beneficiaries, and given that both groups would desire maximum efficiency from donations, this creates a requirement for any investments to be placed where they will earn maximum returns. This pattern of thought often outweighs what should be an equally compelling concern; the reputational risk of investments.

Not-for-profits are rightly judged by the impact that they have in pursuit of their stated cause. Donors are increasingly willing to scrutinise the investments held by not-for-profits to screen out those organisations whose financial management is not consistent with either their personal moral framework, or the stated mission of the not-for-profit. In extreme cases, as seen in December 2013 in the UK, the investment policies of not-for-profit organisations can be publicly challenged, leading to the diminishment of their moral legitimacy. An episode of the BBC investigative documentary programme *Panorama*, entitled “All in a Good Cause”⁶³, claimed that Comic Relief, a large UK grant making registered charity, held considerable investments in the tobacco and arms industries. This controversy led Comic relief to issue a series of rebuttals and explanations to its donors and supporters.

Rather than adopting a laissez-faire approach to the financial management of not-for-profit organisations, governments that want to support the development of a sustainably-resourced civil society should make non-intervention part of a public-facing policy agenda. Whilst this might seem like a subtle distinction, it is in fact an important one. Not-for-profits, subject to competing obligations, should be empowered by government to treat their financial activities in the same way they treat all of their other charitable activities. In other words, governments should make it clear that trustees can legitimately forgo the greater returns offered by a given investment – which is not to say that ethical investments do not perform well - in order to pursue an investment policy which is consistent with its charitable mission. In the United Kingdom for example, specific codes of guidance from the Charity Commission permit trustees to “decide to invest ethically, even if the investment might provide a lower rate of return than an alternative investment”.⁶⁴

In our role as a provider of investment vehicles for not-for-profits, CAF has noticed a significant increase in the demand for ethically-screened investment products.⁶⁵ More research is required to establish the strength of donor concern in this area, but trustees should certainly have the freedom to choose when

Recommendations

Enable not-for-profit organisations to treat investments as charitable activity and pursue investments which are consistent with their charitable mission.

63 All in a Good Cause, *Panorama*, British Broadcasting Corporation. Broadcast in the United Kingdom on December 10, 2013 on BBC One

64 Charities and investment matters: a guide for trustees (CC14), Charity Commission, <https://www.charitycommission.gov.uk/publications/cc14.aspx#3>

65 How to invest ethically as a charity, Voluntary Sector Network, Guardian, Jan 2014, <http://www.theguardian.com/voluntary-sector-network-caf-partner-zone/how-to-invest-ethically-charity>

Recommendations

Require organisations receiving full or partial tax exemption to publish financial accounts.

Where regulators require not-for-profits to provide financial reports they should publish those reports in a publically accessible and searchable format.

Organisations not receiving tax exemption should be encouraged, but not required to provide financial reports to be published by government in a publically accessible format.

Create a publicly accessible platform for not-for-profits to disclose details of their investments.

managing the future risk of donor scrutiny of investment policies. Regulators may want to consider creating a platform for not-for-profits to voluntarily disclose details about their investments, enabling donors to more easily screen for undesirable assets held.

As stated in the Future World Giving report, *Building Trust in Charitable Giving*, it is legitimate for regulators to require not-for-profit organisations receiving tax exemptions or reductions, to publish their financial accounts on an annual basis. Providing that regulators ensure that these accounts are made publically available in an accessible format, this can have the dual effect of helping organisations to earn public trust, whilst improving standards of financial governance. In nations where not-for-profits do not receive any level of tax exemption, governments should provide a space for the voluntary disclosure of financial accounts for this reason.

Creating a mutually beneficial relationship between the state and civil society

We have seen that the relationship between not-for-profit organisations and the State is complex. The independence of not-for-profits is crucial in order for them to be able to operate effectively within the public sphere, linking disenfranchised people and new ideas to the State and channelling the aspirations and frustrations of those who are not represented within public and private structures of power. Not-for-profit organisations are uniquely placed – sitting between citizens and the State – to be able to represent those who mistrust the government whilst being able to work with it.

We have discussed ways in which the independence of not-for-profits can be undermined by governments, whether intentionally or as an unintended consequence of well-meaning policies. So far we have made recommendations which attempt to protect not-for-profits from government interventions and we have set out policies which would guarantee spaces in which they can forge an independent path. However, these recommendations, whilst targeting the strengthening of civil society's position, continue to propagate a paternalistic relationship between the state and not-for-profit organisations. That is to say that the State regulates not-for-profit activities and allows not-for-profits to hold it to account. But if the ideal role of civil society is to work with, rather than against the state, as a partner and critical friend rather than a subordinate, then the relationship needs to be underpinned by shared principles and neutral spaces.

As detailed earlier in this report, the ability for not-for-profits to engage in advocacy activities in which it is critical of government policy is fundamental to a the effective governance of a well functioning and modern society. Indeed, a 2008 report of a European Commission research programme on “citizens and governance in a knowledge-based society” found that;

“It is important to guarantee the NGOs the freedom to undertake research, education and especially advocacy on issues of public debate, regardless of whether the position taken is in accordance with government policy or requires a change in the law.”⁶⁶

But the ideal scenario would afford much more than guarantees. Indeed, our goal should be to reposition not-for-profits as the critical friend to government because a relationship based on shared principles and respect will be more productive than one based on opposition. This aspiration to create an equal partnership was at the heart of the creation in the UK in 1998 of a formal “Compact” between the statutory and “voluntary and community” sectors.

This resulted from a 1996 report of the independent Commission on the Future of the Voluntary Sector in England - known as the Deakin Commission - set up by the National Council for Voluntary Organisations, which recommended that “a concordat [be] drawn up between representatives of government and the sector, laying down basic principles for future relations.”⁶⁷ The first iteration of the UK Compact was a 1998 document that established a set of principles that have broadly remained intact through re-drafting in 2009 and 2010, despite a change of government. These could be summarised across the three documents as reaffirming the importance of an independent civil society, establishing the expectation that governments should ensure and encourage not-

⁶⁶ Liebert, U & Trenz, HJ (eds), *Reconstituting Democracy from Below, New Approaches to Civil Society in Europe*, Centre for European Studies, University of Oslo, 2008
⁶⁷ *Meeting the Challenge of Change: Voluntary Action Into the 21st Century*, Volume 1, Commission on the Future of the Voluntary Sector, National Council for Voluntary Organisations, 1996

Recommendations

Agree with not-for-profits a set of principles on advocacy, that are backed up with statutory force.

Create a cross sector review panel for arbitration before legal challenge.

Introduce the responsibility for government to call for, review and provide redress on evidence from not-for-profit organisations in the form of a formal consultation response when drafting policies.

Introduce not-for-profit sector awareness training for civil servants with responsibilities for commissioning services or implementing public policy.

for-profits contribute to the development of policy and the guarantee that organisations should be free to campaign without fear of government reprisal.

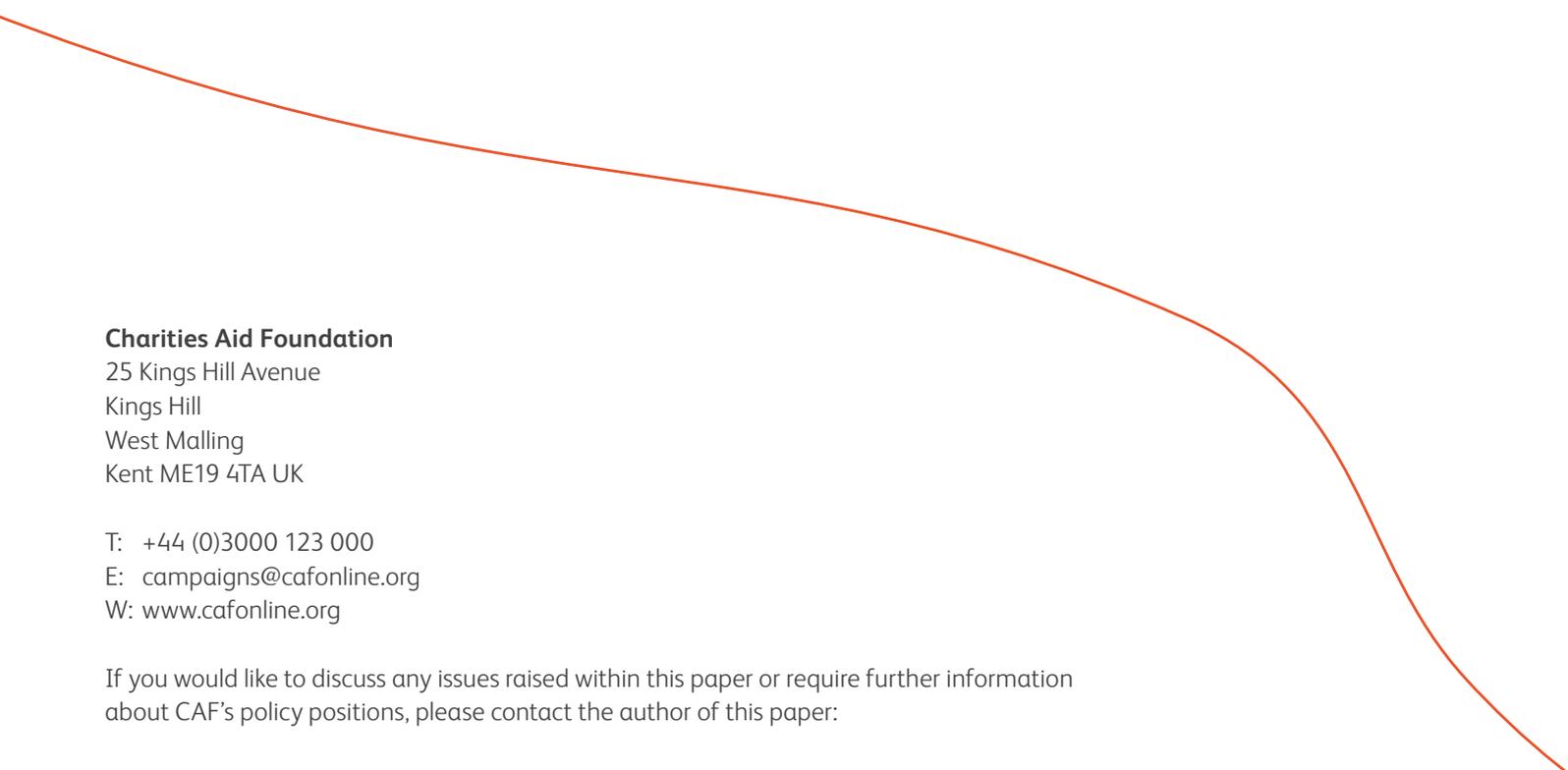
The example of the UK Compact has been globally influential, leading to similar agreements in numerous other countries including Croatia, Denmark, France, Estonia, Croatia, Canada and Australia. However, whilst a set of principles to guide a more positive relationship between the sectors is a positive gesture, the lack of legal redress for not-for-profits who suffer when the agreement is breached by the State has limited the effectiveness of the document in the UK. Even in renewing the government's commitment to the principles of the Compact while announcing its re-launch in 2010, the new Prime Minister David Cameron conceded that its principles had been "honoured more in the breach than the observance".⁶⁸

Though inter-sector relationships require some give and take, it seems clear that any such agreement must be backed up by some form of independent oversight facility that can determine whether a breach has occurred and whether any punitive action must be taken. In the foreword to a report commissioned by the Commission for the Compact, which the government was in the process of closing down at the time of writing, Sir Bert Massie CBE, its outgoing Chief Executive stated that "if the Government does not introduce a mechanism of that sort we can see the Compact becoming worthless and devoid of effectiveness."⁶⁹

The development of agreements between not-for-profits and governments around the world is hugely positive for the independence of civil society. Donors want to believe that the organisations they support are free to pursue their mission but also that they are able to work constructively with partners in the statutory sector where necessary. Furthermore, where politicians and civil servants work with organisations and take the time to understand their needs and aspirations, they are often better able to represent their needs and also those of the communities they represent. As such, civil servants, particularly those who engage in the commissioning of services and implementation of public policy, should be required to familiarise themselves with cross-sector partnership principles as part of their induction into the workplace.

68 David Cameron: Compact will be refreshed and renewed, speech at the launch of the "Big Society" in 2010, report by Third Sector at <http://m.thirdsector.co.uk/article/1004450/david-cameron-compact-will-refreshed-renewed>

69 Zimmeck, M, Rochester, C, Rushbrooke, B, Use it or lose it: A summative evaluation of the Compact, Commission for the Compact. 2011



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