

**OSCE Supplemental Human Dimension Meeting
on
Freedom of Assembly, Association and Expression:
Fostering Full and Equal Participation in Pluralist Societies.**

29-30 March 2007

Working Session 1

Introductory Remarks

I am the founder and manager of an NGO, and I am a board member of several others.

As such, I am frequently confronted with problems to solve relating to compliance with laws and regulations governing non-profit organizations – not just in one jurisdiction, but in several: Hungary, the United States and elsewhere. It is my responsibility in these various capacities to ensure that the organizations I help lead comply with the law and act as good corporate citizens to support policies intended to benefit all.

With equal frequency – in my work supporting the development of civil society – I also encounter problems caused by state bureaucracies interfering with the smooth running of NGOs: through unnecessary red tape, negligence or, sometimes, malicious intent. When that happens, states abridge important aspects of the right to freedom of association and undermine the possibilities offered by NGOs for the healthy development of democratic values and social capital.

My goal this afternoon is to try to offer some thoughts on how to separate out these competing perspectives on how law and human rights standards affect the relationship

between the state and civil society. I will attempt to do so by raising five issues of practical relevance in OSCE states.

First, freedom of association is much broader and more profound than just the efficient and correct regulation of formal not-for-profit legal entities. Even the formal entities it covers extend far beyond the classic NGO legal forms: associations, foundations and the newly emerging form of non-profit companies. The forms that free association can take include political parties, trade unions and religious organizations, each of which have specific characteristics that are appropriately regulated in different ways.

But most importantly, there is no need to set up a formal legal entity at all in order to enjoy the human right to freedom of association. Just as an individual enjoys the right to freedom of expression without registering with the state the intention to express herself, an individual is free to associate with others without first registering a formal legal structure with the state.

The requirement to register with the state – and incur the duties and obligations that result – comes from the state's legitimate interest in protecting citizens from harms such as financial fraud and labor violations and ensuring compliance with tax and other fiscal policies. If an association does not raise and spend funds, if it does not enter into contracts or employ people, if it does not require a bank account, there is no need to formalize the association.

To take an extreme example, if a group of individuals were to informally associate with each other without establishing a legal entity, and they were then to act collectively to conduct illegal activities, such as planning terrorist actions or plotting the overthrow of the government, penalties for conspiracy to commit a crime and other legal tools would be perfectly sufficient for the state to protect its citizens.

On the other hand, if a group of citizens would like to form an informal club or association for the purpose of discussing literature, or to help improve their local school, or to discuss contentious social or political issues, or to write letters to the authorities asking for the release of political prisoners, there is no state interest at stake. Those citizens would simply be exercising their right to freedom of association. As long as they had no need to engage in financial or legal transactions, there would be no reason for them to register.

Turning from informal organizations to formal ones, a **second** important point is the following: while the state has a duty to ensure against fraud and other harms that NGOs can potentially produce, such regulation should be proportionate to the interest at stake. For example, during the registration process, the main state interest should be to guard against any confusion caused by a misleading name or the setting out of objectives clearly incompatible with the law. All other aspects of registration are essentially technical, and NGOs should be given the information and opportunity to correct any deficiencies quickly and simply.

There are certainly objectives which could legitimately result in a refusal to register, such as advocating the violent overthrow of the government or inciting racial or

religious hatred. But legislation providing for such a possibility is often worded quite vaguely, and it is the way in which such provisions are applied in practice that can sometimes violate the freedom of association. Accordingly, independent and effective judicial supervision over such decisions is especially vital.

Most importantly, it is not appropriate for registration authorities to apply their own judgment about the overall desirability of an NGO's objectives. Registration authorities must respect political pluralism, and they must not be driven by prejudice.

In some circumstances, however, more extensive regulation of NGOs is warranted. For example, when NGOs benefit from public funds – either through tax subsidies or more directly through government grants and contracts – states legitimately require more reporting and engage in more rigorous monitoring in order to ensure that public monies are properly spent. Likewise, if NGOs raise money from the public, the state has an interest in protecting the public from fraud. But, still, government oversight in these situations should be proportionate, and any measure they take should be necessary for these purposes.

A **third** set of issues that are particularly important have to do with the extent to which NGOs may conduct political activities. I have found that this is an issue about which there is much confusion – and a great deal of it stems from prosaic issues of vocabulary and translation. In Slavic languages in particular, the use of the same word – *Politika* – to refer to both “public policy” and “partisan politics” has resulted in a great deal of misunderstanding on this topic.

As I expect will be clear in the discussions that take place tomorrow, the rights to freedom of assembly and freedom of expression would be far less meaningful if political engagement by NGOs were restricted. In fact, NGOs can and do engage in all sorts of political activities in the form of what is sometimes called public advocacy. They monitor legislation and its implementation; they propose and oppose changes in legislation; they study policies and make recommendations for change; they frame political and social issues for the general public; they mobilize civic engagement by communities and the citizenry as a whole.

All of these activities are legitimate activities for NGOs, indeed through these means NGOs play a vital role in promoting political pluralism, developing democratic culture and, simply put, making the wheels of democratic governance turn more smoothly.

As a recent report from the Council of Europe succinctly states: “an NGO is entitled to pursue the objective of a change in the law and to participate in political debate.” The jurisprudence of the European Court of Human Rights further elucidates the extent of permissible political engagement by NGOs. In the Bowman case, for example, the Court found that the UK violated human rights when they applied regulatory restrictions relating to political campaigns against an NGO. In that case, the NGO had distributed flyers rating political candidates during an election campaign according to their position on the issues of abortion and experimentation with embryos.

A **fourth** issue that seems to be of increasing concern in some OSCE states is the funding provided to NGOs from donors outside the respective country. In some cases, the result has been extensive new reporting obligations and./or the requirement to get advance governmental approval before spending such funds.

Regarding this issue, many of the same principles I already mentioned should apply. Such regulations should be shown to be necessary in order to safeguard some public interest, and the regulatory obligations should be proportionate. Moreover, due care should be taken to avoid the possibility of a chilling effect on civil society: inhibiting NGO activities and discouraging much needed financial support.

Finally, some of the issues with freedom of association are linked to larger problems with governance and state administration, and they must be seen in that context. When state agencies provide incomplete or vague information about the NGO registration process or issue inconsistent or unfounded decisions or apply arbitrary criteria without a legal basis or regularly exceed their own deadlines without justification, the root cause is often a much more pervasive set of deficiencies in the practices of the state administration.

Sometimes these actions are politically motivated or result from prejudice. But sometimes they simply stem from bad administrative practices that – more often than not – extend to many other areas of state administration. This phenomenon is worsened by the inability of courts in some OSCE countries to exercise effective judicial supervision in order to safeguard good administrative practices.

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So, how can the state best harness the potential of its citizenry to contribute to the country's governance and development? Civic engagement through NGOs activates those who are closest to the issues which are legislated by governments and parliaments and implemented by the state administration. In this way, NGOs make an essential contribution to political and social development.

Further, in a democratic system, which rightly privileges majority voices in the society, NGOs provide a channel for participation of minority voices, and this is an indispensable means for ensuring full social inclusion and guarding against the potential that always exists for the tyranny of the majority. Through NGOs, individuals are able to exercise their right to freedom of association, and as a result, large numbers of citizens can participate more fully in the democratic life of their country.

How can the state best facilitate this? That is a difficult question to answer. But one of the less effective ways to do so is for states to make the mistake of trying to organize the organizations. Doing so disempowers NGOs, undermining the very civic engagement that NGOs are most well placed to promote. Probably the best way to activate the internal resources and energy of the citizenry is to set up a simple and clear framework for organizing, and then get out of the way.

Why do NGOs – whether organized formally or informally, whether providing services or advocating a cause – produce so much anxiety among public officials and state administrators? In countries where there is serious discomfort, let's hope that it is a passing discomfort, and that familiarity will breed at least acceptance if not active support. In the meantime, it is important for all of us to look closely at the issues with clear eyes, absent ideological bias and with the conviction that freedom of association is one of the most important cornerstones of a democratic society.

With this perspective in mind, I hope that we can have a vigorous debate during this session that moves us forward toward greater understanding and leads us to more effective action. Thank you.