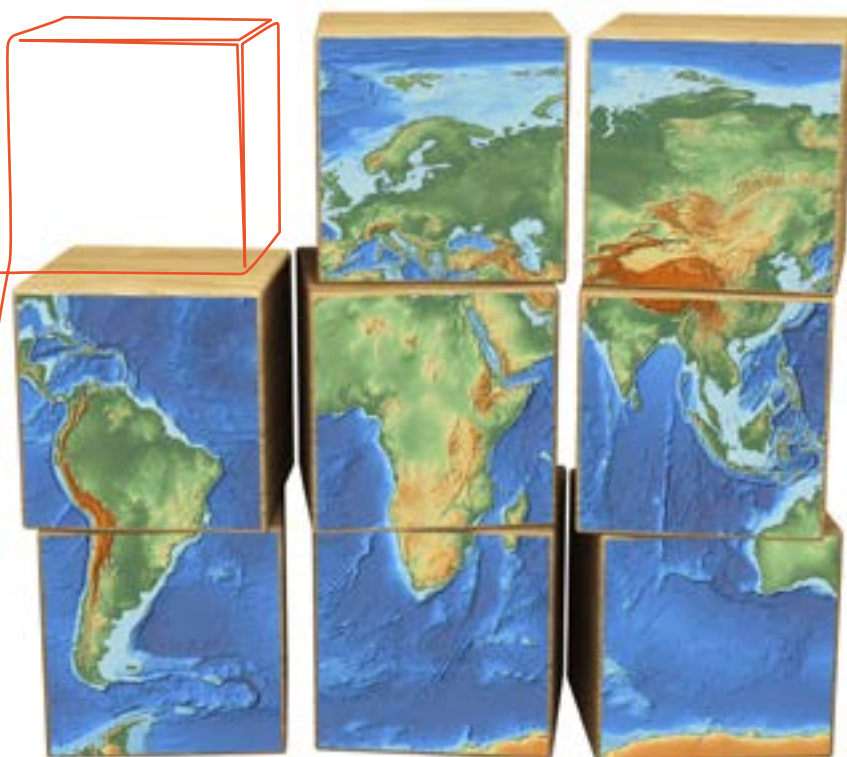


FUTURE WORLD GIVING

Building Trust in Charitable Giving

January 2014



About Charities Aid Foundation

Charities Aid Foundation (CAF) is an international charity registered in the UK. Its mission is to motivate society to give ever more effectively and help transform lives and communities around the world. CAF advises on and distributes charitable funds around the world and has offices in nine countries: Australia, Brazil, Bulgaria, India, Russia, Singapore, South Africa, the UK and the United States of America.

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 Independent Civil Society and Motivating People to Give. This report focuses on the first of those themes.

To read other Future World Giving reports and to keep up to date with the latest trends in global giving visit www.futureworldgiving.org

About the World Giving Index

The World Giving Index is the largest annual study into charitable behaviour across the globe. The 2013 World Giving Index was based on interviews with over 155,000 people in 135 countries. It was conducted by the polling organisation Gallup, as part of their World Poll survey. The Index is based on an average of three measures of giving behaviour – the percentage of people who donate money to charity, volunteer their time, and help a stranger, in a typical month.

Contents

| | |
|---|----|
| Foreword | 4 |
| Executive Summary | 5 |
| Summary of Recommendations | 6 |
| Introduction | 10 |
| The Nature of Trust in Not-For-Profits | 11 |
| Registration | 13 |
| Regulation | 16 |
| Focus On: South Africa | 18 |
| Independent Regulation | 21 |
| Focus On: Australia | 24 |
| Assigning Status | 26 |
| Focus On: China | 28 |
| Regulating Foreign and Foreign Funded Organisations | 30 |
| Focus On: Russia | 32 |
| Regulating Organisations Operating Abroad | 34 |

Foreword

Public trust is one of the most valuable commodities that any not-for-profit organisation can have, and the degree to which people trust these organisations may have a huge bearing on how willing they are to give to them. Hence the importance of this, the first of three thematic reports of the Future World Giving project, which focuses on what governments can do to improve public trust in giving and the extent to which government policies around the world have helped or hindered not-for-profit organisations to earn the trust of the public. We believe that the recommendations in this report offer a template that governments can use to identify what they can do to create an environment in which people can trust and engage fully with not-for-profit organisations.

Since 2010 Charities Aid Foundation (CAF) has published annually the World Giving Index, which gives comparative data on charitable giving and volunteering around the world. The focus on levels of participation in giving, rather than the overall financial value of donations, allows us to measure the relative health of a country's culture of generosity. Whilst the amount of money generated through philanthropic donations is clearly important, it is essential that we consider the wider benefits of mass engagement in philanthropy, which improves the wellbeing of donors as well as benefitting society more broadly.

Although the World Giving Index has stimulated national and international debate around charitable giving, it also raises important questions. Understanding the factors that drive giving, and the barriers which restrict it, continues to present a real challenge for policy makers looking to develop the culture of philanthropy within their own country.

When not-for-profit organisations are able to earn the trust of the public, this attracts higher levels of engagement and resources with which to tackle social problems in ways which compliment the actions of the state. But the benefits of public trust in giving can run deeper still. Because trusted not-for-profit organisations create a civic infrastructure that allows for the representation of differing views, helping to connect public to decision makers and legitimising state representation.

The world is witnessing one of the most radical changes in human history as millions of people are moving from a life of subsistence and poverty to one of relative affluence. Governments should act now to create the conditions that will allow the next generation of potential donors realise their collective potential to transform society through giving.



Dr John Low

Chief Executive, Charities Aid Foundation

Executive Summary

Charities Aid Foundation (CAF) believes that everyone has the right to engage in charitable giving and that societies benefit from that engagement.

The number of middle-class¹ 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.² 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 build public trust in not-for-profit organisations, the results could be transformative, not only for their beneficiaries, but for the health of civil society more widely. 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.³ To bring about this positive future we must act quickly to put the conditions in place that enable such a growth in giving.

It is human nature to work together to solve problems, indeed it has been fundamental to the success of our species. But more than that our compulsion to help others often overwrites our self interest. When Jean-Jacques Rousseau spoke of an “innate repugnance at seeing a fellow-creature suffer” in 1754⁴ he identified a fundamental element of human nature that is as true now as it was then. In all cultures and all religions there are traditions and social norms for giving. This leads us to ask “*why do people in some countries give more than others?*”

The state of the global economy is obviously an important factor in determining how much money and time people around the world are able to give to good causes. However, as CAF’s World Giving Index 2013⁵ shows, economic conditions alone cannot account for levels of giving: there are obviously other factors at play. The purpose of the Future World Giving project is to identify some of these factors and consider how they can be harnessed to encourage charitable behaviour.

The focus of this report is trust. In order for people to give money to charity, it is clear that they must trust that charitable organisations are legitimate and will make effective use of their money. Governments have a vital role to play because they are responsible for the legislation and regulation that governs civil society organisations. This report argues that governments, particularly in emerging economies, should act now to create an enabling environment that encourages the next generation of increasingly affluent citizens to engage in giving to causes that have earned their trust.

Clearly building trust in civil society is not solely the job of governments. Donors, grant-makers and not-for-profit organisations all have a significant role to play in practicing good governance, measuring and communicating impact by publishing and sharing data transparently, and earning public trust by being accountable for their actions. However, we must not fall into the trap of thinking that governments have no role to play – what is important is that we understand what this role is.

It is not the job of governments to ‘build’ trust in not-for-profits, because trust cannot be built, rather, it must be earned. The mistaken belief that they do need to build trust leads some governments

1 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.”

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

3 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>

4 Rousseau, J. J., *Discourse on the Origin and Basis of Inequality Among Men*, 1754

5 2013 World Giving Index, Charities Aid Foundation, 2013

to create regulatory systems that attempt to guarantee standards through excessive registration and reporting requirements. This is counterproductive. Whilst governments have a duty to ensure that not-for-profits are accountable, they should not be gate-keepers for civil society. Civil society is something that, by definition, has to exist separately from government, so attempts to exert an excessive level of governmental control over it are likely to be stifling and will discourage people from giving to charitable organisations.

The intervention of governments can have unintended consequences even where it is well-intentioned. In countries where trust in government is low, the more control governments exert over access to not-for-profits, the more suspicious the public are likely to be of the process and those organisations that successfully navigate it. Conversely, in countries where trust in government is higher, governmental assurance that regulatory frameworks guarantee standards leads to an uncritical approach by the public. This in effect makes it impossible for charitable organisations to earn trust. As a result the system becomes brittle, meaning that isolated examples of malpractice result in crises of confidence that affect the whole sector.

This report also highlights the fact that regulation of not-for-profits in the developed world may be having a negative impact on the development of charitable giving in developing countries. In many of these countries, there are traditional forms of giving which are informal in structure and often rooted in the community, which fall below the radar of regulatory systems which recognise internationally-standardised legal forms. This means that developing countries may be unintentionally missing a huge opportunity. By ensuring that these traditional forms of giving, which already have the trust of the public, are seen as central in the understanding of civil society, it may be possible to build trust in other forms of giving incrementally as the population of developing countries become increasingly able to engage financially. Rather than forcing out existing informal approaches to giving, governments should look to harness them as the basis for developing a culture of giving that reflects their country's own traditions.

Summary of Recommendations

Recommendations for this, and other Future World Giving reports, 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. 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 |
|--|--|--|
| Registration | | |
| <ul style="list-style-type: none"> ■ The registration processes should not be overly burdensome so as to discourage smaller organisations. ■ Ensure that any person (without a relevant criminal conviction) is legally entitled to register a charity without discrimination. ■ The registration process for associations should not require numbers of members or a geographical spread that is disproportionate to the scope of the organisations planned activities. ■ Organisations should not be required to re-register as long as they are meeting reporting requirements and abiding by terms of their registration. ■ The process for de-registering not-for-profits should be transparent and apolitical, with grounds for cancelling registration being specific and not open to interpretation. ■ De-registered not-for-profits should be entitled to a written explanation of the grounds for cancellation of registration and have the opportunity to appeal and ample time set aside to do so. | <ul style="list-style-type: none"> ■ Governments should provide training workshops and online resources where prospective not-for-profit founders can learn about the registration process and the benefits of registering. | <ul style="list-style-type: none"> ■ Create separate tiers of registration which are proportionate to the sizes of organisations, allowing for increased accountability for large not-for-profits whilst maintaining a light touch approach to smaller not-for-profits. |

| Tier 1 | Tier 2 | Tier 3 |
|---|--|---|
| Regulation | | |
| <ul style="list-style-type: none"> ■ Ensure that reporting requirements are proportionate to the skills and capacity of not-for-profits. | <ul style="list-style-type: none"> ■ Ensure that reporting requirements and processes are consistent between provinces and regions to avoid unnecessary duplication for not-for-profits. ■ Governments should develop separate protocols for registering small community organisations. ■ Create formal protocol mandating the sharing of information with not-for-profit regulatory bodies when financial regulators observe suspicious activity in a not-for-profit. ■ Consider nominating staff at all levels within regulatory bodies as having formal liaison roles with other regulators on not-for-profit monitoring. Hold regular meetings of this group to discuss issues of joint working. | <ul style="list-style-type: none"> ■ Create a central database for all regulators to access – ensuring that not-for-profits do not have to report to multiple bodies and eradicating duplication. ■ Commit to understanding the structural weaknesses of the existing not-for-profit regulatory framework (in the form of a consultation and review) before adding to its complexity. ■ Ensure cross party commitment for establishing a regulator in order to avoid politicising its existence. |

| Tier 1 | Tier 2 | Tier 3 |
|--|--|---|
| Assigning status | | |
| <ul style="list-style-type: none"> Recognise existing local forms of not-for-profit legally, using language that resonates with the public. | <ul style="list-style-type: none"> Offer a light touch regulation for previously unrecognised and/or unregistered organisations. Registration should not be a requirement, but should be encouraged. Encourage, but do not require, the measuring of un-monetised assets to highlight the scale and resources of domestic civil society. | <ul style="list-style-type: none"> Allocate funds to not-for-profit infrastructure and development organisations (national and regional) to provide advice and training on meeting the requirements of regulators. |

| Tier 1 | Tier 2 | Tier 3 |
|--|---|--|
| Regulating foreign and foreign funded organisations | | |
| <ul style="list-style-type: none"> Ensure that legislation and regulatory systems are sufficiently robust to be able to hold not-for-profits to account without the need to impose separate requirements on foreign not-for-profits or not-for-profits receiving funds from abroad. Domestic not-for-profits should have the freedom to associate with foreign or international not-for-profits to promote the sharing of ideas and the development of civil society. Allow foreign nationals legally residing in a country to be founders/trustees/board members of not-for-profits providing that they meet generic eligibility requirements. | <ul style="list-style-type: none"> Governments should ask not-for-profits to report on engagement with foreign beneficiaries, explaining the wider benefit that this has on the development of civil society. Governments should sign up to the International Aid Transparency initiative (IATI). | <ul style="list-style-type: none"> Governments should allow for independent scrutiny of its foreign aid spending. |

Introduction

Amongst those who work in civil society and amongst donors, issues of accountability, governance and transparency have for some time aroused debate. What legal structures should be available for civil society organisations, how regulation should take place, how impact should be measured and what data should be presented are clearly important issues. But amongst all this debate, it can be all too easy to forget the simple, core outcome that we are aiming for. Put simply, when people trust the sector, they respond more positively to it; giving more money to support it, working in partnership with it, and removing barriers that restrict it.

The challenge faced by governments in overseeing the development of civil society can seem daunting. Government has a responsibility to ensure that not-for-profit organisations are well regulated yet not overburdened by bureaucracy; that they are free to tackle their charitable mission and innovate, but also accountable for their actions. Even at the best of times, the fact that the not-for-profit sector has so many organisational forms, issues and activities means that there is a danger of policies resulting in unintended consequences. As such, government interventions in civil society are often divisive and their impact is difficult to assess.

Perhaps due to the reasons highlighted above, there is a tendency amongst international organisations to avoid making recommendations about how not-for-profits are regulated by governments. Instead, many favour encouraging more effective self-regulation and cite benefits of improved effectiveness. Whilst this is crucially important, it only addresses one side of a relationship that shapes public trust in not-for-profits. The not-for-profit sector does not exist in isolation and government actions and policies inevitably impact on how people perceive not-for-profit organisations.

By looking at examples of government attempts to regulate not-for-profits from around the world this report will examine the efficacy of various approaches. This report makes recommendations that we have observed to be beneficial to public trust in giving and are, to some extent, universal.

The Nature of Trust in Not-for-profits

Not-for-profits benefit from high levels of public trust around the world. According to Edelman's global Trust Barometer⁶ not-for-profit organisations (referred to by Edelman as NGOs) are the most trusted sector globally. 63 per cent of those surveyed trusted not-for-profits compared to 58 per cent for business, 57 per cent for the media and 48 per cent for governments. Trust in not-for-profits has improved steadily since 2007 (52 per cent) and has recovered from a dip in 2012 which could be attributed to a general loss of trust in all institutions following the global economic slowdown.

Central to the high levels of trust in not-for-profits seen across the globe is the idea of a charitable mission. Not-for-profits are seen as being driven by a cause and governed by altruistic values. But the high levels of trust they enjoy are not formed in isolation from the context in which they operate.

Differing models of government and variations in what is seen as the responsibility of the state have an impact on both the space in which charities are free to operate and the activities in which they engage. This relationship is complicated, however: not-for-profits may fill in gaps left by the state but they are also there to highlight failures, drive improvements and undertake activities which are community-led and bottom up in nature.⁷ The level of trust in not-for-profits is also defined in relation to the private sector. Whilst the extent to which the private sector is perceived as effective in addressing societal needs differs globally, it is generally seen as less trusted than not-for-profits on the whole. The assumption for many is that when a company's social responsibility goals clash with their pursuit of profit, the latter will prevail.

Clearly, this complex relationship with other institutions means that trust in not-for-profits and in charitable giving can be affected by the actions, or inactions of other sectors. In countries where corruption is seen as institutional, trust in not-for-profits can suffer as a result of organisations directly engaging in corrupt activities, benefiting from corruption or simply due to negative perceptions born out of a wider culture of mistrust. This is well illustrated by the fact that in the 10 least corrupt countries according to Transparency International, 58 per cent of people had given money to charity in the month prior to being surveyed for the 2012 World Giving Index, whilst engagement in giving was only 25 per cent in the 10 most corrupt countries.

Tackling corruption is a challenge faced by societies all over the world. In Brazil, for example, a series of corruption scandals – and in particular the exposing of government procurement contracts with not-for-profits in which officials profited personally - has damaged public trust. As a result, Edelman reports that Brazilians have more trust in the media (68 per cent) and business (64 per cent) than they have in NGOs (58 per cent). Perhaps unsurprisingly, Brazil has seen a 5 per cent decrease in the proportion of people giving money to charity since 2007 according to World Giving Index data, despite seeing consistent (though stagnating) economic growth in the same period.

“People in Brazil want to help, but due to some high profile examples of corruption they do not always have confidence in organisations that they have no personal affiliation to. This limits the development of the sector. We would like to see the government speak more positively about not-for-profits and take steps to improve regulation, whilst working with organisations to improve their governance.”

Paula Jancso Fabiani, Executive Director, Instituto para o Desenvolvimento do Investimento Social (IDIS – a partner of CAF).

⁶ Trust Barometer, Edelman <http://www.edelman.com/insights/intellectual-property/trust-2013/>

⁷ Brinkerhoff, D.W., & Brinkerhoff, J.M., *Government-nonprofit relations in comparative perspective: Evolution, themes, and new directions*. Public Admin. Dev. 22, 3–18 (2002)

⁸ Corruption Perceptions Index 2012, Transparency international, <http://cpi.transparency.org/cpi2012/results/>

But when governments show a commitment to building public trust in not-for-profits they can have a clear impact on the development of civil society, which can in turn create positive feedback for government. When the public trust not-for-profits to follow their charitable mission, they are more likely to support them with time and money. For example, CAF's India Giving report shows that 52 per cent of Indians feel that a lack of transparency hinders donations to not-for-profits. Furthermore, enhancing trust in not-for-profits can help to drive up involvement in giving and wider participation in civil society. Such engagement can help to address the very issues that drive corruption through tackling social issues and educating policy makers.

9 Maple, T, Harrison, R, *India Giving 2012*, Charities Aid Foundation, 2012, www.cafonline.org/media-office/press-releases/2012/caf-launches-india-giving.aspx
10 NGO Law Monitor – Belarus, International Centre for Not-For-Profit Law, <http://www.icnl.org/research/monitor/belarus.html>

Registration

The registration of not-for-profits can, if well managed, have benefits for governments, not-for-profits, donors and ultimately beneficiaries. Registration enables government to gain an understanding of the size and structure of civil society, whilst also offering it the opportunity to drive improvements in governance by requiring prospective organisations to meet certain qualifying standards. For not-for-profits, registration provides official recognition which helps in gaining credibility with donors and with the communities in which they work. For donors, the registration process helps to clarify the legal status of an organisation, along with providing a trusted public source of data on its activities. Furthermore, when that process is seen to be fair and transparent, donors are reassured that registered not-for-profit organisations have met certain standards of governance.

In Belarus, public associations and foundations ‘must prepare and submit a formidable package of documents for registration’. In addition, registration fees are prohibitively expensive, amounting to twice the rate charged to commercial entities. However, perhaps the most burdensome provision in Belarus relates to the number of founding members required. The legislation is extremely complicated and requires specific numbers and geographical distribution of members depending on organisation type and area of operation. A local public association operating in Minsk for example, would need 186 founding members in order that they represent the majority of its 22 raions (districts), 307 village councils, 22 towns and 20 urban-type communities.

In Algeria, as well as requiring a high number of founding members (between 10 and 25 depending on organisation type) and that they are spread throughout different regions within the country, registration requires intrusive and burdensome scrutiny on individuals including queries into seemingly irrelevant areas such as establishing marital status. By requiring high numbers of founding members, governments not only limit the development of smaller, but nonetheless vital local organisations, they also send an extremely damaging message to the public: that establishing a not-for-profit is out of reach of most ordinary people.

The effect of this message should not be underestimated. It not only limits people’s aspirations to participate in charitable activities but also diminishes their trust in those who do. Edelman’s Trust Barometer reveals that globally, only 36 per cent of people feel that ‘government officials or regulators’ are credible spokespeople compared with 51 per cent for ‘NGO representatives’. This trust gap could be in part down to the fact that people perceive ‘NGO representatives’ as their peers. Indeed 61 per cent accorded credibility to ‘a person like yourself’.¹¹ A perception that not-for-profits are made up of ordinary community representatives helps to make them seem less remote and hence more accountable.

The registration process has often been seen as an area that requires particular focus in order to create an enabling environment for not-for-profits and donors. Recognising that many people seeking to register not-for-profits might not have the skills required and/or might be intimidated by the process of registration, many countries have resources in place to guide people through the process. However, whilst in some countries this task is undertaken by larger associations and infrastructure not-for-profits, there may be a need for government, and ideally the relevant regulator, to run regional workshops on registration, augmenting online resources for those without access to the internet or the required computer skills.

¹¹ Edelman Trust Barometer 2012, Edelman trust.edelman.com/trust-download/global-results

Recommendations

The registration processes should not be overly burdensome so as to discourage smaller organisations.

Create separate tiers of registration which are proportionate to the sizes of organisations, allowing for increased accountability for large not-for-profits, whilst maintaining a light touch approach to smaller not-for-profits.

Ensure that any person (without a relevant criminal conviction) is legally entitled to register a charity without discrimination.

The registration process for associations should not require numbers of members or a geographical spread that is disproportionate to the scope of the organisations planned activities.

Governments should provide training workshops and online resources where prospective not-for-profit founders can learn about the registration process and the benefits of registering.

Registration is effective when it is mutually beneficial to all the parties involved. When not-for-profits apply for registration voluntarily, they are effectively entering into a contract as an equal partner with the State. However, when all not-for-profits are required to register they stop being perceived as independently demonstrating their trustworthiness and become organisations that are automatically the subject of public scrutiny.

While it may be beneficial for governments to incentivise registration (for example through tax breaks), legislating to require registration by prohibiting unregistered civic organisation changes the power balance between government and not-for-profit organisation. Such legislation changes the relationship of not-for-profits with the State from that of accountable partner to that of permitted subordinate. Given that philanthropists often give in order to bring about societal change, this skewing of perception can be damaging for the development of a culture of giving.

In many cases legislation mandating not-for-profits to register has been enacted in response to real or perceived threats to the sovereignty of the State. Such measures could be seen as logical for new nations seeking to limit civic unrest. However, such practices are now hampering the development of civil society and are in turn holding back the very social transformation that would legitimise and strengthen the State.

The problem of mandatory registration is perhaps most prevalent in sub-Saharan Africa, which may be due to the particular challenges faced by governments in building new nations in the post-colonial era. For example:

- In Kenya, registration is subject to the NGO Council, which has the authority to deny registration on the vague grounds of “national interest” and with no legal requirement to provide further explanation to the applicant. Denials of registered status have been used to curtail the rights of not-for-profits and limit their influence.¹²
- Registration is also mandatory in Uganda, with the NGO Board having full discretion over applications and no fixed time limits for decision making.

The problem is not confined to sub-Saharan Africa however. Indeed, whilst mandatory registration could be seen as a remnant of the post colonial era in sub-Saharan Africa, there appears to be a contemporary trend in Asia, and particularly in South East Asia, for regressive registration policy,¹³ perhaps in response to the perceived threat of civil unrest after the Arab Spring.

- In Cambodia, registration is mandatory and can be rejected or withdrawn at any time without formal process or the right of appeal.¹⁴
- Jordanian law also requires that not-for-profits register and there are no clearly stipulated penalties for conducting activities without registration.

12 Kameri-Mbote, Patricia, Dr. The Operational Environment and Constraints for NGOs in Kenya' IELRC Working Paper, (2000), www.ielrc.org

- In Indonesia, a Bill was introduced (Bill on Mass Organisations) in early 2013 that will give the government the authority to dissolve not-for-profits.

Once a not-for-profit organisation is registered, the relationship between not-for-profit and State should be based on mutual responsibility, with not-for-profits providing accurate and timely reporting and the State providing proportionate but effective scrutiny. There should not be a need to re-register if this reporting regime is well managed. In this way the public are assured of a well-regulated sector but can also be confident that the organisations they support are not hamstrung by unnecessary administrative burdens. Sadly, this is not always the case. In Uganda for example, not-for profits are expected to re-register every year, paying a fee each time. Similarly, Nepalese not-for-profits must re-register every year, undergoing a cripplingly bureaucratic process to do so.

Recommendations

Governments should provide training workshops and online resources where prospective not-for-profit founders can learn about the registration process and the benefits of registering.

The process for de-registering not-for-profits should be transparent and apolitical, with grounds for cancelling registration being specific and not open to interpretation.

De-registered not-for-profits should be entitled to a written explanation of the grounds for cancellation of registration and have the opportunity to appeal and ample time set aside to do so.

Organisations should not be required to re-register as long as they are meeting reporting requirements and abiding by the terms of their registration.

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

14 NGO Law Monitor – Cambodia, International Centre for Not-for-Profit Law <http://www.icnl.org/research/monitor/cambodia.html>

Regulation

The success or failure of not-for-profit regulation can shape the future of giving. Regulators have a responsibility to the public to ensure that they ask the right questions, scrutinise accounts and documents and act on breaches. Likewise, not-for-profits have a vested interest in driving up standards of governance in civil society. But regulation, if done badly, can have serious negative consequences for the development of a culture of giving. Poor quality reporting has long been recognised as a major regulatory issue, since it not only jeopardizes the financial health of not-for-profits by allowing poor standards of governance but poses a high risk to the public's trust in the sector.¹⁵

However, in many nations the problem is not a lack of regulation but an excess of it. In Ecuador, a Presidential Decree issued in 2008 (No. 982) not only gave the government complete discretion to dissolve not-for-profits but also gave regulators the power to request any information at any time. This regressive policy has undermined trust in civil society not only amongst Ecuadorians but also internationally. In 2012 Amnesty International expressed their concern 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.'¹⁶

Difficulty in balancing the need for governments to hold not-for-profits to account with the need to limit the reporting burden is a common theme across the globe. CIVICUS report that in Norway, where the government is widely considered to have a progressive approach to civil society, requirements to report to various different public offices are putting a crippling strain on small community organisations.¹⁷

The fact that burdensome registration and monitoring procedures create a disincentive to registration could be seen as merely the unintended consequence of attempting to build public trust. By seeking to ensure that registered organisations are accountable to donors and tax payers – a laudable aim and one that is crucial for donor trust – over-zealous and bureaucratic monitoring and inspection regimes can have the effect of discouraging formal registration. In this way governments can limit the capacity of smaller organisations to gain status and, in so doing, actually diminish donor trust in a significant part of the not-for-profit sector. Smaller community organisations form the grass roots of a society's engagement in charitable activity and should not be crowded out of formal registration by disproportionate registration processes and procedures.

Recommendations

Ensure that reporting requirements are proportionate to the skills and capacity of not-for-profits.

Develop any new reporting requirements in consultation with not-for-profits.

¹⁵ Irvine, H and Ryan, C. An International Comparison of Not-For-Profit Accounting Regulation, Queensland University of Technology, 2010

¹⁶ Ecuador: Indigenous Peoples' rights and harassment of protesters, Amnesty International Submission to the UN Universal Periodic Review, May-June 2012

¹⁷ State of Civil Society 2013: Creating an Enabling Environment, CIVICUS, 2013

Organisations can only thrive when they are able to operate in an environment of relative stability. This is particularly true when it comes to the regulation of not-for-profits. Knowing how, and for what they will be held to account allows organisations to plan for the future in a sustainable way. As our second Future World Giving report on Independence will show, this is crucial for a strong and independent civil society. But, for the development of trust between governments, not-for-profits and donors, the need to stick to jointly held principles when developing legislation and regulation is particularly important.

Recommendations

Governments should develop separate protocols for registering small community organisations.

Focus on: South Africa

Since the end of apartheid, civil society has played an important role in South African development. Starting with the 1993 Interim Constitution, measures were put in place to ensure an enabling environment for civil society soon after democratic transition. Prohibitive legislation¹⁸ from the apartheid era was no longer seen as consistent with constitutional freedoms of association and expression and the belief that government must work in partnership with civil society. Indeed, the government continues to recognise in its National Development Plan that '[all] provinces rely heavily on not-for-profit organisations to deliver services.'¹⁹ However, recent proposals to amend legislation, reporting requirements and the architecture of regulation have undermined the principles of the NPO Act which are predicated on creating an enabling environment for not-for-profits.

Following the commissioning of two major studies into creating an enabling environment for civil society²⁰ and a high level conference in 1996,²¹ an NPO Act was in place by 1997. This set out regulatory structures for not-for-profits and established the not-for-profit Directorate, the Panel of Arbitration and Tribunal and an Advisory/Technical Committee. Crucially, in addition to establishing a framework to encourage good governance and public access to information, the Act also mandated that 'every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions'.²² According to Ricardo Wyngaard, an expert on South African not-for-profit law, this is "...unprecedented within the international context and captures the state's commitment to promote, support and enhance the capacity of nonprofit organisations to perform their functions".²³

Despite putting civil society in South Africa on a progressive path, a 2005 report²⁴ found several areas where the Act had not been successfully delivered. These included continuing low standards of administration and governance amongst many not-for-profits and a lack of coordination between regulatory bodies. The report also recommended that regulation should recognise different levels of capacity amongst not-for-profits in the registration process to allow for proportionate reporting requirements.

In August 2012, The Department of Social Development hosted the South African Nonprofit Organisation Summit to allow not-for-profits to feed into the development of policy regarding the NPO Act. Presentations detailing the messages from consultation with not-for-profits at the provincial level highlighted the need for simplification of the registration and reporting process and more training for organisations in governance, legal compliance and resource mobilisation – demands which are consistent with the NPO Act's focus on creating an enabling environment for not-for-profits. However, the commission tasked with drawing up a legal framework also proposed legislation

18 Such as the Internal Security Act 1982 which gave government the power to declare organisations unlawful, the Affected Organisations Act 1974 which allowed government to prevent organisation from receiving funds from abroad and the Fundraising Act of 1978 which prohibited organisations from fundraising without government approval.

19 *National Development Plan 2030: Our future – make it work*, National Planning Commission, Department of the President, February 2013, p334

20 Two studies into creating an enabling environment for civil society commissioned by the Development Resources Centre: "Independent Study into the Enabling Environment for NPOS" and a proposed "Non-Profit Organisations Bill"

21 "Enabling Frameworks for Civil Society in Southern and Eastern Africa"

22 Non Profit Organisations Act 1997, Chapter 2, Government Gazette, 1997

23 Wyngaard, R. G. *The South African NPO Crisis – Time to Join Hands*, SANGONeT, March 2013

24 "Impact Assessment of the NPO Act 1997"

creating a new regulatory body, to be called 'The South African Nonprofit Organisations Regulatory Authority' (SANPORA),²⁵ something not proposed by not-for-profit representatives in consultation.

“South African civil society in the post-apartheid era is grounded on the solid foundation that government departments are obligated to coordinate the implementation of their policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions.

Effective implementation has, however, been lacking in many instances. The Supreme Court of Appeal, for example, stated in 2011 that the National Lotteries Board does not appear to understand its mandate properly. Perhaps the same holds true for some other institutions dealing with non-profit organisations. Many organisations are playing a significant role in taking care of the needs of destitute and marginalised South Africans. This in turn alleviates the burden on the state which should at least ensure that there is compliance with the above legal obligation.”

Ricardo Wyngaard, Senior Partner at Ricardo Wyngaard Attorneys, South Africa. Interviewed as part of the Future World Giving project.

Though many have in the past called for the creation of a not-for-profit regulator, it is troubling that a decision in this case has been taken in spite of, rather as a result of dialogue with civil society. In addition, the focus of government in establishing this new regulator seems to be cracking down on non-compliance rather than creating an enabling environment for not-for-profits, as the new regulator has “a formidable regulatory focus”.²⁶ Crucially, SANPORA would, were it to be established, fall short of calls for any new not-for-profit regulator to be independent from government, as it would operate as a special service delivery institution within the not-for-profit Directorate. Whilst the details of the exact governance structure of SANPORA and the accompanying South African Nonprofit Organisations Tribunal are not yet clear, many in civil society have expressed concerns about the potential for new structures to be politicised in a context where government appears to be questioning its previously progressive attitude towards not-for-profits.

Concerns about the trajectory of government proposals for not-for-profits stem from recent experience. From October 2012 to January 2013, the Directorate of not-for-profits launched an unprecedented crackdown on reporting non-compliance. Of 85,000 not-for-profits registered under the NPO Act, 23,000 were de-registered in this period (compared with 468 in the whole of 2011) and 35,000 labelled ‘non-compliant’. Following public outcry, most were reinstated and given six months to comply. Even if, as some have suggested, this scandal amounts to nothing more than a series of calamitous miscalculations on the part of regulators, it is nevertheless deeply damaging to public trust and contravenes the spirit of the NPO Act which sought to promote an enabling environment for civil society. However, others, like John Kane-Berman, Chief Executive of the South African Institute of Race Relations, think that this demonstrates a more worrying trend of actively

²⁵ The South African Nonprofit Organisations Regulatory Authority (SANPORA).

²⁶ Hendricks, P. S. A. & Wyngaard, R. Winds of Change... Yet Again: The NPO Act Policy Amendment framework, 2013

²⁷ Kane-Barman, J. Political agenda may lie behind apparent state incompetence, First published in Business Day, Feb 2013

marginalising the influence of not-for-profits. Incompetence is so characteristic of so much of the government that it may indeed be the explanation for the arbitrary cancellations. But it would be wise to be vigilant, for the African National Congress (ANC) and the government have previously voiced antipathy to not-for-profits, and are now busy with plans to tighten control and impose racial policy.’²⁷

This reference to racial policy is a prime example of how a political intervention in the regulatory context can undermine civil society. On 5 October 2012, the Department of Trade and Industry (DTI) issued a new policy.²⁸ This policy statement proposed amending the Broad Based Black Economic Empowerment Act (BBBEE) – a points based system designed to ensure that private sector development benefits the wider black community in the post-apartheid era – to require that companies would have to undertake CSR activities where the beneficiaries were 100 per cent black. Whilst taking action to benefit marginalised groups in society is a noble goal, there was widespread concern amongst not-for-profit leaders in South Africa that this policy was so poorly designed that it would have a deeply damaging impact on their sector.

More worrying still was the proposal that all funds under BBBEE were to be allocated to organisations with the specific objective of ‘facilitating income generating activities for targeted beneficiaries’. This would have in effect prohibited corporate funding under BBBEE for a wide range of organisations providing crucial work around poverty alleviation and developmental areas - such as health, home-based care, education, childcare, care for the aged and disability - that have an impact on the economic inclusion and empowerment of marginalised and deprived people and communities across South Africa.

This attempt to introduce such amendments to the BBBEE codes showed a worrying lack of understanding of how not-for-profits operate that would have damaged the sustainability of civil society and reduced the very capacity to deliver societal benefits to marginalised groups that it purported to benefit.

“It has been really encouraging to see not-for-profits in South Africa campaigning so effectively against recent government attempts to control the sector. However, the trend towards disproportionate and obstructive regulation is seriously damaging the relationship between government and civil society and is diminishing public trust in both in the process.”

Colleen du Toit, Executive Director at CAF Southern Africa

After a concerted campaign from civil society, the revision to the socio-economic element within the revised BBBEE codes was eventually dropped. But whether government motivations for recent interventions in legislation that governs not-for-profits have been to build public trust in charitable institutions, or undermine it, the clumsy and uncooperative way in which they have been handled has benefited nobody.

²⁷ Kane-Barman, J. Political agenda may lie behind apparent state incompetence, First published in Business Day, Feb 2013

²⁸ Statement 500 of gazette number 35754 - Revised Broad-Based Black Economic Empowerment (B-BBEE) Codes of Good Practice

Independent regulation

For some, the key to ensuring effective reporting is a simplification of the regulatory framework, and the most obvious way to bring this about would seem to be to the creation of a separate regulator specifically tasked with regulating not-for-profits. A single regulator would have the considerable advantage of being visible to the public, who might otherwise struggle to understand more complex systems of accountability. But above all, creating a regulator that is independent of political interests could help to build confidence in the not-for-profit sector. However, the experiences of countries that have created independent regulators are somewhat mixed and the success or failure of such regulators rest on the extent to which the underlying regulatory system is fit for purpose.

As participation in charitable activity grows in a nation, the regulatory system must evolve to meet new demands. These demands come both from not-for-profits, who require regulation that is appropriate for new organisational forms, and from donors, whose expectations of transparent reporting inevitably increase. Dealing with these competing demands can prove extremely challenging for regulatory structures that have evolved over time in an unplanned and reactive way.

In the USA, Federal tax law relating to tax-exempt organisations has evolved in a ‘disorderly, unplanned fashion’.²⁹ The Internal Revenue Service is essentially the primary regulator for not-for-profits, and although it is capable of scrutinising financial reports, it is not naturally disposed to asking questions that might seem relevant to donors. Similarly in Canada, the Canada Revenue Agency has had to work with accounting standard setting boards to regulate not-for-profits, resulting in ‘a complex and diffuse process operationalised through a network of private and public sector bodies’.³⁰

This tendency towards increasing complexity in regulatory relationships can make the idea of establishing a single not-for-profit regulator – a considerable and expensive undertaking – viable for advanced philanthropic societies. In England and Wales, accounting policy is currently developed in cooperation between the Charity Commission and Her Majesty’s Revenue and Customs and policy is able to be refined in a coherent manner. These arrangements have led the England and Wales regulatory model to be the recognised as the leader in the field.³¹

But creating a single regulator is not a panacea for regulating not-for-profits. Even amongst countries where highly complex regulatory systems and increasing demands seemed to point to the creation of an independent regulator, experiences of doing so have been mixed. The complexity of the regulatory environment in New Zealand led to increasing calls for government to create an independent not-for-profit regulator. The 2005 New Zealand Charity Act established the Charities Commission, a Crown entity with an independent board, and gave it a wide range of regulatory powers. Despite quickly gaining traction -with 24,000 charities registering by 2009 - by August 2011 the government had taken the decision to de-authorise the Charities Commission and transfer its functions to the Department of Internal Affairs, while providing for independent registration and

29 Hopkins, B. (2005), Testimony Before the Full Committee of the House Committee on Ways and Means, April 20. <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=2603>.

30 Richardson, A. J. (2009), “Regulatory networks for accounting and auditing standards: a social network analysis of Canadian and international standard-setting”, *Accounting, Organizations and Society*, In Press.

31 Irvine, H and Ryan, C, *An International Comparison of Not-For-Profit Accounting Regulation*, Queensland University of Technology, 2010

related functions through a statutory board.

Where an independent regulator is well established and has a high profile with the public, expectations can surpass the level of scrutiny such an organisation has the capacity to provide. This problem was highlighted in England in 2013 by the case of the Cup Trust, a charity that was named in an investigative report by the Times newspaper as a front for a tax avoidance scheme and subsequently placed under interim management by the Charity Commission, pending the outcome of a full investigation. Up to that point, despite receiving annual returns from the Cup Trust showing an income of £78 million, but assets of just £107,000 and charitable grants of just £55,000, the Charity Commission had not taken action to cease the organisation's activities, allowing 'donors' to make attempts to claim as much as £46 million in tax relief over a two year period, before Her Majesty's Revenue and Customs (HMRC) intervened.

The two main issues that seem to have prevented the Charity Commission from acting decisively to prevent this scandal are a lack of regulatory powers and a breakdown in communications between the themselves and the tax regulator, HMRC. On the first point, the Commission was unable to act in relation to perceived uncharitable behaviour due to the limitations of their remit, explaining that they "have not been able to intervene as, after our careful considerations [they] could not conclude that the trustees have not complied with their duties under charity law."³² Indeed, an investigation by the National Audit Office (NAO), the UK public spending watchdog, into the Cup Trust scandal identified the fact that the Commission could "only take into account an organisation's expressed purposes, not its activities or the motives of its founders" as a 'key finding'.³³

Despite apparent misuse of the Gift Aid tax incentive scheme for the purposes of tax avoidance,³⁴ the Charity Commission was unable to act without receiving the requisite information from HMRC. The Commission made this dependency clear when they eventually took action saying "when we received new information from HMRC, we took immediate steps to open a statutory inquiry".³⁵ The NAO supported this claim in its report on the Cup Trust affair though it also found that "there were issues that might have justified the opening of a statutory inquiry in 2011".³⁶ A more wide ranging NAO investigation into the regulatory effectiveness of the Charity Commission recommended that the Charity Commission should work "more closely with HM Revenue & Customs to [...] share information through a mutual understanding of each other's information requirements" and "collaborate on risk profiling charities."³⁷

The Cup Trust scandal in England shows us that communication and even joint working between regulatory bodies is crucial. Even the best-resourced independent regulator will only be as effective as its relationships with partner authorities allows. Whilst creating an independent not-for-profit regulator adds complexity to what are in many nations already complex systems of regulation, the benefits can be considerable. Independent regulators are able to work with not-for-profits to improve

32 Comment from Charity Commission spokesperson in Civil Society, January 2013, www.civilsociety.co.uk/governance/news/content/14338/charity_tax-avoidance_scheme_did_not_break_any_charity_laws

33 The Cup Trust, Report by the Comptroller and Auditor General, National Audit Office, December 2013

34 A report by the Parliamentary Public Accounts Select Committee of MPs concluded that "despite its declared charitable aims, it is clear that the [Cup] Trust was set up as a tax avoidance scheme by people known to be in the business of tax avoidance."
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/138/13803.htm>

35 Comment from Mark Russell, to the Independent, May 2013 www.independent.co.uk/money/tax/tax-scandal-threatens-charity-donations-8608334.html

36 The Cup Trust, Report by the Comptroller and Auditor General, National Audit Office, December 2013

37 The regulatory effectiveness of the Charity Commission, Report by the Comptroller and Auditor General, National Audit Office, December 2013

the quality of reporting and ensure that donors get more information about the issues that matter to them. Whilst it is possible to retrofit existing regulatory structures to be able to capture information about governance and impact, this mixing of roles looks strange to the public and dilutes the potency of a more specialised system. For example, in the USA, although the introduction of fields in Form 990³⁸ by the Internal Revenue Service allows for the collection of more information on not-for-profit governance, this seems a counterintuitive area of focus for financial specialists.

38 Form 990 is completed by not-for-profit organisations and is primarily concerned with financial information. These documents are available to the public and are used by the Inland Revenue Service to prevent the abuse of tax exemption.

Focus on: Australia

The Australian Charities and Not-for-Profit Commission (ACNC) was established as an independent regulator in 2012 as the result of a long campaign by not-for-profits. Given that Australia was ranked 7th in the world for participation levels in charitable giving in the World Giving Index 2013 and 1st in 2012, one might reasonably wonder whether such a body is necessary.³⁹ However, the process of establishing an independent regulator has led to an in-depth understanding of the needs of Australian not-for-profits and the flaws in the existing system. As such, the ACNC has a clearly defined role and responsibilities which directly respond to recognised needs.

A series of reports and consultations, dating back to the mid 1990s, have called for the creation of an independent not-for-profit regulator in Australia and have helped to pin down its structure and responsibilities. Indeed, an official inquiry published in 2001 conceded that it was ‘ploughing well-tilled soil’⁴⁰. A central concern was the confusion caused by the various terms applied to not-for-profits and their overlapping status in common law – a problem faced by not-for-profits and regulators in many common law nations. A key reason for supporting the creation of the new regulator, according to the 2001 inquiry would be ‘to determine the status of charities and related entities’.

By 2010, the focus of the Productivity Commission report into the ‘Contribution of the Not-For-Profit Sector’ was on simplifying the regulatory framework and reducing the administrative burden on not-for-profits; particularly those operating across jurisdictions which often had different reporting requirements. Crucially, the Government, working with not-for-profits, was planning to create an independent regulator as part of a wider effort to tackle jointly identified problems. Following a consultation in 2011⁴¹ and subsequent parliamentary enquiries, the ACNC was established in December 2012.

The remit of the ACNC has some key features which demonstrate the effort that has been taken to ensure that it adds maximum value in the Australian context. In registering organisations, it will be creating a database of information that will act as a central repository for other government agencies - meaning that charities will only ever have to report to the ACNC. Speaking before the House of Commons Public Administration Select Committee in the UK in November 2012 Murray Baird, Assistant Commissioner (General Counsel) ACNC, explained that: “*The ACNC database will create a charity passport of data that can be made available to all other Commonwealth agencies requiring information from charities. The ACNC legislation requires other agencies to seek such information from the ACNC, rather than require charities to provide it to the Government more than once. The tag for this arrangement is called ‘report once, use often’*”.⁴² The ACNC will also focus heavily on providing education and training on effective not-for-profit governance and administration to drive up standards and ultimately improve public trust.

38 Form 990 is completed by not-for-profit organisations and is primarily concerned with financial information. These documents are available to the public and are used by the Inland Revenue Service to prevent the abuse of tax exemption

39 World Giving Index 2012 and 2013, Charities Aid Foundation

40 Report of the Inquiry into the Definition of Charities and Related Organisations, Commonwealth of Australia, 2001

41 “Final Report on the Scoping Study for a NFP Regulator”

42 Murray Baird, Assistant Commissioner (General Counsel) ACNC, Speaking before the House of Commons Public Administration Select Committee inquiry into the Regulation of the Charitable Sector and the charities act 2006 (Public Question 286-379), 6 November 2012

However, whilst in opposition the Liberal Party spoke out against the ACNC in its current form, first promising to abolish it and subsequently signalling that they would remove its regulatory powers. In a speech at the Centre for Independent Studies in Sydney in April 2013, Kevin Andrews, Shadow Minister for Families, Housing and Human Services at the time (and now Minister for Social Services – a new portfolio that will hold wide ranging control over policy relating to not for profits), laid out plans to “return the regulatory powers that existed in the ATO, ASIC and other similar bodies to those bodies”, citing a failure to reduce bureaucracy and his belief that such an organisation is incompatible with Commonwealth, State and Territory laws.

Should the Liberal-National Coalition, having come to power shortly before the publication of this report, take such steps to diminish, or even abolish the role of the ACNC donors may lose faith in the regulatory system. The politicisation of not-for-profit regulation threatens to polarise the public and stir up mistrust both in regulators and not-for-profits. As such, the Australian example shows that, even in a country with a highly developed culture of giving and with a wealth of prior research and consultation, establishing an independent regulator is extremely challenging and carries considerable risk. Ensuring bipartisan support should be seen as an important prerequisite for taking such a significant step.

Recommendations

Create formal protocol mandating the sharing of information with not-for-profit regulatory bodies when financial regulators observe suspicious activity in a not-for-profit.

Consider nominating staff at all levels within regulatory bodies as having formal liaison roles with other regulators on not-for-profit monitoring. Hold regular meetings of this group to discuss issues of joint working.

Create a central database for all regulators to access ensuring that not-for-profits do not have to report to multiple bodies and eradicating duplication.

Commit to understanding the structural weaknesses of the existing not-for-profit regulatory framework (in the form of a consultation and review) before adding to its complexity.

Ensure cross party commitment for establishing a regulator in order to avoid politicising its existence.

Assigning Status

In most countries there are recognised types of non-profit organisations. However, the typology differs substantially from one country to another. A wide range of legal forms for not-for-profits has advantages for the sector and particularly for donors, as it provides clarity about the nature and the governance structure of a given organisation. Nations that maintain an overly simplistic typology of not-for-profits may risk failing to harness the potential of the sector by failing to allow for choice. For example, in Kenya, a lack of distinction between philanthropic institutions and wider civil society bodies not only limits the development of both sectors by failing to clarify purpose in the eyes of the donor, but also contributes to an underlying mistrust of the sector which is viewed as unaccountable and prone to corruption.⁴³

Indeed, the Kenyan example raises other issues about the assignment of legal status. The legal forms which do exist do not sufficiently reflect long standing traditional charitable practices within the country. The practice of *harambee* (pooling together) predates the colonial era and is still widely practiced, but it does not have legal status as a not-for-profit form by name. This perhaps points to a problem which is inherent in emerging economies – that technical assistance and broader pressures from the international not-for-profit communities can result in the building of legal structures that fit global norms closely but do not necessarily reflect existing domestic patterns. As a result, new forms of philanthropy are seen as separate, and fail to benefit from the legacy of trusted and culturally legitimate forms of charitable activity.

The failure to recognise traditional models of giving is also a problem in Sub-Saharan Africa where, like Kenya, horizontal giving practices linked to a sense of duty to give when times are good (known in several nations as *ubuntu*) are widespread. These localised, trust-based schemes ought to have been the foundation blocks for civil society in nations where trust in institutions is low. But because regulation of not-for-profits too often focuses on monetised assets, many of these organisations are rendered invisible. However, these organisations often have assets which though unofficial, are significant. Land, human resources and skills, connections with and support from local businesses and most importantly the trust of the local community make these under-recognised not-for-profits the hidden majority of civil society in many nations.

By encouraging organisations to measure these assets and offering advice and training and official recognition in exchange for light touch reporting, regulators could bring literally thousands of organisations into the light. This would help to show the public that not-for-profits are not a foreign imposition, but an abundant and highly legitimate national resource. However, encouraging voluntary reporting and measurement of assets should not be seen as an opportunity merely to spread accepted international standards of regulation or to impose new burdens on grassroots organisations. Rather, any such policy should focus on allowing organisations to represent themselves and what they do and to learn from other organisations.

The engagement of these organisations in wider civic dialogue and their exposure to new ideas could prove to be a game changer for promoting greater participation in giving amongst the emerging middle classes and for the addressing of social problems. This potential is highlighted by Akiba Mashinani Trust (AMT), the financing facility for the Kenya Federation of Slumdwellers. Comprising

43 Otieno, M., Ufadhili Trust, Global Institutional Philanthropy Part Two: Country Profiles, Worldwide Initiatives for Grantmaker Support (WINGS)

44 Akiba Mashinani Trust were winners of the 2013 Olga Alexeeva Memorial Prize, organised by Alliance Magazine

more than 700 community savings schemes consisting of 300,000 people, it is able to use some of its members' money to invest in larger projects such as building homes. However, to enable the sharing of ideas like this, governments need to recognise the importance of networking, training and support.

“People don't trust institutions, and often have good reason not to, because they are unaccountable and sometimes corrupt. In contrast, traditional forms of giving are trusted. Governments should perhaps ask themselves ‘can we do more to harness these forms and link them into the wider civil society?’ The reality is that people will look more favourably on all forms of civil society when they can see that they are already playing a part in it.”

Jenny Hodgson, Executive Director, Global Fund for Community Foundation. Quote taken from an interview conducted as part of the Future World Giving project.

However, while too narrow a set of legal forms can fail to make space for the diversity of the not-for-profit sector, there are also pitfalls inherent in creating too many legal forms. Even when governments are proactive in ensuring that new organisational forms are given legal standing, their efforts can be ad hoc and un-strategic, resulting in complex, confusing and often burdensome registration and regulation practices. Tanzania, for example, has seven different laws governing different organisation types.

As previously stated, civil society cannot be viewed in isolation from the context in which it operates and this is particularly pertinent in understanding the way in which governments assign status to not-for-profits. The inherent imbalance in the relationship between the State and civil society, especially in emerging philanthropic markets, enables governments to craft legal definitions of not-for-profits in its own image, rather than as a reflection of civil society.

It is understandable that governments might want to use regulatory systems to assign status to organisations which reinforce their own sovereignty, particularly in countries where regulatory frameworks were drawn up in the immediate aftermath of independence or revolution. However, this narrow view of state building fails to recognise the important role that civil society can play in providing a constructive vehicle for citizens to express concerns without resorting to unrest.

Recommendations

Recognise existing local forms of not-for-profit legally, using language that resonates with the public.

Encourage, but do not require, the measuring of un-monetised assets to highlight the scale and resources of domestic civil society.

Offer a light touch regulation for previously unrecognised and/or unregistered organisations. Registration should not be a requirement, but should be encouraged.

Allocate funds to not-for-profit infrastructure and development organisations (national and regional) to provide advice and training on meeting the requirements of regulators.

Focus on: China

One of the clearest examples of this kind of top down approach to regulating not-for-profits is in China, which has not only legislated to render civil society in its own image but has in fact created 'Government Organised Non-Governmental Organisations' (GONGOs), which dominate the sector (a similar strategy has also been employed in Uzbekistan). It is presumed that Chinese officials wanted to harness the generosity of philanthropists and social organisers to drive improvements in various aspects of Chinese society, whilst retaining control and limiting the capacity of not-for-profits to publicly criticise government.

However, the 2008 Sichuan earthquake proved to be a stress test for the Chinese model of State-organised civil society. The Chinese Red cross, one of the few Chinese GONGOs allowed to accept direct donations from the public, benefited from an outpouring of public generosity and received a share of the 12.4 billion US dollars in donations (inclusive of goods and services) reported by Chinese state media. But stories quickly began to emerge of excesses within the Chinese Red Cross and of donated money being clawed back into government coffers. In 2009, research from Tsinghua University revealed that 80 per cent of charitable donations following the Sichuan earthquake had been designated as extra government revenue.⁴⁵

The legacy of State dominance of service provision has clearly affected attitudes towards philanthropy, and a lack of transparency in the way donor money is spent is likely to set charitable giving back further. The fact that when asked who they felt was most responsible for addressing social need, 80 per cent of Chinese people answered 'government' and just 3 per cent chose 'people like me' (compared to 35 per cent and 22 per cent respectively for the global average),⁴⁶ shows that philanthropy faces a battle to earn the trust of society. Speaking at an international symposium on charity legislation in Beijing in 2007 Xu Yongguang who, from 1988 to 2005, led the China Youth Development Foundation's Project Hope commented that growing up in a society where 'an omnipotent government serves as master of the people [...] the public has a weak charity awareness.'⁴⁷

But despite the crisis of trust after 2008 and subsequent scandals, such as in 2011 when a supposed Red Cross Society of China (RCSC) employee named Guo Meimei (the organisation has denied her employment) posted photos of herself on a social networking website posing with luxury cars and designer handbags, public trust in not-for-profits has risen from 48% in 2008 to 81% in 2013 according to Edelman's Trust Barometer. This suggests that GONGOs have been effective in addressing public concerns in light of recent scandals. The RCSC has since publically committed to improving its transparency and has appointed an independent non-executive committee to strengthen its governance.⁴⁸ Indeed, some spectators see a long term trend towards a more balanced relationship between state and not-for-profits in China. Even before the recent scandals experts on Chinese civil society such as Professor Wu Fengshi observed that 'GONGOs are developing

45 China's Red Cross fights to win back trust, BBC News website, April 2013 <http://www.bbc.co.uk/news/world-asia-china-22244339>

46 Edelman Trust Barometer 2012, Edelman <http://trust.edelman.com/trust-download/global-results>

47 Young, N, Full steam ahead for 'charity' even as brakes are applied to NGOs, China Development Brief, 2007, <http://www.chinadevelopmentbrief.com/node/1222>

their own organizational ideologies and capacities, and in the process both governmental and GONGO perceptions of their respective roles are changing.’⁴⁹

However, it remains to be seen whether a model of philanthropy where not-for-profits are subject to State sovereignty can be sufficiently reactive to donor and beneficiary demands to prosper. According to the World Giving Index 2013, engagement in charitable activity is extremely low. China ranks joint second to last (133rd) in terms of its World Giving Index Score⁵⁰ (a coefficient of engagement in giving money, volunteering and helping a stranger), a significant underperformance compared to countries of a similar level of economic development. Furthermore, if reports at the time of publishing are to be believed⁵¹, a government briefing to officials referred to as ‘Document Number Nine’ identifying the promotion of civil society as a potential threat in the ‘ideological realm’ suggests that the Chinese government is in no hurry to address a stagnant philanthropic sector.

48 Red Cross promises transparency in Lushan quake donations, article on the Central China Television website <http://english.cntv.cn/20130424/107396.shtml>

49 Fengshi Wu: “Environmental GONGO Autonomy: Unintended Consequences of State Strategies in China”, *The Good Society*, Volume 12, no. 1, 2003

50 World Giving Index 2013, Charities Aid Foundation, 2013

51 Political Rebalancing: Thinking Backwards, *The Economist*, June 24th, 2013. Article available online at

Regulating Foreign and Foreign Funded Organisations

In an increasingly globalised world, money flows freely between countries. This is as true for philanthropic giving as it is for capital flows in trade and business. However, the distance between donor and beneficiary raises questions for policy makers about the accountability and transparency of philanthropic activity at both ends of the transaction. Legislation and regulatory procedure often seeks to guarantee that charitable activities meet domestic expectations and adhere to national governance standards, considering only the narrow impact that not-for-profits have against their stated objectives. This renders invisible the wider impact that organisations have on building public trust in giving abroad and the extent to which they are accountable to beneficiaries. On the other hand, some governments treat the support and participation of foreign not-for-profits and donors with suspicion, raising barriers to entry for philanthropists from abroad.

Recommendations

Ensure that legislation and regulatory systems are sufficiently robust to be able to hold not-for-profits to account without the need to impose separate requirements on foreign not-for-profits or not-for-profits receiving funds from abroad.

Domestic not-for-profits should have the freedom to associate with foreign or international not-for-profits to promote the sharing of ideas and the development of civil society.

Allow foreign nationals legally residing in a country to be founders/trustees/board members of not-for-profits providing that they meet generic eligibility requirements.

It is important to recognise that governments have a responsibility to ensure that foreign not-for-profits and/or not-for-profits funded wholly or in part from abroad are held accountable for their activities. However, whilst all sovereign states should be able to expect foreign, and foreign funded not-for-profits to uphold domestic standards, the legislative and regulatory framework that governs domestic not-for-profits should be suitably robust to achieve this without resorting to additional, punitive or prohibitive standards for foreign philanthropy.

Whilst there may be an argument to say that the uncoordinated activities of foreign philanthropists can in some circumstances hamper the development of home-grown charitable movements, any benefit in this regard is far outweighed by what is lost by stifling foreign philanthropic engagement. Restricting the participation of international philanthropists stifles civil society not only through loss of revenue but also through isolation from ideas. In many developing countries not-for-profits have had to improve their governance to meet the expectations of foreign donors, which has driven up standards and will ultimately improve trust amongst emerging domestic middle classes as they begin to engage in philanthropy.

Unfortunately, there appears to be a trend for increasingly restrictive legislation concerning cross-border engagement of foreign NGOs and donors. Some countries in the Middle East and North Africa (MENA) region have sought to quell civic unrest by cracking down on international philanthropic engagement, believing it to be undermining state sovereignty. In Algeria, a 2011 proposal to amend the already restrictive Law No. 90-31 will forbid not-for-profits from receiving funds from abroad unless a partnership agreement is in place between the foreign donor and the Solidarity Minister. Membership of international NGOs must be pre-approved by government. The proposed amendment will also give the government the ability to suspend these agreements if the foreign association clearly interferes in the affairs of the host country or performs activities that violate national sovereignty, the established institutional order,

national unity, the integrity of the national territory, public order and morality, or the 'civilisational values' of the Algerian people.⁵²

In Egypt, the final draft (at time of writing) of the Civil Institutions Act includes articles that, if ratified, would impose requirements on foreign, and foreign funded not-for-profits that do not apply to domestic organisations. Articles 63-65 of the draft law would subject foreign not-for-profits to excessive supervision and prohibit participation in 'political parties' activities' or activities that would violate national sovereignty. The most worrying aspect of the law is not the level of scrutiny it brings to not-for-profits but the fact that they apply specifically to foreign funded organisations. As neither of these terms is defined or limited in any way, the provision allows the government broad discretion to deny a foreign not-for-profit the ability to operate in Egypt.⁵³ In addition, the new law would deem all cross border donations to be 'public funds', which under Egyptian law would allow for unprecedented levels of scrutiny of foreign donations in comparison to domestic funds – a difference that would imply distrust in those organisations receiving money from abroad.

52 Algeria: Review of the Proposed Legislation on Associations, Euro-Mediterranean Human Rights Network, 2011
<http://www.euromedrights.org/eng/2011/10/27/algeria-review-of-the-proposed-legislation-on-associations/>

53 NGO Law Monitor – Egypt, International Centre for not-for-Profit Law, 2013

Focus on: Russia

Recent developments in the regulation of not-for-profits in Russia have challenged public trust in organisations, their capacity to speak freely on key issues and their ability to motivate donors. This goes some way to explaining why Russia is ranked 127th in the World Giving Index. Whilst all these issues will be covered as part of the Future World Giving series, we will focus here on the way in which recent policy has damaged public trust in international not-for-profits.

The regulation of not-for-profits in Russia became the subject of international concern in 2006 when the government introduced the Russian Federation Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation (2006 NCO Law). The 2006 NCO Law established burdensome registration and reporting requirements, and severe penalties now act as a disincentive to smaller not-for-profits. But the most concerning aspect of the Law was the extent to which it was open to interpretation. The International Centre for Not-for-Profit Law (ICNL) bemoan reporting requirements which are ‘not only difficult and costly to comply with, but also hard to understand, leaving excessive room for government officials to exercise discretion in determining whom to target when enforcing these rules.’⁵⁴

In recent years, State policy has fostered distrust in cross border philanthropy and international civil society. The language used in a 2012 Federal Law⁵⁵ seems to paint foreign donors as agitators against the State rather than contributors to the public benefit. In practice, any not-for-profit deemed to be carrying out ‘political activities’- the definition of which is open to interpretation- must register in advance of receiving funding from abroad as a ‘foreign agent’ or executives may face punitive fines (300.000 RUR (EUR 7.300)), and the organisation will risk suspension. 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 have expressed concerns about the effect this language will have on public perceptions of not-for-profits, with Muiznieks commenting that “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.”⁵⁶

Olga Batalina, State Duma deputy and Assistant Secretary of the United Russia General Council has been quoted as saying “Sabotage of the law on foreign agents by individual NGOs may lead to their suspension” whilst also adding that “a number of non-commercial organizations [sic] virtually engaged in politics and financed from abroad, [...] have openly announced that they will sabotage this law”.⁵⁷ Ms Batalina unwittingly sums up the dire situation for organisations which rely on foreign funds. Put another way, if organisations do not register as foreign agents they face suspension, whereas if they do accept a tag of ‘foreign agent’ they concede legitimacy in the eyes of the public, rendering their charitable mission almost impossible and hence unattractive to donors internationally or domestically. This is an obvious catch 22.

⁵⁴ NGO Law Monitor – Russia, International Centre for not-for-Profit Law, 2013

⁵⁵ ‘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’

⁵⁶ 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>

⁵⁷ Olga Batalina quote taken from: B. Bowling, Russian Legislation and NGOs in Russia, Russian Analytical Digest, No. 120, 23 November 2012

“The 2012 Federal Law is monstrous. We still don’t know what proportion of foreign funding would mean an organisation has to register itself as a foreign agent, and exactly what constitutes ‘political activity’. More or less all serious NGOs have a degree of cooperation with the government written into their constitution. Non-commercial organisation receiving even 5 dollars into their accounts will fall under the remit of this law by formal order.”

Tatiana Toulchinskaya, director of “Here and now” Foundation, which works with orphaned children in Russia. Quote taken from an interview conducted by CAF Russia for the Future World Giving project.

This public undermining of trust in foreign and foreign funded not-for-profits, and the promotion of the idea that foreign engagement in domestic civil society should be viewed by Russians with scepticism, is extremely damaging. The damage is not only to those seeking to gain funds from, work with and learn from international donors and partners; it is felt by all of Russia’s estimated 250,000 not-for-profits, because undermining public trust in a certain sub-sector often leads to a general loss of trust in the wider sector. Given that Edelman put trust in ‘NGOs’ in Russia at just 40 per cent (the global average is 63 per cent), not-for-profits can feel the effect that recent government policy is having.

Regulating Organisations Operating Abroad

The distance between donor and beneficiary when NGOs receive the majority of their funding from overseas raises issues not only for maintaining donor trust in those countries where donations originate, but also for potential future donors in beneficiary countries. The development of a civil society with widespread public engagement in giving should be seen as a core goal for all those interested in sustainable development. As such, donors should seek to understand the effect that their giving has on public trust in beneficiary countries as part of their impact measurement requirements. In this context downward accountability to beneficiaries should be seen as an important output rather than merely good performance management practice.

But downward accountability is rarely prioritised to the extent that it should be. According to a 2006 survey by Keystone⁵⁸ 89 per cent of donors felt that it was ‘critically important’ (58 per cent) or ‘important’ (31 per cent) to factor the voices of beneficiaries into assessing the quality of performance. However, only 26 per cent of donors regularly asked for performance indicators to be designed with beneficiaries in mind.

In many developing nations, a reliance on not-for-profits has raised pressing issues around accountability as many of these not-for-profits are funded by donors from rich countries, who are more accountable to their donor agencies than to the people they serve.⁵⁹ Many organisations see asking for the views of beneficiaries as an important part of project evaluation but they are less likely to engage them in the planning phase. In other words, monitoring beneficiary satisfaction is seen as evidence for funders rather than a tool for genuine engagement. Whilst this fact is widely lamented in development circles, few make the link to the potential long-term damage it could be having on the future development of domestic philanthropy.

With massive long term growth forecast for many developing economies, governments should be holding international not-for-profits to account for the extent to which they are engaging beneficiaries – who may one day be donors themselves – in civil society. Not-for-profits are currently encouraged to engage beneficiaries to aid impact measurement and to identify improvements in service delivery. However, by making not-for-profits understand that by engaging beneficiaries fully, they can hasten the development of domestic philanthropy, governments could ‘nudge’ not-for-profits into more collaborative approaches.

Another underappreciated factor in how international organisations can build trust in giving is the example set by government aid agencies. Charitable giving to international causes does not exist in isolation from the wider context of cross border giving. Official Development Assistance is often seen as remote from public scrutiny in both donor and recipient countries.

58 Downward accountability to ‘beneficiaries’: NGO and donor perspectives, Keystone, June 2006 www.keystonereporting.org

59 Duhu, J. Strengthening Civil Society in the South: Challenges and Constraints - A Case Study of Tanzania, *The International Journal, of Not-for-Profit Law*, Volume 8, Issue 1, November 2005

A lack of transparency – whether perceived or real - and a lack of impact reporting can lead to public scepticism about the value of aid. Furthermore, when it comes to public understanding of overseas aid, the distinction between government assistance and private philanthropy is blurred. As a result, scepticism about one can be transferred to the other. This is another reason why governments have a responsibility to ensure that their aid spending is, and is seen to be, transparent. A first step should be to sign the International Aid Transparency Initiative and commit to publishing regular data. Yet to date, only 12 governments have done so.⁶⁰ In addition to making ODA data more transparent, governments should commit to opening aid spending up to external scrutiny. The recent creation of the Independent Commission for Aid Impact in the UK represents a decisive step towards improving the accountability of aid. A clear green, amber and red reporting system allows the public to easily understand whether a project is delivering against objectives.

Recommendations

Governments should ask not-for-profits to report on engagement with foreign beneficiaries, explaining the wider benefit that this has on the development of civil society.

Governments should allow for independent scrutiny of its foreign aid spending.

Governments should sign up to the International Aid Transparency initiative (IATI).

60 150 organisations publishing data to IATI, International Aid Transparency Initiative, online article <http://www.aidtransparency.net/news/150-organisations-publishing-data-to-iati>



Charities Aid Foundation

25 Kings Hill Avenue
Kings Hill
West Malling
Kent ME19 4TA UK

T: +44 (0)3000 123 000
E: campaigns@cafonline.org
W: www.cafonline.org

If you would like to discuss any issues raised within this paper or require further information about CAF's policy positions, please contact the author of this paper:

Adam Pickering
International Policy Manager
email apickering@cafonline.org
call **+44 (0) 3000 123 229**