"Legal Constraints to the Membership of a Trade Union in Nigeria"

O. V. C. OKENE

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LETTER FROM THE EDITOR

July 31, 2007

Dear Readers,

In the middle of a northern hemisphere summer/southern hemisphere winter, this issue contains articles from and about all parts of the world. They make interesting reading and address some very important themes; all written by comparatively recent law graduates.

- Apar Gupta, a lawyer from India who publishes a blog on law and technology, has contributed an analysis of the issue of e-governance in India, which he says is of special significance to that country. India aims to regulate all digital activity through the Information Technology Act, 2000. Mr. Gupta asserts that electronic governance ushers in an epoch of transparency and efficiency and can be an effective measure to reduce corruption and red tape in government, for which India has been notoriously cited in recent years.

- Coming from South Africa is an article analyzing the ways in which civil society organizations can assist the realization of prisoners’ rights in proceedings before the African Commission on Human and Peoples’ Rights. Jamil Ddamulira Mujuzi, who is a Doctoral Research Intern with the Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape, has provided an informative analysis of the various tools that CSOs can use to effectively assert these rights. IJCSL is grateful to the Centre’s Newsletter, which first published Mr. Mujuzi’s paper, for permission to republish it here.

- In another paper concerning developments on the African continent, O.V. C. Okene, a doctoral candidate in the Department of Law of the University of Essex, addresses questions about whether Nigerian law inappropriately restricts the rights of workers to freedom of association. Concluding that the Trade Unions Act is in violation of the Constitution of Nigeria as well as several international agreements to which it is a State Party, Mr. Okene suggests solutions to the perceived problems.

- A fourth article by our own Kevin Schwartz contains the first in-depth analysis of the Farmers’ Professional Cooperative Law of the People’s Republic of China, which went into effect only this month. His paper seeks to place the new law in its political and social context, including looking at how the Central government wants to use it to address issues of unrest in the countryside. Mr. Schwartz also does a careful technical analysis of the law itself, providing insights into drafting problems, etc.

In addition to these articles Issue 5-3 includes two Book Reviews of recent important texts – Dr. Kerry O’Halloran’s CHARITY LAW AND SOCIAL INCLUSION and Samuel P. King and Randall Roth’s BROKEN TRUST (an analysis of the Bishop Estate case/saga). If you read the reviews, you will certainly want to acquire both of them for your bookshelves.

This time of year is also one of change in our staff. With this issue, Malinda Baehr becomes the Managing Editor of IJCSL, replacing Kevin Schwartz who served so ably. Elena Ryjkova joins
her as Associate Editor. Malinda can be contacted at malinda.baehr@gmail.com if you have any comments or concerns.

Please let me know if you would like to ask any questions or address issues raised in this Journal in a Letter to the Editor.

Happy Reading!

Karla W. Simon
Professor of Law
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IJCSL EDITORIAL POLICY

July, 2007

Dear Reader,

CONTENT – The IJCSL publishes articles on a variety of topics, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed herein do not necessarily reflect the views of the IJCSL or its editorial staff.

STYLE – The IJCSL publishes articles by contributors from around the world. Therefore, the IJCSL uses a flexible editorial policy regarding questions of style. Articles submitted by persons for whom the English language is native are edited based on the author’s original syntax and spelling. Articles submitted by persons for whom the English language is not native are edited according to American English style.

Occasionally, the IJCSL publishes articles in languages other than English. In those instances, articles are published as submitted and the IJCSL provides an English-language summary.

QUESTIONS & COMMENTS – The IJCSL welcomes readers’ questions and comments on items it publishes. If you have a question or comment, please contact:

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We look forward to hearing from you, and thank you for your interest in the IJCSL.

Sincerely,

The IJCSL Editorial Staff and Editorial Board

PLEASE CITE AS

5 INT. J. CIV. SOC. L. 3 at http://www.law.cua.edu/Students/Orgs/IJCSL
ABSTRACT

Governments are increasingly utilizing the Internet to perform their functions. The Indian welfare state has been historically plagued with problems of corruption and red tape. With the advent of the Internet and the growing penetration of the Internet in India, the government has commenced shifting its functions to the Internet. India aims to regulate all digital activity through the Information Technology Act 2000. The Act contains detailed provisions regarding electronic governance. This article examines these provisions. Part-1 introduces the rationale and well as the technical and legal background of electronic governance. Part-2 contains an examination of the provisions which act as a backbone for electronic governance. Part-3 contains an examination of the various provisions contained in the act which facilitate electronic governance. Part-4 examines the provisions relating to voluntary implementation of electronic governance, and finally Part-5 concludes the legal framework for electronic governance in India.

I. AN INTRODUCTION TO ELECTRONIC GOVERNANCE

It has been stated that, “open government is a contradiction in terms. You can be open – or you can have a government”. However, with the advent of new technologies, regulatory agencies are increasingly harnessing the power of digital technologies to meet the informational demands of rulemaking and to expand public involvement in policymaking. Governments are increasingly adopting technological means, shifting from walls to webs. India aims to regulate all digital activity through the Information Technology Act, 2000. The heading of Chapter III of the Information Technology Act, 2000 (hereinafter “ITA”) reads as “electronic governance”. Electronic governance may be defined as the use of informational and computer technology to facilitate interaction between, on the one hand, a public authority and, on the other hand, individual citizens, businesses, or non-governmental organizations. However, it is pertinent to note that e-government differs from e-governance. E-government constitutes the way the public sector institutions use technology to conduct administration and to enhance the delivery of existing services. E-governance, however, is not simply about technological or physical application for public affairs but about the ways political and social powers are organized and used. E-governance deals with how the citizens interact with the government or influence the legislative or public sector processes.


Several levels of governance are exemplified through the adoption of e-governance. First, at the individual citizen level, the Internet enables citizens to become active users of information. Second, at the subsystem level, the Internet provides an experimental environment for self-governance, establishing novel participatory initiatives within institutions. Third, at the metasystem level, the Internet supports the shift from the regulatory to the governance model through the expansion of processes such as e-regulation and innovative venues for political and legal activities.

One of the central and frequently voiced criticisms of governments is that they are slow, do not react to the demands of their citizens, and that they are generally bureaucratic and wasteful. The adoption of e-commerce ameliorates this red tape by promoting efficiency, which should allow governments to deliver the same or better services at lower costs. Here sections 4 and 5 act as enabling provisions to provide legal recognition of electronic records and digital signatures, respectively, in statutes wherein such recognition is absent. The provisions contained in section 6 further contain specific prescriptions as to the government or its agencies using electronic records and digital signatures in their functions.

The ITA also provides a framework within which electronic governance is achieved, with section 7 containing several requisites for retention of electronic records. The ITA also provides for electronic publication of any rule, regulation, order, bylaw, notification or any other matter in an electronic gazette in section 8. The new portals for notice and comment help make the public comment process more interactive and deliberative. E-publication and e-filing, including e-procurement, involve two simple functions: (1) Turning the Internet into a giant bulletin board for government, thereby enhancing the citizen’s ability to obtain information from government, including finding out about government purchases and sales of goods and services; (2) Enhancing the citizen’s ability to contact government officials, to obtain and file documents, purchase orders, or invoices through e-mail, and to receive or make payment by electronic funds transfers (‘e-payment’).

However, it should be considered that such methods may not be in the interest of every public function performed by the government, it may be deemed unviable and inefficient. Hence, section 9 states that the provisions contained in sections 6, 7 and 8 are discretionary and a citizen cannot demand their implantation as a matter of right.

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13 See, e.g., Govt. of NCT of Delhi, Pay Your Electricity Bills Online, Department of Information Technology, available at http://delhigovt.nic.in/bijli.asp (last visited Dec. 4, 2006).
II. TECHNO-LEGAL PREREQUISITES FOR ELECTRONIC GOVERNANCE

A. RECOGNITION OF ELECTRONIC RECORDS

The purpose of the various electronic commerce statutes can briefly be stated as creating legal recognition for electronic records, electronic signatures, and electronic contracts and ensuring that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. Section 4 sets forth the fundamental premise of the ITA, namely that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance because the substantive law governing the underlying transaction may require non-electronic records or signatures. The section achieves its purposes by simply overriding the substantive law on these requirements.

The aforementioned section contains two prerequisites before legal recognition may be imparted to electronic records. These prerequisites are: (a) rendered or made available in an electronic form, and (b) accessible to be used for a subsequent reference. The first requirement is fulfilled when the electronic record is within the meaning of section 2(1)(r) of the ITA. The second requirement is satisfied when the record is catalogued or made available. The rationale behind the second requirement is that electronic data is intangible and by its very nature transient, thus it is expedient to require it to be available for future reference.

The aforementioned section is in pari materia with a provision of the Uniform Electronic Transactions Act. It has been observed in respect with the UETA that it does not change the substantive requirements of the Uniform Civil Code Statute of Frauds; it simply mandates that courts recognize the legitimacy of electronic signatures when considering whether the requirement of a signed writing has been met. In applying the statute of frauds after UETA's adoption, courts are still required to conduct an inquiry focusing on the intent of the party against whom enforcement is sought. The aforementioned statute of frauds provides that “a contract for the sale of goods for the price of $500 or more is not enforceable” unless the contract is in writing and is signed by the party to be charged. Although the order form on the Web site may bear letters, numbers, and symbols, the courts may not view the order form, a paperless electronic file, as a written record.

In the case of Orissa Consumers Association v. Orissa Electricity Regulatory Commission, the Orissa High Court considered the legal recognition of records as per the ITA and stated that the requirements of publication contained in the Orissa Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Retail Sale of Electricity) Regulations,

15 Uniform Electronic Transactions Act Section 7 (Nat'l Conference of Comm'rs on Unif. State Laws 1999) (U.S.) [hereinafter UETA].
19 AIR 2005 Ori 11.
2004 had been satisfied. The court noted that the publication of the draft Regulations by putting the same in the website of the Commission would be a publication of the draft Regulations within the meaning of Section 23 of the Central General Clauses Act, 1897.

B. RECOGNITION OF DIGITAL SIGNATURES

Section 5 chooses a technology-based approach promoting a highly regulatory and prescriptive standard, granting functional equivalence only to digital signatures. Section 5 applies the same principle as adopted by the preceding section, granting legal recognition to digital signatures where statutes require when any matter or document requires authentication by affixing a signature. The explanation to the section couches the term “signature” in a plenary context, including its grammatical and cognate expressions.

The prerequisites which must be satisfied for the application of the section are: (a) a law should require that information, matter or document shall be signed or bear the signature of a person, (b) a digital signature is affixed in place of such signature, and (c) the digital signature is affixed in a manner prescribed by the central government. Take the illustration of the Bureau of Indian Standards Act, 1986, which provides that the authentication of orders and other instruments issued by the Bureau shall be authenticated by the signature of such officer or officers as may be authorised by the Bureau in this behalf. Thus if the Bureau decides to affix a digital signature to its orders the mere factum that the statute from which it derives its power does not expressly provide for affixing a digital signature will not impart any defect to its orders.

The draft amendments, with the objective of technological neutrality, suggest substituting the term “digital” with “electronic”. The amendments also make provisions to ensure that the electronic signature affixed is reliable. There is a proposition to add another sub-section, which prescribes the minimum standards of reliability. The proposed standards are: (a) the electronic data in relation to which the Electronic Signature is affixed is linked to the signatory and to no others, (b) the Electronic Signature creation code given is unique to the signatory, and (c) any alteration to the Electronic Signature or to the electronic data in relation to which the signature is affixed made after the time of signing is detectable. The comments to this sub-section specify that they are being added to define the reliability of Electronic Signatures and to allow only those technologies which conform to those conditions in line with UNICITRAL Model Law of Electronic Commerce.

C. RETENTION OF ELECTRONIC RECORDS

A record is any documentary material, regardless of physical form, that has the following three characteristics: (a) it is generated or received by [an entity] in connection with transacting its business or is related to its legal obligations, (b) it is retained for any period of time, and (c) it is


\[^{23}\text{Proposed Amendments to IT Act 2000, §4.}\]

\[^{24}\text{Id. at §4(2).}\]
necessary to be preserved as legal evidence of the [entity]’s activities or as historical reference.\textsuperscript{25} Records retention is unconcerned with the genesis of records, but takes up matters after creation. Records retention principally concerns the retention period: that is, the duration of a record’s life.\textsuperscript{26} Records retention has various objectives which include: (a) maintaining an institutional policy memory, (b) enhancing the body of knowledge in a factual and scientific sense, (c) maintaining official records for possible use as evidence in legal proceedings, (d) promoting efficiency and effectiveness of agency operations, and (d) increasing the return on investment from information in government records which has long-term value.\textsuperscript{27}

Governments and business are increasingly relying upon electronic records. One of the benefits of electronic records is that archiving them is much more economical than paper.\textsuperscript{28} A minimum standard of records retention is especially important with respect to electronic data since its being intangible renders it highly susceptible to a partial or complete loss of accessibility, integrity or/and identification. For example, if data is stored on a Compact Disk Read Only Memory (CDROM) the reliability and storage life expectancy of the storage media is secure for at least three to five years, with some estimates reaching as high as twenty years.\textsuperscript{29} Thus it becomes expedient to have minimum policy standards for the retention of electronic records.

The ITA under section 7 sets forth the basic rules regarding the retention of electronic records. It applies to the retention of records that originally exist in electronic form, as well as to the electronic retention of records that originally exist in paper form or on other tangible media. The section does not prescribe for any specified period for retention of an electronic record but provides minimum standards for records retention “when any law provides that documents, records or information shall be retained for any specific period”.

These minimum standards are contained in section 7(1) and relate to:

1. Accessibility – Records retention in archives is ineffective unless the archived records can be accessed. The technical issues with legal implications relating to accessibility include ease of alteration and physical deterioration. Thus section 7(1)(a) provides for making records, “accessible so as to be usable for a subsequent reference”.
2. Format Integrity – The integrity of the format in which the information was originally generated is important because changes in format can affect the material characteristics of the record. With several versions of software available for performing the same task, section 7(1)(b) prescribes that, even if there is a change in format, the electronic record shall be “in a format which can be demonstrated to represent accurately the information originally generated, sent or received”.
3. Identification – It is imperative that any form of record retention must enable identification. Thus section 7(1)(c) provides for, “the details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record.”

\textsuperscript{25} \textsc{Phyllis M. Lybarger}, \textit{Records Retention Scheduling} 1 (1980).
\textsuperscript{28} Benjamin Wright & Jane K. Winn, \textit{The Law of Electronic Commerce}, §1-03[D], at 1- 9 (3d ed. 1998).
\textsuperscript{29} \textit{Id.} at 992.
This section is similar to a provision in the Electronic Signatures in Global and National Commerce Act. E-SIGN provides guidance for original documents and the retention of electronic records. When a document or record is required to be maintained, an electronic record is sufficient as long as two requirements are met. First, the electronic record must “accurately reflect” the information from the document or record. Second, the electronic record must be accessible to all persons who are entitled to access for any required period in a form “that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.” Also, whenever an original is required, an electronic record which complies with the above two requirements will be sufficient.

Section 7(2) states that, “nothing in this section shall apply to any law that expressly provides for the retention of documents, records or information in the form of electronic records”. This section also makes it clear that the standards set forth here are minimum standards only; it does not preclude a government agency from establishing additional requirements for the retention of records required under the regulations of that agency.

III. PROVISIONS FACILITATING ELECTRONIC GOVERNANCE

A. PROVISIONS FOR ELECTRONIC FILING

Section 6(1)(a) provides for the, “the filing of any form, application or any other document” electronically. Electronic filing revolves around the use of the Internet and appropriate software to permit documents to be used by a public authority. Because the documents are communicated electronically instead of in paper format, the innovation is called “e-filing.” The statistics for electronic filing systems are quite impressive. In Texas, California, and several other states approximately 15,000 documents are electronically filed per day without submitting paper. Among the benefits of e-filing is the elimination of costs of hand delivery, messenger service, printing, photocopying, envelope, postage, and communication management. Cost savings to public authorities include the avoidance of both printing costs, to make multiple copies to a reasonable extent that officials are willing to read a document on a computer screen, and paper storage costs, with documents stored on a server accessible through an e-filing website. Benefits to authorities include efficiency gains by officials being able to retrieve documents more quickly and easily when they are stored electronically. Similar benefits arise from an automated search capacity in electronic systems to locate topics of specific interest in lengthy documents.

32 Id. at § 7001(d)(1)(A).
33 Id. at § 7001(d)(1)(B).
34 Id at § 7001(d)(3).
35 Roger A. Hanson, American State Appellate Court Technology Diffusion, 7 J. APP. PRAC. & PROCESS 259, 268 (2005).
The J.J. Irani report on the review of Company Law suggested, *inter alia* that a separate electronic registry should be established for filing schemes under section 391-394 of the Companies Act, 1956 where filing with such an electronic registry would replace filing with local registration offices where the properties of the company are located.³⁸ The ministry of company affairs partly implemented the Irani Report with the promulgation of the Companies (Central Government’s) General Rules and Forms (Amendment) Rules, 2006.³⁹ The rules provide for electronic filing of various documents utilizing the public key infrastructure. The website of the Ministry for Company Affairs lists Comprehensive guidelines for e-filing,⁴⁰ and contains various e-forms that can be read and edited in Adobe Acrobat Reader. One of these is an e-Form with Instruction kit for “Form 23AAA,”⁴¹ which is an “Application to Central Government for modification in the matters to be stated in the company’s balance sheet or profit and loss account”.

**B. PROVISIONS FOR FACILITATING ELECTRONIC GRANTS**

Section 6(1)(b) provides for “the issue or grant of any license, permit, sanction or approval” by electronic means. The benefits of grants electronically are similar to the benefits of e-filing. The Government of India has implemented a system utilizing the legal validity of electronic grants by providing for a comprehensive system for “e-procurement”. ⁴² The website “covers [the] full life cycle of purchasing (indent to receipt of goods)” ⁴³ and through the website, the Government of Andhra Pradesh is even “award[ing] contract[s]” ⁴⁴ relating to public works. However, the website is not technology neutral and has compatibility issues even with browsers that support the Public Key Infrastructure, such as Mozilla Firefox Version 1.5.0.4.⁴⁵

The Andhra Pradesh High Court in the case of *J. Rama Krishna Rao v. The Municipal Corporation of Hyderabad*⁴⁶ upheld the validity of a license for operating a Specialty Cuisine Court issued via the “e-seva” facility to the petitioner firm. The facts of the case are as follows, the petitioner firm after being allotted with a Trade Identification Number (TIN) through “e-seva”...

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⁴⁶ 2005 (2) ALT 186; 2004 (6) ALD 791.
was subjected to inspections by various authorities, i.e., fire authorities, traffic authorities etc., and granted a no objection certificate and labor permit. The petitioner at this stage made a payment of certain monies that was accepted by the respondents and was waiting for the issuance of a formal trade license. Thereafter the respondents sought to cancel the license of the petitioner because it was operating in a residential locality. It was alleged the respondents pleaded that since any written permission was not granted, as per section 521 of the Hyderabad Municipal Corporation Act 1955 there arose no need for the statutory prerequisites to cancellation of a trade license. The court held that:

1. Once the petitioner paid an amount of Rs.250/- along with application and only after such an application was processed a TIN was allotted, necessary license fee was notified and collected. In view of the same, the contention that license was not issued in required format, cannot be accepted.

2. Further, rejection of the license does not arise for the simple reason that the application was processed as per policy. The allotment of the TIN and collection of license fee amounted to the grant of a license. If the said license was granted in inadvertently or contrary to any of the provisions of the Act, necessary particulars have to be furnished, but under the garb of rejection of application, license cannot be cancelled once granted in favor of the petitioner.

C. PROVISIONS FOR FACILITATING MONETARY TRANSFER’S

Section 6(1)(b) also provides for the, “receipt or payment of money” in an electronic form as may be specified by the government. The introduction of a payment mechanism and electronic payment system into government expenditure, for procurement and purchasing as well as for activities like tax collection and other administrative processes may facilitate more effective use of public funds. When utilized by private parties electronic receipt and payment systems are viewed most favorably, as emerging retail electronic payments mechanisms offer enormous opportunities for efficient financial services and commerce. Viewed least favorably, they create opportunities for serious mischief such as penetrations of major bank’s computer systems, fraudulent investment offers, and online gambling.

D. RULES FOR THE USE OF ELECTRONIC FILING, GRANTS & MONETARY TRANSFERS

Section 6(2) provides for the appropriate government to frame rules for the prescription of “(a) the manner and format in which such electronic records shall be filed, created or issued; (b) the manner or method of payment of any fee or charges for filing, creation or issue any electronic record under clause (a).” The central government pursuant to this has framed the Information

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Technology (Use of electronic records and digital signatures) Rules, 2004. The rules prescribe various requirements for: (a) filing of form, application or any other document, (b) issue or grant of any license, permit, sanction or approval, and (c) payment and receipt of fee or charges.

The rules prescribe that for the filing of form, application or any other document referred to in section 6(1)(a) of the ITA a public authority shall, while generating such software, take into account the a set of minimum standards relating to the electronic records. These are: (a) life time, (b) preserveability, (c) accessibili, (d) readability, (e) comprehensibility in respect of linked information, (f) evidentiary value in terms of authenticity and integrity, (g) controlled destructibility, and (h) augmentability.

The rules specify that for the issue or grant of any license, permit, sanction or approval may be issued or granted under section 6(1)(b) of the ITA by using the software specified under rule 3. For the payment and receipt of fee or charges, under section 6(1)(c) of the ITA the rules stipulate that the payment shall be made in a “cheque in the electronic form” as defined in Explanation 1 to section 6(a) of the Negotiable Instrument Act, 1881.

The draft amendments propose the division of Chapter III with sections 4 and 5 falling in as sections 3 and 4 respectively in the tweaked Chapter II and section 6 being the first section in Chapter III. These proposed amendments will bring in conceptual clarity as to the subject matter of each section. The proposed amendments add a provision of 6(2)(b) for legal recognition of an “authorized service provider”. The provision grants legal recognition to authorized providers of electronic services. India is increasingly being seen as an attractive destination for such services, which include Business Process Outsourcing (‘BPO’), and Information Technology Enabled Services (‘ITES’) and there arises a need for electronic recognition and regulation of such businesses. The added explanation specifies that, an “authorized service provider”, includes, any person who has been permitted by the appropriate government through a license, registration certificate or a specific authorization letter to offer services through electronic means as per the policy governing the relevant service sector.

E. PROVISIONS FOR AN ELECTRONIC GAZETTE

Section 8 grants legal recognition to publication of rule, regulation, order, bylaw, notification or any other matter in the Electronic Gazette. However, India has yet to have a central, official electronic gazette various departments have utilized the provisions of the instant section to electronically publish the various Rules and Regulations formed by them.

Several Countries have adopted different approaches towards electronic gazettes. Singapore has a functioning electronic gazette website, which even though may not be used in legal proceedings for the purpose of evidence, does serve the function of dissemination of...
However, it is essential that due regard may be had to effectively communicating information to the entire populace. Income disparity has a causal relationship with Internet access, or the lack of it, and until access is universalized, an electronic gazette being the sole means of publication would be contrary to democratic principles. From 1 January 2003, Belgium made the electronic publication of legislation in the Belgian Official Gazette (www.staatsblad.be) the only authentic publication except for three printed versions, one of which is kept within the Official Gazette services and accessible to the public. The Belgian Constitutional Court held that an authentic electronic version was certainly compatible with social developments, and for some was more accessible and less expensive than a printed version. However, it criticized the fact that the enactment of the legislation was not accompanied by sufficient measures to facilitate access to the electronic Gazette and thus discriminated against those who have no proper access to the Internet. Therefore, the Court annulled the law, but maintained its legal effect until 31 Dec. 2005 by which date the law must provide measures for adequate access to the electronic text.

IV. VOLUNTARY IMPLEMENTATION OF E-GOVERNANCE

Section 9 of the ITA provides for, “any Ministry or Department of the Central Government or the State Government or any authority or body established by or under any law or controlled or funded by the Central or State Government” to go in for the implementation of sections 6, 7 and 8 on an “opt-in” basis. The rationale being that agencies that are not yet ready to go “paperless” are not compelled to do so and over enthused litigants may not flood the courts with public interest litigation(s) praying for implementation of e-governance. However, debate surrounds the aspect as to whether the central government should frame rules for implementation of e-governance within an adequate timeframe and whether the provision merely allows official inaction. Thus, in essence the ITA does not provide justiciable rights to citizens to enforce e-governance.

V. CONCLUSION

Electronic governance is of special significance to India. Compare Moore’s law, which seems almost leisurely with its eighteen-month increments, to the cancerous growth of corruption in India. India’s red tape is also legendary. It took a personal visit by Jack Welch in 1989 to break through the red tape so that General Electric could begin using India as an outsourcing venue.

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63 Gordon Moore, Experts Look Ahead, ELECTRONICS MAGAZINE, 27 (1965).
Electronic governance ushers in an epoch of transparency and efficiency and can be an effective measure to reduce corruption and red tape in government. The ITA by providing for a legal framework for electronic governance aids the government in its initiatives to shift from walls to webs.

John Perry Barlow notoriously put it, “[G]overnments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace …[Y]ou have no sovereignty where we gather … [W]e have no elected government, nor are we likely to have one.” It is indeed ironic that governments have today not only started using the Internet to regulate content on the Internet but also to govern effectively, govern electronically.

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64 See Gurcharan Das, India Unbound 207-210 (2002).
65 Supra note 3.
THE ROLE OF CIVIL SOCIETY IN PROTECTING AND PROMOTING PRISONERS’ RIGHTS BEFORE THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS

BY JAMIL DDAMULIRA MUJUZI∗

I. INTRODUCTION

Many articles and studies that deal with civil society-related issues will ordinarily first attempt to give a definition or an understanding of civil society so that the subject matter of the article or study is put in that context. However, we have to recall that there are many definitions of civil society and going into a debate of what amounts or what does not amount to civil society is beyond the scope of this article. Much as there are disagreements on the definition of civil society, there is general consensus that non-governmental organisations (NGOs), whose definition is also contestable, are part of the civil society. For example, while referring to the role of civil society in Egypt, Nof-Steiner observes that “Egypt enjoys an active and vibrant civil society of over 1,7000 [non-governmental] organisations.” This article looks at the role Civil Society, and in particular NGOs, can play in the promotion and protection of prisoners’ rights before the African Commission on Human and Peoples’ Rights.

The African Commission on Human and Peoples’ Rights (the African Commission) was established under Article 30 of the African Charter on Human and Peoples’ Rights (the African Charter) with the mandate to promote and protect the rights of individuals and peoples under the

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∗ Doctoral Research Intern, Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape; LLB (Hons) Makerere; LLM (Human Rights and Democratisation in Africa) Pretoria; LLM (Human Rights Specialising in Reproductive and Sexual Health Rights) Free State. Email: djmujuzi@yahoo.com. I would like to thank Prof. Julia Sloth-Nielsen and Mr. Lukas Muntingh of Civil Society Prison Reform Initiative for their comments on the earlier drafts of this article. This is a revised version of the article that I wrote and published in the Civil Society Prison Reform Initiative Electronic Newsletter No. 22 of June 2007. Civil Society has permitted me to publish it in this journal, and IJCSL and I gratefully acknowledge that permission.


2 Various definitions or descriptions have been adopted of what amounts to an NGO. Some people look at the extent to which an organization is independent of the government in terms of funding and staffing among other things. See David P. Forsythe and Laurie S. Wiseberg, Human Rights Protection: A Research Agenda 1:4 UNIVERSAL HUMAN RIGHTS at 18 (1979); Anthony J. Bebbington, Reinventing NGOs and Rethinking Alternatives in the Andes, 554 ANNALS OF THE AM. ACADEMY OF POLIT. AND SOC. SCI. 117, 120 (1997).


6 African Charter on Human and Peoples Rights, adopted June 27,1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 L.L.M. 58(1982), entered into force Oct. 21, 1986. Individual rights in the African Charter include the rights to education under article 17 (1) where it is provided that “[e]very individual shall have the right to
African Charter. The activities of the African Commission since its establishment have been a subject of various studies, books and journal articles but little has been written about how the African Commission can be used effectively, especially by civil society, as a means to protect prisoners’ rights. This article aims to explore the avenues through which civil society can participate in the activities of the African Commission to promote and protect prisoners’ rights. It is noted at the outset that the African Charter has no provision that explicitly relates to prisoners’ rights or the rights of people in detention, but these rights are implied in other rights such as the right to human dignity and the right not to be subjected to any form of torture, cruel, inhuman and degrading treatment, or punishment. Attention is paid to the individual communication procedure of the African Commission; the acquisition and utilisation of observer status at the African Commission; the amicus curiae role of civil society in communications submitted to the African Commission; and the involvement of the Commissioners or Special Rapporteur in the activities of national human rights organisations that deal with prisoners’ rights.

II. Civil Society and Communications before the African Commission

The African Commission has jurisdiction to deal with interstate and individual communications alleging human rights violations under the African Charter. It is beyond the scope of this article to deal with interstate communications as the African Commission lacks established jurisprudence in this area and therefore it is difficult to ascertain the role civil society can play in interstate communications. The focus is thus on individual communications.

education”; article 13 (1) where it is provided that “[e]very citizen shall have the right to participate freely in the government of his country…” among other articles.

7 Id. Peoples’ rights in the African Charter include the right to existence under article 20 (1) which provides that “[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination”; the right to dispose of natural resources under article 21(1) which is to the effect that “[a]ll peoples shall freely dispose of their wealth and natural resources” among other rights. For a brief discussion of both the individual and peoples’ rights under the African Charter, see Ibrahim Al Badawi El-Sheikh, The African Regional System of Human Rights: Notes and Comments, in PROTECTION OF HUMAN RIGHTS IN AFIR.CRIM. PROC. 23, 25 (M. Cherif Bassiouni & Ziyad Motala eds., 1995). For a detailed discussion of the jurisprudence of the African Commission on peoples’ rights, see Solomon A Dersso, The Jurisprudence of the Commission on Human and Peoples’ Rights with Respect to Peoples’ Rights, 6: 2 AFRICA HUMAN RIGHTS L. J., 358–381.

8 The most comprehensive study, as far as my research could go, on the African Commission and Prisoners’ Rights was carried out by Professor Frans Viljoen of the Centre for Human Rights, University of Pretoria on behalf of the Penal Reform International and published under the title “The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities.” Frans Viljoen, The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities, 27 HUMAN RIGHTS QUARTERLY 125-171 (2005). It should be noted that Viljoen, as the title of the article suggests, deals with the work of the Special Rapporteur on Prisons, and suggests various strategies that could be adopted for the office of the Special Rapporteur to successfully carry out its work of promoting and protecting the rights of detainees in Africa.


10 See African Charter, supra note 6, art. 47-59.

Most of the communications that have been heard by the African Commission were filed by non-governmental organisations and a few by individual victims. Through these communications, states are called upon to react to the allegations that they are violating human rights, including prisoners’ rights. The African Commission, when it finds such violations, would then call upon the relevant states to report to it on the measures taken to ensure that such rights are being promoted or protected. Like any other judicial or quasi-judicial body, the African Commission has requirements or procedures that must be followed before a communication can be dealt with, that is, before a communication is declared admissible and then heard on merits. These requirements are laid down under Article 56 of the African Charter read together with Rules 102-120 of the Rules of Procedure of the African Commission. Article 56 of the African Charter provides that: Communications relating to Human and Peoples’ rights referred to in Article 55 received by the Commission shall be considered if they:

1. Indicate their authors even if the latter requests anonymity;
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter;
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter; and
7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

The above provisions have been interpreted in various communications and have been the subject of numerous books and journal articles. A detailed analysis of each and every...
provision is outside the scope of this article. It is important to note that the most contentious issue has always been the exhaustion of domestic remedies. It should be emphasised that before a communication is filed before the African Commission, local remedies, both judicial and administrative, where they are available and efficient, should be exhausted. The African Commission has on various occasions reiterated the rationale for the requirement of exhaustion of domestic remedies and stated that

the Commission notes the importance of this rule as a condition for the admissibility of a claim before an international forum. It notes that the rule is based on the premise that the Respondent State must first have an opportunity to redress by its own means and within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.  

A further important requirement regarding the rule of exhaustion of domestic remedies is that any allegation that a right has been violated should be based on a law that has already entered into force. Unlike, for instance, the Constitutional Court of South Africa which can decide on the constitutionality of a bill of law and decide whether in infringes on a right that is protected under the constitution or under any international treaty to which South Africa is a party, the African Commission “is of the view that a law which has not yet entered into force cannot violate any right which is protected by the Charter” and therefore cannot be challenged before the African Commission that it violates human rights, including prisoners’ rights.

A. SOME COMMUNICATIONS INVOLVING PRISONERS’ RIGHTS

As mentioned earlier, the African Charter does not specifically provide for prisoners’ rights but the African Commission has held in a number of communications that governments have an obligation to protect prisoners’ rights. In *International Pen and others on behalf of Ken Saro-Wiwa and Civil Liberties Organisation v. Nigeria*, the complainants alleged that Mr Ken Saro-Wiwa was detained by the Nigerian government and that while in detention, many of his rights were violated including the right to the best attainable state of physical and mental health protected under Article 16 of the African Charter. The Commission held, among other things, that

the responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependant on the actions of the authorities. The state has a direct

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16 The jurisprudence of the African Commission is extensively covered by the African Human Rights Law Journal that is published by the Centre for Human Rights, University of Pretoria. In this journal one finds many articles relating to various aspects of the African Commission and especially on how it has interpreted the various provisions of the African Charter including those that relates to jurisdiction and admissibility of communications. For some of the online articles in the journal and for more information about the journal visit, <http://www.chr.up.ac.za/centre_publications/ahrlj/ahrlj_contents.html> [accessed 29 May 2007].


responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of Article 16.\footnote{Id. at para. 112.}

In that communication, the African Commission rightly demonstrated the vulnerability of prisoners. If governments resort to imprisonment, they should at the same time shoulder the responsibility of ensuring that prisoners’ rights, such as the right to health, which is closely linked to the right to life, are protected. In \textit{Civil Liberties Organisation v. Nigeria},\footnote{Communication 151/96, 13\textsuperscript{th} Annual Activity Report of the African Commission on Human and Peoples’ Rights (1999-2000) Annex V.} in which the Federal Military government of Nigeria imprisoned civilians and military officers in military camps who allegedly wanted to overthrow it, the African Commission held that

\begin{quote}
While being held in military detention camp is not necessarily inhuman, there is the obvious danger that normal safeguards on the treatment of prisoners will be lacking. Being deprived of access to one’s lawyer, even after trial and conviction, is a violation of article 7(1)(c) [of the African Charter].\footnote{Id. at para. 26.}
\end{quote}

The African Commission thus encourages governments to detain people in humane conditions and during detention such people should be allowed to have access to their lawyers during trial, so that they can prepare their defence. Such people should also have access to their lawyers after convictions to discuss the prospects of appeal and also for the lawyers to ensure that their clients are detained in conditions that are in line with international standards. Prisoners should also be granted access to their family members, doctors and should also be allowed sufficient light in their cells and enough food. The African Commission thus observed that “[b]eing deprived of the right to see one’s family is psychological trauma difficult to justify, and may constitute inhuman treatment. Deprivation of light, insufficient food and lack of access to medicine or medical care…constitute violations of Article 5.”\footnote{Id. at para. 27.}

Furthermore, the African Commission has held that states have an obligation to treat all prisoners equally and more specifically not to discriminate against prisoners because of the religious beliefs. In \textit{Amnesty International and others v. Sudan}\footnote{Communication 48/90, 13\textsuperscript{th} Annual Activity Report of the African Commission on Human and Peoples’ Rights (1999-2000) (Annex V).} it was alleged that many people were arbitrarily detained in Sudan after an attempted coup and that during detention they were not only subjected to various forms of torture in \textit{incommunicado} cells known as “ghost houses”, they were also offered different treatment according to their religious beliefs. The African Commission observed that “a serious allegation is that of unequal food distribution in prisons subjecting Christian prisoners to blackmail in order to receive food” and the Commission held that this was a violation of Article 8 of the African Charter.\footnote{Id. at para. 76.}

Related to the above, was a communication brought against Mauritania. In \textit{Malawi African Association and others v. Mauritania},\footnote{Communication 54/91, 13\textsuperscript{th} Annual Activity Report of the African Commission on Human and Peoples’ Rights (1999-2000)(Annex V).} it was alleged that the Mauritania government detained
many black Mauritanians on allegations of an attempted coup. That during detention, they were
detained in the “worst” prison conditions and that they

only received a small amount of rice per day, without any meat or salt. Some of
them had to eat leaves and grass. The prisoners were forced to carry out very
hard labour day and night; they were chained up in pairs in windowless cells.
They only received one set of clothes and lived in very bad conditions of
hygiene… they were regularly beaten by their guards… four prisoners died of
malnutrition and lack of medical attention… the cells were overcrowded. The
prisoners slept on the floor without any blankets, even during the cold season.
The cells were infested with lice, bedbugs and cockroaches, and nothing was
done to ensure hygiene and provision of health care.28

The African Commission held that

Article 5 of the African Charter prohibits torture, cruel, inhuman or degrading
punishment… the communications detail instances of torture, and cruel, inhuman
and degrading treatment. During their time of custody, the detainees were
beaten… forced to make statements… denied the opportunity of sleeping… some
of the prisoners were held in solitary confinement… The conditions of detention
were, at the very least, bad. The prisoners were not feed; they were kept in
chains, locked up in overpopulated cells lacking in hygiene and access to medical
care. They were burnt and buried in sand and left to die a slow death…29

The Commission thus found that Mauritania had violated various provisions of the African
Charter. The African Commission has held that preventing a prisoner from taking a bath for over
147 days, denying him sufficient food and detaining him in solitary confinement violate Article 5
of the African Charter and Principle 1 of the UN Body of Principles for the Protection of All
Persons under Any Form of Detention or Imprisonment which requires prison authorities to treat
prisoners in a humane manner and Principle 6 which outlaws torture.30 The African Commission
held further that detaining an individual in a facility equipped with a 250 Watt electric light and
leaving such a light on for 10 months accompanied by denying a prisoner bathroom facilities
during his or her detention, amounts to inhuman treatment under Article 5 of the African Charter
and also violate Principles 1 and 6 of the UN Body of Principles for the Protection of All Persons
under Any Form of Detention or Imprisonment.31

It should be emphasised that the decisions of the African Commission are not binding in the
same way as court rulings. They are recommendations in which the African Commission
“requests” states parties to implement them.32 States are expected to take these recommendations

28 Id. at para. 12.
29 Id. at para. 115-116.
32 For example, in Antione Bissangou v. Republic of Congo, Communication 253/2002, 21st
Annex II, (describing how complainant’s property was unlawfully taken and also damaged by people
including Congolese security officers). The African Commission, after observing that the Republic of
seriously and implement them because its one of the ways of fulfilling their treaty obligations. The African Commission also requires states parties to report on the measures they have taken to implement the recommendations made in the relevant communications. Some scholars have argued that most of the recommendations of the African Commission are ignored by states. The non-binding nature of the decisions of the African Commission is soon to be addressed when the newly established African Court on Human and Peoples’ Rights starts to hear cases alleging violations of the African Charter. Unlike the decisions of the African Commission, the Protocol to the African Charter on Human and Peoples’ Rights Establishing the African Court on Human and Peoples’ Rights makes it clear that the decisions of the African Court on Human and Peoples’ Rights are (will be) binding.

III. AMICUS CURIAE

The term *amicus curiae* is a technical legal term which literary means “friend of the court.” Like the Rules of Procedure of United Nations Human Rights Committee established under the International Covenant on Civil and Political Rights and the Committee Against Torture established under the Convention Against Torture, the Rules of Procedure of the African Commission do not expressly provide for *amicus curiae*. However, as the discussion below illustrates, this does not mean that civil society organisations cannot appear as amici before the African Commission in communications in which they have an interest or posses expertise. An *amicus curiae* should ordinarily be an expert in the area he or she is to address the African Commission about. It has been observed in relation to the role of *amicis curiae* in the United States, that

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33. For example, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe Communication 245/2002, 21st Annual Activity Report of the African Commission on Human and Peoples’ Rights (May – November 2006) Annex III*, in which 12 Zimbabwe-based NGOs alleged before the African Commission that various human rights violations were perpetrated by the government in the aftermath of the 2000 Constitutional Referendum, the African Commission found that Zimbabwe violated articles 1 and 7(1) of the African Charter and called upon the government of Zimbabwe to establish a Commission of Inquiry to investigate that allegations and also prosecute those responsible for the alleged violations. The African Commission “request[ed] the government of Zimbabwe to report to the African Commission on the implementation of this recommendation during the presentation of its next period report.” See para. 215. It is difficult to assess the extent to which states have reported on the steps they have taken to implement the recommendations of the African Commission because state periodic reports are rarely readily available on the website of the African Commission and some many states do not submit their periodic reports on time.


35. See Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP//AFCHPR/PROT(III), art. 30. See also art. 2 (for the complementary role of the African Court with the Commission and articles 5(3) and 34(6) for the requirements for the NGOs to bring cases before the African Court).


37. CCPR/C/3/Rev.8, 22 September 2005 (Rules 84-87).


39. Plural for *amicus*. 
Several studies of amicus activity have suggested that “[a]micus curiae practice has evolved from a mechanism for aiding the Court to a method of lobbying it,” and that the filing of amicus briefs is part of the vigorous extensive, and continuing efforts on the part of the interest groups to lobby the courts… amici have an important agenda-setting effect… these briefs improve, or even “democratize,” interpretive litigation by expanding the scope and of perspective before the Court.  

Civil society organisations in various countries appear before courts as amici curiae in human rights-related matters. For instance, in the case of South Africa, the Community Law Centre, University of the Western Cape, has played an instrumental role in appearing as amicus curiae before courts in a number of cases involving social-economic rights, the most popular one being the Grootboom case.

The fact that the Rules of Procedure of the African Commission do not expressly mention amicus curiae does not mean that amicus curiae cannot appear before the African Commission in a communication that he or she or the organisation has an interest in or possesses expertise. What it means is that such amicus curiae will have to identify a particular litigant in a particular communication and ask that litigant to allow him or her to be part of the case to “beef up” the team. It could also mean that non-governmental organisations that intend to send communications to the African Commission should identify people or organisations that can support them as amici and make them part of their team. However, under Rule 76 of the Rules of Procedure of the African Commission, “[t]he Commission may consult the non-governmental organisations either directly or through one or several committees set up for this purpose. These consultations may be held at the invitation of the Commission or at the request of the organisation.” This could be interpreted to mean that the Commission can also engage NGOs as amici curiae on matters that it needs technical input.

IV. OBSERVER STATUS, SHADOW REPORTS AND THE SPECIAL RAPPORTEUR ON PRISON CONDITIONS IN AFRICA

Another avenue through which a non-governmental organisation can promote and protect prisoners’ rights using the African Commission is by applying for Observer Status before the African Commission. Since 1999, when the Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the field of Human and Peoples’ Rights was adopted, the African Commission has granted Observer Status to 370 non-

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42 See <http://www.communitylawcentre.org.za/Court-Interventions%20> [accessed 30 May 2007]. In Grootboom case Constitutional Court of South Africa held among other things that state had to put in place reasonable measures towards the realisation of the right to housing of its citizens who do not have access to housing.
governmental organisations, some of whom deal with prisoners’ rights directly and others indirectly.

One may rightly ask: what benefits accrue to an organisation on acquiring Observer Status with the African Commission? Two obvious benefits are provided for under the Rules of Procedure of the African Commission. Rule 75 states that “[n]on-governmental organisations, granted observer status by the Commission, may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies.” Under Rule 76, “[t]he Commission may consult the non-governmental organisations either directly or through one or several committees set up for this purpose. These consultations may be held at the invitation of the Commission or at the request of the organisation.”

By using their Observer Status, NGOs can submit shadow reports to the African Commission as a supplement to State reports. The shadow reports usually contain alternative and/or additional information, such as human rights violations that governments would prefer not to include in their reports. The shadow reports are therefore a good source of information for the Commissioners when they engage government officials during the presentation of a particular state’s report. For example, from the reports submitted by the governments of Zambia, Zimbabwe, Kenya and Algeria that the African Commission considered at its recently concluded 41st Ordinary Session, it is evident that these governments neglected the issue of prisoners in their reports and shadow reports would be of great importance to address this shortcoming. The Zambia report only talks about the laws in place in that country to deal with prisoners. It does not inform the African Commission about the situation of prisoners in Zambia and the conditions under which prisoners are being detained. The Zimbabwean report mentions prisoners’ rights briefly and reports that the conditions under which female prisoners are being detained, are improving. It also highlights the role community service has played in reducing overcrowding in some of the prisons. Needless to say it ignores the well-known problems facing the prison system in that country. Had a shadow report accompanied it, the African Commission would have had a more informed picture of the prison situation in Zimbabwe. The Kenyan report is probably the most interesting one not because it covers prisoners’ rights extensively but because in its 48 pages there is not even a single mention of the word prison or prisoner. The Algerian report, like the Zambian one,

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45 For a list of all the NGOs with Observer status before the African Commission, see the 12th-21st Activity Reports of the African Commission at <http://www.chr.up.ac.za/hr_docs/themes/theme02.html> accessed 30 May 2007.
46 For a copy of the Shadow Report that was submitted to the African Commission by South African-based non-governmental organizations, see <http://www.chr.up.ac.za/hr_docs/countries/docs/Shadow%20report.doc> [accessed 30 May 2007].
47 It took place from 16th – 30th May 2007, Accra, Ghana.
only mentions prison reform legislation. The only difference between the two is that whereas the Zambian report gives an extensive coverage of prisons related laws, the Algerian report mentions it briefly.

Another way in which civil society organisations can collaborate with the African Commission to promote and protect prisoners’ rights is by working hand-in-hand with the Office of the Special Rapporteur on Prisons and Conditions of Detention in Africa. The current Special Rapporteur is Commissioner Mumba Malila who was appointed at the 38th Ordinary Session of the African Commission for a period of two years effective from 5 December 2005.

The Office of the Special Rapporteur on Prisons in Africa, in comparison with other Special Rapporteur of the African Commission, has been successful in its activities of promoting and protecting the rights of prisoners in Africa. This success has been measured by: the mandate of the Special Rapporteur; analysing the work of the Special Rapporteur in comparison with other Special Rapporteurs of the African Commission; and by the investigating the impact on the situation in countries that have been visited. While commenting on the relevance of the Special Rapporteur on Prisons, Viljoen observed that “the SRP [Special Rapporteur on Prisons] is an indispensable piece in the protective puzzle...” Civil society organisations can organise workshops on prisoners’ rights and invite the Special Rapporteur on Prisons to present papers on the role of the African Commission in promoting and protecting prisoners’ rights. NGOs can also help supply the Special Rapporteur on Prisons’ office with information relating to the rights of prisoners in their respective countries for his/her intervention. The African Commission is in the process of establishing a “hotline on prisons in Africa” and when established, civil society organisations can be part of the Special Rapporteur’s teams when they inspect prisons and places of detention in their respective countries. This would enable the Special Rapporteur not to overlook any key issues. When the Special Rapporteur is also availed the relevant information about prisons and

53 The other Special Rapporteurs of the African Commission are: Special Rapporteur on the Rights of Women in Africa; Special Rapporteur on Freedom of Expression in Africa; Special Rapporteur on the Situation of Human Rights Defenders in Africa; Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa; and Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions.
54 See Viljoen supra note 8, 167.
55 Id. at 162.
56 For example, the Special Rapporteur on Prisons is reported to have visited “prisons and other places of detention, meeting with government, participation in seminars on African prisons.” See 11th Activity Report of the African Commission on Human and Peoples’ Rights (1997-1998) para. 32.
57 For example, non-governmental organisations have at times notified the African Commission about the ‘inhuman prison and detention conditions’ in their respective countries. See 12th Annual Activity Report of the African Commission on Human and Peoples’ Rights (1998-1999) para. 36.
detention conditions, this would enable the African Commission to pass appropriate resolutions calling upon countries to improve conditions in prisons.

V. Conclusion

The role that NGOs can and do play at the African Commission should not be underestimated. There are several avenues, as discussed above, through which civil society can engage the African Commission in the protection and promotion of prisoners’ rights. There are a range of problems besetting Africa’s prisons such as overcrowding, torture, and other human rights violations. The African Commission may need to be petitioned to come out strongly and advise African governments on alternative forms of punishments other than imprisonment. If imprisonment is to be imposed, it should be done as a last resort and prisoners should be detained under humane conditions that are in line with international and regional human rights obligations. But unfortunately, most African governments detain prisoners in some of the world’s worst conditions. This deprives them of their dignity and undermines reintegration. It also appears that most state reports lack serious consideration of prisoners’ rights. NGOs are instrumental in providing the African Commission additional information relating to the conditions in prisons in their respective countries through shadow reports. The Office of the Special Rapporteur on Prisons in Africa can be effectively utilised, as the discussion above has illustrated, to protect and promote prisoners’ rights in Africa.
I. INTRODUCTION

Trade unions have always been part of the fabric of the labour organisation and larger civil society in Nigeria. Workers join trade unions to get improvements in working and living conditions by collective action. Though trade unions are private, voluntary and autonomous organisations, they discharge indispensable public functions through membership in innumerable governmental institutions, committees, tribunals, and through rights of consultation throughout the legal system and society.

In his goodwill message to the first Annual Conference of the Trade Union Congress of Nigeria in April, 1960, Sir Abubakar Tafawa Balewa, then Prime Minister of Nigeria said, “It is true that as representatives of workers it is your duty to strive to improve the working conditions and living standards of your members. But your duty does not end there. Those of you who have been entrusted with the leadership of the trade union movement have another equally important obligation. You should educate your members to appreciate their economic, social and civic responsibilities toward the state and the community…You and your employers have contributed, in no small measure, to the remarkable progress which this country has made in recent years, but this progress is yet a beginning.”

Trade unions perform many functions, both to their members and to the society at large. As has been noted, “The fundamental and enduring concern of the honest trade union is the welfare of the workers and their families. The genuine trade union works for social justice and national progress. It works for these great ideals on their most meaningful level—the greatest good for the greatest number. The concern of the genuine trade union is that the worker is adequately paid for his labour, that his family has decent food and housing, and that his life time of toil yield dignity for himself and a happier prospect for his children.”

Over a century, trade unions have fought for the right to decent pay and conditions for workers at the workplace and generally for improved social welfare through, for example, health care, education, and social security. Generations of struggle for basic democratic rights at the workplace have created an increased labour movement advocating social justice, equality, and human dignity across the globe.

Trade unions have also contributed immensely in their fight for democracy all over the world as they consist of those with relatively few rights in the society. They have contributed to extending the concept of democracy from political rights to economic rights. Rights such as free

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movement, the freedom to choose and engage in an occupation and to be fairly remunerated, the right to improved living conditions, the right to social health protection, the right to vocational training, as well instrumental rights which workers need to achieve these substantive rights, namely the right to freedom of association, collective bargaining, the right to strike and right of workers to participation and information.  

There can be no doubt that trade unions make positive contributions to the social and economic development of their countries. Indeed, the great improvements in the standard of living of mankind could not have been attained without workers and their organisations. This fact underscores the need for strong and effective trade unions in every country. However such unions cannot exist if there are serious impediments to membership.

This article examines some of the impediments to the right to membership in trade unions in Nigeria. It argues that despite the important functions of trade unions and the fundamental nature of the right to belong to a trade union, the vast array of legal constraints to the membership of trade unions in Nigeria tend to frustrate the full realisation of the right to belong to a trade union in Nigeria. The article further argues that a denial or limitation by law and the public authorities of the exercise of this legitimate right by workers is a violation of international law. Nigeria must relax its stringent rules on trade union membership to enable all those who desire to belong to unions to do so freely so as to be recognised in international circles as one the countries with respect for human rights. The conclusion is that these impediments must be relaxed if the right to belong to trade unions in Nigeria is to be meaningful.

II. SOURCES OF THE RIGHT TO MEMBERSHIP OF TRADE UNIONS

A Firm international consensus has evolved on the status of the right to associate as a fundamental human right. There are a number of human rights instruments which acknowledge this right, both at international and regional levels. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, proclaims that "Everyone has the right of freedom of peaceful assembly and association." Article 23, paragraph 4, also states that "Everyone has the right to form and to join trade unions for the protection of his interests." The same principle is echoed in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) both of 1966 (which entered into force in 1976). The International Labour Organization (ILO) likewise recognizes freedom of association as a fundamental principle in several major documents, the most important ones being the Freedom of Association and Protection of the Right to Organise

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6 See also P. Davies and M. Freedland, KAHN-FREUND’S LABOUR AND THE LAW (3rd ed., Sweet and Maxwell, 1983), 200-1. (The right to belong to a trade union is so fundamental that labour experts rank it along such other rights as "free speech, religion and freedom from arbitrary arrest.)
Convention 1948 (No. 87)\textsuperscript{10} and the Right to Organise and Collective Bargaining Convention 1949 (No. 98)\textsuperscript{11}. Further, the right to freely associate is guaranteed in various regional documents not applicable to Nigeria, such as the European Convention on Human Rights (ECHR) 1950\textsuperscript{12}, the European Social Charter (ESC) 196\textsuperscript{13}, the American Convention on Human Rights (ACHCR) 1969\textsuperscript{14}, the Community Charter of Fundamental Social Rights of Worker (CCFSRW) 1989\textsuperscript{15}, the EU Charter of Fundamental Rights (EUCFR) 2000\textsuperscript{16}, as well as the African Charter on Human and Peoples’ Rights (ACHPR) 1981.\textsuperscript{17}

The freedom to associate enjoys a constitutional and statutory legitimacy in Nigeria. Section 40 of the Constitution of the Federal Republic of Nigeria 1999 provides that, “Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any association for the protection of his interests.” The regionally applicable source of freedom of association for workers in Nigeria and Africa generally can be found in the African [Banjul] Charter of Human and Peoples Rights 1981, to which Nigeria is a State Party. Article 10 of the Charter provides that "Every individual shall have a right to free association provided that he abides by the law." Member states of the African Union who are parties to the Banjul Charter have an obligation to recognise the rights, duties and freedom enshrined therein and to “undertake to adopt legislative or other measures to give effect to them.”\textsuperscript{18}

The wording of the Banjul Charter shows that it was clearly designed to be binding. As Thomas Beurgental has noted, under Article 1 of the American Convention a state has the

\begin{footnotesize}
\begin{enumerate}
\item See Freedom of Association and Protection of the Right to Organize Convention (ILO No. 87), 68 U.N.T.S. 17, entered into force July 4, 1950, art. 2-7.
\item Convention for the Protection of Human Rights & Fundamental Freedom, Council of Europe, (Sept. 3 1953), art. 11.
\item European Social Charter, 529 U.N.T.S. 89, entered into force Feb. 26, 1965. part 1, par. 5, art. 5
\item Commission of the European Communities Charter of the Fundamental Social Rights of Workers (Luxemburg, Office of Official Publications of the European Communities, 1990), art. 11.
\item Charter of Fundamental Rights of the European Union, 2000 O.J. (C364) 1 (Dec. 7, 2000), art.12 (1).
\item African Charter on Human and Peoples’ Rights, supra note 17, art. 1
\end{enumerate}
\end{footnotesize}
negative obligation “not to violate an individuals rights” and may also have the obligation to adopt “affirmative measures necessary and reasonable under the circumstances to ensure the full enjoyment of the rights the American Convention guarantees.”\textsuperscript{19} The African Charter demands a strong commitment from member states. Quite apart from establishing a duty on states to enact legislation to give effect to the Charter’s provision, it also establishes a Commission to oversee the protection of enumerated rights, which implies that states are bound to respect these rights. To hold otherwise would ignore the function of the Commission to “ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.”\textsuperscript{20}

Furthermore, as far as trade union rights are concerned, the Commission has provided detailed guidance on trade union rights in its Guidelines for the Submission of State Reports. Under the Guidelines, States are obliged to provide information on laws, regulations and court decisions that are designated to promote, regulate or safeguard trade union rights, which include the right of trade unions to function freely, collective bargaining and the right to strike.\textsuperscript{21} This is a demonstration of support for the protection of trade union rights in Africa.\textsuperscript{22} In sum, there can be no doubt that international law recognizes the right to freedom of association and the right to organize.\textsuperscript{23}

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\textsuperscript{20} African Charter on Human and Peoples Rights, \textit{supra} note 17, art. 45(2).
\textsuperscript{22} Abacha v Fawehinmi, 2000 9 NWLR Part 475 (Nigeria). (The Supreme Court held that since the African Charter has been incorporated into Nigerian law, it enjoys a status higher than a mere international convention; it is part of Nigerian \textit{corpus juris}. Nigeria is therefore bound to implement the obligations under the Charter.)
III. CONSTRAINTS TO MEMBERSHIP IN TRADE UNIONS

The right to associate and belong to a trade union of one’s choice is not an absolute right, after all. There are certain laws and regulations which affect the right of workers to belong to the trade association of their choice.

A. THE REQUIREMENT OF MINIMUM MEMBERSHIP

It is clear that where the minimum number of persons required for the registration of a functional trade union is pegged too high, workers’ freedom of association will be impaired. In this regard, the ILO seems to support a minimum of twenty workers for the formation of a trade union.24

Under Nigerian law, a legally registered entity can be constituted by 2 or more persons, however, 50 members are required to form a trade union of workers. Because only two persons are required to form an association of employers,25 the law is obviously discriminatory in the treatment of the two parties to the industrial relationship, employers and workers. This requirement would appear to unduly restrain workers and this seems to be in conflict with Convention 87.26

The failure to relax the membership requirement may not be unconnected with the argument that, for Nigeria, compliance with the ILO requirements on minimum membership is not viable. The argument is that the low threshold and the formal requirements for registration would lead to the proliferation of trade unions and undermine the solidarity of trade unions and employers’ associations in Nigeria. It would permit, if not encourage, the formation of trade unions and employers’ associations on ethnic, religious, regional and factional lines, which could feed into the regional and factional rivalries that characterise Nigerian politics.27

It is submitted, nevertheless, that the argument to sustain the high threshold for membership of trade unions in Nigeria is not justifiable in a country in a hurry to catch up with all the trappings of democracy. We must not always allow ethnic and religious sentiments to dissuade us from what is proper and necessary in a democratic society. If Nigeria is to move forward as a democratic nation it must be prepared to adopt international standards and allow freedom of association to survive. Ethnic and religious differences exist in many countries, yet elsewhere that has not been an excuse for not complying with international standards. In Ghana, for example, a minimum of two persons are required to form a trade union.28 The ILO has in fact held that “the establishment of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes…too high a figure, as is the case, for example where legislation requires…at least 50 founder members.”29

Nigeria is clearly in violation of workers’ freedom of association by prescribing a high threshold of 50 members for the formation of a trade union. What is more, given the fact that

25 The Trade Unions Act, Chapter 437 Laws of the Federation of Nigeria, 1990, §3 (1) (a) (b).
28 The Labour Act 2003 (Ghana), § 80(1), provides that “Two or more workers employed in the same undertaking may form a trade union.
over 80 per cent of enterprises employ less than 50 persons in Nigeria, this provision of the law is tantamount to industrial disenfranchisement. It is therefore suggested that Nigerian law should be amended to stipulate for a minimum of say two persons for the formation of a trade union.

B. RESTRICTION OF MEMBERSHIP TO PARTICULAR TRADES OR INDUSTRIES

The restriction of membership to particular trades or industries can also affect the right of workers to belong to the trade union of their choice. The ILO Committee of Experts has pointed out that the question of trade union “structure is not only related to the general problem of the free establishment of occupational organisations, but also to that of the promotion of strong and effective organisations, and that in certain cases the desirability of general unions may arise more especially in cases where the industry is scarcely developed with a small or medium sized undertakings scattered throughout the country.”

This implies that general unions should be encouraged. For example, nothing should stop a banker from joining and being represented by a general union, especially if the general union consists of other smaller unions. The Trade Unions Act of Nigeria prevents the registration of a union where the interest of the workers sought to be covered are already catered for by an existing union. It is submitted that this is an infringement of a right to belong to the union of one’s choice.

C. LIMITATIONS AS REGARDS PERSONS

Despite the ILO Convention 87 provision that workers without distinction whatsoever shall have the right to establish and to join organisations of their own choosing without previous authorisation, certain categories of workers are specifically denied the right to belong to trade unions and consequently cannot also contemplate strike action. These workers include the armed forces and the police, other public workers in the Central Bank of Nigeria, customs, external telecommunications, security minting and printing, immigration, firemen and prison staff, domestic workers and farmworkers.

1. The Armed Forces and the Police

As far as the ILO is concerned, the issue of whether members of the armed forces and the police have the right to organise is left to the discretion of the various States to decide. The neutral position of the ILO seems to take cognisance of the fact that the police and the armed forces in some countries have the right to organise, whereas in other countries this right is denied or severely limited. The ILO’s neutrality is shown in Article 9(1) of Convention which states that, “The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.”

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30 See Trade Unions Act, supra note 25, at §5 (4).
31 See Freedom of Association and Protection of the Right to Organise Convention, supra note 10, at art.2
32 See Trade Unions Act, supra note 25, at §11(1). See also Trade Unions (Prohibition) (Federal Fire Service) Order 1976.
33 This is the case in Germany for example. See Hodges-Aeberhard, J., The Right to Organise in Article 2 of Convention 87: What is meant by Workers “without distinction whatsoever” 128:2 INT’L LAB. REV.180 (1989).
Similar neutral attitudes to the application of the right to organise to members of the armed forces and the police are taken by other human rights instruments such as the European Convention on Human Rights, the European Social Charter, EU Charter of Fundamental Rights, and the Community Charter of Fundamental Social Rights of Workers. These instruments clearly leave the determination and regulation of the right to organise by workers in the armed forces and the police to domestic law.

In Nigeria, the armed forces personnel and the police are completely debarred from combining, organising or becoming members of a trade union.34 Also debarred from unionism is “every Federal or State government establishment, the employees of which are authorised to bear arms.”35 This class of “arms bearers” do not fall under the police or the armed forces in the strict sense but arguably they can be classified under this heading since they are workers who bear arms and are seen to perform important security functions as well. It is submitted that the denial of the freedom to associate by the armed forces in the barracks, the police and public officers who bear arms is justifiable. These workers have important security functions and responsibilities to the entire nation and it is in the public interest that they should not be allowed to organise so as to ensure peace and security of the nation at all times, both internally and externally. The workers in the armed forces and police are protected from unionism in order not to weaken and dilute or compromise their loyalty to the state in readiness to perform their security functions. Grunfeld has expressed a similar view:

The power to repel domestic as well as foreign enemies of the state depends on the command and obedience of the armed forces and the police force. Therefore these major components of state power must be protected by law from any attempt to weaken them through direct approach to individuals to abandon their allegiance or through membership of organisations whose loyalty to which may conflict with loyalty to the state.36

Despite this severe restriction on the right to organise by members of the armed forces and the police in Nigeria, they are however entitled to take part in the setting up of joint consultative committees. This is made possible by the provisions of section 11(2) of the Trade Unions Act, which states that it shall not be lawful for persons employed in any of the establishments to which subsection (1) relates to combine, organise themselves, or to be members of a trade union, for purposes of employment, but nothing in this section shall be construed as preventing the setting up of joint consultative committees in the establishments concerned. Based on this provision the Armed Forces Consultative Committee made up of the Army, Navy and the Air Force has been set up by the President. This seems to provide an alternative form of representation where matters affecting the welfare and efficiency of the armed forces can be generally discussed. Such bodies cannot, however, be brought within the definition of a trade union and are in no way ideal substitutes for trade unions. The denial of the actual right to organise by members of the armed forces and police means that in practice they are also denied the right to collective action.

2. Public Servants

The concept of the public service is wide in the Nigerian sense. Quite apart from the members of the armed forces and the police, section 11(1) of the Trade Unions Act also prohibit persons

34 See Trade Unions Act, supra note 25, at §11(1) (a)-(b).
35 Id. at §11(1) (g).
36 C. Grunfeld, MODERN TRADE UNION LAW 322 (Sweet and Maxwell, 1980).
employed in the customs service and employees of the Nigerian Security Printing and Minting Company from forming or joining trade unions. The same provision is extended to employees of the Central Bank of Nigeria as well workers in the Nigerian External Telecommunications Limited. Furthermore, the staff of any service - be it of federal or of state government - the employees of which are authorised to bear arms are all prohibited from being members of, or taking part in the activities of a trade union.

The categories of workers prohibited in this way are not closed. The Minister of Labour, Employment and Productivity is further empowered to specify by regulations “such other establishments...from time to time” whose staff may be brought within the provision prohibiting them from belonging to, or taking part in, the activities of a trade union. This is a blanket provision which can be used to further deny workers the right to organise.

It is submitted that the provisions of law denying Nigerian civil servants the right to organise themselves into trade unions offend the spirit of ILO Convention 87. The Committee on Freedom of Association has stressed that the Convention gives effect to the generally accepted principle that workers, without distinction whatsoever should have the right to establish and join organisations of their own choosing, and that, this right applies to workers, whether public or private, whether civil servants or not, with the sole possible exception of members of the armed services and police.

Indeed a discussion in the travaux preparatoires leading to the adoption of Convention 87 affirms the right of public employees to organise. It was stated there that “the principle of freedom of association was to be guaranteed both to workers in private industry and to public employees.”

The position was reiterated by the ILO in connection with the famous case of Government Communication Headquarters v. UK (GCHQ) involving the British government and its civil servants working in the area of security. Notwithstanding a tradition of over sixty years of trade union activity at the GCHQ, the government banned the staff union and replaced it with a departmental staff association. The union took the matter to the ILO and to the European Commission of Human Rights in Strasbourg. The ILO Freedom of Association Committee ruled that the ban on trade unionism at the GCHQ “was not in conformity” with Convention 87. It reiterated the provisions of article 2 which provides that workers “without distinction whatsoever shall have the right to establish, and subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.” The Committee also found the UK government in contravention of article 11 of the European Convention on Human Rights.

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37 See, Trade Unions Act, supra note 25, at §11(1) (i).
38 See Article 2 of Convention 151 and Recommendation 159 of 1978 on Labour Relations in the Public Service of the ILO.
39 Official Bulletin, 1974, Supplement, 139th Report, Case No 373, Para 171
Rights as it had failed to “take all necessary and appropriate measures to ensure that workers…may exercise freely the right to organise.”

For Nigeria, the lumping together of the armed forces and police on the one hand and other public servants such as bank staff and telecommunication employees on the other, cannot be justified as it results in denying the latter their rights under the ILO Convention. It is submitted that the law should make a difference between categories of civil servants. There may be civil servants the nature of whose jobs merit a restriction or a total ban on their right to organise, while on the other hand, there does not seem to be any justification in the denial of say, dust bin collectors, employed by the Central Bank of Nigeria, of their right to constitute a proper trade union for the protection of their rights.

D. THE RIGHT TO ORGANISE IN EXPORT PROCESSING ZONES (EPZs)

An export processing zone could be defined as “a clearly demarcated industrial zone which constitutes a free trade enclave outside a country's normal customs and trading system where foreign enterprises produce principally for export and benefit from certain tax and financial incentives.”

The concept of Export Processing Zones originated out the desire to permit employers to import materials to be processed in an EPZ area of a country and then re-exported without the payment of duty and other tariffs. The EPZ system began in the 1960’s with the creation of a zone near Shannon airport in Ireland which suffered loss of employment in the refuelling of aircraft on transatlantic routes. The creation of EPZ’s was seen as a less expensive method of creating jobs without spending scarce taxpayers’ money and avoiding a bureaucratic system of reimbursing import taxes on goods intended for export.

However, from the beginning this attractive idea had a major drawback. This is because it requires the sealing off of the zone or of designated factories, often behind high fences, to prevent untaxed goods being smuggled into the rest of the economy. With the spread of the EPZ concept around the world, governments found that they had to add further incentives to attract footloose investors to their enclave; subsidised factory buildings, telecommunication links, energy supplies and most worrying of all, guarantees that the labour force would stay cheap and uncomplaining.

In Nigeria, workers’ employed in the Export Processing Zones are absolutely denied the right to form unions, bargain collectively and exercise the right to strike. In addition, the EPZ Authority is given the mandate to handle the resolution of all disputes between employers and workers.

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42 Id. at 164. However, in direct contrast to the ILO, the Commission on Human Rights accepted that the prohibition of trade unions was defensible on the grounds of “national security” even if it was in breach of Convention No 87. See Lord Wedderburn, Freedom of Association or Right to Organise? 18 INDUS. REL. J. 4, 244, 254 (1987).
43 Dustbin collectors employed by the Central Bank of Nigeria are civil servants per definition and are therefore subject to the strictures of the Act.
46 Id.
employees arising from the workplace and contract of employment, instead of workers’ organizations or unions.47

It is submitted that the absolute prohibition of the right to strike in Export Processing Zones in Nigeria is incompatible with international labour standards which demands that no restrictions should be placed on the workers in the way of organizing their activities to protect their interests in the workplace. The ILO Convention No. 87 guarantees that all workers, without distinction whatsoever, shall have the right to establish organizations of their own choosing and that such organizations shall have the right to organize their activities and to formulate their programmes, including the right to strike.48 In Mauritius, for example, there is no such restriction in their EPZs. There are nearly 300 active trade unions in the EPZs of Mauritius representing 22 per cent of workers.49

IV. CONCLUSION

The right to belong to a trade union is a fundamental right of every worker. Trade unions constitute the mouthpiece for the struggle for social justice and for the rights of the working people in the world. International human rights instruments to which Nigeria has ratified do claim fundamental status for the right to membership of trade unions.

As we have seen, the extent to which Nigerian law protects the right to belong to trade unions appears inadequate. On a closer scrutiny, one discovers that there exists an array of legal constraints to the membership of trade unions in Nigeria. Restrictions are placed on number of persons who can form a union, there are restrictions relating to particular trades or industry and on special categories of persons. Furthermore, those in Export Processing Zones are completely denied the right to trade unionism.

These restrictions must be removed in order for Nigerian workers to freely enlist in trade unions of their choice and take advantage of the benefits of such associations. One must hope that Nigeria will unleash its workers and restore its posture as a liberal democratic nation that respects the rule of law.

47 See Federal Republic of Nigeria Official Gazette No. 67 Vol. 79 21\textsuperscript{st} December 1992. section 4 (e)
48 See supra note 10, art. 2 -3.
THE FARMERS’ PROFESSIONAL COOPERATIVE LAW (P.R.C.)

IN ECONOMIC, POLITICAL, AND LEGAL CONTEXT

BY KEVIN SCHWARTZ*

I. INTRODUCTION

China is a nation in the midst of a profound transformation. After centuries as the world’s largest economy, it rapidly fell under foreign domination and fractured into civil war. When China again took its fate into its own hands in its present incarnation, the People’s Republic of China, it did so as a Communist state that avoided binding geopolitical encumbrances. China closed its doors to the world and did not substantially reenter the international economic community until 1978, when it began a series of structural and institutional reforms that led to astonishing levels of economic growth.

These reforms began with the peasantry, or nongmin, yet the rural focus faded, and urban development quickly outpaced growth in the countryside. As the Center liberalized its control over China, fewer services and protections were afforded to the Chinese people. Dissatisfied with their plight, nongmin have become increasingly disgruntled, and rural unrest has escalated in recent years.

In part as a response to the economic conditions in the countryside, Beijing promulgated the Farmers Professional Cooperative Law (FPCL). This law, which went into effect on July 1, 2007, will permit farmers to increase their standard of living, and it will also provide an avenue through which important rights-related information can be disseminated.

This paper is a contextual presentation of the FPCL. It seeks to place the FPCL in an economic, political, and legal context that will provide readers with a holistic view of not only the need for farmers’ professional cooperatives (FPCs), but the impact this new law permitting them will have on the people who benefit from it most.

After this Introduction (Section I), Section II presents a comprehensive background, which will relate the upheavals that the nongmin have had to face over the past century and more, and the difficulties under which they labored. Section III provides a deeper look into China’s most recent era, the “Reform and Opening Up” period. During this period, major changes have taken place throughout China in economic, political, and legal contexts that have had an important impact on the countryside.

Section IV discusses the FPCL itself. It begins with an introduction to FPCs, and goes on to investigate the economic and political needs for an FPCL and the impact such a law will have

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on the legal landscape. Following that is an exploration of some the salient characteristics of, and questions arising from, the FPCL.

Section V supplies this paper’s conclusions: that the FPCL does not create an institution through which nongmin will be permitted to assert political or civil rights in a manner favored by rights reformers or advocates of democratic reform. Rather, the FPCs are more likely to adhere to their function as economic entities by which the nongmin can increase their standard of living. To the extent that FPCs will operate as an advocate of nongmins’ economic interests – and provided that they escape the control of local leadership – they will, however, provide protection from corrupt local cadres and act as a conduit through which vital information regarding nongmins’ rights can travel.

A version of the first translation of the FPCL from ChinaLawInfo.com is attached as an appendix. Very few modifications have been made to it.

II. BACKGROUND

A. HISTORICAL PERSPECTIVE

China has the distinct honor of being the oldest country on earth. A succession of dynasties ruled China, with varying levels of success and greatness, until the beginning of the 20th century. For millennia, the Chinese empire overshadowed other civilizations. China is responsible for the development of the printing press, paper, the magnetic compass, and gunpowder. It enjoyed the world’s largest economy for hundreds of years; in 1820, China occupied a 28.7 percent share of the global economy.1 As the nineteenth century wore on, China found itself unable to resist foreign incursions, and everything that held the empire together for over 2000 years soon unraveled.2 That the Chinese people became helpless before foreign powers was a deep national psychological humiliation that continues to rankle today.3

By the end of the 19th century, Chinese attempts to adjust their thinking and regain their former position settled into three main schools of thought: 1) isolation, 2) accommodation, and 3) innovation.4 Proponents of isolation believed that China should strive to regroup around a native ideology capable of shielding China from outside influences. Those who favored accommodation advocated absorbing foreign technology while retaining the fundamentals of Chinese civilization. Finally, supporters of innovation maintained that nothing, including tradition, should prevent China from achieving superior technology such that they could free themselves from foreign domination. None of these theories of reform were able to save either the Qing dynasty or the

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2 KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM (2nd ed.) 30 W.W. Norton & Company 2004); “Because the imperial Chinese state reflected fundamental ideas about the nature of civilization itself, the collapse of the imperial system required reconsideration not only of the form of government, but also of the basic ethics and social organization of society.” Id.
4 LIEBERTHAL, supra note 2 at 24-25.
monarchical system. However, they would become the bases of reforms until the present day. The Qing dynasty finally collapsed in a fractured rebellion that began October 10, 1911, in Wuhan.5

The years following the demise of the Qing dynasty (the Republic of China, 1912-1949) were marred by warlordism and Japanese invasion.6 The revolutionary zeal that had materialized in the 19th century continued, and it was inherited by a younger generation of intellectuals, from which emerged the two defining political parties of the present stage of Chinese history: the Communist Party of China (CPC) and the Guomindang (GMD). Japan invaded China in 1931 and set up the puppet state Manchukuo in far northeastern Manchuria.7 The Japanese were not to leave until 1945, at the end of World War II. During the War, Japan conquered much of China and killed or mistreated innumerable Chinese citizens.8 The CPC and GMD had formed a wary alliance to fight the Japanese invasion in 1937, but an all-out civil war erupted between them in 1946.9 The CPC drove the GMD into exile on Taiwan in 1949. On October 1, 1949 the leader of the CPC, Chairman Mao Zedong, declared the founding of the People’s Republic of China.


The Communists quickly consolidated their control over the country and set about restructuring the Chinese economy on the Soviet model, which included collectivization of agriculture and rapid industrialization.10 Between 1951 and 1953 the CPC launched urban-based programs designed to weed out anti-Marxist elements.11 Through these campaigns the CPC further consolidated its hold over the population and the economy, by both exerting control over and infiltrating business organizations.12 Thus, through its early policies to restructure the Chinese economy, the CPC was able to both foster economic growth and permeate Chinese society.13 Even though most of the country still lived in poverty, stability and autonomous rule were reestablished for the first time in many decades.

China’s economic development under the CPC suffered from two disastrous setbacks, both of which were engineered by Chairman Mao: the Great Leap Forward (1958-1961) and the Great Proletarian Cultural Revolution (1966-1976). The Great Leap Forward was a set of policies designed to advance the Chinese economy at lightning speed through mass mobilization of the

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6 When the communist government was installed in 1949, the nationalist government fled into exile on Taiwan, and it still calls itself the Republic of China. The question of which government represents “China” is a fundamental element of foreign policy for both political entities.
7 Modern day Heilongjiang, Liaoning, and Jilin Provinces – also called simply Dongbei (the “Northeast”).
11 Teiwes, supra note 10 at 37-40. These campaigns were 1) the campaign to suppress counterrevolutionaries; 2) the Three Antis Campaign (against corruption within the CPC); 3) the Five Antis Campaign (against the bourgeoisie); and 4) the thought reform campaign (against intellectuals). Ibid. at 37.
12 Ibid. at 40.
13 RICHARD VIETOR & ROBERT KENNEDY, GLOBALIZATION AND GROWTH: CASE STUDIES IN NATIONAL ECONOMIC STRATEGIES 5 (Harcourt 2001).
The countryside was industrialized, unreasonable production quotas were set, and local leaders falsified production reports to appear to have met their quotas. Instead of increasing, agricultural production decreased. Instead of increasing, agricultural production decreased. In urban areas similar production inefficiencies predominated. Based on the falsified reports, economic planners ordered higher industrial output from the countryside. To cover up their misdeeds, the local leaders were obliged to transfer inordinate amounts of food to urban areas. The drop in agricultural production, coupled with successive bad weather and bad leadership, caused a famine in 1960-61 in which approximately 30 million people died.

After that, Mao stepped back from the front lines for a little while, and the Great Leap was dismantled under the leadership of Deng Xiaoping. More than 20 million rural migrants returned to the countryside when a labor, food, and consumer goods rationing institution was created based on strict residence requirements; rural workers could not receive food rations in the cities because they did not hold urban residence identification. This is called the hukou system. The CPC then instituted an iron rice bowl policy that guaranteed and fixed employment for life. This system created a framework in which rural residents could not migrate to the cities because they could not sustain themselves there, and urban residents were locked into work units because they could not freely transfer employment and they depended on the work unit for their food, health care, lodging, and pension benefits. By 1965, production had returned to 1957 levels.

By 1966 Mao again took the reins of government into his hands and launched the Cultural Revolution to combat “the sluggishness of the bureaucracy, the emergence of traditional and ‘bourgeois’ ideas in intellectual life, and the emphasis on efficiency in national economic strategy.” By exploiting popular dissatisfaction with government policy initiatives, by adopting an effective propaganda strategy, and by courting the military, Mao was able to meld a tripartite base from which to launch a mass campaign – executed by youthful Red Guards – against “revisionism,” which was directed against anyone allegedly taking the “capitalist road.” The purpose of the Cultural Revolution was to create a state of permanent revolution that would lead China to pure and perpetual communism. The result was social chaos and the breakdown of Chinese institutions. In 1968, with the Cultural Revolution failing in its intended purpose, Mao

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14 Lieberthal, supra note 2, at 103-09.
15 Vietor & Kennedy, supra note 13, at 5.
16 Zhan Wu & Liu Wenpu, Agriculture, in 207 China’s Socialist Modernization 212 (Yu Guangyuan, ed., Foreign Language Press 1984). Grain production, for example, fell by over 25 percent between 1959-1961. Id.
17 Lieberthal, supra note 2, at 104.
18 Id. at 108-09.
19 Vietor & Kennedy, supra note 13, at 5-6.
20 Lieberthal, supra note 2, at 109.
21 Id.
22 Id. at 112.
24 Id. at 154-63.
26 The economy suffered far less during the Cultural Revolution than it had during the Great Leap Forward. Harding, supra note 23, at 240-41. Nevertheless, a generation of students received little or no education. Lieberthal, supra note 2 at 116-17. Party leaders at all levels were purged – many were tortured and killed. School teachers suffered the same fate, as did the families of former landlords. Only the countryside was comparatively spared from the ravages of the Cultural Revolution. Harding, supra note 23 at 240.

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ordered the People’s Liberation Army (PLA) to restore order, which it did by taking *de facto* control.  

In September 1971, a failed military coup d’état significantly weakened the PLA’s position within the governing structure. As a result of the coup’s failure, its radical leftist allies lost influence, and Premier Zhou Enlai, China’s chief administrator, pushed for badly needed economic reforms. However, Zhou was diagnosed with terminal cancer in 1972 and was decreasingly able to perform his duties. Even though Mao preferred the radical left, in 1975 he installed Deng Xiaoping, an opponent of the radicals and a victim of the depredations of the Cultural Revolution, to the vice-premiership. Mao chose Deng because he was qualified to perform Zhou’s vital function of stabilizing the nation in the face of near continuous political and ideological turmoil. Deng pacified the military, rekindled economic performance, and cooled social unrest. Both Mao Zedong and Zhou Enlai died in 1976. The subsequent scramble for power saw Deng Xiaoping come out the effective victor by 1978.

2. “Reform and Opening Up”

Deng immediately pushed for far-reaching economic reforms. The previous 30 years of ideological orthodoxy had caused more harm than good, and the legitimacy of Marxism-Leninism-Mao Zedong Thought was in grave danger—and with it the legitimacy of the CPC itself. Partially as a response to this disillusionment, the CPC linked its legitimacy to its ability to increase standards of living and economic growth. To that end, the “reform and opening up” era began, and it has met with considerable success.

The first stage of reforms occurred in the countryside, when the central government relaxed its hold on the provinces and granted increased responsibility for production levels to local leaders. In response, in many areas the agricultural collectives implemented a “household responsibility system,” wherein plots of land were apportioned by the collectives’ administrators to the farmers, who then worked the land as they liked and freely sold above-quota production.

This system was approved by the central government in 1981, and quickly spread to 95 percent of the countryside. This led to large increases in efficiency, which in turn led to increases in capital growth. The surplus thereby created increased demand for consumer products.

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27 LIEBERTHAL, supra note 2, at 116.
28 MacFarquhar, supra note 25, at 275-76.
29 Id. at 280, 282-83.
30 Id. at 283, 296-97.
31 Id. at 290-94.
32 Id. at 317; LIEBERTHAL, supra note 2, at 149-50.
37 Kennedy, supra note 35, at 36.
In response, township village enterprises (TVEs), funded by policy loans from banks, sprang up to produce the desired goods with labor that was freed up by increased productive efficiency in agriculture.\textsuperscript{38} This process received official sanction in 1984.\textsuperscript{39}

The second stage of reforms began in the mid-1980s, and focused on liberalization in the urban enterprise centers and the introduction of foreign direct investment (FDI).\textsuperscript{40} The same model that was used in the countryside began to gain prominence in the cities: above-quota production levels were left to plant management to sell.\textsuperscript{41} This model led to a “dual track” approach to price marketization.\textsuperscript{42} This is explained as follows: “Under the plan track, economic agents are assigned rights to and obligations for fixed quantities of goods and fixed plan prices as specified in the preexisting plan. In addition, a market track is introduced under which economic agents participate in the market at free-market prices….”\textsuperscript{43} The dual track permitted reforms to proceed in a manner that rewarded efficient production while keeping a safety net in place for other (inefficient) producers.\textsuperscript{44}

Foreign direct investment was originally limited to four special economic zones (SEZs) beginning in 1980, and these were granted permission to experiment with measures to attract foreign investment, including tax breaks and labor regulations.\textsuperscript{47} Their productivity increased at a rapid rate, and 14 more SEZs were created in 1984.\textsuperscript{48} Meanwhile, China acquired further foreign capital for investment by borrowing it.\textsuperscript{49} The government used the funds to improve China’s suboptimal infrastructure in a bid to attract foreign investors.\textsuperscript{50}

Foreign exchange reforms, which permitted limited convertibility of China’s currency, the yuan, and limited transactions by non-SEZ domestic firms in foreign currency led to rapid increases in labor-intensive exports.\textsuperscript{51} In 1993, the CPC promulgated the “Decision on Some

\textsuperscript{38} Id. at 36-37. Policy loans are loans ordered up for political reasons rather than economic reasons. \textsc{John Black}, \textsc{The Oxford Dictionary of Economics} 101 (Shanghai Foreign Language Education Press 2000). At this time, China was not generally open to foreign investment. Therefore, its investment capital needed to be raised domestically. Fortunately, China enjoyed – and continues to enjoy – a very high savings rate, and the savings of individual Chinese available when the local governments directed the banks to supply investment capital to the TVEs. \textsc{Panitchpakdi & Clifford}, supra note 1, at 23; \textsc{Kennedy}, supra note 35, at 37.

\textsuperscript{39} \textsc{Kennedy}, supra note 35, at 37.

\textsuperscript{40} \textsc{Yabuki & Harner}, supra note 36 at 30; \textsc{Kennedy}, supra note 33 at 37; \textsc{Shahid Yusuf}, et al., \textsc{Under New Ownership: Privatizing China’s State-Owned Enterprises} 2 (co-publication of The World Bank and Stanford University Press 2006).

\textsuperscript{41} \textsc{Yusuf}, supra note 40, at 2.

\textsuperscript{42} \textsc{Lawrence Lau} et al, \textsc{Reform Without Losers: An Interpretation of China’s Dual Track Approach to Transition} \textsc{The Journal of Political Economy}, Feb. 2000, at 121

\textsuperscript{43} Id.

\textsuperscript{44} Id. at 122 N3.

\textsuperscript{45} \textsc{Lardy}, supra note 34, at 24; \textsc{Lau, supra note 39, at 140

\textsuperscript{46} \textsc{Lardy, supra note 34, at 25 table 1-3 Price Reform in China, 1978-99.

\textsuperscript{47} \textsc{Kennedy, supra note 35, at 37.

\textsuperscript{48} Id. at 37-38 FN **.

\textsuperscript{49} \textsc{Yabuki & Harner, supra note 36, at 239.

\textsuperscript{50} Id. at 239.

\textsuperscript{51} \textsc{Kennedy, supra note 35, at 38.
Issues Concerning the Establishment of a Socialist Market Economic System,” which included a commitment to open up to the outside world and a reduction in tariffs and non-tariff barriers.52

The reform and opening up policies had remarkable results. In 1979, China’s GDP was $177 billion (per capita, $183 per year) and more than 60 percent of the population lived in poverty.53 By year-end 2004, the GDP had risen to $1.65 trillion (per capita, over $1,268 per year) and the poverty rate in 2001 had reduced to 16.6 percent.54 Between 1979 and 2004, China’s average annual GDP grew at nearly nine percent.55 In 1984, agriculture represented 32 percent of GDP, industry 43 percent, and services 24.7 percent; by 2004, sectoral shifts due to economic development changed these percentages to 15.2, 52.9, and 31.9 percent, respectively. The move to open the economy and remove trade restrictions allowed FDI to explode from around $3 billion per year between 1989 and 1991 to $27.5 billion in 1993; in 2004 FDI was $60.9 billion, and in 2005 it was $79.1 billion.56

Economic growth has not come without social costs. China’s economic growth has been fueled by exports in labor-intensive goods produced in state-owned firms.57 Local leaders run these firms – TVEs and SOEs – much like subsidiaries of a corporation.58 While granting a greater stake in the success of these enterprises to local officials increased their productive efficiency, by the late 1980s the dual track approach also led to administrative inefficiencies (corruption).59 By obtaining goods at lower plan prices and turning them around at higher market prices, large profits could be reaped.60 Further, the local government was responsible for collecting taxes and providing social services; profitable corporate localities could provide free schooling and healthcare, for example, while unprofitable ones could not.61 In addition, it was not uncommon for local officials to extract taxes in excess of the limits imposed by the central government (taxes above those allocated to the Center and below the tax ceiling went to local coffers), which fueled rural unrest.62

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52 YABUKI & HARNER, supra note 36, at 43-44.
53 YUSUF, supra note 40, at 3; Kennedy, supra note 35, at 35.
56 YUSUF, supra note 40, at 72-73; World Bank, China at-a-Glance, supra note 55.
58 Oi, supra note 57, at 1138.
59 YUSUF, supra note 40, at 66-67.
60 Id. at 66-67.
61 Thomas P. Bernstein & Xiaoobo Lü, Taxation without Representation: Peasants, the Central and the Local States in Reform China, 163 THE CHINA QUARTERLY 742, 750, Sept. 2000.
62 Id. at 745. In 1996, for example, the tax ceiling was 5 percent “of a village’s previous year’s income.” Lianjiang Li & Kevin O’Brien, Villagers and Popular Resistance in Contemporary China 22 MODERN CHINA 28, 41 (1996).
III. A CLOSER LOOK AT REFORM IN THE COUNTRYSIDE

A. LAND REFORMS

The countryside was the vanguard of the Reform and Opening Up policy, and it quickly accrued the benefits of decentralization. During the first stage of reforms, the nongmin saw their income increase at a higher rate (11 percent annually) than their urban comrades (8.7 percent annually). However, the countryside’s progress quickly fell behind that of the urban areas during the second stage of reforms as weaknesses in the household responsibility system deterred further investment in the land. Without diminishing the vital role that the household responsibility system played in launching China’s rapid growth, it is important to grasp the deficiencies in it that rendered the initial growth in the countryside stunted, and indeed dangerous.

Collectivization of the countryside began before the CPC victory over the GMD in 1949, yet it was not complete until the end of the Great Leap Forward, during which the People’s Communes were institutionalized. Public ownership of all land in China was finally confirmed by the Constitution drafted in 1982. Generally, the allocation of land to the collective was inefficiently performed, and the social and economic structure of the collectivized countryside was often rapidly and illogically altered to suit ideological campaigns. The result was economic uncertainty and distrust for government-sponsored collectivism.

The end of the Maoist era saw the end of the politicization of Chinese society. The internecine battles that raged within the CPC between 1976 and 1978 saw the reinstatement of leaders formerly purged during the Cultural Revolution. In a sense, both Chinese society and its re-installed leadership had suffered together under the highly politicized atmosphere of the Cultural Revolution. This circumstance permitted the de-emphasis on ideology and an emphasis on economic development, which in turn allowed the Center to relax its hold on the countryside and permit provincial governments to experiment with rural economic reforms. It was in this environment that the household responsibility system emerged.

Under the household responsibility system, the farmers did not hold an ownership interest in the land allotted to them; the agricultural collectives, which in turn were administered by local cadres, parcelled it out. Because the land was technically owned by the collective, the allotments of it could be – and was – reviewed and restructured as conditions or the whims of a small group of cadres dictated. Further, in addition to reallocations by the collective itself, the State reserved the right to take agricultural land for its own purposes, provided it pays compensation.

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63 ZHU, supra note 36, at 770.
64 Id. at 770-71.
65 The GMD was also heavily influenced by Leninist views on agriculture.
66 PATRICK A. RANDOLPH, JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 77-79 (Kulwer 2000).
67 Id. at 10. While there is some argument as to the accuracy of this claim as it applies to urban areas, it is at the very least true of the rural areas. Id. at 11.
68 Id. at 16.
70 ZHU, supra, note 36, at 769; see also OECD ECONOMIC SURVEYS: CHINA, 113 Box 2.6 (OECD 2006) (2005) for a brief but informative summary of the land tenure system.
71 ZHU, supra, note 36, at 770, 775.
72 RANDOLPH & LOU, supra note 66, at 83.
The central economic inefficiency thereby created is simply stated:

Rights to a piece of land subject to periodic and unexpected readjustments cannot be considered either secure or marketable. Farmers will not make mid- to long-term investments on a land parcel which they may not possess the next year or year after, and potential transactions, from a transferee’s perspective, are likewise limited to those whose time horizon does not extend beyond the current crop season or agricultural year.73

As a result, China’s 850 million nongmin were denied access to the only asset with which they could leverage their way out of the economic stagnation they experienced, and an urban-to-rural income gap of 3.22:1 grew to divide the cities from the countryside.74

B. RURAL UNREST

China’s bureaucratic decentralization has created political space in the countryside that provides an arena for mobilizing dissent.75 Legal reforms from Beijing have created, if not a venue for voicing discontent, then at least a language in which to express it.76 Rural unrest arises over, for example, land takings by local governments,77 illegal taxation,78 and rigged village elections,79 though the trend in rural protest has been away from tax disputes and toward land disputes.80 Emerging from the patterns of rural resistance throughout the reform era is the central importance of information in achieving dissenters’ goals.81

Rights consciousness in China is state-centered: China’s constitution grants, rather than recognizes, citizenship rights.82 These rights may also be considered in terms of interests. “The central goal of the extension of rights to individuals, moreover, is not the protection of individuals against the state, but the better fulfillment of duties to the state by individuals.”83 The state, in

73 ZHU, supra, note 36, at 770-71; see also OECD, supra note 70, at 48-49.
74 ZHU, supra, note 36, at 764.
77 ZHU, supra, note 36, at 778-79.
78 O’BRIEN & Li, supra note 75, at 105
79 Id. at 37.
80 Id. at 37 FN7.
81 Id. at 30, 34, 39-42.
82 PEI, supra, note 75, at 25-26; The term “rights” as understood in the West, however, should not be considered interchangeable with that used in China, though they may express similar sentiment. See, e.g., O’BRIEN & Li, supra note 75, at 120, 120 FN5. The Chinese term 权利 (quanli), meaning “right, interest” is homonymous with 权力 (quanli), meaning “authority,” “might,” or “power,” and to the extent they refer to external manifestations of “right,” they may be synonymous, as where both a citizen exercises “power” over his property and where a government exercises “power” over its citizens. LAW PRESS CHINA, A NEW CHINESE-ENGLISH LAW DICTIONARY 637-38 (Law Press China, 2005); SHANGHAI JIAOTONG UNIVERSITY PRESS, Chinese-English Dictionary, vol II 2088-82 (Shanghai Jiaotong University Press, 2002).
83 PEI, supra note 75, at 25.
return, owes a duty to the people.84 Viewed in this light, a central factor in maintaining the regime’s legitimacy becomes its ability meet its people’s expectations.85

Local cadres often resist change because the legal reforms that have accompanied (and permitted) China’s economic development on a national level are a threat to the entrenched power of corrupt officials at the local level.86 Where new laws and regulations interfere with corrupt local cadres’ enjoyment and exploitation of their position, their first tactic is simply to either fail to inform the populace, or, barring that, to misinform them.87

Even where rural dissenters learn of their rights and attempt to bring their complaints to the People’s Courts, powerful local cadres are able to order the courts to reject the suits brought before them.88 An important factor fueling rural discontent, especially in land-taking cases, is the lack of an independent judiciary.89 Denied access to courts, villagers are forced to combat corruption by other means.

Because the central government is not only the source of rights but also is responsible for ensuring the implementation of those rights, rural dissenters look to the higher levels of government for redress.90 To the extent such dissent comports with policies already put in place or with policy areas over which Beijing shows some flexibility, these calls to the Center can be successful.91

Rural unrest performs a valuable communicative service for the central government. It alerts the Center to recalcitrant localities that are not properly implementing laws and policies promulgated in Beijing:92

…most notably [the] unwillingness of local cadres to revoke unapproved taxes and fees, disregard of measures that bar corruption and use of excessive force, manipulation of village elections, unlawful requisition of farmland, and distortion of popular central policies … into harmful ‘local policies’ that justify wasted investment and unauthorized extraction.93

Supporting the dissenters serves the Center’s interests by both implementing its policies and keeping local leaders in line.94 Where the din of dissent reaches Beijing’s ears via rightful

84 O’BRIEN & LI, supra note 75, at 122. It is important to note that China has signed (Oct. 27, 1997) and ratified (Mar. 27, 2001) the International Convention on Economic, Social, and Cultural Rights (ICESCR) (1966), while it has only signed (Oct. 5, 1998) the International Covenant on Civil and Political Rights (ICCPR) (1966).
85 PEI, supra, note 75, at 23, 26; O’BRIEN & LI supra, note 75, at 120-22.
86 O’BRIEN & LI, supra note 75, at 34.
87 Id. at 34, 40: on the importance of information: “Central policies are good, but they are distorted when they reach lower levels.”
88 Id. at 37.
89 ZHU, supra note 36, at 779; PEI supra note 75, at 25; Stanley Lubman, Looking for Law in China, 20 COLUMB J. ASIAN L 1, 30, 32. (2006).
90 O’BRIEN & LI, supra note 75, at 7, 10, 28 – 30; PEI, supra note 75, at 23, 39.
91 Hand, supra note 76, at 142-143
92 O’BRIEN & LI, supra note 75, at 99-100.
93 Id. at 100.
94 Id. at 54. “[T]he Center seeks to encourage economic growth and head off unrest by creating webs of mutual obligation, and they [villagers] are prepared to hand over whatever grain, taxes, and fees they lawfully owe, provided the local representatives of state power treat them equitably.” Id. at 7.
channels – for instance in the language of the law – the Center is more likely to respond favorably to the dissenters’ demands.

Where, on the other hand, discord manifests itself in a manner threatening to social stability, the dissenters are less likely to be successful, and more likely to face harsh consequences. Threats to social stability are likely to be found where, for example, social organizations attempt to establish horizontal linkages (connections between other, like-minded groups across geographic and electronic space). Such organizational networks, it is feared, can serve as cover organizations for dissenters who can utilize these networks to coordinate unrest on a national or regional scale.

Denying horizontal linkages among the disparate dissident groups dampens the potential for widespread social discord. By keeping dissenters from establishing horizontal links, the CPC is able to marginalize domestic threats to stability by keeping them localized and manageable. Notwithstanding these efforts at cooling the outbursts in the countryside, social unrest in rural areas has continued to increase at alarming rates.

Such discord has recently been blamed on “contradictions among the people” by the head of the CPC Political-Legal Committee where, for example, rural citizens agitated for legal reforms with the help of rights lawyers. The phrase “contradictions among the people” is a specific reference which dates back at least to 1957 and to Mao Zedong. Mao asserted that such contradictions could be resolved through discourse between contending parties.

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95 O’BRIEN & LI, supra, note 75, at 2: “[R]ightful resistance entails the innovative use of laws, policies, and other officially promoted values to defy disloyal political and economic elites; it is a kind of partially sanctioned protest….” Id.; See also Hand, supra note 76, at 159-60.
96 O’BRIEN & LI, supra, note 75, at 7.
97 Hand, supra note 76, at 175-80.
98 PEI, supra note 75, at 31-32; See also, Tony Saich, Negotiating the State: The Development of Social Organizations in China 161 THE CHINA QUARTERLY 124, 132 (Mar. 2000).
99 PEI, supra note 75, at 31-32.
100 Saich, supra note 98, at 131-32; ROBERT G. SUTTER, CHINA’S RISE IN ASIA: PROMISES AND PERILS 56 (Rowman & Littlefield, 2005).
101 The extent to which the recent closure of China Development Brief, one of the few real linkage mechanisms for social organizations and foundations in China should be seen as part of the effort to eliminate such linkages cannot yet be determined. See Message from the Editor, China Development Brief, July 12, 2007 (available at http://www.chinadevelopmentbrief.com/node/node/508).
102 PEI supra note 75, at 29-30.
103 Hand, supra note 76, at 181 (quoting Luo Gan, head of the Party Political-Legal Committee, in Shenru kaizhan shehuizhuyi fazhi linian jiaoyu, qieshi jiaqiang zhengfa duiwu sixian zhengzhizhijianshe [Deeply Carry Out Education on Socialist Rule of Law Concepts, Strengthen the Ideological and Political Construction of Political Legal Team] § III(4), Qiushi [Seeking Truth], Apr. 11, 2006. “Rights lawyers” are those who use the present legal system as a platform for advocacy and reform. Hand, supra note 76, at 159-60.
104 Mao Zedong, On the Correct Handling of Contradictions Among the People (Feb. 27, 1957) in QUOTATIONS FROM CHAIRMAN MAO TSETUNG 45(Foreign Languages Press, 1976) (1966). Contradictions among the people include those between the government and the people: “These include contradictions among the interests of the state, the interests of the collective and the interests of the individual; between democracy and centralism; between the leadership and the led; and the contradiction arising from the bureaucratic style of work of certain government workers in their relations with the masses.” Id.
105 Id.
referred to a second contradiction, that “between ourselves and the enemy,” which could only be
resolved through repression.\textsuperscript{106}

In 1957, Mao was calling for discourse, and thus invited a “hundred flowers to bloom,
and a hundred schools of thought to contend.” The intelligentsia raised their voices in criticism of
the CPC – not so much at its existence or power, but at its fundamental inefficiencies.\textsuperscript{107} The
government answered with the Anti-Rightist Campaign, in which hundreds of thousands of urban
and rural citizens faced public criticism, prison terms, forced labor, and suppression.\textsuperscript{108} In effect,
the government had redefined the contradictions. The current use of such “contradiction”
terminology by high-ranking Party officials may be a signal that Beijing intends to rein in the
countryside and maintain stability whatever the cost.

\textbf{IV. THE FARMERS’ PROFESSIONAL COOPERATIVE LAW OF THE PRC}

\textbf{A. INTRODUCTION}

Farmers’ Professional Cooperatives will help establish economic avenues to higher standards of
living for China’s 850 million rural inhabitants. Further, FPCs will increase China’s economic
competitiveness while establishing an institution capable of combating local corruption, though
not expressly tasked to do so.

The provisions of the FPCL establish a vertically integrated, non-profit enterprise
enjoying legal personality that can advocate on its own behalf under democratic leadership. The
freedom to grow within China’s national boundaries creates the potential for Chinese FPCs of a
scope similar to the United State’s 6,000 citrus-grower strong Sunkist Growers, Inc. The profit
and political motives thereby created make it unlikely that FPCs will become advocates of
democratic reform. However, to the extent that the economic interests of the nongmin owner-
members and the FPCs’ interests coincide, the FPCs stand to become advocates for their
members against corrupt local officials and their de-stabilizing practices, such as unlawful land
takings.

\textbf{B. WHAT IS AN FPC?}

A majority of the globe’s agriculture sector is organized in some manner.\textsuperscript{109} A popular and very
effective form of rural organization is the cooperative. Due perhaps to its nature, there is no hard
and fast definition of the cooperative form. Generally, cooperatives are business organizations
owned and controlled by their member-users on a democratic basis.\textsuperscript{110} They are structured and
managed according to their articles of incorporation and bylaws. A cooperative’s profits are

\begin{itemize}
  \item \textsuperscript{106} \textit{Id.} The “enemy” are those “social forces and groups which resist the socialist revolution and are hostile
to or sabotage socialist construction.” \textit{Id.;} LIEBERTHAL, \textit{supra} note 2, at 101.
  \item \textsuperscript{107} LIEBERTHAL, \textit{supra} note 2, at 101-102; Teiwes, \textit{supra} note 10, at 81-82.
  \item \textsuperscript{108} LIEBERTHAL, \textit{supra} note 2, at 101-102.
  \item \textsuperscript{109} FOCK \& ZACHERNUK, \textit{supra} note 69, at 1.
  \item \textsuperscript{110} Robert Cropp, \textit{A Glossary for Cooperatives} UNIVERSITY OF WISCONSIN CENTER FOR COOPERATIVES
    \textbf{BULLETIN NO. 10 (Nov. 2005), http://www.uwcc.wisc.edu/info/uwcc_pubs/bulletins.html; See also
    (select “What is a farmer cooperative?”); Generally, the principal of
democratic ownership manifests itself in a one-member-one-vote decision-making process. Neil D.
    Hamilton, \textit{Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and
\end{itemize}
apportioned to its members according to each member’s contribution to, or use of, the cooperative.\textsuperscript{111} The central tenet of cooperative organizations is mutual benefit of members. Cooperatives often emerge during periods of profound economic change to cope with evolving economic environments.\textsuperscript{112}

In many countries, a legal framework is vital to the existence of cooperative business organizations.\textsuperscript{113} Cooperatives formed under state laws receive the benefit of legal personality. This benefit includes limited liability, access to credit, and favorable tax treatment. A legal person may represent itself in a court of law, which in the case of cooperatives means that the individual member is protected by the power of the group to the extent the member’s interests coincide with those of the cooperative.

In addition to the benefits that legal status affords cooperatives, economic forces also lend a hand. Because cooperatives pool the resources of their members, they are able not only to purchase inputs at volume-discounted prices,\textsuperscript{114} but also to lower effective transaction costs.\textsuperscript{115} Further, use of the cooperative form increases members’ bargaining power; cooperatives have greater leverage at the negotiating table than their members would have on an individual basis.\textsuperscript{116}

In addition, cooperatives are able to bid for, and enter into, the large volume contracts preferred by modern retailers and the international trade regime.\textsuperscript{117} Finally, cooperatives are important information gathering and dissemination mechanisms because information about new technologies and market information can be better accumulated and imparted through the cooperative network.\textsuperscript{118}

\textbf{C. THE NEED FOR A FPC LAW IN CHINA}

The benefits and attributes of cooperative business organizations became available to China’s countryside July 1, 2007. Promulgating the FPCL confers on China a number of advantages. First and foremost, because China’s agriculture sector is composed of a vast number of small,}

\textsuperscript{111} Cropp, supra note 110; See also National Council of Farmer Cooperatives “What is a Farmer Cooperative, supra note 110. Generally, the principal of democratic ownership manifests itself in a one-member-one-vote decision-making process. Hamilton, supra note 110, at 626.


\textsuperscript{113} FOCK & ZACHERNUK, supra note 69, at 22. In Britain and Denmark cooperatives have no statutory basis, \textit{Id.}, while in both the United States and Canada federal and local legislation govern their formation and, for example, their tax status.


\textsuperscript{115} National Council of Farmer Cooperatives, supra note 110.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} FOCK & ZACHERNUK, supra note 69, at 1,13-14; National Council of Farmer Cooperatives, supra note 110.

\textsuperscript{118} FOCK & ZACHERNUK, supra note 69, at 1,13-14; National Council of Farmer Cooperatives, supra note 110.
individual household farms, its farmers will now benefit from the ability to field a united front in the face of rapidly evolving agricultural market forces.

Further, fashioning an FPC law is politically reasonable for a number of reasons. Increasing the lot of farmers not only benefits the national economy, but also stabilizes a countryside riddled with social unrest. At the same time, however, it hints at a Hamiltonian protectionism aimed as much at cultivating a market socialist countryside as it is at staving off foreign competition in agriculture. Finally, providing a legal framework for farmer professional cooperatives removes many obstacles to FPC formation and reduces the risks associated with participation in unrecognized business forms.

1. Economic Incentives for the FPCL

Chinese agriculture production is now generally market driven, both as to its inputs and its outputs. However, agricultural industrialization has rendered China’s agriculture sector uncompetitive. At the heart of Chinese agriculture’s lack of competitiveness is the small scale at which most farming there takes place, and its relatively low productivity. Both international and domestic markets increasingly favor large scale, vertically integrated, and standardized production methods. This imposes high costs that individual farming households simply cannot meet, yet cooperative organizations can.

Further, marketing changes have led to higher quality standards that traditional farming methods do not meet. Traditional outdoor markets are being replaced by supermarkets in urban areas, which require standardized produce of a higher quality, purchased in volume. In addition, WTO accession introduced sanitary and phyto-sanitary restrictions on agricultural exports that, again, traditional Chinese farming methods have trouble meeting.

The environmental effects of China’s ongoing economic development have had an enormous impact on Chinese agriculture. Consider, for example, China’s use of fertilizers:

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119 FOCK & ZACHERNUK, supra note 69, at 5. There are about 200 million of these households, whose farms average about 0.4 ha. Id.
120 Id. at 8.
122 Donald C. Clarke, How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China, 19 COLUM. J. ASIAN L. 50, 55 (2005); FOCK & ZACHERNUK, supra note 69, at 22.
123 Thomas Urban, president of the largest hybrid seed supplier, defines agricultural industrialization as “the process whereby the production of goods is restructured under the pressure of increasing levels of capital and technology in a manner which allows for a management system to integrate ‘each step in the economic process to achieve increasing efficiencies in the use of capital, labor, and technology.’” Hamilton, supra note 110, at 613.
124 FOCK & ZACHERNUK, supra note 69, at 10, 12.
125 Id. at 1, 5; IMF, supra note 121, at 55.
126 FOCK & ZACHERNUK, supra note 69, at 1, 5.
127 Id. at 1, 5, 13-14.
128 Id. at 13-14.
129 Id. at 10, 12-14.
131 Id. ¶¶ 147, 151.
Chinese farmers continue to use banned chemicals in their fields, in addition to their grossly inefficient use of (legal) nitrogen fertilizer. China uses 30 percent of the world’s fertilizer, yet contains only 9 percent of global farmland. China cannot cut down appreciably on its agriculture production and hope to continue to meet its demand for grain. Rather, it must rationalize its production methods in a manner that increases efficiency, not merely by increasing output-to-input ratios, but also by increasing sustainability.

2. Political Incentives for the FPCL

The primary goal of the CPC is to maintain itself. To that end regime stability is the most important driver of Beijing’s decision-making, both at home and abroad. The greatest threat to regime stability is the threat of social chaos brought about by the CPC’s inability to satisfy either the people’s economic or nationalist interests, or both.

When domestic threats are effectively marginalized, Beijing is free to concentrate more of its resources on increasing economic prosperity. It is from this perspective that China faces globalization. It is important to note that China sees globalization as an issue “confront[ing]” it, rather than as a neutral forum for mutually beneficial cooperation in international commerce.

China has not openly embraced international economic integration or globalization. Rather, China has taken a calculated risk in its future, using economic growth as a means of acquiring power and influence abroad and shoring up stability at home. Participating in the global economy through such institutions as the WTO, the World Bank, and APEC will provide China the capital, technology, and expertise it needs to reach its goal of parity with the world’s great powers.

This statement by members of the Chinese Ministry of Agriculture may offer further insight into the political impetus for promulgating the FPCL:

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132 Id. ¶ 151.
133 Id. ¶¶ 18, 80-81. China’s inefficient use of fertilizer, 10-50 percent more than necessary, Id. ¶ 81, translates into income losses of 10-30 percent. Id., at ¶ 80.
134 Id. ¶ 18. China loses fertilizer through evaporation and leaching than U.S. farmers use. Id.
135 Id. ¶ 18, 25.
136 PEI, supra note 75, at 23, 26; O’BRIEN & LI supra, note 75, at 120-22; GRIES, supra note 3, at 119, 121; Peter Hays Gries, Nationalism and Chinese Foreign Policy, in 121 CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY 110 (Yong DENG & Fei-Ling WANG eds., Rowman & Littlefield, 2005); Fei-Ling WANG, Beijing’s Incentive Structure: The Pursuit of Preservation, Prosperity, and Power, in 19 CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY 19 (Yong DENG & Fei-Ling WANG eds., Rowman & Littlefield, 2005); LIEBERTHAL, supra note 2 at 247, 316. See also PEI, supra note 75, at 25-26.
Producer organizations can be expected to expand international markets while the domestic markets are effectively protected and developed, and producer associations can shun vicious competition.139

To the extent such an unattributed remark can express the sentiment of the Ministry of Agriculture, it evinces distrust for the present international agriculture trade regime. Such protectionist sentiments may not be so uncalled for, however, in the face of the WTO/GATT Doha Round’s failure to find some compromise on the subject of international agricultural protectionism.140

3. Effect of the FPCL on the Legal Landscape: The importance of recognition

Farmers cooperatives require a legal framework to operate and succeed in China.141 Because the FPCL was passed by the Standing Committee of the National Peoples’ Congress, it enjoys an authority surpassed only by the PRC Constitution.142 In other words, the fact that China’s highest law-making body passed this law means that only the Chinese Constitution supercedes it. The promulgation of the FPCL thus lifts FPCs out of the ambiguous realm of “non-statutory” business forms by providing a “solid statutory basis” for them.143

Legislation such as the FPCL not only describes the procedures by which organizations come into being, but it also describes the relationship of that such organizations have to the society in which it will operate. Failing such legislation, that relationship is uncertain, possibly illegal.144 Further, the legislation provides a framework on which to base the organization’s relationship with its members.145 To the extent this framework defines the roles of the organization’s members and officers, it also resolves disputes over who represents the organization before the world.146

Up to now, nongmin organizations have had to improvise. Lacking legislation, these organizations lacked a definition.147 As result, the many nongmin organizations that have arisen to
cope with the evolving agriculture market have had to conform the definition of their organization, and thus the scope of their operations, within that of a pre-existing rule. The FPCL promulgated by the NPC Standing Committee finally defines this organization type:

**Article 2.** A *Nongmin* Professional Cooperative is a mutual-aid economic organization, which is voluntarily formed by production and business operators of similar agricultural products or by providers or users of similar agricultural production and business operation services on the basis of rural household contractual management and which is subject to democratic management.

Article 2 goes on to place the services provided by FPCs into three main categories:

(a) purchases of production materials;
(b) sale, processing, transport and storage of agricultural products, and;
(c) technologies and information relating to agricultural production and business operations.

A farmers’ professional cooperative that is duly registered with the appropriate Administrative Department for Industry and Commerce qualifies as a legal person, which confers both limited liability and the right to own and dispose of property. It also confers the capacity to sue. The cooperative must be governed by articles of association agreed upon by the promoters’ unanimous consensus at the inception of the organization. Each FPC begins with the premise that each member will have one vote of equal value, yet the articles of association may provide otherwise.

The FPCL provides for voluntary withdrawal from FPCs, as well as their dissolution, and for the distribution of assets upon both occurrences. Each year, the FPC must make an accounting and determine the dividend attributable to each member. Either the articles of association or a general meeting of co-op members will then control the method by which the dividends are dispensed.

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Clarke, *supra* note 122, at 55 (again, noting that, in the absence of a statutory scheme, the legal standing of an enterprise is ambiguous).

148 FOCK & ZACHERNUK, *supra* note 69, at 14, 16-17.

149 FPCL art. 2. The FPCL does not, however, define the term “agriculture.” The definition supplied by the Agriculture Law may be helpful in this regard: “For the purpose of this Law, agriculture consists of the industries of crop-planting, forestry, animal husbandry and fishery, including the services before, during and after the production process directly related with the above.” Agriculture Law, *supra* note 145, art 2.

150 FPCL art. 2.

151 FPCL arts. 4-5, 13. “The people’s governments at the county level or above” will determine the appropriate level at which FPC will be required to register. FPCL art 9. The level at which the FPC registers will have important implications, as discussed below, Part III.E. 2.


153 FPCL arts. 10, 11. Article 11 also requires a governing structure and officers to be chosen at the organizational meeting, FPCL art 11(2).

154 FPCL art. 17.

155 FPCL arts. 3, 21, 41 – 48.

156 FPCL arts. 35 – 36.

157 FPCL art. 37.
The primary significance of the FPCL is the legitimacy it confers on FPCs qua FPCs. Legislation is not, strictly speaking, necessary for recognition of an organization. Yet without it, an organization may not be the same thing to different people: by providing a definition, the FPCL provides a level of certainty previously unavailable. In the past, agriculture organizations have registered with: a county science association as an industrialized organization; a local industrial commercial bureau as a professional cooperative economic organization, and; first a county science association, then with both a civil affairs bureau and industrial and commercial bureau as a share-holding technological and economic organization. This no longer need be the case. The FPCL provides for one organizational form registered with one administrative department.

Legal personality allows access to credit at a level inaccessible to individual farmers, which lowers a key obstacle to the success of the FPC. Limited liability limits the respective members’ risk to their capital contribution and undistributed dividends. Because FPCs will be legal persons, they will be able to form, register, and protect a brand name if they so desire. Marketing cooperatives have been highly profitable in the past where they have been able to establish name recognition and maintain quality standards and access to transportation networks.

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158 Clarke, supra note 122, at 53
160 FENG XIAOLIN, FARMERS’ PROFESSIONAL COOPERATIVE ORGANIZATIONS IN RURAL CHINA: CASE STUDY REPORT, 103-104 (RAF Institute for Rural Development 2004).
161 FPCL art. 2, 13
162 FOCK & ZACHERNUK, supra note 69, at 34-35; Ish & Turner, supra note 162, at 3.
163 FOCK & ZACHERNUK, supra note 69, at 34-35, 61.
164 FPCL art. 6.
165 Sunkist, for example, is a multi-billion dollar United States citrus cooperative that has taken full advantage of the cooperative form. Sunkist, http://www.sunkist.com/about/. So says Sunkist:

Cooperatives give producers clout. In today’s competitive international market, an independent grower stands alone against the competition. As a member of a cooperative, each individual grower joins with other growers to gain a mutually larger market share. A cooperative of growers together can do many things that a grower alone cannot afford to do — develop a worldwide market, promote a brand name, access a global transportation system, develop comprehensive research capabilities, and gain governmental access to overseas markets.

C. SALIENT CHARACTERISTICS OF, AND QUESTIONS ARISING FROM, THE FARMERS’ PROFESSIONAL COOPERATIVE LAW

1. Registration and Oversight

There is no provision in the General Principles of Civil Law (GPCL) specifically addressing cooperative organizations as legal persons. Four general categories of legal persons are discussed in the GPCL: enterprises, government organs, public institutions, and social organizations. Farmer cooperatives present something of a conundrum vis-à-vis the GPCL because they are non-profit commercial organizations and thus possess the attributes of both profit-seeking enterprises and social organizations.

The category that a legal person falls into can have important legal implications. Social organizations, for example, must register with the local civil affairs bureau and obtain sponsorship from an official (state) organ. Social organizations’ activities are restricted to the locality administered by the local civil affairs bureau with which they register. Enterprises, on the other hand, do not face the same restrictions as social organizations. They register with administrative departments of industry and commerce, and they do not need an official sponsor.

The FPCL requires FPCs to register with an administrative department for industry and commerce, but it does not specify at what hierarchical level registration is to take place. However, the State Council’s companion administrative regulations governing FPC registration affirmatively address this issue:

Article 4 …The administrative department of industry and commerce under the State Council shall be responsible for the administrative work concerning the registration of farmers’ professional cooperatives across the whole nation.

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167 Min fa, supra note 171, at §§ 2-3; See also Karla W. Simon China Update 3 INT’L J. CIV. SOC. L. 4, 60 http://www.iccsl.org/pubs/index.html (select “International Journal of Civil Society Law,” then select “Volume III, Issue IV (October 2005).” A fifth organizational form addressed in the GPCL is the Economic Association; these are made up of other organizations and do not have legal personality. Min Fa, supra note 171, at arts. 51-52.
168 An important role played by farmer cooperatives is information sharing. Due to Chinese farmers’ general disconnect with their ultimate consumers, there is a need for information regarding market needs and new technologies. Farmer specialized associations, registered with civil affairs bureaus, currently provide this service. Yamei HU et al, Organization and Strategy of Farmer Specialized Cooperatives in China, 4-5 (Erasmus Research Institute of Management 2005), available at http://hdl.handle.net/1765/699; FOCK & ZACHERNUK, supra note 69, at 9.
169 Simon, supra note 167, at 62; FOCK & ZACHERNUK, supra note 69, at 24; These restrictions permit managed development of the social sector to both control possible social unrest generated by these organizations and to further liberalize the Chinese polity. Saich supra note 98, at 126.
170 China’s Civil Law, supra note 156, at 22.
171 FPCL, art. 13.
A farmers’ professional cooperative shall be registered by the administrative department of industry and commerce of the county (city) or region where it is located.\footnote{農民專業合作社登記管理條例 (Nong min zhuan ye he zuo ding ji guan li tiao li) [The Administrative Regulation on the Registration of Farmers’ Professional Cooperatives] (P.R.C.) CHINALAWINFO (find at http://chinalawinfo.com) (emphasis added) (hereinafter “Administrative Regulations”).}

Further, the FPCL does not include a requirement for sponsorship from an official organ. Thus, while the GPCL does not specifically provide for farmer cooperatives, the FPCL places them within the enterprise category, while simultaneously absolving them of some of the tax burdens that attach to those entities.\footnote{FPCL, art. 52; see also FOCK & ZACHERNUK, supra note 69, at 24-25. Another attribute that frees FPCs from the restrictions that might be placed on them were they to fall in the social organization category is the threshold requirement of five members for FPCs – social organizations require fifty. FPCL art. 10(1); Simon, supra note 167, at 62FN 34.}

Requiring FPCs to register with departments for industry and commerce frees them to act within a larger area than had they been required to register with the civil affairs bureaus.\footnote{FOCK & ZACHERNUK, supra note 69, at 29.} Such a requirement would have not only denied FPCs the capacity to contract and engage in trade,\footnote{Id. at 24-25.} but would also have restricted the FPCs’ scope of activity to those areas within the reach of the bureaus with which they registered; registration with the county civil affairs bureau, for instance, would restrict activity to only the registered county.\footnote{Id. at 29.}

Further, registration with commerce and industry departments, coupled with legal personality, also permits access to bank loans.\footnote{Id. at 35.} The importance of this attribute is highlighted when one considers that lack of capital is seen as the main internal obstacle to farmer professional associations by both their leaders and their members.\footnote{Id. at 31.}

The People’s Governments at the county level or higher are left to form the agriculture administration departments that shall “direct, support, and serve” the FPCs.\footnote{FPCL, Art. 9.} The separation between the registration and oversight organs provides an important level of objectivity in FPC oversight.\footnote{FOCK & ZACHERNUK, supra note 69, at 46.}

2. Democratic Cooperative Governance

One of the prime attributes of farmer cooperatives is democratic governance under the principle of one-member-one-vote.\footnote{Ish & Turner, supra note 159, at 5; Hamilton, supra note 110, at 626; FOCK & ZACHERNUK, supra note 69, at 17, 66.} The FPCL declines to strictly follow this model:

\begin{quote}
\textbf{Article 17.} The election and voting at the general meeting of members of a Farmers’ Professional Cooperative shall be conducted on the one-person-one-vote basis. Each member shall be entitled to the basic voting right of one vote.
\end{quote}
The members, whose amount of capital contribution to or amount (volume) of transactions with this cooperative is relatively large, may enjoy additional voting rights under the articles of association. The total number of the additional voting rights of this cooperative shall not exceed 20 percent of the total number of basic voting rights of the members of this cooperative. When holding a general meeting of members, the members attending the meeting shall be informed of the members who have the additional voting rights and the number of the additional voting rights.

The articles of association may restrict the scope of exercise of the additional voting rights.\(^{182}\)

Those members whose (a) capital contribution to the FPC or (b) transaction volume with the FPC is “relatively large” may receive up to 20 percent of the total voting power of the cooperative. The phrase “relatively large” is undefined. Nor is it apparent whether the total number of such volume voters shall be limited within the cooperative. It would appear that any limitation on such volume voters – whether they may exist, on what matters their power vote may be cast, or whether the number of such voters in the cooperative shall be limited – must appear in the articles of association. While Article 17 states that all members shall have at least one vote, it does not state whether this right is waivable, assignable, or transferable.

Lurking behind the rule in Article 17 is the specter of minority dominance of the cooperative: only two power voters could control up to 40 percent of the cooperative, while only three such voters would dominate it.\(^{183}\)

Up to this point in time, farmer associations have been limited in size to that of the township.\(^{184}\) Further, local township leaders often wound up in charge of or leading these associations. Though no “entity” administering public affairs can join an FPC under the FPCL,\(^ {185}\) can an individual administering public affairs do so? There does not seem to be a prohibition against it. This also ties into the argument – discussed below – that FPCs are just as likely to be co-opted like urban business associations have been than to spark or lead a democratic movement in the countryside. This would serve Beijing’s interests by both locking up the countryside and boosting the rural economy, which is more likely to quell unrest than would be an attempt to reform corrupt rural leaders.

3. Danger of Co-optation -- the small chance that FPCs will lead to democratic reforms in the countryside – co-opting the co-ops.

There is a great deal of speculation about the effects of economic liberalization on China’s political system. An investigation of urban analogs to FPCs – business organizations – will dispel

\(^{182}\) This article closely tracks the provisions of the farmer cooperative law of Zhejiang Province, the first province in China to promulgate such regulations. The FPCL also resembles Zhejiang’s regulations in a number of other ways: FPCs must register with local departments of industry and commerce; they operate under the oversight of an agricultural administration department, and; registration and oversight are administered by different departments. FOCK & ZACHERNUK, supra note 69, at 17.

\(^{183}\) See, e.g., FOCK & ZACHERNUK, supra note 69, at 17.

\(^{184}\) FOCK & ZACHERNUK, supra note 69, at 21.

\(^{185}\) FPCL art. 14
the notion that the FPCL will lead to democratic reforms in the countryside.\textsuperscript{186} Rather, it is more likely that, while decreasing the power of local officials, they will increase the power of the central government.

A survey of business and political elites reveals a high degree of ambivalence toward democratization.\textsuperscript{187} This refutes the hypothesis of many authors who claim that economic success will instill a desire to obtain a greater voice in political decision-making, if not a change in the political system itself.

Corporatization and co-optation are adaptive means by which a state can maintain control over non-government organizations and private individuals.\textsuperscript{188} China utilizes these methods as a means to retain the control over society that it would otherwise lose as a result of its policy shift from an ideological orientation to an economic development focus. Neither institutionalized business organizations nor co-opted entrepreneurs are likely to agitate for increased autonomy or democracy as a result of their relationship with the government.

By creating government links with private organizations, the CPC is able to endorse those business organizations whose causes serve state interests and condemn those which run counter to state policy. Each interest may be represented by only one organization in its locality, and each organization must have government approval and sponsorship before being recognized.\textsuperscript{189} Corporatism serves the interests of both the state and the organization: the state influences society through the organizations that represent it; and the organizations gain influence and legitimacy, which enable them to further their members' interests.

While some scholars believe that these organizations will agitate for increasing amounts of autonomy and usher in a period of political change, to the contrary, these organizations prefer a closer relationship with the state.\textsuperscript{190} Further, though state officials disagree, Chinese businessmen believe that their organizations can influence policy.\textsuperscript{191} It seems, therefore, that if ever business organizations play a role in political liberalization, they will do so by pursuing greater integration with the state policy-making apparatus, rather than by pursuing greater autonomy from it.

Whereas corporatization involves the state forging institutional alliances with society, co-optation occurs when the state makes individuals part of the political system itself. Like corporatization, co-optation also serves the interests of both the state and private entrepreneurs: in addition to the benefits of corporatism, above, the party gains technical expertise and control over potential leadership rivals; the entrepreneurs become part of the system, with all its attendant influence and protections.\textsuperscript{192} The most successful entrepreneurs are those most likely to be co-opted into the CPC itself — the Party’s interest in gaining technical expertise and absorbing potential rivals is best served by co-opting those with the most potential technical and leadership skills.\textsuperscript{193}

\textsuperscript{186} FOCK & ZACHERNUK, supra note 69, at 12 (noting that farmers’ past experience with government-supported collectives makes it more likely that they may see FPCs as an arm of the government).

\textsuperscript{187} BRUCE DICKSON, RED CAPITALISTS IN CHINA: THE PARTY, PRIVATE ENTREPRENEURS, AND PROSPECTS FOR POLITICAL CHANGE (Cambridge 2003).

\textsuperscript{188} In the Chinese context, this policy follows that of other Leninist polities, with the attendant concern for political hegemony. DICKSON, supra note 191, at 9, 57-58, 60; Saich, supra note 98, at 127-32.

\textsuperscript{189} Saich, supra note 98, at 129, 131-32; Simon, supra note 170, at 62.

\textsuperscript{190} DICKSON, supra note 187 at 84-85.

\textsuperscript{191} Id. at 81.

\textsuperscript{192} Id. at 106.

\textsuperscript{193} Id. at 108.
Co-opted entrepreneurs are able to play a role that corporatized institutions are unable to play: private entrepreneurs are able to hold leadership positions within the CPC, and many are becoming involved with the politics of their locality. For interested parties who believe that entrepreneur participation in politics will – or should – spell the end of the CPC, a word of caution is in order: entrepreneurs tend to favor that the state dictate policy rather than resort to democratic competition. In addition, where the entrepreneurs do approve of societal input on policy, they prefer limiting that input to the elites, such as themselves, rather than permitting universal participation. As with the corporatized organizations, then, it seems that the interests of the co-opted entrepreneurs are best served by further integrating with the CPC rather than attempting to democratize the political system.

This is an unsurprising conclusion if one takes the view that business elites – whether taken as individuals or represented by an organization – will seek to maximize their personal interests rather than upset the system that permitted them to attain success in the first place. Further, they will attempt to achieve more comprehensive integration with that system in an attempt to protect and further those interests. The corporatized and co-opted business elites – the Red Capitalists – will not be the vanguard of an urban movement to democratize China, nor will they be the answer to the Party’s current problems.

4. Implications for Activism

The Chinese legislature defines FPCs as mutual-aid economic organizations. In the context of rural unrest, this has far-reaching implications. Just as cooperatives act to magnify the economic power of the farmers of which they are composed, cooperatives have the potential to represent the political rights of their members and amplify their voices. The Chinese government has repeatedly communicated its disapproval of horizontal linkages. Luo Gan’s reference to “conflicts among the people,” for example, sent a veiled warning to keep a lid on political rights activism.

To the extent rights are legitimately granted by the central government, they are amenable to administrative redress when violated. However, the networking benefits supplied by FPCs are not the appropriate method for defending these rights, unless the right violated is an economic right. The question then becomes, what are economic rights? A great deal of rural unrest occurs as a result of corrupt land taking. To the extent agricultural land is improperly taken, one can argue that this invades the affected farmer’s – and therefore the farmer’s

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194 Id. at 123-25.
195 Id. at 133-35.
196 Id. at 135.
197 Id. at 170.
198 FPCL art. 2 cl 1.
199 See, e.g., Sunkist, supra note 165.
200 See, e.g., Saich, supra note 98, at 130-32.
201 Further, Luo Gan was purportedly vehemently opposed to softening government control over social organizations during the promulgation of the “Regulations on the Registration and Management of Social Organizations,” and declared that such regulations should impose stricter rather than softer control over social organizations. Saich, supra note 98, at 130-31. Luo Gan, it seems, deeply distrusts organizational independence and access to advocacy.
203 FPCs are “economic organizations,” FPCL, art 2.
cooperative’s – ability to earn a living or meet the burden arising through his membership in the cooperative.

On the other hand, because FPCs are voluntary private organizations that do not, on the face of the FPCL, have an interest in their members’ property, the FPC may not be found to have appropriate standing to represent the individual farmer’s interests, especially in a locality with powerful corrupt cadres. Yet Beijing’s anticipated broad horizontality of the FPCs is very encouraging in this regard. Legal personality, and hence the ability to litigate in the legitimate interests of the FPC, is not of itself enough to overcome corrupt cadres. A litigating FPC need either be more powerful than its opponent or have a more powerful network than its opponent.

In this regard, the FPC may have an advantage. The administrative regulations on FPC registration clearly anticipates the creation of vast, vertically integrated agricultural cooperatives capable of defending their interests:

**Article 4** The administrative department of industry and commerce under the State Council may formulate special provisions on the administrative work concerning the registration of large-scale or trans-regional farmers’ professional cooperatives.

Thus, by placing FPCs squarely into the enterprise category, rather than labeling them social organizations, the FPCL permits the formation of organizations capable of defending themselves not only from “vicious competition” from abroad, but also from entrenched local interests. Note, however, that the State Council has reserved the power to restrain those FPCs that become too unwieldy.

**V. CONCLUSION**

Perhaps the most important aspect of the FPCL is its existence. The legal standing it confers on farmer cooperatives establishes a base from which to protect farmers’ economic rights from usurious lenders, unscrupulous retailers and suppliers, and from corrupt local officials.

The effectiveness of a FPC as an advocate for its members hinges on well-crafted articles of association. The level to which a FPC will deviate from the one-member-one-vote principle can have a profound effect on the future of the FPC. As a mutual-aid organization, that FPC which best represents each member’s best interests will be the most successful, regardless of its revenues.

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204 The FPCL creates the capacity to sue on the FPCs behalf; it says nothing of advocating on behalf of the individual member in a legal, as opposed to economic, capacity. Yet, because the FPC represents the pooled resources of its members, it may by able to exert a great deal of pressure on local cadres who are trying to extort farmers. O’BRIEN & LI, *supra* note 75, at 37; Lubman, *supra* note 89, at 30-31. However, the dynamic of many villages in China are such that the FPCs, to the extent they have already appeared, are controlled by the village leaders. We will have to wait and see what effect the permissible size of FPCs will have on this fact.


The discussion above evinces a limited expectation that FPCs will become champions of rural rights consciousness. Farmers’ Professional Cooperatives should not be looked to by either state or private interests to act as anything other than non-profit commercial enterprises. To expect anything more would run counter to their purpose and diminish the potential for them to evolve into larger, vertically integrated enterprises capable of significantly raising nongmins’ standard of living and aiding in the economic development of China’s socialist countryside.

This is not to say that FPCs, in the course of their economic activity, will not perform important social functions with political implications. For example, the networks permitting the transfer of technical and market know-how and development will provide an avenue for information of many kinds to be disseminated. In fact, in order for FPCs to function properly at all, information concerning the FPCL itself must be broadcast throughout China’s countryside. The act of nongmin organizing for their own economic benefit will empower them to an extent that was previously unavailable.

It is at this point that the leadership question becomes most critical. Should the leadership of the FPCs become co-opted by local leaders, then the potential for FPCs to act as a counter-weight to local officials will be severely restricted. The prohibition of official entities from being members of a FPC limits them to private (economic) activity, as does, possibly, their registration with bureaus of industry and commerce.

However, as noted by O’Brien and Li in a different context, knowledge of the FPCL itself can prove empowering enough. The information dissemination function that FPCs will serve will also provide a conduit for legal information – which Beijing intends the nongmin to have – that can be used by all rural citizens for their own benefit. To the extent that FPCs confer knowledge of Central policies and increased connectivity with similarly situated nongmin, they can act both to protect the nongmin and serve the interests of the Center by diminishing the power of corrupt local officials.

Because FPCs are, by definition, economic entities, the State retains the power to revoke their licenses should their behavior cross invisible lines of permissible advocacy. Thus, by devising a law that creates an economic cooperative enterprise capable of increasing the nongmins’ standard of living while at the same time both informing them of their rights – as opposed to defending their rights – and creating a defense against foreign agribusiness, the FPCL serves Beijing’s interest in promoting a stable socialist countryside while simultaneously shoring up its regime legitimacy.

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207 O’BRIEN & LI, supra note 75, at 73, 80-85.
Appendix A

Law of the People’s Republic of China on Farmers Professional Cooperatives

By order of the President (No. 57)

The Law of the People’s Republic of China on Farmers’ Professional Cooperatives, adopted at the 24th Session of the Standing Committee of the 10th National People’s Congress of the People’s Republic of China, October 31, 2006, is hereby promulgated, and shall come into force as of July 1, 2007.

President of the People’s Republic of China Hu Jintao

October 31, 2006

Law of the People's Republic of China on Farmers Professional Cooperatives

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Chapter I: General Provisions

Article 1. This law is formulated with a view to supporting and directing the development of Farmers’ Professional Cooperatives, regulating the organization and acts of Farmers’ Professional Cooperatives, protecting the legitimate rights and interests of Farmers’ Professional Cooperatives the members thereof, and promoting the development of agriculture and the rural economy.

Article 2. A Farmers’ Professional Cooperative is a mutual-aid economic organization that is voluntarily formed by production and business operators of similar agricultural products, or by providers or users of similar agricultural production and business operation services, on the basis of [based on] rural household contractual management, and that is subject to democratic management.

Article 3. A Farmers’ Professional Cooperative shall observe the following principles:

(1) Most of its members shall be farmers;

(2) It shall aim to provide services to its members and seek the common interests of all members;

(3) Voluntary obtainment of membership and free withdrawal from membership;

(4) All members shall be equal and shall be subject to democratic management; and
(5) The surplus shall be returned to the members according to the volume (amount) of transactions with the Farmers’ Professional Cooperative.

**Article 4.** A Farmers’ Professional Cooperative shall be registered and obtain the qualification of a legal person under this law.

A Farmers’ Professional Cooperative shall be entitled to own, use and dispose of the properties derived from the members’ capital contributions, accumulation fund, direct subsidies from the state treasury, donations of others, and other assets lawfully obtained, and shall bear liabilities for the debts with the aforesaid properties.

**Article 5.** Each member of a Farmers’ Professional Cooperative shall bear liabilities for the debts of the Farmers’ Professional Cooperatives within the limit of capital contribution and its proportion of accumulation fund recorded in its account.

**Article 6.** The state shall protect the lawful rights and interests of the Farmers’ Professional Cooperatives and their members. No entity or individual may impair the rights and interests of any Farmers’ Professional Cooperative or if its members.

**Article 7.** When engaging in production and business operations, a Farmers’ Professional Cooperative shall abide by the laws, administrative regulations, social moralities and commercial ethics, shall be honest and shall have good faith.

**Article 8.** The state shall promote the development of Farmers’ Professional Cooperatives through fiscal support, tax preferential treatments, support in finance, science, technology and talents, as well as through industrial policies.

The state shall encourage and support all social forces to provide services to Farmers’ Professional Cooperatives.

**Article 9.** The people’s governments at the county level or above shall organize the agriculture administrative departments, other relevant departments as well as the pertinent organizations to direct, support and serve the construction and development of Farmers’ Professional Cooperatives under this Law and according to their respective functions.

**Chapter II: Establishment and Registration**

**Article 10.** To establish a Farmers’ Professional Cooperative, the following requirements shall be satisfied:

1. Having 5 or more members, who meet the requirements as described in Articles 14 [who may join] and 15 [minimum composition] of this Law;
2. Having the articles of association, which meet the requirements of this Law;
3. Having an organizational structure, which meets the requirements of this Law;
4. Having a domicile, which meets the requirements of the laws and administrative regulations and which is determined in the articles of association; and
5. Having the capital contributions made by the members who meet the requirements of the articles of association.
**Article 11.** To establish a Farmers’ Professional Cooperative, a general meeting of establishment for all promoters shall be held. Those who become the members of this cooperative at their own free will shall be promoters.

The general meeting of establishment shall exercise the following powers:

1. To pass the articles of association of this cooperative. The articles of association shall be subject to unanimous consent of promoters;
2. To elect the director-general, directors, executive supervisor, or members of the board of supervisors; and
3. To deliberate other important matters.

**Article 12.** The articles of a Farmers’ Professional Cooperative shall cover:

1. Its name and address;
2. Business scope;
3. Membership qualifications, admission, withdrawal and removal;
4. Rights and obligations of a member;
5. Organizational structure and its formation, powers, term of office, and rules of procedures;
6. Form and amount of capital contribution of each member;
7. Financial management, distribution of surplus, and handling of losses;
8. Procedures for modifying the articles of association;
9. Causes of dissolution and liquidation methods;
10. Matters to be announced, and announcement [methods]; and
11. Other items necessary to be covered.

**Article 13.** To establish a Farmers’ Professional Cooperative, the applicant shall file an establishment application with the Administrative Department for Industry and Commerce and submit to it the following documents:

1. An establishment application;
2. The minutes of the general meeting of establishment, which are under the signatures or seals of all promoters;
3. The articles of association, which are under the signatures or seals of all promoters;
4. The appointment documents and identity certificates of the legal representative and directors;
5. A checklist of capital contributions, which is under the signatures or seals of the members who make capital contributions;
6. A certification for the use of domicile; and
7. Other documents as required by any law or administrative regulation.

The registration organ shall complete the relevant formalities within 20 days after it accepts a registration application and shall issue a business license to the qualified applicant.

To modify any of the statutory registration items of a Farmers’ Professional Cooperative, the applicant shall file a registration modification application.

The measures for the registration of Farmers’ Professional Cooperatives shall be formulated by the State Council. No fee may be charged for the registration of Farmers’ Professional Cooperatives.
Chapter III: Members

Article 14. Any citizen with civil capacity, or any enterprise, public institution or social organization, which is engaged in the production and business operations directly related to the business of a Farmers’ Professional Cooperative, can make use of the services rendered by this cooperative, recognize and abide by its articles of association and goes through the admission formalities as specified in its articles of association, may become a member of this cooperative. However, no entity administering the public affairs may join any Farmers’ Professional Cooperative.

A Farmers’ Professional Cooperative shall prepare a roster of members and submit it to the registration organ.

Article 15. Farmers of a Farmers’ Professional Cooperative shall constitute at least 80% of the total number of members.

If the total number of members is less than 20, one of these members may be an enterprise, public institution, or social organization. If the total number exceeds 20, no more than 5 percent may be enterprises, public institutions [or] social organizations.

Article 16. A member of a Farmers’ Professional Cooperative may be entitled to:

1. Attend the general meeting of members, have the voting right, election right, and right to be elected, and carry out democratic management over this cooperative under the articles of association;
2. Utilize the services rendered by this cooperative and the production and business operation facilities thereof;
3. Share the surplus according to the articles of association or resolution of the general meeting of members;
4. Consult the articles of association, roster of members, minutes of the general meeting of members or general meeting of the members’ representatives, resolution of the meeting of the council, resolution of the meeting of the board of supervisors, financial and accounting statements and account books;
5. Enjoy other rights as specified in the articles of association.

Article 17. The election and voting at the general meeting of members of a Farmers’ Professional Cooperative shall be conducted on the one-person-one-vote basis. Each member shall be entitled to the basic voting right of one vote.

The members, whose amount of capital contribution to or amount (volume) of transactions with this cooperative is relatively large, may enjoy additional voting rights under the articles of association. The total number of the additional voting rights of this cooperative shall not exceed 20 percent of the total number of basic voting rights of the members of this cooperative. When holding a general meeting of members, the members attending the meeting shall be informed of the members who have the additional voting rights and the number of the additional voting rights.

The articles of association may restrict the scope of exercise of the additional voting rights.

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208 享有下列权利 (xiǎngyǒu xiàliè quánlì, “to enjoy the following rights”). Use of the term 享有 suggests that the rights enjoyed arise by virtue of membership in the cooperative; the use of the term “may” in translation could be misleading.
Article 18. Each member of a Farmers’ Professional Cooperative shall perform the following obligations:

1. To execute the resolutions of the general meeting of members, the general meeting of the members’ representatives, and those [resolutions] of the council;
2. To make capital contributions under the articles of association;
3. To conduct transactions with this cooperative under the articles of association;
4. To bear losses under the articles of association; and
5. To assume other obligations as specified in the articles of association.

Article 19. Where a member of a Farmers’ Professional Cooperative requests for withdrawal from the cooperative, he shall make a request to the director general or to the council three (3) months prior to the end of a fiscal year. If an enterprise, public institution, or social organization which is a member requests for withdrawal, it shall make a request six (6) months prior to the end of a fiscal year. If the articles of association provide otherwise, the articles of association shall prevail. The membership qualifications of a member who withdraws from the cooperative shall be terminated as of the end of the fiscal year.

Article 20. The contracts, which have been concluded between a member and the Farmers’ Professional Cooperative prior to the termination of his (its) membership qualifications shall be executed continuously, unless it is otherwise provided for in the articles of association or its is otherwise agreed upon by him (it) and this cooperative.

Article 21. After the termination of the membership qualifications of a member, the Farmers’ Professional Cooperative shall, according to the form and time limit as provided for in the articles of association, refund to him (it) the amount of capital contributions and proportion of accumulation fund as recorded in his (its) account. The distributable surplus prior to the termination of the membership qualifications may be refunded to him (it) according to Paragraph 2 of Article 37 [distributable surplus] of this Law.

A member whose membership qualification is terminated shall, under the articles of association, share the losses and debts of this cooperative prior to termination of his (its) membership qualifications.

Chapter IV: Organizational Structure

Article 22. The general meeting of members of a Farmers’ Professional Cooperative shall be composed of all members. It is the power body of this cooperative and shall exercise the following powers:

1. To amend the articles of association;
2. To elect and remove the director general, directors, executive supervisor. Or members of the board of supervisors;
3. To make decisions on the disposal of important properties, investments to outsiders, guaranties to outsiders, and other matters important in the production and business operations;
4. To approve the annual business reports, surplus distribution plans and loss-handling plans;
5. To make resolutions about the merger, split-up, dissolution, and liquidation [of the cooperative];

209 Nowhere in Article 19 does the term 他 (“he”) arise; only the term 成员 (chéngyuán, “member” is used).
(6). To decide the number, qualifications, and term of office of the managers and professional technicians to be hired;
(7). To hear the report on the changes of members made by the director general or by the council; and
(8). Other powers as described in the articles of association.

Article 23. [Quorum, voting] Where a Farmers’ [Professional Cooperative] convenes a general meeting of members, the number of members attending the general meeting shall reach 2/3 of the total number of members or more.

An election or resolution made by the general meeting shall be subject to the consent of more than half of the total number of the voting rights of the members of this cooperative. A resolution about the revisions to the articles of association, or about the merger, split-up, or dissolution of the cooperative shall be subject to the consent of 2/3 or more of the total number of the voting rights of the members of this cooperative. If there is a higher requirement in the articles of association, the articles of association shall prevail.

Article 24. The general meeting of a Farmers’ Professional Cooperative shall be held at least once a year under the articles of association. An interim general meeting of members shall be convened within 20 days under any of the following circumstances:
(1). It is so proposed by 30 percent of the members;
(2). It is so proposed by the executive supervisor, or by the board of supervisors;
(3). Other circumstances as described in the articles of association.

Article 25. If there are more than 150 members in a Farmers’ Professional Cooperative, it may, under the articles of association, establish a general meeting of the members’ representatives, which may exercise partial or all the powers of the general meeting of members according to the articles of association.

Article 26. A Farmers’ Professional Cooperative shall be equipped with one director general and may set up a council. The director general shall be the legal representative of this cooperative.

A Farmers’ Professional Cooperative may be equipped with an executive supervisor or set up a board of supervisors. None of the director general, directors, managers, and accountants may concurrently assume the position of a supervisor.

The director general, directors, executive supervisor, or members of the board of supervisors shall be elected from the members of this cooperative by the general meeting of members. They shall exercise their powers according to this law and the articles of association and be responsible for the general meeting of members.

The voting at a meeting of the council or board of supervisors shall be conducted on the one-vote-one person basis.

Article 27. The general meeting of members, council, and board of supervisors of a Farmers’ Professional Cooperative shall make minutes according to the decisions on the matters discussed[;], the members, director general, or supervisors attending such meetings shall affix their signatures to the minutes.
Article 28. The director general or council of a Farmers’ Professional Cooperative may, according to the decision of the general meeting, hire a manager and accountants. The director general or a director may concurrently assume the position of manager. The manager may, according to the articles of association or the decision of the council, hire other personnel.

The manager shall, under the articles of association or according to the authorization of the director general or of the council, be responsible for the concrete production and business operations.

Article 29. Neither the director general, the directors, nor the managerial personnel of a Farmers’ Professional Cooperative may conduct any of the following acts:

1. To usurp, misappropriate, or illegally distribute any assets of this cooperative;
2. To lend the funds of this cooperative to others or provide a guaranty to others with any asset of this cooperative as collateral by violating the articles of association, or without approval of the general meeting;
3. To accept a commission for any transaction between others and this cooperative as his own; or
4. To commit any other act which impairs the economic benefits of this cooperative.

The income obtained by the director general, the directors, or the managerial personnel in violation of the provisions of the preceding paragraph shall be attributed to this cooperative. If any loss is caused to this cooperative, he shall be personally liable for the compensation.

Article 30. The director general, the directors, or the manager of a Farmers’ Professional Cooperative shall not concurrently act as the director general, a director, or the manager of any other Farmers’ Professional Cooperative of a similar business nature.

Article 31. A person who executes the relevant businesses of a Farmers’ Professional Cooperative shall not act as the director general, director, supervisor, manager, or accountant of this cooperative.

Chapter V: Financial Management

Article 32. The finance department of the State Council shall, in pursuance of the relevant laws and administrative regulations, formulate accounting rules for Farmers’ Professional Cooperatives. A Farmers’ Professional Cooperative shall comply with the accounting rules formulated by the finance department of the State Council.

Article 33. The director general or council of a Farmers’ Professional Cooperative shall, under the articles of association, organize the preparation of annual business report, surplus distribution plan, loss handling plan, and financial statement, and shall, 15 days prior to the general meeting of members, put them at the office so as to be ready for the consultation by the members.

Article 34. The transactions between a Farmers’ Professional Cooperative, and the transactions between it and non-members using its services shall be computed separately.

Article 35. A Farmers’ Professional Cooperative may, under the articles of association or the resolution of the general meeting of members, draw an accumulation fund from the surplus of the
current year. The accumulation fund shall be used to offset the losses, expand production and business operations, or be converted into the capital contribution of members.

The accumulation fund drawn each year shall, under the articles of association, be divided into the shares of each member.

**Article 36.** A Farmers’ Professional Cooperative shall set up an account for each member, which mainly records:

1. The capital contribution of this member;
2. The concrete share of accumulation fund of this member; and
3. The volume (amount) of transactions between this member and this cooperative.

**Article 37.** After offsetting the losses and drawing the accumulation fund, the surplus of the current year shall be the distributable surplus of a Farmers’ Professional Cooperative.

The distributable surplus shall be refunded or distributed to the members under the following provisions. The specific distribution methods shall be determined according to the articles of association or the resolution of the general meeting of members:

1. If it is refunded to the members on the basis of the volume (amount) between the members and this cooperative, the total amount of refund shall not be less than 60 percent of the distributable surplus;
2. The balance of the surplus after the refund as mentioned in the preceding paragraph shall be distributed to the members of this cooperative by taking into consideration the amount of capital contributions and the share of accumulation fund as recorded in the accounts of the members, as well as the members’ average share of the properties derived from the direct subsidies from the state treasury and others’ donations which this cooperative accepts.

**Article 38.** For a Farmers’ Professional Cooperative which has an executive supervisor or board of supervisors, the executive supervisor or board of supervisors shall be responsible for the internal audit over the financial affairs of this cooperative. The audit result shall be reported to the general meeting of members.

The general meeting of members may also entrust an [independent / outside] audit institution to audit the financial affairs of this cooperative.

**Chapter VI: Merger, Split-up, Dissolution, and Liquidation**

**Article 39.** For the merger of a Farmers’ Professional Cooperative, the creditors shall be notified of the merger resolution within ten (10) days after it is made. The credits and debts of all parties concerned to the merger shall be inherited by the organization which survives after the merger or which is newly established.

**Article 40.** For the split-up of a Farmers’ Professional Cooperative, its properties shall be divided correspondingly and the creditors shall be notified of the split-up resolution within ten (10) days after it is made. The organizations after the split-up shall bear joint and several liability for the debts incurred prior to the split-up, unless it is otherwise stipulated in the debt settlement agreements in writing reached between the Farmers’ Professional Cooperative and the creditors prior to the split-up.

**Article 41.** A Farmers’ Professional Cooperative shall dissolve for the following reasons:
(1). Any of the dissolution reasons as described in the articles of association occurs;
(2). The general meeting of members makes a resolution on dissolution;
(3). It is necessary to dissolve due to merger or split-up;
(4). Its business license is withdrawn or revoked.

If a Farmers’ Professional Cooperative dissolves for the reason as mentioned in Item (1) or Item (2) or Item (4) in the preceding paragraph, the general meeting of members shall, within fifteen (15) days after the occurrence of the said dissolution reason, choose some members to form a liquidation team to start the liquidation for dissolution. If no liquidation team is formed within the time limit, the members and creditors may file an application with the People’s Court for designating some members to form a liquidation team to conduct the liquidation. The People’s Court shall accept such an application and shall timely designate some members to form a liquidation team to conduct the liquidation.

**Article 42.** A liquidation team shall take over the Farmers’ Professional Cooperative from the day when it is formed. It shall be responsible for dealing with the pending businesses relating to the liquidation, settle the properties, credits and debts, distribute the remnant properties after settling the debts, participate in the lawsuit, arbitration or any other legal proceeding on behalf of the Farmers’ Professional Cooperative and go through deregistration formalities after the end of the liquidation.

**Article 43.** Within ten (10) days after a liquidation team is formed, the members and creditors of the Farmers’ Professional Cooperative shall be given a notice, and an announcement shall be made on a newspaper within sixty (60) days. A creditor shall, within thirty (30) days from the day when he (it) receives the notice, or within forty-five (45) days after the date of announcement if he (it) fails to receive a notice, declare his (its) credits to the liquidation team. If all members and creditors have received such a notice within the prescribed time limit, the liquidation team is not required to make an announcement.

When a creditor declares his (its) credits, [he] it shall state the matters relating to the credits and provide certification materials. The liquidation team shall register the credits.

During the credit declaration period, the liquidation team shall not settle the debts owing to any creditor.

**Article 44.** If a Farmers’ Professional Cooperative dissolves for the reason as mentioned in Paragraph 1 of Article 41, or when the People’s Court accepts a bankruptcy application, no member may go through the formalities for the withdrawal from this cooperative.

**Article 45.** The liquidation team shall be responsible for working out a liquidation plan, which includes the settlement of wages and social insurance premiums of the employees of the Farmers’ Professional Cooperative, the payments of outstanding taxes and other debts, and the distribution of the remnant properties. The liquidation plan shall be executed after it is adopted by the general meeting of members or confirmed by the People’s Court.

If the liquidation team finds that the properties of the Farmers’ Professional Cooperative are not enough to settle its debts, it shall apply to the People’s Court for bankruptcy.

**Article 46.** At the time of liquidation for the dissolution or bankruptcy of a Farmers’ Professional Cooperative, its properties derived from the direct subsidies from the state treasury
shall not be distributed to the members as the distributable remnant assets. The relevant disposal measures shall be formulated by the State Council.

**Article 47.** The members of the liquidation team shall be dutiful. They shall perform their liquidation obligations. If their intentional or gross negligence causes any loss to any of the members or creditors of the Farmers’ Professional Cooperative, they shall be liable for compensation.

**Article 48.** The bankruptcy of a Farmers’ Professional Cooperative shall be governed by the relevant provisions of the Enterprise Bankruptcy Law. However, for the remnant properties after settling the liquidation expenses and the debts of the cooperative, priority shall be given to the payment of the prices of transactions made between the Farmers’ Professional Cooperative and its farmer members prior to bankruptcy.

**Chapter VII: Supportive Policies**

**Article 49.** The state may authorize or arrange qualified Farmers’ Professional Cooperatives to undertake the construction projects supporting the development of agriculture and rural economy.

**Article 50.** The central and local finance shall separately arrange funds to support the Farmers’ Professional Cooperatives to carry out services relating to information, training, quality standards and certification of agricultural products, construction of the basic facilities of agricultural products, construction of the basic facilities of agricultural production, marketing, as well as technology popularization. The state shall give prior support to the Farmer’s Professional Cooperatives in the areas of ethnic minorities, remote areas and poverty-stricken areas, and to those producing important agricultural products that the state and the society badly need.

**Article 51.** The policy financial institutions of the state shall provide diversified forms of monetary support to the Farmers’ Professional Cooperatives. The concrete supportive policies shall be formulated by the State Council.

The state encourages the commercial financial institutions to provide monetary support to the Farmers’ Professional Cooperatives in various forms.

**Article 52.** A Farmers’ Professional Cooperative shall be entitled to the tax preferential treatments regarding the agricultural production, processing, circulation, services, and other economic activities relating to agriculture.

The State Council shall formulate other tax preferential policies on supporting the development of Farmers’ Professional Cooperatives.

**Chapter VIII: Legal Liabilities**

**Article 53.** Anyone who usurps, misappropriates, retains, illegally distributes, or encroaches on the legitimate property of any Farmers’ Professional Cooperative or of any of its members; illegally intervenes in the production and business operation of any Farmers’ Professional Cooperative or of any of its members; imposes any fee on any Farmers’ Professional Cooperative or on any of its members; forces any Farmers’ Professional Cooperative, or any of its members,
to accept any paid service, or; causes any economic loss to any Farmers’ Professional Cooperative, shall bear legal liabilities.

**Article 54.** Where any Farmers’ Professional Cooperative is registered by providing false registration materials or by any other fraudulent means, the registration organ shall order it to make a correction. If the circumstance is serious, the registration shall be revoked.

**Article 55.** If the financial statements and other materials provided to the relevant competent organ by a Farmers’ Professional Cooperative contains any false record or in which any important fact is concealed, the Farmers’ Professional Cooperative shall bear legal liabilities.

**Chapter IX: Supplementary Provisions**

**Article 56.** This Law shall come into force as of July 1, 2007.
BOOK REVIEW

Samuel P. King & Randall W. Roth, BROKEN TRUST: GREED, MISMANAGEMENT, AND POLITICAL MANIPULATION AT AMERICA’S LARGEST CHARITABLE TRUST (2006)

This book -- which recounts the saga of the eventually successful efforts to forcibly remove the trustees of the Bishop Estate -- is a highly readable though depressing account of the ways in which human greed can interfere with the accomplishment of laudable charitable purposes. The problems with trust governance began to draw public scrutiny in 1995, when the Estate announced that it would eliminate community education outreach programs that benefited more than 10,000 people annually, including young people and parents in outlying areas of the Islands, inhabited mainly by native Hawaiians. The trustees said there were financial constraints leading to the closure of the programs even though the net worth of the endowment had risen to at least $10 billion and they continued to pay each of the five of themselves annual salaries of more than $800,000.1

In addition, the trustees had established a governance system in which each one was “lead trustee” for a particular aspect of the Estate’s activities, with no general board oversight. The most disliked of the trustees was the trustee in charge of educational activities, Lokelani Lindsay, who actively interfered in the management of the school and at times tried to intimidate students and faculty members who were trying to express their frustration with her attempts to oust good teachers and administrators in favor of her hand-picked (and not particularly well-qualified) cronies. It was principally her actions that spurred thousands of Kamehameha staff, alumni, and other concerned citizens to march from the royal mausoleum, where Princess Bernice Pauahi Bishop was laid to rest, to Bishop Estate’s headquarters on May 15, 1997, to protest trustee mismanagement and abuse.

Then, on August 9, 1997, the Honolulu Star-Bulletin published an essay in its editorial section under the banner headline “Broken Trust.” The essay, written by five prominent Hawaiians began: “The community has lost faith in Bishop Estate trustees, in how they are chosen, how much they are paid, how they govern. The time has come to say ‘no more.’” One of the authors of the essay, Prof. Randal Roth of the University of Hawaii, William S. Richardson School of Law, went on to co-author, with Senior U.S. District Court judge Samuel King, this book of the same name.2

The Bishop Estate was created in 1884 by the bequest of Princess Bernice Pauahi Bishop, the last direct descendent of King Kamehameha I of the Kingdom of Hawaii. The book recounts in detail Princess Pauahi’s desire to advance the education of native Hawaiians, whose population had been decimated as a result of the introduction of foreign influences and diseases. She therefore was determined to set up a school for the education of such individuals, and under her will she

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1 The amount of compensation was based on a formula derived from state law (two percent of the Estate’s tax-free revenues plus commissions on some taxable profits plus comparisons with salaries paid to CEO’s of multi-billion dollar for-profit companies. The value of such compensation to the trustees is evident from the book’s description of the joy expressed by Lokelani Lindsay when she received word of her appointment.

2 The book has an extensive website, with many of the legal documents relevant to the two cases (see note 3) and their outcomes. It is available at http://www.brokentrustbook.com/index.html, which lists 48 legal issues raised by the Bishop Estate imbroglio.
directed that 434,000 acres of royal lands be set aside for in a charitable trust to be used for the benefit of the Kamehameha School for native Hawaiians.³

For many years the trust operated appropriately, but it began to fall under the influence of powerful politicians and corrupt members of the judiciary. The Supreme Court of Hawaii had assumed the power to select the trustees,⁴ which carried with it the duty to carry out that responsibility with due care and the goal of benefiting the trust. That this did not occur is evident from the many conflicts of interest between the justices and the trustees, including the appointment of the Chief Justice as a trustee! Indeed, a few months after the publication of the Broken Trust essay, the justices stopped naming trustees and the power to do so is now vested in a single probate judge.

Publication of the essay led the governor of Hawaii to order the attorney general to commence an investigation, and she initiated both a civil inquiry and a criminal one. In addition, the Federal Internal Revenue Service (IRS) launched an investigation into the issue of excessive compensation, use of charitable funds for personal purposes, conflicts of interest and self-dealing, and impermissible lobbying. The IRS threatened to revoke the trust’s tax exempt status unless the sitting trustees⁵ were removed because it believed the Estate’s assets to be at risk.

The state investigations found the following:

1. repeated payment of excessive compensation;
2. concentration of huge sums in an international investment portfolio instead of spending the money to improve the school, add campuses, etc.;
3. trustee conflicts of interest including personal investments made in investments held by the Estate and use of nearly $1 million of Estate assets to lobby against legislation that would have limited the trustees compensation;⁶
4. use of Estate employees to do personal work; and
5. micromanagement of the educational aspects of the Estate.

One particularly egregious conflict of interest uncovered was when a trustee “recused” himself as a Bishop Estate trustee just long enough to negotiate on behalf of a buyer for the purchase of Bishop Estate land. The state proceedings were settled in 2000, when the Estate agreed to pay

³ There was a dispute about whether a stipulation that native Hawaiians will be given preference in admissions is lawful. The terms of Princess Pauahi’s will do not require that only native Hawaiians be admitted to the school, but the school had limited admissions to such persons. See Doe v. Kamehameha Schools, http://www.ca9.uscourts.gov/ca9/newopinions.nsf/A294DE38BC83F75B88257051005488B8/$file/0415044.pdf?openelement. The lawsuit was settled in May 2007. See Kamehameha Schools website press release, available at www.ksbe.edu.
⁴ According to Randall Roth, when the will was written justices of the Supreme Court of the Kingdom of Hawaii had original jurisdiction over probate matters. “When Hawaii became first a republic, then a territory, and then a state, the Supreme Court ceased to have original jurisdiction over probate matters, but the justices continued to select Bishop Estate trustees, now in an unofficial ‘individual capacity.’”
⁵ It should be noted that one of the trustees, Oz Stender, whom King and Roth call the “accidental” trustee (he was appointed as a compromise candidate), tried valiantly to persuade the other trustees to act more appropriately. Unlike the others, Stender had actual experience as a trustee of a charitable trust, and the book recounts in detail his inability to change things due to the intransigence of the others.
⁶ This was the Federal Intermediate Sanctions legislation, which eventually became § 4958 of the Internal Revenue Code.
$25 million to the State of Hawaii. But even then the trustees did not suffer, for this was all covered by insurance.\(^7\)

The Federal investigation, which had threatened the Estate with loss of tax exempt status as a charity, was also settled. The Estate agreed to pay $9 million, again covered by insurance.\(^8\) Under the closing agreement, which is available on the website of the School (www.ksbe.edu), there was a restructuring of the institution and its oversight. For example, it was agreed that the management of the School be placed in the hands of a Chief Executive Officer\(^9\) and that the trustees exercise only normal policy making and other duties typical of such bodies. Various other conditions were specified, including that business meetings must be documented in writing, that a comprehensive business and investment strategy be developed, and that annual reports be prepared and filed in a timely fashion, with the attorney general as well as the IRS.

The book received three awards in 2007 from the Hawaii Book Publishers Association, including “Book of the Year.” It is a valuable book for all who are interested in the ways in which charitable intentions of donors can be perverted by corruption and mismanagement by those who owe fiduciary duties to the beneficiaries. The familiar refrain of the book – that courts charged with oversight of the largest charitable trusts can fail in performing their duties -- is also one that needs to be borne in mind by all who seek to develop a better regulatory framework for the not-for-profit sector. Randall Roth has suggested, for example, that the Bishop Estate should be transformed into a charitable corporation, which would allow for greater oversight by the attorney general. Nevertheless, there are many stories of bad board oversight of such entities as well. Perhaps there is no panacea – just a need for continuing vigilance and the willingness of concerned community members to speak out when wrongdoing is unearthed, as they did in Hawaii.

Leon Irish

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\(^8\) See Stephen C. Greene, Bishop Estate to Pay IR $9 Million but Retain its Tax-Exempt Status, Cron. Philanthropy, Jan. 13, 2000, at 50. The insurance policy, paid for by the Estate, also reimbursed the trustees for their legal expenses in defending their wrongdoing – some $4 million!

\(^9\) This was also mandated by the Hawaii Probate Court.
BOOK REVIEW

Kerry O’Halloran, CHARITY LAW AND SOCIAL INCLUSION (Routledge 2007)

This important and effective book is written with a very simple aim – looking into the “legal framework regulating the philanthropic environment [so as to] facilitate a more effective contribution of charitable resources for the alleviation of poverty and the encouragement of social inclusion.” The author wants “existing obstructions” to be removed in order to accomplish this goal, and he takes a comparative perspective to show ways in which a variety of common law jurisdictions have addressed (well or not so well) the issues he raises. Dr. O’Halloran is Adjunct Professor at the Centre of Philanthropy and Nonprofit Studies at Queensland University of Technology in Australia. He addresses the issues at a time when the countries he has studied have recently completed or are in the process of charity law reform efforts.

The book is divided into four parts. The first of these examines the core concepts of charity and fundamental dilemmas of charity and the law, including the “gift relationship.” The second looks at the 400 year old common law legacy of charity law, which still today makes a significant contribution to the definitions of charity in the six jurisdictions studied. The third develops a framework for the jurisdiction specific analysis and the book’s conclusions both according to international human rights norms and the legal benchmarks of an appropriate system of charity law. The final chapter sets out conclusions, focusing on the principal areas of “sensitivity in the relationship between the charity law framework and social inclusion.”

What are some of the key issues examined?

1. The extent to which it is useful/necessary to have “an independent forum for adjusting the law” like the Charity Commission for England and Wales and the new Charities Commission in New Zealand. Dr. O’Halloran clearly feels rather strongly that this is a good way to develop the law, and in another forum this reviewer has agreed. On the other hand, it should be noted that the tendency has been for the Internal Revenue Service (IRS) in the United States and the Canada Revenue Agency (CRA) to address various aspects of poverty alleviation and community development in public pronouncements indicating that such activities are charitable. These are, of course, statutory interpretations of revenue laws, but they have necessarily addressed important areas of social inclusion.

Of course, one of the principal constraints faced by the charitable sector in countries without a single entity that determines charitable status is the overlapping of jurisdictional regimes – in both Canada and the United States, for example, charities can register as corporate entities at the state or provincial level, while needing to apply for tax exempt status at the national level (and in some states in the US). There are also laws regulating fund-raising, which differ from local jurisdiction to local jurisdiction. Further, as Dr. O’Halloran notes, the fact that the Charity Commission can itself apply cy pres to

1 The author of this review must disclose at the outset that she is engaged with the book’s author and Prof. Myles McGregor-Lowndes of the Centre of Philanthropy and Nonprofit Studies, Queensland University of Technology, in preparing a companion volume entitled CHARITY LAW AND SOCIAL POLICY.
2 One is also proposed for Northern Ireland.
3 See Robert Kushen, Leon E. Irish & Karla W. Simon, GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS §3.2 B.
charities is enormously useful and avoids the delays and expense occasioned by requiring court supervision of such changes.

In addition, it is clear that the role of the Charity Commission in broadening the definition of “public benefit” is a salutary one. Both Dr. O’Halloran and Prof. McGregor-Lowndes, who wrote the chapter on Australia, have deplored the revenue agency focused regulation of the sector in so many of the common law countries.

2. The extent to which charities can address causes rather than effects of poverty. Historically, this has been a problem, given that charity as defined in the Preamble to the 1601 Statute of Charitable Uses was principally aimed at effects. Dr. O’Halloran points out, however, that as times have changed so has this focus on effects. One can see it, for example, in the health field and in overseas aid – in both these areas charities aiming to alleviate disease and attend to development rather than mere disaster relief have been given charity status.

3. Whether limiting the definition of the “public” to exclude clan-based groups has the effect of placing unnecessary limits on the charitable nature of trusts for the benefit of indigenous peoples. Dr. O’Halloran points to the differences between the rule in New Zealand, which contrasts rather sharply with the CRA policy, to wit:

An organization cannot qualify for registration with purposes established to assist Aboriginal Peoples of Canada if it further restricts its beneficiaries to a limited class of persons, also known as a ‘class within a class.’ For example, limiting beneficiaries to a particular nation that excludes members of other nations does not meet the necessary element of public benefit.

Obviously such limitations can be a serious problem in the case of indigenous peoples, and this is troubling matter – it is clear that many of the members of such groups need to have charitable assets focused on their inclusion in the larger polity.

4. The extent to which limits on political activities of charities impede their ability to address the needs of the socially marginalized. Dr. O’Halloran suggests that such restrictions exist in all common law jurisdictions, but not in any civil law countries. While the latter is not strictly true, the point about the common law countries is generally valid. But there are important distinctions among the common law countries studied. In England and Wales and Ireland, for example, the restrictions are related to the definition of what is a charity and having charitable objects or purposes will preclude registration with the Commission. This is also true in New Zealand, where an organization whose primary purpose is political will not be registered. A similar result would apply if the purposes were political and an organization sought charity status under the tax laws in Australia, Canada or the United States.

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4 He cites an article by Perri 6 and Anita Randon entitled Liberty, Charity and Politics: Non-profit Law and Freedom of Speech, which was published in 1995. Subsequent research has shown that it is not atypical of some civil law jurisdictions to limit the political activities of charitable organizations. See teaching materials for PKU course, available at http://www.iccsl.org/pubs/Bei Da Course Reader.pdf, page 186, describing the restrictions in Germany and France.

In these latter jurisdictions, the issue is more clearly one of tax policy. In other words, it comes up in the context of whether the tax laws should “subsidize” political activities through an income tax deduction or credit. In general these jurisdictions have decided not to allow such subsidies on the theory that using the tax system to support such organizations does not create a level playing field. Nevertheless, American and Canadian case law have both developed a rule that makes it easy for charities to establish “sister” organizations that do engage in considerable political campaigning or lobbying. In addition, both jurisdictions have rules about the extent to which lobbying or campaigning is permissible, which allow most organizations as much latitude as they need.

5. The extent to which the law or public policy encourages public-private partnerships to advance issues of social inclusion. As Dr. O’Halloran suggests, all the common law jurisdictions studied, with the notable exception of the United States, have agreements between the not-for-profit sector and the State outlining a relationship that deals with how these interactions are to take place. In the United States, of course, the overwhelming tendency of government has been to contract out many functions related to poverty relief and social and economic development of marginalized populations, and it is thus questionable whether such an agreement is necessary.

6. Ways in which the charity law encourages support for international aid and human rights, and the necessary impact of anti-terrorism measures on such concerns. Although Dr. O’Halloran notes that charity law reviews in the various common law countries began “with much optimism,” he concludes that such reform efforts now “show every sign of succumbing to an international security imperative.” The balancing of the interests in this regard clearly has not yet concluded, but it is hard to disagree that the current environment does not favor what he calls “more innovative social inclusion strategies” across borders.

There is, however, another significant threat to charities that engage in the international arena and that is that many of them run the risk of becoming agents of the foreign policies of the government bodies that fund them. For those charities that receive all or most of their funding from government aid agencies such as the Department for International Development (DfID – UK), the Australian Agency for International Development (AusAID), or the United States Agency for International Development (USAID) the question of whether they are truly independent or non-governmental is a real one. Combining an environment that favors contracting to private entities with increased government oversight of charitable activities in foreign countries can create an environment in which the innovation referred to in the previous paragraph goes missing.

7. Issues about legal form. Although England and Wales have clung tenaciously to the trust form for charities, the choice of that legal form has largely been abandoned in other jurisdictions, such as Australia, Canada, New Zealand, and the United States, for a

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7 There are absolute prohibitions on election or political party related activities, but an extremely interesting United States case outlines a road map for a traditional charity to engage in such activities by forming three related organizations. See Branch Ministries v. Rossotti, 211 F. 3d 137 (D.C. Cir. 2000).
8 For an interesting discussion of these and other issues about what influences charity, see Nick Seddon, Who Cares? How state funding and political activism can change charity (CIVITAS UK 2007)
variety of historical reasons. In England and Wales and Ireland statutory forms are being or have been created that will make it easier to incorporate a charity. As the accompanying Book Review points out, however, one of the current issues in the United States (resulting from the famous Bishop Estate controversy) is the extent to which large trusts should be allowed to exist without a more corporate form of governance (with a CEO rather than). Clearly allowing flexibility is a good idea, but it must carry with it the notion that any form chosen will have adequate governance by its board and oversight by the appropriate body (Charity Commission or court).

This book is too rich to adequately describe in a review of a few short pages. It needs to be studied, pondered over, and discussed by serious scholars, teachers, and practitioners in this field. As charity law reviews in the various jurisdictions proceed, one can only hope that more lawyers will carefully explore the issues raised – as well as the comparative perspective taken – and seek to convene a forum for a broader and informed discussion.

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