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Defending Civil Society

*Report on Laws and Regulations
Governing Civil Society Organizations
in
El Salvador*

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*Statements and views expressed in this report are those of the author and do not necessarily reflect that of the World Movement for Democracy, the National Endowment for Democracy, or the International Center for Not-for-Profit Law.

INTRODUCTION

Salvadoran civil society exhibits a lower level of participation in organizations relative to other societies in the region.¹ Aside from churches and other groups whose establishment do not require legal formalities, the social capital of people whose self image traditionally has been informed by solidarity and cooperation has not translated into active, organized, and formal social participation. This is due in part to the country's recent history, and particularly the restrictions and even oppression placed upon organizations during the armed conflict of the 1980s. Nonetheless, those years are the past, and organized civil society is gradually embarking on a process of revitalization and expansion. This study examines the legal framework governing the establishment and operations of civil society organizations (CSOs) with a focus on assessing the barriers that continue to hamper its healthy development while suggesting courses of action to address them.

El Salvador is a unitary state that follows the civil law tradition in which the main source of law is written or codified. The Constitution, as the supreme law of the land, regulates the rights and duties of all of the country's inhabitants. It envisages the rights to freedom of expression and thought,² as well as freedom of association.³ The latter is limited to peaceful and unarmed association for any licit purpose (Article 7). Secondary legislation regulates the scope of the rights articulated in the Constitution.

CSOs are mainly governed by the 1996 Law for Not-for-Profit Associations and Foundations [Ley de Asociaciones y Fundaciones sin Fines de Lucro – LAFSFL],⁴ which regulates their establishment, operations, and dissolution. This law mainly focuses on the requirements for forming such entities. According to the Constitution and the Municipal Code,⁵ municipalities are vested with the authority to approve the formation of community associations by ordinance, or general municipal rules governing matters of local interest.⁶ While the Municipal Code sets out the general rules applicable to associations, specific regulations are set out in the ordinances issued by each of the country's 262 municipalities.⁷

This report examines the rules governing: i) the establishment and registration of new CSOs; ii) State supervision and law enforcement; and iii) CSO activities. The report also offers a number of conclusions about challenges facing organized civil society and suggests appropriate strategic responses to them.

¹ "As far as local committees or boards, associations or professional groups, no more than 10% of Salvadorans report being organized and far fewer state that they participate actively in such organizations." Perfil de Gobernabilidad de El Salvador. Centro de Iniciativas de Cooperación al Desarrollo (CICODE), Alcalá de Henares: Universidad de Alcalá, 2005. According to this study, Salvadoran civil society is deeply marked by its association with the leftist revolutionary initiatives of the 1980s, and its current state is strongly related to the history of political choices.

² Constitution, Article 6: Everyone has the right to freely express and disseminate their thoughts as long as they do not subvert the public order or harm the morals, honor or private life of others. The enjoyment of this right shall not be subject to any prior review, censure or deterrent; but those who use it to violate the law shall be held liable for the crime they commit.

³ Constitution, Article 7: The inhabitants of El Salvador have the right to associate freely and to assemble peacefully and without arms for any licit objective.

⁴ Ley de Asociaciones y Fundaciones sin Fines de Lucro. Available at: <http://www.csj.gob.sv/leyes.nsf/ed400a03431a688906256a84005aec75/f85b3b814eb5d1be06256d02005a3c10?OpenDocument>.

⁵ Article 204 (5) of the Constitution of the Republic and Articles 3, 4, 32, and 118 of the Municipal Code.

⁶ Some ordinances also refer to community associations as Community Development Associations, which are frequently referred to as ADESCOS.

⁷ The Judicial Documentation Center of the Supreme Court of Justice has registered a total of 106 ordinances on community associations. They are available at: www.jurisprudencia.gob.sv. Last searched: October 17, 2010.

ESTABLISHMENT & REGISTRATION

Categories of Organizations

The constitutional right to freedom of association is not contingent upon formal recognition of an entity and, in practice, is often expressed in informal associations. Examples range from neighborhood boards to informal networks of several CSOs. This report, however, focuses on CSOs recognized under Salvadoran law and therefore subject to direct State regulation.

Two systems govern the establishment and operations of CSOs in El Salvador. The first is the National Law of Not-for-Profit Associations and Foundations (LAFSFL by its Spanish acronym). The second operates at the local level and is regulated in the Municipal Code and municipal ordinances issued by each of the country's 262 municipalities.

The LAFSFL addresses two categories of CSOs (Article 1), which may be domestic or foreign in either case (Article 44). The first category of CSOs is *association*, a private legal person formed by two or more natural or legal persons for the ongoing pursuit of any legal not-for-profit activity (LAFSFL, Articles 9 and 11). These entities are formally established by means of a public instrument and are governed by internal by-laws. Their members may be natural or legal persons, whether national or foreign, although the latter must reside in the country (LAFSFL, Article 12). Association members or affiliates may organize themselves into different roles (LAFSFL, Articles 15 and 28(6)). Associations are allowed to incorporate new members (LAFSFL, Article 14).

Under the LAFSFL, federations and confederations, which are made up of legal persons, are also recognized associations (Article 17). At present, the Ministry of Government reports only 15 registered federations and confederations.⁸

The second category of CSOs under the LAFSFL is *foundation*, which is established by one or more natural or legal persons for the administration of capital intended for purposes of public service (LAFSFL, Article 18). A foundation may be made up of nationals or foreigners. The establishment of a foundation is formally recognized in a public instrument or will (Article 19). Foundations are governed by their internal by-laws (LAFSFL, Article 23) and an endowment and operating funds are required for their establishment (LAFSFL, Article 22). They are not member organizations, which means that they comprise only the founders of the institution and may not admit new members. For both associations and foundations, legal personality is obtained by registering with the Ministry of Government (LAFSFL, Article 26).

The Municipal Code (MC) provides for two categories of CSOs at the local level. The first are *municipal associations*, which may include one or more municipalities together with civil society and the private sector (MC, Article 12). Legal personality is conferred by the municipality(ies) in the articles of incorporation. This report will not examine these associations as they are mixed public-private entities.

The second category is *community association* formed by local residents who come together to address their needs (MC, Article 118). Community associations must have at least 25 members (MC, Article 120). A decision by a Special General Assembly is required for their establishment and the relevant municipal council confers legal personality (MC, Article 119).

⁸ Field research at the Registry of Not-for-Profit Associations and Foundations, October 2010.

Churches, which do not fall under the sphere of application of the LAFSFL (LAFSFL, Article 10) are governed by Title 30 of the Civil Code. Churches do register, however, with the Ministry of Government's Registry of Not-for-Profit Associations and Foundations (RAF by its Spanish acronym). They are the second most prevalent type of association in the country after associations. Similarly, *trade unions*, which are regulated under the Labor Code, do not fall under the CSO legal regime examined in this report.

Purposes of CSOs & Restrictions

The Constitution provides that the inhabitants of El Salvador may associate peacefully and without arms for any licit purpose (Constitution, Article 7). Constitutional jurisprudence has established that "licit purpose" must be understood as "a purpose that is not contrary to constitutional aims and values or other legally protected interests."⁹ The LAFSFL stipulates that associations are established to carry out "any legal activity" (LAFSFL, Article 11), and that foundations must use their assets for "purposes of public interest" (LAFSFL, Article 18). In both cases, specific purposes should be outlined in the by-laws (LAFSFL, Article 28).

LAFSFL refers to associations and foundations as "not-for-profit and apolitical nature" (LAFSFL, Article 28(2)). Operations of foreign entities shall be approved as long as their purposes are licit, but they are explicitly prohibited from participating in political activities (LAFSFL, Articles 44 and 47). In both cases, Salvadoran constitutional jurisprudence has upheld the legal restriction on freedom of association when a CSO seeks "active and ongoing participation in the political life of the State," inasmuch as such purposes correspond to political parties.¹⁰ CSOs may not, therefore, have the same purposes as political parties or operate as such.

Community associations are not subject to restrictions other than that their purpose must be licit and "they may participate in the social, economic, cultural, religious, civic, educational and any other realms, as long as they are legal and benefit the community" (MC, Article 118). Given its ambiguity, the interpretation of "*benefit*" to the community could cause arbitrary decisions that impede the formation of community associations or restrict their operations. To date, however, there are no known cases of arbitrary application of this precept.

CSOs in Statistics

In principle, the information in the RAF is public (LAFSFL, Article 59). In order to access information in the registry,¹¹ however, the requester must identify him or herself, notarize the signature on the request, and even justify the use of the information. Moreover, a printing fee applied to the requested information is set at a higher price than what is considered typical. The requirements for obtaining the information are not clearly stated in the law.

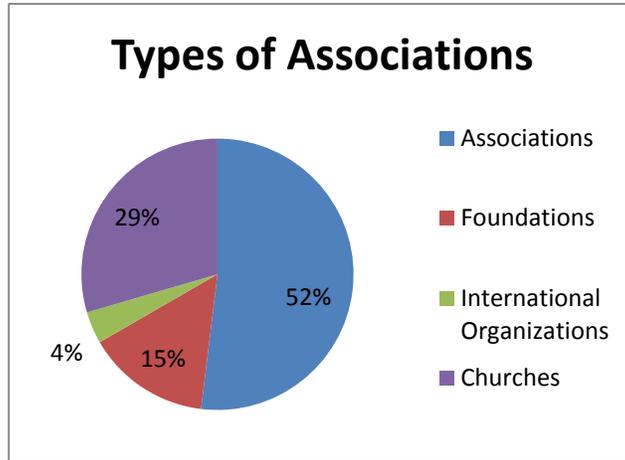
As of October 15, 2010, the registry included 2,031 associations, 576 foundations, 149 international entities, and 1,155 churches, as shown in Figure 1.

⁹ Ruling on unconstitutionality Number 8-97/15-97 Ac, of March 23, 2001.

¹⁰ Ibid.

¹¹ In general, information in the registry includes statistical information on the type of associations, its organs, and its members. See LAFSFL Articles 5 and 17.

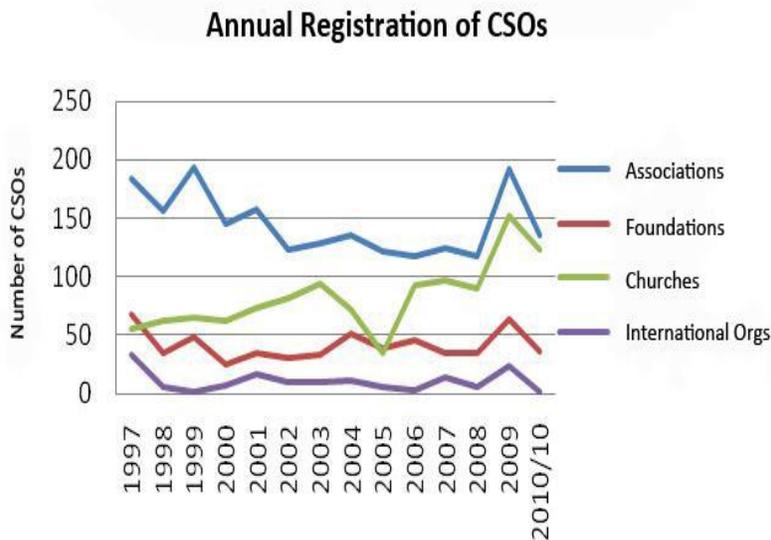
Figure 1



Source: Prepared by the author based on data obtained from the Registry of Associations and Foundations of the Ministry of Government.

As observed, association is the main type of organization in El Salvador, followed by churches. Figure 2 shows annual trends in the establishment of these categories of CSOs. Interestingly, the total number of registrations for all associative categories sharply rose during 2009, the year that the current administration took office.¹² However, there is insufficient information to explain the reason for this increase.

Figure 2



Source: Prepared by the author based on data obtained from the Registry of Associations and Foundations of the Ministry of Government.

¹² Mauricio Funes, the successful presidential candidate for the FMLN party, took office on June 1, 2009, following four consecutive presidential terms of the ARENA party.

No comparable registration data is available for community associations mainly because there is no single registry.

Tax Benefits

Subject to prior certification by the General Directorate of Internal Taxes under the Ministry of the Treasury, associations and foundations can be declared as public interest entities, and therefore are exempt from paying income taxes. This benefit, which virtually all CSOs request, is regulated by the LAFSFL (Articles 6 and 7) and the Income Tax Law (Article 6). The requirements for obtaining this status are set out in the Regulation of the Income Tax Law (Article 7). However, in practice, the process to obtain this status is long and bureaucratic. Furthermore, a designation as a public interest entity does not exempt the CSO from complying with other formal obligations such as the submission of reports and other documentation requested by the tax authority.

The authorization is granted for one year and may be renewed automatically absent a notice of revocation by the tax authority. The public interest designation may be revoked at any time should the grounds on which it was granted cease to exist (LAFSFL, Article 7). Neither the LAFSFL nor the tax law outline a specific procedure for revocation of eligibility and there are no known cases of revocation.

Not-for-profit corporations and foundations established for purposes of social assistance, the promotion of road construction, charity, education, and instruction, and cultural, scientific, literary, artistic, political, trade associations, and unions, professional, and sports activities are eligible to receive this certification as long as their income and assets are used solely to fulfill the institution's purpose and are not distributed among its members (Income Tax Law, Article 6).

The law does not establish explicit criteria for certifying public interest status, although it can be inferred that the process includes an examination of the supporting documentation provided with the request. Nonetheless, the law does not specify the criteria that the tax authority will use to certify that any such requirements have been met. This ambiguity leaves room for arbitrary interpretations. The regulations provide for no procedure or administrative remedy should a request for certification as a public interest entity be denied, which leaves no other option than protracted and costly legal processes.

Barriers to Entry

The law does not prohibit unregistered groups from forming and operating, although they must also have licit aims. The Criminal Code establishes sanctions for associations of persons established for the pursuit of an illicit aim.¹³

The LAFSFL also provides for the existence of unregistered associations, and it stipulates that all actions preceding the obtention of recognized legal personality will be valid (Article 67). This provision explicitly assigns legal value to the actions of associations that are not yet registered but later request government recognition.

Registration

The requirements and procedures for registering associations and foundations are provided in the LAFSFL.

¹³ Criminal Code, Art. 345: "Any group, association or organization, whether temporary or permanent, of two or more people with some level of organization, whose objective or one of whose objectives is to commit crimes, as well as any others that carry out violent acts or use violent means for incoming, current or outgoing members, shall be considered illegal."

The Ministry of Government provides detailed information on its web portal (<http://elsalvador.e-regulations.org/>) concerning the procedures for establishing an association or foundation.

In practice, however, the Ministry of Government requires more information than what is outlined under the law. For example, the RAF exceeds its powers by carrying out illustrative consultations to improve its service provision (Article 65 LAFSFL). Although this is not required, it consists of consulting public entities concerning the aims of CSOs related to that particular public entity. While there is no regulation concerning what would happen if the entity consulted should object to the association's aims, the CSOs in question are, in practice, offered an opportunity to modify their objectives or be confronted with the prospect of having their registration denied. Another example is that the Registry may demand further information if the aims set out in the by-laws are too general or lack specificity. The Registry requires information that describes the origin, allocation, and use of funds for the projects implemented or to be implemented. The establishment of requirements beyond those provided in the law is clearly arbitrary, and it creates a situation of legal uncertainty.¹⁴

There are a number of expenses associated with the registration and legalization of CSOs. First, filing the documentation costs US \$34.39 (LAFSFL, Article 69). Moreover, other government institutions aside from the RAF are involved in finalizing the incorporation of CSOs in areas such as taxes and book-keeping. In practice, the cost of procedures before government entities, which are established by a fee scale, must not exceed US \$250. Other costs associated with the registration procedure are fees for professional services, which are not assessed, but rather are negotiated directly with the individual notary or accountant. Therefore, establishing a CSO may cost as high as approximately US \$1,000 in total.

There are three stages to the process of incorporation for CSOs operating under the LAFSFL: *pre-registration, registration, and post-registration*.

In the pre-registration stage, members or founders sign the articles of incorporation of an association or foundation before a notary public (although this may be done through a last will and testament in the case of a foundation). They also create by-laws and elect a board of directors or governing board.

Then, with the assistance of an accountant, they set up the initial balance and a book-keeping system for the association or foundation. If the CSO's assets are less than US \$1,142.86, they will only require an income and expenditures ledger. However, if the assets are US \$1,142.86 or more, the association or foundation must have a general journal or ledger and a financial statements record. Both, associations and foundations must keep a record of membership and the minutes of the General Assembly.¹⁵

In the registration stage, a written request to be entered into the Registry is submitted for the consideration of the General Registry Office [Dirección General del Registro]. It must be accompanied by three copies of the public instrument recording the articles of incorporation and by-laws, the election of the first board of directors or governing board, and other documentation (LAFSFL, Article 65).

Should the Registry find that the request contains information that is inadequate, incomplete, formally flawed or in violation of the law, it notifies the organization no more than 90 working days from the date

¹⁴ The forms can be obtained free of charge on the Internet, but there is a fee of US \$2.29 if they are physically delivered. These practices must therefore be standardized.

¹⁵ Note: An association has membership at a General Assembly, but a foundation is not a membership-based organization by definition.

the documentation was received, specifying the errors or violations and advising the organization to correct them. This time period is not always adhered to in practice.

The organization will have up to 45 working days to correct any errors or violations, counted from the date the notification was received from the Registry. In the case of an association, once all of the objections have been corrected, or if none were received, the Ministry of Government shall, within 60 working days, issue an Executive Agreement recognizing its legal personality or juridical existence, approving its by-laws, remitting it for publication in the Official Gazette and ordering the CSO's registration within 60 working days. If no resolution has been issued by the time the 60-day period has elapsed, the entity's by-laws are automatically approved. The same procedure applies to foundations, but formal approval is granted by means of an Executive Decree signed by the President of the Republic (LAFSFL, Articles 64 and 65(5) and (6)). In practice, the registration of a CSO is not finalized until the respective Agreement or Executive Decree has been published.

Once registered, the CSO must comply with its official tax obligations. Under the Tax Code (Articles 23(a), 86, 87 and 88) and its regulation (Article 24) taxpayers must register with the Ministry of the Treasury and request registration of a Tax Identification Number (NIT by its Spanish acronym) and its Value Added Tax number (IVA). Where applicable, it must also request the tax authorities to designate it as a public interest entity for the purposes of obtaining income tax exemption status.

Community associations wishing to be registered must meet the requirements set out in the Municipal Code as well as those established in the relevant ordinance. The Municipal Code establishes the general framework for the registration procedure (Articles 120 and 121). Pursuant to this law, a community association must submit its request for registration and recognition of legal personality to the respective Municipal Council. The request must be accompanied by the minutes of the Special General Assembly during which the members approved its formation, the by-laws, and a list of members.

The Council must issue a decision approving or rejecting the registration of the community association no later than 15 days following submission of the request. The Council shall verify that the by-laws submitted include the provisions required by the Municipal Code and that they do not contravene any law or ordinance. In case of an objection, the requesters will be notified and will be given a period of 15 days counted from the date of the notification in which to correct it. Once any objections have been corrected, the Council must issue a decision within 15 days counted from the date of the new request.

Should the Council fail to issue a decision within the time frame indicated above, the association's legal personality will be automatically recognized, as mandated by law, with its by-laws approved and registered accordingly. The Council will be obligated to enter the association's registration and immediately order the publication of the approval and the by-laws in the Official Gazette. This compulsory registration is not always observed and some municipalities delay registrations. In practice, the registration of community associations with the municipality is less than systematic or standardized.

Incorporation of Foreign CSOs

The LAFSL also governs the registration and incorporation of foreign CSOs and it grants them the same rights as Salvadoran CSOs (Article 44). This law outlines the requirements for foreign entities to register and operate in El Salvador (Article 50 and 51). A foreign CSO must submit documentation to the RAF verifying:

- That the entity has been legally established under the laws of the country of origin;
- That, according to the laws of that country and the entity's by-laws, it may decide to establish branches, subsidiaries, agencies or offices in foreign countries;

- That the decision to operate in El Salvador has been duly adopted;
- That it pledges to have at least one representative residing permanently in El Salvador, with broad and sufficient powers to perform all actions that will produce results in the national territory;
- That the entity is liable in and outside of the country for the acts and contracts entered into in the Republic; and
- The list of foreign staff that will reside in the country.

According to the LAFSFL, the registration procedure must include an assessment as to whether or not the by-laws of the foreign entity are contrary to “morals, public order, and good customs” (Article 50).¹⁶ In 2001, the Constitutional Chamber of the Supreme Court of Justice ruled that similar provisions were unconstitutional because they used ambiguous legal concepts—morals, public order, and good customs—since limitations on the basic right of association constitute an unacceptable regulation contrary to the essential content of this right and can lead to arbitrary decisions on the part of the acting official.¹⁷

Other Restrictions

The LAFSFL provides no administrative remedy by which associations or foundations may contest a denial of their registration request by the RAF. The constitutional jurisprudence has observed that even the Ministry of Government’s power to issue such a denial is confusing at the very least.¹⁸ The lack of a clear procedure to contest government decisions unquestionably restricts the enjoyment of the right of association because it leaves no choice but to resort to less expeditious and costlier legal remedies.

An explicit regulation on the power of the registration authority to deny a CSO’s registration is therefore necessary. Adequate controls on the exercise of this power must be established by setting out strict grounds for denial of such registration and providing administrative remedies to defend the right of association. The recent ruling by the Constitutional Chamber of the Supreme Court of Justice, despite having limited effect on the case at hand, censures the LAFSFL’s lack of procedures to appeal the decisions taken by the authorities.¹⁹

GOVERNMENT OVERSIGHT & ENFORCEMENT

Regulatory Authorities

The Ministry of Government, through its General Registry Office [Dirección General del Registro] regulates and oversees the establishment and operations of CSOs subject to the LAFSFL regime. The municipalities regulate the establishment and operations of local CSOs. The Treasury Ministry is responsible for tax obligations.

In addition, the Treasury Ministry and the General Accounting Office [Corte de Cuentas de la República], which supervises the Public Treasury, have the authority to oversee the funds of CSOs that receive State subsidies (LAFSFL, Articles 41 and 42).

¹⁶ In a recent case, the Constitutional Chamber of the Supreme Court of Justice granted *amparo* in favor of the plaintiff, which had alleged a violation of the rights to equality and freedom of association due to the refusal of the Registry of Not-for-Profit Associations and Foundations to register an association that advocates for the rights of transvestite homosexuals. The Registry had argued that the purposes of the association were contrary to morals and good conduct. See Amparo Ruling 18-2004, of December 9, 2009.

¹⁷ Ruling on Unconstitutionality Number 8-97/15-97, of March 23, 2001.

¹⁸ Amparo Ruling 18-2004, of December 9, 2009.

¹⁹ *Ibid.*

While this oversight does not apply exclusively to CSOs, CSO funds may also be subject to the supervision of the Office of the Attorney General of the Republic [Fiscalía General de la República], either at the request of a party or official, for the possible charge of a crime (LADSFL, Article 43).

Internal Governance

Internal governance is established in the by-laws in the case of CSOs subject to the LAFSFL (Articles 8 and 28) as well as local CSOs (MC, Article 120). As a general rule, entities are governed by their members in the case of associations, or founding members in the case of foundations, although the by-laws may stipulate special powers and restrictions in some cases. The most significant power in terms of internal governance is the modification of the by-laws. In the case of associations, the reform procedure will be set out in their by-laws (LAFSFL, Article. 16). The by-laws of foundations may be amended by the founders or, should it be so provided, by the governing body established in the by-laws (LAFSFL, Article 25).

The members or founders, as the case may be, also determine the way in which the entity will be administered. The law requires that the by-laws of associations and foundations include rules concerning the entity's administrative structures (LAFSFL, Articles 13 and 19). These rules must define their sphere of authority and duties, election procedures, terms, the system for accountability, and the identification of the entity's legally authorized representatives. (LAFSFL, Article 28(5)). The elections or appointments of the administrators and legal representatives of associations and foundations must be registered with the RAF (LAFSFL, Article 27).

The by-laws of community associations also must include provisions concerning the administration and governing bodies and their spheres of authority (MC, Article 120).

Reporting

Under current law, CSOs must provide periodic information to the RAF and the Treasury Ministry on their finances and compliance with official tax obligations. The LAFSFL regulations require all associations and foundations to submit duly audited annual balance sheets and financial statements to the Registry within two months following the end of their fiscal year for registration purposes (Article 27). In the case of foreign CSOs, the LAFSFL establishes that the registry may also request financial and administrative expenditure reports (Articles 14 and 28).

All recognized "public interest" CSOs have the additional duty to report monthly all donations they have received and this must be done during ten working days of the following month. This information must include the donor's name and tax identification number, and the amount of the donation. Failure to comply with this obligation will be punished and could lead to a revocation of the "public interest" status and attendant tax benefits (Tax Code, Article 146). CSOs must also submit a statement of the origin and use of funds to the tax administration within the first ten working days of January, April, June, and September of each year (Tax Code, Article 146).

In January of each year, community associations must submit annually a report certifying the list of associates entered into the respective record (Municipal Code, Article 121).

Disciplinary System

The LAFSFL establishes a disciplinary regime applicable to associations and foundations. Possible infractions that may be committed by associations and foundations, as well as their directors or administrators, include failure to comply with the legal requirements relating to official accounting procedures, failure to submit and register information with the Registry, malicious tampering with the values and contents of

financial statements and inventories, and the provision of fraudulent data to the Registry. Infractions are punishable by fines ranging from US \$57 to US \$1,143 (Articles 83 to 89). The law establishes three remedies to contest fines. These remedies must be presented before the offices of the Ministry of Government, which is the authority that originally imposed the fine (Articles 87 to 89).²⁰

There is no single disciplinary system for municipalities. Therefore these matters are regulated under each of the ordinances governing community associations.

Dissolution, Winding Up, & Liquidation of Assets

Foundations and associations may be dissolved based on the grounds established under the LAFSFL (Articles 71 and 72) or those specified in their by-laws. Voluntary dissolution begins with a decision made by members and entered into the respective registry. The disposal of assets during liquidation follows the by-laws. However, those assets may not be distributed in such a way as to benefit their members (Article 81). In cases where the by-laws do not provide for the disposal of assets, or should the authorities determine that they may proceed with their disposal, the assets become State property and it falls to the Executive Branch to allocate them to one of its ministries or departments.

The LAFSFL also regulates the legal or involuntary dissolution of associations and foundations. This form of dissolution may proceed at the State's initiative if it considers that the entity is engaged in activities that are illicit, for direct profit, or contrary to morals or public security and order. In 2001, however, the Constitutional Chamber of the Supreme Court of Justice ruled that this provision was unconstitutional in terms of the definition of the grounds. As discussed earlier, the regulation is unacceptable inasmuch as it uses ambiguous concepts such as morals, public order, and security to limit rights of association, in violation of the essence of this right.²¹

Community associations may also be dissolved voluntarily or involuntarily. In the instance of voluntary dissolution, a general assembly of members makes the decision. This decision must be sent to the Municipal Council for the purposes of cancelling its legal personality and its entry in the municipal record of community associations. It also has to be published in the Official Gazette. Once the decision to dissolve has been made, the community association will be liquidated (MC, Article 121-A).

The grounds for involuntary dissolution are as follows: a) the number of members being lower than that required by its articles of incorporation; b) the pursuit of aims other than those set out in its by-laws; and c) cessation to operate as an association. The Attorney General of the State may also pursue a dissolution proceeding, either *ex-officio* or at the petition of any government authority.

The declaration of dissolution must be entered into the respective municipal registry, and it leads to liquidation. Any remaining assets of the association must be transferred to the local charitable institution designated in the by-laws. Should that not be possible, the municipal authorities shall dispose of them (MC, Article 121-B).

²⁰ Under Salvadoran law, the use of administrative remedies is a procedural prerequisite for lodging legal challenges such as a contentious administrative proceeding before the Contentious-Administrative Chamber of the Supreme Court of Justice or an Amparo remedy before the Constitutional Chamber of that Court.

²¹ Ruling on Unconstitutionality Number 8-97/15-97, of March 23, 2001.

CSO ACTIVITIES

General Powers

CSOs have wide-ranging capacity to act and any applicable restrictions or prohibitions must be specified in the law and in their by-laws. The LAFSFL grants associations and foundations the power to carry out “all actions necessary for the fulfillment of their aims” as articulated in their by-laws, as long as they do not engage in any action contrary to public order, morals, the law, and good conduct (LAFSFL, Article 3). These limitations should be clarified further in light of the jurisprudence, which has declared that the use of ambiguous legal concepts to limit the essential content of basic rights is unconstitutional. It should be noted, however, that the article of the law itself has not been declared unconstitutional and remains in force.

Several limitations are derived from a CSO’s not-for-profit status. They may not seek the direct enrichment of their members, founders, or administrators. More specifically, they may not distribute benefits, remainder assets or earnings among themselves, nor may they stipulate the distribution of the entity’s net assets among themselves in case of dissolution or liquidation. CSOs also are not authorized to provide third party guarantees of obligations, nor act as guarantors, bondsmen, or surety [*fiadoras, caucioneras o avalistas*] for obligations (LAFSFL, Article 9).

According to the LAFSFL, CSOs are empowered to acquire any title and to administer any type of movable or immovable assets, without any limitations save those established in Article 108 of the Constitution of the Republic and their own by-laws. (LAFSFL, Article 37). This article prohibits CSOs from owning or administering any immovable assets other than those immediately and directly related to the service or purpose of the institution.

Public Political Expression, Advocacy, & Activities

CSOs are free to criticize the government and advocate for causes that may be uncomfortable to the government. There are no legal prohibitions associated with this. It is not a crime in El Salvador to express unfavorable views of the government or of any individual. Restrictions on freedom of expression relate to the crimes of defamation, injury and slander, which safeguard other basic rights.

As noted earlier, constitutional jurisprudence has found that CSOs have different aims than political parties and that the prohibition on participating “actively and continuously” in politics constitutes a valid restriction on the enjoyment of the right to freedom of association. While CSOs are prohibited from participating in the political life of the State, “the isolated expression of an opinion of this nature by the association or any of its members” would not be prohibited.

Indeed, several CSOs include the active defense of democratic principles and human rights among their aims. In practice, CSOs propose the adoption or reform of laws and public policies, and speak out on issues that could be uncomfortable for the administration in power, even individual officials. For example, a group of CSOs have been actively promoting the passage of the Law on Transparency and Access to Public Information and has even been involved in drafting its language.²²

Moreover, CSOs are legally mandated to participate in the management of certain government institutions. At least 40 such institutions include CSOs in their governing bodies, although this practice is largely limited to

²² See the website of the Group Promoting the Law on Transparency and Access to Public Information: www.transparenciaelsalvador.org. Last searched on October 20, 2010.

business associations.²³ At least 6 of the laws on public institutions stipulate that CSOs other than business associations, such as professional associations and human rights organizations, form part of the governing bodies of a public entity.²⁴ In practice, the selected CSOs tend to have some relationship with the aims of the public entity to which they belong and the only requirement is that they be registered in the relevant registries.²⁵ As a general rule, however, objective criteria are not used to select these CSOs, nor are mechanisms in place to ensure adequate representativity.

The government recently created the Economic and Social Council,²⁶ an advisory body under the Executive Branch made up of key sectors of Salvadoran society such as entrepreneurs, social movements, governments, and academia. Academia includes universities and think-tanks. This Council examines issues of national relevance such as public security, transparency, the fiscal pact, and social development. According to some observers, while the Council has created opportunities for dialogue on key public policies, the process for selecting participants has not been informed by transparent criteria and this has led to criticisms of its degree of representation.²⁷ As for the selection of CSOs to the council, in general, there is no established legal procedure and in great part, the decision is at the discretion of government officials. For example, recently, to reach out to CSOs focused on children's issues, a public call was made via newspapers. It is a positive practice yet since it is not regulated; its use depends on the discretion of the government official charged with gathering the Council at the time.

Communication & Cooperation

There are no legal restrictions on CSOs in terms of communication and cooperation. There are many public examples of communication networks, collaboration and communication among local CSOs, and between them and other domestic or foreign sectors. Support networks are formed around shared causes. Some CSOs working on children's rights, for example, have organized collaborative activities to promote the passage of the Law on Integral Protection of Children and Adolescents.

Economic Activities & Financing

CSOs may participate in any legal activity, whether commercial or economic, related to their purpose or aims. The only limitation is that the funds obtained must be used for the institution itself and must not seek the direct enrichment of its members, founders, and administrators (LAFSFL, Article 9). There are, however, no special rules restricting the ability of CSOs to obtain and manage foreign funds.

State Financing

There are no specific rules regulating the existence of State subsidies for CSOs, nor any known criteria or requirement for selecting the recipients of such subsidies or their amounts. Every year, however, the

²³ See the laws establishing the Instituto de Formación Profesional, Centro Internacional de Ferias y Convenciones de El Salvador, Consejo de Vigilancia Contaduría Pública and the Superintendencia de Electricidad y Telecomunicaciones, among others. Available at www.jurisprudencia.gob.sv.

²⁴ See, for example, the Law Creating the Social Investment Fund of El Salvador [Ley de Creación del Fondo de Inversión Social de El Salvador], an entity in which private development organizations propose a representative, or the Law of the Salvadoran Institute for the Integral Development of Children and Adolescents that provides that a duly registered CSO shall designate a representative.

²⁵ See the Law of the Institute for the Development of Women (ISDEMU), in which NGOs working on the promotion of women have the right to two seats on the 12 member board of directors.

²⁶ "Funes Instala el Consejo Económico y Social", *El Diario de Hoy*, September 3, 2009.

http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6351&idArt=3973508.

²⁷ Organización Social abandona Consejo Económico y Social, *La Prensa Grafica*, September 4, 2010.

<http://www.laprensagrafica.com/el-salvador/politica/140100--organizacion-social-abandona-consejo-economico-y-social.html>.

government budget includes transfers of public funds to certain CSOs. The budgets of several government departments specify the CSOs that will receive State subsidies. For example, the 2010 budget of the Secretariat of Culture under the Office of the President of the Republic includes a list of CSOs that receive subsidies.²⁸ CSOs may participate in a government bidding process for the procurement of assets or service provisions.

In practice, the recipients of these public resources are selected at the discretion of the Executive Branch. As with other activities, their participation is limited to the aims set out in their by-laws. From the legal standpoint, CSOs participate on par with other private actors.

CONCLUSIONS

Priority Issues

The barriers that discourage, complicate, and even impede the formation of civil society organizations in El Salvador is a priority area currently facing civil society organizations.

These barriers primarily consist of the arbitrary application of countless ambiguous legal concepts that are still found in the rules governing their establishment and operations. Specifically, the LAFSFL grants government officials the power to interpret concepts such as public order, morals and good customs, and to use them as grounds to impede or delay the establishment and registration of a CSO.

Although this point has been clarified in constitutional jurisprudence, the administrative authorities continue to apply ambiguous criteria when evaluating the apolitical nature of organizations. While no arbitrary interpretations that would impede the enjoyment of the right of association have been reported in recent months, CSOs' freedom to express their political opinions is still contingent upon the judgment of the acting official since the rule has never been amended or clarified.

The Legislative Assembly is still debating a draft Law on Transparency and Access to Public Information intended to establish rules for requesting public information from entities that receive public funding. The passage of this law could bring about changes in the work of CSOs, insofar as more information on government conduct could help them better channel their participation in the pursuit of specific public or social objectives. The law would also apply to CSOs that receive State financing or subsidies. This would enhance the transparency of existing procedures and compel the establishment of mechanisms for CSOs receiving assistance, thereby ensuring that they can compete freely for funding and that state financing or subsidies are not confined to a limited number of receiving entities.

While labor organizations are not specifically addressed in this report, they essentially are CSOs who could be affected by CSO regulations. Furthermore, recent reports indicate that the Ministry of Labor and Social Welfare has launched a program to promote labor union organizing among CSOs.²⁹ This program would promote the organization of CSO employees for the collective defense of their labor rights. To date, there is no further information on the aim or rationale for this program.

²⁸ Available at:

http://www.mh.gob.sv/portal/page/portal/MH_Finanzas/MH_PRESUPUESTO/PRESUPUESTOS_ESTADO/LPGE_2010_AL/presupuestos/LP0500-10.pdf. Last searched on October 6, 2010. * Note: In practice, the recipients of these public resources are selected at the discretion of the Executive Branch.

²⁹ "Labor Unions Pressured to Create CSOs", *El Diario de Hoy*, October 29, 2010.

To date, there is no information to indicate that the Legislative Assembly is considering other bills or amendments to the Law on Not-for-Profit Associations and Foundations or to other laws directly applicable to CSOs.

Government Justifications

The government has justified legal barriers for new CSO establishments based on the need to establish controls over veiled partisan activities or associations that seek to subvert the ambiguously defined moral, political or social status quo in the country. Moreover, while there is no information to indicate the existence of a bill or reform in this area, in the past, government representatives have promoted reforms to laws governing civil society aimed at strengthening controls over the origin, allocation, and administration of their financial resources. In the context of the debate of the draft transparency and access to public information law, the government has gone so far as to suggest that even CSOs that do not receive State funds should provide unrestricted public access to information concerning their management and resources.

Strategic Responses

The assessment of the legal regime governing CSOs in El Salvador clearly demonstrates the need for legislative reforms aimed at eliminating illegitimate barriers to the entitlement of new entities. The reform should be consulted with a broad and representative sample of CSOs operating in El Salvador and be based on international principles for the protection of civil society.

In particular, this reform should fine tune the criteria used to validly deny authorization for the establishment of new CSOs and limit the discretion of the authorizing official to the fullest extent possible, making sure that the latter is prevented from establishing requirements that are not established by law. The law should also recognize the right of CSOs, and CSOs must be confident that they are protected to establish their aims as they see fit without restrictions other than those validly set out in the law. Limitations for political reasons should be strictly specified to prevent their arbitrary application by the acting official. In addition, the reform should establish consequences for the government's failure to adhere to the established time frames for authorizing CSOs.

Two important administrative issues are assurance of the public nature of the RAF and the reduction of the costs of establishing and operating a CSO. Unrestricted access to information concerning CSOs would surely foster a better understanding of this sector and provide opportunities for it to establish synergies and collaborations with other sectors. Costs can constitute a real barrier to the enjoyment of the right of association. Given their link to collective or social goals, the procedures to form and register such entities should be free, or at least significantly lower in cost than is presently the case.

It is also necessary to harmonize the laws regulating CSOs operating at the national level with those regulating local CSOs. The rules are currently difficult to grasp and present different problems in each jurisdiction. It would be necessary to assess the areas that should be strengthened in the local laws governing CSOs.

Finally, in relation to the State's obligation to proactively uphold the right of association, it is recommended to identify and promote expeditious and effective mechanisms to allow CSOs to organize and act in cooperation with networks for the achievement of common objectives without having to establish individual legal entities.