

SUBTLE RESTRICTIONS ON THE FREEDOM OF ASSOCIATION

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- *Responses from organised civil society in Mexico*

ABSTRACT

There is a trend towards imposing restrictions on freedom of association in several Latin American countries. Some of these restrictions constitute open and highly visible attacks on civil society organisations (CSOs) by different governments. There are, however, other types of restrictions that are less noticeable to the public, some of which are related to states' international obligations in the area of transparency.

Some governments have established additional restrictions on the funding of CSOs based on the argument that such donations are vulnerable activities. Civil society in Mexico has responded by employing various strategies that combine coordinated actions and advocacy with proposals to contribute to the state's fulfilment of its duties while safeguarding the rights of civil society.

KEYWORDS

Financial restrictions | Freedom of expression | CSO | Civil organisations | Lobbying

1 • Introduction

For decades, civil society organisations (CSOs) have been one of the expressions of the human right to the freedom of association established by the Universal Declaration of Human Rights.¹ They have enabled common citizens to play an active role in the sphere of public interest.

In the western hemisphere, after the fall of the Berlin Wall and after various dictatorships in Latin America gave way to fragile democracies, CSOs finally had a favourable environment to work in – one that allowed them to increase their numbers, as more and more citizens decided to join or form new organisations and as governments built relationships of trust with the organisations.² The immediate task – for which several issues remain pending in the case of Mexico – was the construction of a regulatory framework that offered the best possible conditions for setting up CSOs without the need for government authorisation or mandatory registries. In parallel, optimal conditions had to be established so that organisations could access different funding sources to execute their plans and programmes freely and, for those that see fit, exercise their right to participate in public policymaking, as well as other areas of work relevant to civil society. Several of these rights were established by the *Ley de fomento a las actividades de la sociedad civil* (Law for the Promotion of the Activities of Civil Society, herein referred to as the CSO Promotion Law),³ which recognised the rights of CSOs and established criteria for their recognition.⁴

However, the national and even regional trend in policies and regulations began to swing in the opposite direction, following the same lines as the international trend to limit spaces for exercising the freedom of association. One of the negative indicators that allows us to confirm this trend is the decrease in the amount of new international foundations created. This number went from 700 new foundations in 1990 to nearly zero growth in 2016.⁵ A specialist on the issue, former UN Special rapporteur on the freedom to association Maina Kiai⁶ has highlighted on several occasions the formal or *de facto* establishment of restrictions on civil society. Some of the subtle, yet effective, limitations are the financial and banking restrictions. While their main purpose is to combat terrorism and money laundering – an aspect that is particularly important in certain countries of the world – unfortunately, it has also become an instrument for controlling and restraining CSOs.

The Financial Action Task Force (FATF) was created in 1989 and was in charge of elaborating 40 recommendations for states around the world to combat money laundering and various situations of risk related to terrorism funding. In practice, these guidelines were turned into different types of obligations that governments must adapt to their national contexts. Unfortunately, donations to civil society organisations in general were included among the various financial activities classified as “risky”, without taking into consideration differences in national contexts, risk levels, types of donations or the existing controls used by both states and foundations or donor agencies in general.

While the FATF’s recommendations naturally affected the international flow of funds to civil society indirectly by promoting strict controls, some governments took advantage of

the opportunity to deliberately adopt stifling control measures, arguing that they had to in order to meet their obligations. This proved very convenient, as it allowed them indirectly to restrict CSOs' freedom of association.

In light of these events, a group of CSOs created the Global NPO Coalition on FATF, which works to identify the impacts of the measures in different regions and proposals on how to improve the task force's recommendations. The first plenary meeting with CSOs was held in Vienna in April 2017.

2 • Financial restrictions in the case of Mexico

In 2012, the Congress approved the "Federal Law for the Prevention and Identification of Operations with Illegally Acquired Funds"⁷ (known as the Anti-Money Laundering Law) as part of the country's international commitments to fight money laundering and terrorism funding and, obviously, a response to the recommendations of the FATF.⁸ Mexico has been a full member of the task force since the year 2000.

The measures included in the Anti-Money Laundering Law allowed Mexico to finally be taken off the list of countries that require annual monitoring. However, its success involved the adoption of certain restrictions on the flow of national and international funds, including donations to civil society organisations (listed in Art. 17 of the said law as one of the vulnerable activities), as well as follow up in the form of less frequent assessments. These measures created complications for transfers between donors and recipients – and in some cases, prevented them from being completed – especially when international foundations were involved. It also conveniently served as an obstacle to the sustainability of organisations working on issues that were sensitive for the government, such as human rights. This happened at a time when the Mexican government was being strongly questioned and denounced for its failure to take action to protect human rights and for the deliberate violations committed by federal, state and even municipal law enforcement agencies, primarily in the fight against drug trafficking.

The restriction to CSO funding is based on the demand for information on the origin of the financial resources, namely on donations and grant makers. Two types of obligations exist: the obligation to recompile information and the one to submit it, depending on the size of the donation. One of the problems is that the information demanded may be confidential. Part of the request for information runs counter to the practices of access to information and the right to privacy. It also generates pressure on CSOs to comply with the rules of the *Unidad de Inteligencia Financiera* (UIF, or Financial Intelligence Unit),⁹ the department of the Ministry of Finance and Public Credit responsible for enforcing the law.

The UIF determined that in cases where recipients do not have adequate information on the donor, they must refuse the donation. If they fail to do so, the Unit has the authority to impose sizeable fines.

Table 1: Financial restrictions on civil society

UIF actions and reporting thresholds
<ul style="list-style-type: none"> • Identification and compilation of donor information <ul style="list-style-type: none"> - Reporting amount: if a donation exceeds the equivalent of 1,605 days of the minimum wage in effect (approximately US\$7,000 as of August 2017) • Mandatory submission to the Ministry of Finance's Financial Intelligence Unit <ul style="list-style-type: none"> - Amount for submitting information: if a donation exceeds the equivalent of 3,210 days (approximately US\$14,000 as of August 2017)
Information of interest to the UIF
<ul style="list-style-type: none"> • Identification of the donor and recipient <ul style="list-style-type: none"> - "... based on credentials or official documentation, as well as gathering a copy of the documentation" • Information on respective activities and occupations • Description of "vulnerable activity"

Source: Elaborated by the author based on the UIF's list of obligations¹⁰

The Anti-Money Laundering Law is, then, a legal tool for exerting government pressure on organisations, as it subjects them to stricter information requirements than other laws do. Therefore, the underlying logic is that these provisions can be used indirectly to attempt to block activities considered dangerous for cases where governments are involved in corruption, human rights violations and antidemocratic practices.

3 • Restrictions from the private sector: the banks

In addition to the restrictions imposed by public entities, certain banks in the country have recently established other types of restrictions. Again, this trend exists at the international level.

In 2012, the US Justice Department accused HSBC Bank of laundering money from illegal acts committed in Mexico. The bank was forced to pay a historical fine and make changes to part of its operations and internal policies in the country and abroad.¹¹ This scandal sparked public interest in who the clients involved in illegal actions might be. Even though it has not been proven that civil society organisations were involved, the classification of donations as vulnerable activities and donors as "subjects at risk" led certain banks to establish requirements that make it very difficult for CSOs to open accounts or they simply refuse to provide them services.

In the case of the said bank, even though it has not publicly expressed rejection of organisations and has kept existing CSO accounts open, there have been reports of applications being

declined and delays making it impossible to open accounts. This was the case of organisations we interviewed, such as Appleseed Mexico and the *Consejo mexicano de silvicultura sostenible* (Mexican Council of Sustainable Forestry), which reported that this banking institution has repeatedly declined their account applications, as well as those from other organisations.

The requests for interviews with other banking institutions, such as BBVA Bancomer and Scotiabank Mexico (there are also reports from CSOs of the latter turning down their applications), were refused for no specific reason, even when made by people close to civil society, personnel of the banks' own foundations or of their social responsibility programmes. These practices constitute *de facto* – but not *de jure* – exclusion from the financial system.

The specific origin of these policies lies in what is known as “de-risking”.¹² This is when institutions from the financial system take measures to reduce risks for reasons related to the market approach, concerns with reputation or the type of clients or financial transactions. Regulatory burdens that include sanctions also come into consideration here, as in the case of HSBC mentioned above.

The work of civil society at the international level, such as the Global NPO Coalition on FATF, has helped get the task force to take into the account the risks that its own recommendations pose. In 2015, it concluded that:

[T]here is currently no evidence that de-risking is adversely impacting global financial stability [...] This is a serious concern for FATF and the FATF-style regional bodies to the extent that de-risking may drive financial transactions underground which creates financial exclusion and reduces transparency, thereby increasing [the possibility of] money laundering and terrorist financing risks.¹³

Two years after this statement, we can observe in several countries, especially in the case of Mexico, that the measures adopted to reduce financial risks continue to affect CSOs and that the risk of their exclusion from the financial system grows. Furthermore, the measures have become a tool for limiting their activities, even when the Government of Mexico's own risk assessment in 2016 concluded that the risk of financing terrorism in the country is zero and the risk of money being laundered through CSOs is low.¹⁴

4 • The actions of organised civil society

Civil society usually organises to respond to threats to human rights. However, the kind of case we are dealing with here does not usually have the same visibility in the media as others do; sometimes, they are not even given enough attention to generate a broad coalition to contest this type of restrictive policies. Hence, their identification as subtle restrictions, which does not mean, however, that they are less efficient.

The global trend of altering regulations and practices or generating new ones to restrict the actions of organised civil society gave rise to various analyses on some of these restrictions.¹⁵ These assessments then served to launch processes of coordination aimed at taking direct action on the issue. This was the intention behind the creation of UnidOSC, a coalition of organisations formed in late 2015. With the support of academic institutions, UnidOSC seeks to foster coordination among CSOs on the defence of the rights inherent to the freedom of association and the construction of a favourable framework.

The coalition initiated processes that led to the adoption of two different strategies. The first was to draft a proposal on the harmonisation of three legal frameworks with the goal of eliminating aspects that violate the rights of CSOs. The themes were the creation of a trust to elaborate a special plan on strengthening CSOs, the elimination of discretion in the distribution of state subsidies and the attribution of responsibility to all government bodies to carry out actions to promote organisations. The strategy was not only to carry out a technical analysis of the legislation, but mainly to ensure that the legislation is in line with international principles of freedom of association. Legislation is seen not as an end, but rather a means to guarantee the right to freedom of association.

The second strategy focused on contesting tax changes that created new restrictions announced in early 2017. Joint action was again directed at drafting proposals to reject or, in this case, lessen the impact of provisions that introduced very aggressive measures, such as: forced liquidation of assets not used for an entity's social purpose in cases where it loses and does not recover its authorisation to operate as a funding agency within a certain period of time; voluntary certification of social impact carried out by private agents, which could potentially generate inequalities in the distribution of private resources; and finally, the obligation to adopt a form of governance, which infringes on the autonomy enshrined in the CSO Promotion Law. However, in view of the government's lack of receptivity to the proposals, the coalition had to undertake actions to make its position known to the public to influence the political agenda. Statements of rejection signed by more than 500 CSOs were published in the main national newspapers in the form of petitions demanding that the changes be revoked. As UnidOSC has always remained open to dialogue, this pressure led to the opening of spaces for dialogue with high-level tax authorities – in this case, with the Ministry of Finance.

In parallel to this, in the legal arena, collective lawsuits were filed so that 45 CSOs, if they so decide, could defend themselves against the new measures. Unfortunately, this strategy was suspended by the courts.

As in the case of the Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*, SHCP), UnidOSC initiated a separate dialogue with the Financial Intelligence Unit (UIF). This opened the door to discussions and the construction of proposals for improving the general framework, collaborating with authorities while, at the same time, protecting CSOs' rights, particularly the right to receive financial resources, as established

by the CSO Promotion Law. There are possibilities on two dimensions to consider: the first includes recommendations on the functioning of the website, formats and, in general, aspects that are not subject to any modification of the law itself; the second, on aspects where regulations must be subject to improvements.

The likelihood of successful change will depend on the quality of the dialogue the coalition can build and the receptivity of the UIF to the obstacles CSOs face. The possibility of introducing modifications to the legislation, if any, will also depend on the political situation. Presidential elections will be held in 2018. Therefore, it will be more feasible to obtain changes that do not depend on alterations to the Anti-Money Laundering Law in the short term, whereas reforms themselves will have to wait to be introduced to the new Congress. However, the agenda must be built beforehand and it would be desirable to share it with presidential and congressional candidates.

5 • Strategies and results of the UnidOSC's actions

The proposals presented by UnidOSC were developed through a mixed process that involved civil society organisations and academic representatives in the elaboration of a first draft. This process took into account a survey of over 100 civil organisations, which was part of the study carried out by Sustenta Ciudadanía and the International Center for Not-for-Profit Law (ICNL) mentioned earlier. The first group of proposals was submitted to a group of experts who met with a technical advisory group to consolidate aspects related to viability. These proposals include improvements to tax legislation and public policies on sustainability, as well as administrative simplification.¹⁶ They were then submitted again to the plenary of UnidOSC, which presented them to tax authorities.

In retrospect, UnidOSC's actions produced several results, from which lessons for similar processes can be drawn:

- **Coordination:** Combining participants from different sectors proved to be very effective. The integration of academics and especially experts from private firms, working on a pro bono basis, into an advisory group was of great value for ensuring the technical soundness of UnidOSC's proposals.
- **Working with teams of legislators:** There are legislators who are interested in CSOs' work and who realise that supporting civil participation and democratic development can increase their political capital. Regardless of their reason for supporting citizen initiatives, it is useful to have teams of policymakers contribute to the process's presentation (form) and diagnosis (analysis), and to driving the process (until the final decision is made). Effective to a certain extent, this path would have been successful had other actors not intervened.

- **Strategies that combine lobbying and dialogue:** While networks of organisations usually opt for one strategy or the other, the combination of the two proved useful for opening up space for influencing decision-making.
- **International support:** The exchange of knowledge made it possible to learn more about other national and regional practices, as well as a significant contribution to the design of proposals and the implementation of strategies. The workshop given by the Human Security Collective in Mexico on the issue and the participation of the Global NPO Coalition on FATF were particularly useful. These different forms of coordination fostered collective learning, contributed various kinds of resources and strengthened knowledge transfer from one advocacy process to another.
- **Public commitment reflected in political costs.** During an initial meeting with the Ministry of Finance, we succeeded in getting the ministry to commit to having its advisory team revise and respond to our proposals. The ministry's advisors must send their response in writing by the end of 2017. Failure to do so will generate high political costs and therefore, although not all of the proposals will be reflected in specific changes, an important portion of the agenda will be.

The most significant results until now have been the development of broad proposals that contribute to the construction of comprehensive frameworks on promotion. More specifically, two initial proposals were drafted: a harmonisation framework that sought to reaffirm the rights of CSOs recognised in the different legal frameworks, and the taxation framework that opposition to the miscellaneous tax resolution for 2017 used to recompile and draft proposals for a just tax treaty that both allows organisations to develop and promotes transparency.

Another important outcome was the opportunity to have periodic spaces for dialogue that vary in frequency and effectiveness, but have not stopped functioning and that incorporate actors with power to make decisions.

Finally, the priority of intervening on these issues has spread to several regions of the country, despite the fact that the majority of CSOs do not have extensive knowledge of these issues. Even so, the dissemination and the discontent caused by the most recent tax provisions has generated an increase in civil society's participation and expectations in general.

6 • Conclusions

Information requirements related to the prevention of money laundering have taken an enormous toll on the administration of CSOs. They also threaten to weaken CSOs' relationships with donors, as they force them to request excessively detailed information that does not necessarily bring greater transparency.

The process of lobbying for the easing of financial and banking restrictions on CSOs has different stages and requires analysing one's strategies. The experience in Mexico demonstrated that when one seeks to obtain changes through the legislative power and then dialogue with the executive branch, proposals are met almost immediately with opposition and attempts to discredit them.

UnidOSC has opted for a different strategy – one that seeks, together with tax authorities, to present, in the future, proposals for change that could be submitted to the Congress for approval. While the search for consensuses with tax authorities means taking a much longer path, this effort is necessary, as part of changing the framework on CSOs necessarily involves making improvements to the legal framework.

Finally, there is a much vaguer and subtler area that is linked to the punitive practices employed by the government in the form of discretionary notices related especially to provisions that limit spending on administrative expenses to 5 per cent. It is no coincidence that several CSOs that have participated in lobbying processes and are critical of the government have received requests for information; failure to comply with the requests could lead to the cancellation of their authorisation to receive donations. This is partly due to the lack of definition for certain compliance criteria for the said spending. Yet, it may also be used as a political strategy to repress and silence civil society. This aspect remains to be addressed in an agenda for the media to shine light on undesirable and anti-democratic practices that infringe the right to the freedom to express criticism, which is one of the international principles of the freedom of association. Limitations on this right have been denounced in both Mexico and other countries as one of the causes of the closing of space for civil society.

NOTES

- 1 · Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association. "Universal Declaration of Human Rights", Article 20, United Nations General Assembly, December 10, 1948, accessed November 28, 2017, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/spn.pdf.
- 2 · José Fernández Santillán, "Sociedad Civil y Capital Social," *Convergencia. Revista de Ciencias Sociales* 16, no. 49 (January-April, 2009): 103-141.
- 3 · "Ley Federal de Fomento a las Actividades Realizadas por Organizaciones de la Sociedad Civil," Chamber of Deputies of the Congress of the Union, February 9, 2004, accessed November 28, 2017, <http://www.diputados.gob.mx/LeyesBiblio/pdf/266.pdf>.
- 4 · Alberto Olvera, "Avances y Desafíos de la Relación Sociedad Civil y Gobierno." Ministry of the Interior (SEGOB), Mexico, 2007, accessed November 28, 2017.
- 5 · Helmut K. Anheier, "Civil Society Challenged: Towards an Enabling Policy Environment," *Economics Discussion Papers*, no. 2017-45 (2017), accessed November 28, 2017, <http://www.economics-ejournal.org/economics/discussionpapers/2017-45>.
- 6 · Maina Kiai, "Monitoring and Protecting Assembly and Association Rights Worldwide." Free Assembly, 2017, accessed November 28, 2017, <http://freeassembly.net/>.
- 7 · "Ley Federal Para La Prevención e Identificación de Operaciones Con Recursos de Procedencia Ilícita," Chamber of Deputies of the Congress of the Union, October 17, 2012, accessed November 28, 2017, <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFPIORPI.pdf>.
- 8 · Xavier Méndez, "Las Entidades no Lucrativas Ante la Nueva Ley Federal Antilavado," *Revista Consultorio Fiscal*, no. 591 (2014).
- 9 · UIF website: "Donativos," SPPLD, 2017, accessed November 28, 2017, <https://sppld.sat.gob.mx/pld/interiores/donativos.html>.
- 10 · See: "Obligaciones Contempladas en la LFPIORPI para Quienes Realicen Actividades Vulnerables," SPPLD, 2017, accessed November 28, 2017, <https://sppld.sat.gob.mx/pld/interiores/obligaciones.html>.
- 11 · The case has been widely documented partly because of the historical US\$1.9 billion fine imposed by the United States Justice Department. Mayra Zepeda, "El Lavado de Dinero en HSBC, Explicado por Analistas." *Animal Politico*, July 18, 2012, accessed November 28, 2017, <http://www.animalpolitico.com/2012/07/el-caso-hsbc-lavado-de-dinero-bajo-la-lupa-de-los-analistas/>.
- 12 · An analysis of this issue by members of the Global NPO Coalition on FATF can be found at: Ben Hayes, Lia Van Broekhoven and Vanja Skoric, "De-risking and Non-profits: How Do You Solve a Problem that No-one Wants to Take Responsibility For, Open Democracy, July 11, 2017, accessed November 28, 2017, <https://www.opendemocracy.net/ben-hayes-lia-van-broekhoven-vanja-skoric/de-risking-and-non-profits-how-do-you-solve-a-problem-that-n>.
- 13 · FATF website: Financial Action Task Force (FATF), Homepage, 2017, accessed November 28, 2017, www.fatf-gafi.org/.
- 14 · "1^a Evaluación Nacional de Riesgos de Lavado de Dinero y Financiamiento al Terrorismo en México," Ministry of Finance and Public Credit (SHCP), 2016, accessed November 28, 2017, <http://www.pld.hacienda.gob.mx/work/models/PLD/documentos/enr.pdf>.
- 15 · Studies carried out by Sustenta Ciudadanía and Observatorio Mexicano de la Crisis (the Mexican Observatory on Crisis), Appleseed Mexico and the Mora Institute, to name of few examples.
- 16 · United for the rights of civil society, *Puntos de Mejora Para Una Agenda Fiscal Favorable a las OSC* (Mexico: UnidOSC, 2017).

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