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An Evaluation Model for Non-Governmental Organizations Engaged in Advocacy

Nathalie Des Rosiers

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An Evaluation Model for Non-Governmental Organizations Engaged in Advocacy

Abstract

The article proposes a model to evaluate the effectiveness of NGOs that engage in advocacy for compliance with international human rights and civil liberties standards or constitutional rules. The model draws on the analysis of social movement effectiveness, ombudsmen's roles and the literature on the evaluation of human rights NGOs at the international level. It establishes ways to measure the legitimacy and effectiveness of advocacy NGOs. In particular, it suggests that transparency and independence must be constantly demonstrated, that factual accuracy must always be sought and that legal compliance must be shown to have moral and public interest resonance. The article also discusses the choices between short term and long term strategies.

Keywords

Human rights advocacy; Non-governmental organizations; International law and human rights

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An Evaluation Model for Non-Governmental Organizations Engaged in Advocacy

NATHALIE DES ROSIERS*

The article proposes a model to evaluate the effectiveness of NGOs that engage in advocacy for compliance with international human rights and civil liberties standards or constitutional rules. The model draws on the analysis of social movement effectiveness, ombudsmen's roles and the literature on the evaluation of human rights NGOs at the international level. It establishes ways to measure the legitimacy and effectiveness of advocacy NGOs. In particular, it suggests that transparency and independence must be constantly demonstrated, that factual accuracy must always be sought and that legal compliance must be shown to have moral and public interest resonance. The article also discusses the choices between short term and long term strategies.

Cet article propose un modèle permettant d'évaluer l'efficacité des ONG s'occupant de la défense des droits en ce qui a trait au respect des normes internationales sur les droits humains et les libertés civiles ou des règles constitutionnelles. Ce modèle procède de l'étude de l'efficacité des mouvements sociaux, du rôle de leur ombudsman et de la documentation relative à l'évaluation des ONG s'occupant de la défense des droits humains sur la scène internationale. Il crée des moyens d'évaluer la légitimité et l'efficacité des ONG s'occupant de la défense des droits. Il suggère en particulier qu'en tout temps, ces ONG doivent faire preuve de transparence et d'indépendance, rechercher l'exactitude des faits et s'assurer que leur respect des lois s'accorde à l'intérêt moral et public. Cet article discute également du choix entre des stratégies à court ou à long termes.

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IN DECEMBER 2012, MCGILL UNIVERSITY PUBLICLY ANNOUNCED that it had developed a protocol to regulate protests on its campus. Some students and faculty members sent the protocol to the Canadian Civil Liberties Association (the CCLA). The CCLA sent the university a letter detailing why, in its view, the policy unreasonably undermined freedom of expression.¹ The letter was made public, and the next day the university announced that it was withdrawing its policy. Many factors could explain why it did so, but the students and faculty members who had communicated with the CCLA felt that the letter had an influence.²

In early 2012, the Canadian government tabled the *Protecting Children from Internet Predators Act*, which increased police officers' powers to obtain the name, and possibly address, of individuals behind Internet URLs.³ A large civil society campaign aimed at stopping the bill began. Privacy Commissioners and advocacy groups spoke against it; advertisements against the bill were placed on TV and

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1. A copy of the letter to McGill is available on the website of the Canadian Civil Liberties Association, see online: <<http://ccla.org/wordpress/wp-content/uploads/2013/01/2013-01-08-PDF-Letter-to-McGill-re-draft-protocol.pdf>>.
 2. At the time of writing, the issue continued to preoccupy students and faculty. Another attempt to regulate protests was underway.
 3. Bill C-30, *An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts*, 1st Sess, 41st Parl, 2012 (first reading 13 February 2012). The bill did not proceed past first reading.

YouTube. The adoption of the bill was deferred and was eventually stalled. The public pressure had an influence.

Examples abound of reversals of policy due to public outcry or to the actions of civil society advocacy groups. There are also many examples of such voices being completely ignored. In this article, I examine the role of civil society advocacy non-governmental organizations (NGOs) in the Canadian context and assess their effectiveness. Although some aspects of human rights advocacy in Canada have been subjects of academic discussion, an assessment of the potential value of advocacy NGOs has not been fully developed. This article aims to lay the foundations for a model to assess and compare more effectively different organizations, actions, and strategies.

I am particularly pleased to provide this work in the context of the celebration of the career of John McCamus. This article is an homage to McCamus that aims to highlight his immense contribution to access to justice and, in particular, to the CCLA. McCamus has been a member of the board of CCLA for the last thirty years and has chaired its meetings for the last twenty. In this capacity, he has ensured the survival and the sustainability of an association that devotes itself to the protection of civil liberties and democratic values in Canada. It is no exaggeration to say that, without McCamus, the association would have dwindled away when money was tight and energy was low.

Despite his busy life and extraordinary accomplishments in other fields, McCamus was able to find the time to lead the organization, gently ensuring that board members reached consistent decisions and conducted themselves appropriately. He found the energy to help recruit and support staff members and served as counsel in many breach of privacy cases. Over the years, I was able to observe how much his fairness and decency, combined with his ability to listen and de-escalate conflicts, helped the CCLA. We all are indebted to his work, support, and good judgment. Because McCamus has a profound sense of how institutions should be governed, how to guide without interfering, and how to inspire without crushing creativity, an article on the governance and good performance of advocacy organizations is appropriate to celebrate his legacy.

This article is divided into three parts. In Part I, I posit briefly the need for and role of advocacy NGOs in a democracy such as Canada. I then move in Part II to review different evaluation models proposed for social movements, ombudsmen, and human rights NGOs. The purpose is to identify a range of criteria associated with evaluation of groups or people with influence. This inventory of evaluation measures leads me to propose, in Part III, a model to assess human rights and

civil liberties NGOs in a Canadian, as opposed to international, context.⁴ This paper does not address whether human rights advocacy that draws on legal norms or constitutional compliance presents particular challenges. The questions I ask here are how we know whether an organization did the “right thing”; what model can support a performance assessment of an organization; what success looks like for a national human rights organization; and how we can measure it.

The enterprise may seem daunting. Many doubt the effectiveness of NGOs. As Peter R. Baehr recently concluded, “Despite the abundance of non-governmental human rights organizations little is actually known about their effectiveness or impact, except for the fact that they tend to rely on what is commonly known as the ‘mobilization of shame’.”⁵ He concluded that there was no evidence that NGOs had any real influence and that everything could be explained by happenstance or a variety of other factors. Scott Calnan has attempted to challenge this negative assessment.⁶ His model provides some answers, though he relies mostly on the ability of domestic NGOs to implement international human rights obligations and his theory has not been applied to Canadian NGOs. I attempt here to flesh out an account that would modestly support evaluative frameworks for advocacy NGOs.

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4. The subject has been discussed mostly at the international level. See Claude E Welch, ed, *NGOs and Human Rights: Promise and Performance* (Philadelphia: University of Pennsylvania Press, 2001); Caroline E Schwitter Marsiaj, *The Role of International NGOs in the Global Governance of Human Rights: Challenging the Democratic Deficit* (Zurich, CH: Schulthess, 2004).
 5. Peter R Baehr, *Non-Governmental Human Rights Organizations in International Relations* (New York, NY: Palgrave Macmillan, 2009) at 123.
 6. Scott Calnan, *The Effectiveness of Domestic Human Rights NGOs: A Comparative Study* (Leiden, NL: Martinus Nijhoff, 2008).

I. THE NEED FOR AN ADVOCACY SECTOR

Most democratic countries aspire to abide by the rule of law⁷ and to ensure that “all persons, institutions and entities, public and private, including the State itself, are accountable to laws”⁸ Mechanisms to prevent abuses of power are deemed necessary in that context. This certainly requires an independent judiciary and a vigorous, independent, and courageous bar. However, there is no doubt that a civil society’s commitment to refuse to accept injustices and abuses of power is essential to a continued obedience to the rule of law. A mature democracy aims to create sufficient incentives within its governance culture to prevent, identify, and correct abuses on a routine and systematic basis. Advocacy groups work in the interstices between democratic aspirations, the realities of day-to-day life, and the pressures and temptations of power.

No doubt an independent bar, able and willing to take on difficult cases to denounce injustices and uphold the rule of law, is crucial. However, many people do not even recognize that they have suffered an injustice or that their rights have been breached. People often internalize oppression to such a degree that they are unable to imagine a different life, a different outcome, or a different treatment.⁹

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7. There is a large critical assessment of the rule of law in modern legal theory. See for example the theory advanced in Luc Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal: McGill-Queen’s University Press, 1997). The term itself is subject to numerous interpretations. As Pietro Costa and Danilo Zolo suggest: “The semantic complexity of the notion of ‘rule of law’ is not a recent phenomenon. . . . It is a notion connected with political and legal projects and conflicts; it carries an intrinsic plurality of meanings, and is value-laden and ideologically momentous.” Pietro Costa, Danilo Zolo & Emilio Santoro, *The Rule of Law: History, Theory and Criticism* (Dordrecht, NL: Springer, 2007) at x. In the present context, I use the expression “rule of law” in what Luc Tremblay describes as the orthodox view, that is, the positivist view of law. However, my claim is that democratic commitment to the rule of law demands an assessment of how laws are lived on the ground, how abuses are perpetrated, and how values of justice and equality are subverted, which is where NGOs often act. In that sense, it is compatible with Tremblay’s “rule of law as justice” theory.
 8. Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSOR, 2004, S/2004/616.
 9. The well-known language of “capabilities” was developed by Amartya Sen. See Amartya Sen, *Commodities and Capabilities* (Oxford: Oxford University Press, 1985). See also Amartya Sen, *Development as Freedom* (New York: Knopf, 1999). *Development as Freedom* is useful to understand how the language of rights does not always capture the full extent of human suffering. Oppressed people may rationally opt not to ask for what is constantly denied to them and make due with less. The ideas of Sen have been used widely. See, for example, Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass: Harvard University Press, 2006).

In these circumstances they will not call a lawyer. Further, at times, the legal world may not have given a name or a remedy to an injustice, or may be unable to frame that injustice as a legal question. Finally, the lawyer's ethical construct forces her to represent an individual client to the best of her abilities. This individualized approach may isolate poor and powerless people from each other, compound their sense of vulnerability, and contribute, at times, to a misdiagnosis of widespread bad management as individual mistake.¹⁰

Advocacy groups often emerge to take on systemic cases, to advocate in the courts, in the media, and in the public, and to strengthen the capacity of marginalized persons to speak and demand better treatment. In a context of the access-to-justice crisis that faces many societies, where the traditional legal services on offer do not begin to address the demand or meet the need for justice,¹¹ the role of advocacy should be strengthened. The debates on access to justice often downplay or ignore the role of advocacy groups. One might presume that access-to-justice solutions begin at the point at which an individual seeks information, formulates a question, makes a claim, identifies a justiciable problem, reaches out to a lawyer, or appears at the courthouse. The failure of the judicial system to respond adequately to all such needs must certainly be addressed, but a democracy should aim to address larger problems of accountability that can be invisible to an individual claimant. The identification of systemic failures cannot be relegated only to the political arena; it must also be claimed and framed as a legal problem.¹² For example, reducing injustices through improving accountability should be part of an access-to-justice agenda. No matter the strength of the bar's commitment to pro bono work and to creative

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10. Steven Wexler, "Practicing Law for the Poor" (1970) 79:6 Yale LJ 1049. Wexler's seminal article has influenced the development of clinical legal education and the often problematic use of litigation to advance claims in contexts of serious deprivations. See also Gary Bellow, "Steady Work: A Practitioners Reflections on Political Lawyering" (1996) 31:2 Harv CR-CLL Rev 297.
 11. Action Committee on Access to Justice in Civil and Family Matters, online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/action-committee#NAC>>. See also, the Canadian Bar Association, Envisioning Equal Justice Project, online: <<http://www.cba.org/CBA/Access/main>>.
 12. Pearl Eliadis, "Inscribing Charter Values in Policy Processes" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis, 2006); Nathalie Des Rosiers, "Frein, moteur et levier: le droit à l'égalité, les droits économiques et sociaux et le développement des politiques publiques au Canada" in Sheila McIntyre and Sanda Rodgers, *Diminishing Returns, Inequality and the Canadian Charter of Rights and Freedoms*, (Toronto, ON: Butterworths, 2007), 213-27.

ways of financing legal challenges, there is a need for advocacy groups to articulate claims that aim to speak “truth to power.” How we assess their performance is the subject of this article.

II. EVALUATION MODELS FOR THE ADVOCACY SECTOR

In this section, I explore different models that have emerged to assess performance, seeking criteria to determine how a good advocacy group should function. After briefly looking at the criteria usually associated with the assessment of social movements, I examine the way in which another form of advocacy—namely, the ombudsman function—has been evaluated, before reviewing the literature on the assessment of NGOs, which relates mostly to the international context.

My choice of models requires explanation. Why look at social movements, which seem so contingent on political contexts? What can the review of an ombudsman’s performance tell us about advocacy NGOs? Would it not be sufficient to focus on the ways in which NGOs have been studied and criticized? My analysis considers the advocacy function to see whether there are constant themes that emerge from a performance analysis of social actors that do not have the power to impose their views. It is in this context that I first examine social movements that have exercised influence and created change. My question is whether the critical analysis of social movements can help in developing an assessment framework for advocacy NGOs. For the same reason, I look at ombudsmen models, which also aim to create change despite the office’s lack of binding power. Finally, I review the literature on NGO assessment, which has been more abundant in the context of international NGOs.

A. SOCIAL MOVEMENTS AND CHANGE

The study of social movements is very rich. Their contentious history and varied evolution invite evaluation and theorization. The focus of this section is the evaluation of the successes and failures of social movements. I have attempted to discern patterns and criteria that could stimulate a comparative analysis in the context of attempting to develop an evaluation framework for advocacy NGOs. As detailed below, there is often a linkage between advocacy NGOs and the social movements from which they emerge. In the present section, I am less interested in exploring these linkages than in looking at the evaluation criteria that have been used to measure the success of social movements. My goal is to create an inventory of criteria that could be applied to NGOs.

The evaluative framework for social movements is grounded in the practicalities of political achievements and relies on a dynamic analysis of a multitude of factors. Assessment is difficult because no social movement is good or bad: movements occur and some succeed or are perceived to have succeeded, while others do not. The characteristics of a successful movement may not be able to be reproduced elsewhere and the “success” label is often controversial. Nevertheless, there are lessons to be learned.

The traditional and most often used definition of a social movement is given by Charles Tilly,¹³ and includes:

1. A sustained, organized public effort making collective claims on target audiences;
2. The employment of combinations from among the following forms of political action: creation of special purpose associations and coalitions, public meetings, solemn processions, vigils, rallies, demonstrations, petition drives, statements to and in public media, and pamphleteering; call the variable ensemble of performances the social-movement repertoire; and,
3. Participants’ concerted public representations of worthiness, unity, numbers and commitment on the part of themselves and/or their constituencies.

Different theories attempt to explain the success or failure of various social movements. Many social movements have been analyzed in detail: from the civil rights movement, to the feminist movement, to the gay and lesbian liberation movement; more recently, the anti-globalization movement and the Occupy movement have been the subject of much discussion.¹⁴

At the same time, many advocacy NGOs can trace their birth to the actions of a social movement. Hence, the relationship of some NGOs to the founding movement is both a source of pride and comfort, as well as a limitation. Does the death of the movement imply the irrelevance of the NGO? Is the NGO the embodiment of the promises of the movement? Is the NGO accountable to the

13. *Social Movements, 1768–2004* (Boulder, CO: Paradigm, 2004) at 53. See also Mayer N Zald, “Making Change: Why Does the Social Sector Need Social Movements?” (2004) 2:1 *Stan Soc Innovation Rev* 25 at 28; Max De Pree, *Leading without Power: Finding Hope in Serving Community* (San Francisco, CA: Jossey-Bass, 1997) at 21-32.

14. See generally Miriam Smith, ed, *Group Politics and Social Movements in Canada* (Toronto: University of Toronto Press, 2007); William K Carroll, “Social Movements and Counterhegemony: Canadian Contexts and Social Theories” in William K Carroll, ed, *Organizing Dissent: Contemporary Social Movements in Theory and Practice*, 2d (Toronto: Garamond Press, 1997) at 3-38.

movement? Should it be a catalyst for other social movements? For example, many civil liberties organizations were born in the 1960s and can claim that they are linked to the civil rights movements of that decade. Their continued relevance must be reasserted as some of the initial demands of better human rights instruments have arguably been met. For example, the initial demands from civil liberties groups included abolition of art censorship and abolition of the death penalty. In the context where the demands have been met in terms of legal reforms, the group may have to move to other objectives to reignite the support that initial claims had. As we will see, which issue the NGO selects will be relevant to an assessment of its performance.¹⁵

Charles Dobson has summarized the range of success indicators for social movements in his *Citizens Handbook*.¹⁶ His work is highly practical and is useful for our purposes as he attempts to determine “what works” for a social movement. Many of the criteria that he highlights can be found in Tilly’s assessment: notably, success indicators for social movements tend to focus on the ability to establish a moral claim, which often will require a “reframing exercise.”¹⁷ A second indicator is the ability to regroup a sufficiently large number of people prepared to commit time and energy. Some argue that access to resources—that is, networks, elite approbation, financial resources, and access to decision-makers—is also key. Finally, the role of leadership is debated. Some argue that a charismatic figure is essential, while others downplay the importance of personality over membership commitment.¹⁸ These four criteria—a moral claim, committed membership, access to resources, and leadership—are generally regarded as the main factors in assessing the success of a social movement.¹⁹ Failures are deemed to stem from cooptation or “symbolic reassurance,”²⁰ fatigue, or direct annihilation by opposing forces. Repression does work.

Dobson’s analysis is relevant for our purposes. If, as Dobson argues, morally grounded claims matter, the assessment of NGOs should reflect such criteria. Advocacy couched in moral terms aims to appeal to higher ideals of the human

15. See Calnan, *supra* note 6, which speaks to assessing the “agenda” of the NGO and its relevance to international human rights priorities.

16. The Citizen’s handbook is available online. See: <<http://www.citizenshandbook.org>>.

17. Tilly uses “worthiness.” See Tilly, *supra* note 13.

18. This assessment comes largely from an interesting article from Charles Dobson. See Charles Dobson, “Social Movements: A summary of what works” in *The Citizen’s Handbook: A Guide to Community Organizing* (Vancouver: Vancouver Citizen’s Committee, August 2001), online: <<http://www.citizenshandbook.org/movements.pdf>>.

19. *Ibid.*

20. *Ibid.*

spirit. To the extent that advocacy NGOs claim that their mandate is rooted in law, they are making the assumption that unconstitutionality, or illegality, is immoral. At times, the simple assertion of illegality or immorality will not be sufficient. It is often necessary to explain why illegal actions are immoral. Some rules or laws may be immoral, unworkable, or unconstitutional. At times, the public is ambivalent about the morality of some legal obligations. For example, in the context of police chasing dangerous criminals or attempting to uncover terrorist plots, the claim that police action is “illegal” or “unconstitutional” has resonance, but may need to be grounded in broader appeals to humanity. Fear may lead a society to accept and tolerate illegality because it is under the illusion that this will guarantee safety or because it has learned to devalue the humanity of the alleged terrorist or criminal. If Dobson is right, the constant search to strike the right chord in moral terms should be an important element in assessing NGOs.

The second success criterion is the commitment of its membership. Although commitment may be difficult to evaluate objectively, a large cadre of volunteers or a smaller long-time and very active group of members is a positive indicator and suggests that NGO management should foster the commitment of members.

Dobson also mentions access to political resources. He suggests that the ability to reach out to elites and to large membership bases is key, along with the ability to mobilize financial resources. This organizational aspect of NGOs is worth investigating in an assessment of their worth. We will see that Calnan also makes the claim that organizational health is relevant to the effectiveness of NGOs.

The fourth criterion, which appears more debated, is the link to a charismatic leader. Many NGOs identify with a leadership figure, particularly in the context of media appeal. Alan Borovoy for the CCLA, David Suzuki for the David Suzuki Foundation, and Maud Barlow for the Council of Canadians, are examples of charismatic leaders who highlight the effectiveness of the organizations. Finally, Dobson argues that cooptation is a danger that constantly lurks in the dynamic of political positioning. This may be a fruitful avenue of research in assessing how advocacy NGOs relate to their targets and how they maintain their independence and ability to criticize while themselves attempting to achieve a level of cooperation to foster implementation.

This short review of success criteria from the social movement literature suggests that messaging, organizational strength, access to resources broadly defined, and leadership are meaningful criteria to assess NGOs. In addition, a failure indicator, that is, the possibility of being coopted, should also be included

in our assessment. I now move to review the way in which the effectiveness of ombudsmen has been evaluated.

A. OMBUDSMEN AND INFLUENCE

Ombudsmen have occupied a cherished place in the Canadian legal landscape for many decades. Canada has often opted for an ombudsman model at various levels of government to strengthen its democracy. Ombudsmen are created by governments or institutions to respond to complaints. They do not have binding power. They simply have the power to make recommendations. Therefore, the essence of the ombudsman is his or her capacity to exert influence on administrative processes. Ombudsmen make recommendations and hope to be listened to. In that sense, like NGOs, they seek to influence.

In her series of interviews with various ombudsmen, Michelle Le Baron identifies the roles of the “classical” ombudsman; raising the bar for service to the public; articulating and fostering best practices; encouraging government agencies to offer a spectrum of services with appropriate dispute prevention and resolution mechanisms; reporting on the general landscape of issues including substantive, procedural and relational dimensions; promoting confidence in governance structures and processes; providing access to justice, especially for those who have limited access to resources for redress; commenting on systemic issues, especially those where social justice may be compromised; and holding government accountable for the accessibility and workability of its policies and avenues for citizen engagement.²¹

My sense is that, in Canada, the growth of the governmental ombudsman function may have led to a reduction in funding or support for the non-governmental advocacy sector. This contrasts with the United States, for example, where the financial support for various NGOs is more established. Is it necessary to have an organization devoted to privacy concerns if there is a statutory Privacy Commissioner? Is the function of this organization simply to ensure good performance of the governmental actor and appropriate support for its recommendations? Does the presence of a governmental advocacy actor weaken or otherwise affect the non-governmental advocacy sector in Canada? If so, does this change the role and the assessment of an NGO's performance? These questions warrant further research.

21. Michelle Le Baron, “Watchdogs and Wise Ones in Winter Lands: The Practice Spectrum of Canadian Ombudsman” *Forum of Canadian Ombudsmen* (2008), online: <<http://www.ombudsmanforum.ca/en/wp-content/uploads/2012/02/Liz%20Hoffman%20Paper%202009%20%28Eng%29.pdf>>.

Commentators on the roles of ombudsmen usually emphasize their democratic worth,²² although they recognize the difficulty of providing a definitive assessment.²³ Isabelle Fortier talks about sustaining democratic functions of redress, integrity, and accountability.²⁴ At times, ombudsmen have been created to protect particular values such as integrity, financial accuracy, protection of official languages, or protection of the environment. Ombudsmen in that context aim to embody a value often forgotten in the busy world of politics. From the poignant question as to whether “trees should have standing”²⁵ has come the realization that some intangible values must be anthropomorphized—given a human face—to be heard and considered. I use the term “Value Ombudsman” to describe the ombudsmen who function in defense of a particular legislative objective, such as privacy, access to information, whistleblower protection, or bilingualism, as opposed to the more general ombudsmen who are empowered to act for good administrative governance. Value Ombudsmen have a specialized perspective: They speak for a particular aspect of public governance and act to raise awareness, convince others, reframe debates, ask for accountability, and empower individuals and groups to ask for better treatment²⁶—all of which are actions often performed by NGOs.

This functional similarity is not completely fortuitous: both NGOs and ombudsmen can leverage moral powers in a search for justice or constitutional compliance, and both can be ignored. The ombudsman is paid by government and so may have more resources and easier access to government information. However, the literature on the ombudsman provides further indicia of measurement for the enigmatic and elusive influence that advocacy NGOs strive to exert. Ombudsmen have no enforcement or disciplinary powers and they generally depend on the power of persuasion: “They are an interface, practicing

22. See Gregory J Levine, “Administrative Justice and the Ombudsman—Concepts and Codes in British Columbia and Ontario” (2004) 17:3 C J Admin L & Prac 239. See also Stewart Hyson, “The Ombudsman Research Project” Canadian Political Science Association (2006), online: <<http://www.cpsa-acsp.ca/papers-2006/Hyson.pdf>>.

23. Brenda Danet, “Toward a Method to Evaluate the Ombudsman Role” (1978) 10:3 Admin & Soc 340-42.

24. Isabelle Fortier, “Multiple roles of Ombudsmen in fostering democratic values: Evolution and emergent issues of the Québec’s provincial Ombudsman 2000-2006” *Forum of Canadian Ombudsmen*, online: <http://www.ombudsmanforum.ca/en/wp-content/uploads/2011/07/isabelle_fortier_democratic_values_e.pdf>.

25. Christopher D Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment* (Dobbs Ferry, NY: Oceana, 1996).

26. Nathalie Des Rosiers, “Balance and Values – The Multiple Roles of the Ombudsmen” *Forum of Canadian Ombudsmen*, online: <<http://www.ombudsmanforum.ca/en/?p=561>>.

dynamic in-between-ness in ways that promote voice, procedural satisfaction and accountability.”²⁷ Indeed, Daniel Jacoby and Patrick Robardet have used the expression “change agent”²⁸ to describe the work of ombudsmen.

The many roles of ombudsmen come from the diversity of mandates and missions as well as the diversity of personalities that have occupied the various positions.²⁹ Nevertheless, a form of administrative advocacy has resulted from the strategies deployed by ombudsmen. This administrative advocacy is helpful to consider in assessing the value of advocacy NGOs. Most agree that independence is the core value of ombudsmen’s appeal.³⁰ Effectiveness is measured by the capacity to effect change that leads to improvement. André Marin certainly suggests that the real measure of effectiveness is the capacity to concentrate on an issue that affects a large number of people and to focus more on systemic issues and less on individual mistakes.³¹

This review suggests that three criteria have been identified in assessing the effectiveness of ombudsmen. First, their independence is viewed as key. Second is the credibility or prestige either of the individual ombudsman or the office itself. Third, some suggest that the real measure of effectiveness is the ability of the ombudsman to change the culture of government, to focus on systemic as opposed to individual complaints, or to strengthen the internal capacity of government to correct its mistakes without recourse to external complaint mechanisms. As Martin Oosting quips: “The better the government functions, and the greater the effectiveness of these internal complaints procedures, the less the ombudsman will have to do. But is it not precisely the task of each ombudsman to try to put himself (sic) out of a job?”³²

These three criteria should be relevant to the assessment of an NGO. Its capacity to assert and demonstrate independence from the targets or subjects of its action and criticism, be they government, police services, or large corporations, is imperative. Such independence gives an NGO status and makes

27. Le Baron, *supra* note 21.

28. Daniel Jacoby and Patrick Robardet, “The Protecteur du Citoyen du Québec as an Agent of Change” (1993) 11 *The Ombudsman Journal* 113.

29. Le Baron, *supra* note 21 at 6.

30. *Ibid* at 24.

31. André Marin, “Vital Watchdog vs. Paper Tiger: What kind of ombudsman do you want to be?” *Forum of the Canadian Ombudsman* (29 May 2008), online: <<http://www.ombudsmanforum.ca/en/?p=400>>.

32. Marten Oosting, “The Ombudsman and his Environment: A global view” in Linda C Reif, ed, *The International Ombudsman Anthology* (The Hague, NL: Kluwer Law International, 1999) at para 9 at 13.

its recommendations worthwhile. Second, the credibility of the organization or of the person leading it, like the credibility of the ombudsman's office or of the individual ombudsman, may also warrant some attention. Finally, the ability to focus on issues that are transformative of the culture of government is a thought-provoking assessment tool. For example, on this criterion, it might be more profitable to take a case to improve police disciplinary processes than to argue for the exclusion of evidence in yet another police misconduct case, no matter how outrageous the misconduct may be.

The ombudsmen literature discloses criteria that complement the social movement literature in predictable ways. An ombudsman's office is created and imbued with credibility because of its creation. It has access to some resources by virtue of its governmental or institutional position, which makes access to resources a less salient assessment criterion for ombudsmen than for social movements. Social movements, by contrast, emerge from grassroots community engagement and are far less organized and stable. Their success requires that they discipline themselves to access resources broadly defined. On the other hand, the ombudsman cannot count on membership or numbers of adherents, and he or she is dependent on the government's rather amorphous sense that the recommendations he or she makes ought to be followed. The recommendations of an ombudsman may not catch the public's imagination—he or she cannot organize a street demonstration or engage in collective mobilization in the same way that a social movement tends to do. NGOs can be perceived as falling between these two poles: they may be more permanent and more organized than a large, fluid social movement, but less structured and stable than an ombudsman's office. How, then, should they be assessed?

B. ASSESSING NGOS' WORTH

The variety of NGOs makes uniform rules for evaluation and assessment difficult: some NGOs pressure businesses and governments, deliver services, and empower the poor and the disenfranchised, while others are watchdogs that comment on governmental action or inaction. Nevertheless, a few authors have proposed models to critically evaluate the role of NGOs. Most of this work has taken place in the international sphere. International donors are increasingly demanding that NGOs demonstrate not only clarity of purpose and transparency in spending, but also efficiency and effectiveness in their programming. These demands have framed certain discussions, which have also been sparked by concerns over NGOs' democratic deficit and their inclusion in international decision-making forums.

In response to criticisms that NGOs are at risk of usurping the positions of democratic institutions, scholars have developed models to discuss the legitimacy of NGOs that assume greater powers and are invited to participate in international negotiations.³³ The questions addressed include whether or not NGOs would replace democratically elected state governments in devising policies, and whether they would hinder or add value to international negotiations. Underlying the questions about NGOs' utility is the eternal debate about their authority, democratically speaking: who are they to claim such power? Even before discussing their worth or performance, NGOs must claim legitimacy.

1. LEGITIMACY

Legitimacy has often been discussed in the context of human rights organizations. In the United States, an entire industry has arisen around NGO assessment.³⁴ Groups such as Charity Navigator and the American Institute of Philanthropy evaluate thousands of charities. For the most part, however, these ratings groups have stayed away from substantive measures of legitimacy, preferring instead to measure charities according to independence in governance, transparency, and financial efficiency.³⁵

To understand the discussions regarding legitimacy, it is important to start with the nature of NGOs. Interestingly, the multiple definitions of NGOs reflect the different missions that NGOs adopt. A workshop held at the Asian Institute of Technology in 1988 used a following list, which included the following criteria to determine which organizations were NGOs, among others:

- A non profit-making, voluntary, service-oriented/development-oriented organization, either for the benefit of members (a grassroots organization) or of other members of the population (an agency).
- It is an organization of private individuals who believe in certain basic social principles and who structure their activities to bring about development to communities that they are servicing. ...

33. See Vivien Collingwood, "Non-governmental organizations, power and legitimacy in international society" (2006) 32:3 *Rev of Int Stud* 439; Ian Clark, "Legitimacy in the Global Order" (2003) 29 *Rev of Int Stud* 75.

34. Carl Bialik, "Charity Rankings Giveth Less Than Meets the Eye", *The Wall Street Journal* (19 December 2008) online: <<http://online.wsj.com/article/SB122963299671419401.html>>; Carl Bialik, "Evaluating Charity Evaluations" *The Wall Street Journal* (18 December 2008) online: <<http://blogs.wsj.com/numbersguy/evaluating-the-charity-evaluators-478/>>.

35. Carolina Preston, "Making a Measurable Difference" *The Chronicle of Philanthropy* (13 November 2008) online: <<http://philanthropy.com/article/Making-a-Measurable-Difference/57560/>>.

- An independent, democratic, non-setarian people's [sic] organization working for the empowerment of economic and/or socially marginalized groups. ...
- Organizations established by and for the community without or with little intervention from the government; they are not only a charity organization, but work on socio-economic-cultural activities. ...³⁶

The World Bank uses a more restrictive definition: "[P]rivate organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services or undertake community development."³⁷

It is interesting to review these definitions because they are essentially functional in nature: NGOs are what they aim to do. Their key identifying feature is that they are not government, even if they receive funding, speak to, or work with or for governments. This functional approach almost blends the question of legitimacy with that of efficiency; NGOs are who they are because of what they do. Indeed, many authors explicitly recognize that NGOs' legitimacy comes from their commitment to their mission. Some authors venture to say that NGOs are political corporations with no less or more legitimacy than any private sector corporation;³⁸ only their power and influence make them popular or important in public discussions. In that context, the legitimacy question is irrelevant—NGOs are legitimate because they exist. The political market determines whether they have power or influence, but they are all legitimate.

Others accept that the concerns over the legitimacy of NGOs are well placed and that NGOs must prove their legitimacy. How they do it and what criteria they use are the questions. The debate over legitimacy has focused on additional demands for the accountability of NGOs—that they be more like government, in the sense of being constrained by elections, limited by constitutions, and subject to ouster when unpopular. Many authors debate whether the comparison with the state is useful or needed, and insist on a rather different analysis for NGO's legitimacy. As Vivien Collingwood points out, "The argument that NGOs are not democratic because they are not formally representative, or do not allow

36. "Definitions of an NGO" *The Global Development Research Centre*, online: <www.gdrc.org/ngo/wb-define.html>.

37. Operations Policy Department, World Bank, "Working with NGOs: A Practical Guide to Operational Collaboration between The World Bank and Non-governmental Organizations" (1995) at 7.

38. Robert Blood, "Should NGOs be viewed as 'political corporations'?" (2004) 9:2 *J of Comm Management* 120.

direct participation of stakeholders in decision-making, displays, at best, a failure of political imagination, and at worst, a desire to misrepresent how transnational NGOs actually function.”³⁹

There is no doubt that legitimacy is often assumed. There are sociological and normative aspects to legitimacy: institutions are legitimate because people believe them to be and because they seek to gain and preserve such legitimacy by observing certain rules and values in their work.⁴⁰ Nevertheless, a deconstruction of the ways in which legitimacy is assumed, assigned, or claimed is useful. For example, in the context of advocacy organizations, Hugo Slim suggests that legitimacy might be defined as “*the particular status with which an organisation is imbued and perceived at any given time that enables it to operate with the general consent of peoples, governments, companies and non-state groups around the world.*”⁴¹ According to Slim, “legitimacy is both derived and generated. It is derived from morality and law. It is generated by veracity, tangible support and more intangible goodwill.”⁴² Slim’s work confronts the legitimacy question directly. In his understanding, legitimacy also stems from an NGO’s ability to ground its mandate in legal commitments to human rights and in the duty of every human being to protect human rights. Slim is not the only author to see a linkage to law as generating legitimacy. Collingwood, for example, also suggests that international treaties act as the source of the moral claims asserted by NGOs.⁴³

Other important elements of legitimacy have also been identified. Financial transparency and political independence, for example, have been suggested as a source of legitimacy in the international context. Many NGOs criticize governments and emphasize their impartiality and non-partisanship in doing so.⁴⁴ Extensive membership is also perceived as a source of legitimacy as it is seen as a proxy for organizational expertise and access to networks or partnerships.⁴⁵

The debate over legitimacy is somewhat unique to NGOs, because social movements or ombudsmen rarely have to assert their legitimacy. Whereas social movements “are” and therefore must be reckoned with, ombudsmen have been

39. Collingwood, *supra* note 33 at 451.

40. *Ibid* at 454.

41. Hugo Slim, “By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations” *The Global Development Research Centre* (2002), online: <http://www.gdrc.org/ngo/accountability/by-what-authority.html> [emphasis in original].

42. *Ibid*.

43. Collingwood, *supra* note 33 at 447.

44. *Ibid* at 448.

45. *Ibid*.

granted legitimacy through legislative mandates. It will be important to consider the question of legitimacy in the assessment model to be developed.

2. THE DEBATE OVER EFFECTIVENESS

Another important debate that arises from the literature pertains to the effectiveness of NGOs. Led by donors, this debate stresses that scarce philanthropic resources should be allocated rationally, and asks whether better indicators should be developed to make sense of the different claims made by NGOs as they seek to obtain funding. This discussion is also helpful because it invites debates about the measurement of effectiveness and ways in which human rights advancements can be monitored. Strategies of engagement vary among NGOs: direct delivery of services warrants a different analysis than advocacy for legal or political change. For the purposes of this article, I primarily identify and examine the strategies developed by advocacy organizations.

Collingwood identifies strategies of “dialogue and discussion, formal advice, agreement of voluntary codes and standards, and independent monitoring schemes.”⁴⁶ In her view, innovation is a hallmark of efficiency. She also notes that direct engagement with private and public actors has helped to bolster the perceived usefulness of NGOs. For example, developing codes of conduct to assist private actors to engage in sound human rights practices, or publishing annual ratings lists, may assist in creating an appetite for change or demystifying the obstacles to change. Collingwood notes that such efforts are heavily dependent for their success on “the extent to which the NGO is able to harness the pressure of the media and public opinion to its cause, the extent to which the government or organisation involved is prepared to make concessions”⁴⁷ Some governments or organizations may be sensitive to their image and may care that it could be tarnished by allegations of human rights violations; others may be less sensitive to such claims. In addition, the legal enforceability of various human rights commitments varies and NGOs’ ability to pressure governments may be influenced by such legal uncertainty. Some governments may worry about acting illegally or unconstitutionally, but will not be swayed by arguments that a course of action is merely ill-advised without being illegal.

Most would accept that the failure of a government or a powerful political actor to respond to human rights concerns cannot be the sole measure of the effectiveness or ineffectiveness of human rights advocacy organizations. Though political resistance to an organization’s message is not synonymous with

46. *Ibid* at 443.

47. *Ibid* at 444.

ineffectiveness, the debate as to how to measure its effectiveness remains open. Slim suggests a “voice accountability” model. Slim asks: if NGOs give a “voice” to injustice and work to remedy it in individual and systemic ways, how should they ensure that it is the right “voice,” the true voice of injustice? If NGOs aspire to “speak truth to power” and claim moral authority to challenge governmental or other action, how can they ensure moral legitimacy?⁴⁸ Slim suggests that voice accountability depends on legitimacy and authority. The influence of NGOs is the real measure of their effectiveness. By influence, Slim means their ability to articulate demands to various decision-makers and to bring about changes despite their relative lack of resources. However, even in attempting to give voice to injustice, issues of legitimacy arise. As Slim puts it:

The questions NGOs have asked themselves concentrate on how their voice relates to the people they are primarily concerned about — the poor, people whose rights are violated, and the victims of war. These debates about NGO voice might be summed up as follows: *do NGOs speak as the poor, with the poor, for the poor or about the poor?* ...

How NGOs answer this question determines the precise nature of their legitimacy. If they are an NGO or CBO (community based organisation) that is made up of poor people or the victims of human rights violations then they can be regarded as *speaking as*. If an NGO is working very closely with such people and speaks with their consent, then they can be said to be *speaking with*. If — as much NGO rhetoric declares — the poor and the oppressed are effectively unable to speak out and so are somehow ‘voiceless’ then NGOs could claim to be *speaking for* or on behalf of them. However, this last form of voice must be treated with great caution as it can be argued that it is in the organisational interests of middle class NGO people to keep lower class people voiceless. In other words, some voiceless-ness may be the result of NGO oppression as well as government or other violent oppression. The problem of northern NGOs ‘capturing’ the agenda and taking over the voice of southern NGOs is well known. Finally, if NGOs are not strictly speaking as, with or for a particular group of poor or victimised people, or are speaking so generally as to make specific relationships meaningless, then they may claim to be *speaking about* poverty or oppression.⁴⁹

Slim is quick to point out that many organizations speak in different modes, that is, with, for, or about the poor and the oppressed, depending on issues or strategies. His point is simply that these modes should be distinguished clearly and that NGOs must be clear about which mode they offer or run the risk of being found to be masquerading rather than to be voices for the poor and the

48. Slim, *supra* note 41.

49. *Ibid* [emphasis in original] [citation omitted].

oppressed. From this commentary, one might reflect that integrity, transparency, and conformity of actions to mandates are sources of legitimacy and authority.

In his work, Scott Calnan also suggests that effectiveness can be measured. His book, *The Effectiveness of Domestic Human Rights NGOs*,⁵⁰ seeks to evaluate the capacity of different NGOs in the United States, UK, and Germany to implement international human rights norms. He proposes a qualitative method that seeks to measure several aspects of effectiveness.⁵¹ First, he attempts to gauge the way in which the state receives, interprets, and uses the NGO's criticisms. His second measure, which he describes as more important, is the way in which the state is socialized into internalizing the norms that the NGO puts forward. A successful internalization happens when the state itself and its leaders fundamentally believe that transgressing human rights norms is wrong. Finally, Calnan looks at the extent to which an NGO is self-reflexive to ensure that its strategies are deployed in an appropriate way to achieve compliance with international human rights instruments.

Calnan's comparative work and his evaluations of different domestic NGOs lead him to the following conclusions that are relevant for our purposes:

1. The primary determinants of an NGO's effectiveness are its organizational abilities, not environmental factors; that is, even in a negative political environment, NGOs may be effective.
2. An NGO's organizational culture is more important than its organizational structure (mechanical or organic) in determining the NGO's effectiveness. Calnan distinguishes between a mechanical structure, which is hierarchical and bureaucratic, and an organic one, which is easily adaptable to new environments and information. His conclusion is that tension in organizational culture is linked to a conflict between internal coherence and external focus. In his view, some NGOs are too internally focused and miss opportunities for partnerships or actions because of their self-centeredness. Others lack identity and cannot coalesce easily around a message, have trouble reaching decisions, or cannot develop a good image.
3. NGO tactics are generally determined by the relative pull of legitimacy on the one hand and rational adaptation to the environment on the other. Calnan explains that legitimacy may be obtained at the cost of efficiency; that is, in order to have legitimacy,

50. Calnan, *supra* note 6.

51. *Ibid.*

an NGO may invest greatly in structures that validate its stance, whereas efficiency would dictate fast decision-making.

4. Sources of money capital for an NGO can be either constraining or liberating in terms of their effects on its tactics. Calnan's view is that funding dictates choices, and that, at times, the lack of funding or the restrictions on a prescribed funding source may limit an NGO's effectiveness.⁵²

Calnan's work is interesting because he has endeavoured to give a mark of effectiveness to the NGOs that he has studied and to deepen our knowledge of the variety of factors that impact effectiveness. He acknowledges that his work provides only a partial account of effectiveness due to his lack of access to some data. Thus, Calnan's work only gives a snapshot-in-time assessment of the various organizations he considers. Nevertheless, his model provides some additional elements to my framework for NGO evaluation.

Calnan and others provide a variety of tools to assess effectiveness. Many reflect the assessment of effectiveness of other influential players such as ombudsmen. It is noteworthy that Calnan and Collingwood both recognize that effectiveness may be present in a negative political environment. Even if the audience is not listening, the message may still be well delivered. Slim and others may disagree with that assessment. The real measure of effectiveness rests in the ability to influence powerful actors and the ability to find the appropriate way to do so. It is not enough to put up a good fight; winning is important. In the next section, I propose an evaluation model for advocacy NGOs that draws on the inventory of criteria listed above.

III. A PROPOSED FRAMEWORK

There are certain features that a national human rights and civil liberties watchdog organization should monitor to assess its worth, legitimacy, effectiveness, and strategic choices. In the following section, I propose criteria to measure the work of an advocacy organization drawing on the ideas explored above. The model has two main components, legitimacy and efficiency, recognizing that both are interrelated and must be present in the context of an NGO's work.

A. LEGITIMACY

NGOs claim legitimacy. They should. In my view, their role in a democratic society is important. How they assert this legitimacy must be theorized. The

52. *Ibid* at 325-26.

following proposal suggests that legitimacy is gained through three essential factors: transparency, independence, and expertise. I suggest that each factor enhances the overall legitimacy of an NGO's voice, and that the three factors are interdependent. That is, more transparency leads to more independence, greater expertise adds to the perception of independence, and independence is essential to the assertion of expertise.

1. TRANSPARENCY

It seems clear that while representativeness in the democratic sense (*i.e.*, elections or direct participation) may not be essential to an NGO's legitimacy, transparency is. NGOs must make it clear how they function, for whom, and to whom they deem themselves accountable.

As a social movement draws its power from a group's commitment, an NGO draws its influence from its capacity to speak. The power to speak can be challenged, and the ability to demonstrate a credible process or a meaningful reflection is essential to the exercise of that power. Ombudsmen benefit from the transparency afforded by a legislative mandate that is publicly available. Slim certainly suggests that transparency is both necessary and the most important defence against "masquerading." Although Calnan does not use the concept of transparency as frequently, he emphasizes the process by which an organization determines its agenda. He also criticizes NGOs for failing to be transparent about their evaluation processes.

What would transparency require? It seems that public disclosure of an NGO's decision-making structure and sources of funding is essential. Transparency may also require that an NGO's policy positions and advocacy stances also be disclosed. The identity of donors is a more delicate question. Does it matter whether the person is a major donor and known to the organization? Is it sufficient to state that there are anonymous donors to the organization? At a minimum, the issue must be addressed and the policy made public. Identifying the decision-making structure clearly and publicly can allay the fear that a particular donor may be able to influence decision-making within the organization.

2. INDEPENDENCE

The ability to contribute to public discourse in an impartial way contributes to legitimacy. Though this does not mean an NGO must take a neutral position, independence is necessary to demonstrate how an NGO's voice is distinct from that of political parties or other powerful actors. This criterion relates to transparency in the sense that transparency about processes and funding may

supersede a demonstration of absolute independence and impartiality, which is impossible to achieve. In other words, an NGO could have a bias in favour of social justice or civil liberties without sacrificing its legitimacy. However, it must demonstrate integrity in its findings and actions: it ought not to be easily manipulated or used by political actors.

In that sense, independence draws on research related to both social movements and ombudsmen. The literature identifies cooptation as a source of failure and a major danger for social movements. In that sense, the ability to maintain independence is linked to keeping the dangers of cooptation at bay. There is no doubt that ombudsmen cherish their independence and view it as the most important aspect of their legitimacy and ability to contribute meaningfully to public debates. Similarly, the research on NGOs also points to independence and non-partisanship as essential to credibility. The ability to demonstrate independence, not simply to claim it, is necessary. The diversity of sources of funding and the ability to criticize governments of all stripes should be apparent to all. Expertise

Demonstrating expertise enhances legitimacy. The expertise of an organization or the people associated with it is crucial to legitimacy. In what follows, I analyze two types of expertise in the context of legal advocacy NGOs: factual accuracy and democratic analysis.

3. FACTUAL ACCURACY

Truth fosters legitimacy and, in that sense, accuracy of information must be ensured. There is no doubt that truth is difficult to assess and that there is a continuous battle to establish it. Nevertheless, trust is in short supply and to the extent that an NGO participates in a watchdog enterprise, it must attempt to bring the “truth” out into the open.

Although the strength of social movements is not about demonstrating expertise in the traditional sense as much as expressing outrage or denunciation, one can argue that the correctness of the facts presented by NGOs plays an important role. The moral claim that is asserted by NGOs often pertains to untold truths, the hidden costs of social policies, or silenced suffering. Many social movements, like the civil rights movement, the feminist movement, the gay-lesbian movement, and the Occupy movement, are about denouncing discrimination and unfairness. Similarly, ombudsmen have investigatory powers to ascertain the truth of a complaint, as well as access to information to ensure that their findings are accurate.

NGOs should strive to ensure that they have factually correct information. This is not always easy. Access to government information is notoriously labour-intensive and often untimely. Systematic analysis may be impeded by the lack of reliable data. In that sense, NGOs should foster partnerships with universities and other institutions capable of establishing credible research protocols. However, truth is not only claimed by numbers, reliable statistical analysis, or longitudinal studies. Lived unfairness also needs to be disclosed. Testimonies can be made available and individual stories of abuse can be very compelling. The test for accuracy becomes the diagnosis that is attached to the story: is it an abhorrent tale? Unusual? Or is it representative of a systemic problem?

The issue of diagnosis is of fundamental importance. At times, it is impossible to tell whether an outrageous story is representative of a trend or an isolated occurrence. In such cases, access to data and academic expertise are needed. Nevertheless, the uncovering of individual injustices, however exceptional, uncommon, or abnormal, is still a worthwhile enterprise. Justice is not attained at an abstract level. The presumption of innocence must be applied to individual cases. It is not good enough that, in general, most people are treated appropriately by the justice system. Justice aspires to a perfect score; wrongful convictions, even if counted in single digits, are unacceptable.

4. DEMOCRATIC ASSESSMENT

In this section, I purposely use the term democratic assessment as opposed to legal accuracy or public interest analysis. If a legal mandate is what gives legitimacy to an organization, as Slim seems to suggest, the organization must be rigorous about the law and complement the fact-finding aspect with a legal assessment that stands a good chance to be borne out in any eventual litigation. However, law is in constant evolution and there may be times when the current rules are unsatisfactory. In addition, the commitment to international values of human rights may not have been fully reflected in national legislative instruments, or simply ignored in a given situation. Reasonable people may disagree about the interpretation of the law in a particular context. Within the ambit of legal interpretation, one would hope generally not to stray too far outside the bounds of expected legal pronouncements. Nevertheless, legal accuracy may be insufficient to claim the moral imprimatur that seems to be needed to assert influence outside of legal circles.

Although the legal community may be an important ally in the fight to ensure compliance with human rights (whether internationally mandated

or constitutionally enshrined), it may not be enough to influence the public or politicians. Some people are dismayed by the prospects of illegality or unconstitutionality, but others may want to understand why the legal world is so adamant about protecting such values. A truly democratic society is not secure simply because the legal world is able to protect the rule of law; a democracy must aim to have the entire society committed to upholding its underlying principles in rational and conscious ways. As society experiences a “decline in deference,”⁵³ it cannot be expected to simply abide by the words of experts. The art form is to explain why respect for legal norms is democratically and morally required, as well as in the public interest.

The legitimacy debate will continue to dominate the assessment of NGOs’ participation in various arenas. NGOs claim legitimacy to participate in these arenas whenever they are invited to speak on Parliament Hill to support or oppose a bill, when they seek intervener status before tribunals and courts, and when they issue media statements. Calnan’s work invites NGOs to be more self-reflective as to how this claim is made, while Slim’s analysis suggests that transparency must be at the core of all legitimacy claims. In my view, the legitimacy claimed must be grounded in expertise, transparency, and independence. The legitimacy challenge is unique to NGOs but it must be shouldered energetically and with imagination. The self-analysis and self-reflection recommended by Calnan must be constantly undertaken.

It is also important to assess the effectiveness of NGOs, an issue to which I turn in the next section.

B. EFFECTIVENESS

In this section, I engage more fully with the idea of measuring effectiveness in light of the analysis provided above. I explore themes that, in my view, bring the discussion of effectiveness into the realm of actual choices made daily by NGOs. My objective is to see whether a discussion of effectiveness enriched by the inventory of measurement criteria can shed light on some of the dilemmas that face NGOs. I propose to discuss two main issues: whether NGOs should claim that they are “causing” change and how they should attempt to resolve the choice between long-term and short-term strategies.

53. The expression comes from Neil Nevitte, *The Decline of Deference: Canadian Value Change in Cross-National Perspective* (Peterborough, ON: Broadview Press, 1995).

1. "CAUSING" CHANGE?

The primary way in which advocacy organizations assess their effectiveness is by claiming a causal role in bringing about change. Ideally, effectiveness would be measured by changes attributable to an NGO's actions: changes in the law, changes in public opinion, or changes in practices. A causal connection is certainly difficult to establish. Calnan's work explains how the search for such a causal connection is destined to fail because most advocacy efforts operate at the margins and create change in small increments over a lengthy period of time.

The literature on ombudsmen is helpful in this regard because ombudsmen view themselves as agents of change. The ombudsman's strategy is one of leveraging the credibility of his or her office, coupled with ongoing lobbying, credible findings, and workable recommendations. Some NGOs benefit from a similar position, where their findings are viewed as credible and their recommendations worthy of a reaction. When soft advocacy and the power of words do not suffice, advocacy NGOs will resort to legal action with a view to effect change. Joel Handler famously concluded that resorting to courts is a sign of weakness, of an inability to exert influence where it matters—in politics, in administration, or in the market.⁵⁴ Only moderate success is to be expected from court action. Indeed, many suggest that litigation is useless and even detrimental to the achievement of equality and civil rights.⁵⁵

I do not hold these views. In my view, there are two aspects of litigation that are overlooked by this grim evaluation. First, litigation is voice; it is the occupation of a public sphere that demands recognition. Many recognize the power to raise consciousness by using rights language. There is a certain powerful democratization when groups and people discuss law and suggest what the right law should be. This empowerment through claiming the space of law ought not to be dismissed. In addition, the courtroom may appear as inaccessible as the boardroom of a corporation or the ballroom of an expensive hotel, and this is precisely why it must be seized and occupied by claims of ordinary people.

Second, litigation is unavoidable. Most civil liberties or human rights laws are essentially defensive: they are a response to the attempt to use law to impose silence, to impose punishment, or to enforce rules. Indeed, many civil liberties arguments are brought in the context of state actions against an individual in criminal law or in immigration law. At times, civil liberties arguments will be brought in defense of actions by powerful actors using defamation suits to

54. Joel Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (New York, NY: Academic Press, 1978).

55. *Ibid.*

silence dissent or trademark law to impose restraints. To the extent that there are proactive lawsuits that seek to change the law, they ought to be analysed in different categories: claims that challenge existing criminal or immigration laws that could be used against individuals or claims that object to recent amendments that some consider unconstitutional. In both cases, the litigation strategy is essentially aimed at stopping allegedly abusive state action.

In that context, the special role of NGO lawyers must be discussed. Legal advocacy could be criticized as disempowering and disabling as opposed to enabling poor and vulnerable people. The fear is that lawyers will take over the agenda and, as Wexler so appropriately denounced in 1970,⁵⁶ devise legal strategies as though poor people were rich people without money, and fail to recognize the power dynamics. There is a danger that litigation strategies may create a dependency on legal experts and fail to empower people to organize politically. Special attention must be paid to this possibility and lawyers need to be particularly conscious of the danger that they might disable or slow down mobilization campaigns. Special lawyering skills are needed in the NGO context. The work demands versatility, an ability to move from the courtroom to the media room, the community centre, the school and the parliamentary hearing. Further research on the ethical concerns raised by this multiplicity of roles is certainly needed.

In addition, the analysis of whether a long-term goal ought to supplant a short-term victory is often at stake: litigation may require the manipulation of legal precedents that are, at times, unsympathetic to human rights concerns. One could imagine a legal theory that fully embraces human rights principles, like a fulsome respect for socio-economic rights. Instead, one could opt for recognition that the current caselaw is paralysed on the question and develop a different legal argument, one that seeks to secure progress but not propose the ultimate legal analysis that would fully support a vigorous human rights vision. This tension is real. On the one hand, the possibility of under-arguing a human rights analysis is dangerous—it might preserve an inadequate and unsatisfactory precedent, have widespread repercussions, and represent a missed opportunity that might not return. On the other hand, disregarding the status quo of the law and the typically slow pace of legal change may result in vital concerns being dismissed or ignored. Courts may simply pay no attention to arguments that stretch the current caselaw too far or clearly call for overruling a pre-existing case. The legal strategy is often confronted with such dilemmas, which are discussed in the next section.

56. Wexler, *supra* note 10.

2. SHORT TERM VERSUS LONG TERM

Most advocacy NGOs view themselves as being in the business for the long term. They often argue that short-term political expediency will have detrimental consequences. However, immediate needs must be met and current injustices must be addressed. Whether it is the release of people detained for breach of peace, immediate changes of abusive bail conditions, or the release of information about police surveillance in a particular locale, such issues deserve to be fully aired. Transparency values suggest that any short-term fight should be linked to a long-term advocacy position and supported by analysis that identifies how the short-term position enhances the NGO's capacity to achieve its long-term goals.

Calnan's work in this respect is very helpful. He challenges NGOs to become more self-reflexive, to bring clarity to their work, and to engage fully in goal identification. In his view, the capacity to publicly and transparently acknowledge and evaluate strategic choices is essential to developing a sustainable agenda. In a way, Calnan invites NGOs to enlarge their focus and assess the range of strategies that are open to them, not only in terms of mobilization, public education, media outreach, lobbying, or litigation, but also in terms of the goal that is sought. For example, some would argue that a solution-oriented, reasonable NGO may be more efficient if it is prepared to develop solutions for the government faced with human rights violations. But this is not always clear. At times, anger creation, without offering a solution, may also be a legitimate strategy that galvanizes the will for action. The choice between solution-oriented strategies and anger-creation ought to be acknowledged and evaluated. Proposing a solution may be a short-term, expedient goal, while sustaining a campaign that expresses outrage may lead to more profound long-term changes and may build more emotional attachment to the fight for human rights or civil liberties.

Finally, the short-term versus long-term dilemma is also raised in the choice between grassroots advocacy and elite leveraging. Both are common strategies for NGOs and both have benefits. There is no shame in attempting to convince the powerful to relinquish some power, to care more about social issues, and to engage in more altruistic behaviour. The danger that lurks is the cooptation or legitimization that comes from participating in processes that seek to appease wrongdoers without resolving the issues, as highlighted in the literature on social movements.⁵⁷ This suggests that NGOs must engage in self-reflection to prevent being manipulated by "symbolic reassurance."⁵⁸

57. See *supra* note 20.

58. Dobson, *supra* note 18.

IV. CONCLUSION

The field of assessment of NGOs' strategies is highly politicized, and rightly so. People demand a certain degree of virtue from those who criticize others. The advocacy function in a democracy is well served by a vibrant NGO sector that is self-critical and self-searching, and attempts to evaluate and reflect on its flaws and quandaries. This article has discussed the effectiveness of domestic advocacy NGOs in comparison with the success indicators developed in the context of social movements, ombudsmen, and international NGOs or domestic NGOs engaged in ensuring compliance with international standards. It proposes a framework for assessing the performance of NGOs.

The main contribution of the research undertaken and the proposed framework lies in identifying the transparency and self-reflexivity requirements needed to achieve effectiveness. In my view, effectiveness is enhanced by independence, expertise, and resources (including financial resources, as well as access to networks). It must also be grounded in a requirement of transparency, which confers meaningful credibility, and in on-going analysis or self-reflexivity, which entails continuous assessment of strategic choices to determine their link to long-term goals. Evidence of causal connections between an NGO's action and change, in the form of governmental response or court ruling, will always be difficult to obtain; influence may or may not be acknowledged. Nevertheless, advocacy NGOs should aim to clarify for themselves why they choose certain strategies and accept that their claim to influence requires a commitment to transparency, not unlike the commitment that they require from governments.

Calnan suggests that more research ought to be done on the roles and strategies that NGOs develop. I agree. The constant struggle to work and survive that characterizes most NGOs leaves little time for reflection, which is why academics need to pay attention to NGOs and help them. The CCLA would not have prospered as it did but for the patient attention that John McCamus gave to it. We were fortunate to have several academics who cared about the endeavour and brought rigour and imagination to the task. Personally, I am particularly grateful for the opportunity that has been provided by Osgoode Hall Law School to delve into the question of assessment of the performance of advocacy NGOs.

