

Colombia

Reviewer: Dr. Adriana Ruiz-Restrepo
Institutional Affiliation: Alteritas Lab, RRA (Public Law + Social Innovation)

Section One: CSO Formation, Operation, & Dissolution

The questions in this section pertain to the laws and regulations governing civil society organizations (CSOs). CSOs refer to a wide range of groups including the following: community groups, non-governmental organizations (NGOs), labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations. The scoring questions for this category cover three aspects of regulations: (A) formation and registration, (B) operations, and (C) dissolution.

Question One: To what extent can individuals form and incorporate the organizations defined?

Reviewer Score 3.1

Colombians are free to form unregistered groups and—if such is their will—incorporate as separate legal entities. Both freedoms of reunion and of association are constitutional, real and effective. The country has an active civil society that participates in the public sphere through civic actions and solidarity initiatives that either fuel social movements or crystallize as juristic persons engaging directly in the development of the country. If cause and purpose are lawful, the Civil Code authorizes legal incorporation under two archetypes of juristic persons: a foundation or a corporation. Foundations are structured around donated equity capital—an endowment—while corporations are structured around associated individuals. Similarly, while for-profit corporations are governed by the Commercial Code, not-for-profit corporations, also known as associations, are regulated by Civil Law.

CSO juristic persons must give themselves organic statutes that contain both articles of incorporation and governing bylaws. The Registrars public function is delegated to private Chambers of Commerce in 57 cities—out of 1000 municipalities—which have a window of service for processing CSO

paperwork. Certain CSO activities relating, for instance, to health, childcare or finance, do require governmental approval for both incorporation and statutory reform. Overall, no minimum amount of capital or assets is required at the time of establishment, not even for foundations. Formation costs are low and the document verification process of the Chamber of Commerce is expedient. Although a private body and seemingly apolitical, the Chambers of Commerce in Colombia are also part of a revolving door between the business and political sectors; whereby individuals transition from State to Private sectors and vice versa. Additionally, in at least two cities, the government has declared the elections to the Chambers´ board null and void due to corruption linked to certain corporations and associated philanthropic foundations.

Regarding the incorporation process, it merely consists of reviewing the basics of the applicant—usually its name and governance structure—and it usually takes between three and five days to obtain a "certification of existence and legal representation". After obtaining the certificate, newly created entities are provided with a temporary Taxpayer Identification Number that is later confirmed personally in the Fiscal Authority´s office and which provides a Unique Tax Register and an authorization to invoice. Taken together, this process is not particularly lengthy nor onerous, and can be completed with minimal difficulty.

Note: Delegating the public incorporation and registration of legal entities to a private organization like the Colombian Trade Organization and its 57 branches is certainly not a system as sound, solid and extensive as that of other countries which do so through the local authorities of the State. However, and by comparison with other countries, the original score was higher because the Colombia State, not even in through it's more authoritarian governments, has restricted the freedom of association of civil society willing to legally incorporate as a new and separate entity.

Question Two: To what extent are CSOs free to operate without excessive government interference?

Other than requirements for lawfulness, identification and governance structures, the Colombian government generally has no *ab initio* control over the incorporation of CSOs. Legal

Reviewer Score

4.0

personhood is granted automatically by the private Chambers of Commerce. Some types of activities, however, require governmental approval even though this is generally a formality. Ex-post State control is also nebulous, both formally and materially, so opportunities for official interference are minimal to nonexistent or diffuse to the point that a legal provision may merely and vaguely refer the organization to "the competent authority for inspection and oversight" without being able to precise it. Oversight, if any, is more topical and functional than organic and structural. Instances of government interference with worker unions have been largely eliminated, although claims for real and effective participatory governance of CSOs and assembly for protest have increased at both the local and national level. Agencies of control are diverse and include the Electoral Council, Superintendencies, the Family and Welfare Institute and residually the offices of the country's various Governors. However, because the control exercised by diverse governmental agencies is imprecise and inconsistent, CSOs are just as likely to be subject to the intense discretionary inspection of a public servant as they are to never come across requests for accountability. Whether attributed to negligence or liberality, Colombians enjoy an ample civic space for structuring and running NPOs.

Reporting requirements, however, have grown and become increasingly uncoordinated. This general increase has also been accompanied by specific city-level initiatives designed to approach and organize the nebula of CSOs. The city of Bogota, for example, has been gathering information on the NPOs under its residual control since 2006, and the Mayor intensified it in 2013 by creating a sub-national superintendence of juristic persons. Simultaneously, the National Government created a single social merchant and nonprofit registration system known as RUES, and delegated its control to the private sector as represented by the Chambers of Commerce. Compliance under this system requires CSOs to update their registration information annually and to pay a corresponding fee—proportional to assets—for renewing its inscription in the registry. Non-compliance with RUES is not an option for the vast majority of CSOs, as a renewal failure would lead to legal difficulties with contracting, invoicing, and participating in public procurement processes. Thus while a de-listing from RUES does not threaten the legal personality of a CSO, it makes its operations prohibitively difficult. At present, Colombia has no restrictions on communications, nor on national or international exchanges with colleagues through the internet or other mediums.

Question Three: To what extent is there government discretion in shutting down CSOs?

Reviewer Score 4.7

As with any other juristic individuals, Colombian not-for-profits may voluntarily terminate themselves by following the clear procedure set forth by the Civil code detailed in the organizations´ statutes. Involuntary dissolution is uncommon, and only occurs after notice has been given and the conclusion of due administrative process. The dissolution decision is reviewable, and if the decision to shut down a CSO is confirmed by the government, then the organization`s representatives may take the case to the judiciary.

The dissolution and termination of the legal personhood of a CSO may result from a penal case or be meted out as punishment for organizations involved in fraud, money laundering or the financing of criminal activities and terrorism. Even in penal cases, organizations maintain the right to lodge an appeal with a Penal Court to overturn the termination.

In rare cases, the legal personality of a Not-for-Profit organization can be decided by the country's highest courts. One of the most well-known examples of this is the case of the *Convivir* organizations—cooperative associations created in the mid-1990s. These civil society organizations were right wing associations of armed rural peasants that were legally established to facilitate civil defense against the growing power of the country's guerilla groups. Following a tense and prolonged controversy, they were struck down by the Constitutional Court. Another prominent example is the case of the ex-guerrilla leftist political organization Union Patriotica, which lost its legal personhood in 2002 due to its inability to secure Congressional seats in the legislature. In 2013, however, the High Administrative Court reversed this decision, and restored its legal personality. This Court held that the systematic murdering of most of its leaders during the late 20th century was the effective cause of its earlier inability to win elections and hence revived the organization's legal personality. Aside from these exceptional jurisdictional decisions, legal personality is typically acquired and terminated by voluntary decision of the organization.

Section Two: Domestic Tax and Fiscal Issues

The questions in this section pertain to laws and regulations governing the fiscal constraints of giving and receiving donations domestically. The scoring for these questions pertains to the donor and receiving entities.

Question Four: To what extent is the tax system favorable to CSOs in receiving charitable donations?

Reviewer Score
4.3

Charitable donations are encouraged by various legal provisions, and contributions by both individuals and legal persons may permit the donor to claim a reduction of up to 30% of annual income tax. Furthermore, donations to certain activities like sports, justice and human rights allow a deduction of 125% of its value. Because Colombian law defines donations as bilateral contracts of a gratuitous nature, it is important to have evidence of such agreements, particularly documentation of expression and of acceptance. All the conditions necessary to claim a donation as tax deductible are established in the Tax Code.

To qualify for tax incentives, the recipient must be a not-for-profit entity, and it must provide a letter signed by its public accountant or statutory auditor in which the date, mode and value of the donation are certified. The process for claiming a deduction is straightforward for cash donations, which are those made by card, check, payroll deduction or wire transfer. Donations of bonds or other financial products are deducted based upon their market value, and inflation and depreciation are factored into the calculation.

Regarding in-kind donations, most goods and services are subject to a Value Added Tax which is paid by the final consumer and collected and periodically transferred by the seller to the National Revenue and Customs Directorate. The legal process for claiming deductions on such contributions is unclear and the authorities implement existing regulations inconsistently, particularly those regarding public accounting procedures. In practice, products subject to the standard tariff of 16 % are still liable for

the payment of VAT despite the gratuity of the transaction. As a result, the donor usually assumes the cost of tax compliance. Additional legal hurdles discourage those willing to make in-kind donations of perishable products and consumer goods to either humanitarian institutions or Food Banks. Despite these difficulties, the relatively high ceiling on income deductions makes it worthwhile for many donors—particularly business corporations—to contribute to CSOs.

Question Five: To what extent is the tax system favorable to CSOs in receiving charitable donations?

Preferential tax treatment is the norm for most Colombian organizations, but confusing regulations governing financing and accounting practices are a known hindrance. While most organizations are able to take advantage of the country's various incentives, the process is complicated by fluctuating legal interpretations and the worrisome extent of private and public corruption in the country's special NPO tax regime.

Reviewer Score
3.4

CSOs willing to receive and certify tax deductible donations have to be a Not-for-Profit organization pursuant to the general interest. They must carry out activities related to health, education, culture, faith, sports, tech, science, environment, or justice and human rights. Additionally, they must operate under official oversight, have presented their revenue declaration in the preceding year, and be able to demonstrate that past donations were properly administered through the financial system. Income tax benefits range from exonerations, exemptions or reductions in tariff rates. While the Fiscal Code explicitly lists those CSOs eligible for tax exonerations, tax exemptions are more general and are granted to organizations which reinvest their income in developing their organizational purpose within one year (or more if authorized) and whose programs are open to the community. Otherwise, their net benefit is taxed at the reduced rate of 20% as opposed to the general tariff rate of 25%. This reduction is common for many CSOs, and is the general rule for all solidarity economy organizations in Colombia. Property tax exemptions originally authorized for organizations affiliated with the Catholic Church have also been extended to all Faith-Based Organizations by court order. Just as selling goods or

services requires CSOs to collect and transfer VAT, so too are CSOs required to pay VAT on purchases. Similarly, CSOs are not exempted from the payment of financial transaction contributions (GMF), which charges 4 pesos for each 1000 pesos moved within the banking system. NPOs are, however, exempt from the payment of the recently created equity tax (CREE), which is levied on all other legal persons at a tariff of 9%. Nonetheless, they are still obligated to pay payroll-based para fiscal contributions. The local level Industry, Commerce, Advertisement and Boards Tax (ICA) is to be paid by those CSOs that engage in the industrial and commercial production of goods and services.

Section Three: Cross-Border Philanthropic Flows

The questions in this section pertain to laws and regulations governing the fiscal constraints of giving and receiving cross- border donations. The scoring for these questions pertains to the donor and receiving entities. This category includes open-ended questions and ranking questions.

Question Six: To what extent is the legal regulatory environment favorable to receiving cross-border donations?

Reviewer Score
3.5

Cross border donations can face different treatments depending on their nature. Private juristic or physical persons receiving a cross-border donation in cash from a destination abroad must provide supporting evidence of the legal transaction to the bank, which is responsible for processing the transaction, converting the foreign currency to Colombian pesos, and complying with anti-money laundering and anti-terrorism financing standards. Once a transaction has been processed, the bank will usually retain around 10% of the contribution, as a way of pre-empting the payment of income tax. It is worth noting that while capital or currency donations are easier to make than in-kind donations, they depend heavily on the legal status of the foreign donor. When donations are made by a public international legal person—such as a government or multilateral organization—to Colombian national or sub-

national public legal persons—such as a ministry or a village—they may receive an exemption from VAT and the payment of GMF. Otherwise, financial cooperation between private foreign CSOs and private national CSOs, is taxed.

In-kind donations from abroad must, in addition to the cost of nationalizing the goods in Colombia, pay VAT. However, to facilitate cross border in-kind donations the Presidential Agency for Cooperation—a public entity—uses its public tax-exempt status to serve as a channel to funnel funding from foreign private organizations into the country. This project is done with local CSO partners that check the legality of the foreign contribution and determine its feasibility. It is important to note that this service is only an option and is in no way meant to impose official control on in-kind cross border flows of cooperation. Should an organization choose not to employ the Agency's services, the costs of receiving in-kind donations are mainly dependent on the capacity of the donor to assume the high costs of transport, customs and taxes.

Question Seven: To what extent is the legal regulatory environment favorable to sending cross border donations?

Reviewer Score
3.6

Colombia is a not a high-income country and it faces important challenges regarding peace, equity, justice, and poverty reduction. Therefore, both cash and in-kind donations tend to stay in Colombia, where they are used to support social and institutional investments. Only in exceptional circumstances would donations be destined for causes abroad. As such, most international giving by Colombians is conducted by the government. The international assistance rendered by the Colombian government generally focuses on technical and cultural assistance more than financial aid.

Nonetheless, when humanitarian requests are made through diplomatic channels, the Ministry of Foreign Affairs in concert with the Presidential Cooperation Agency, can send cross-border donations through FOCAI, the country's cooperation and international assistance fund. Calls for private and public donations to foreign populations usually follow after a natural disaster, or during a war or crisis. Such contributions are frequently channeled through an intermediary such as the Red Cross or UNICEF. Any

other cross-border donation made by a Colombian individual or juristic person, whether for-profit or not-for-profit, must follow standard international export or wire transfer procedures. As such, both physical and juristic persons need to comply with disclosure requirements and obtain official clearance before items can be shipped abroad. For their part, financial donations are merely regarded as another type of international financial transaction, which in turn requires that they be accounted for in bank records. Lastly, sending physical donations from Colombia to destinations abroad is subject to the same safety and security standards as any other export shipped from Colombia.

Section Four: Socio-Cultural Narrative

The questions in this section will not be used in the final ranking. Instead, these questions will be used to provide a more complete picture of the philanthropic environment in the final report. In addition to the expert's narrative, CGP will compile data from other sources, such as the World Values Survey and the Gallup World Poll to societal perception and cultural environment of philanthropy.

Philanthropy is not a frequently used term nor does it chiefly reflect Colombia´s matrix of values and behaviors. Rather than gravitate towards philanthropy, Colombians tend to express their charitableness by weaving tight support networks with family, neighbors and work colleagues. When it does appear, philanthropy chiefly refers to economic financing offered by established donors such as international NGOs present in the country and multinational and corporate foundations run by their main shareholding families. Foundations devoted to giving and creating opportunities within the realm of the arts, science and justice that are not related to income generation are usually not perceived as philanthropy but merely as NGOs. Hence, in Colombia the general perception of CSOs varies immensely, and is largely dependent on the activity pursued by the organization and its size. As a result, groups advocating for change like minority or grassroots associations for democratic empowerment and human rights' organizations may be perceived by some governmental authorities as uncomfortable or even with suspicion. Conversely, established givers of funds such as high net worth individuals are relatively trusted.

Back in the mid-1990s, Colombia's commercial regulatory framework began to expand and encompass CSOs, subjecting them to sets of rules meant originally for mercantile organizations. This decision was originally made with the intention of cutting red tape and fast-tracking the formation and operation of companies for doing business. This approach was expanded to include nonprofit juristic persons like CSOs and has resulted in an intense marketization of Colombian CSOs. It has also resulted in an increased hybridization of organized citizens' intentions with corporate strategies and the frequent misuse and abuse of CSOs by political interests.

Generally speaking, efforts to improve public transparency and public accountability are not only absent, but moreover, when they are attempted, they generally draw little interest. Indeed, the regulation of CSOs is also largely dependent, not on State action, but rather on private initiatives of self-certification, self-regulation, self-promotion, and international CSR certifications.

In a context of deep inequality and reduced social mobility, any and all acts of helping or giving funds that results in upward social mobility and/or international visibility are generally welcomed, praised and defended, no questions asked. Hence, CSO activities are easily conducted and can be used to further a variety of aims, whether that be to maximize the image of a company's CSR program or to form populist political programs.

Despite the recent increase in the attention paid to NPOs,—namely for entering governmental covenants, and joining CSR alliances —real and effective efforts to understand the sector are few and far between. With unrestricted space, automatic legal incorporation, income tax incentives, preferential public procurement policies, and minimal accountability requirements and oversight, the Colombian setting is ideal for a dynamic and ever-growing civil society[1] but, also, for abuse.

More specifically, not-for-profit juristic persons used by legitimate civil society initiatives can be abused for self-employment, profit maximization, strategic proselytism and even criminal activities. These abuses can easily cloak themselves in Colombia's tradition of civicness and solidarity. Abuse and corruption can easily take advantage of Colombia's legal system to the detriment of the country's democracy, rule of law and development. In sum,

[1] ICNL / IJCSL

while the legal environment can nurture civil society, it can also breed organizations which are anathema to it, and in so doing take opportunities for participatory governance away from the people, particularly from those who rely on CSOs as their main means of organizing, accessing State services, and political empowerment.

For Colombia, it is important to understand and evaluate Civic Space not only by size but also by quality. This requires recognizing that the degree of liberty and diversity that is available for the formation and operation of CSOs is just as important as the degree of legitimacy and transparency that is secured for the functioning of real civil society organizations. In other words, respecting the space for civil society is as crucial as making sure that all participants in civil society remain oriented towards serving the interests of the citizenry.[2]

It is, therefore, important for the State to approach CSOs not merely as a sociopolitical phenomenon, a fiscal challenge or as a new sector of economic activity, but rather as a unique and nascent subject of regulation.[3] CSOs are standalone juristic persons with correlative rights and duties that can benefit from legal and regulatory analysis and possibly from specific and articulated laws. As with all other organizations, the rule of law is necessary to safeguard and promote organized civil society while simultaneously facilitating its positive impacts on democracy, justice and development.

Since 2012, the Colombian government has attempted to better its regulatory approach to NPOs, primarily through fiscal policy. As stated in a recent government commissioned document intended to support tax reform, the government's goal is twofold: to improve the promotion and protection of CSOs and to reduce the potential for abuse. Key to this approach is the notion of alterity—introduced by Ruiz-Restrepo in 2011—whereby the legal nature for non-profit juristic persons is defined by their distinctiveness from other types of organizations. The notion of alterity was officially codified in the 2012 tax reform when the Colombian Congress introduced the basic notion of alterity in article 468-3 of the Tax Code as a way to better define the juridical treatment of ill-defined Not-for-profit and Non-governmental organizations. More recently, Law 1739 of 2014, created an *ad-honorem* temporary

[2] Washington/ ICNL WMD
[3] Bogota /RRA Thinktank – Alteritas Lab Recommendations to the IMF

commission to study an upcoming structural tax reform that will contain further NPO reform efforts.