



*The International Journal  
of Not-for-Profit Law*

**Volume 12, Number 2  
February 2010**

A Quarterly Publication of

The International Center for Not-for-Profit Law  
1126 16th Street, NW, Suite 400  
Washington, DC 20036  
(202) 452-8600  
[www.icnl.org](http://www.icnl.org)

*Publisher*

International Center for Not-for-Profit Law  
1126 16th Street, NW, Suite 400  
Washington, DC 20036  
(202) 452-8600  
[www.icnl.org](http://www.icnl.org)

Editor: Stephen Bates

Senior Editor: Douglas Rutzen

Contributing Editor: Stephan Klingelhofer

Production Editor: Ivan Gan

*The International Journal of Not-for-Profit Law*, ISSN 1556-5157, is a forum for the discussion of civil society, philanthropy, nongovernmental organizations, and the law, published quarterly by the International Center for Not-for-Profit Law, [www.icnl.org](http://www.icnl.org). Based in Washington, D.C., the International Center for Not-for-Profit Law promotes an enabling environment for civil society and public participation around the world. Views expressed here do not necessarily reflect those of the International Center for Not-for-Profit Law, its affiliates, or its funders.

Except where otherwise noted, all contents copyright 2010 by the International Center for Not-for-Profit Law.

# *The International Journal of Not-for-Profit Law*

Volume 12, Number 2

February 2010

<i>Letter from the Editor</i> .....	4
-------------------------------------	---

## **SUB-SAHARAN AFRICA COUNTRY REPORTS**

<i>Introductory Overview</i>	
International Center for Not-for-Profit Law .....	5

<i>Ethiopia</i>	
Debebe Hailegebriel .....	9

<i>Kenya</i>	
Faith Kisinga Gitonga .....	21

<i>Liberia</i>	
Cecil B. Griffiths .....	39

<i>Rwanda</i>	
Gloria Tengera .....	49

<i>Sierra Leone</i>	
Emmanuel Saffa Abdulai .....	55

<i>South Africa</i>	
Ricardo G. Wyngaard .....	65

<i>Uganda</i>	
Livingstone Sewanyana .....	78

<i>Zimbabwe</i>	
Otto Saki .....	89

## **ARTICLES**

<i>South Africa's King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations</i>	
Peter S.A. Hendricks and Ricardo G. Wyngaard .....	104

## ***Letter from the Editor***

In this issue, the *International Journal of Not-for-Profit Law* features country reports from sub-Saharan Africa. We are proud to publish reports on Ethiopia, by **Debebe Hailegebriel**; Kenya, by **Faith Kisinga Gitonga**; Liberia, by **Cecil B. Griffiths**; Rwanda, by **Gloria Tengeru**; Sierra Leone, by **Emmanuel Saffa Abdulai**; South Africa, by **Ricardo G. Wyngaard**; Uganda, by **Livingstone Sewanyana**; and Zimbabwe, by **Otto Saki**. The reports are especially timely, as African countries deal in different ways with regulatory challenges affecting civil society.

In addition, **Peter S.A. Hendricks** and **Ricardo G. Wyngaard** analyze the King Report on Governance for South Africa, which seeks to apply commercial standards to the governance of civil society organizations.

We thank USAID for its generous support to the International Center for Not-for-Profit Law, which made possible the country reports on Kenya, South Africa, Uganda, and Zimbabwe; and the World Movement for Democracy for allowing us to reprint the reports on Ethiopia, Liberia, Rwanda, and Sierra Leone, which were made possible through the Defending Civil Society project, funded by Canada's Department of Foreign Affairs and International Trade. We also thank our authors for their valuable country reports and incisive articles.

Stephen Bates

Editor

*International Journal of Not-for-Profit Law*

[sbates@icnl.org](mailto:sbates@icnl.org)

## ***Sub-Saharan Africa Country Reports***

# **Introductory Overview**

## **International Center for Not-for-Profit Law<sup>1</sup>**

### **I. Introduction**

Under the auspices of the NGO Legal Enabling Environment Program (LEEP), made possible by the U.S. Agency for International Development (USAID), the International Center for Not-for-Profit Law (ICNL) recently commissioned the preparation of reports on the legal framework for civil society in four sub-Saharan African countries, including Kenya, South Africa, Uganda and Zimbabwe. With the support of the Canada's Department of Foreign Affairs and International Trade (*DFAIT*), the World Movement for Democracy (WMD) similarly commissioned reports on the same theme in four additional countries, including Ethiopia, Liberia, Rwanda, and Sierra Leone.<sup>2</sup> All reports were prepared based on the same research template, in order to ensure some measure of consistency among them. ICNL and WMD are grateful to the local partners in each country and pleased to present the results of their efforts. We hope that the country reports will raise awareness of both the positive legal developments and the barriers and challenges affecting civil society within those countries.

### **II. Scope of Research**

Each country report seeks to present an overview of the legal and regulatory framework affecting civil society organizations (CSOs). Included in each report are the following themes:

- The legal and constitutional context;
- The types of CSOs recognized by the legal system;
- Aspects of the CSO life-cycle, including the registration and establishment of CSOs; the government's supervisory and enforcement role; and the ability of CSOs to engage in a

---

<sup>1</sup> The International Center for Not-for-Profit Law is the leading source for information on the legal environment for civil society and public participation. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in over 100 countries.

This paper is made possible with the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID or the United States Government.



<sup>2</sup> The four WMD reports are also available on the website of the World Movement for Democracy (<http://www.wmd.org/defcivilsociety/defcivilsociety.html#CR>). The publication of these reports was made possible by the Defending Civil Society Project, which is a joint project of WMD and ICNL.

range of activities, from advocacy to international cooperation to the receipt of foreign funding;

- Information relating to the fiscal framework, with a focus on the tax treatment of CSOs; and
- The priority challenges to civil society and appropriate strategic responses.

Central to each country analysis is, necessarily, the basic “framework” legislation: the law(s), regulations and/or policies governing the establishment and general life-cycle of the available organizational forms of civil society. In South Africa, for example, the key legal instruments governing CSOs are the Trust Property Control Act and the Companies Act, as well as the Nonprofit Organisations Act. In Kenya, while there are multiple laws addressing multiple organizational forms, the NGO Coordination Act of 1990 is currently in the spotlight, as it is subject to a reform initiative. In Ethiopia, the Federal Government adopted the Charities and Societies Proclamation in 2009, which has emerged to be one of the most controversial laws in Africa.

In addition, each country analysis may refer to other laws, regulations and/or policies that impact on civic space. Tax legislation may or may not provide fiscal incentives to CSOs, thereby encouraging or hindering financial sustainability. Legislation focused on national security, such as the Public Order Security Act (POSA) in Zimbabwe, can be used to intimidate and harass human rights defenders and civil society leaders.<sup>3</sup> And customary or indigenous law remains a critical strand of the legal system in each country, and indeed throughout the countries of sub-Saharan Africa.<sup>4</sup>

Finally, it is important to note that four of the reports – Ethiopia, Liberia, Rwanda, and Sierra Leone – were commissioned by the World Movement for Democracy nearly one year ago. Since that time, there have been developments which are not reflected in the reports, but which we highlight briefly here:

- In Ethiopia, the newly enacted Proclamation on Charities and Societies envisioned a one-year transition period, to run until February 2010. Nonetheless, the Charities and Society Agency launched the re-registration process in late 2009; the process has had mixed results. For example, the Ethiopian Human Rights Council (EHRCO) was re-registered as an 'Ethiopian' charitable society in December 2009, but was forced to drop 'Ethiopian' from its name and to remove an objective from its statutes; even more disturbingly, the CSA also froze its bank accounts.
- In Rwanda, the draft laws described in the report continue to make their way through the Parliamentary process, with hearings before the Senate likely to be scheduled in the coming months.

---

<sup>3</sup> The leaders of Zimbabwe’s National Association of Nongovernmental Organizations (NANGO), which represents more than 1,000 civic groups, were arrested in Victoria Falls after a three-day conference. They were charged with convening a political meeting without police clearance, under the highly restrictive Public Order and Security Act (POSA). Source: <http://civicus.civiblog.org/blog/archives/2009/10/27/4363065.html>

<sup>4</sup> As but one example, in Uganda, customary law governs to the extent that it does not contradict statutory laws or the Constitution. The relationship between customary law and the formal legal system is not addressed in detail in these reports and deserves further exploration.

- In Sierra Leone, the draft NGO Policy Regulations, which are central to the analysis in the report, were ultimately enacted by the Parliament of Sierra Leone in November 2009. The content of the enacted Policy is not significantly different from the draft version discussed in the Sierra Leone report.

### **III. Legal Trend to Constrain Civic Space**

The eight reports included in this compilation reveal a multiplicity of regulatory approaches. We find generally supportive legal frameworks in Liberia and South Africa. Legal frameworks in Kenya and Rwanda are the focus of cross-sectoral reform efforts to improve the operating environment. The laws in Ethiopia, Uganda and Zimbabwe are based on a more restrictive, controlling regulatory orientation, and the political will to improve the legal framework is questionable.

Indeed, the past year alone has witnessed several examples of regressive legislative change, whether proposed or enacted. These laws have narrowed the available space for civic activity and have set poor legal models for neighboring countries. Taken together, the following examples seem to reveal a worrying trend. To illustrate:

- Ethiopia: In February 2009, the Government adopted the [Proclamation to Provide for the Registration and Regulation of Charities and Societies](#) (CSP), Ethiopia's first comprehensive law governing the registration and regulation of NGOs. The law is one of the most controversial NGO laws in Africa, and indeed in the world. The Proclamation, among other things, restricts NGOs that receive more than 10% of their financing from foreign sources from engaging in essentially all human rights and advocacy activities.
- Uganda: The NGO Registration Act (as amended in 2006) and the accompanying NGO Registration Regulation (2009) contain a number of formidable obstacles relating to the registration and supervision of NGOs. As but one example, Regulation 13 prohibits an organization from making direct contact with the people in its area of operation, unless it has given seven days' notice in writing of its intention to the local councils and Resident District Commissioners of the area.
- Sierra Leone: The Parliament of Sierra Leone enacted the revised NGO Policy Regulations in November 2009. The reaction of the civic sector toward the NGO Policy has been decidedly mixed. To some, the enactment of the Policy is viewed as continuity. To others, the Policy represents a carefully constructed means of controlling virtually every aspect of the formation and operation of NGOs in Sierra Leone, which severely constrains independent civil society.
- Zambia: In August 2009, the President signed an NGO Law, the enactment of which has sent shock waves through the NGO sector. The NGO Law criminalizes unregistered organizations; allows the State to impose limitations on an organization's registration status; requires re-registration every five years; envisions a heavily bureaucratic regulatory body called the NGO Registration Board; grants the NGO Board dangerously broad regulatory powers; imposes constraints on the ability of NGOs to communicate and

cooperate with counterparts both domestically and abroad; mandates membership in an umbrella organization; and threatens those who contravene the law's provisions with harsh criminal sanctions, including imprisonment.

- Zimbabwe: In May 2009, the Ministry of Labor and the Ministry of Justice issued the *Joint Memorandum re: Amendment to the PVO Act and the Deeds Registries Act*. The Memo proposed that those trusts that are registered with the Deeds Registry and fall within the definition of a PVO, be explicitly obliged to register as a PVO before commencing activities. This would subject trusts to a burdensome two-tiered registration process, and to broad control by the Registrar and PVO Board.

#### **IV. Toward More Enabling Environments**

While the challenges facing civil society in many African countries are formidable, there are noteworthy positive developments as well.

The legal framework in *South Africa* – which is perhaps the most influential country in sub-Saharan Africa – is generally considered to be enabling and supportive of civil society. South Africa thus provides an important positive model for other developing nations in the region. The Nonprofit Organisations (NPO) Act, in section 2, sets an admirably high standard in seeking to:

- (a) create an enabling environment within which NPOs can flourish;
- (b) establish an administrative and regulatory framework within which NPOs can conduct their affairs; and
- (c) encourage NPOs to maintain adequate standards of governance, transparency and accountability and to improve those standards.

In *Kenya*, the Government and civil society are collaborating to review and improve the legal framework and the NGO Coordination Act in particular. Among other issues, reformers are seeking to resolve the appropriate balance between statutory regulation and self-regulation, and the relationship among the various, overlapping regulatory schemes. In addition, Government and CSO representatives have formed a working group aimed at strengthening the Government-CSO relationship the group has developed principles for collaboration and is in the process of developing clear strategies for engagement between the sectors.

In *Rwanda*, three civil society-related bills are pending Parliamentary review. The draft laws relate to national NGOs, international NGOs, and religious organizations, respectively. ICNL has now seen the latest versions of the draft INGO and National NGO laws, soon to be considered by the upper house of Parliament before Presidential review. It is clear that, even with some defects that may be removed in the latter stages of the legislative process, the laws would provide better guidance concerning formation procedures and organizations' legal rights and obligations; would reduce the extent of administrative procedures; and would introduce a system of appeals to neutral arbiters, including pre-court mediation, to deal with potential conflicts.

*Sub-Saharan Africa Country Reports*

## **Ethiopia**

**Debebe Hailegebriel**

### **I. PROVISIONS OF THE GENERAL LAWS**

#### *General Framework*

The Ethiopian legal system generally adheres to the civil law tradition, though there are some areas influenced by the common law tradition. Ethiopia is a federal country divided into nine regional states and two chartered cities administered by the Federal Government. Parallel to the Federal Government, Regional States also have legislative, executive, and judicial powers. The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) accords Regional States residual power, wherein all powers not expressly assigned to the Federal Government or concurrently to the Federal Government and the States are reserved to the States.<sup>1</sup> Article 51 of the FDRE Constitution, which defines the power of the Federal Government, does not give the Federal government exclusive power over the administration of civil society organizations (CSOs) in the country. The power of the Federal Government is in fact restricted to the regulation of CSOs working in the two chartered cities—Addis Ababa and Dire-Dawa.<sup>2</sup>

#### *General Constitutional Framework*

One third of the constitutional provisions are devoted to human rights, including those of individuals and groups. The Constitution guarantees freedom of expression, association, and assembly, which are crucial for the operation of active CSOs in a democratic system. Specifically, Article 31 of the FDRE Constitution provides that “[E]very person has the right to freedom of association **for any cause or purpose**. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited” (emphasis added).

The Constitution guarantees freedom of association for “**every person**” regardless of nationality, race, color, etc. In addition, the Constitution guarantees freedom of association irrespective of the cause or purpose for which the association is established or standing. Indeed, it should be noted that Article 31 of the FDRE Constitution enjoins only the positive freedom to associate, without explicitly stating the negative freedom not to associate. In other words, the Constitution does not give explicit protection to individuals to be not forced to join a certain association.

The FDRE Constitution prescribes two permissible grounds for state interference and limitation of freedom of association, including the formation of an association in violation of the

---

<sup>1</sup> Article 50 and following of the Constitution of the Federal Democratic Republic of Ethiopia; Proclamation No. 1/1995

<sup>2</sup> Contrary to this Constitutional restriction, however, the new CSOs Proclamation enacted by the Federal Government includes charities or societies that operate in more than one regional state or whose members are from more than one regional state, and Foreign Charities and Ethiopian Resident Charities and Societies, even if they operate only in one regional state.

“appropriate law” and establishment with the intent of illegally subverting the constitutional order. The first ground of limitation—“in violation of the appropriate law”—is too wide and open to subjective interpretation. The provision should have explicitly stated under what grounds the appropriate law can limit freedom.

### ***Types of Organizations***

Recently, the Federal Government of Ethiopia adopted one of the most controversial proclamations in the country, the Charities and Societies Proclamation (CSP) dealing with the formation and operation of CSOs.<sup>3</sup> This law divided CSOs into two broad categories known as “Charity” and “Society.” Under the previous practice, the registering authority divided CSOs into the categories of development, advocacy, religious, and professional associations. Nevertheless, the new law envisages three forms of legal establishment of charities or societies, which may vary depending on their place of registration, source of income, composition of members’ nationality, and place of residence. The three forms of association include:<sup>4</sup>

1. **"Ethiopian Charities" or "Ethiopian Societies"** are Charities or Societies formed under the laws of Ethiopia and whose members are Ethiopians, generate income from Ethiopia, and are wholly controlled by Ethiopians. However, they may be deemed Ethiopian Charities or Ethiopian Societies if no more than 10 percent of their funds received from foreign sources;
2. **"Ethiopian Residents Charities" or "Ethiopian Residents Societies"** are Charities or Societies that are formed under the laws of Ethiopia and consist of members dwelling in Ethiopia, and who receive more than 10 percent of their funds from foreign sources;
3. **"Foreign Charities"** are Charities that are formed under the laws of foreign countries, or consist of members who are foreign nationals, or are controlled by foreign nationals, or receive funds from foreign country sources.

## **II. ESTABLISHMENT AND REGISTRATION**

### ***Purposes***

CSOs can be established for the benefit of third parties and classified as “Charity,” or for the benefit of their members, and classified as a “Society” or for the benefit of both their members and third parties, and classified as “Charitable Society.” Article 14 of the CSP lists the types of charitable activities in which CSOs may or may not take part. The law implicitly restricts organizations categorized as “Ethiopian Residents” or “Foreign” from taking part in advocacy activities, such as advancement of human rights, gender equality, the rights of children and disabled persons, and the efficiency of the justice system.

The Agency may also refuse to register a Charity or Society on the grounds that “the proposed Charity or Society is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Ethiopia.”<sup>5</sup> The proclamation further provides that the

---

<sup>3</sup> The Proclamation is cited as “Charities and Societies Proclamation (CSP) No. 621/2009. This law came into effect as of 13 February 2009.

<sup>4</sup> See Art. 2 (2, 3 and 4) of the CSP.

<sup>5</sup> See Art 69(2) of the CSP.

Agency may refuse registration if the name under which the proposed Charity or Society is to be registered is considered to be contrary to public morality or is illegal.

### ***Registration as a Voluntary vs. Mandatory Requirement***

The law makes registration a mandatory prerequisite to forming an association, and thus “any Charity or Society shall apply for registration within three month of its formation.”<sup>6</sup> Failure to register within the prescribed period shall be grounds for cessation of the formed Charity or Society.

### ***Registration or Incorporation Requirements***

The law puts no explicit restrictions on who can be founders of a Charity or Society, and there is no limitation on the number of founders. Accordingly, natural or legal persons can establish an association of their choice, whether a charity or society.<sup>7</sup> However, there is an implied inference from the reading of Article 57 (6) that a society that has a federal character and nomenclature should have members from at least five Regional States. This means, in effect, that the law is attempting to determine the number and composition of the founders.

The power of licensing, registering, and supervising CSOs is given to a special Agency established as a separate legal entity, but accountable to the Ministry of Justice, which is in turn accountable to the Council of Ministers. Therefore, the administration of CSOs falls under the executive branch.

Concerning registration formalities, the application for CSO registration includes particulars, such as the goals, objectives, and activities of the CSO. The form prepared by the Agency must be accompanied by:

1. A copy of the rules of the Charity or the Society and, where applicable, documentation of the act of constituting a Charitable Trust or Charitable Endowment;
2. Other similar documents and duly completed forms as the Agency may require.

### ***CSO Registry***

Article 71 of the CSP deals with Register of CSOs and instructs the Agency to keep a registry of Charities and Societies. However, this provision fails to specify whether the registry would be accessible to the general public or any interested person. The Agency is also mandated to publish the list of Charities and Societies registered, suspended, or cancelled.

### ***Foreign Organizations***

In addition to the above requirements, Charities that are established abroad shall present:

1. Duly authenticated certificate of registration showing the CSO’s establishment in its country of origin;
2. Proof of the decision of its competent organ to operate in Ethiopia;

---

<sup>6</sup> See Art. 64 of the CSP.

<sup>7</sup> Charities or Societies can establish a consortium to coordinate their activities. See Articles 15 (3) and 55 (2) of the CSP.

3. A letter of recommendation from the Embassy of the country in which the Charity is incorporated, or in the absence of such by a competent government office in that country;
4. A letter of recommendation from the Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia;
5. Power of attorney of the CSO's representative in Ethiopia.

The law also provides for a registration fee determined by a regulation of the Ministers of Council.

The Agency is required to register the applicant and issue a certificate of legal personality within 30 days from the date of application. If the Agency does not issue a certificate of legal personality, or does not make known that it will not do so, the applicant may apply to the Board<sup>8</sup> no later than 45 days from the date of application. Article 104 of the CSP provides that the decision of the Board is final on the administrative level, and only organizations classified as Ethiopian Charities or Societies have the right to a judicial appeal of the decision of the Board. Ethiopian Resident or Foreign CSOs do not have the right to lodge an appeal of the decision of the Board.<sup>9</sup>

Registration may be denied on one of the following specific grounds:

1. The rules of the proposed Charity or Society do not comply with the necessary conditions set by the proclamation;
2. The proposed Charity or Society is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare, or good order in Ethiopia;
3. The application for registration does not comply with the provisions of this law;
4. The name under which the proposed Charity or Society is to be registered resembles the name of another Charity or Society, or any other institution, or is contrary to public morality, or is illegal;
5. The nomenclature of the Charity or Society is countrywide and the composition of its members or its work place does not show the representation of at least five Regional States.

However, the law fails to put an obligation on the Agency to provide a written communication on the refusal of a registration.

The following are significant constraints on the registration/incorporation process that should be considered:

1. The requirement imposed on CSOs having federal character or nomenclature to have members from or a work place in at least five Regions;

---

<sup>8</sup> The Board is an administrative body in the Agency that is accountable to the Ministry of Justice. It has 7 members, 5 from government and 2 from civil society, and all are appointed by the Government. See Articles 8 & 9 of the CSP.

<sup>9</sup> See Article 104 of the CSP

2. The restriction on CSOs in the formation stage to not raise funds of more than 50,000 Ethiopian Birr; and
3. The additional requirement imposed on foreign organizations to produce letters of recommendation from Ethiopian embassies and the Ministry of Foreign Affairs.

### **III. SUPERVISION AND ENFORCEMENT**

#### ***Regulatory Authorities***

The law has mandated the following supervisory organs to oversee the administration and operation of CSOs:

1. Ministry of Justice, as the Agency accountable to the Ministry;
2. Charities and Societies Agency, a special organ established to administer the registration, operation and dissolution of Charities and Societies;
3. Charity and Society Board, established under the Agency, consisting of 7 members nominated by the government, including two from the civil society; and
4. Sector Administrators, having a supervisory and advisory role in the administration of CSOs.

#### ***Internal Governance***

In principle, the law recognizes the rights of CSOs to determine their own structure.<sup>10</sup> Nevertheless, there are some provisions that require CSOs to adopt certain forms of structure. For example:

1. Charitable Endowments and Charitable Institutions must have a board of management, manager, and auditor within their structure;
2. Charitable Trusts should have a trustee manager, a trustee treasurer, and a trustee auditor;
3. Societies and Charitable Societies must have a general assembly, executive committee, and an internal auditor.

The law further provides the power and responsibilities of the different organs in the administration of the organization.

There are various provisions that allow or call for the interference of the Agency in the internal affairs of the organization. Societies must notify the Agency, in writing, of the time and place of any meeting of the General Assembly of a Society no later than seven working days prior to such a meeting.<sup>11</sup> No Charity or Society may employ expatriates unless a work permit is granted in accordance with the relevant law. The Agency may order the appropriate organ of the Charity or Society to remove an officer who falls short of any of the requirements set forth under

---

<sup>10</sup> See Article 59 of the CSP.

<sup>11</sup> See Article 86 of the CSP.

Article 70 of the CSP and to assign another person as an officer. In addition, Article 70 identifies individuals who cannot be assigned as officers of Charities or Societies, including:

1. Convicts of a crime that involves fraud or other crimes that involve dishonest acts;
2. Convicts of any crime whose punishment results in the deprivation of her/his civil rights, which have not yet been restored; and
3. Individuals outside Ethiopia whose absence impedes the proper administration of the Charity or Society.

Moreover, the Agency may, upon the request of one or more members or officers of the Society, convene the meeting of the General Assembly through the Chairperson or on its own. The Agency may, where appropriate, nominate a Chairperson of the General Assembly.<sup>12</sup> The Agency may also suspend an officer responsible for misconduct or mismanagement of the administration of the Charity or Society and order the appropriate organ of the Charity or Society to assign another person.<sup>13</sup>

### ***Reporting***

CSOs are generally required to submit statements of accounts, annual activity reports, and bank accounts. The statement of account (accounting record) must show all sums of money received and expended by the Charity or Society on a day-to-day basis, the context in which the receipts and expenditures took place, and a record of the assets and liabilities of the Charity or Society. The annual statement of accounts shall be prepared in accordance with standards set by a Certified Auditor. It should also be noted that Charities and Societies may not receive anonymous donations, and shall at all times keep records clearly indicating the identity of donors.<sup>14</sup> Charities and Ethiopian Resident Societies shall prepare and transmit to the Agency an annual report on the major activities carried out and relevant information regarding the Charity. Ethiopian Societies are not required to submit annual activity reports. CSOs are to report to the Agency annually and upon request concerning all bank accounts of the Charity or Society with necessary particulars. Charities and Societies whose annual flows of funds do not exceed Birr 50,000 may choose to prepare a statement indicating receipts and payments as a statement of assets and liabilities. The law also exempts organizations whose annual income is less than Birr 100,000 from being examined by Certified Auditors. Finally, CSOs that are engaged in income-generating activities are expected to keep books of income-generating activities separate from books of account.

### ***State Enforcement and Sanctions***

The CSP contains enforcement mechanisms for violation of its provisions consisting of both administrative and judicial measures. Any person who violates the provisions of the proclamation may be punished in accordance with the provisions of the criminal code, and in addition:

---

<sup>12</sup> See Article 61 of the CSP.

<sup>13</sup> See Article 91 of the CSP.

<sup>14</sup> See Article 77 of the CSP.

1. Any Charity or Society failing to keep its book of accounts; to record money received, its source, and the amount expended; to preserve any accounting records for at least five years from the end of its financial year, will be punishable with a fine of no less than Birr 20,000 and not exceeding Birr 50,000.
2. Any Charity or Society that, in violation of Article 79, fails to submit to the Agency an annual statement of account prepared in accordance with acceptable standards, fails to prepare the statements of receipts, payments and assets and send the same to the Agency, or does not preserve any statements of accounts and related documents for at least five years from the end of its financial year will be punishable with a fine of not less than Birr 10,000 and not exceeding Birr 20,000.
3. Any Charity or Society that, in violation of Article 84, fails to report annually or upon request its bank accounts with the necessary particulars will be fined not less than Birr 50,000 and not exceeding Birr 100,000.
4. Any Charity or Society that, in violation of Article 90, allocates less than 70 percent of its expenses in the budget year for the implementation of its purposes and not more than 30 percent for its administrative activities shall be punishable with a fine of not less than Birr 5,000 and not exceeding Birr 10,000.
5. Any officer, employee or person who participates in criminal acts stated under sub article (2) of this article shall be punished with a fine of not less than Birr 10,000 and not exceeding Birr 20,000 or imprisonment of not less than five years and not exceeding ten years or both.

One should recall that it is only Ethiopian Charities or Societies that have the right to a judicial appeal the decision of the Agency, and thus Ethiopian Residents or Foreign CSOs do not have such rights.

### ***Dissolution, Winding Up, and Liquidation of Assets***

A Charity or Society can decide on its dissolution according to its own rules. In addition, CSOs of any type may be dissolved involuntarily by the Agency in any one of the following cases:

1. The Agency cancels or suspends the license of the Charity or Society in accordance with Article 93 of the proclamation; or
2. The Charity or Society has become insolvent.

The following are grounds for suspension of an organization:

1. Failing to comply with the Agency's orders to amend a rule of the organization or correct another fault;
2. Submitting falsified accounts or reports to the Agency;
3. Contravening the provisions of the proclamation or regulations and directives issued there-under or orders of the Agency or its own rules; or
4. Failing to provide the Agency with information required by the Proclamation.

On the other hand, the license of any Charity or Society can be canceled if:

1. The registration of the organization has been procured by fraud or misrepresentation;
2. The organization has been used for unlawful purposes or for purposes prejudicial to public peace, welfare, or security;
3. The organization fails to rectify the causes for suspension within the time limit set by the Agency;
4. The organization fails to renew its license; or
5. The organization commits a crime by violating the provisions of the criminal code or that of the Proclamation.

The dissolution of Ethiopian Charities and Societies may be effected by a decision of the Federal High Court, whereas the dissolution of Ethiopian Residents Charity or Society or Foreign Charity shall be effected by the decision of the Agency, with no judicial recourse. Dissolution has the following effects:

1. The property of the organization will be liquidated;
2. After settling all debts and liabilities of the organization, the remaining property will be given to a Charity or Society with a similar purpose, or to any Charity or Society by the order of the Agency;
3. A Charity or Society that is being dissolved may not perform activities other than those necessary for its liquidation without the authorization of the Agency.

#### **IV. CSO ACTIVITIES**

##### ***General Powers***

Once legally registered, CSOs have legal personality and thus enjoy the general rights and powers of juridical entities, such as ownership of property or entering into contracts. However, though not provided by the CSP, the Civil Code requires foreigners to have special permission from the Government to own immovable property in Ethiopia.<sup>15</sup>

##### ***Expressive / Advocacy / Public Policy Activities***

Advocacy activities are considered “political activities,”<sup>16</sup> which are allowed only for Ethiopians and Ethiopian organizations that can mobilize more than 90 percent of their income from local sources. Article 14 (5) of the CSP lists those activities that are reserved only for Ethiopian Charities:

1. The advancement of human and democratic rights;
2. The promotion of equality of nations, nationalities and peoples and that of gender and religion;
3. The promotion of the rights of the disabled and children’s rights;
4. The promotion of conflict resolution and reconciliation; and

---

<sup>15</sup> Article 548 of the Civil Code of Ethiopia

<sup>16</sup> The Prime Minister and, subsequently, the drafters of the CSP, argued that activities dealing with rights of individuals are political activities, and hence only citizens can work on these issues.

5. The promotion of the efficiency of justice and law enforcement services.

### ***Communication and Cooperation***

One of the strengths of the CSP is that it clearly provides for the rights of Charities and Societies to establish consortiums that coordinate their activities.<sup>17</sup> The law permits CSOs to engage in income-generating activities with the following conditions: the activity must be approved by the Agency; the activity must be incidental to the achievement of the purposes of the organization; and the profits must be used only to further the activities of the organization.<sup>18</sup> The registration and licensing requirements shall be determined in accordance with other law applicable to business organizations.

### ***Seeking / Securing Funding***

One of the most contentious provisions in the CSP is the provision dealing with access to foreign funds. CSOs opting to be registered as Ethiopian are not allowed to receive more than 10 percent of their funds from foreign sources.<sup>19</sup> There is no law binding the Government to fund the activities of CSOs, though there are some CSOs that work closely and with the support of the Government.<sup>20</sup>

## **V. TAX LAWS**

The Proclamation does not specify which taxes CSOs are required to pay. Article 103 of the CSP states that CSOs may engage in income-generating activities, but are subject to laws concerning registration and licensing requirements for activities related to trade, investment, or any profit-making activities. Income from grants, donations, and membership fees are not subject to tax. CSOs generally pay different taxes when buying services and goods.<sup>21</sup>

CSOs working on service delivery and relief activities may be exempt from some forms of taxes, such as customs duties on imported items. Similarly, CSOs working with the financial support of international organizations like USAID may also be exempt from value-added taxes (VAT) due to agreements between the U.S. and Ethiopian governments. The Income Tax Proclamation considers donations to CSOs from business organizations or individuals to be non-deductible expenses,<sup>22</sup> and provides limits on expenses for administrative and core business of CSOs. Accordingly, no Charity or Society can allocate less than **70 percent** of the expenses in

---

<sup>17</sup> See Articles 15(3) and 55 (2) of the CSP.

<sup>18</sup> There is a discrepancy between the English version and the Amharic version which is the ruling version. The Amharic version adds another requirement which is not in the English version. According to the Amharic version CSOs are also required to prove that the income generating activities are related to their main activities.

<sup>19</sup> See Article 2(2) of the CSP.

<sup>20</sup> Women and youth associations are among those organizations which the government is encouraging and working together.

<sup>21</sup> CSOs working on service delivery and relief activities may have exemption from some form of taxes like custom duties on imported items, and CSOs working with the financial support of international organizations like USAID may also have exemption from VAT because of the agreement between the US and the Ethiopian Governments.

<sup>22</sup> See Art.21 (1) (n) of the Income Tax Proclamation No. 286/2002. This Proclamation provided that the Council of Ministers may by regulations allow donations or gifts donated for public use to be deducted. However, the Council has not issued the said regulation so far.

the budget year for the implementation of its purposes, and cannot exceed 30 percent for its administrative activities.<sup>23</sup>

## **VI. CONCLUSION**

### ***Priority Issues***

The following can be identified as the highest priority legal issues confronting CSOs in Ethiopia:

1. **Access to foreign funds:** the restriction on Ethiopian CSOs that forbids access to more than 10 percent of income from foreign sources should be rescinded, as most of the CSOs in the country are foreign-fund dependent.
2. **Restrictions on activities:** the restriction imposed on organizations deriving their funds from foreign sources to not participate in advocacy activities, such as advancement of human rights, women, child and disabled persons' rights, conflict resolution, and the efficiency of the justice system, is against the Constitution, which guarantees the rights of "everyone" to associate for any lawful "cause or purpose."
3. **Denial of access to justice:** The Proclamation, against the Constitution and the ICCPR to which Ethiopia is a party, denies the right of CSOs established in the form of Ethiopian Residents or Foreign Charities to have access to judicial recourse or appeal of administrative decisions.
4. **Membership:** Article 31 of the Constitution does not require any qualification on membership while guaranteeing freedom of association. The CSP, however, requires organizations to meet certain criteria in relation to membership composition. Article 58 of the CSP states that where "the Society has Federal character and nomenclature, its work place and composition of the members shall show the representation of at least five Regional States." Failure to observe this requirement may lead to refusal of registration as stated under Article 71(5) of the CSP, which reads, "[the] Agency shall refuse to register a Charity or Society where the nomenclature of the Charity or Society is countrywide and the composition of its members or its workplace do not show the representation of at least five regional states."
5. **Branch Offices or Work Places:** As stated above, organizations that have federal character and nomenclature are required to represent at least five Regional States in their workplace. In other words, these organizations must show that they are operating in at least five Regional States. The law defines "place of work" as "the place where a person's records and books of account are kept or the place where a person conducts work." Accordingly, organizations may not have branch offices *per se*, but are required to operate in five Regional States from their headquarters.
6. **Administrative Cost vs. Operational Cost:** Article 90 of the CSP provides for the regulation of administrative and operational costs. This provision reads; "Any Charity or Society shall allocate not less than 70 percent of the expenses in the budget year for the implementation of its purposes and an amount not exceeding 30 percent for its

---

<sup>23</sup> See Articles 2 (14) and 89(1) of the CSP. The law defines administrative costs as "those costs incurred for emoluments, allowances, benefits, purchasing goods and services, travelling and entertainment necessary for the administrative activities of a Charity or society."

administrative activities.” In tandem with Article 2 (14) of the same Proclamation,<sup>24</sup> this provision places organizations in a challenging situation regarding the administration of their costs. The definition given to “administrative cost” is very vague and circular. Second, the definition of expenses, classified as “administrative costs,” is too broad, incorporating expenses that were previously considered to be operational costs.

### ***Government Rationale***

The Government’s rationale for the enactment of this law can be found in the law itself and other relevant documents.<sup>25</sup> These include the following objectives:<sup>26</sup>

1. To ensure that citizens' right to association is enshrined in the Constitution of the Federal Democratic Republic of Ethiopia;
2. To aid and facilitate the role of Charities and Societies in the overall development of Ethiopian peoples;
3. To provide varieties of measures to be taken against CSOs in case of fault;
4. To ensure the accountability, transparency and consistency of CSOs and their objectives to the public;
5. To provide legal basis for the relationship between CSOs and Sector Administrators, which did not exist before; and
6. To determine the amount of money CSOs may spend for administrative purposes and project activities (core objectives).

### ***Strategic Response***

There are two broad, strategic ways to defend CSOs from the Proclamation. One dictates that the current law be improved by:

1. Challenging the constitutionality of the law both at the national and international levels;
2. Engaging in comprehensive legal advocacy activities to improve the law;
3. Continuing dialogue between CSOs and the international community and the Government to improve the law;
4. Establishing a strong system of monitoring the impact of the new legislation, and using findings for advocacy activities;

---

<sup>24</sup> Administrative costs shall mean those costs incurred for emoluments, allowances, benefits, purchasing goods and services, travelling and entertainment necessary for the administrative activities of a Charity or Society.

<sup>25</sup> See Paragraph 1 and 2 of the Preamble of CSP and the explanatory note prepared by the Ministry of Justice, Pp 5 and 6 as well as the Minutes of the Legal and Administrative Affairs Standing Committee’s public debate on the draft CSP, 24 December 2008, House of Peoples Representatives Assembly Hall.

<sup>26</sup> For objectives mentioned under 1 and 2, please see the Preamble of the CSP, whereas the rest are taken from the Minute of the Legal and Administrative Affairs of the House of Peoples’ Representatives of Ethiopia, December 24, 2008.

5. Organizing comprehensive public outreach activities on the role and contribution of CSOs in Ethiopia to economic development and the democratization process to change the public's negative perception of them;
6. Developing coping mechanisms, particularly in domestic resource mobilization;
7. Ensuring that members of the international community make use of their leverage in dealing with the Government, and that their development assistance also includes CSOs; and
8. Urging the Government to accept the classification of major aid channels as foreign, including UN agencies, European Commission (EC), World Bank (WB), etc.

The second broad strategy should focus on supporting Ethiopian CSOs in adapting to the legal environment and continuing their work, particularly on human rights issues. In this regard, capacity-building training is crucial.

***Sub-Saharan Africa Country Reports***

# **Kenya**

**Faith Kisinga Gitonga<sup>1</sup>**

## **I. PROVISIONS OF THE GENERAL LAWS**

### **A. General Framework**

Kenya's historical antecedents can be traced to England. Though most of Kenya's substantive laws are statutory in nature, the laws of torts, contracts, and agency largely follow England's common law. Many statutes are merely codification of the older common law rules. But Kenyan courts are not always bound to follow or apply the rules of common law, doctrines of equity, and English statutes of general application. Instead, courts have discretion to examine the rules in the context of the local circumstances and determine whether to apply, modify or refrain from using them.<sup>2</sup>

The Judicature Act of Kenya<sup>3</sup> sets out the formal sources of law in the country. They are:

- (1) The Constitution.
- (2) Statutory law or Acts of Parliament, including foreign laws named in the First Schedule of the Judicature Act.<sup>4</sup> There are more than 500 local laws in Kenya. These comprise the largest proportion of laws in the country.<sup>5</sup> The NGO Coordination Act of 1990, which regulates NGOs, is an Act of Parliament.
- (3) Subsidiary legislation: These are laws formulated by those to whom Parliament has delegated the power or responsibility to make laws. They include orders, regulations, rules or by-laws: for example, the NGO Regulations of 1992.

---

<sup>1</sup> Faith Kisinga Gitonga is Consultant on the Enabling Environment for Civil Society.

This paper is made possible with the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID or the United States Government.



<sup>2</sup> The rules are subject to what the "circumstances of Kenya and its inhabitants permit".

<sup>3</sup> Section 3 of the Judicature Act, Chapter 8, Laws of Kenya (Act 16 of 1967)

<sup>4</sup> For example, the Indian Transfer of Property Act.

<sup>5</sup> The NGO Coordination Act of 1990, The Societies Act (Chapter 108, Laws of Kenya) and the Trustees (Perpetual Succession) Act, Chapter 164, Laws of Kenya are some of these laws.

- (4) The substance of the common law, doctrines of equity, English Statutes of general application, and procedure and practice observed in courts in England until 12 August 1897.<sup>6</sup>
- (5) African customary laws, including certain religious laws (Islamic and Hindu): In civil cases where one or more of the parties is governed or affected by customary law, the courts are to be guided by it on condition that it is not repugnant to justice and morality or inconsistent with any written law. The courts are also to “decide such cases in accordance with substantial justice, without undue regard to technicalities of procedure and without undue delay”<sup>7</sup>. Parties that seek to rely on customary laws in court must prove, by evidence, that they are relevant and that they are habitually observed and applied. Customary law is applicable in a number of areas, including the following: Land held under customary tenure, marriage, divorce, maintenance of children, dowry, matters affecting the status of women, widows, guardianship, custody, adoption, legitimacy of children, and succession.<sup>8</sup>

International law is also a source of law though it is not listed under the Judicature Act. One can therefore invoke treaties, especially international and regional instruments on human rights, in matters pertaining to human rights litigation.

According to the Constitution, Kenya is a unitary state. Although the doctrine of separation of powers is ingrained in the Constitution, the document vests many powers without effective checks and balances in the President and in the central government. There are six levels of government, namely sub-locational, locational, division, district, provincial and national.

While laws are generally accessible, there is a general lack of awareness and understanding of the law and its contents. The Government Printers is the official agency that provides printed copies of laws to the public for a fee. The laws are available in English, which is the official language in Kenya. Public libraries, which are few and concentrated mainly in large towns, also provide citizens with some of the most frequently used laws. One can find the laws in government offices. There have also been efforts to increase the accessibility of laws by citizens during the last decade, through internet sources. Official laws can now be found online.<sup>9</sup> However, only citizens who are literate and have access to computers or live in towns with cyber cafes can benefit from online channels.

## B. International Legal Context

The protection of the freedom of association is enshrined in Article 20 of the Universal Declaration of Human Rights (UDHR) of 1948. Article 20 states that everyone has the right to freedom of peaceful assembly and association. Kenya has ratified the UDHR.

---

<sup>6</sup> 12 August 1897 is the date when these English laws were received and recognized as laws to be applied in the Kenya colony.

<sup>7</sup> Ibid. Section 3(2)

<sup>8</sup> An inclusive list, which serves as a guide, is found in The Magistrates Courts Act, 1967, Section 2

<sup>9</sup> See [www.kenyalaw.org](http://www.kenyalaw.org)

Kenya is also a signatory to the Vienna Declaration of Human Rights, which calls for the protection and promotion of the freedoms of association, assembly, speech and thought. The country has also ratified the International Covenant of Civil and Political Rights (ICCPR). The Covenant states that every one shall have the right to freedom of association with others, including the rights to form and join trade unions for the protection of his/her interests.<sup>10</sup>

The Africa Charter on Human and People's Rights (ACHPR), which Kenya has ratified, provides 'Every individual shall have the right to free association provided that he abides by the law'.<sup>11</sup>

Kenya is a member of the East Africa Community. In Chapter 25 (Art. 127 – 129), the East Africa Community Treaty explicitly emphasizes the creation of an enabling environment in which civil society can operate. Art. 127 (4) provides: "The Secretary General shall provide the forum for consultations between the private sector, civil society organizations, other interest groups and appropriate institutions of the EAC."

### C. Constitutional Provisions

Kenya's Constitution is the supreme law of the land from which other laws derive their validity. This means that where provisions in other laws are found to be inconsistent with those of the Constitution, they will be declared null and void and the Constitution's provisions will prevail. A Bill of Rights is enshrined in the Constitution, which provides a whole range of fundamental rights and freedoms. The rights which are vital for civil society include the following:

- Freedom of assembly and association with others;<sup>12</sup>
- Freedom of thought, conscience, and religion; and
- Freedom to hold opinions and expression without interference, and receive and impart information and ideas.

These rights and freedoms are contained in Sections 78 to 81 of the Constitution. However, they are subject to certain constitutional limitations. For example, the rights are subject to limitations imposed in the interests of defence, public safety, public order, public morality or public health; or reasonably required for the purpose of protecting the rights or freedoms of other persons.<sup>13</sup> The limitations must be reasonably justifiable in a democratic society.<sup>14</sup>

---

<sup>10</sup> Article 22(1) of the ICCPR, 1996

<sup>11</sup> Article 10(1) of the ACHPR

<sup>12</sup> The freedom of assembly and of association with others is found in Chapter V, Section 80: "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests".

<sup>13</sup> Under section 80(2)d of the Constitution of Kenya, the freedom of assembly and association is also subject to limitations provided in laws governing the registration of trade unions and associations of trade unions.

<sup>14</sup> Section 80 of Chapter V Constitution of Kenya provides for limitations "except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

#### D. Types of Organizations

The term “Civil Society Organization” (CSO) is used generally in Kenya to refer to the wide array of organizations that operate in the realm between the individual and the state and are formed to promote the interests of their members or the public good. The term “NGO” is used to specifically refer to public benefit entities that are registered by the NGO Coordination Board.<sup>15</sup> Though NGOs are just a small part of the larger CSO sector, they are the most visible. Generally, there are two main types of CSOs, organizations for the public benefit (NGOs) and membership organizations. CSOs in Kenya are diverse and governed by a plethora of registration and regulation regimes. Available legal organizational forms of CSOs include:

(1) Non Governmental Organizations (NGOs). NGOs are registered by the NGO Coordination Board and governed by the NGO Coordination Act of 1990<sup>16</sup> and its Regulations of 1992. Section 2 of the Act defines NGOs as “private voluntary groupings of individuals or associations not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services.” Some public benefit organizations which fit this definition are however registered under other legal frameworks including the Trustees (Perpetual Succession) Act (Chapter 164 of the Laws of Kenya), the Companies Act, (Cap.486, Laws of Kenya), the Societies Act, (Chapter 108, Laws of Kenya), or as community-based organizations with provincial administrations. Organizations registered as NGOs include local/indigenous NGOs and foreign NGOs<sup>17</sup>, as well as umbrella organizations, such as Health NGOs Network (HENNET), Kenya Human Rights Network (K-HURINET), and Peace and Development Network (PEACENET).

(2) Companies Limited by Guarantee and not having Share Capital. These CSOs are registered by the Registrar of Companies under the Companies Act.<sup>18</sup> They can exist to promote any legal purpose as long as these are contained in the memorandum of association and articles of association. As but one example, many service delivery institutions – such as schools and healthcare organizations – are registered as companies limited by guarantee and having no share capital.

(3) Trusts and foundations are established by families, groups or individuals, to improve peoples’ well-being and to engage in mobilizing resources. Trusts are incorporated under the Trustees (Perpetual Succession) Act, Chapter 164 of the Laws of Kenya. Some trusts and foundations are also registered as companies limited by guarantee and not having share capital (under the Companies Act, Cap.486, Laws of Kenya) or through trust agreements under the Registration of Documents Act (Chapter 285, Laws of Kenya). Some international foundations operate under protocol arrangements with the Ministry of Foreign Affairs and sometimes under special agreements between the Kenyan Government and the government of the country where

---

<sup>15</sup> The NGO Coordination Board is a Government Agency which exists to register, co-ordinate and facilitate the work of all national and international NGOs operating in Kenya.

<sup>16</sup> Act No. 19 of 1990, Laws of Kenya

<sup>17</sup> Kanyinga, K., Mitullah, M. and Njagi, S., *The Non-Profit Sector in Kenya: Size, Scope and Financing*. Nairobi: The Institute for Development Studies, 2007.

<sup>18</sup> Chapter 486, Laws of Kenya

the parent foundation is registered; they are, however, required to apply for and obtain registration under the NGO Coordination Act.

(4) Societies and professional clubs and associations of ten or more persons are registered as societies under the Societies Act, Chapter 108, and are established to advance their members' interests. Professional clubs and associations are mainly based in urban areas. After grassroots organizations, this is the second largest category of CSO: there are over 70,000 societies registered in Kenya.

(5) Cooperative societies and unions are registered at the Department of Cooperatives under the Cooperative Societies Act (Amended) 2004, No. 12 of 1997. They include consumer, producer and marketing cooperative societies in rural and urban areas and housing development societies found in major urban areas. They are voluntary membership organizations and advance the welfare, economic interests and goals of their members.

(6) Grassroots organizations include *harambee* or self-help groups and community-based organizations (CBOs) such as neighbourhood associations. Self-help groups and CBOs are formally recognized through registration under the Department of Social Services in the Ministry of Gender and Children Affairs. As the largest group in the CSO sector, they are operating primarily at the village and community level.

## **II. ESTABLISHMENT, REGISTRATION**

### **A. Permissible Purposes**

The NGO Coordination Act states that NGOs may be established for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services. Sessional Paper No. 1 of 2006, which is the National Policy for NGOs, describes NGO purposes as the following: "Enhancing the legitimate economic, social and/or cultural development or lobbying or advocating on issues of public interest or interest of a group of individuals or organizations." Where it is deemed that the proposed activities or procedures of an applicant NGO are not in the national interest, registration may be refused.

Trusts may be established to promote religious, educational, literary, scientific, social or charitable, or athletic purposes.

Societies may be established for any purpose or object. The Registrar of Societies, however, will refuse to register a body that he has reason to believe will pursue any unlawful purpose or purposes prejudicial to or incompatible with the peace, welfare or good order in Kenya.

Cooperative societies and unions can be created for the promotion of the welfare and economic interests of their members.

Grassroots organizations exist to advance the interests of their members and the immediate needs of the local communities in which they operate.

In sum, in light of the range of legal organizational forms, individuals can form CSOs to pursue any legal purpose. The choice of organizational form is usually dictated by issues relating to the ease and speed of the registration process, or more generally by whether or not the rules and regulations governing a particular form are perceived to be crippling or supportive. The freedom to choose from the wide menu of organizational forms is often viewed as convenient by

those seeking to register a CSO. The current situation, however, of multiple and overlapping governing acts and legal forms presents difficulties for the Government in developing harmonized, systematic and coordinated plans and approaches to civil society, as there is no cooperation and much duplication among the various regulatory agencies.

When the NGO Coordination Act was formulated, all CSOs meeting the definition of “NGO” were expected to register themselves with the NGO Coordination Board.<sup>19</sup> However, since the Act was passed, many organizations that fit the definition of an NGO have been registered under alternative laws. Though the Act was envisaged as a tool to provide an overarching, enabling legal framework for all civil society organizations,<sup>20</sup> there were few practical efforts to specifically encourage organizations to register and operate under the NGO Coordination Act. Instead, the other regulatory options remained available and some organizations have found it politically or functionally expedient to register under the other laws.

#### B. Registration as Voluntary vs Mandatory Requirement

A recent survey of the size, scope and financing of the non-profit sector in Kenya revealed that 90 percent of the non-profit organizations (NPOs) sampled were registered. Most of the organizations that are not ‘registered’ under a specific law were self-help groups or women and youth groups, which can be registered under administrative regulations of various government departments.<sup>21</sup> Registered organizations receive the benefit, of course, of formal recognition. While self-help groups are encouraged to register, it is not a mandatory requirement. The regulations provide a straightforward method of registration, which most grassroots organizations find easy to use.

It is an offence, however, for any person to operate an NGO in Kenya without registration and a certificate under the NGO Coordination Act. While some NGOs are exempt from registration (for instance, those established by a state or group of states for welfare, research, relief, public health and other forms of development assistance), they must apply for exemption.

The Societies Act similarly provides that every society which is not a registered society or an exempted society is an unlawful society. Hence, where ten or more persons get together, they are expected, according to the law, to have that group registered. There are stiff penalties for operating as a society without a registration certificate. This legal provision is, however, rarely enforced.

---

<sup>19</sup> Section 25(1) and (2) NGO Regulations 1992, Subsection 2 provides: Upon registration under the Act, the organization referred to shall cease to operate under any other written law in Kenya or on the basis of any agreements with the Government as the case may be.

<sup>20</sup> Sessional Paper No. 1 of 2006 reiterates this objective. It remains to be seen how the revised law will address the issue.

<sup>21</sup> Kanyinga, K., Mitullah, M. and Njagi, S., *The Non-Profit Sector in Kenya: Size, Scope and Financing*. Nairobi: The Institute for Development Studies, 2007.

### C. Registration or Incorporation Requirements

#### 1) *NGOs*

NGOs may be founded by individuals, whether citizens or foreigners, and by legal entities, including states. At least three persons are required to establish an NGO. The NGO Coordination Act requires three governing officers to sign the organization's constitution.

- *Registration Requirements:*

An application for registration should be submitted to the executive director of the NGO Coordination Board.<sup>22</sup> It must be signed by the chief officer of the applicant NGO and specify among other issues, the officers of the organization; the head office and postal address of the organization; the fields of the proposed activities; the districts, divisions and locations of the proposed activities; the proposed average annual budget; the duration of the activities; and all sources of funding.

Other documents required include:

- i. A completed name reservation form;
- ii. Three copies of the applicant NGO's Constitution, signed by three governing officers;
- iii. Two recent photographs of three governing officers; and
- iv. Processing fees of Ksh 11,000 for national NGOs and Ksh. 22,000 for international NGOs.

There are no requirements for minimum assets or capital at the time of registration. While applications for NGO registration are often processed within about 90 days, the law does not explicitly provide a fixed time period within which the Board must act. The applications pass through the staff and board of the NGO Coordination Board and the National Security Intelligence Service (NSIS). Every certificate issued to an organization shall be valid for a period of sixty months from the date of issue.

- *Reasons for denial of registration:*

The Board may refuse registration of an applicant if it is satisfied that its proposed activities or procedures are not in the national interest; if it is satisfied that the applicant has given false information in its application; or if it is satisfied, on the recommendation of the NGO Council,<sup>23</sup> that the applicant should not be registered. While the Board may sometimes furnish the applicant with an explanation for the refusal of registration, the Board is not legally required to do so. Moreover, the vague grounds provided in the Act for denial of registration may invite the exercise of excessive government discretion. For example, denial on the broad ground of the 'national interest' has been used unjustifiably to curtail the rights of NGOs.<sup>24</sup>

---

<sup>22</sup> The NGO Coordination Board's main mandate is to streamline registration and coordination of NGOs.

<sup>23</sup> The NGO Council is a national umbrella body for NGOs. Once NGOs are registered by the NGO Coordination Board, they are required to apply for membership in the Council. The Council represents the interests of its members and also provides them with essential services. It also formulates policies on self-regulation for NGOs and advises the NGO Board on the Code of Conduct for NGOs.

<sup>24</sup> Kameri-Mbote, Patricia, Dr. (2000) 'The Operational Environment and Constraints for NGOs in Kenya' IELRC Working Paper, [www.ielrc.org](http://www.ielrc.org).

- *Appeal provision:*

Any organization which is aggrieved by a decision of the Board may, within 60 days from the date of the decision, appeal to the Minister. At the request of the Minister, the NGO Council shall provide written comments on any matter over which an appeal has been submitted to the Minister. The Minister shall issue a decision on the appeal within 30 days from the date of the appeal. Any organization aggrieved by the decision of the Minister may, within 28 days of receiving the written decision of the Minister, appeal to the High Court against that decision. In the case of such an appeal, the High Court may give such direction and orders as it deems fit, and the decision of the High Court shall be final.

- *Other Significant Constraints:*

The law is vague and ambiguous on a number of issues where wide discretion is given to the NGO Board and the Minister. For example, the certificate of registration may contain such terms and conditions as the NGO Coordination Board may prescribe.<sup>25</sup> There are no guidelines, however, to ensure that the Board uses this prescriptive power in a clear, objective and predictable manner.

## 2) *Trusts*

Trusts may be founded by trustees who have been appointed or constituted to play that role. The number of founding trustees is determined by the constitution or trust deed of the trust. The law does not contain any minimum capital or asset requirements. Trustees may apply to the Minister of Lands for a certificate of incorporation of the trustees as a corporate body.<sup>26</sup> In terms of general registration procedures, the application should be accompanied by the following, amongst other things:

- i. Application for registration of a certificate of incorporation (Form AI) in triplicate bearing adhesive revenue stamps in the value of Kshs.1,500;
- ii. A certified copy of the trust deed, constitution or rules of the body;
- iii. The names, addresses and occupations of the trustees;
- iv. A certified copy of the resolution appointing the trustees; and
- v. A statement and short description of the land or interest in land that is possessed by, belonging to, or held on behalf of such body or association of persons.

A certificate of incorporation serves as conclusive evidence that all the preliminary requirements relating to incorporation have been complied with. However, incorporation may be subject to “such conditions or directions generally as the Minister thinks fit to insert in the certificate, and particularly relating to the qualifications and number of the trustees, their tenure and profession, the mode of appointing new trustees, the custody and use of the common seal, the amount of movable or immovable property which the trustees may hold, and the purposes for which that property may be applied.”<sup>27</sup> Trustees may apply for variation of such conditions or

---

<sup>25</sup> Section 12(4) NGO Coordination Act

<sup>26</sup> Trustees (Perpetual Succession Act), Chapter 164, Laws of Kenya

<sup>27</sup> *Id.*

directions and the Minister, if he is satisfied that it is proper to do so, may vary the conditions or directions.

The Trustee Act<sup>28</sup> aims to ensure that the incorporation of trusts will not be used for the personal gain of the trustees. For example, it is required that the certificate of incorporation be registered against the title to any land already held on behalf of the body. Furthermore, the trustees shall not acquire or dispose of any movable or immovable property without the prior written consent of the Minister of Lands, and must comply with other existing rules and regulations on the acquisition and disposal of such properties. The Act makes the failure to provide information a punishable offense.

### *3) Societies*

- *Registration Requirements*

Application for registration or exemption from registration as a society must be made to the Registrar of Societies within 28 days of formation. A minimum of ten persons is required to establish a society. Applications for registration or exemption from registration must be accompanied by a fee of Ksh. 2,000. There are no requirements for minimum capital or assets at the time of registration. An application for registration must be processed within 120 days.

- *Reasons for denial of registration:*

The Registrar has wide discretion to refuse to register a society if he has “reasonable cause to believe” that the society has among its objects, or is likely to pursue or be used for, any unlawful purpose or any purpose prejudicial to or incompatible with the peace, welfare or good order in Kenya, or that the interests of peace, welfare or good order in Kenya would otherwise be likely to suffer prejudice by registration of the society. The Registrar may also refuse to register a society where he is satisfied that such society is a branch of, or is affiliated to or connected with, any organization or association of a political nature established outside Kenya. Additional reasons for denial apply where the terms of the constitution or rules of the society or the name of the society is in any respect repugnant to or inconsistent with any law or is otherwise undesirable.

- *Appeal provision:*

Appeals against refusals can be lodged before the Minister of the relevant Ministry within 30 days of the refusal. The Minister shall consider and communicate his decision within 90 days of the appeal. Appeals against the Minister’s decision can be lodged in the High Court within 30 days of the decision.

### *4) Grassroots Organizations*

Grassroots organizations are founded by individuals. Elected officials of the self-help group may, on a voluntary basis, meet with a local community development assistant or the district officer in charge of social development to formally request registration. There is no minimum number of founders or members required for registration. There are also no requirements for minimum capital or assets at the time of registration. To be registered, self-help groups are expected to submit an application letter, their constitution (with a clearly defined purpose or project), a list of members, evidence of local resource mobilization and detailed

---

<sup>28</sup> Section 3(1), Trustee Act Chapter 167, Laws of Kenya.

minutes of democratic elections. An application fee of between Ksh 1000 and 2000 is payable when the application forms are accepted. Non-compliance with these requirements can lead to denial of registration.

In practice, the registration process can take up to four weeks because all applications are approved by the district officer in charge of social development. In some cases, applicants may be asked to seek the consent of the local chief and district officer before their application for registration is finalized. The registration process is complete when the group receives a certificate of registration. The law requires self-help groups to renew their certificates every year.

#### D. CSO Registries

The NGO registry is located at the NGO Coordination Bureau of the NGO Coordination Board.

Any person may during working hours, and upon payment of the specified fee specified, inspect the registry and any documents relating to any registered NGO lodged with the Board, and may obtain from the Director of the Board a copy or extract of such register or document.

The NGO registry is published periodically, in accordance with the law.

The Registrar of Societies and the Registrar of Companies maintains a registry of societies and companies limited by guarantee, respectively, at the State Law offices. Given the restricted space where the registry is maintained, and the fact that information is still contained in physical files, inspection at the registry can be a tedious affair. Requests for information must be accompanied by the name and file number of the registered society. Requests to personally inspect the registry require payment of a fee of Ksh. 200, while Ksh. 300 and a letter are needed where an official search is sought.

The Attorney General's Chambers and the Principal Registry of Documents at the Registration of Documents Department in Nairobi and Mombasa maintain the Registry for Trusts. Any person requiring information may apply in person at the Registry and, on payment of the prescribed fee, inspect the Registry.

The Department of Social Services maintains a registry of self-help groups in Nairobi. At the local level, the District Social Development Office maintains a register of self-help groups.

#### E. Foreign Organizations

Generally, requirements for foreign organizations seeking to register branch offices are similar to those of local organizations. They are, however, required to submit, along with their application for registration, a certificate of registration outside Kenya. They are also required to pay Ksh. 22,000 (approximately 295 USD) as an application fee.

### **III. SUPERVISION AND ENFORCEMENT**

#### A. Regulatory Authorities

*NGOs:* The NGO Coordination Board is a quasi-governmental agency established to streamline the registration, coordination and regulation of NGOs. The NGO Coordination Act of 1990 will be reviewed in line with the provisions of Sessional Paper No. 1 2006. The Policy states that all NGOs must reach agreement with the NGO Coordination Board on a variety of issues before commencing operations. The current terms and conditions for registration relate to

issues of governance, areas of activity, submission of annual returns and tax exemptions. They are fairly reasonable conditions and NGOs have been largely agreeable to them.

*Societies:* The Societies Act gives wide discretion to the Registrar of Societies and sweeping powers to various government officials with respect to investigating, arresting, entering and searching the premises of any society. This is probably due to historical antecedents where the government was eager to curb and even eradicate groups that it considered a threat. Where societies fail to comply with requirements to provide annual accounts, membership lists or other information, they are liable to heavy penalties, including fines and imprisonment. The Act makes it an offence for a society to fail to keep a register of its members, their names, and the date of admission and exit. Where it is alleged that a society is an unlawful society, the burden of proving that it is a registered or exempted society or that it is not a society shall lie with the person charged. In practice, however, these powers are rarely exercised. Societies generally operate under minimum supervision. Only occasionally, where a group is suspected to be conducting illegal activities, have the provisions in this Act been put into effect.

*Trusts:* Generally, the court has regulatory powers over the operation of trusts.

*Self-help groups:* The District Social Development Office in every district has regulatory authority over self-help groups and CBOs. The Department of Social Development in the Ministry of Gender has overall regulatory authority and sets the general regulations and criteria for operation.

## B. Internal Governance

The NGO Coordination Board and the NGO Council share responsibility for regulating NGOs. The NGO Board ensures that NGOs adhere to certain statutory requirements at the time of registration by specifically including information in their constitutions on their governance structure; the manner of amending their name, constitution and rules; and the dates for their general meetings. The NGO Council is a national umbrella body for NGOs. Once NGOs are registered by the NGO Board, they are required to apply for membership in the Council. The Council represents the interests of its members, provides them with essential services, and formulates policies on self-regulation for NGOs.

Indeed, the NGO sector has several mechanisms for self-regulation. The NGO Coordination Act does not establish mandatory rules or standards of internal governance, but rather defers to the self-regulatory mechanisms envisioned by the Act, which include the NGO Code of Conduct, the Regulatory Committee and the General Assembly of the NGO Council. Much of the Code of Conduct is devoted to describing how the standards will be enforced by the sector itself. According to the Code, the NGO Council can summon NGOs and other parties to appear before the Regulatory Committee. The Regulatory Committee is empowered to hear or dismiss complaints, issue warnings, recommend de-registration of NGOs and removal of NGO officials from office or from the Council, among other sanctions and penalties. However, the main limitation of this self-regulatory framework is that it is overwhelmingly reliant on the voluntary submission by NGOs to the self-regulatory mechanisms (i.e., the Regulatory Committee and the General Assembly). Such reliance has proved misplaced due to blatant disregard for the Code.

While emphasizing self-regulation, the NGO Coordination Act has failed to provide a practical framework for enforcement of the standards. For example, the Regulatory Committee, which is expected to convene periodically, has not sat as a tribunal for a long time. The Committee relies on volunteers and has yet to develop procedural guidelines for its operation. The decisions of the Regulatory Committee are subject to endorsement by a tribunal of over 3000 members of the Council's General Assembly, but the legitimacy of the process is undermined by the absence of a neutral third party to provide checks and balances in cases where the self-regulatory mechanism fails.

The NGO Coordination Act provides for automatic membership of an NGO to the NGO Council, upon registration.<sup>29</sup> However, the Council finds it difficult to check on the extent of member compliance with the rules and regulations or the Code of Conduct, given its limited capacity and the rapid growth of the sector. It is also powerless to penalize errant organizations.

### C. Reporting

The NGOs Regulations (1992)<sup>30</sup> and the NGO Coordination Act of 1990<sup>31</sup> clearly state that NGOs must submit their annual returns to the NGO Coordination Board within three months of the end of their financial year, in the prescribed format of Form 14, which is set out in the schedule to the Regulations. Form 14 seeks information regarding finances (for instance, the amount expended on various institutional and project areas, as well as the amount spent on certain fields of activity), collaborating partners, and project and governance details. Expenditure or receipts exceeding Ksh. 1 million should be accompanied by audited accounts. Where any concerns about impropriety arise from an NGO's annual return, a wide range of sanctions are available for use by the NGO Coordination Board including admonition, fines, and warnings, followed by suspension or cancellation of registration and prosecution.

### D. State Enforcement and Sanctions

The Board has the power to investigate any complaints regarding an NGO. Through the Regulatory Committee, the Board can make recommendations for action, including dismissal of the complaint, admonishing the NGO, and suspending or cancelling its registration certificate. The Board can also freeze an NGO's bank account. Where the Board believes that the registration of an NGO should be cancelled, it must notify the NGO of the proposed cancellation in prescribed format (Form 9). Grounds for cancellation are to be stated in the notification.

### E. Dissolution, Winding Up and Liquidation of Assets

The NGO Regulations provide that an NGO should not voluntarily dissolve unless it has obtained prior consent in writing from the NGO Coordination Board. The NGO must present a written application seeking consent from the Director of the Board. The application should be signed by three of the governing officers of the NGO.<sup>32</sup>

---

<sup>29</sup> Section 23 (1) of the NGO Coordination Act presumes automatic membership of NGOs upon registration. It provides: "There shall be established a Council to be known as the Non-Governmental Organisations Council which shall serve, as a collective forum of all Non-Governmental Organizations registered under this Act."

<sup>30</sup> Rule 24

<sup>31</sup> Section 7(c)

<sup>32</sup> Rule 21(c)

The Companies Act set forth the procedure for voluntary and involuntary winding up of companies. Once a resolution for voluntary winding up is passed, a declaration of solvency must be made by the directors of the company. The provisions of the Companies Act address the distribution of property and powers and duties of a liquidator, and apply to every voluntary winding up. Involuntary winding up may be undertaken by the court or subject to the supervision of the court.

The Societies Act addresses the winding up of solvent and insolvent societies. In the case of solvent societies, the receiver prepares and submits a scheme for the disposal of the societies' assets to the relevant Minister. Once the Minister approves the plan submitted to him, the receiver can proceed to distribute the assets accordingly.

Depending on where a CBO of self-help group operates, it may give notice to the District Officer in charge of social development in its district of its intended dissolution.

#### **IV. CSO ACTIVITIES**

##### **A. General Powers**

Upon registration, CSOs acquire rights and powers like other legal entities with perpetual succession. They are capable of suing and being sued; taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; entering into contracts; and doing anything else that is permissible for a legal entity.

##### **B. Expressive/Advocacy/Public Policy Activities**

The political environment for CSOs has improved to some extent since 2003. The space for public participation in policy formulation and through the operation of political systems has been enlarged. Campaigns for the promulgation of the Access to Information Act are also underway and are crucial for the creation of an enabling environment for advocacy work. Generally, there are no legal barriers for CSOs to speak out or engage in advocacy efforts on any issues of public importance.

The definition of NGO under section 2 of the NGO Coordination Act is limited in terms of the scope of activities envisaged for NGOs. Advocacy and public policy activities are not expressly included. Nonetheless, Sessional Paper No. 1 provides for a broader definition, which includes organizations that lobby or advocate on issues of public interest. It is therefore envisioned that the new law will explicitly provide the space required for advocacy CSOs to register and operate.

##### **C. Communication and Cooperation**

The NGO Coordination Regulations provide that no NGO can become a branch of or affiliated to or connected with any organization or group of a political nature established outside Kenya, except with prior consent in writing of the Board, obtained upon written application addressed to the Director and signed by three officers of the NGO. Where an NGO fails to do so, it is guilty of an offence. This provision may be interpreted narrowly and hence serve as a barrier to communication and cooperation.

##### **D. Seeking / Securing Funding**

There are no special rules relating to the receipt of foreign funds by CSOs.

*NGOs are permitted to engage in economic activities to sustain themselves as long as they plough back the profits into promoting the NGO's purposes and ensure that the activities are directly related to the NGO's purposes or carried out on behalf of its beneficiaries. NGOs can conduct the business activities either directly or through for-profit subsidiaries.*

CSOs are permitted to compete for government funds in free and open competitions where specific guidelines have been established. There are, however, very few instances where CSOs receive funding from the Government.

Generally, Kenyan law provides a conducive framework for CSOs to seek and secure funding. Local resource mobilization through harambees (public fund-raisers) is recognized, as long as it adheres to the guidelines in the Public Collections Act, which are generally enabling.

## **V. TAX LAWS**

### **A. Tax Treatment of CSO Income**

#### *1. Income from grants, donations, membership fees*

Even though donations are not identified under section 3(2) of the Income Tax Act (Chapter 470, Laws of Kenya) as income subject to taxation, CSOs must apply for tax exemption of their income, which mainly consists of donor funds. Paragraph 10 of Schedule 1 of the Income Tax Act exempts the following organizations, which are charities or charitable organizations, from income tax:

*“an institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education,*

- *established in Kenya; or*
- *whose regional headquarters is situated in Kenya,*

*in so far as the Commissioner is satisfied that the income is to be expended either within Kenya or in circumstances in which the expenditure of that income is for purposes which result to the benefit of the residents of Kenya.”*

The open-ended phrase “*purposes which result to the benefit of the residents of Kenya*” which constitutes part of the definition of a charity is flexible enough to enable the concept of charity to adapt to changes in Kenyan society. Indeed, the Commissioner of Income Tax has exercised his discretion to determine, with regard to all circumstances, whether a type of activity, object or purpose falls in this final category and, as a corollary, is charitable.

Organizations meeting the conditions laid out under Schedule 1, part 10, of the Income Tax Act are eligible for registration as charities and, as a corollary, for exemption from income tax. Once the Commissioner is convinced that the conditions under the provision have been met, he is obliged to grant tax exempt status to the applying entity.

#### *2. Customs Duties and VAT*

The Minister of Finance has powers to grant remission to CSOs for duty or tax payable on imported goods. He can remit customs duties in respect of goods including equipment, motor vehicles, vessels and aircraft (and excluding motor vehicles of a seating capacity of up to twenty-six persons, office equipment, stationery and office furniture), which the Commissioner is

satisfied are imported by or consigned to charitable organizations ... for free distribution to poor and needy persons or for use in medical treatment or rehabilitation work in their institutions, provided that the Treasury has given its approval in writing where the duty exceeds KShs. 500,000<sup>33</sup>; This provision limits the type of goods that are subject to remission of customs duties and restricts the use to which such goods can be put, i.e., to charitable uses. The remission is primarily intended to serve the public interest. Only CSOs with tax-exempt status<sup>34</sup> can apply for remission of customs duties.

The EAC Customs Management Act 2005 provides that NGOs seeking exemptions are required to enter into partnerships with Ministries in their respective sectors of operation, through signing specific agreements. The Ministries will then recommend the NGO for exemptions.

The VAT Act<sup>35</sup> provides for remission of tax for taxable goods, which are intended for emergency relief purposes, for use in specific areas and within a specified period, imported or purchased locally by the Government or its approved agent, a nongovernmental organization or a relief agency authorized by the Minister responsible for disaster management, where:

- (i) the goods are for use in areas where a natural disaster or calamity has occurred in Kenya; or
- (ii) the goods are intended for use in officially recognized refugee camps in Kenya;
- (iii) the goods are household utensils, foodstuffs, materials for provision of shelter or equipment and materials for health, sanitary or educational purposes; and
- (iv) in the case of a natural disaster or calamity, the importation or purchase locally is made within six months or such further period, not exceeding twelve months, as the Commissioner may permit in each case.

The 3<sup>rd</sup> Schedule of the VAT Act also exempts a wide range of social welfare services provided by charitable organizations from VAT. Only tax-exempt CSOs can apply for remission of VAT. Whether an NGO seeks exemption from tax in respect to imported goods, value added tax on goods and services required to meet the organization's objectives, or income tax for expatriate employees, it should apply for exemptions through the Board to the Minister of Finance. Section 30(2) of the NGO Regulations states that the Board shall, on receipt of any application, forward it to the Minister of Finance together with its relevant recommendations.

### *3. Tax Deductible Donations*

Under the Income Tax (Charitable Donations) Regulations published in June 2007, persons (individuals or corporate entities) who give cash donations to eligible non-profit bodies are entitled to deduct 100% of the donation from their gross income before arriving at their taxable income. Under the Regulations, recipients of deductible donations must be charitable organizations, which are defined as: "Non-profit making organizations established in Kenya and which are of a public character, and have been established for purposes of the relief of the poverty or distress of the public, or advancement of education."

---

<sup>33</sup> Schedule 3, Part 12 to the Customs and Excise Act, Cap 472.

<sup>34</sup> That is, non-profit making organizations with charitable and tax-exempt status.

<sup>35</sup> Chapter 476, Laws of Kenya, section 23(3) as amended by Finance Bill of 2009.

Unlike the definition of charitable organization for purposes of income tax exemption, this definition omits non-profit making organizations *whose regional headquarters are situated in Kenya, where the Commissioner of Income Tax is satisfied that the income is to be expended either within Kenya or in circumstances in which the expenditure of that income is for purposes which result to the benefit of the residents of Kenya*; and omits the word “solely”, which implies that charitable CSOs do not have to be established only for one or more of the exempt purposes specified, in order to benefit from tax deductible donations extended to them.

Nonetheless, the recipient must give the donor a written declaration that the donation shall be used exclusively for the object(s) of charity. The recipient must also supply the donor with a copy of its valid certificate of tax-exempt status issued by Kenya Revenue Authority (KRA), or with a copy of the approval of the project issued by the Minister of Finance. Donations must be in “cash” or by “cheque”. The donation, however, must never, under any circumstances, be repayable or refundable to the donor. The law also states categorically that the donation must not in any way, apart from moral satisfaction, benefit the giver.

#### *4. Income from Economic Activities*

*Schedule 1, Part I (10) of the Income Tax Act distinguishes between related and unrelated business activities in determining whether income is exempt from taxation. Income derived directly from business activities, which are carried out by charities, may be exempt from taxation only if:*

- *The income is applied to the limited charitable purposes set out in Schedule I; and*
- *The business activities are directly related to the limited purposes set out in Schedule I; or*
- *The business activities are carried out by the charity’s beneficiaries.*

While the provisions governing the business activities of charities may encourage non-commercial behaviour, they also recognize the need of CSOs to have a balanced and reliable revenue stream to carry out their activities.

#### *5. Investment Income*

There are a variety of investment options available to CSOs in their quest for sustainability. They include acquiring property; taking out social bonds on the stock exchange, where the CSO channels investors’ funds directly to assist community development projects; investing in stocks, bonds, money market instruments and unit trusts; and endowment funds.

The first key stumbling block for CSOs that are keen to invest is the lack of a legal framework to address the issue, which has led to much uncertainty. The NGO Coordination Act, for example, does not sufficiently address questions regarding investment. In the absence of a conducive legal framework, most CSOs are likely to shy away from venturing into these initiatives. At the same time, traditional investment instruments, such as savings and fixed deposit accounts, which most CSOs use, have negligible returns and may not, in the opinion of some, be worth the effort.

The second major challenge CSOs face is in raising the initial seed capital for investment. Most donors supply funding to CSOs through annual grants, which are not sufficient to support a wide variety of investments. In addition, many CSOs may not have the time and expertise

required to venture into, monitor and manage such investments. For example, to set up endowment funds, a board of trustees must be set up, the fund has to be registered, and stringent Revenue Authority requirements must be complied with. Similarly, floating a bond on the stock exchange requires rigorous and painstaking efforts; the NGO must register a corporation, as the laws only permit companies to undertake this type of investment.

## **VI. CONCLUSIONS**

### **A. Priority Issues**

The most important legal issues or challenges currently confronting civil society organizations include the following:

1. The existing legal and institutional framework for CSOs is fragmented and confusing, with multiple options for registration. There is no coordination among the various regulatory agencies. Sessional Paper No. 1 of 2006 recommends that the overlapping legislative acts be harmonized. The Paper proposes that the NGO Coordination Board, the NGO Council and other stakeholders should play a key role in the harmonization process.

2. Suspicions and mistrust still characterize the Government-CSO relationship. The suspicion has been fueled by, among other things, the lack of a comprehensive framework for partnership and poorly defined structures for collaboration between CSOs and the Government.

3. Issues of transparency and internal governance especially in NGOs are in dire need of being addressed. There is definitely a need to rethink the role of self-regulation and to re-define compliance and enforcement strategies in Kenya. The regulatory mechanisms for the promotion of good practices will have to be strengthened. For instance, Sessional Paper No. 1 of 2006 proposes that the NGO Coordination Act of 1990 will need to be revised in order to formally establish and strengthen the NGO Council's Regulatory Committee, which will retain the key responsibility for enforcing the Code of Conduct.

### **B. Opportunities**

The opportunities for progressive law reform affecting civil society in Kenya are several:

1. *Government-backed reform initiative.* The Government of Kenya and NGOs are preparing to review the NGO Coordination Act. The opportunity to influence the NGO Act and create a more enabling environment is therefore available. The Government has shown willingness to collaborate with CSOs in revising the legal framework. Among other issues, it will be necessary to resolve the appropriate balance between statutory regulation vs. self-regulation, and the harmonization of the relationship among the various regulatory schemes.

2. *An initiative to enhance partnerships between the Government and CSOs.* An initiative aimed at strengthening the Government-CSO relationship is currently underway and has brought together Government and CSO representatives in a working group. The group has developed principles for collaboration and is in the process of developing clear strategies for engagement between the sectors.

3. *The CSO initiative on standards.* The Kenya Civil Society Competence and Sustainability Program is a CSO-led initiative, which aims to strengthen the competence and sustainability of the CSO sector through developing sector-wide standards, building the capacity of CSOs to comply with the standards and establishing an institution—VIWANGO—to assess compliance with the standards. The initiative demonstrates that CSOs appreciate the grave need

to put their houses and the sector in order. Through this sector-wide initiative, CSOs are sending an important message to the Government and all potential partners that they intend to conduct themselves in a professional, competent and transparent manner. The initiative will therefore lay the foundation for improved relationships between CSOs and the Government.

*4. Research paper available.* A well-researched paper on the content of Kenyan law and the process of law reform has been published in an online journal – the *International Journal for Not-for-Profit Law (IJNL)* – to inform the consultations, decisions, positions and strategies of the law review process in Kenya. The paper was prepared by two Kenyan research fellows (an NGO representative and a government official) at the International Center for Not-for-Profit Law (ICNL). In addition, an action plan has been developed by NGO and government representatives during a South Africa study tour.

*5. Constitution review process.* Efforts to review the constitution may provide an opportunity to improve the overarching constitutional framework for CSO formation and activities. For example, the draft constitution provides for access to information; prohibits unlawful instructions or orders; and recognises civil society as a sector to be represented in the various organs and levels of governance. The draft also restricts the limitations found in the Bill of Rights, which could be significant, as Sessional Paper No. 1 2006 provides that any possible restrictions on the operations of any NGO will be those contained in or based on the authority of the law *or* those shown to be reasonably justifiable in a democratic society. Since the Constitution is the supreme law of the land, its provisions will prevail where provisions in other laws are found to be inconsistent with it. It will therefore be prudent for stakeholders to ensure that revisions to the NGO law are consistent with those of the reviewed Constitution.

***Sub-Saharan Africa Country Reports***

**Liberia**

**Cecil B. Griffiths<sup>1</sup>**

**I. PROVISIONS OF THE GENERAL LAWS**

***General Framework***

The Legal System in Liberia is a dual one of statutory law based on Anglo-American common law for the modern sector, and customary law based on unwritten practices for the indigenous people.

The primary sources of law in Liberia are:

- The Constitution
- Legislation
- Statutes
- Customary Law
- Court Precedents

Liberia is a unitary state with three branches of government: the Executive branch headed by the President; the bicameral national Legislature consisting of the House of Senate headed by the President Pro-Tempore and the House of Representative headed by a Speaker; and the Judiciary, headed by the Chief Justice. The country is divided into 15 sub-political divisions called counties. The laws are applicable throughout the country.

There is a shortage of legal materials as a consequence of the civil conflict. In the late 1990s, attempts were made to reprint all the volumes contained in the Liberian Code of Laws. Copies were distributed to major institutions and other stakeholders, but there is still a shortage of these legal documents.

Legislation that was passed in recent years, particularly that dealing with gender issues, is being simplified and distributed by women's groups to ensure that it is accessible.

In relation to legislation dealing with civil society organizations (CSOs), most individuals and organizations rely on the services of lawyers to process articles of incorporation, etc. Copies of the National Policy on Non-Governmental Organizations (NGOs) have not been sufficiently distributed.

***General Constitutional Framework***

Article 15 of the Constitution provides for freedom of expression; the right to hold opinions without interference; freedom of speech and of the press; academic freedom to receive

---

<sup>1</sup> Cecil B. Griffiths is Director, Center of Criminal Justice Research & Education.

and impart knowledge; the right to non-interference with the use of the mail; telephone and telegraph; and the right of the public to be informed about the functions of government.

Article 17 of the Constitution guarantees the right to assemble and the right of association as follows: “All persons at all times, in an orderly and peaceable manner, shall have the right to assemble and consult upon the common good, to instruct their representatives, to petition the government or other functionaries for the redress of grievances, and to associate fully with others, or refuse to associate, in political parties, trade unions and other organizations.”

These rights shall not be curtailed, restricted, or enjoined by the government save during an emergency declared in accordance with the Constitution.

These freedoms may be limited only by judicial action, either on grounds of defamation, invasion of the rights to privacy and publicity or the commercial use of expression for deception, false advertising, or copyright infringement.

### ***Types of Organizations***

The basic types of civil society organizations in Liberia are:

1. Not-for-profit organizations (NPOs) – formalized CSOs legally incorporated with the Ministry of Foreign Affairs under the Associations Law of Liberia. This category includes a wide range of organizations, including human rights and prodemocracy organizations, professional associations, youth and women’s groups, development NGOs, umbrella coalitions and networks, and other interest groups.
2. Unincorporated Associations –bodies of individuals acting together for the promotion of a common enterprise without a corporate charter. Instead, these common enterprises are expressed in bylaws regulating the conduct of the association, and express its purpose and the governing relations of members among themselves and to the association in the absence of a statute. This category covers many community based organizations (CBOs); grassroots organizations, particularly in rural communities; self help groups; and neighborhood welfare organizations.
3. Cooperative Societies – registered if their purpose is the promotion of the economic interests of their members in accordance with cooperative principles. The membership must be composed of at least 10 persons over 18 years of age or at least two registered societies. Cooperatives are registered with the Ministry of Agriculture.
4. Trade and labor unions are registered with the Ministry of Labor.

## **II. Establishment and Registration**

### ***Purposes***

There are two main categories of CSOs in Liberia – mutual benefit organizations and public benefit organizations.

Mutual benefit organizations are organizations whose purpose is to help their members. The members of the organization are the beneficiaries, and the organization is accountable to them. Examples of such organizations are community based organizations, employment related associations, cooperatives, religious groups, and people’s organizations representing a variety of interests.

The purpose of public benefit organizations is to help specifically identified groups of people or the general population. The beneficiaries of these organizations are not directly the members of the organization itself. The organization is not necessarily accountable to those that it plans to help, but is accountable to itself.

The two key groupings under this category are civic organizations and development and welfare CSOs. Civic organizations are mainly watchdog organizations set up to monitor the status of democracy, to encourage greater use of democratic practices among citizens, and to advocate and lobby on specific issues connected to democracy, such as human rights. Such organizations are often very vocal, and because of the high profile of this kind of work are seen by the public and by government to represent the NGO sector, even if they are only working on one issue.

Development and welfare CSOs can work in a variety of roles, none of which are exclusive:

1. *Implementing*: the main work is carrying out grassroots activities. They are usually organized on a “project” basis, which means a limited time period with a prepared budget. This usually aligns with the administrative convenience of the donor;
2. *Advocacy*: the main work is trying to change public policy with regard to a given issue;
3. *Networking*: the primary role is coordinating work with others in a particular sector;
4. *Research CSO*: the primary activity is researching pertinent issues, which are often linked to an advocacy function;
5. *Umbrella CSO*: the purpose is to provide a coordinating and representative role;
6. *Federations*: the main work is bringing CSOs in one area or sector together for certain purposes they can best carry out in greater numbers. It could also be that CSOs interested in a particular issue federate together with certain specific joint objectives related to that issue.

### ***Registration as Voluntary vs. Mandatory Requirement***

In keeping with Part IV of the Associations Law of Liberia, under Chapter 41, unincorporated associations/organizations can be formed without having corporate documentation. An unincorporated association as defined in this Law is a body of individuals acting together for the prosecution of a common enterprise without a corporate charter, but expressed in its bylaws that regulate its conduct, expressing its purpose, and governing the relations of its members among themselves, in the absence of a statute.

After it is organized, every unincorporated association is required to produce a certificate signed and sworn by its president and treasurer stating the name of the unincorporated association, the date of its organization, the number of its members, and a description of the purpose of the organization.

The organization is also required to file the certificate in the office of the Registrar of Deeds in the county where the principal office of the association is located, and, after filing the certificate, should publish a copy or a notice containing the substance of the certificate in a newspaper of general circulation, or if no newspaper is available, a copy of certificate should be displayed prominently for three consecutive business days in front of the post office in the

principal place where the unincorporated association is located. Upon completion of such publication, the organization is required to file an affidavit of compliance at the place where the certificate was filed, duly signed by the president and treasurer.

### ***Registration or Incorporation Requirements***

The general law providing for the establishment of a CSO as a legal entity is the Associations Law of Liberia. Part II, Chapter 20 of the Liberian Code of Laws, under general provisions of the Associations Law, gives the following general guidelines:

1. CSOs can be established through a charter, by a special act of the Legislature, or by filling articles of incorporation. CSOs may also be formed without obtaining a charter or an article of incorporation. Such organizations referred to as unincorporated associations must meet certain legal requirements as discussed in the section above.
2. A not-for-profit corporation may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to members thereof and for which individuals may lawfully associate. There are no restrictions on who can serve as founder.
3. At least three persons can establish a not-for-profit organization.
4. No amount of capital or assets is required at the time of establishment.

In order to secure articles of incorporation, a fee of US \$50 is required. The articles of incorporation are then submitted to the Ministry of Foreign Affairs with the following required provisions:

1. The name of the organization;
2. The duration of the organization, if not perpetual;
3. The purpose(s) for which the corporation is organized;
4. That the corporation is organized pursuant to the not-for profit corporation act;
5. The number of directors constituting the initial board of directors;
6. If an existing unincorporated association is being incorporated, the name of the existing unincorporated association; and
7. A designation from the Ministry of Foreign Affairs of the corporation, upon which those seeking to process against the corporation may be served in accordance with law.

To secure accreditation from the Ministry of Planning and Economic Affairs the following are required:

- Articles of incorporation from the Ministry of Foreign Affairs as an entity;
- A mission statement containing clearly defined objectives, target beneficiaries, sector(s) of operation, constitution, and by-laws;
- Office space with a visible signboard exhibited, and, where feasible, a postal address, email addresses and telephone numbers;
- A bank account in the organization's name with at least two signatories;

- No less than 3 full-time staff;
- A board of directors or an equivalent policy-making body whose composition is not dominated by a family group. Members of the board may be domiciled inside or outside of Liberia. The NGO should make the contact information of this body available upon request;
- A legal status in their own country of origin for international NGOs (INGOs). Such organizations, where applicable, must show proof of their activities in other countries; and
- A certificate of incorporation in the country of origin and other constitutive documents of the parent NGO for international organizations. (i.e. memorandum, articles of association and by-laws).

The Ministry of Foreign Affairs is responsible for granting requests for incorporation, while the Ministry of Planning and Economic Affairs (MPEA) is responsible for accrediting NGOs.

The Associations Law is mandated with the incorporation of all organizations except unincorporated organizations through the Ministry of Foreign Affairs, which makes the organizations legal entities. The NGO Policy is an attempt to regulate the activities of NGOs and is being administered by the Ministry of Planning and Economic Affairs. To be registered with the Planning Ministry, an organization must have an article of incorporation or must have registered the unincorporated association in keeping with the provisions of the Associations Law. Articles of incorporation can be processed at the Ministry of Foreign Affairs within five working days if the document contains all the required provisions and articles.

The accreditation process at the Ministry of Planning and Economic Affairs should not exceed 20 working days from the date of submission. Application for accreditation may be denied if any of the requirements for registration are not met, for instance, if the organization does not have a sign board, etc.

Reasons for denial are generally not given in writing. When the organization follows up with the Ministry, they are informed verbally of the reasons why accreditation was not granted and are advised to take corrective measures.

In the case of a denial of accreditation, the NGO concerned may appeal the decision of the MPEA before a Standing Independent Appeal Board as defined in Section 15 of the National Policy on NGOs. However, the Board is yet to be constituted.

Presently, there are no significant constraints on the registration/incorporation process.

### ***CSO Registry***

The Ministry of Planning and Economic Affairs maintains a registry of NGOs that have been accredited by the Ministry and those that have applied. Presently, the Ministry has a list of about 277 NGOs that have been accredited. This registry does not account for the over 500 CSOs operating in Liberia. The registry is not yet available via the Internet, but can be made available upon request to the Minister of Planning.

### ***Foreign Organizations***

To obtain articles of incorporation, INGOs should submit an Application for Authority to Operate in Liberia. They should have a legal status in their own country of origin. Such organizations, where applicable, must show proof of their activities in other countries. They also must present copies of their certificate of incorporation from the country of origin and other constitutive documents of the parent NGO (i.e. memorandum, articles of association and by-laws). The fee for incorporation of international NGOs is US\$500, compared to US\$50.00 for local NGOS.

## **III. SUPERVISION AND ENFORCEMENT**

### ***Regulatory Authorities***

The Ministry of Planning and Economic Affairs (MPEA) is the Government of Liberia (GOL) agency mandated to monitor and evaluate the activities of NGOs and enhance the cooperation between GOL and NGOs. The ministries of Health and Agriculture also monitor CSOs engaged in activities under the purview of those ministries.

### ***Internal Governance***

Both the Associations Law and the NGO Policy provide for Board members of not-for profit organizations. The Associations Law does not require a general assembly. However, in developing their articles of incorporation, organizations can include in their articles the structural format of the organization, including the functions of the assembly if they have the role of the board and the function of the secretariat, depending on the structure of the organization.

### ***Reporting***

The only CSOs that are so far required to submit activity and financial reports to the government are NGOs accredited by the Ministry of Planning and Economic Affairs. Such reports are to be submitted within three months of the end of the financial or programmatic year of the respective organizations.

Activity reports should cover the following information:

- Period of activity;
- Objectives of the project and programs;
- Achievements measured against the objectives;
- Implementation arrangements;
- Partnerships;
- Implementation constraints;
- Lessons learned; and
- Conclusions and recommendations.

Financial reports should cover the following information:

- Funding sources;
- Duty waiver obtained (if any);

- Budget for the period;
- Expenditure breakdown against the budget; and
- Audit report for the period (if any).

### ***State Enforcement and Sanctions***

In keeping with the current NGO policy, NGOs are required to submit annual reports to the MPEA. The present accreditation for NGOs is three years. Accredited NGOs that fail to submit reports covering the three years may be denied re-accreditation. While sanctions exist for failing to meet tax obligations, these sanctions have not been imposed.

### ***Dissolution, Winding Up, and Liquidation of Assets***

In keeping with 24.6 (3) of the Associations Law, on dissolution or liquidation of the corporation, the assets of the corporation remaining after payment, or adequately providing for payment of its liabilities, should be distributed in accordance with the applicable provisions of the organization's articles of incorporation, or the by-laws, or, in the absence of any such provisions equally to all members. From this provision, it is understood that the members themselves can initiate voluntary dissolution, either through provisions contained in the articles of incorporation of the organization or its bylaws.

There are no legal provisions for involuntary dissolution.

### ***Other Constraints***

In the past, during the regime of Mr. Charles Taylor, some CSOs and human rights activists were harassed and intimidated. The current administration has provided a free space for CSOs to operate. There has not been an instance of harassment of CSOs, and the government has not established NGOs to threaten the independent space for CSOs.

## **IV. CSO ACTIVITIES**

### ***General Powers***

Every not-for-profit organization can:

1. Sue and be sued;
2. Make contracts;
3. Receive property by devise or bequest, and otherwise acquire and hold property, real or personal, including shares of stock, bonds, and securities of other corporations;
4. Act as trustee under any trust incidental to the principal objects of the corporation, and receive, hold, administer, and expand funds and property subject to such trust;
5. Convey, exchange, lease, mortgage, encumber, transfer upon trust, or otherwise dispose of all property, real or personal;
6. Borrow money, contract debts, and issue bonds, notes, debentures, and secure the payment or performance of its obligations; and
7. Do all other acts necessary or expedient for the administration of the affairs and attainment of the purpose of the corporation.

### ***Expressive/ Advocacy / Public Policy Activities***

CSOs are free to criticize the government and advocate politically unpopular causes. CSOs can also engage in legislative activities, such as helping to draft laws or urging the government to adopt certain policies.

### ***Communication and Cooperation***

There are absolutely no restrictions regarding communication and cooperation in relation to the functioning of CSOs in Liberia. CSOs are permitted to contact and cooperate with colleagues in civil society, business and government sectors, both within and outside the country. CSOs are not required to give advance notice of international cooperation

### ***Seeking / Securing Funding***

#### **1. Foreign Funds**

There are no special rules for domestic CSOs to receive foreign funding. CSOs are not restricted to the amount of funding they can receive, nor are they required to deposit the funds in any government controlled bank.

#### **2. Economic Activities**

CSOs are generally not-for-profit organizations. If a registered charity or other CSO engages in business activities or other activities inconsistent with its charitable purpose, it is subject to tax with respect to those activities and, under regulations to be provided by the Minister, may lose its approved registered status.

However, in keeping with Chapter 23 of Part II of the Associations Law under Corporate Finance, not-for-profit corporation whose lawful activities involve, among other things, the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit. All such incidental profits shall be applied to the maintenance and operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation.

#### **3. Government Funding**

The government does not have funds set aside for CSOs.

#### **4. Other Constraints**

The laws or regulations do not impose any constraints on the ability of CSOs to seek and secure funding.

## **V. TAX LAWS**

### ***Tax Treatment of CSO Income***

In keeping with Section 905 of the Revenue Laws of Liberia Act of 2000, all CSOs are to pay income on wages and salaries of staff. The schedule of income tax payment begins with 2 percent up to 35 percent, depending on the income earned by the employee.

The Revenue Laws also provide that renters or lessees of buildings pay an estate tax of 10 percent on behalf on the owner of the property. Contracts awarded by CSOs amounting to more

than 100,000 Liberian Dollars should pay a withholding tax of 10 percent. There are no special taxes imposed on funding from abroad.

- Part 1, Section 9 of the Revenue Code of Liberia 2000 provides for persons exempt from tax as follows:

The Government of the Republic of Liberia, Government agencies, and charitable or not-for-profit private organizations that are approved by and registered with the Ministry of Finance are referred to as “Exempt persons” and are exempt from tax to the extent provided for by this Code.

Foreign governments, foreign diplomatic representatives, foreign consular officials, international organizations and officials of international organizations that are exempt from taxation under international agreements are exempt from tax to the extent required by those agreements and also enjoy those exemptions provided to them by this Code.

- Part II: Chapter 2, Section 200 (g)

Tax exempt persons. No tax shall be imposed under this part on the government, a government agency designated as an approved recipient of charitable donations, or a private, charitable or not-for-profit organization that qualifies as a registered charity. Foreign governments, foreign diplomatic representatives, foreign consular officials, international organizations and officials of international organizations that are exempt from taxation under international agreements are exempt from tax under this part to the extent provided in the applicable international agreement.

1. A private, charitable or not-for-profit organization will qualify for registration if:

A. It is a noncommercial organization that is established for the purposes of carrying out charitable or not-for-profit activity.

An organization does not qualify as a registered charity, or if registered is subject to loss of its approved and registered status, if it:

Pursues political goals or performs political activities, including direct or indirect participation in election campaign of any political party, public organization or movement, or person; or the revenues or property of the organization benefit or may benefit any person except as a result of the conduct of its charitable activity or as a reasonable payment for the property or services

If a registered charity engages in a business activity or other activity inconsistent with its charitable purpose, it is subject to tax with respect to those activities and, under regulations to be provided by the Minister, may lose its approved and registered status.

Section 205. Other deductions:

Charitable contribution deductions. A deduction is allowed to taxpayer filing a tax return under Section 900 or 901 for the amount of a contribution made to a qualifying organization. Qualifying organizations are the government, a government agency designated as an approved recipient of charitable donations, or a registered charity described in section 200(g).

The deduction for charitable contributions is limited to an amount not in excess of 15 percent of the taxpayer taxable income (computed before reduction for charitable contributions but after inclusion of any gain on the transfers as provided under section 207(b)).

### ***Customs Duties***

A CSO may import products free of duties and customs excises provided it is accredited by the Ministry of Finance as a private charitable or not-for-profit organization. An organization will qualify as private charitable or not-for-profit if it is a non-commercial organization that is established for the purpose of carrying out charitable or not-for-profit activity.

### ***Donor Incentives***

Deductions are allowed to a taxpayer filling a tax return under section 900 or 901 of the Revenue Code of Liberia, for the amount paid to a qualifying organization. Qualifying organizations are the government, a government agency designated as an approved recipient of charitable donations, or a registered charity.

In keeping with Part II, Chapter 2, section 200 (g), a registered charity is a special status available for other CSO forms. This status is given when an organization, duly incorporated and registered with the Ministry of Planning, is also registered with the Ministry of Finance.

### ***Administrative Spending***

There are no limits on administrative expenses or salaries which can be expended or paid.

## **VI. CONCLUSIONS**

### ***Priority Issues***

There has been intense lobbying for a review of the current National Policy on NGOs. International NGOs are concerned about the issue of work permits for staff, and the government is concerned that programs of INGOs are not in line with the Government's Poverty Reduction Strategy, and would like to see more oversight and monitoring. Also, some government officials feel that the three year accreditation period is too long and would like to see the accreditation period reduced. A consultative forum is being planned to discuss these concerns.

### ***Financial Crisis***

Many Civil Society Organizations depend on foreign grants and donations to implement projects. As a consequence of the global economic crisis, key funding organizations have either put a freeze on new applications or have reduced the amount of funding given out. Quite recently, a donor organization that had in principle committed to funding a three-year project, reduced its funding to one year, citing the global economic crisis as the reason for its decision.

### ***Strategic Responses***

Civil Society Organizations must be able to work together to tackle attempts by the government to limit their space. The international community, particularly international democracy organizations, or networks like the World Movement for Democracy, should continue support and efforts to strengthen CSOs. This report should be disseminated widely both to CSOs and governments to ensure that governments are aware that their actions are being monitored and analyzed.

***Sub-Saharan Africa Country Reports***

**Rwanda**  
**Gloria Tengera**

***Introduction***

Though 15 years have passed since the end of the genocide, the people of Rwanda continue to struggle with its social consequences. In its aftermath, civil society organizations (CSOs) emerged to assist in rebuilding the state and to fill the gaps left from war, including the assistance to widows and orphans, child-headed households, and traumatized survivors. Today, CSOs continue to provide essential social assistance to the people.

In Rwanda, civil society organizations are primarily understood to be non-governmental organizations (NGOs). The legal provisions for the existence of CSOs are found in the Constitution, Law N° 20/2000 of 26/07/2000 Relating to Non-profit Making Organizations (O.G. n° 7 of 01/04/2001), and the newly promulgated Organic Law no. 55/2008 of 10/09/2008 Governing Non-Governmental Organizations (O.G. no. 23 of 01/12/2008). Operational laws stemming from the Organic Law have yet to be promulgated and thus the operational law is Law N° 20/2000 of 26/07/2000 relating to Nonprofit Organizations remains operational insofar as it does not conflict with the Organic Law. The latter documents methods for CSOs and the Government to enter into cooperation agreements to promote the social welfare of the population, allowing the Government to regard CSOs as potential partners.

Approximately 80 percent of CSOs in Rwanda carry out health and education-related activities, while 20 percent provide other social services. Local NGOs fall broadly under the jurisdiction of the Ministry of Local Government, while international NGOs are regulated by the Ministry of Internal Affairs, specifically the Immigration and Emigration Department. The organizations' operations are supervised by the Ministries responsible for the activities in which they are engaged. The Rwandan Government requires that CSOs incorporate formal governmental priorities into their missions, including the Vision 2020 and EDPRS. CSOs must document the utilization of these roadmaps in their activities.

Currently, specific laws relating to local NGOs, international NGOs, and religious organizations are being deliberated in the Political Commission of the Chamber of Deputies, and may be subsequently passed into law by Parliament.

**I. PROVISIONS OF THE LAW**

***General Framework***

Rwanda is governed by a civil law system. Post-genocide, there have been progressive changes to the judicial system, and the accessibility of laws has increased with commendable success, including the introduction of a Web site, [www.amategeko.net](http://www.amategeko.net), on which all laws are posted for public consumption. Hard copies of laws are also accessible at the Prime Minister's office for any interested parties. These laws are available in the three official languages of Kinyarwanda, English, and French.

### ***Constitutional Framework***

The rights of civil society are vested in the Constitution of the Republic of Rwanda in the following articles:

1. *Article 33*- Freedom of thought, opinion, conscience, religion, worship and the public manifestation thereof is guaranteed by the State in accordance with conditions determined by law. Propagation of ethnic, regional, or racial discrimination, or any other form of division, is punishable by law.
2. *Article: 35*- Freedom of association is guaranteed and shall not require prior authorization. Such freedom shall be exercised under conditions determined by law.

### ***Statutory Framework***

*Law Number 20/2000 of 26/07/2000 Relating to Nonprofit Organizations* - In addition to these constitutional provisions, Law N° 20/2000 of 26/07/2000, Relating to Nonprofit Organizations (O.G. n° 7 of 01/04/2001), is the operational law for civil society organizations. According to this law, a nonprofit organization is defined as any grouping having a legal personality, governed by civil law, and constituted by physical or moral entities which accomplishes social works and that decides to use its knowledge or activities for a goal other than making a profit (Article 1).

*Law Number 20/2000 of 26/07/2000 Relating to Nonprofit Organizations*- It also states that a nonprofit organization's main objective is to exercise religious, philanthropic, scientific, cultural, or sporting activities, and may, at a subsidiary level, extend its field to other activities, as long as they are also carried out for no profit (Article 1, Paragraph 1).

### ***Types of Organizations***

The new Organic Law governing NGOs defines NGOs loosely as organizations that are not established by the Government, and work for the general interest. This broader definition takes precedence over the previous one stated in the operating law.

The Law Relating to Nonprofit Organizations remains in force, as long as it does not contradict the Organic Law until the latter's specific regulations are enacted.

## **II. ESTABLISHMENT AND REGISTRATION**

### ***Purposes***

According to the Law Relating to Nonprofit Organizations, CSOs may be established for social works (religious, philanthropic, scientific, cultural and sporting activities), though it may extend its field to other activities at a subsidiary level. The Organic Law provides for three categories of NGOs: Local, International, and Religious Organizations. Specific laws, yet to be voted on, shall determine which organizations shall fall into each of these categories.

### ***Registration as a Voluntary vs. Mandatory Requirement***

Though the Constitution provides that freedom of association is guaranteed and shall not require prior authorization, it maintains that such freedom shall be determined by conditions provided by law. The Organic law does not clarify whether authorization for NGOs is mandatory or voluntary, but only states that those that are authorized must meet the following criteria: have

legal personality, have a mission not contrary to Rwandan Laws, and not distort public order or commit affronts to public decency (Article 4).

The Organic Law also states that NGOs must be given legal personality by competent authorities provided for by specific laws (Article 5). Until these laws are promulgated, however, the Law Relating to Nonprofit Making Organizations (No. 20/2000 of 26/07/2000) will stand, including the article stating that every person is free to form an association with others, unless founded for an illicit objective, contrary to laws, public order, or morality. Nonprofit organizations are therefore only recognized by the Government if conforming to legal procedures.

### ***Registration or Incorporation Requirements***

- A nonprofit organization must consist of at least three members (Article 4).
- Presentation of aims and a plan of action must be given to local authorities at the place it intends to headquarter the organization in order to obtain provisional authorization (Article 8, Paragraph 1). This plan of action should detail the financial methods the organization it will use to meet its aims, as well as a nominal list of all members with their signatures. A decision to grant provisional permission is made within three months from that date of submission.
- An application requesting legal personality must be addressed to the Minister of Justice six months following the date of receipt of provisional permit. (Article 9).
- The following documents are mandatory for request of legal personality:
  - i) The provisional authorization or proof that the period prescribed therein has not expired;
  - ii) Statutes of the organization;
  - iii) List of duly registered members;
  - iv) Names of legal representatives of the organization;
  - v) Minutes of the meeting that put the organization in place with signatures of all the members; and
  - vi) A copy of the criminal records of the legal representatives, if any.
- Legal personality is granted on the signing date of the ministerial decree six months from the date the request was made to the Minister of Justice (Article 10).
- In case legal personality is not granted, reasons for its denial must be communicated to the association's representatives within six months of application (Article 11).

### ***Foreign Organizations***

- Every foreign nonprofit organization must be authorized to exercise activities in Rwanda (Article 32).
- It must submit its request to the authority of the area/activity in which it wishes to work, as well as inform the Minister of Cooperation and Justice.
- The application must contain: (Article 33)
  - i) Nature of activities anticipated;
  - ii) Implementation schedule and its various stages of planning;
  - iii) Targeted population and area where activities will take place;

- iv) Detailed cost estimates with data;
- v) Means available- material, human, and financial;
- vi) Means expected and their origin;
- vii) Results anticipated at the end of the activity;
- viii) Eventual contemplated beneficiaries for the launched activities or the executed work at the association's winding up;
- ix) One copy of the associations' statutes; and
- x) All information relating to its geographical establishment throughout the world.
- Granting of the authorization is subject to (Article 34):
  - i) Adequacy between planned activities and the means acquired or expected;
  - ii) The benefit of the activities, impact on the population;
  - iii) The commitment to achieve the proposed objectives.
- The decision regarding authorization is communicated within three months of receiving the request.
- Registration with the Ministry of Local Administration is acquired on presentation of the acquired working permit (Article 36).

### **III. SUPERVISION AND ENFORCEMENT**

#### ***Regulatory Authority***

The Ministry of Local Government (MINALOC) regulates all Local NGOs, while the Ministry of Internal Affairs regulates International NGOs. However, International NGOs must be recommended by the Ministries in charge of the activities of the International NGO.

#### ***Internal Governance***

- Nonprofit making organizations must enact statutes including the following (Article 12):
  - i) Name of the organization;
  - ii) Headquarters and complete address;
  - iii) Objectives for which the organization was formed;
  - iv) Area of activity;
  - v) Assets;
  - vi) Asset disposal in the case of dissolution;
  - vii) Rules to be followed in modifying the statutes;
  - viii) Procedures for convening a General Assembly; and
  - ix) Modalities to gain or lose membership.
- No decision relating to statutory provisions mentioned above shall be effective unless approved by the Minister of Justice; this indicates some level of government influence. (Article 14)
- The organization must have a General Assembly made up of registered members (Article 15), which functions as the supreme organ of the association (Article 16).
- The organization must be administered by one or several legal representatives or substitutes (Article 17), who must be approved by the Minister of Justice (Article 20).

#### ***Reporting***

The governmental authority responsible for the nonprofit organization may at any time request data and documents on its activities, which must be delivered within a month. Additionally, every nonprofit organization in Rwanda must submit a detailed report on its

achievements, balance sheet, and documentation of its financial situation to the authority by April 30 of each year. These reports are forwarded to concerned Ministries by May 31 and to the Cabinet by June 30. The non-delivery of reports can result in the suspension of an organization's activities.

### ***Dissolution, Winding up and Liquidation of Assets***

Any organization may be dissolved on a decision taken by a two-thirds majority of the registered members or the Judiciary (Article 27). It can also be dissolved on grounds of unfulfilled commitments, allocation of assets or asset-generated income to an objective other than that for which it was created, or activities against the statutes, law, or public order. Dissolution can be initiated by an associate, interested third party, or the Public Prosecutor (Article 28). In the case of involuntary dissolution (legal dissolution), liquidators are appointed by the Tribunal which, after clearing debts and liabilities, will determine the distribution of remaining property according to what is provided for in the organization's statutes or as stated by the majority of registered members (Article 29).

In the case of voluntary dissolution, destination of assets will be determined only by statutes that cannot be altered by interested parties (Article 30). Associate members, creditors, and the Public Prosecutor may appeal to the Tribunal to reject the decision of liquidators (Article 29, Paragraph 3).

## **IV. CSO ACTIVITIES**

### ***General Powers***

CSOs are entitled to function as any other legal entity, and may own property and enter into legal contracts.

### ***Expressive / Advocacy / Public Policy Activities***

There is no legal clause expressly prohibiting advocacy activities per the constitutional right to opinion and expression; in reality, however, CSOs rarely participate in these activities.

### ***Communication and Cooperation***

CSOs are free to communicate with whomever they wish with no intervention from the government.

### ***Seeking / Securing Funding***

CSOs are free to obtain foreign funding with no restrictions, and may engage in commercial and economic activities if proceeds are used for the purpose for which that organization was founded. Organizations are also permitted and encouraged to compete for government funds, as their grassroots credentials make them uniquely qualified to implement community activities.

## **V. TAX LAWS**

### ***Tax treatment of CSO Income***

CSO income is not taxed in Rwanda, whether in the form of income from grants, donations, or investments.

### ***Customs Duties***

CSOs are able to import products free of duties and customs excises if the goods are shown to be donations for the sole purpose of aiding the work of the nonprofit organization.

### ***Donor Incentives***

There is no particular legislation concerning donor incentives apart from the tax-exempt nature of donations to CSOs.

### ***Administrative Spending***

Administrative expenses cannot exceed 30 percent of the total CSO budget.

## **VI. CONCLUSIONS**

### ***Priority Issues***

Though new laws concerning CSOs are forthcoming, the currently-enforced Law Relating to Nonprofit Organizations is ambiguous since it does not provide clear definitions regarding different classifications of NGOs (i.e., different rules for local and international NGOs). As such, the rights and obligations of the various types of organizations are not well defined in the law.

The specific laws concerning international and local NGOs that are currently being debated in Parliament provide better guidance concerning formation procedures, as well as organizations' legal rights and obligations. The laws in question have reduced the duration of administrative procedures, and have outlined a system of pre-court arbitration to deal with potential conflicts. A system of joint collaboration between the Rwandan Government and NGOs has been advocated to facilitate their partnership.

### ***Strategic Responses***

Some steps that can be taken to improve the quality, administration, and enforcement of laws to strengthen and defend civil society are:

- Promotion of CSO advocacy;
- Stronger involvement of stakeholders;
- Stronger capacity of local NGOs;
- Increased funding base; and
- Reduction of bureaucratic and administrative procedures.

***Sub-Saharan Africa Country Reports***

**Sierra Leone**

**Emmanuel Saffa Abdulai**

**Introduction**

For the purposes of this Report,<sup>1</sup> the Constitution of Sierra Leone was reviewed, along with the final draft proposal for regulations for non-governmental organizations (NGOs). Also considered was the legal basis for taxation and waiver as well as other international treaties ratified by Sierra Leone.

**I. PROVISIONS OF THE GENERAL LAW**

***General Framework***

Sierra Leone operates under a common law system originating from its time as a British colony. Under Article 170(2) of the Constitution, the common law of Sierra Leone is deemed to be comprised of the rules of law generally known as the common law, the doctrine of equity, and the rules of customary law, including those determined by the Superior Court of Judicature.

Article 6 of the Constitution states that every statutory instrument should be published in the *Gazette* no later than 28 days after it is proposed, or, in the case of a statutory instrument that will not have the force of law unless it is approved by some person or authority other than the person or authority by which it is made, no later than twenty-eight days after it is approved. If it is not published, it is void from the date on which it was proposed. Given the high illiteracy rates in the country, however, many sectors of the indigenous population are unaware of the content of the law and are therefore not aware of the rights to which they are entitled, and the duties and obligations owed to them by the State.

***General Constitutional Framework***

The general constitutional framework of Sierra Leone is based on the 1991 Constitution. Article 5(1) of the Constitution states that Sierra Leone is to be a republic based on the principles of freedom, democracy and justice. Indeed, the constitutional framework of Sierra Leone has further enshrined recognition and protection of the fundamental human rights and freedoms of the individual under Chapter III, Article 15. In part, the Constitution provides for life, liberty, the security of the person; freedom of expression and association; and respect for family life. While the state recognizes these fundamental rights, which are also part of international law, the Constitution allows for a number of instances in which these freedoms can be limited by the state, ostensibly on the grounds of affording protection to the rights of society as a whole, but

---

<sup>1</sup> Please note that, as specified by the World Movement for Democracy and the International Center for Not-for-Profit Law, for the purposes of this report, civil society organizations or “CSOs” include not-for-profit, non-governmental organizations such as associations, foundations, non-profit companies, societies, public benefit companies, etc. – in other words, organizations that are private, non-profit distributing, self-governing and voluntary. Although this definition would on its face include trade unions, political parties, cooperatives and possibly religious organizations, this report will generally exclude such organizations, since they are frequently (though not always) regulated under separate laws.

more frequently based on the protection and maintenance of the state and public order and interest. There are also provisions for a state of emergency to be issued during times of war or the occurrence or anticipation of societal breakdown, which allows the state to derogate from its obligations regarding the protection of fundamental freedoms for the purpose of securing peace, order, and good government.

A key aspect of a functioning and inclusive civil society structure is that citizens have an inherent right to associate with organizations without fear of reprisal. Article 26 of the Constitution provides for the freedom of association as follows:

*26(1) Except with his own consent, no person shall be hindered in the enjoyment of his [...] Freedom of Association, that is to say, his right to [...] associate with other persons and in particular to form or belong to any political party, trade unions or other economic, social or professional associations, national or international, for the protection of his interests.*

*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*

*a. which is reasonably required—*

*i. in the interests of defense, public safety, public order, public morality, public health, or provision for the maintenance of supplies and services essential to the life of the community; or*

*ii. for the purpose of protecting the rights and freedoms of other persons; or*

*b. which imposes restrictions upon public officers and upon members of a defense force; or*

*c. which imposes restrictions on the establishment of political parties, or regulates the organization, registration, and functioning of political parties and the conduct of its members;*

*and except in so far as that provision, or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

The protection of fundamental freedoms of association has been accepted by the Sierra Leonean Government in its ratification and acceptance of various international treaties which expressly provide for the right to freedom of association. Of particular note is Article 22 of the International Covenant on Civil and Political Rights (ICCPR), which states:<sup>2</sup>

*There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law,*

---

<sup>2</sup>22(1) *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.* 22(2) *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

*conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.*

It is clear from the context of this treaty that the formal registration required by the Government of Sierra Leone in its draft NGO Policy is not required of an organization before its members can exercise their right to associate.

## **II. ESTABLISHMENT and REGISTRATION**

### ***Introduction***

The final draft of Sierra Leone's NGO Policy was submitted in May 2008. Its self-stated purpose is to accomplish "the effective coordination and monitoring of the activities of both National and International NGOs in order to enhance their cooperation and collaboration with the Government of Sierra Leone (GOSL) and ensure maximum benefits to the people of Sierra Leone."<sup>3</sup> The Policy defines NGOs as "independent, non-profit making non-political and charitable organization(s), with the primary objective of enhancing the social, cultural and economic well being of communities." However, "religious bodies" and "community-based organizations" defined as "group(s) of community members working together as... independent non-profit making charitable organization(s)," or those with a "political or ethnic bias" are specifically excluded from gaining NGO status.<sup>4</sup> Additionally, the draft does not allow NGOs to work to develop political and human rights.

On review of the policy, the law seems to represent a carefully constructed mechanism controlling virtually every aspect of the creation, existence, operation and activities of NGOs and Civil Society Organizations (CSOs) in Sierra Leone, placing onerous burdens on the independent development of civil society structures in Sierra Leone.

A similar policy was put in place in 1994 under the military junta of the National Provisional Ruling Council, and over time many additions were made to it. The policy had the following consequences:

- Raised the financial requirement that must be met by existing and new NGOs applying for registration;
- Increased the documentation requirements to include an annual and audited report;
- Required a fully functioning office space and a staff of at least five before registration can be approved;
- Required all NGOs to join a supposed umbrella organizations for NGOS in the country, the Sierra Leone Association of Non-Governmental Organizations, and pay an expensive subscription fee;
- Required all NGOs to get "attestation" from various government ministries before registration can be approved;

---

<sup>3</sup> Paragraph 1.1.7 NGO Policy Regulations, Policies and Guidelines for the Operations of Non-Governmental Organisations in Sierra Leone

<sup>4</sup> A religious organization aiming to carry out any NGO-related activities must do so via a separate division established for such a purpose, Paragraph 2.1.3.

- Required unannounced on-sight visits to offices and working areas of NGOs by the NGO Desk of the government Ministry of Development;
- Established an inter-governmental community that would approve project implementation and funding of NGOs;
- Established another community that would determine the existence of NGOs based on some performance appraisal;
- Provided tax exemption and duty waiver for all fully registered NGOs.

### ***Registration of Not-for-Profit Organizations***

Chapter 245, the Registration of Business Act of the Laws of Sierra Leone 1960, provides for the registration of not-for-profit organizations. To complete this process, the entity must have a Memorandum of Association prepared by a legal representative. The registration is authorized by the Registry Office.

While Chapter 245 might be seen as an opportunity to avoid the provisions of the draft policy, it does not qualify an organization for tax exemption or duty waivers.

### ***Purposes***

Education, health and sanitation, agriculture, arts and culture, relief, skills promotion, consultancy, human rights, gender, small scale industries, social and community development, environment, and finance are the only self-classifying areas that an NGO can choose when completing the registration application. There is a space to indicate “other.”

### ***Registration as Mandatory or Voluntary***

The NGO Supervisory Committee determines the criteria necessary for an NGO to operate efficiently. All applicants for registration as NGOs must submit application forms together with the documents specified in those application forms. This includes copies of the organization’s constitution; memoranda and articles of association; the logo of the organization; a list of staff, including local and expatriate workers and details of the work and residential permits of those expatriate staff. In addition, an Agreement must be signed between the NGO and the Government of Sierra Leone before activities can commence. Groups failing to adhere to the criteria can carry out their activities, but will not have the protections of the Government promised to registered NGOs.<sup>5</sup>

### ***Registration or Incorporation Requirements***

Chief among the requirements stipulated by the NGO Supervisory Committee is a clear mission statement outlining the NGO’s purpose, objectives, target beneficiaries, and constitution. These must conform to the Government of Sierra Leone (GOSL) development policies to promote the well-being and welfare of Sierra Leoneans. Organizations are also required to possess an easily identifiable office space with a sign board visibly displayed, an accessible postal address, a bank account in the organization’s name with at least two signatories, and evidence or commitment to access funds to support its programs. Additionally, an organization must have a clearly delineated administrative structure, an auditable transparent accounting system from which annual accounts can be compiled, and at least five full-time staff and/or

---

<sup>5</sup> See attached Agreement to be signed between an NGO and the GOSL.

volunteers, excluding secretaries, messengers, and drivers. NGOs should also be transparent and accountable to donors, the Sierra Leonean government, and their beneficiaries in the use of their resources, including a summary of overhead/direct support to beneficiaries, local/expatriate staff costs, and estimated quantifiable costs of GOSL/community contributions to programs. During the auditing process, there is a clear potential for governmental abuse through excessive or corrupt auditing procedures, particularly if the NGO is not operating in line with current governmental policy.

The NGO registration process is lengthy and involves a large amount of cooperation with the government through the submission of applications, verification, interviews and the payment of registration fees. This involves communications with various levels of government, including the relevant ministry for the specific operation of the NGO and approval from the committee and ministerial level. Given the history of West African democracies, these applications may likely be a time-consuming process requiring wide-scale interaction with corrupt government departments.

### ***CSO Registry***

The Ministry of Finance and Economic Development (MOFED) has responsibility for all NGO registrations, and monitors the relationships between government, donors, NGOs and beneficiary communities.<sup>6</sup> MOFED's NGO Unit will maintain a register issued to several bodies,<sup>7</sup> and made available to the general public for a fee. This additional bureaucracy may slow down the development of civil society operations in Sierra Leone.

### ***Foreign Organizations***

International NGOs must also show that they have legal status in their country of origin and proof of NGO activities there. Applicants are required to submit copies of their certificate of registration in their country of origin together with their Memoranda and Articles of Association or the constitution of the parent body of that particular organization.

## **III. Supervision and Enforcement**

### ***Regulatory Authorities***

The NGO Unit is responsible for monitoring and evaluating all NGO programs in Sierra Leone.<sup>8</sup> Additionally, the government seeks to enhance networking among organizations and create a unified NGO voice through the Sierra Leone Association of Non-Governmental Organizations (SLANGO), the compulsory inter-governmental group of NGOs.

The NGO Unit will be supervised by the NGO (Supervisory) Committee, which will advise the Government on policies governing NGOs. There is limited representation on the Committee by members of the NGO community, and fails to use the available expertise of the local NGO community and civil society sector. Many West African governments create and support similar committees in an effort to manipulate local NGO and CSO activities and decision

---

<sup>6</sup> See Paragraphs 2.3.1 and 2.3.2.

<sup>7</sup> Ministry of Finance and Economic Development, all NGOs, NGO Coordinators in Sector Ministries, Mayors or Chairmen, Local Councils, UN Agencies, National Commission for Social Action (NaCSA), National Revenue Authority, the Office of the President and Parliament, paragraph 3.1

<sup>8</sup> The Policy does not explain how this NGO Unit will be made up.

making. In effect, excessive government regulation allows for complete control of the NGO community in Sierra Leone.

### ***Internal Governance***

Throughout the planning and implementation of projects, local NGOs must include MOFED and their relevant Ministry in the discussion, or the project cannot be implemented.<sup>9</sup> Arduous project proposals must be completed, affecting the ability of small-scale NGOs to carry out their work. Additionally, NGOs must produce evidence indicating their contribution to employment and training in the country, even though reliance on donor funding could limit the organization's ability to create jobs or stimulate the economy.<sup>10</sup> Regulations also stipulate that NGOs must attempt to employ nationals of Sierra Leone before employing non-nationals.<sup>11</sup> To accomplish this, the Government compiles a list of skills that are widely available locally, ensuring that NGOs do not look outside its jurisdiction to find them.<sup>12</sup> These policies reduce the options available for organizations to obtain outside expertise where local capacity is insufficient. It is recommended that tax incentives be made more readily available for NGOs to allow them to fulfill these obligations.

### ***Reporting***

Under the draft policy, it is mandatory for NGOs to provide all information requested by MOFED, including status, structure, and organization, allowing MOFED to develop a database of this information. Every registered NGO is responsible for renewing its registration with the NGO Unit at the appropriate time using the established procedures. Renewal of registration will commence in September and end in January of the next year, with renewal dependent upon the periodic submission of relevant documentation listed on the renewal application form. In addition, MOFED requires an independent assessment of the performance of NGOs regarding Sierra Leone operations to ensure transparency and accountability. To satisfy this provision, MOFED requires a number of documents, including summaries of final donor project narratives and financial reports, specific external project audits undertaken at donor request, and proof of paid membership in SLANGO.

### ***State Enforcement and Sanctions***

MOFED is responsible for enforcing policy, and is able to apply sanctions when necessary. NGO non-compliance can be reported directly to MOFED, and, in a number of instances, NGOs may face sanctions recommended by the NGO Supervisory Committee if their activities are considered to be in contravention to the stated objectives of the NGOs, or where the NGO persistently fails to abide by the provisions of these policy guidelines.

An organization can also face sanctions if the NGO shows by its nature, composition, and operations that it is not developing and/or promoting the capacity of Sierra Leoneans in the management of its operations. These sanctions range from the cancellation or suspension of certificates of registration by the Minister on the advice of the NGO Supervisory Committee to

---

<sup>9</sup> This may be waived in an emergency by request to MoFED, paragraph 2.5.1.1

<sup>10</sup> Paragraph 2.11.2

<sup>11</sup> Paragraph 2.110.3

<sup>12</sup> Paragraph 2.11.9

restrictions of duty-free concessions. More ambiguously, “other” sanctions may also be determined by the NGO Supervisory Committee.

#### **IV. CSO Activities**

##### ***General Powers***

NGO activities in Sierra Leone are primarily geared towards improving the economic and socio-cultural welfare of target groups within the country. It is the intention of donors that a significant percentage of all contributions go directly to meet the needs of such beneficiaries; in other words, incurred project costs would be closely monitored by MOFED.<sup>13</sup> The government expects NGOs to ensure that a large percentage of their resources go directly to supporting and targeting beneficiaries, and that the administrative costs involved are limited.

Registration with MOFED gives legal status to NGOs, allowing them to enter into contracts, and sue or be sued. NGOs can also lease offices and houses for their staff, as well as open operational bank accounts with existing banks in the country. However, NGOs are only permitted to have current accounts, and are forbidden to have “savings accounts” in order to maintain their “not-for profit” status and the tax exceptions from which they benefit.

##### ***Expressive / Advocacy / Public Policy Activities***

While government rhetoric is supportive of the implementation of an effective civil society, there have been instances in which the GOSL has refused to cooperate with NGOs involved in advocacy critical of government policy. Indeed, making recommendations on the draft Policy is problematic in itself given objections to the government taking on this form of extensive civil society regulation.

##### ***Communication and Cooperation***

MOFED encourages NGOs to utilize the services of other NGOs based in the same region in the implementation of programs.<sup>14</sup> NGOs have no restrictions on the expression of their policies and programs or with whom an NGO may communicate and work. Organizations are able to partner with any ministry, local government official, international organization, local government organization, or any other group.

##### ***Seeking / Securing Funding***

All NGOs are required to submit details of all funds donated for project implementation.<sup>15</sup> Assets purchased with donor funds are the property of those they were bought to benefit. At the end of a program, a liquidation process is required, and the property of the organization must be sold under the supervision of government officials, with proceeds going to the community. Therefore, assets must be disposed of in collaboration with SLANGO and the Government. Even where funds are provided for capacity building/logistics support, items so acquired remain the property of the NGO for as long as it stays in operation.<sup>16</sup>

---

<sup>13</sup> Paragraph 2.4.1

<sup>14</sup> Paragraph 2.8.3

<sup>15</sup> Paragraph 2.7.1

<sup>16</sup> Paragraph 2.8.4

## **V. TAX LAWS**

### ***Tax Treatment of CSO Income***

The civil society sector in Sierra Leone is principally composed of charitable organizations. While there is an absence of specific laws governing charities, Articles 8 and 9 of the Income Tax Act of 2000 do describe instances where businesses and public international organizations are exempt from paying income tax, though the resident employees of a charity are not themselves exempt from paying income tax. Public international organizations are exempt under international law if they submit details to SLANGO and the Government of all funds committed by donors. This disclosure includes the amount donated, the sources of funding, details of donors, and descriptions of installment arrangements or other donor requirements.

Under the draft Policy, it would be a requirement that assets to build the capacity of local NGOs and CSOs be transferred through SLANGO and MOFED. In the process of closure, all assets must be disposed of in collaboration with the Government of Sierra Leone. Even non-governmental donors' funds provided for NGO capacity building must be transferred to SLANGO.

### ***Customs Duties***

NGOs can be given a waiver of import taxes on imported goods, which must be approved by the MOFED, thus providing an opportunity for corrupt behavior. In effect, permit clearance from NGOs will only be granted by MOFED after a recommendation from the Minister of Finance and Economic Development. Only properly registered NGOs can be given the duty waiver. Through every stage of the process, all documents must be forwarded and notifications given to relevant government bodies, placing a large burden on NGOs in situations where speed is a necessity, as in the event of an emergency or humanitarian disaster. In the case of one-off imports, distribution plans must be submitted for approval by the relevant NGO Unit. Capacity-building items, based on a checklist agreed upon by MOFED and the Commissioner General of National Revenue Authority (NRA) of basic needs for this purpose, are exempt from duty. Once the full complement has been allowed, no further allowance can be given except for replacement due to disposal, loss, or wear and tear.

All items eligible for duty waiver concessions must bear relevance to the approved project of the applying NGO. As a consequence, goods imported for monetization according to donor instructions, so that the proceeds would be utilized for program implementation, cannot be granted a duty waiver. The GOSL has added specific control provisions that exceed common norms, including a provision within the draft policy that an NGO must include a list of intended imports needed to carry out a program, together with detailed distribution plans and government approval of the shipping documentation. This documentation must be in place before the program begins. No additional allowance is permitted, except for replacements. Thus, an NGO is unable to address needs that may arise during the course of its program, or adapt to changing conditions requiring additional or different materials to be imported.

### ***Donor Incentives***

Where an NGO is involved in income-generating activities, it must declare details of the operation to the income tax department for a certificate of exemption. Failure to secure such a certificate will adversely affect the re-registration possibilities of the NGO.

It must be noted that the draft Policy provides tax exemption for income-generating activities of NGOs, which is a particularly progressive approach. It is unclear what additional tax benefits are available to NGOs or philanthropic donors in Sierra Leone. International NGOs, UN agencies, and other institutions are encouraged to develop and strengthen the capacity of collaborating NGOs by assisting with their structures and organizations. To further this, the GOSL may provide relevant financial and institutional support to NGOs in the form of duty waivers, tax allowances, and other facilities to enable them to develop, reinforce and sustain their organizational capacity for more effective delivery of service.

The policy, however, makes no provisions for tax exemption for donors or businesses making donations to NGOs. This is a particular gap that needs to be filled to provide incentives for donors within and outside of the country.

## **VI. CONCLUSIONS**

### ***Priority Issues***

The new draft policy governing the running of CSOs would have a particularly detrimental impact on local NGOs that are unable to cope with the excessive fees and regulations. This will directly impact the success of NGO outreach programs in Sierra Leone, and will contribute to a loss of expertise, jobs, and effective local knowledge. While Sierra Leone has adopted positive rhetoric in terms of its Constitution, the draft NGO Policy reflects a different approach to the right to freedom of association. Without registering and providing the required detailed information and accepting the strict government oversight outlined in the draft Policy, an organization would not be able to exist.

### ***Government Rationale***

The Government's stated rationale for the draft policy is, first, a desire for harmonization and coordination of NGO activities within Sierra Leone to allow for more effective development of the civil society sector. The purpose of this is to benefit Sierra Leoneans through ministerial leadership and the identification of stakeholders in the developmental process. Second, the Government has advocated greater transparency and accountability in the NGO community, resulting in stringent registration requirements and the development and coordination of NGO activities through SLANGO, with close cooperation and monitoring by the Sierra Leonean Government.

### ***Strategic Responses***

Currently, moves are being made to challenge the implementation of the draft NGO Policy. Criticism ranges from definitional concerns to the independence of CSOs and their ability to deliver quality services to improve the socioeconomic realities for Sierra Leonean citizens. It is recommended that the Policy be made to agree with basic constitutional and international protections of the freedom of association, and that the regulation of the civil society be limited to allow for independent and responsive programs. There is a particular need to review the expense and speed of the registration procedure, the definition of well being, and the clarification of the position of SLANGO.<sup>17</sup> The requirements in the draft Policy are both burdensome and expensive—for example, the need to re-register every two years. Also of concern is the contractual relationship that may exist between civil society service providers and the

---

<sup>17</sup> Paragraph 2.2.1 of the Draft NGO Policy

Government of Sierra Leone, particularly on occasions where CSOs do not want to implement government policy. There is an obvious ability for governmental interference in this area, and if the independence, inclusivity, transparency, and impartiality of the civil society sector in Sierra Leone are to be maintained, this draft policy requires urgent review and modification.

***Sub-Saharan Africa Country Reports***

## **South Africa**

**Ricardo G. Wyngaard<sup>1</sup>**

### **I. PROVISIONS OF THE GENERAL LAWS**

#### **A. General Framework**

- Does the legal framework follow civil law, common law, or other legal traditions?

The South African legal system comprises of a combination of legal traditions. This is because South Africa was colonized by both the English and the Dutch. The civil legal tradition was predominantly influenced by the Dutch whilst the common law tradition emanated from the English. In addition, indigenous law remains a central part of the South African legal system. The South African constitutional dispensation has further resulted in the development of common law in line with the constitution and the invalidation on the statutory laws which were found to be inconsistent with the South African Constitution.

- Is the country a federal system; if so, are there different provisions in state laws and national laws?

The concept of federalism is not specifically mentioned in the South African Constitution, but it does make provision for a national government and nine provincial governments. The powers of the national and provincial governments are set out in the Constitution.

The laws dealing with civil society are primarily enacted at national level. This include establishment, registration and taxation of civil society organisations.

- Are relevant laws accessible and generally understood?

Laws are generally accessible via the government printers and the internet. South Africa has eleven official languages.

Relevant laws include:

---

<sup>1</sup> Ricardo G. Wyngaard has provided legal advice, training, and assistance to the nonprofit sector since 2000. He has participated in a number of legislative reform and research initiatives on nonprofit legislation and is currently running a solo law practice focusing on nonprofit law and governance ([www.nonprofitlawyer.co.za](http://www.nonprofitlawyer.co.za)).

This paper is made possible with the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID or the United States Government.



1. Nonprofit Organisations Act of 1997
2. Trust Property Control Act of 1988
3. Companies Act
  - a. 1973 version – currently in operation - [www.acts.co.za/company/index.htm](http://www.acts.co.za/company/index.htm)
  - b. 2008 version
4. Income Tax Act – [www.acts.co.za/income\\_tax\\_act\\_1962.htm](http://www.acts.co.za/income_tax_act_1962.htm)

## **B. General Constitutional Framework**

**Freedom of association** – The South African Constitution provides one sentence under clause 18: *Everyone has the right to freedom of association.* This freedom extends to both an individual’s right to choose his or her associates and that of a group of individuals to choose its associates. The clause itself does not specify any limitations to the right. This clause must therefore be read in conjunction with clause 36 which provide for the limitation of the rights contained in the Bill of Rights.

**Freedom of expression** - Clause 16 of the Bill of Rights within the South African Constitution protects freedom of expression with a content-based restrictive approach. The second part of the clause provides for certain internal content-related restrictions.

### ***Freedom of expression***

*16. (1) Everyone has the right to freedom of expression, which includes*

- a) freedom of the press and other media;*
- b) freedom to receive or impart information or ideas;*
- c) freedom of artistic creativity; and*
- d) academic freedom and freedom of scientific research.*

*(2) The right in subsection (1) does not extend to*

- a) propaganda for war;*
- b) incitement of imminent violence; or*
- c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

The South African Constitutional Court has been careful in limiting this particular right. The following quotation summarises the court’s regard for the context of this right:<sup>2</sup> *“This is because of the critical need, for the South African community, to promote and protect human dignity, equality, freedom, the healing of the divisions of the past and the building of a united society. South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and*

---

<sup>2</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others CCT36/01*

*inequality. Left unregulated, such expression has the potential to perpetuate the negative aspects of our past and further divide our society.”*<sup>3</sup>

The Constitutional Court has confirmed on more than one occasion that the right to freedom of expression is not absolute. It can be limited in terms of the limitations clause. It can also be limited in instances of competing rights, including the right to dignity and other state interests.

**Right to equality** - Section 7 of the Bill of Rights identifies equality as one of its three basic values that enshrine the rights of people in South Africa. The other values are dignity and freedom. Section 9 (commonly referred to as the equality clause) of the South African constitution deals with equality and lists detailed grounds which may result in unfair discrimination.

Sixteen grounds are set out in section (9) (3) of the Bill of Rights on which the state is prohibited to unfairly discriminate. The clause also applies horizontally amongst persons in terms of clause 9 (3) which require “no person” to unfairly discriminate directly or indirectly against anyone on those grounds. Section 9 imposes a further duty on the state to prevent or prohibit unfair discrimination.

#### **Limitations Clause -**

##### ***36. Limitation of rights***

- 1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
  - a) *the nature of the right;*
  - b) *the importance of the purpose of the limitation;*
  - c) *the nature and extent of the limitation;*
  - d) *the relation between the limitation and its purpose; and*
  - e) *less restrictive means to achieve the purpose.*
- 2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

In the matter of *Christian Education South Africa v. the Minister of Education* the Constitutional Court found that the overall assessment as required in the Limitation Clause may vary from case to case. It quoted with approval the following finding from an earlier ruling: “In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected . . . Each particular infringement of a right has different implications in an open

---

<sup>3</sup> Ibid p. 45

and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness.”<sup>4</sup> The Court concluded that: “To sum up: limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.”<sup>5</sup>

### **C. Types of Organizations**

There are three kinds of civil society organisations in South Africa, namely:

- Voluntary associations that are established in terms of common law.
- Non-profit trusts that are established in terms of the Trust Property Control Act, and
- Non-profit companies that are established in terms of the Companies Act.

Any of these CSOs can register in terms of the Nonprofit Organisations Act of 1997, provided that those CSOs comply with a number of requirements listed in that Act. In essence, the founding document of such CSOs must contain prescribed information (including the name, objectives, non-profit distribution constraint, governance structures, etc) and narrative and financial reports must be submitted to the Directorate for Nonprofit Organisations on an annual basis.

## **II. ESTABLISHMENT, REGISTRATION**

### **A. Purposes**

The CSOs can generally be established for lawful purposes. The Nonprofit Organisations Act defines a nonprofit organisation as a trust, company or other association of persons established for a public purpose and the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered. The Prevention of Organised Crime Act, 1998 (Act 121 of 1998, is a law of general application which prohibits people or legal entities from knowingly receiving gifts and donations that originated from unlawful activities.

### **B. Registration as Voluntary vs. Mandatory Requirement**

The common law governs the establishment of voluntary associations in South Africa. Unregistered groups or voluntary associations are permitted to act collectively. Registration in terms of the Nonprofit Organisations Act is voluntary. There are no sanctions and penalties for carrying out activities through an unregistered organisation.

### **C. Registration or Incorporation Requirements**

- Who may be a founder (individuals, legal entities, foreigners, minors, etc)? Are there restrictions on who can serve as a founder?

---

<sup>4</sup> *S v Manamela and Another (Director-General of Justice Intervening) 2000 (5) BCLR 491 (CC) at paras 32 and 33.*

<sup>5</sup> *Para 31*

Founders of voluntary associations, nonprofit trusts and non-profit companies may include individuals, legal entities, foreigners and minors. There are generally no restrictions as to who can serve as a founder of a voluntary association.

- What is the minimum number of founders or initial members required?

A voluntary association can, in terms of common law be established with a minimum number of three founders. There is no minimum number of founders or initial members required for the establishment of a non-profit trust. It can legally be established with only one founder. Legally two different persons are required to ensure the establishment of a non-profit trust as the initial founder cannot be the same person as the initial trustee. The Companies Act of 1973 requires at least seven members to establish a non-profit company and at least two directors. The two directors can be part of the seven members. This is because the non-profit company is deemed to be a public company. The new Companies Act of 2008 which is not yet in operation requires at least three directors when setting up a non-profit company – no members are required.

The NPO Act does not specify a minimum number of founders when CSOs want to register in terms of that Act.

- Is a certain amount of minimum capital or assets required at the time of establishment?

No.

- What are the general registration procedures? For example, what documents must be submitted? Is there a registration fee?

**Voluntary Association:** The voluntary association is established in terms of common law. This can be done through a verbal or written constitution. In order for a voluntary association to have body corporate status, the founding document must provide that it; *firstly*, has perpetual succession, *secondly*, the capacity to acquire certain rights apart from the rights of the members forming it and no member has any rights by reason of his membership to the property of the association, and *thirdly*, the right to hold property in its own name. (Molotlegi and Another vs. President of Bophuthatswana 1989 (3) SA 119 (B))

**Non-profit Trust:** A trust must be registered in terms of the Trust Property Control Act in order to legally exist. This involves the submission of a written trust deed which serves as the agreement between the initial founder(s) and the initial trustee(s). The application is made to the Master of the High Court. There are fourteen offices situated in South Africa. The initial trustees also complete and sign an *acceptance of trusteeship* form containing their details and commitment to serve as trustees. As a matter of practice the Master's office has required pro forma letters issued by auditors or accounting officers to accompany the application for registration. Revenue stamps in the amount of R100-00 must be paid with the application for registration.

**Non-profit Company:** The non-profit company represents the more complex process of registration in respect of the three entities. The process is started with the reservation of a name for the company in the prescribed form. Once reserved, the Memorandum and Articles of Association together with a number of prescribed forms must be lodged with the Registrar of Companies. A minimal prescribed fee must accompany the application for registration. The

Registrar's office (the Companies and Intellectual Property Registration Office - CIPRO) is based at a central location, Pretoria.

**Nonprofit Organisations Act:** CSOs wanting to register in terms of this Act complete the prescribed application form and ensure that their founding documents contain the required clauses. As mentioned above, the founding document of such CSOs must contain prescribed information (including the name, objectives, non-profit distribution constraint, governance structures, etc). There are no fees involved.

- Which entity is responsible for deciding on the request for registration/incorporation?

**Voluntary Association:** The voluntary association is established in terms of common law and establishment is not dependent upon authorization by a public office.

**Non-profit Trust:** The Master of the High Court.

**Non-profit Company:** The Registrar of Companies [also known as CIPRO – the Companies and Intellectual Property Registration Office.

**Nonprofit Organisations Act:** The Director of Nonprofit Organisations as designated in terms of the NPO Act.

- Is there a fixed time period within which the responsible registration authority must review and decide upon registration? If so, what is it?

**Voluntary Association:** Not applicable.

**Non-profit Trust:** No. Registration ordinarily takes about three weeks if the application is fully compliant.

**Non-profit Company:** No. Registration ordinarily takes about three months if the application is fully compliant.

**Nonprofit Organisations Act:** Yes, two months, but this is not happening in practices as CSOs may wait six months and longer to get registered.

- May registration be denied and for what reasons?

**Voluntary Association:** Not applicable.

**Non-profit Trust:** Only if the application does not comply with the requirements of the legislation or the practice requirements of the Master's office.

**Non-profit Company:** Only if the application does not comply with the requirements of the legislation or the prescribed requirements of CIPRO.

**Nonprofit Organisations Act:** The Director for Nonprofit Organisations may refuse to register a nonprofit organisation that does not comply with the requirements listed in the Nonprofit Organisations Act. For example, if the required clauses listed in the Act are not contained in the founding document of the organisation, the director may refuse to register the organisation. The Director cannot refuse to register a nonprofit organisation based upon arbitrary grounds.

- In case of denial of registration, must the responsible registration authority provide reasons for the denial in writing to the applicant?

**Voluntary Association:** Not applicable.

**Non-profit Trust:** This is not a requirement in terms of the Trust Property Control Act, but the exercise of this function can be regarded an “administrative function” which would require the Master’s office to provide reasons in terms of the Promotion of Administrative Justice Act of 2000.

**Non-profit Company:** This is not a requirement in terms of the Companies Act of 2003, but the exercise of this function can be regarded an “administrative function” which would require the Master’s office to provide reasons in terms of the Promotion of Administrative Justice Act of 2000.

**Nonprofit Organisations Act:** The NPO Act makes provision for the appointment of an Arbitration Panel to consider appeals received from CSOs that were either denied registration or that were de-registered.

- May an applicant organization appeal from such a denial to an administrative body or independent court?

**Voluntary Association:** Not applicable.

The organisation would be able to approach an independent court in terms of the provisions of the Promotion of Administrative Justice Act to have an administrative decision reviewed if it disagrees with the decision of the Master of the High Court, the Registrar of Companies or the Director or Nonprofit Organisations.

- Are there other significant constraints on the registration/incorporation process that need to be considered?

No.

#### **D. CSO Registry**

Is there a registry of CSOs? Yes. This is maintained by the Directorate for Nonprofit Organisations which is based within the Department of Social Development. The registry containing the name of the organisation, its office-bearers, its contact details and registration status are available on the internet. The website portal does not contain other information like the founding documents or financial and narrative reports of organisations. These can be requested from the Directorate of Nonprofit Organisations.

#### **E. Foreign Organizations**

Foreign CSOs may incorporate as external companies in terms of section 21A of the Companies Act. In essence this means that the foreign CSO will be incorporated as a nonprofit company although it would be making use of its own founding document from its country of origin. The foreign CSO will have to comply with the requirements listed in section 21 of the Act. The new Companies Act will require foreign companies carrying certain activities in South Africa to be registered as an external company and to maintain an office in South Africa.

### **III. SUPERVISION AND ENFORCEMENT**

#### **A. Regulatory Authorities**

Which agency or agencies have regulatory authority over CSOs?

**Voluntary Association:** Not applicable.

**Non-profit Trust:** The Master of the High Court may, in terms of section 16 of the Trust Property Control Act request the trustees to account to the Master's office for the administration and disposal of trust property. The Master may also appoint a fit and proper person to do an investigation into the administration and disposal of trust property.

**Non-profit Company:** The Registrar of Companies has some regulatory powers to ensure that companies comply with the provisions of the Companies Act. These regulatory powers relate to all companies and not only non-profit companies.

**Nonprofit Organisations Act:** The Directorate for Nonprofit Organisations has been established in terms of the Nonprofit Organisations Act. The functions of the Directorate include: facilitating the process for developing and implementing policy; determining and implementing programs, including programs to ensure that the standard of governance within nonprofit organisations is maintained and improved; and liaising with other organs of state and interested parties.

#### **B. Internal Governance**

What do the laws provide regarding the internal governance and structure of the CSO? What governing bodies and officers are required? Does the law impose constraints relating to the self-governance of a CSO (e.g., the right of the government to attend meetings of the CSO, the right of government to appoint or approve board members, or requiring the CSO to notify the government in advance of internal meetings, etc.)?

The Trust Property Control Act is not intrusive of the internal governance affairs of non-profit trusts. The Master authorizes trustees to act in their capacity as trustees. Existing trustees ordinarily 'nominate' new trustees to serve in that capacity. The Master's office will then authorize such nominated trustees by issuing letters of authority. It is uncommon for the Master's office to refuse the authorization of trustees of non-profit trusts. Government is not given the right to attend meetings of CSOs or to require prior notification of internal meetings. No significant constraints are placed on the self-governance of non-profit companies. The Companies Act would regulate certain aspects of the internal governance of a company, but only if the company's own founding documents do not make provision for such aspects.

The NPO Act requires that certain information must be reflected in the founding document of a registered NPO, but it does not prescribe the governance structures of CSOs.

#### **C. Reporting**

The Trust Property Control Act does not require the submission of annual reports to the Master's office. The Master of the High Court may call upon the trustees to account for their administration and disposal of the trust property and to deliver any book, record, account or document relating to the trust to the Master. This power is only exercised in exceptional circumstances. The Companies Act of 1973 places more emphasis on nonprofit companies

having to report to their members and updating prescribed information with the Registrar of Companies.

Registered nonprofit organisations must in terms of the Nonprofit Organisations Act annually submit narrative and financial reports to the Director of Nonprofit Organisations. The narrative reports must contain the prescribed information which include the activities carried on by the organisation during the reporting period, the number and kind of meetings held, any changes to its governance structure and information on the number and composition of board and staff members. These reporting requirements are universal to all registered nonprofit organisations.

All nonprofit organisations that are approved as public benefit organisations must annually submit tax returns to the Tax Exemption Unit of the South African Revenue Service (SARS). These returns can be submitted electronically. Organisations are not required to submit supporting documents with the tax returns, but are required to keep records of relevant supporting documents should it be required. The tax return forms are the same for all organisations that are approved as public benefit organisations.

Nonprofit organisations that are not approved public benefit organisations are taxed at the same rate as commercial taxable entities. An organisation may be a registered nonprofit organisation in terms of the NPO Act, but that does not grant beneficial tax status to such an organisation. The process of applying for public benefit organisation status under the Income Tax Act is separate from the registration process under the NPO Act.

#### **D. State Enforcement and Sanctions**

The biggest challenge with reporting is faced by the Directorate for Nonprofit organisations. The majority of organisations that are registered in terms of Nonprofit Organisation's Act are community-based organisations. Some of these organisations have not complied with the reporting requirements. The Directorate is required in terms of the Act to notify organisations that are non-compliant and to give one month's notice to comply. If the organisation fails to adhere to the notice, the Directorate may deregister the organisation. An organisation that has been deregistered may follow the appeal procedure laid down in terms of the Nonprofit Organisation's Act. Once that process has been exhausted can an organisation approach an independent court. The Directorate has already deregistered a number of organisations that have not complied with their reporting requirements. De-registration does not result in an organisation losing its legal status. It remains in existence as a nonprofit legal entity and it can still carry on activities, but it is no longer regarded as a registered nonprofit organisation. It would, however, lose any benefits linked to that status – for example, funding from government.

Sanctions are also available in terms of the Income Tax Act for those public benefit organisations that do not comply with the provisions of that Act. The Commissioner of SARS must issue a compliance notice in the event of an organisation not complying with the conditions laid down in the Act. Failure to adhere thereto can result in a loss of tax benefits. The Income Tax Act allows for a process to object and appeal against a decision of the Commissioner to withdraw approval status as a public benefit organisation. SARS has not experienced significant problems in relation to non-compliance and has not withdrawn the tax benefits of public benefit organisations.

### **E. Dissolution, Winding Up, and Liquidation of Assets**

The voluntary dissolution process can ordinarily be initiated by the CSO itself. Involuntary dissolution can ordinarily take place in terms of the procedure laid down in the Insolvency Act. In such cases the creditors of CSO may apply to court for an involuntary liquidation of a CSO that is presumed to be insolvent.

### **F. Other Constraints**

Are CSOs subject to government harassment (e.g., frequent inspections, requests for documentation, etc.)? Does the government provide adequate protection to CSO representatives in the face of threats and violence? Has government established GONGOS that threaten the independent space for CSOs?

In my view that this has not happened in South Africa.

## **IV. CSO ACTIVITIES**

### **A. General Powers**

CSOs are not forbidden from carrying on any activities or exercising the general rights and powers of juridical entities.

### **B. Expressive / Advocacy / Public Policy Activities**

CSOs in South Africa not prohibited from criticizing the government or advocating for politically unpopular causes. There are no legal restrictions or governmental harassment for such activities. CSOs that are involved with causes that are unpopular from a government's perspective may ordinarily not attract significant funding support from government. CSOs have been involved with the processes of drafting of laws and lobbying for legislation and government policies. CSOs that have tax exemption cannot use their resources to support, oppose or advance the activities of any political party.

### **C. Communication and Cooperation**

Are CSOs permitted to contact and cooperate with colleagues in civil society, business and government sectors, both within and outside the country? Or are there any restrictions on this kind of activity (e.g., requiring advance notice of international cooperation, restricting travel, prohibiting conferences, etc.)? Does the law or government impose restrictions on participating in networks or on accessing the Internet or world wide web? If so, what are they?

None.

### **D. Seeking / Securing Funding**

1) Foreign Funds: There are no special rules for domestic CSOs to receive foreign funding.

2) Economic Activities: South African CSOs are permitted to carry on commercial activities. This can be done by the CSO itself or through a for-profit subsidiary.

3) Government Funding: South African CSOs can compete for government funds in the context where objective criteria for funding are laid down.

4) Other Constraints: In my view does not impose any other constraints on the ability of CSOs to seek and secure funding. The practices on the part of government departments and development funding agencies have however impacted on the ability of CSOs to secure funding.

## **V. TAX LAWS**

### **A. Tax Treatment of CSO Income**

Tax exemption is granted according to the category of CSO. The two main requirements are, firstly, that CSOs must be public benefit organisations (PBOs), and secondly, CSOs must carry on public benefit activities. As mentioned above, the process of applying for public benefit organisation status under the Income Tax Act is separate from the registration process under the NPO Act. To be recognized as a public benefit organization, an organization must, amongst other, meet the following criteria:

- Complete the prescribed application and submit it to the Tax Exemption Unit,
- Carry on one or more public benefit activities as listed in the Ninth Schedule to the Income Tax Act - which contains over 60 activities. Very few non-profit organisations are not covered under this list.
- Have at least three fiduciaries who are not related to each other.
- Transfer its assets upon dissolution to any similar approved PBO, a prescribed body established by law or a government department.
- Submit any amendments to its founding document to the Commissioner of the South African Revenue Services.
- Not take part in any tax avoidance or reduction scheme.
- Not pay employees or office-bearers excessive remuneration.
- Not use its resources to directly or indirectly support or advance or oppose any political party.

In addition, income generated through business activities (in excess of certain limitations) is taxable.

### **B. Customs Duties**

Certain products may receive a partial or full rebate of custom duties even though CSOs in general may not import products free of custom duties. Examples of qualifying products are those designated for educational, charitable, cultural and welfare organisations or purposes. The availability of a partial or full rebate for customs duties depends, in most cases, on both the nature of the import products and on the legal form or status of the importing organisation. Certain goods for persons with disabilities and indigent persons may also receive rebates.

### **C. Donor Incentives**

Donors are entitled to deductions – a maximum of ten percent of their taxable income. The same percentage and requirements apply to both individuals and corporate donors. The main requirements that must be complied with in order to make deductible contributions include:

- The CSO must be an approved PBO in terms of section 18A of the Income Tax Act and use the donation for a public benefit purpose stipulated under that section,

- The donation can either be in cash or kind, but not in the form of a service.

#### **D. Administrative Spending**

There are no limits on administrative expenses. However, CSOs that are approved PBOs are not allowed to pay employees or office-bearers excessive remuneration, having regard to what is generally considered reasonable in the sector and in relation to the service rendered.

### **VI. CONCLUSIONS**

#### **A. Priority Issues**

The Financial Action Task Force and the Eastern Southern Africa Anti-Money Laundering Group recently published a report entitled: Mutual Evaluation Report - Anti-Money Laundering and Combating the Financing of Terrorism (the report). The report concludes that South Africa has not assessed potential risks of terrorist financing posed within the non-profit sector and recommended that NPOs should be compelled to register in terms of the Nonprofit Organisations Act and the Directorate for Nonprofit Organisations should be given the power to sanction office-bearers, impose fines and freeze accounts of NPOs that are in violation of oversight measures.

It is not clear whether the South African government will support this initiative.

#### **B. Government Rationale**

If civil society is confronted with legal barriers of the kind described in the Defending Civil Society report, how have the legal impediments been justified by the Government (e.g., as related to national security, counter-terrorism, harmonization and coordination of NGO activities, etc.)?

Civil society in South Africa is by and large not confronted with legal barriers described in the Defending Civil Society Report. The main barrier to entry pertains to the delay the registration process provided for in the Nonprofit Organisations Act. Organisations can wait to up to six months and longer before getting registered in terms of the NPO Act. The implication for community-based organisations that are established as voluntary associations is the inability to open a bank account – and consequently receiving funding. This is largely due to a lack of resources allocated to the Directorate to implement its legislative mandate.

#### **C. Financial Crisis**

How has the global economic crisis affected civil society in your country, if at all?

No research study has been done on the effect of the global economic crisis on CSOs in South Africa, but newspaper reports have already pointed towards increased strain on CSOs. A number of CSOs have reported a reduction of financial support and the inevitable cutting of expenditures. Some CSOs are also facing possible closure due to the global economic crisis.

#### **D. Strategic Responses**

What concrete steps can be taken to improve the laws, or their administration and enforcement, in order to strengthen / defend civil society?

The laws are generally not big obstacles for CSOs in South Africa. In comparison to other countries, South Africa's legislation in relation to CSOs are generally well drafted. The challenge comes with the effective implementation thereof. The agencies responsible for the

implementation of the respective legislation are generally under-resourced. For some institutions it would be beneficial to review their effectiveness since coming in to operation – or since South Africa became a democratic country.

***Sub-Saharan Africa Country Reports***

# Uganda

Livingstone Sewanyana<sup>1</sup>

## I. PROVISION OF THE GENERAL LAWS

### A. General Framework:

Uganda's legal system is based on English Common Law and African Customary Law. Customary law governs to the extent it does not contradict with the statutory laws, although the 1995 Constitution is the supreme law of the land. **The laws applicable in Uganda include common law, statutory law, doctrines of equity and customary law.**

Uganda does not have a federal system, but instead is a unitary state.

The laws of Uganda are generally accessible via government printers, government agencies (Uganda Law Reform commission) and internet.

Relevant laws include the following:

1. Constitution of the Republic of Uganda, 1995
2. Constitutional Amendment Act, 2006
3. Nongovernmental Organizations Registration Act, Chapter 113 (1989)
4. NGO Registration Amendment Act 2006
5. The Non Governmental Organisations Registration Regulations, 2009.
6. The Companies Act, Chapter 110 (1961)
7. The Trustees Incorporation Act, Chapter 165 (1939)
8. Income Tax Act, Chapter 340 (1997)
9. The Value Added Tax (Amendment) Act (2005)
10. East African Community Customs Management (EACC) Act (2004)

### B. General Constitutional Framework:

The Constitution of the Republic of Uganda, 1995, provides under **Article 29 (e), the right to 'freedom of association which shall include the freedom to form and join**

---

<sup>1</sup> Human Rights Lawyer and Executive Director of the Foundation for Human Rights Initiative, [www.fhri.or.ug](http://www.fhri.or.ug).

This paper is made possible with the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID or the United States Government.



**associations or unions, including trade unions and political and other civic organizations’.** Under Principle<sup>2</sup> II (vi) (democratic principles of state policy) it is provided that Civic Organizations shall retain their autonomy in pursuit of their declared objectives.

**Article 29 (a)** of the Constitution provides for **freedom of speech and expression** where it stipulates that **‘every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.**

**Article 29 (d)** of the Constitution also provides for **freedom of assembly** stating that, **‘every person shall have the right to freedom to assemble and demonstrate together with others peacefully and unarmed and to petition.**

In **Article 29 (e)**, the Constitution states that **every person shall have the right to freedom of association and that this right shall include ‘the freedom to form and join associations or unions, including trade unions and political and other civic organizations’.**

**Directive principle V (ii)** states that **“The state shall guarantee and respect the independence of nongovernmental organizations which protect and promote human rights.”**

Although the directive principle is limited to human rights organizations, when read together with Article 29 (e) and objective V (i) which provides that **‘the state shall guarantee and respect institutions which are charged by the state with responsibility for protecting and promoting human rights by providing them with adequate resources to function effectively’**, it can be argued that it encompasses all nongovernmental organisations *ejus dem generis*. This is indeed a major positive step towards promotion and independence of NGOs.

More generally, the Constitution provides for both the people and civic associations to be involved not merely in executing development plans and policies but also in helping to formulate policy, suggesting that the role of NGOs needs explicitly to embrace and acknowledge involvement in policy debate. This is stipulated in **Article 38 (2): ‘every Ugandan has a right to participate in peaceful activities to influence policies of government through civic organizations’**. And in **Article 50 (2), it is provided that any person can bring an action against the violation of another person’s or groups human rights.**

The Constitution provides for the **general limitations** on the fundamental and other human rights and freedoms.

**Article 43 (1)** states that **‘in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest’.**

**Article 43 (2)** defines **‘public interest not to permit: political persecution, detention without trial and any limitation of the enjoyment of the rights and freedoms beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in the Constitution’.**

Nonetheless, the Constitution provides for equity and freedom from discrimination; Article 21 (1) states that, **‘all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal**

---

<sup>2</sup> A directive principle is non-binding provision whereas an article is constitutionally enforceable.

protection of the law'. In addition, Article 21 (2) defines grounds for non-discrimination to include; sex, race, color, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

### **C. Types of Organizations:**

Ugandan law makes provision for the establishment of a variety of civil society organizations. The CSOs that can be formed include:

#### **1. Nongovernmental Organisations (NGOs)**

NGOs are governed by the NGO Registration Act of 1989 which was amended by the NGO Registration Amendment Act 2006<sup>3</sup>. The NGO Registration Act 1989 defines an "organization" as "a nongovernmental organization established to provide voluntary services, including religious, education, literary, scientific, social or charitable services, to the community or any part of it." (NGO Registration Act, section 1(d)). Examples of NGOs include umbrella NGOs, Intermediary organizations, Specialist organizations, and local, national and international NGOs.

#### **2. Trusts and Foundations**

Trusts are covered by the Trustees Act, Cap. 164, 1954 and the Trustees Incorporation Act. Cap. 165, 1939. Foundations can be registered either under the Trustee's Incorporation Act or as companies limited by guarantee under the Companies Act, Cap. 110, 1961. Trusts and Foundations are established to provide grants and in some cases loan financing at a more affordable rate to NGOs, CBOs and private organizations in support of their goals and objectives.

#### **3. Community Based Organizations (CBOs)**

CBOs are predominantly self-help oriented, with the principle aim of improving individual or household welfare, although a few groups take a wider, community development role. They are defined by their relatively small size (usually involving 10-20 households) and limited geographic area, and are generally formed along communal work lines, e.g. forming groups to work collectively on members' farms or to support funeral ceremony preparations. CBOs with larger, community development roles are supported and sometimes initiated by organizations outside the community. CBOs are registered through notification of area Local Councils (LC 1 and LC 3) for official recognition or with the District administration (section 7 (e) (2) of the NGO Registration Amendment Act.

#### **4. Companies <sup>4</sup>**

Companies are regulated and registered under the Companies Act, Cap. 110, 1961. Although many companies are considered part of the private sector/market sector, some have been established with both a humanitarian support motive mainly company limited by guarantee

---

<sup>3</sup> The new NGO Regulations cited as Non-Governmental Organizations Registration Regulations, 2009 were gazetted on 29 March 2009 and are in force. Thus the NGO Registration Regulations SI 113-1, 1990 are null and void (Regulation 20 of the NGO Registration Regulations 2009).

<sup>4</sup> This section largely describes for-profit companies that may have social programs. The Companies Act basically regulates for-profit companies, though some of these may have a social program as part of their social corporate responsibility. The majority of CSOs, however, do not fall under this category.

(providing access to more affordable credit for those normally excluded from the formal banking system) and a profit motive (ensuring sustainability of the bank without external funding support).

## **II. ESTABLISHMENT, REGISTRATION**

### **A. Purposes:**

Generally **CSOs can be established for both public benefit and the benefit of the organization's members**. The NGO Registration Act of 1989 defines an "organization" as "a nongovernmental organization established to provide voluntary services, including religious, education, literary, scientific, social or charitable services, to the community or any part of it." The NGO Registration Amendment Act 2006 (section 7) defines a community based organization as a nongovernmental organization operating at a sub-county level and below, whose objective is to promote and advance the well-being of its members.

The law has **restrictions on purposes or activities of CSOs**. Regulation 13 of NGO Registration Regulation, 2009 provides that an organization must in carrying out its operations comply with the following:

- a) Shall not make any direct contact with the people in its area of operation in Uganda unless it has given seven days' notice in writing of its intention to the local councils and Resident District Commissioners of the area<sup>5</sup>;
- b) Cooperate with the local councils and the relevant district committees in the area; [article 26 (j) of the Local Government Act, Cap. 243, 1997];
- c) Should not 'engage in any act which is prejudicial to the national interest of Uganda'. The law further prohibits the registration of the organization whose objectives are in contravention of the law;
- d) An organization must also restrict its operations to the area of Uganda in respect of which it is registered to carry out its operations;
- e) Hold itself responsible for all acts of its members and employees and;
- f) Obtain the approval of the Board for any goods for which it seeks exemptions.

Regulation 15 of the NGO Registration Regulations, 2009 prohibits an organization or member or employee from using the name of the organization directly or indirectly to engage in any gainful activities for the economic interest of the organization or of its members or employees.

### **B. Registration as Voluntary vs. Mandatory Requirement:**

The law does not permit individuals to act collectively through unregistered groups or organizations (Section 2 (1) of the NGO Registration Act 1989, Section 4 of the NGO Registration Amendment Act 2006, Regulation 3 of the NGO Registration Regulations 2009).

Regulation 18 of NGO Registration Regulations, 2009 specifies that CBOs are not mandatorily required to be incorporated under the Act but are required to register with the

---

<sup>5</sup> The restriction is currently in force and has also been proposed as part of the NGO Registration Regulations 2009 [Regulation 13 (a)].

district local government of the area where they operate. This requirement is mandatory and upon registration of a CBO, the district local government is supposed to issue a certificate of registration authorizing the CBO to operate.

There are penalties for carrying out activities through unregistered organizations (section 4 of the NGO Registration Act 1989, Section 4 (b) of the NGO Registration Amendment Act 2006, Regulation 8 (3) of the NGO Registration Regulations 2009).

### **C. Registration or Incorporation Requirements:**

**NGOs:** Every citizen of Uganda has a right to form an NGO (Article 29 (e) of the 1995 Constitution of Uganda). At the time of registration, no minimum number of founders, or minimum capital or assets is required. Regulation 4 of the NGO Registration Regulations 2009 requires NGOs to register with the NGO Board with an application in Form A as specified in the Schedule of the Regulations. Applications must be accompanied by specification of the area of intended operation, organizational chart, two copies of the organization's constitution, valid reservation of its name by the Registrar of Companies, a work plan and budget for one year, recommendations by two sureties and the Chairperson of the Local Government Executive committee of the sub-county council and the Resident District Commissioner (Regulation 5 of the NGO Registration Regulations 2009). And in case of a foreign organization, a recommendation is required from the diplomatic mission in Uganda of the country from which the organization originates.

NGOs are required to pay registration fees; UShs.20, 000 for Ugandan organization, USD 100 for a foreign organization (Regulation 10 (1) of the NGO Registration Regulations 2009). NGOs are also required to pay the same fee upon application for a permit or for renewal of a permit (Regulation 10 (2) of the NGO Registration Regulations 2009). There is no fixed time period within which the NGO Board must review and decide upon registration.

A certificate of registration and incorporation shall be issued by the Board in Form B in the Schedule of the NGO Registration Regulations 2009 (Regulation 6 of 2009 Regulations). In addition to the issuing a certificate of registration and incorporation, the Board shall issue a permit to the organization in Form C in the Schedule of NGO Registration Regulation 2009. The permit shall be issued in the 1<sup>st</sup> instance for a period of 12 months from the date of issue of the permit (Regulation 7 of the NGO Registration Regulations 2009).

The NGO Board can deny registration of an organization by notifying its decision to the organization in Form F as specified in the Schedule to the NGO Regulations 2009, within 21 days (Regulation 9 (1) of the NGO Regulations 2009). However, the law does not provide for categorical reasons on which an application can be denied, thus it is upon the discretion of the Board to accept or reject an application made by an organization. NGOs may appeal within one month of date of notification to the Minister. Also under article 42 of the 1995 Constitution, an aggrieved organization may appeal to High Court if not satisfied with the decision of the Minister.

The NGO Board has a registry for all CSOs and it is generally considered up to date since they are supposed to append any CSO which has fulfilled the requirements of registration. Currently the NGO Board's website is not functional, thus the registry is not accessible on the Internet by the public. However, the public can access the registry from the offices of the NGO Board located within the Ministry of Internal Affairs.

**CBOs:** In practice, CBOs are formed by community members or organizations outside the community with a minimum number of 10 initial members. Regulation 18 of the NGO Registration Regulations 2009 requires CBOs to register with the district local government with an application Form A as specified in the Schedule of the Regulations. At the time of registration, CBOs are required to pay registration fees of UShs. 20,000 (Regulation 18 (4) of the NGO Registration Regulations 2009). Upon registration, the district local government shall issue a certificate of registration specifying the area of operation of the organization and the activities the organization is authorized to operate (Regulation 18 (3) of the NGO Registration Regulations 2009).

There is no fixed time period within which the district local government must review the application made by the CBO and decide upon registration. The district local government may deny registration of a CBO if it does not satisfy the requirements for registration. However, the law does not provide reasons for the denial of registration for CBOs.

#### **E. Foreign Organizations:**

The NGO Registration Regulations, 2009, Regulation 2 states that a foreign NGO is one which is not a local organization. This includes an affiliate of a foreign or International Organization with offices in Uganda. Regulation 10 of the NGO Registration Regulations 2009 set out prescribed registration fees for a foreign organization of **100\$ (one hundred United States dollars)** or its equivalent is payable. The same fee is payable upon application for a permit or for renewal of a permit.

Generally all legislation, including the NGO Registration Act 1989, the NGO Registration Amendment Act 2006 and the NGO Registration Regulations 2009, are silent on procedures and requirements for registration or incorporation of foreign CSOs in Uganda.

### **III. SUPERVISION AND ENFORCEMENT**

#### **A. Regulatory Authorities:**

- **National Board of NGOs** - key agency which has regulatory authority over NGOs in Uganda (Section 2 and 2 (3) of the NGO Registration Act, Cap. 113, 1989).
- **District local governments** - regulate and register the Community Based Organizations (CBOs).
- **Ministry of Internal Affairs** - has regulatory authority over Trusts under Trustees Incorporation Act, Cap 165, 1939.
- **Companies Registry** - regulates and registers Companies under the Companies Act, Cap. 110, 1961.

#### **B. Internal Governance:**

Regulation 14 of the NGO Registration Regulations 2009 provides that an organization shall comply with certain staffing regulations. Thus it is a requirement for every organization to submit to the NGO Board a chart showing its structure and staffing, particularly specifying: foreign workforce requirements; requirements of the Ugandan counterparts of foreign employees; planned period to replace foreign employees with qualified Ugandans and must comply with the labor laws of Uganda.

There are no express legal requirements for governing bodies and officers. The law also does not impose constraints relating to self-governance of CSOs.

### **C. Reporting:**

Regulation 16 of the NGO Registration Regulations 2009 requires **NGOs to submit to the NGO Board each year returns in Form C as specified in the Schedule to the NGO Regulation, furnish to the district development committee of each area and submit to the Board or any other authority information the Board may from time to time consider to be in public interest.** However in practice most organizations rarely comply with this regulation and the Board currently has few staff to follow up on this requirement<sup>6</sup>. As a practice most CSOs produce annual reports which they disseminate to partners, members and the general public.

Section 390 of the Companies Act Cap 110 also require **companies every year to make and file with the registrar of companies a statement in the form set out in the 9<sup>th</sup> Schedule of the said Act.**

### **D. State Enforcement and Sanctions:**

There are sanctions available for violations particular to CSOs. **Where an organization contravenes any provision of the NGO Registration Amendment Act 2006, operates contrary to the conditions or directions specified in its permit, or carries out any activity without a valid permit or certificate of incorporation, the organization commits an offence and is liable on conviction to a fine not exceeding twenty five currency points (Section 4 (e) of the said Act).**

Regulation 8 (3) of the NGO Registration Regulations 2009 states that, **an organization which fails to submit its application within the period specified in sub regulation (1) shall be required to pay a fine of one currency point for every month of default.**

Section 390 (4) of the Companies Act Cap.110 provides that **if default is made in complying with section 390 of the said Act, the company and every officer of the company who is in default are liable to a default fine.**

### **E. Dissolution, Winding Up and Liquidation of Assets:**

Voluntary dissolution process can ordinarily be initiated by the CSO itself. Upon application for registration, NGOs are required under the law to submit a prescribed form accompanied by an authenticated constitution by the subscribers of the organization. Every constitution must have a dissolution clause. Thus **the manner in which an organization is voluntarily dissolved is laid out in its constitution.** It is general practice however, for voluntary dissolution to be carried out by a resolution at the annual general meeting through a  $\frac{3}{4}$  majority vote by the members of the organization. The members must be given written notice 30 days in advance specifying the proposal to dissolve.

Involuntary dissolution may occur where an organization's certificate is revoked by the NGO Board due to any of the following:

- a) The organization fails to operate in accordance with its constitution;

---

<sup>6</sup> Interview with the NGO Board Secretary, Rosemary Nabifo Wamimbi on 17 June 2009.

- b) The organization contravenes any of the conditions or directions inserted in its certificate or;
- c) If in the opinion of the board it is in public interest to do so (Section 10 of the NGO Registration Act 1989).

In addition, Regulation 17 (3) of the NGO Registration Regulations 2009 provides that, an organization may also be dissolved by order of the Board if:

- a) the Board has reason to believe that a registered organization has not commenced its activities within twelve months from the time of its registration;
- b) it is proved to be defrauding the public or its members or both;
- c) it has violated the terms and conditions attached to its permit;
- d) it has operated in contravention of the provisions of the Act;
- e) for any other reason the Board considers necessary in the public interest.

Once the certificate of incorporation is revoked, the Board issues a notice of revocation in Form G as specified in the Schedule of the NGO Registration Regulations 2009 to the organization concerned (Regulations 11 and 17 (7) of the said Regulations). And before a decision is made by the Board to dissolve an organization, Regulation 17 (4) of the NGO Registration Regulations 2009 requires the Board to give a thirty days notice to the organization to appear before it and show cause why it should not be dissolved. Where an organization fails to satisfy the Board in its defence as to the need for its continued existence or fails to appear, the Board shall proceed to dissolve it.

Regulation 17 (7) (b) of the NGO Registration Regulations 2009 provides that; upon dissolution of an organization by the Board, the Board shall cause the assets and liabilities of the organization to be dealt with in accordance with the relevant provisions of its constitution.

There is no administrative provision for appeal in the general law regulating NGOs however; an aggrieved person may invoke through the provision of article 42 of the 1995 Constitution which guarantees the right to be treated fairly and justly and the right to apply to a court of law in respect of any administrative decision taken against a person. Also Article 28 provides for the right to fair and speedy hearing before an impartial and independent court or tribunal. Thus one can apply to court to appeal the decision of the Board.

#### **IV. CSO ACTIVITIES**

##### **A. General Powers:**

Generally CSOs are not forbidden from exercising general rights and powers of juridical entities. However, regulation 13 of NGO Registration Regulations limits the nature of activities an NGO can engage in, as stated earlier.

##### **B. Expressive / Advocacy / Public Policy Activities:**

CSOs in Uganda are not prohibited to criticize the government and advocate for human rights and democracy. Article 29 of the 1995 Constitution of Uganda guarantees every person the right to freedom of speech and expression which is relied on by CSOs that wish to involve themselves in the legislative process or government affairs. Even though there are no express

legal restrictions on CSOs' engagement in advocacy activities, the government usually intimidates CSOs that seek to promote human rights and democracy.

CSOs in Uganda are allowed to participate in peaceful activities to influence the policies of government (Article 38 (2) of the 1995 Constitution of Uganda). And although there are no set rules governing the engagement of CSOs in legislative making, CSOs as a practice do engage in legislative activities. For instance, once a bill is tabled in Parliament the views of various stakeholders are sought including CSOs through, consultative meetings, workshops and invitations of representatives of different factions of society likely to be affected by the legislation.

However CSOs under the law are not allowed to engage in political activities or belong to any political group because they are generally non partisan. As such they cannot directly or indirectly support a political candidate into office. But since they are regarded as partners with government in promoting good governance and democracy in the country, they can actively participate in the election process through; monitoring, observing and documenting flaws in elections, sensitizing masses on the qualities of would be leaders and urge them to vote wisely, and proposing ways of improving the electoral process.

### **C. Communication and Cooperation:**

Under the law CSOs are allowed to contact and cooperate with colleagues in civil society, business and government sectors, both within and outside the country (article 29 of the 1995 Constitution of Uganda). However Regulation 13 (a) of the NGO Registration Regulations 2009 provides that an organisation shall not make any direct contact with the people in any part of the rural area of Uganda unless it has given seven days' notice in writing of its intention to the local council committee and the Resident District Commissioner of the area.

The law or government does not impose restrictions on participating in networks or accessing the Internet or World Wide Web.

There are no legal provisions requiring advance notice of international cooperation, or prohibiting conferences or restricting travel. Article 29 (2) of the 1995 of Constitution of Uganda guarantees every person the right to free movement in and outside Uganda.

### **D. Seeking / Securing Funding:**

1) **Foreign Funds:** Generally there is a requirement for all organizations receiving monies in convertible currency to open and operate an external bank account with the Bank of Uganda (government-controlled bank) in which the currency is deposited and through which transactions are conducted (Regulation 15 (3) of the NGO Registration Regulation, 2009).<sup>7</sup> There are no legal provisions that require CSOs to seek permission of a ministry before receiving foreign funds.

2) **Economic Activities:** Regulation 15 (1) of the NGO Registration Regulation 2009 does not permit NGOs or members or employees to use the organization to engage directly or indirectly in any gainful activity for economic interest of the organization or of any of its members or employees.

---

<sup>7</sup> The requirement is not perceived as a problem per se since it is not strictly enforced. In fact the practice is that many NGOs do not even have the said account, and government has not come out to strictly enforce it. Thus it is not practically a barrier.

That said, Regulation 15 (4) of the NGO Registration Regulation 2009 permits NGOs to engage in economic activities for fundraising purposes by selling any goods or services to the public or to any other organization as long as the prices of the goods and services are in conformity with prices prescribed by the government or open market prices obtaining in Uganda. And any income received from the sale of any goods or services sold in excess of the administrative costs incurred in the sale shall be re-invested in the project or as directed by the organization (Regulation 15 (5) of the NGO Registration Regulation 2009). Therefore, with the application of the Regulations 15 (4) and (5) of the NGO Registration Regulations 2009, NGOs may directly conduct economic activities.

**3) Government Funding:** As an implementation practice, CSOs do not receive funds from government, and as such they do not compete for government funds.

**4) Other Constraints:** There are no other constraints imposed by law or implementation practice on the ability of CSOs to seek and secure funding.

## **V. TAX LAWS**

### **A. Tax Treatment of CSO Income:**

Section 2 (bb) of the Income Tax Act defines what amounts to an exempt organization and this could include CSOs. The organizations have to apply for a written exemption from the Commissioner of the Uganda Revenue Authority. As a general rule, a tax-exempt CSO does not pay tax on charitable donations. The VAT Act also exempts specific types of donations from paying VAT. These exempted donations are listed in the third Schedule of the VAT Act Cap. 349. The laws are silent on the taxation of membership fees and grants specifically. However, since all these are part of an organization's income, it is exempted from tax under Section 21 (1) (f) of the Income Tax Act.

Section 21(1) (f) (ii) of the Income Tax Act exempts business income of an organization (or income from economic activities) from taxation unless that income is derived from an economic activity that is not related to the functions constituting the organization's existence. The laws are silent on investment income. However the interpretation could be that unless that income falls within that not exempted from tax, it will not be chargeable since the general rule is that all income of an exempt organization is not chargeable to tax. The laws are also silent on foreign funding tax liability.

Although the law gives several exemptions to CSOs, in practice CSOs find themselves in many taxable transactions. This therefore leaves a very thin line between what amounts to taxable income of a CSO and what doesn't.

### **B. Customs Duties:**

The Customs and Exercise Act Cap. 335 is silent on specific exemptions for CSOs. However section 188 of the East African Community Customs Management Act exempts duties on goods and equipment used in aid funded projects.

### **C. Donor Incentives:**

Individuals and legal entities are eligible for tax deductions for charitable contributions to a tax exempt organization listed in Section 2 (bb) (a) and (b) of the Income Tax Act. An individual may claim as a deduction up to 5% of that individual's taxable income for the year in which the gift is made.

**D. Administrative Spending:**

The law does not provide limitations on administrative expenses or salaries.

**VI. CONCLUSIONS**

**A. Priority Issues**

The NGO Registration Act 1989 was amended by the NGO Registration Act 2006 which is currently in force. The entire NGO Act 2006 has the following legal issues affecting CSOs:

- The Act is premised on a very narrow definition and understanding of NGOs, and what they do and cannot do (article 1 (e)).
- It is also premised on an overbearing intent by the state to control the activities of NGOs and therefore provides for unfettered administrative discretion to the NGO Board and Minister of Internal Affairs to so (article 2).
- It unduly burdens NGO staff over and above what is acceptable in international law and even standard company law in Uganda. (Article 2 (6) and sub section (5)).
- It does not recognize the important role, knowledge and expertise NGOs can make to their governance and so does not provide for NGO representation on the NGO Board to defend their interests.<sup>8</sup>
- It does not make any provisions for remedy if an NGO feels aggrieved. Instead it vests arbitrary power in the office of the Minister of Internal Affairs.
- It does not provide adequate commitment by government to strengthen the capacity of the NGO Board to carry out its functions effectively and efficiently.

**D. Strategic Responses**

NGOs resolved to challenge the NGO Registration Amendment Act 2006 in the Courts of Law. The Human Rights Network-Uganda (HURINET), DENIVA and other organizations representing their affiliate NGOs, including FHRI, filed a petition in the Constitutional Court in May 2009, challenging the constitutionality of several provisions of the NGO Registration Amendment Act 2006 and the NGO Registration Regulations 2009. A scheduling conference between the petitioners and the Attorney General was held in July 2009 and the case has not been cause listed.

---

<sup>8</sup> Although NGOs may have problems like deciding which NGO representatives and conflict of interest, the rationale of having NGO representative on the NGO Board is to ensure that issues / policies that negatively affect operations of NGOs are effectively addressed by the Board.

***Sub-Saharan Africa Country Reports***

# **Zimbabwe**

**Otto Saki<sup>1</sup>**

## **I. PROVISIONS OF THE GENERAL LAWS**

### **A. General Framework**

Zimbabwe is a common law country with a strong influence of customary laws and traditions. The operation of non governmental organisations (NGOs) or civil society organisations (CSOs) in Zimbabwe has been addressed through legislation since the colonial era; after attainment of independence, this legislative tradition was developed. During the colonial era the Welfare Organisations Act (1967)<sup>2</sup> was aimed at controlling the operations of organisations believed to be linked to the liberation movement and spreading information around the human rights situation in what was then Rhodesia now present day Zimbabwe. With the increased demand for democratic space and reforms in Zimbabwe, NGOs and CSOs became targets of state harassment through increased legislative and administrative interference.

ZANU Pf has been in office with unfettered power since 1980. The signing of the Inter Party Agreement in September 2008 and the formation of the inclusive transitional government in February 2009 heralded a slightly new political system. The Constitution of Zimbabwe (1979) (commonly referred to as the Lancaster Constitution) has been amended 19 times, with severe implications in some instances for the Bill of Rights. Numerous laws and policies have been issued at different intervals, all aimed at curtailing the operating space for NGOs and CSOs. The main instrument which repealed the 1967 Welfare Organisations Act is the Private Voluntary Organisations Act (hereinafter PVO Act).

Zimbabwe is a unitary state and not a federal system. Laws passed by the legislature are applicable without regional exceptions.

All laws passed are in English and there have been limited efforts to translate such laws, mainly by law-based NGOs.

---

<sup>1</sup> Otto Saki is the programmes Coordinator of Zimbabwe Lawyers for Human Rights (ZLHR). He holds a law degree from the University of Zimbabwe and a masters in law from Columbia University with a major in human rights law. The views contained in this paper are personal and any improprieties are borne by the author.

This paper is made possible with the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID or the United States Government.



<sup>2</sup> Welfare organizations Act [93/67].

## **B. General Constitutional Framework**

The Constitution of Zimbabwe provides for a Bill of Rights, s11 to 23, including a specific section on the enforcement of one's rights in the event of such being breached by state or non-state actors. The forum for adjudication of such rights is the Supreme Court sitting as a constitutional court. The Bill of Rights includes **limitation clauses**, which have been given due interpretation by the courts. The Supreme Court has deduced a three-tier test on whether any restriction is reasonably justified in a democracy, in *Tawanda Nyambirai vs. National Social Security*<sup>3</sup>. The test used by the courts is: whether the legislative objective which the limitation is designed to promote is sufficiently important to warrant overriding a fundamental right; whether the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations; and whether the means used to impair the right or freedom is no more than is necessary to accomplish the objective.

Section 20 (1) of the Constitution provides that “except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his **freedom of expression**, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

The limitations provided by the Constitution of this right include (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; (b) for the purpose of (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings; (ii) preventing the disclosure of information received in confidence; (iii) maintaining the authority and independence of the courts or tribunals or the Senate or the House of Assembly.<sup>4</sup> The application of this limitation clause is subject to the Government demonstrating that it is reasonably justifiable in a democracy. The state has repeatedly claimed that most CSO activities, especially in the area of good governance and democracy, appear not to be in the economic interests of the state, public order and public safety. Laws which have been applied to deal with this have been security laws such as the Public Order and Security Act (POSA) and the Criminal Law Reform and Codification Act (the Code).<sup>5</sup>

**Freedom of association and assembly** are provided under s21 of the Constitution, which states that “except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests”. The provision makes it clear that anyone can join or form an association of his or her choice for the protection of his or her interests. This would entail anything which is lawful and does not contravene the security laws in place as mentioned above. Some of the limitations for the enjoyment of freedom of association and assembly include: in the interests of defence, public safety, public order, public morality or

---

<sup>3</sup> *Nyambirai versus NSSA* 1995 (2) ZLR 1 (S), *Retrofit (Pvt) Ltd versus PTC and another* 1995 (2) ZLR 199 (S)

<sup>4</sup> Sections 20 (2),

<sup>5</sup> Also the now repealed Unlawful Organisations Act repealed by Suppression of Foreign and International Terrorism Act, carried provisions that outlaw activities of organisations which “are likely to endanger, disturb or interfere with defence, public safety or public order in Zimbabwe.

public health;<sup>6</sup> for the purpose of protecting the rights or freedom of other persons;<sup>7</sup> for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations;<sup>8</sup> or that imposes restrictions upon public officers. Thus, s21(3)(b) lays the basis for the various laws which then provide for the registration of companies, of societies and other associations of persons, of trusts, etc. Acts including the Zimbabwe Red Cross Society Act, PVO Act, and Deeds Registries Act address how such entities are registered or regularised at law.

An interesting further restriction of freedom of assembly and association entails the blocking of pavements and other such thoroughfares. The Constitution provides under s21(4) that s21(1) shall not be held "to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles". This section has been applied to protests by various pro-democracy groups through application of the Public Order and Security Act and the Criminal Law Reform and Codification Act.

Finally, there has been a notable constitutional amendment, which introduces what are termed "political rights," under s23A, through the 19<sup>th</sup> Amendment of 2009.<sup>9</sup>

### **C. Types of Organizations**

#### **Private Voluntary Organisations**

The main law which governs CSOs in Zimbabwe is the PVO Act. Under the PVO Act, organisations that are registered will be deemed to be Private Voluntary Organisations. PVOs are defined as "any body or association of persons, corporate or unincorporate, or any institution, the objects of which include or are one or more of the following that provides for the provision of all or any of the material, mental, physical or social needs of persons or families; the rendering of charity to persons or families in distress; the prevention of social distress or destitution of persons or families; the provision of assistance in, or promotion of, activities aimed at uplifting the standard of living of persons or families; the provision of funds for legal aid; the prevention of cruelty to, or the promotion of the welfare of, animals."<sup>10</sup> It is possible, however, for a CSO or NGO which is not registered under the PVO Act to carry out activities that are defined above. The Government of Zimbabwe has been issuing policy directives since 2003 which the relevant

---

<sup>6</sup> Section 21(3)(a)

<sup>7</sup> Section 21 (3)(b)

<sup>8</sup> Section 21(3)(c)

<sup>9</sup> 23A Political rights (1) Subject to the provisions of this Constitution, every Zimbabwean citizen shall have the right to (a) free, fair and regular elections for any legislative body, including a local authority, established under this Constitution or any Act of Parliament; (b) free, fair and regular elections to the office of President and to any other elective office; (c) free and fair referendums whenever they are called in terms of this Constitution or an Act of Parliament. (2) Subject to this Constitution, every adult Zimbabwean citizen shall have the right (a) to vote in referendums and elections for any legislative body established under this Constitution, and (b) to do so in secret; and to stand for public office and, if elected, to hold office.

<sup>10</sup> Section 2 (1) PVO Act

ministry says are meant to clarify certain issues and to be read and interpreted in conjunction with the PVO Act.<sup>11</sup> These policies have instead only brought more confusion.

### **Trusts**

Trusts are regulated under S 5<sup>12</sup> of the Deeds Registries Act, which allows the Register of Deeds at the High Court to register notarial deeds in donation or in trust. Trusts usually have unlimited objectives which sometimes are meant for the benefit of the members or an identifiable constituency; the trust form, however, has also been used as a way of registering organisations that have faced difficulties in registering under the PVO Act. The PVO Act excludes Trusts in its definition of what constitutes a PVO.<sup>13</sup>

### **Universitas / Corporations**

The use of the membership form known as “universitas” springs from common law practice of recognising an entity which has members, a constitution and activities that are entirely for the benefit of its members. Such an entity is excluded from registering under the PVO Act<sup>14</sup> and is therefore not viewed as a PVO, but as the corporate form “universitas”. Despite the many exclusions from the definition of what constitutes a PVO, several organisations in Zimbabwe exist under many identities and carry out work which one might view as that of a PVO. Examples include organisations registered as institutions under the Health Professions Act or under the Psychological Practices Act, but rendering help to persons in distress in the form of medical counselling for victims of torture or organised political violence. Such institutions might be running on the basis on funds received from well wishers and external foundations, governments and/or developmental agencies.

## **II. ESTABLISHMENT, REGISTRATION**

### **A. Purposes**

CSOs can be established as PVOs for any of the activities that are provided in the PVO Act. These activities include humanitarian work, charity, human rights work, and legal aid. PVOs are meant for the benefit of the public, family, persons or for animals.

CSOs recognized as unincorporated or corporate associations can pursue membership focused activities.

Trusts can pursue unlimited objectives, the only limitation being the wishes of the trustees in the trust deed. Trusts have covered issues of human rights advocacy, media freedom, youth democracy organisations, humanitarian information and facilities, community development organisations among others.

---

<sup>11</sup> See Policy Operations for Non Governmental Organisations in Zimbabwe [www.nango.org.zw/resourcecentre/docs/Policy%20on%20NGOs.pdf](http://www.nango.org.zw/resourcecentre/docs/Policy%20on%20NGOs.pdf) (last accessed June 21, 2009)

<sup>12</sup> Section 5(m) the Register, shall register antenuptial contracts, such notarial deeds of donation, including a donation to be held in trust, and such other deeds having reference to persons and property within the area served by the deeds registry in question as are required or permitted by law to be registered;

<sup>13</sup> Section 2(1)(iii)

<sup>14</sup> Section 2(1)(v)

Restrictions applicable to CSO purposes are included in the provisions of the Constitution relating to freedom of expression, association and assembly. The formation of organisations that intend to carry out acts which undermine public order or public safety are proscribed.

### **B. Registration as Voluntary vs. Mandatory Requirement**

The law in Zimbabwe allows individuals or groups to operate as unincorporated entities, and this appears to be utilized mostly by organisations which have been unable to register under the PVO Act or by community based organisations. Organisations operate as *universitas* which are not registered under any statute but are deemed operational and lawful by virtue of having a constitution and members.

The PVO Act, however, makes registration mandatory, in that any organisation that seeks to carry out work as defined under s2 of the PVO Act has to be registered. Section 6 (1) (a) and (b) of the PVO Act states that “no private voluntary organisation shall commence or continue to carry on its activities or seek financial assistance from any source unless it has been registered in respect of a particular object or objects in furtherance of which it is being conducted.” By virtue of not being registered, an organisation cannot collect funds from the public nor shall any individual be part of management or control of such an organisation with the knowledge that such institution is not registered.<sup>15</sup> It would appear that operating as an unregistered entity is not an offence in itself, but being part of management or control of such an organisation or collecting funds from the public is an offence. For contravening s6(2) on collection of funds from the public, one shall be liable to 6 months imprisonment or a fine not exceeding level five<sup>16</sup> or both; for contravening s6(3) on managing or controlling an unregistered entity, one shall be liable for imprisonment not exceeding 3 months or a fine not exceeding level four<sup>17</sup> or both.

### **C. Registration or Incorporation Requirements**

For any organisation to be registered under the **PVO Act**, certain requirements have to be fulfilled. Section 9 of the PVO Act provides for the type of application forms to be used; the secretary of the organisation or such other person must lodge the application in the prescribed format with the Registrar of PVOs, along with a constitution of the PVO.<sup>18</sup> Once an application has been lodged, the PVO in question must publish in a local paper, at its expense, a notice as prescribed by the PVO Act calling for persons with objections to lodge them with the Registrar of PVOs within the prescribed time limit.<sup>19</sup> Once the registration papers are lodged with the Registrar of PVOs, who is ordinarily the Director of Social Welfare in the Ministry of Labour

---

<sup>15</sup> Section 6(2),(3), see also Section 23(1) and (2)

<sup>16</sup> Level Five, USD 200,

<sup>17</sup> Level Four USD 100,.

<sup>18</sup> General Notice 99 of 2007, provides for an organisation which intends to register to complete application forms PVO1, PVO2, proof of advertisement, copies of the organisation’s constitution, curriculum vitae of the members of the executive committee, proof of notification to local authorities of intent to register, police criminal clearance certificates,

<sup>19</sup> Statutory Instrument 111/97 provides Section 9 (4) that “Any objection in terms of subsection (3) of section 9 of the Act to the registration of a private voluntary organisation shall be lodged with the Registrar within twenty-one days of the date the notice is published in a newspaper in terms of subsection (2) of section 9 of the Act”.

and Social Welfare, the application forms are then submitted to the Private Voluntary Organisations Board (PVOB). The PVOB is constituted as provided under s3 (1).<sup>20</sup>

The PVO Act prohibits individuals who have been convicted of a criminal offence involving dishonesty under statutory or common law within the past five years from occupying the position of office bearer.<sup>21</sup> There is no limitation in terms of the number of the founders, nor is a minimum amount of capital required for the PVO. Operating an account or fundraising<sup>22</sup> before registration is an offence under the PVO Act. The PVOB makes a decision on the registration of an entity as a PVO, independently of the decision by the Registrar concerning compliance with s9 (1), (2), (3) and (4). The PVOB may grant the application, or reject the same if the organisation appears unable to abide by the objectives stated in its application or if the constitution and management of the organisation fail to comply with the PVO Act. The Act is silent regarding a time period for the review process. The organisation shall be informed in full of the reasons for rejection of the application, and appeal against the decision of the PVOB lies with the Minister. The Minister may direct the PVOB otherwise or give effect to its decision.<sup>23</sup>

An aggrieved person may appeal against the decision of both the PVOB and the Minister based on the Administrative Justice Act (AJA). In terms of s3 of AJA, any administrative authority responsible for or empowered to take any action affecting the rights, interests or legitimate expectations of any person must act lawfully, reasonably and fairly. An administrative authority includes an officer, employee, member, committee, council, or board of the State or a local authority or Parastatal, committee, or board appointed by or in terms of any law, a Minister or Deputy Minister of the State, any other person or body authorised by any law to exercise or perform any administrative power or duty. If the authority fails to act lawfully, the High Court may on being approached by any aggrieved party confirm or set aside the decision concerned, and refer the matter back to the administrative authority concerned for consideration or reconsideration.<sup>24</sup>

The registration of a PVO may be cancelled after giving time for the secretary of the PVO to respond; failure to respond within 90 days will constitute an offence punishable by imprisonment of one month or a fine or both. If the PVO fails to comply with provisions of its registration, ceases to function as such, fails to provide audited accounts or a report to the

---

<sup>20</sup> Five representatives from private voluntary organizations or organizations which the Minister considers are representative of private voluntary organizations; and one representative from such private voluntary organization, association, institution or other organization as the Minister may determine, from each of the provinces into which Zimbabwe is for the time being divided; and one representative from each of the following Ministries - the Ministry for which the Minister is responsible; the Ministry responsible for health and child welfare; the Ministry responsible for justice; the Ministry responsible for finance; the Ministry responsible for co-operatives; and the Ministry responsible for foreign affairs; the Registrar, *ex officio*.

<sup>21</sup> Section 24, Persons prohibited from being office-bearers or officers, officer bearer means a member of the governing body of that organisation, officer, means any person working for that organisation whether or not he receives remuneration or reward for such work.

<sup>22</sup> Section 26, contributions unlawfully collected

<sup>23</sup> Section 14 Appeals

<sup>24</sup> The assumption is that the courts of appeal will be independent enough and able to adjudicate on the matter without fear or favour or influence from the administrative body, which might not necessarily be the case. Or in the worst case scenario the findings of that court, be High or Constitutional Court are not enforced.

Registrar within 3 months of being requested, then the PVOB may cancel the PVO's registration.<sup>25</sup>

For a **universitas** all that is needed is a constitution and membership and by virtue of the application of common law in Zimbabwe<sup>26</sup>, such an entity will be deemed to be a legal entity. **Trusts** are registered with Registrar of Deeds in the High Court. There are no restrictions on founders, but for minors and those incapable of concluding contracts. The minimum number of trustees is usually 3 and the maximum 10, although additional trustees are appointed in some instances as per the constitution of the organisation. There is no minimum amount required to be deposited in trust; an amount sufficient to open a corporate bank account is required. Registration is completed upon submission of the deed of trust with the Registrar of Deeds, and upon payment of a processing fee for the application, which usually takes 14 working days to process. Registration is usually denied if the objectives of the deed of trust do not meet the formatting required by the courts, or no details of the trustees are provided such as date of birth, or a similarly named trust exists. If these problems are rectified, registration will normally be approved.

#### **D. CSO Registry**

In terms of s5 (1) and (2) of the PVO Act, the Registrar of PVOs shall maintain a registry of all organisations registered. The registry shall be available for inspection upon payment of a fee during normal office hours. In theory this registry is open to the public and should be up to date, but practice indicates otherwise. It is not available electronically.

The Registrar of Deeds keeps all deeds of trusts, which are open to public scrutiny upon payment of a fee. Since trusts have been used for family trusts and properties, the registry is well updated and has all trusts recorded.

#### **E. Foreign Organizations**

Foreign organisations that seek to carry out work in Zimbabwe, and in particular work of a humanitarian nature or whose objectives are covered under the PVO Act, are required to register as such. Most international organisations are operating as PVOs and are supposed to have a direct memorandum of understanding (MoU)<sup>27</sup> or cooperation with the Government

---

<sup>25</sup> Section 10

<sup>26</sup> Section 89 of the Constitution, provides that "subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law". Please note that the Criminal Law and Codification Reform Act provides under Section 3 (1) and (2) that "the non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law. (2) Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of— (a) the criminal law referred to in subsection (1); or (b) the criminal law that is or was in force in any country other than Zimbabwe.

<sup>27</sup> General Notice 99 of 2007, MoUs for International Organisations are and include (a) agreements entered into with international Non-Governmental Organisations define the operational parameters of the organisations' partnership with technical supervisory ministries; (b) the proposed geographic areas to be covered by the organisations should be clearly stated in the MOU. It constitutes part of what line ministries agree with the organisations. Where there is need for organisations to expand geographic coverage after an agreement has been

(usually at both national and local levels.) General Notice 99 of 2007 (GN 99/2007) provides that for international organisations to be registered, they should have an MoU with the Government. Section 3 of the GN 99/2007 requires an international organisation to file its application with the Registrar of PVOs.<sup>28</sup> None of the international organisations in Zimbabwe are operating as universitas or trusts. Unfortunately, some foreign organisations registered under the local laws have had their operations suspended by the Government of Zimbabwe under the guise of rooting out organisations involved in political activity through partisan distribution of relief.<sup>29</sup>

### **III. SUPERVISION and ENFORCEMENT**

#### **A. Regulatory Authorities**

Under the PVO Act the regulating agency over PVOs is the PVOB as constituted under the PVO Act, with the Registrar of Deeds acting or providing secretarial support to the Board. This Minister and Permanent Secretary for Labour and Social Welfare, and the Registrar of PVOs also play a regulatory role of PVOs. Organisations registered as trusts have autonomy in terms of control and the dissolution of a trust is usually accomplished by way of majority vote of the trustees and a court order legalizing the dissolution of the same.

#### **B. Internal Governance**

In respect of management of the organisation, the PVO Act requires the secretary of any PVO to ensure that books of accounts are kept in order and to the satisfaction of the Registrar of PVOs. If it comes to the attention of the Minister that a PVO has not abided by its objectives or constitution, or that there has been maladministration or the PVO has engaged in illegal activities or more vaguely "it is necessary or desirable to do so in the public interest," the Minister through notice in a government gazette may suspend all or any of the members of the Executive Committee of the PVO. The Minister may also amend or revoke any suspension.<sup>30</sup> The suspension shall of course result in a vacancy on the Executive committee of that PVO; if thirty days expire and the suspension is not lifted, an election will be called based on the constitution of

---

entered into, operational arrangements shall be made with the concerned local authorities with the consent and facilitation of the ministries; (c) organisations are required to notify host local authorities in the area of operations prior to commencing operations; (d) organisations, however, shall not digress into programmes that are not specified in the MOU as agreed upon by line ministries and registered by the Registrar.

<sup>28</sup> curriculum vitae and Interpol clearance certificate for the country representative. Interpol clearance is required where the country representative is of foreign origin but local police clearance suffices where the representative is a citizen or permanent resident of Zimbabwe; proposed area of geographic coverage; period of financial year e.g. 1 January to 31 December, 1 July to 30 June

<sup>29</sup> **Zimbabwe: NGO de-registration stalls aid for 90,000 kids,** <http://www.pambazuka.org/en/category/welfare/25914> (last accessed 21 June 2009). In June 2008 Nicholas Goche (Member of Parliament) in a circular addressed to "All Private Voluntary Organizations (PVOs)/Non-Governmental Organizations (NGOs)". The Notice reads as follows: "It has come to my attention that a number of NGOs involved in humanitarian operations are breaching the terms and conditions of their registration as enshrined in the Private Voluntary Organizations Act [Chapter 17:05], as well as the provisions of the Code of Procedures for the Registration and operations of Non Governmental Organizations in Zimbabwe (General Notice 99 of 2007). As the Regulatory Authority, before proceeding with the provision of Section (10), Subsection ( c ), of the Private Voluntary (sic) Act [Chapter 17:05], I hereby instruct all PVOs/NGOs to suspend all field operation until further notice."

<sup>30</sup> Section 21, Suspension of Executive Committee,

the PVO.<sup>31</sup> If the entire executive committee has been suspended, a trustee (curator) may be appointed to manage the PVO for sixty days (60) or upon filling of the vacancies of the executive committee, whichever comes first.<sup>32</sup> According to Section 7 of GN99/2007, the Registrar is the supervising authority of all PVOs in terms of the developmental impact of programmes and monitoring of the organisations' corporate governance. The monitoring entails field visits by social service officers to project areas, analysis of submitted annual narrative reports and audited financial statements.

Regarding trusts, provisions regarding internal governance are usually part of any deed of trust. "True accounts shall be kept of all monies and assets received and expended by the Trust and the manner in respect of which such receipts and expenditures take place, and of the property, credits and liabilities of the Trust. At least once in every calendar year, a balance sheet and a statement of income and expenditure shall be prepared, which shall be audited by an auditor(s), qualified in terms of the Accountants' Act, to be elected by the Trust in a General Meeting".<sup>33</sup> The Government and its agencies are excluded from meetings of any trust. Trustees appoint an executive director who is responsible for setting up the secretariat, and other internal control mechanisms, such as a finance and administration committee.

### **C. Reporting**

While there are no requirements for the state to be informed of internal meetings of a particular PVO, the Minister is allowed to send inspectors to examine the accounts and any documents of any PVO. Once a notice has been delivered to the PVO contact person, the Minister expects the PVO to comply with the notice by providing all information that is required by the inspector as specified in the notice. The documents that are effectively seized by virtue of the notice can be kept for a "reasonable period".<sup>34</sup> The reports that should be submitted to the state when an inspector visits include "any aspect of the affairs or activities of any private voluntary organisation", and the inspector has the right "to examine books, accounts and any other documents that relate to the financial affairs." The reports must be submitted to the Registrar; in the past, however, few organisations have complied with this requirement and there has been no enforcement against PVOs per se, but rather against organisations deemed to be political (even if not PVOs).

Universitas and trusts usually produce accounts for the benefit of their members, and such institutions are supposed to conduct internal audits in terms of their founding documents and deed of trust. The reports are submitted and approved by members at annual general meetings or extraordinary meetings. In the event of a breach of fiduciary duties of one of the members of the board or the secretariat, internal disciplinary and remedial measures are usually provided in each constitution or deed of trust.

### **D. State Enforcement and Sanctions**

The PVO Act provides for sanctions in the event of the PVO failing to abide by provisions of the Act. Offences under the PVO Act include raising funds as an unregistered

---

<sup>31</sup> Section 21(3)

<sup>32</sup> Section 22

<sup>33</sup> This is a standard section of any Deed of Trust

<sup>34</sup> Section 20, PVO Act

organisation; being an office bearer despite having been convicted for more than 5 years for a crime involving dishonesty; and the failure to provide information as requested by an inspection officer. Available sanctions include fines, imprisonment or both, cancellation of the registration, suspension of board members and/or dismissal. Following attempts to dismiss board members of a PVO, the Minister was faced with a constitutional challenge and the Supreme Court found the Minister in breach of the individual executive committee member's constitutional rights.<sup>35</sup> The decision to impose sanctions or refuse registration or cancel registration is appealable before the courts. In the past years the Minister and Registrar have not imposed any sanctions on PVOs. As for trusts and universitas, any sanctions and state involvement is usually at the instigation of the trustees and the members of the universitas.

### **E. Dissolution, Winding Up, and Liquidation of Assets**

The Registrar can initiate dissolution of a PVO if the organisation ceases to operate. The assets of the organisation will be disposed of in terms of its constitution.<sup>36</sup> The PVO Act, through its regulations, provides for how dissolution takes place.<sup>37</sup> The provisions for dissolution of CSOs operating as universitas are contained in the constitutions of these organisations; such a decision will have to be reached by at least a majority of the board members. The same is true for trusts. Trusts and universitas usually provide for dissolution of the organisation in their deeds of trust<sup>38</sup> and constitution, respectively.

### **F. Other Constraints**

The disruption of CSO activity by Government acts typically occurs during periods of increased political activity in the country, such as during or after elections, and during periods of increased demand for humanitarian services. State interference may take the form of repeated requests for information or threatened suspension of activity. For example, in June 2008, the

---

<sup>35</sup> Sekai Holland vs. Minister of Labour and Social Welfare 1997 (1) ZLR 186 (SC)

<sup>36</sup> Section 27 provides that "If a private voluntary organization ceases to function and the persons responsible in terms of its constitution for dissolving the organization fail or are unable to dissolve it within six months thereafter, the Registrar may do so in their stead and shall be vested with all the powers necessary therefor, and shall dispose of the assets of the organization in accordance with its constitution"

<sup>37</sup> Section 28 (1), Regulations, (1) The Minister may make regulations with regard to (a) the form of any application, authority, certificate, notice, order or register to be made, given, issued or kept under this Act and any other form which may be required in carrying out this Act; (b) the books, accounts and records to be kept by private voluntary organizations and the manner in which they shall be kept; (c) the procedure to be followed on the dissolution of a private voluntary organization and the manner in which its assets shall be disposed of; (d) the circumstances under and the conditions upon which contributions may be collected by one private voluntary organization on behalf of another private voluntary organization; (e) the manner in which persons shall be authorized by registered private voluntary organization to collect contributions on their behalf; (f) any other matter which in terms of this Act is required or permitted to be prescribed;

<sup>38</sup> Example of a winding up or dissolution clause in a deed of trust -The decision to wind up or dissolve shall be made only by a resolution to that effect passed by a **two-thirds** majority of those personally present and entitled to vote at a General Meeting of the Trust convened specifically for the purposes of which not less than thirty days notice shall have been given in accordance with provisions of the constitution, setting out the terms of the proposed resolution and reasons therefore. In the event of the being wound up for any reason, the Trust shall, if necessary, sell sufficient movable or immovable property to pay any unpaid liabilities of the Trust and any movable or immovable property remaining shall be transferred to another organization or association operating in Zimbabwe having similar objectives to the Trust agreed upon by no less than **three quarters (3/4)** of the existing Trustees at such time.

Government sought a blanket suspension of all PVOs engaged in humanitarian work. The Permanent Secretary justified the suspension as “necessitated by reports that several NGOs were operating outside the terms of their registered mandates. Some were not following operational guidelines and some were dabbling in partisan politics. A number of NGOs will have to answer for their iniquities.”<sup>39</sup> It is interesting to note that no PVO was ever made to answer for such iniquities; however, there was disruption of food aid and assistance to persons in need, including people living with HIV/Aids (PLWHA) and orphans.

During the same period, organisations were raided by police officers, and some were asked to provide details of their board members or show proof of registration.<sup>40</sup> Protection for CSOs that are threatened remains non-existent, as the state is the source of the threat against CSOs. Organisations that have not been registered as PVOs are more exposed than PVOs to government harassment.

The establishment of government sponsored NGOs has become prevalent since 2000. Such entities include associations for labour, students, doctors, teachers, and for NGOs.<sup>41</sup> These government-sponsored NGOs have contributed to a mixed messaging in respect of the operating environment of NGOs and the general human rights situation in the country.

#### **IV. CSO ACTIVITIES**

##### **A. General Powers**

Once registered as a PVO, the entity is allowed to carry out any activities as long as they are within the confines of the registration certificate and law. The registration certificate allows such an entity to enter into contracts as long as such is approved by its executive committee and is lawful. Most PVOs have acquired real property with the approval of their executive committee and funding partners. The same is applicable to trusts and universities.

##### **B. Expressive / Advocacy / Public Policy Activities**

In November 2002, the Minister of Justice, Legal and Parliamentary Affairs, Patrick Chinamasa, published a list of NGOs which he claimed were a threat to peace and security in Zimbabwe. Amani Trust appeared on the Minister’s list of NGOs and was reportedly accused of working with the British government to unseat President Robert Mugabe and destabilize the nation. That same month, the Trust closed its offices following the Government’s decision to criminalize the non-registration of NGOs under the PVO Act. In August 2002, Dr Francis Lovemore, medical director of Amani Trust<sup>42</sup> was arrested on allegations that the Trust was

---

<sup>39</sup>**New Rules Styming NGO Operations**, Vusumuzi Sifile/Walter Marwizi 13 September 2008, <http://allafrica.com/stories/200809150456.html> (last accessed 21 June 2009) Lancaster Museka, the Ministry of Public Service Labour and Social Welfare's Permanent Secretary

<sup>40</sup>**Zimbabwe police raid Christian groups in Harare 13 June 2008**, <http://www.ekklesia.co.uk/node/7283> (last accessed 21 June 2009)

<sup>41</sup> Zimbabwe Congress of Trade Unions has Zimbabwe Federation of Trade Unions, Zimbabwe National Students Unions has Zimbabwe Congress of Students Unions, Zimbabwe Lawyers for Human Rights has Zimbabwe Lawyers for Justice, Zimbabwe Association of Doctors for Human Rights has Zimbabwe Doctors for Development,

<sup>42</sup> Amani Trust has since been closed and assumed a different name, see also Arnold Tsunga, *An Overview of the Human Rights Situation in Zimbabwe with Specific Reference to Repressive Legislation, Impunity, The State of Administration of Justice and Selective Application of the Law*, [http://www.kubatana.net/docs/hr/zlhr\\_overview\\_040220.pdf](http://www.kubatana.net/docs/hr/zlhr_overview_040220.pdf) (last accessed 22 June 2009)

guilty under the Public Order and Security Act (POSA) of “publishing or communicating false statements prejudicial to the state.” The arrest stemmed from press reports which referred to Amani Trust’s work with victims of torture and politically motivated rape. The offices of Amani Trust were raided and searched by police. Dr Lovemore was released without charge.<sup>43</sup> This is but one example of the Government targeting CSOs that are involved in high-level advocacy and critical of the Government for its human rights record.

The law is silent with respect to CSOs endorsing a specific candidate. Most organisations whose mandate remains sensitive have tried to avoid endorsing candidates. In fact, most organisations include clauses in their constitutions or deeds of trust that require them to remain apolitical. CSOs – though mostly those that are not PVOs – do seek to influence public policy or develop alternative legislation. Limits on advocacy are often self-imposed, as CSOs are aware of the potential state response, which includes arrests, raids, threats, and malicious prosecution through selective application of the law. Organisations that have embarked on advocacy which involve media or free speech related activities have found themselves operating within a landmine of laws which hinder free expression. Advocacy materials, publications and opinions are all printed with due regard to laws such as POSA and the Criminal Code, which criminalises, for instance, insulting the office or person of the President<sup>44</sup>, or uttering words which are likely to undermine policing authority.<sup>45</sup> Many individuals have been arrested for causing disaffection among or within the policing authority and for insulting the office of the President.<sup>46</sup> Such laws cause individuals and organisations to censor themselves or engage in selective and thorough reviews before placing any information in the public domain.

### **C. Communication and Cooperation**

CSOs do not suffer from legal limitations in terms of cooperation with other similarly placed organisations. Cooperation is usually based on shared values and objectives and purely programmatic. Many CSOs cooperate through networks, associations and unions, both within and outside the country. For purposes of holding meetings in public spaces, the state pressures CSOs to submit letters of notification of intent to hold such meetings; notification, however, has

---

<sup>43</sup> [http://asiapacific.amnesty.org/library/pdf/AFR460152003ENGLISH/\\$File/AFR4601503.pdf](http://asiapacific.amnesty.org/library/pdf/AFR460152003ENGLISH/$File/AFR4601503.pdf) (last accessed 21 June 2009)

<sup>44</sup> **s33 of the Code, Undermining authority of or insulting President** (1) In this section— “publicly”, in relation to making a statement, means—(a) making the statement in a public place or any place to which the public or any section of the public have access; (b) publishing it in any printed or electronic medium for reception by the public; “statement” includes any act or gesture. (2) Any person who publicly, unlawfully and intentionally— (a) makes any statement about or concerning the President or an acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may— (i) engender feelings of hostility towards; or (ii) cause hatred, contempt or ridicule of; the President or an acting President, whether in person or in respect of the President’s office; or (b) makes any abusive, indecent or obscene statement about or concerning the President or an acting President, whether in respect of the President personally or the President’s office; shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.

<sup>45</sup> s177 Code

<sup>46</sup> **Lawyer Arrested for insulting Mugabe**  
[http://www.iol.co.za/index.php?from=rss\\_Africa&set\\_id=1&click\\_id=68&art\\_id=nw20080508063719242C226145](http://www.iol.co.za/index.php?from=rss_Africa&set_id=1&click_id=68&art_id=nw20080508063719242C226145)  
(last accessed August 2, 2009), **2 Zimbabwe Journalists Arrested on Charges of Insulting President Mugabe**,  
<http://www.voanews.com/english/archive/2003-07/a-2003-07-01-6-2.cfm?moddate=2003-07-01>, last accessed 2 August 2009,

been interpreted to mean actual application.<sup>47</sup> There are no limitations in terms of accessing the Internet, though the law allows the state to intercept such communications.<sup>48</sup>

## **D. Seeking / Securing Funding**

### **1) Foreign Funds**

There are no legal limitations for CSOs to obtain funding from any source, but the state has attacked PVOs that receive foreign funding as instruments used by the West to undermine the Government. Due to the varying internal governance and control mechanisms, CSOs do operate accounts with local banks. According to the Exchange Control Act, it is an offence to receive funds in a local account and then transfer them to an offshore account.<sup>49</sup> For purposes of funds received from donors, such have been termed “free funds”<sup>50</sup> and such limitations are deemed not applicable. The Zimbabwe Electoral Commission Act (ZEC Act) prohibits the receipt of foreign funding for conducting voter education.<sup>51</sup>

### **2) Economic Activities**

The PVO Act is silent on investment or generating profits through economic activities. Indeed CSOs do generate income in a variety of ways, such as selling publications at nominal costs and through consultancies for fees. Other CSOs operating as trusts or universities have carried out similar work to generate income. It is expected, however, that funds generated from economic activity be used for the non-profit purposes of the CSO.<sup>52</sup>

### **3) Government Funding**

Most CSOs that seek to be independent have not accepted funds from the state. On the contrary, the state has actually used funds from CSOs that were locked up in the Reserve Bank

---

<sup>47</sup> Section 24 of Public Order and Security Act (POSA) see also ZLHR position on ban of public gatherings, [http://www.kubatana.net/docs/hr/zlhr\\_rally\\_public\\_gathering\\_bans\\_070412.pdf](http://www.kubatana.net/docs/hr/zlhr_rally_public_gathering_bans_070412.pdf) (last accessed 22 June 2009)

<sup>48</sup> Interception of Communications Act

<sup>49</sup> Statutory Instrument (SI)109/96 s4(1) Subject to subsection (3), unless permitted to do so by an exchange control authority—(a) no person shall, in Zimbabwe—(i) buy any foreign currency from or sell any foreign currency to any person than an authorised dealer ;or (ii) borrow any foreign currency from, lend any foreign currency to or exchange any foreign currency with any person other than an authorised dealer; (b) no Zimbabwean resident shall, outside Zimbabwe—(i) buy or borrow any foreign currency from any person if the transaction results in or is likely to result in a debt payable in or from Zimbabwe; or (ii) sell or lend any foreign currency to any person if the foreign currency originated from Zimbabwe or is the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe; or (iii) exchange any foreign currency with any person if—A. the transaction results in or is likely to result in a debt payable in or from Zimbabwe; or B. except in the case of a travellers cheque, the foreign currency originated from Zimbabwe or is the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe.

<sup>50</sup> SI 109/96, “free funds” means money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe

<sup>51</sup> Section 16 provides that “No foreign contribution or donation for the purposes of voter education shall be made except to the Commission, which may allocate such contribution or donation to any person referred to in section 14(3) or subsection 15(1).

<sup>52</sup> s10 PVO Act

for government purposes, including funds allocated from the Global Fund for HIV/AIDs and Tuberculosis.

## **V. TAX LAWS**

### **A. Tax Treatment of CSO Income**

Donations and grants received are not taxed; membership fees are also not taxed if such is not for the benefit of members or pecuniary profit.<sup>53</sup> Other tax laws, such as value added tax (V.A.T.) do apply to CSOs. If the entity generates income through investment, then that income is subject to tax. If the organisation operates but does not register any profit and funds are channeled to the sustainability of the organisation, then profits will not be declared to warrant tax liability.

### **B. Customs Duties**

Import duties are paid by all PVOs with the exception of those importing products for the benefit of persons with disabilities, such as wheelchairs, or humanitarian relief. For an exemption to apply, a PVO must submit a request to the Commissioner General of Taxes and the Revenue Authority.<sup>54</sup> Section 120(6) of Customs and Excise Act provides that “in regulations referred to in subsection (1), the Minister shall endeavour, so far as is practicable, to provide for appropriate suspensions, rebates, remission or refunds of duty in respect of (c) books and equipment for use in schools and educational and training institutions; and (d) essential medicines and medical equipment; and (e) goods donated for welfare or relief purposes.”

### **C. Donor Incentives**

None exist at the present moment.

### **D. Administrative Spending**

There are no statutory limits on administrative spending. Any individual PVO, however, may have internal rules which proscribe administrative spending beyond a certain amount.

## **VI. CONCLUSIONS**

### **A. Priority Issues**

At the present moment CSOs are faced with the need to improve the general operating environment, which has been characterised mainly by the presence of laws which contribute to self censorship and constraints in civic space. Such laws have been used selectively to target organisations which are deemed to be political or openly confrontational in their advocacy or other activity. The development of a constitutional framework with an expanded Bill of Rights would help allow CSOs to operate with more confidence. That said, the presence of a Constitution without the relevant institutions to safeguard rights is meaningless. Institutions that

---

<sup>53</sup> Income Tax Act Section 14, Third Schedule, clubs, societies, institutes and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or the advancement or control of any profession or trade or other similar purposes if such receipts or accruals, whether current or accumulated, may not be divided amongst or credited to or enure to the benefit of any member or shareholder other than by way of remuneration for services rendered; ecclesiastical, charitable and educational institutions of a public character

<sup>54</sup> Customs and Excise Act Section 120, Section 121 When any claim is made for exemption from or drawback, rebate, refund or remission of any duty, fee or charge in accordance with this Act, the burden of proof shall lie upon the claimant to show that he is entitled to such exemption, drawback, rebate, refund or remission.

are meant to safeguard fundamental rights have been compromised and there is a lack of confidence in them. There are efforts again being made by the Ministry of Justice and Ministry of Labour and Social Welfare to amend the PVO Act to include trusts as organisations that must be registered under the Act. Registration as a trust will only be allowed after one is registered as a PVO. This will obviously raise conflicts in the governing regulatory systems for a PVO-Trust. The constitutional reform process may be an opportunity in terms of providing a platform for engagement with the state through education of the citizenry on how to contribute meaningfully to constitution making.

### **B. Government Rationale**

The government has justified the legal impediments encountered by CSOs as related to national security, counter-terrorism, and harmonization and coordination of NGO activities. The state has used national security arguments to arrest human rights defenders working for trusts. Individuals have been hauled before the courts to answer to charges of training terrorists and saboteurs.

### **C. Financial Crisis**

The operations of some CSOs have been affected as funding and donor agencies have reduced their support to organisations, due to changing priorities. At the same time, since the formation of the Transitional Inclusive Government, there has been expanded interest in supporting the work of the Government.

### **D. Strategic Responses**

There is an urgent need to engage with the various arms of the Transitional Government in regards to the various laws which have to be either repealed or amended. The Transitional Government in Zimbabwe was formed soon after the signing of the Inter-Party Agreement (IPA) which, among other things, prioritizes legislative reform. The formation of the inclusive Government has also weakened CSOs to the extent that there has been a skills transfer from civil society to government. There is a need for leadership development and renewal. CSOs will also have to develop and provide an alternative act for PVOs, which act should introduce self regulation and corporate accountability, peer review mechanisms and an NGO Council. The timing of such legislative reforms is unclear as the government has yet to lay out its legislative reform agenda. Repeal or amending the current laws governing CSOs and PVOs will contribute to democratization agenda of the Transitional Inclusive Government.

*Article*

# **South Africa's King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations**

**Peter S.A. Hendricks<sup>1</sup> and Ricardo G. Wyngaard<sup>2</sup>**

## **1. Introduction**

The King Code of Governance Principles (the Code) and the King Report on Governance for South Africa (King III) were published on 1 September 2009 and became effective on 1 March 2010. Like the first and second reports, this third report is aimed at promoting good corporate governance in South Africa and was compiled by the King Committee under the chairmanship of Professor Mervyn E. King. The King Committee has received both local and international acclaim for its contribution towards corporate governance.

In its first two reports the King Committee did not make any effort to explain its relevance to civil society organisations (CSOs). The King Committee was noticeably more concerned with the governance of commercial companies. CSOs were left in the dark as to the relevance and applicability of the first two codes.

King III has now boldly declared that it applies to '*all entities regardless of the manner and form of incorporation or establishment and whether in the public, private sectors or non-profit sectors*'.<sup>3</sup> The principles contained in the report have purportedly been drafted so that '*every entity can apply them and, in doing so, achieve good governance*'.<sup>4</sup> The accuracy of this statement is questionable.

Although King III is a very important document in the history of corporate governance in South Africa, it must be recognized for what it is: a code suited for commercial entities that may find limited application in CSOs.

This article briefly explores the potential implications of King III on CSOs.

---

<sup>1</sup> Peter S.A. Hendricks was admitted as an attorney in 1999 in the Cape High Court of South Africa. He has numerous skills and wide experience in nonprofit law and governance. His law firm PSA Hendricks & Associates has a focus on service and support to nonprofit and commercial entities with a social mission.

<sup>2</sup> Ricardo G. Wyngaard has provided legal advice, training, and assistance to the nonprofit sector since 2000. He has participated in a number of legislative reform and research initiatives on nonprofit legislation and is currently running a solo law practice focusing on nonprofit law and governance ([www.nonprofitlawyer.co.za](http://www.nonprofitlawyer.co.za)).

<sup>3</sup> The King Committee, (2009) *King Report on Governance for South Africa*, Institute of Directors, p. 17

<sup>4</sup> Ibid.

## **2. The development of the King Codes**

In 1992 the King Committee was established with the specific aim of researching and making recommendations into corporate governance in South Africa. The first King report was published in 1994. King I recognized that companies do not act independent from society. For this reason the highest standards of corporate governance were encouraged through enterprise with integrity. This entailed that a wide range of stakeholders' interests are to be considered as it relates to the fundamental principles of good financial, social, ethical, and environmental practice. The second King Report (King II) was released in 2002. Without deviating from the principles of its predecessor, King II was more focused on introducing the idea of corporate citizenship and the notion of a triple bottom line. The latter involved the exercise of the corporate governance function with due regard to the company's actions on people, planet, and profit.

Some of the recommended practices of the King II report were incorporated into the Companies Act 71 of 2008 and some have become regulatory prescriptions to companies listed on the Johannesburg Stock Exchange. King III now states that *“Good governance is not something that exists separate from the law and it is inappropriate to unhinge governance from the law.”*<sup>5</sup> The argument is that with time governance practices eventually become the standard against which the board is measured. Should a court have to look at an incident in respect of governance, such standard (governance practices) will be used to measure the conduct of directors. The insinuation is clearly being made that components of King III stand a good chance to attain the standard of law. King III further argues that: *“Corporate governance practices, codes and guidelines therefore lift the bar of what are regarded as appropriate standards of conduct. Consequently, any failure to meet a recognised standard of governance, albeit not legislated, may render a board or individual director liable at law.”*<sup>6</sup>

There is no doubt that some of the principles contained in King III would eventually become law. This raises the question whether King III lays a proper foundation that could inspire legislation that will govern CSOs.

## **3. Is King III an appropriate standard for civil society governance?**

King III is not legislation. The fact that King III suggests that organisations should *‘apply or explain’* why they are not applying it, creates the illusion that it has the same authority as legislation. Given this insistence that King III applies to all entities, some funders may view it as the standard of governance for all CSOs in South Africa. King III, whether appropriate or inappropriate for CSOs, can in effect play the role of a gatekeeper for donor support.

King III is heavily skewed, in language and meaning, towards the commercial sector. This is highlighted by the fact that the report speaks overwhelmingly to business and commercial enterprises and assumes that trading activities are the sole means of sustaining all entities. King III is seemingly unmindful of the fact that a large number of CSOs in South Africa do not generate their own income through trading activities. It can only be deduced that this assumption is a consequence of a neglected consideration of the nonprofit sector.

King III is heavily associated with the Companies Act. Throughout the Report consistent reference is only made to the Companies Act of 2008 as the Act regulating the establishment of

---

<sup>5</sup> Ibid, p.7

<sup>6</sup> Ibid, p. 8

entities in South Africa. Now, one can only deduce that the intention was to speak to the governance of companies that have been and will be registered in terms of the companies' legislation.

Given these factors alone there is reason to be concerned with the impact that King III may have on the enabling environment of CSOs—in particular on community-based organizations, as the Cinderellas to our sector.

It is claimed that King III was necessary in light of the new Companies Act 71 of 2008 and changes in international governance trends. This poses two very important considerations. *First*, not all CSOs are established in terms of the Companies Act and King III is seemingly not cognizant of the tens of thousands of voluntary associations that operate in terms of common law in South Africa. *Second*, an increased expectation of a high level of sophistication has now been imposed by King III on smaller community-based organizations. This seemingly academic approach has placed less emphasis on the local context.

The more sophisticated NGOs would be better placed to keep in step with the latest tunes. That however is not the reality for the majority of community-based organizations, which comprise the overwhelming component of CSOs in South Africa.

The Nonprofit Organisations Act, No. 71 of 1997 (the NPO Act) is one of the key pieces of legislation for the non-profit sector in South Africa. It provides for the establishment of a Nonprofit Directorate which has, amongst others, the function “*to ensure that the standard of governance within nonprofit organisations is maintained and improved*”.<sup>7</sup> It is clear that the King III report was compiled without involvement from the NPO Directorate. This is an important factor, as the NPO Act is in particular aimed at “*creating an environment in which nonprofit organisations can flourish*.”<sup>8</sup>

#### **4. The implications of King III for civil society governance**

It is not difficult to see how some CSOs would snugly embrace King III and would most probably gain competitive advantage in implementing it. The authors of King III claim that it has been prepared so that ‘*every entity can apply them and, in doing so, achieve good governance*’. This is hardly evident from the Report. A number of principles contained in King III cannot realistically be applied to all legal entities. The following are such examples:

- a. **Audit Committees:** Principle 3.1 of King III recommends that the board should voluntarily appoint an effective and independent audit committee consisting of at least three members. It further suggests that ‘*there should be a basic level of qualification and experience for audit committee membership*’.<sup>9</sup> This audit committee should collectively have an understanding of a wide range of issues, namely: integrated reporting, internal financial controls, external audit process, corporate law, risk management, sustainability issues, information technology governance, and governance processes within the company.<sup>10</sup> This expectation is out of sync with the reality of most community-based organizations in South Africa. In addition, the

---

<sup>7</sup> Section 5b(ii) of Nonprofit Organisations Act, No. 71 of 1997

<sup>8</sup> Section 2 (a) of the Nonprofit Organisation Act, No. 71 of 1997

<sup>9</sup> The King Committee, (2009) *King Report on Governance for South Africa*, Institute of Directors, p. 57

<sup>10</sup> *Ibid.*

preparation of audit reports is not a legislative requirement for all companies in terms of the Companies Act of 2008.<sup>11</sup>

- b. *Internal Audit:*** Principle 7.1 of King III provides that the board should ensure that there is an effective risk-based internal audit. The Report further suggests that the internal audit function ‘*should adhere to the Institute of Internal Auditors’ Standards for the Professional Practice of Internal Auditing and Code of Ethics at a minimum*’.<sup>12</sup> The implication is that all CSOs should introduce the standards of a professional practice as a minimum requirement into its internal audit function.
- c. *Remuneration:*** Principle 2.25 of the Code states that ‘*Companies should remunerate directors and executives fairly and responsibly*’.<sup>13</sup> The Report further states that “*The Board should promote a culture that supports enterprise and innovation with appropriate short-term and long-term performance-related rewards that are fair and achievable.*”<sup>14</sup> King III has not taken into account that nonprofit boards are, due to the nature of nonprofit organisations, predominantly volunteers and are not getting paid for serving. The payment of nonprofit board members may have detrimental consequences for the nonprofit sector.

Community-based organizations, in particular, may find the implementation difficult for the following reasons:

- A lack of financial resources.
- The availability of proficient board members to ensure compliance with King III.
- The additional financial burden or potential mission drift that may result from having to now also consider matters pertaining to business that do not form part of their main objective.
- Many of the recommended practices ignore the fact that CSOs derive income through soliciting funding from a donor. Whether cash-strapped CSOs would be able to mobilise additional resources to implement King III remains to be seen.

## **5. Some issues not covered by King III**

King III has introduced a code on governance that largely considers governance practices from a market-based perspective. It has not taken into account that the nonprofit sector does not operate primarily on the premise of supply and demand. The Code accordingly lacks principles on key areas that are central to civil society governance.

King III has not mentioned the issue of resource mobilisation, being a key responsibility of nonprofit boards. It is premised on the assumption that business is a means of sustaining all entities. King III does not take into account that a large part of CSOs have come into existence due to market failure. Accordingly, a number of organisations caring for the poor and needy (who are unable to pay for services) have to rely on donations and fundraising. King III provides

---

<sup>11</sup> The draft regulations of the Companies Act of 2008 are more in line with a threshold approached adopted by the California's Nonprofit Integrity Act of 2004 which requires charities with gross revenue of \$2 million or more to appoint an audit committee, which amount excludes grants received from government.

<sup>12</sup> The King Committee, (2009) *King Report on Governance for South Africa*, Institute of Directors, p. 93

<sup>13</sup> *Ibid*, p. 48

<sup>14</sup> *Ibid*

no guidance to nonprofit boards on their role and responsibilities in philanthropic resource mobilisation.

King III provides no guidance on how CSO boards should go about recruiting new board members. Recruiting new board members to volunteer their time serving on a CSO board is very different from offering someone a salary to become a director of a commercial company. Nonprofit directors carry similar responsibilities as for-profit directors, but are ordinarily not remunerated. The motivation to serve on the board of a nonprofit is therefore different compared to a for-profit. The commercial director is motivated primarily by financial gain whilst the CSO director will not ordinarily receive financial payment. The recruitment of directors to serve on nonprofit boards is therefore a central component of nonprofit governance – an aspect that King III has simply ignored.

King III does not take into account that different models of CSO governance have evolved over time. King III has, however, impliedly given recognition to the existence of different commercial models. King III does not offer guidance on some of the governance challenges faced with different CSO governance models. In one CSO model, for example—the constituent model—board members are appointed with the mandate of representing a particular constituency on the board. This governance model is widespread in the South African CSO sector and is also being promoted by the South African government. One of the shortfalls of this governance model is that it is not aimed at ensuring individuals with diverse governance skills are represented on the board. King III is unmindful of these unique challenges and offers no guidance on them.

## **6. Conclusion**

Developments in the marketplace continue to have impacts on the development of legislation affecting the nonprofit sectors across the world. Legislatures often do not take into account the implications of such legislation on nonprofit organizations. The confusion following the applicability of the Sarbanes-Oxley Act to nonprofit organizations in the United States, shortly after its introduction, is an example of this.

CSO accountability should be promoted through laws and codes. The intention of this article is not to argue for lesser standards of governance and accountability of CSOs, but for suitable standards. Governance standards should not be introduced on the assumption that marketplace standards are suitable for CSOs. This form of legislative development is detrimental to the unique character of CSOs and will corrode the values underlying the nonprofit sector.

At least two prominent institutions have blamed weak corporate governance arrangements for the current global financial crisis. The Organisation for Economic Cooperation and Development concluded that: “...*the financial crisis can be to an important extent attributed to failures and weaknesses in corporate governance arrangements. When they were put to the test, corporate governance routines did not serve their purpose to safeguard against excessive risk taking in a number of financial service companies.*”<sup>15</sup> In a similar vein, the United Nations

---

<sup>15</sup> The Corporate Governance Lessons from the Financial Crisis, Organisation for Economic Co-operation and Development, 2009

found that: “...it is equally urgent to recognize the root causes for the [global economic] crisis and to embark on a profound reform of the global economic governance system.”<sup>16</sup>

It is likely that the global financial crisis will result in further legislative and governance reforms. King III illustrates how commercial entities and CSOs can easily be thrown together and measured with one measuring tape. This is clearly inappropriate in the South African context and the consequences of it remain to be seen. A governance code aimed at promoting good governance will overburden and may potentially stifle the growth of CSOs.

---

<sup>16</sup> The Global Economic Crisis: Systemic Failures and Multilateral Remedies, United Nations, 2009