



## **This document has been provided by the International Center for Not-for-Profit Law (ICNL).**

ICNL 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 90 countries.

Visit ICNL's **Online Library** at  
<http://www.icnl.org/knowledge/library/index.php>  
for further resources and research from countries all over the world.

### Disclaimers

**Content.** The information provided herein is for general informational and educational purposes only. It is not intended and should not be construed to constitute legal advice. The information contained herein may not be applicable in all situations and may not, after the date of its presentation, even reflect the most current authority. Nothing contained herein should be relied or acted upon without the benefit of legal advice based upon the particular facts and circumstances presented, and nothing herein should be construed otherwise.

**Translations.** Translations by ICNL of any materials into other languages are intended solely as a convenience. Translation accuracy is not guaranteed nor implied. If any questions arise related to the accuracy of a translation, please refer to the original language official version of the document. Any discrepancies or differences created in the translation are not binding and have no legal effect for compliance or enforcement purposes.

**Warranty and Limitation of Liability.** Although ICNL uses reasonable efforts to include accurate and up-to-date information herein, ICNL makes no warranties or representations of any kind as to its accuracy, currency or completeness. You agree that access to and use of this document and the content thereof is at your own risk. ICNL disclaims all warranties of any kind, express or implied. Neither ICNL nor any party involved in creating, producing or delivering this document shall be liable for any damages whatsoever arising out of access to, use of or inability to use this document, or any errors or omissions in the content thereof.

**Regional Cluster Report**  
**CONFERENCE ON AN ENABLING ENVIRONMENT FOR CIVIL**  
**SOCIETY, Sept. 1996**  
**South Africa**

***Cluster: Malawi, Zimbabwe, Zambia, Mozambique, Angola,  
 Botswana, Lesotho***

**Resume**

The context is scanned using examples from the different country scenarios. The analysis and reporting combines, in an evidence-based format, the issues around the nature and evolution of civil society, its relations with other stake-holders, its capacity and mandate, and the environment in which it should operate. Country highlights are then dealt with to elicit evidence, and where possible/useful, to highlight comparative dimensions.

**Praxis**

The simultaneous emphasis on legislation and policy is crucial. Especially within the context of our present socio-political experience as a region, good laws are necessary but not sufficient for an independent, responsible and viable NGO Sector. Taking this conceptual option might also help dispose us towards the inclination to support NGO models where the emphasis is on broad-based popular struggles in which the democratic potential of ordinary people is cultivated. Ultimately the NGO Sector cannot be an answer in itself and for its own sake. Yet it is important to strengthen its obvious potential to be an alternative and largely voluntary, and in the result potentially more democratic centre of popular social struggles as well as a training ground for democrats among ordinary people.

Another point seems to also derive from the above. It appears that the main strength of this initiative will lie in its continuity and ability to go beyond a platform for legislative discussion (present and desired), but also a network of activist and innovative linkage, an opportunity for the identification and initiation of (more) capacity-building possibilities for NGOs, an opening into (more) discussion of ancillary aspects of effective NGO work eg Financial Sustainability, Context-specific Advocacy work, etc.

For instance it will appear from the analysis of Zimbabwe that the emphasis cannot be in the past, (except for what the past is worth as an experience), but in the possibilities provided for future collusive work among concerned actors especially in Government, and Civil Society to build an alternative and ideal policy and legal regime for NGOs in the country.

**A Digest of Key Convergent and Divergent Issues in the Cluster**

**History and Relations with the State**

In broad strokes the NGO Sector in the cluster seems to have developed through four principal milestones: First, during colonial times there are variant cases of

voluntarism that have not found a decent place in the annals of the histories of the different countries. These were especially philanthropic and class/gender/age-group consortia with a strong peer educational and value-transmission function. Although the recollection of this phase is made difficult on account of obvious historiographical problems of dominance and servitude in international social relations, the benefit of even a stressful recollection lies in the assertion of the value drive of any *bona-fide* not-for-profit sector, and also in the placement of value in the voluntary efforts of many ordinary people who do not have desks and date-stamps with which to receive Fiscal benefits from Government, but who come together with the genuine and fervent concern for Social Progress. Perhaps that may begin to give us a pointer to new frontiers for the discourse on an enabling policy and legislative environment.

The second phase is during the colonial period when the main benchmarks of the voluntary sector were either in the realm of parochial and sometimes elitist concerns like the Society for the Prevention of Cruelty to animals in Zimbabwe, or were philanthropic (read political once every ten times) efforts aimed at alleviating the distress that was the result of the colonial experience, or efforts by indigenous resistance groups to colonial edifice. The third phase has been the period soon after the attainment of Flag Independence when in many African countries of the cluster the NGO's have enjoyed a honeymoon with the state with the new emphasis on developmentalism. Here the relationship has been so collusive that it has not been easy for the voluntary sector to also look critically at government conduct and process.

In many of the cluster countries, it being now many years after independence, there is a new realisation that in virtually all of the scenarios the state has failed to deliver and people have reaped a "grain of wheat". Within this new polity, civil society has realised that it needs now to engage politically, define its own space, articulate an alternative development paradigm, and demand accountability from the State. This in fact is the fourth phase.

It will appear from the reports from Zambia and Zimbabwe that the State has not found itself comfortable relating to civil society in the fourth phase. It is important to grasp the outlines of the broad picture, though in miniature detail the post-modern State may make concessions here and there and allow NGOs some semblance of participation. For instance in Lesotho the Government has allocated NGOs a slot in the National Planning Board and promised NGOs representation on the Law Reform Commission established in 1993, albeit not yet functional. In the same country Central Planning informs NGOs through the Lesotho Council of

NGOs about the availability of funds for development projects for which proposals have to be submitted, and there is mention being made of the possibility of that funds generated through the Lesotho Highlands Water Development Project will be available to NGOs.

But as mentioned earlier, the more emphatic picture in this fourth phase of the historical development of NGOs in the cluster is one of uneasy-bedfellowship. Even in the aforementioned Lesotho situation, there is a general perception that NGOs when they involve themselves in Rights based work are being used for political purposes and this controversy has in some ways threatened the "credibility" of even the Lesotho Council of NGOs. On this account it is useful to place a new emphasis on an alternative jurisprudence that gives permissive space to civil society to engage at the political, rights based level. The starting point would be to recreate the basis of NGO voluntarism as the fundamental Right of Citizens to Association and Expression (c.f. Botswana Constitution Secs. 12 & 13; Zimbabwe Constitution Secs. 20 & 21; Lesotho Constitution Secs. 14 & 16, etc). This would then proffer a basis for deconstructing the proscriptive regulatory principle and for establishing a Rights basis. From the reflections on this point coming out of my cluster, it is possible to suggest two levels of principles that could govern regulation of the voluntary sector:

#### 1. The political level.

The first aspect here would be to recognise the scope of voluntary action, no matter how and where initiated, with the *caveat* only that it be *bona fide*.

The second connected aspect is to appreciate the right space for civil society to engage in rights based work. When in Zimbabwe the Zimbabwe Human Rights organisation organised a demonstration to commemorate the fatal shooting by police of innocent civilians in Harare, a demonstration that was then hijacked by agent provocateurs, the State castigated Zimrights so heavily that it wittlessly suggested that there were now Zimlooters who would end up in Zimprisons. The third aspect is to recognise that responsible regulation is premised among other things on the involvement of those who are to be regulated or governed. This way arbitrary regulatory power is proscribed and a mechanism is put in place to, as it were, regulate the regulators. To this end this principle of regulation would suggest that NGO's themselves must be part of the agency responsible for self accounting of NGO's, or must be solely responsible for the same. A final aspect here is to recognise that if NGO's are involved in the crafting of a regulatory environment, they must also be involved in amendments to that environment so that they do not suffer net prejudice with respect to their space and right to operate. There could be possibilities then of building into emerging legislation the residual right of

NGO's to be consulted before any amendments on NGO's are passed in Parliament.

## 2. The legal / Jurisprudential level

In the experience and discussions of the cluster, there are two aspects to emphasise here :

The first is to ensure that the regulation of the voluntary sector takes departure in a rights based jurisprudence, in other words *in favorem libertatis*. It is obviously possible that without this legislation a national legal scenario can have as its inarticulate premise the need to control and limit. It emerges from the requirements for instance of the 1978 Fundraising Act of South Africa that NGO's must first be authorised by the State in terms of the Act before they receive any contribution "solicited, accepted or obtained" from outside the Republic of South Africa. This was clearly motivated during the Apartheid era by the need to check on who would support the liberation effort from outside the South African borders.

The second aspect can be constructed in the broad realm of the human rights jurisprudential concern to ensure that limitations on rights should only be such as are reasonably justifiable in a democratic society. The test is three fold:

- whether the legislative objective is sufficiently important to justify the limiting of a fundamental right ;
- whether the measures designed to meet the legislative object are rationally connected to it and are not arbitrary, unfair or based on unreasonable considerations;
- whether the means used impair the right of freedom no more than is necessary to accomplish the objective.

### Self Governance

The other question that emerges is of course the question of self governance of NGO's. The broad point that should be established here is that although it is important to clean ourselves up as NGOs, we must not be derailed and made to pre-occupy ourselves with self-image correctitude to the extent that we fail to engage

because we feel that we are not "clean enough". The point is that Rights based work exposes NGOs to the societal contradictions underpinning the struggle against vested interests, and hence to the wrath, at the very least discomfort, of the powerful interests in society. In the regulatory realm, this antagonism may translate into deregistration or refusal to register, even for the cleanest NGOs. In essence, with the current political terrain in the Region, for the State the primary expediency of Regulatory power might not lie in its utility for management auditing, but in its prostitutability for narrow political ends. Perhaps this is why the Lesotho, Botswana and, outside our cluster, even South African country reports all suggest that although regulatory law is existent in those countries, the follow-up is poor and many NGOs simply end up doing what they think is useful for them in spite of the law. In Lesotho, discussions between the Legal Aid Officer at FIDA-Lesotho, Rethabile Sakoane and her colleagues, and the Registrar General's office, disclosed that there is hardly a sufficient human resource portfolio at the office to effect monitoring and follow-up (whatever the intrinsic value of these), in such a way that the office shelves still contain long-dissolved societies--the dead--among the living!

Malawi provides an interesting example of clear attempts by the NGO co-ordinating body to come up with a code of conduct for local NGO's. So does Zambia. Zimbabwe is grappling with models of governance and accountability in the co-ordinating body itself. The Botswana council is new, and is still trying to work out its arena of work. But reflections in the cluster seem to point to five useful purposes of self regulation for NGO's. As there would be space elsewhere for discussing details of codes of conduct during the conference, I propose to confine myself here to the perceived benefits that may emanate from a good self governance model and practice on the part of NGO's.

- The enhancement of credibility
- It is also a form of leadership training in terms of appropriate value systems, self management and leadership integrity.
- It enhances accountability to the public as well as to constituencies of the NGO's in question.
- It enhances the capacity of NGO's in visioning, planning, management and programming.
- It facilitates the retention of the value based principle.

### **Public Accountability v Public Information** **with sub-notes on the Media**

One problem confronting civil society in the cluster is the problem of access to

information . Most of the Media, both print and electronic, is controlled by the state and / or parochial private sector interests. Hence both are not independent. In this context it is difficult for NGO's to contribute meaningfully to the social justice and development debate, because they simply do not have information. This is particularly worrisome with the emerging matrix of "decentralised co-operation" where obviously civil society in the cluster cannot be in effective partnership with multi-resource, data-strong actors like the World Bank and the European Union, indeed their own governments. When I was in Malawi I took occasion to sit in in a World Bank and NGO's meeting called to brainstorm on co-operation and partnership. One of the World bank representatives present suggested to the NGO's that as NGO's and the World bank in Malawi they both had something to contribute to a new partnership. In his estimation, he went on, the comparative advantage of NGO's in Malawi *vis-a-vis* the World Bank was that they had grassroots contacts and abundant goodwill and the zeal to work in development. On the other hand the World Bank could also bring in to the relationship massive funding , "and we also have an incredibly deep pool of *knowledge*". Although I shifted in my chair at what in my humble view was the the political and ideological incorrectness of this observation, I am afraid I admitted in my heart that unfortunately it was true at this point in time in the history of the region's development , or is it under development!

This places a challenge on the voluntary sector in the cluster to make urgent demands for not only a freedom of information and constitutional affirmation and jurisprudence , but also the opening up of public information resource outlets accessible to the public and the NGO's themselves. It is difficult to conceive of constructive engagement and accountability in a situation where you don't know what the other person or entity is supposed to do , has done , not done and will do.

The other option would be for NGO's themselves to seriously look into the setting aside of resources , or the sourcing of same , for putting up their own Media.

### **Capacity Building**

Capacity building in the cluster discussions emerged in two packages. The first is the concern about technical capacity that will accompany the new policy and legislative regimes that may be ushered in by the evolving or potential process of charting an enabling environment. In this regard NGO's would want to be strengthened in the areas of putting together organisational values and attitudes, visioning and mission, appropriate and effective systems and structures, staff development in the different aspects of NGO endeavour, and organic and creative

linkage with constituencies and laterally with other actors.

But there is a second , and perhaps more fundamental , level of capacity building . This is the need to build political capacity for NGO's in the cluster to understand and articulate a progressive development discourse, to unpack globalisation and root their own working in authentic African needs and demands, to engage the State creatively and critically, to organise and marshall ordinary people on issue based platforms for social justice, to democratise internally and to consistently otherwise broaden the democratic space on a day to day basis.

At a more immediate and practical level , this concern for political capacity is in turn seen at two levels differentially in the region. The one level is for countries like Zimbabwe and Mozambique, and to an extent Botswana, which need to have the capacity to actually initiate and streamline discussions on an enabling environment for civil society. The other level is for countries like Malawi and Zambia which need to continue what they have started, by ensuring that their interests and their agenda are not sidestepped, that they can still make legitimate demands from the State, and that their entire engagement continues to be value based and inspired by a genuine will to enhance the democratic space of ordinary people in their countries. This would translate into among other things not coming up with flagrantly obtuse opportunities and resources for the aggrandizement of NGO personalities..

### **The Nature of Civil Society in the Region/Cluster** **with sub-notes on agenda and identity**

Again in the cluster experience there are fundamental questions of the scope and ambit of the voluntary sector. Definitions of what is Civil Society, and/or on what considerations some actors in Civil Society should be excluded from the vinculum of say NGOs, cannot be politically neutral. Let us take the example of one important Civic actor in the region.

It appears that throughout the sector , in both existing and proposed policy and legislation (e.g. Malawi Draft Law) , the ambit of the definition of NGO's does not encompass Trade Unions. This is of particular interest in a cluster where all the countries are undergoing some form or another of the Bretton Woods driven Economic Structural Adjustment Programmes, characterised by massive retrenchments of workers , cascading standards of living for ordinary people, and over-permissive environments for international (read Western) finance capital



surplus appropriation. It seems to me in a context like this that trade unions play a very crucial role both on the social and structural development planes. The reality on the ground bears it out that trade unions cannot, and are not playing a parochial class based role of protecting shop-floor interests, but are championing a comprehensive social justice agenda. In Zimbabwe for instance as appears more fully under the Malawi part of the report herein, the Zimbabwe Congress of Trade Unions was the first organisation to pioneer a "beyond - ESAP study". Ultimately this perhaps advocates, as previewed already herein, the case for a unitary and comprehensive law of voluntary organisation as such, to enable citizens to organise and congregate around ideas -- a potentially new form of politics on the continent! I do not share the concern that I have heard in the past that such permissive legislation would erode the essential (serious) value of Civil Society, as the process opens up to non-issue based voluntarism, which could be a concern especially with regard to the Fiscal incentives/benefits. I think that can be worked out in terms of detail and the evolution of some broad social guideline and legal convention. Things would then work themselves out, and the value drive would be maintained so that one should not be apprehensive within that scope of the emergence of flippant social organisation, say an Association of Bespectacled Women of Angola (ABWA).

## **Issues from the country contacts and discussions**

### **ZAMBIA**

A. The tripartite process of meetings between NGOs, the Government and donors started about early June 1996 and so far about 4 meetings have been held. A working group has been formed to spearhead the process. In terms of initiation, the process was born partly of the general aspirations from the non-Governmental and Governmental sectors, but more specifically out of the visioning process started especially by the Gender-advocacy organisations after Beijing.

B. It is also interesting to note that the NGOs have made a lot of impact especially

in the evolution of multi-partyism in Zambia. The State clearly notices the strength and potential of NGOs, as is evidenced by the fact that the State President has made reference of some sort or other to the NGOs during well-nigh every public political address. As previewed in the discussion on praxis, this is important to understand because it establishes clearly the context and possibilities in which and for which the discussions on NGO Policy and Legislation are taking place.

C. As in many other country scenarios, the present contact arrangement is such that the NGOs are regulated through the Ministry of Community Development. It is felt by the NGOs that the ideal scenario should not only be one where the contact point between them and Government goes beyond "regulation" to even include self-regulation by NGOs, but also where NGOs are not restricted to one "parent Ministry" so to speak, but have Liaison points established for them in all the key Social and Public Service Ministries. Surely NGOs, some of whom have a long history of involvement in the provision of education, should deserve a guaranteed space in say the Ministry of Education policy-making echelons so that they can also input therein their experience and "interests". Equally, NGOs who enjoy (or suffer) partnerships with donor NGOs outside Zambia may also want to have a liaison point in the Ministry of foreign affairs as a forum in which their interests and aspirations may be represented.

I found this concern by the Zambian NGOs to be legitimate. Other studies have already shown too the inherent limitations in having a single ministry as contact point for NGOs, including that the relationship of such ministry with NGOs would tend to be coloured by the other primary concerns/mandate of the same ministry.

D. The NGO Co-ordinating committee has been given the mandate to do a Code of Conduct for their members. Codes of Conduct should be encouraged and in fact built into the principal NGO governing legislation in order to have a mechanism of self-regulation for NGOs, which mechanism is in turn important for dissuading Government from finding excuses for proscriptive regulation.

E. Concomitantly, (the) co-ordinating body(ies) for NGOs should be strengthened to enhance their capacity to play the role envisaged in "D" above.

F. Legislation should affirm the Constitutional right of NGOs to exist and serve. Article 20 of the Universal Declaration of Human Rights, 1948 affirms the right of individuals to "peaceful assembly and association". It is important that this right is not only transcribed into national constitutions, but is also affirmed and understood to apply to juridical persons like NGOs as well as the right of natural persons to congregate in such.

G. Regarding the question of fiscal incentives/benefits, NGOs, apart from the lessons they might glean from the Malawi proposals, *infra*, would also want to be considered in allocations from the regular annual national budget, and/or when at the end of each year budgets are retired, they may also get an allocation from their sector-related ministries from funds that would not have been spent during the given financial year. This issue must be discussed as it relates to an issue NGOs are continually seeing as crucial: their financial Sustainability.

H. During this conference Zambian NGOs would also want us to discuss the relationship between international and domestic/indigenous NGOs, as well as explore together capacity-building possibilities for NGOs as they engage in this process.

## **MALAWI**

In terms of the generation of ideas on an ideal legislative and policy framework for NGOs in a given country context, as well as tripartite coalition to achieve the same, one would say a lot has been achieved in Malawi.

A. The NGO Law process, as it is being generally called, was motivated by three principal issues/concerns:

- \*Affirmation of the right to existence for NGOs,
- \*The question of the credibility and integrity of NGOs,
- \*Fiscal benefits/Incentives for NGOs.

B. I think it could also be crucial to revisit the issue of why Trade Unions are left out in the definition of NGOs to be encompassed by the proposed legislation. In an economic and socio-political context such as our Third World scenario, Trade Unions inevitably go beyond the representation of "parochial" shop-floor interests to articulate a broader Social Justice agenda (in Zimbabwe for instance they were about the first group to undertake a "Beyond ESAP" Study). Given this, would we not want Trade Unions to also have their right to exist affirmed, to be viable through among other things what might accrue from the fiscal incentives, etc? Would excluding such a (potentially) principal African civic actor not be falling into the pitfall of a neo-classical definition of NGOs and their work? Granted that they may already be governed by other more specific legislation, but that is the next point here;

C. We need to look at the present NGO Law initiative in conjunction with parallel legislation governing some sectors of the NGO Community itself-- labour, if the

above were granted, disability legislation, Memoranda of Understanding governing usually the status of international NGOs, etc.

Apart from the more mundane legalistic concern to avoid conflicts in the laws and so on, the more urgent concern here is to make sure that there is some basic standard of rights which as it were is not given by the right hand and taken away by the left.

D. A crucial issue which the Malawian NGOs are grappling with is the proposal in their draft law for a NGO Liaison Board established at Section 3 therein. The Board would be composed of 10 members representing NGOs, government and specialist profession representatives eg from the Law Society and the Accountancy. Its duties specified at Section 3.2 of the proposed draft legislation would be as follows:-

- a) to consider for approval or rejection applications for registration as an NGO..
- b) to de-register an NGO which has violated the Act.
- c) to appoint, supervise and terminate the services of a Registrar of NGOs.
- d) to provide a regular forum for consultations between Government and NGOs and the donor community.
- e) to make annual reports in the ministry on the NGO community, the implementation of the Act and "other connected matters".
- f) to recommend to the Minister amendments to the Act or necessary subsidiary legislation.

These proposed duties warrant a closer analysis:

The concept of the liaison body itself seems to have a two-fold inspiration. On one level there is an obvious need for NGOs to institute, and where present, enhance mechanisms for self-regulation. On another there seems to be the inarticulate premise to want to continue with a semblance of the tripartite coalition of Government, NGOs and Donors. Yet it is important to look with a magnifying glass at whether the Liaison Board itself would be needed, if so, what its powers would be.

If the Liaison Board is going to be a regular forum for tripartite consultation as well as make annual reports on the NGO community and even recommend to the Minister, amendments to the Act and secondary legislation, then it is possible that this could militate against the role of the Council of NGOs in Malawi (CONGOMA). Regarding the principal function of registration and de-registration of NGOs, it is fundamental that this be exercised for purely regulatory rather than limiting purposes. To achieve this there is not only need to ensure that the Board,

investment and the growth of the economy: "I am convinced that in order to exploit these opportunities fully, the existing partnership and trust between Civil Society, labour, the private sector and Government should be nurtured and strengthened. It is only through this that we can achieve our shared goal of alleviating poverty through rapid economic growth."

(Zimbabwe, *Budget Statement, 1996* @ p.2)

As they listened to the Minister, the Churches in Zimbabwe sat with unease because The Ministry of Finance had just totally disregarded the extensively researched and wide-consultation-based input which the Churches had submitted to the Ministry under the rubric: "A People Centred National Budget". Far from even acknowledging receipt of the popular, broad-based input into the National Budget thus facilitated through the midwifery of the Churches--to my mind the process and package representing an incontrovertibly authentic Civic initiative--the Ministry chose to "incorporate" the Churches' input by simply prefacing the Budget document with a rather oversubscribed biblical verse.

Such a typical "Fowler's paradox" context lends credence to the Zimbabwean Civil Society's hypothesis that if one attempts a political reading of the post-1990 principal amendments to legislation governing some key sub-sectors of Civil Society--labour, students, voluntary organisations--one notices a consistent trend on the part of the State to muzzle alternative centres of popular participation, especially against the backdrop of a 1990 and beyond Economic Structural Adjustment programme that seems to have worsened the poverty situation and also created the new poor. The reference here is to the amendment of the Welfare Organisations Act in 1995, and before it of the Labour Relations Act in 1992, and before both of the University of Zimbabwe Act in 1990.

Zeroing in on the new Private Voluntary Organisations Act, the Act permits the creation of any body or association of persons the objectives of which are providing for the material, mental, physical or social needs of individuals or families, prevention of distress for persons or families, raising families or persons' standards of living, provision of funds for legal aid, prevention of cruelty to animals, and/or the collection of contributions to aid any of the above. There is also an enabling provision for the inclusion of such other unspecified categories as may be prescribed from time to time.

Bodies that are expressly excluded from the ambit of the Act include any

Governmental organisation (national, regional, etc), any religious body confining itself to religious work, any trust executed by deed of trust with the High Court, any educational trust approved by the Minister, any self-benefitting body or association, any health association (registered under a separate Act of Parliament), any body approved by the Minister to benefit a hospital or nursing home, the Zimbabwe Red Cross Society, and any political organisation "which limits itself to political activities".

More or less like the Lesotho Societies Act of 1966, the legislation is fairly detailed in terms of the mode of registration of voluntary organisations. To be registered a PVO must lodge with the Registrar a copy of the Constitution of the organisation, arrange for the publication of the constitution in a locally circulating newspaper and provide proof of such to the registrar, and file an application for registration with the registrar. The constitution of the organisation must include such particulars as how the managing committee of the organisation is constituted and how vacancies shall be filled, how assets would be distributed in the event of dissolution, and a statement that the organisation is not for profit and that it shall uphold the laws of Zimbabwe.

What perhaps may have to be looked at more critically are the controversial powers given to the Minister, in terms of S.20(A) of The Act, inserted by S.8 of Act 6/95 (the Amending Act), to suspend the Executive of a voluntary organisation and provide her own (interim) Executive whenever "it appears to the Minister, on information supplied to (him) with respect to any registered private voluntary organisation that:-

- (A) The organisation has ceased to operate in furtherance of the objectives specified in its Constitution, or,
- (B) The maladministration of the organisation is adversely affecting the activities of the organisation, or,
- (C) The organisation is involved in any illegal activities, or,
- (D) It is necessary or desirable to do so in the public interest..."

The first weakness of this sweeping legislation seems to be in that it controverts the Right to association in S.21 of the Constitution of Zimbabwe. Although there are limiting clauses in the Constitution regarding the exercise of this right, which clauses also prompt some possible ambiguities in interpretation, there seems to be prospects that the constitutionality of S.20(A) of the PVO Act could be successfully challenged, given some recent attempts by Zimbabwean Courts to read fundamental rights provisions *in favorem libertatis* (for instance ***In re Munhumeso* 1994 (2) ZLR 49**). A broader interpretation of the freedom of expression (see ***Retrofit (Pvt)***)

Ltd v The Posts and Telecommunications Corporation SC. 136/95), could also be another head of argument. The threats on the other hand stem from the fact that, with the overarching politics of patronage and post-modern collapse of the Social Ethic, citizens cannot be too sure on which day of the week a Judge chooses with impunity to deliver a judgement written from the fountain pen of the political bosses.

Another leg of argument should also be isolated here. This is the whole question of the Right to a fair hearing as both a Constitutional Right and Natural Justice principle. S. 18(9) of the Constitution of Zimbabwe reads in pertinent part:-

“Every person is entitled to be afforded a fair hearing, within a reasonable time, by an independent and impartial Court or other adjudicating authority established by law, in the determination of the existence or extent of his civil rights or obligations.”

In the case so far dealt with under the PVO Act, the Minister has published in the Government Gazette the names of the affected Executive Committee members without furnishing reasons for his action, and impliedly purporting to act on “information”. In addition, the effect of the so-called suspension is that the affected Executive Committee members may not be re-elected to the Executive Committee until, or worse still unless, the Minister revokes the “ban”. So, on the basis of “information” the Minister has determined that the members may not fully participate in the activities of their organisation. This, it is submitted, is a determination which should entitle affected members to “a fair hearing” before it is made, which was not the case in this experience. The Minister’s determination had the effect of curtailing the members’ freedom of association. Consequently, insofar as the Act empowers the Minister to act without so much as giving reasons, let alone according the members a fair hearing, S.20(A) of the Act is inconsistent with S.18(9) of the Constitution.

Yet at the same time the bases given for possible suspension are also facets of conduct that could be regulated by existing legislation and common law. The leadership of an organisation may simply be prosecuted for illegal activities. At the same time if there are internal problems of governance the Courts of the Land would/(should) be open to hear complaints from disgruntled members (compare Botswana: Mpho and Ors v Matante 1964- 67 BLR 76; Phikane v Geoffrey Leteemane & Ors Misca No 48 of 1994).

Civil Society in Zimbabwe however could also capitalise on the emerging spirit in

Government that may be behind the drafting of the **Private Voluntary Organisations (General) Regulations, 1996**, which effectively alter significant parts of the principal Act. In particular, the Statutory instrument requires the Board (set up under the Act) to grant members of an NGO's Executive Committee an opportunity to show cause why they should not be suspended, requires the responsible Minister to provide written reasons for suspending members, and establishes, or rather affirms, the right to Judicial review of decisions by the Minister to suspend members of an NGO's Executive Committee.

## **MOZAMBIQUE**

The portfolio of NGOs found in Mozambique includes:-

- \*Socio-economic development organisations: integrated rural development activities, social assistance, health, education, agriculture, environmental, social research,
- \*Human Rights/Humanitarian organisations: defence and support of Human Rights struggles, disability, community care, etc,
- \*Professional associations/Group interest bodies: promotion and defence of professional groups, trade unions, Farmers and peasant associations, etc.

The main umbrella or networking or co-ordinating organisations are:

- \*LINK-NGO Forum: information exchange, working group and meeting forums, institutional development for local associations, national and regional networking, advocacy and lobbying,
- \*FORUM MULHER: Women's network, gender and development issues, capacity-building, lobbying, etc,
- \*MONASO-AIDS and sexual diseases education network,
- \*OTM: Trade unions network.

The registration of voluntary organisations is defined and undertaken in terms of the Decree for the formation of local associations (1991). The co-ordinating NGOs in Mozambique feel however that this process is made difficult by the widespread corruption and also by the red tape. Furthermore, in a vast and country within problems of accessibility the registration of NGOs away from the capital city is extremely slow and not always functioning.

A process is currently under way for the designing of a new law to govern the not-



for-profit sector in Mozambique. But, in the words of the LINK and Kalima secretariat:-

“Whilst the government is pursuing the long process of designing a new law concerning the activities of NGOs in Mozambique, and without the minimum of consultation and dialogue, the situation remains inefficient and ineffective”.

The NGO Sector has a very clear vision of the kind of legal environment they would want to work in. They would want simple and robust registration systems, easily accessible to the different geographical regions/provinces. They would want to evolve a code of conduct that ensures the integrity of NGOs. They would want minimum bureaucracy, as well as the assertion that they have a right to participate in comprehensive social justice programmes including rights-based work. They would also want the latitude to import project and organisational equipment/goods free of taxes and duties, to fundraise free of tax obligations, etc. The concomitant responsibilities that they see are to fulfil minimum reporting and accountability to an autonomous administrative body, and to co-operate with Government officials and plans at appropriate and mutually beneficial levels.

## **BOTSWANA**

The formal origins of the NGO Sector in Botswana are traced to relatively recent historical crisis points like the 1965-69 drought and famine when NGOs were formed generally to deal with welfare matters particularly famine relief. At that point in time, the Government was more concerned with relief facilities reaching the people than with within the legality or otherwise of bodies instrumental in assisting in the same.

It was only in 1972 that a law dealing with “Societies” and “Associations” was enacted. In the analysis of some Botswana NGOs, the striking feature of the 1972 law was its simplicity.

The law accords the power and responsibility to register voluntary organisations to a Registrar who is an officer in the public service and is appointed by the Minister of Home Affairs.

For a voluntary organisation to be registered it must furnish the Registrar with its governing documents, list of office bearers, and must indicate that it operates and holds its meetings in Botswana.

The Registrar has the power to refuse to register an organisation if its objects are unlawful, prejudicial to or incompatible with peace, welfare and good order in the country; the membership of the organisation is not clearly defined and there are no rules for dissolution of the organisation". The Registrar can also refuse to register an organisation if he "doubts the capability of the members to manage its affairs; its Constitution is repugnant to the laws of the country; where the organisation does not exist or its name so closely resembles that of other registered societies that it is likely to deceive the public or members of the society"

If an organisation is refused registration it may appeal to the Minister. The decision of the Minister is subject to judicial review.

Besides the framework on establishment and registration, the law has scope for very little else. Specific "accountability" duties towards the government include the filing of annual accounts, and any such changes as may have occurred with regard to the objects of the organisation, office bearers, etc. Generally the rest is left to be governed by the internal rules. Each Constitution, however, must state the general powers of each organ and office-bearer of the organisation, for instance the power of the Annual General Meeting, General Assembly, Secretary-General/ Chief Executive, etc. A recent study by the *Democracy Research Project* discloses that quite a good few of voluntary organisations do not follow their own internal rules. For instance in some cases elections are not held according to the Constitution. In one organisation the last elections were held in 1965 and the members assumed that elections would only be held if an office-bearer died.

It has already been observed that where members are aggrieved by any internal governance issues a claim may lie in the Courts at the behest of such members.

Where they make profit, NGOs are subject to taxation. The law permits an organisation to seek exemption under the Income Tax Act from the Minister of Finance and Development planning. It would have to be shown that the profit so made is not distributed as dividends to shareholders.

There are currently no tax rebates on donations to NGOs .

## ANGOLA

*Information had not come from Angola at the time of writing this report on account of the fact that their paper was still being translated from Portuguese into English.*

*However, concerns/expectations I garnered from the Angolan participants, who include members from the umbrella body that houses about 260 members, when they arrived for the Conference include:-*

- \* Discussion of the relationship of and mutual perceptions between Government and the Voluntary Sector, including the problematic that Government tends to recognise and apparently prefer to co-operate with those NGOs that work in the primary or complementary development sector, and not with those who are engaged in Human Rights work.
- \* Discussion of Financial Sustainability of NGOs not only vis-a-vis the Fiscal incentives and the raising of funds locally but also with respect to donors whose funding mechanisms are sometimes not clear to the NGOs with the result that in some instances funds end up not reaching the intended beneficiaries.
- \* Discussion around the nature of the law of Associations in Angola, comparable to Mozambique. Would its over-arching principle of providing the framework for activities of associations for the interests of their members not militate against the broader Civic mandate/desire to serve the general public beyond members of an NGO?

## **LESOTHO**

NGOs in Lesotho are registered under three pieces of legislation, the Societies Act of 1966, the Friendly Societies Act of 1882, and the Co-operatives Proclamation of 1948.

Apart from the Statute, the Law office has gone further to issue out a simple Manual setting out the requirements for registration. The Manual is meant to assist prospective applicants to prepare their documents for registration of their societies. In the estimation of the NGOs in Lesotho, the Manual has been very helpful coming in to assist as it were many people who would not have deciphered unwieldy legislative material.

The production of the Manual in Lesotho calls to mind the whole question of State technical assistance in the registration and life of NGOs. A Malawian Government official for instance suggested that there may be need to envisage in the indicators for an enabling environment the role that Government could play to help NGOs to register in terms of the documentation, situation analysis, etc. On the other hand this was seen as patronising on the part of the State.

The Lesotho legislation is very leading/instructive especially with regard to the rules and regulations that must be submitted on application. Detailed guidelines are put down and these include about 22 items, ranging from the objects of the proposed NGO to the manner of calling the Annual General meeting, etc.

As in Botswana, Zimbabwe, etc, the Registrar may refuse to register a Society on "public safety, morality, order," etc, ( S.7).

Comparing to the discussions on the Malawi Draft Law,*supra*, on the role of the proposed NGO Liason Board, another point needs to be captured here. This is the point on accountability in terms of reports, financial statements, etc, to appropriate organs of Civil Society governance. It emerges for instance that whereas in Lesotho the Registrar is empowered to demand reports from NGOs in terms of S.14 of the Societies Act. Yet at the same time the Lesotho Council of NGOs in its Constitution provides that every member is required to give reports to the LCN. Add to that the expectations that the membership of an organisation in Lesotho may have towards accountability from its officers. Not to mention donor expectations. There is hence need to examine carefully how to mainstream the expectations of the different stakeholders to ensure that NGOs are not consumed by oversupervision.

### **Conclusion**

There appears to be need to follow up on information and build a reliable database at the cluster level. There might also be merit in stimulating lateral discussions possibly through a workshop at Governments level, on the question of the enabling environment that they would want to see in their countries for the civil sector. This could mediate tensions of ownership and help speed up the process of change.

**T. Mutasa, September 1996**

**Zimbabwe**

















Environment (Rio), Social Development (Copenhagen), Women (Beijing), Population (Cairo) and Habitat (Istanbul), a lot of space has opened up for NGO to participate in setting the agenda for social development. This seems to be the test phase as governments themselves worry about how to tackle the agenda. However, this room may constrict depending on the balance of forces between the State and the advocacy initiatives of the NGO sector - particularly if the perception changes to that of NGOs threatening the power base of the ruling elites.

It is necessary therefore that NGOs engage in activities that go beyond national level activism. This realization exists within the umbrella organizations. The several networks in East Africa have been discussing the establishment of an East African NGO Network to influence issues of regional cooperation around the regional economic blocks of the East African Cooperation, the OAU, the African Development Bank, SADC and other donor initiatives like the Horn of Africa Initiative and the Great Lakes Initiative. This cooperation is also likely to expand to linkages with Ethiopia, Eritrea, Rwanda and Burundi. MACOSS in Mauritius and several other NGOs in the country are also moving towards closer cooperation with their counterparts in the Indian Ocean Rim countries of Mauritius, Madagascar, Reunion, Seychelles and the Comores.

Understanding of the regional issues however remain low and the necessity to build information capacity is recognized.

#### Proposals for an Enabling Environment

In terms of an enabling environment to be provided by the state and other power structures, the suggestions from the region have focused around the following key issues:

- A written policy framework negotiated between the state and civil society - particularly NGOs.
- A minimalist legislation that promotes quick, easy, cost free registration of all civil society organizations
- Decentralized registration process for small NGOs/CBOs in the regions
- Legislation to incorporate the right to freedom of association, assembly and organization without the necessity of having to obtain State permission or license.
- The Constitution to be amended to recognize the role of civil society organizations as legitimate social actors with the right to exist, monitor state deviance from stated policy or law and challenge state action.
- The right of the sector to self govern and regulate its own membership
- The establishment of a public resource centre that provides basic information on development activity by the state, donors and civil society organizations.

- right to freedom of information from the state
- The changing of definition of NGO to something akin to what it is - voluntary organization.
- Minimalist reporting requirements from NGOs
- Statutory right to participate in national social policy development and to be consulted on development and rights issues
- inclusion of an NGO Development Fund subsidy in the national budget and right to such state subsidy by NGOs on application
- right to raise funds from the public
- tax benefit for citizen contribution to NGOs
- tax exempt status for all registered organizations
- right to participate in national development activities with relevant government ministries and to sit on national or sectoral advisory bodies.
- incorporation of an NGO developed Code of Ethics/ Conduct/ Good Practice in the law.

In order to achieve some of the aims of the sector for the creation of an enabling environment, it has also been proposed that NGOs negotiate, where government are about to pass new legislation, a moratorium on the law whilst the sector gets together to discuss and prepare policy positions for adoption by governments. Such a move is expected to show government's goodwill and the sector's interest in being partners in development.

#### Future Projections

Future of the NGO sector in promoting an enabling environment has been discussed at two levels. The first being the kind of issues and activities that need to be promoted in order to achieve consensus within the sector. These issues, as outlined above, focus on concerns around an ideal legislation to promote an enabling environment for development, the development of a Code of Conduct and issues related thereto, concerns for capacity building to manage the organization of tomorrow, the entrenchment of core values within the sector, the enhancement of NGO public profile, strengthening of umbrella organizations and broadening effective networking and advocacy for social policy change.

Some of the issues raised include:

- The urgent need to analyze current legal regimes prior to legislation in order to understand what the controlling features are. This should be done against a set of core indicators developed for the promotion of an enabling environment for development. "It is dangerous to assume that any current legal regime is enabling".

- Legislation can only be a basis for organizing the sector since NGOs network best when under threat. The sector must then examine and clearly spell out its vision, mission and policies to identify tensions and conflicts and build lasting alliances.
- NGOs must learn to analyze its bargaining power and utilize opening spaces in order to build positive relationships with other players whilst being alert to the potential for cooption.
- NGOs are only a peripheral sector of society and not another term for civil society itself. It would therefore be naive to isolate the sectoral struggle for an enabling environment outside the context of the liberation and democratization of society as a whole.
- The struggle for independence of civil society is preferred over the struggle for an enabling environment for the NGO sector.

At the second level, discussion of the future has been in terms of developing scenarios and gazing into the future to understand the nature of NGOs in next century. Insights gained can be used in the critique of policy and legislative regimes being proposed for the coordination of the NGO sector. Whilst a future scenario is rooted in one's world view, the vision of freedom of association within a pluralistic society can guide some thinking.

The NGO sector is being prepared for a sub-contractor role as a precursor to the takeover of society by the Market. However, since the market remains insignificant in most parts of Africa in the foreseeable future, NGOs will continue to play a crucial role. Whilst the state will eventually make a comeback as the dominant player, the time is now for NGOs to position themselves for proactive policy engagement with the state in order to position itself as a dominant player for social good in the future.

Another scenario suggests that the NGO sector will not retain its dominant position as donors are increasingly channeling funds directly to CBOs as the new partners and as the globalist agenda impinges increasingly on the grassroots, middlemen roles for NGOs will diminish. Depending on one's world view, this will not be a bad thing since it will herald the rise of civil society and the absorption of NGOs within mainstream civil society.

After all, isn't built-in obsolescence the overriding value of any NGO?

# **An Enabling Framework for Civil Society Conference**

Opening Address delivered by:

**RAMS RAMASHIA**

**President : South African National NGO Coalition**

**16 September 1996**

Comrade chairperson, political leaders, dignitaries, government officials, delegates, ladies and gentlemen. It is indeed a great pleasure and privilege for me to officially welcome you all to this historic and auspicious conference entitled "An Enabling Framework for Civil Society".

I deem it proper and fitting to extend a special word of welcome to you, our brothers and sisters from neighboring countries. I welcome you all to our non-racial, non-sexist democratic South Africa, governed by a new constitution, underpinned by a Bill of Rights.

It is an open secret that our country would still be suffering from the barbarism of apartheid had it not been for the spiritual, moral, logistical, military and material support your countries gave us during our liberation struggle. On behalf of all the freedom loving people of our country I would like to pay tribute to your respective countries and acknowledge my country's indebtedness to you all for your selfless and sacrificial support.

It is interesting to note, however, that the liberation you have helped us obtain, has brought about new challenges for the NGO sector in South Africa. The NGO sector has sustained an unprecedented erosion of key leaders when some of our comrades decided to take public office. While this represents a great loss to the NGO community, it is a gain to the country in that this exodus has significantly enhanced the government's capacity to deliver to its people. Unfortunately, this happens at a time when donor policies and priorities have changed, making it difficult for us to access money to train another cadre of leadership. But NGOs are by their very nature, survivors. We have survived many hostilities in the past and we are not about to give up. Our new challenge is to find innovative ways to do more with less.

Another formidable challenge occasioned by political changes in our country is for us to manage our relationship with our new government. It is our responsibility to seek to contribute towards the creation of an environment which promotes civil society participation in the process of governance. This process inevitably requires a review of the current jurisprudential framework conceived by the apartheid system and intent on destroying the NGO sector. I believe that NGO coalitions and consortia from different countries are all struggling with the task of developing mutually beneficial activities without one sector being co-opted to the agenda of the other. We need to find ways to establish functional relationships with our respective governments in such a way that our identity is not destroyed. We need to establish relationships based on terms which do not compromise our autonomy.

We need to find ways of co-operating under conditions which will not bring our integrity into disrepute. Since NGO activities are an expression of civil participation, it is imperative for NGOs to preserve their identity, project their independence, and retain their integrity at all cost. Having fought and won bitter struggles against colonial rule we owe it to ourselves to ensure that we don't lose our hard-earned democracy. For our democracy to be sustained, it is imperative that we ensure that governors are held to account to those who have elected them and over whom they rule. This can only happen in an environment where institutions of civil society are guaranteed space to operate with, independence, integrity and assertiveness.

A cursory scan of political dynamics in Africa bear witness to the fact that while democratic constitutions are a necessary condition for the creation of a democratic order, a robust and vibrant civil society is a *conditio sine qua non* for the sustenance of a democratic culture. Evidence looms large in Africa, of governments which either outrightly violate constitutions or engage in activities which undermine the constitution, with impunity. Given the fact that democracy is a prerequisite for foreign aid many African dictators practice theatrical democracy, aimed at satisfying those who watch from the Western gallery. They parade mock elections every five years in order to meet the minimum requirements for foreign aid. These elections do not give the people the power to decide who they want as their leaders. These elections do not even change the content of the power between parties. Even if the constitution pays lip service to multi-party democracy, the reality is that only one party is given the political space to mobilize. In some instances, the cost of the political campaign of "the party" are funded from the national fiscus.



In African countries where civil society is weak we have witnessed governments which due to political expediency, decided to embrace spurious socio-economic policies with short term gains, and consequences which are repugnant to sustainable development, causing untold social and economic damages.

Certain African dictators see NGOs as a threat to their absolute power and seek to control them through draconian laws. This form of undemocratic behaviour destroys the spirit of patriotism and render NGOs vulnerable to be co-opted to agendas of foreign imperialists intent on undermining the sovereignty and integrity of African states.

In a democracy, politicians are elected representatives of the people, and as such, carry terminal responsibility for what happens within their borders. But the task of governance is not an exclusive privilege for politicians, for politicians are not the sole repository of wisdom, knowledge and goodwill. Citizen participation in governance is not a gift or privilege governments bestow to their people as bonus for good behaviour. In a democratic order the participation of citizens in the process of governance is an inalienable right not contingent on the mood of the ruler of the day, which is susceptible to seasonal changes. As citizens, it is our right to demand open, transparent and accountable governments with a right-sized, effective bureaucracy devoid of any form of corruption whatsoever.

Our role as NGOs is, therefore, to deepen a democratic culture and promote participatory democracy where ordinary people have a say on how they want to live their lives.

NGO consortia in different countries will be well advised to take the initiative, to develop a policy framework that enables civil society organizations to make their contribution to development without undue state interference. NGOs should facilitate the development of a jurisprudence, which recognizes the value that civil society organizations add to the development process. Such regulatory framework must promote democracy, openness, transparency and accountability. Such legislation must not be aimed at controlling civil society but at liberating it. It must not be aimed at destroying civil society but at promoting its vibrancy. If it is meant to be used by ordinary people, it would have to be simple and user-friendly.

Let us together reflect on these issues in the next few days with an honest and deliberate intent to learn from each other's experiences. I am confident that by the end of this week each country will be better placed to develop sound guidelines for good policy and practice.

# REGIONAL SYNTHESIS

## EASTERN AFRICA

Kenya, Uganda, Tanzania, Mauritius & Madagascar

### Introduction

The Regional synthesis was developed out of a process of preparation for the conference on enabling environment for civil society. A draft template of issues to focus on was developed and agreed with the organizers and national umbrella bodies and networks in the region. The intention was to develop a participatory process with NGOs, through their national umbrella organizations and networks in order to facilitate in-country discussions around the identified issues and to develop a draft country paper. This process, it is hoped, would vest ownership of country preparatory process and outputs within the sector. Thereafter the country paper was to be subject to discussion between NGOs, respective umbrella bodies and where possible, government officials, donors and the media.

The country paper was then to be finalized and made available for preparation of the regional synthesis. The synthesis would focus on a situation analysis of the region within the context of the global perspective of socio-political and economic change after the cold war and the imposition of the New World Order. It would also look at the local policy regime in the region.

The purpose of the synthesis would also be to raise potential scenarios for the voluntary action within the development sector. It is expected that the overview presented in the regional synthesis would assist participants at the conference to discuss concrete legal and policy issues within the context of the larger global issues and propose concrete directions for the establishment of enabling policy, legal and operational environments for voluntary action aimed at social equity and justice.

Whilst it is admitted that given the time constraints and communication difficulties in the region, the country paper preparation did not involve as many participants as was earlier suggested, the regional coordinators hope that the regional synthesis for the different regions will provide some useful background and serve as a basic discussion paper around which country and regional clusters will focus to enrich the analysis and develop the agenda further at the conference workshops and beyond.

Finally, the regional synthesis is not a comprehensive review of all the different country specific contexts and analysis but only a think piece with some examples to highlight similarities and differences in the respective regions and country clusters. Detailed analysis are available within the country reports for consultation.

Civil Society is a very broad term which historically included the whole of society outside of those who are in control of the state. However, post-cold war development theory proposes a three sector model of partnership between the (1) State, the (2) Market and (3) Civil Society. The State is understood as those who are in possession of political power, the Market as those who are in the private profit sector and Civil Society thus becoming a residual category to capture all those who do not seem to possess the means of power or economic production!

When unpacked further, the model seems to turn social relations on its head and suggest that IBM and Coca Cola are equal to the single mother selling vegetables on a street corner for basic survival because the state has evicted her from her shanty town dwelling and the market cannot give her credit to set up a kiosk. Her children in the meantime have to be fed and clothed since the husband is away working in the mines or plantations of the Market. Or perhaps that the community based organization (CBO) working on water or health issues belongs to the same sector as the Mafia because the CBO is a part of civil society by definition and the Mafia by default - it has no legal legitimacy to operate (and therefore cannot belong to the Market); and there is no other sector for it to relate to. Since Civil Society is a term used for organized structures within society (outside the state and the market), the individual, the people are silently left out of the calculation.

The reason to upscale or mainstream the Market at this historical juncture has also to be questioned in order to understand the future of the voluntary sector and scope for civil society to organize for development. The three-sector model promotes (a) the mainstreaming of the Market forces as the engineers of social development, (b) the downsizing or rolling back of the State whose role is to be restricted to that of a functionary to promote private sector interests and (c) Civil Society as the balancing force that takes over from the State its social service provision responsibility - perhaps until such time as the market is ready to take over from Civil Society. In the meantime, Civil Society has to promote a partnership concept with social "stakeholders" (a World Bank coinage) i.e. communities (the masses), the Market and the State - as if this were either desirable or even possible.

Given that African civil society organizations are very weak, the states authoritarian and the market non-existent on the international level (1% of international trade), what possibilities and scenarios are there for the three-sector model to play out on the continent and level the playing field for democracy, respect for human rights and alleviation of poverty of the masses living in absolute poverty?

The future of African civil societies and their scope for making change towards greater social equity and economic justice has to be understood within the context of global trends, promoted, sometimes unconsciously, by the elite within the NGO sector itself in Africa.

## The Regional Context of Development Sector Activity

The NGO Sector in the region is entrapped within the emerging post-modern development paradigm that promotes the sector as an alternative to the state and a partner of the private profit sector in the delivery of social welfare services. In interim period of economic liberalization, the sector is also expected to act as a guardian of democratic governance within a capitalist orientation.

Civic action by NGOs is made up at a variety of levels. These include international and national NGOs that are part of the donor chain whose survival is predicated on continued external donor support. Professional organizations working on human rights issues and research and advocacy. These are of recent vintage over the past 10-15 years. Huge government and political party linked NGOs like the national women's organizations (e.g. *Maendeleo Ya Wanawake* in Kenya) that have thousands of members around the country and more recent service provision and government funding hopefuls created by bureaucrats. Traditional charities and social service and cultural organizations that are linked to international relief organizations, are colonial creations or are linked to religious groups and communities (Red Cross, Housewives Consumer Associations, charities for the care of the disabled, provision of health services, etc.). Foundations and corporate NGOs mostly from the northern countries and former colonial rulers. And thousands of community based rural and peri-urban NGOs and CBOs that have proliferated in the recent past for a variety of suggested reasons. These include increased political space for organizational life, the failure of the state to provide basic social amenities, the focus on the empowerment of women through income generation projects, the potential for donor funding, the hope of state funding, increased appreciation by communities and the marginalized on the potential for leverage through organized activity, the promotion of organizational life by large NGOs themselves and the promise of support to grassroots communities by potential donors that they too could tap financial and material resources if they had the 'legal status to open a bank account'.

Our primary concern perhaps should be with the earlier group of NGOs that are a part of the donor chain, are the ones that substantially participate in such conferences and are the loudest voice within civil society.

The sector is therefore expected to be prepared to manage increasing direct resource flows from donors and government in order to provide public services hitherto managed by the state as a fundamental democratic responsibility. The definition of NGOs, in this context, would expand to include other 'civil society' actors as well. These include community organizations, associations involved in charitable/ developmental work, family groupings and all the others mentioned above. Civil society, and particularly NGOs, would therefore be expected to have the necessary capacity, commitment, national outreach and indeed legitimacy to take on the social service provision responsibilities of the state.

Whilst it has been argued in self defense that increased funding to provide social welfare services is not such a bad thing, that it is time the north paid back for what it takes away everyday in terms of social surplus from Africa and that the State has failed to do its job, it has also been suggested that the issue be looked

at more closely. The new dispensation will not make NGOs more independent of donors and states but will achieve the opposite. NGOs will become contractors and sub-contractors to donors and the state in service delivery. We will be privatized by the market forces and expected to continue to provide low cost, more efficient and quicker delivery of services - all with a smile as our hearts reach out to the poor and the oppressed. Issues around social policy changes will have to play second fiddle to overriding concerns for managing time and resources to stay afloat. This may not be a bad thing for a few experts. What will it do to the mass of civil society organizations who are marginalized by virtue of their lack of capacity to manage external resources and who organize to change the social relations within the local context?

The NGO sector in the meantime remains internally divided. International and national NGOs and Community Based Organizations (CBOs) promote different priorities. It disagrees on the role of NGOs in development. The elite, urban based NGOs focus on relief, development and human rights as mutually exclusive sub-themes whilst the activities of rural CBOs and small NGOs centre mainly around social welfare provision, membership support and micro-enterprise concerns as principal activities.

NGOs proliferate and seem to be the fastest growing upwardly mobile section of society. Communities, professionals, pressure groups, governments, political parties and private corporations and lobby interests are all moving in to establish NGOs. The sectoral values of people-centred development, participatory action and pro-people advocacy initiatives is fast getting diluted under pressure of World Bank sponsored ideas of "stakeholders" and "partnerships" between unequals. The stronger the capitalist base of the economy, the greater the power and capacity of corporate NGOs.

Within an African context, the space for small community based initiatives to promote voluntary action for local change is drowned out by the cacophony of policy oriented, advocacy pushing, large service provision NGOs whose budgets can be expected to outstrip those of governmental departments. Values centred around a package of 'rights and responsibilities' of groups are being overtaken by those promoting individual freedoms and rights.

Umbrella bodies struggle to bridge the gap between race and class interests. The dividing line between "politics" and "party politics" remains thin as governments, donors, opposition political parties and the private corporations level the playing ground for state control and outreach to the citizen through NGOs who are perceived as having substantial grassroots contact and influence. The experience of umbrella organizations in the region are instructive in this regard.

Kenya has the National Council of NGOs which is a statutory but self-regulating body. Its current membership is just over 700. International NGOs seek cover under the NGO Council umbrella because membership is automatic upon registration and it provides a political shield in times of hardships. Beyond that, most of the international NGOs seek to stay away from the pro-people advocacy initiatives that the NGO Council promotes in pursuance of its vision of promoting voluntary action for social justice. The state, through legislation, legitimizes only

those NGOs that it considers safe from an undefined 'national security' perspective. In the meantime, the NGO Council proposes to legitimize voluntary action through open house membership for all civic organizations (registered or otherwise) of its various networks.

In Mauritius, on the other hand, the statutory umbrella organization is made up of about 95 voluntary members who seek membership and are admitted upon fulfillment of certain conditions. As a result, other umbrellas exist and have membership of their own with little or no contact with the larger statutory umbrella.

Tanzania and Uganda have several umbrella bodies, each independent of the other with varying levels of joint action and networking between them. Madagascar also has a network or two with most of the NGOs being outside the ambit of such umbrellas. The challenge seems to be for the umbrella bodies to define their missions and promote the development of civil society by providing leadership and space for civic organizations as it works its way up to a position of strength and equilibrium with the state and market forces.

NGOs generally network and organize joint action at times of external threat - especially when the threat is perceived as going to the root of their financial lifelines. The establishment of the NGO Council in Kenya is one example of NGO networking as a direct result of the threat posed by the passing of the NGO Coordination Act without their consultation in 1990. In Tanzania the three major NGO umbrellas are similarly responding to state threats to pass NGO legislation soon by moving to establishing a national coalition to discuss the proposed NGO policy framework and law. MACOSS in Mauritius is also responding to external stimuli by jettisoning traces of government NGOs and officials within its membership and proposing an NGO Code of Conduct. In Madagascar NGOs are getting together to form alliances to respond to the new law on NGOs. Seychelles is soon to discuss NGO inputs towards a legal framework. What do these examples suggest?

The donor community, private sector and opposition political parties and some NGOs herald the age of a downsized state in order to create more space for their own enrichment whilst the larger majority of NGOs despair the roll back of the state. The fear of a tremendous increase of responsibility for NGOs to step in the shoes of the state without adequate financial support, institutional capacity of even broad public legitimacy creates a crisis of its own.

In this scenario, NGOs remain sandwiched between the elephants and the grassroots, lacking in financial capacity, public legitimacy or state acceptance as the new leaders for tomorrow. NGOs are unprepared, sometimes unwilling and generally incapable of taking on the donors, private sector and the state at the same time.

Economically weak but authoritarian states are finding it difficult to find accommodation in this New World Order. The state is buffeted by opposition from the outside (donor conditionalities, Structural Adjustment Programs, increased international monitoring for economic waste and human rights abuse and direct

funding of NGOs) and from within (religious organizations, opposition political parties and other civic lobby groups) all at the same time. It is slowly giving in without really understanding the nature of the global changes around it.

The governments in the region all seem to portray a somewhat schizophrenic attitude towards NGOs. In Kenya where the NGO sector is larger than elsewhere in the region, estimated figures show that almost 60% of rural health services and 40% of education is provided by NGOs. NGOs are the sole providers of free legal aid to indigent citizens. Elsewhere the role of NGOs, particularly in the difficult areas like support for HIV/AIDS victims, street children, urban slum dwellers and refugees is increasing and being increasingly recognized by governments. Many government officials now openly recognize the contribution of NGOs in social service delivery and in the same breath castigate 'human rights' NGOs as power-hungry trouble makers allied to the opposition parties. Because NGOs, particularly the high profile international NGOs, specifically focus on service delivery in an apolitical manner, the role played by activist NGOs on rights based concerns is marginalized. The bridge between development and rights to development remains large. It is being increased by the new policy agenda increasingly being packaged as 'capacity building' and 'sound management practices' for accountable and affordable service delivery. Few NGOs in the region see the essential nexus between relief-development-rights. The docility of the NGO sector separates it from the rest of civil society that engages in struggles for liberation from authoritarianism at all levels. NGOs in the meantime are involved in their own internal struggles for organizational democratic practices and in understanding the difference between "non-partisan" and "non-political".

Donors on the other hand, promote NGO activities around their capacity to promote participation with communities and 'grassroots' groups. Participatory methodologies for social change cannot be apolitical. It is of its essence a political act. States support the participatory angle as long as it remains within the bounds of non-political activity like organizing women to bear a triple burden of economic and social reproduction at the household level and to then take on the additional burden of engaging in extra income generation activity. At the end of the Market benefits from this support of labour reproduction cost. However, donors are not allowed to fund political change activities and it is feared that this support for participatory action may soon diminish as communities take on the fundamental structural issues within their societies in a participatory manner.

With the changing socio-political environment and the enforced economic liberalization of African economies, development is no longer being treated as a monopoly of the state. De politicizing civil society and focusing on service provision have hitherto gone hand in hand. The question of states being accountable to the people and not just to themselves, the demands being made by the corporate sector for liberalizing the economy (largely for foreign capital and goods) and the enhanced role for citizen action in determining the direction of development are all on the agenda. NGOs in the region are divided in their visions for engaging in changing the dominant discourse on development through participatory political action.

posting bail in court, etc.) or sporting and cultural activities. These organizations did not make the break to development NGOs.

NGOs are a recent phenomenon. Their formation, legitimacy and resource base comes from outside the communities rather than from within. In Kenya estimates for 'NGOs' vary from 30,000 - 47,000 of which over 40,000 are grassroots organizations (25,000 being women's organizations) that are not registered under any law but have informal recognition as community based 'Self-Help Groups' by the Ministry of Culture and Social Services. Mainstream NGOs which have legal registration and an office based physical address are less than 4,000.

In Tanzania there are less than 900 registered NGOs and several hundred community based organizations that are not registered under any law but are generally recognized by the state functionaries at the district level. Similar figures apply to Uganda as well. Mauritius has about 500 registered NGOs and several thousand grassroots community organizations. Madagascar has very few registered NGOs but organized community action continues within the rural areas.

Whilst the reality exposes a rich tapestry of organized civic action at the grassroots, the state dictates that all organized activity be legitimized by it through registration under one or more of the 5-6 statutes that apply in each of the countries.

It is necessary therefore to consider the need for such legislation and its impact on peoples' voluntary action if, everytime they have to meet to address the causes of their marginalization, they first have to seek government permission.

#### Nature of the State

The states in the region have generally been described as being soft but authoritarian. Colonial rule set the standards for unaccountable governance. Independence was negotiated with a local elite that had largely been prepared for post-colonial governance in the image of the Westminster parliamentary model. The difference being that the colonial state ruled without and indeed outside a constitutional order but insisted on one for the emerging ruling class in the ex-colony. Democratic order had to have a constitution with a Bill of Rights that was observable more in the exception. Governance practice within a national security focus continues to date.

Over the past 30 years of post-colonial rule, elites in control of the state ruled with an iron hand and allowed little dissent. The rhetoric of African socialism, nationalism and state controlled development ensured that the politically connected developed into the new bourgeoisie.

Kenya and Mauritius charted a capitalist path. Tanzania and Madagascar went through the socialism hoop. Uganda tried the middle path - something akin to social capitalism. However all the states were largely appendages of international capital with little control over the national resources or the political will to achieve the promises of independence: that of land, freedom and human dignity.



Socialist experiments in Tanzania, Uganda and Madagascar led to the entrenchment of the state, through the respective ruling parties, into the villages and urban communities. The state organized civic action for development and utilized voluntary (often forced) labour for large scale development projects like water and irrigation and construction of public utility buildings. The party ruled supreme and its effects are felt upto today. In Tanzania government officials still control development action at the grassroots and NGOs do not perceive the state, albeit a post-socialist state, as an antagonist. In Mauritius, with a greater measure of democratic freedom, the state established or actively supported social welfare NGOs on whose Boards and committees many state functionaries sat. National Councils of Social Services under the relevant Ministry of Culture and Social Services or Family were established by the State to ensure political control of peoples' organized action towards development.

In Kenya, with a long history of organized action for political freedom, the state opted to sanitize the development community through registration (and at times mass de registration) of social welfare organizations under the Societies Act. It also diluted the potential for organized networking by diluting the sector through registration of rural social clubs and beer halls, political parties and religious organizations, women's associations and community groups under one law - the Societies Act. State presence at the village level through the posting of government servants called 'Chief' ensured that the 'Divide and Rule' policy perfected by Lord Lugard in colonial Nigeria was well entrenched in East Africa as a local governance tool.

As a result the principal law of organization for civil society - the Societies Act in Kenya, Uganda and Tanzania and Mauritius remains unchanged todate. Any seven persons can seek registration as a Society so long as they have an acceptable constitution, a managing committee with a treasurer and a set of acceptable aims and objectives. In East Africa, such societies had to go through a security check before being granted registration. Such societies did not acquire corporate status and its members are individually and collectively liable for the organizational misdeeds. The need for amendment to the law has not been seen by governments. The laws have served the purpose they were intended to: to ensure that civil society does not organize outside state ambit to pose a threat to the monopoly of power.

Governments in the region over the past ten years have been on the retreat. Citizen pressure for opening up of democratic space, the advent of political pluralism through the registration of several political parties, the flowering of an independent media, the reduction of government's capacity to provide social services, the external donor conditionalities and the liberalization of the economy have all played a role in this.

#### Potential Role of NGOs as Change Agents

Whilst increased space is available for independent civic action, civil society as a whole continues to be very weak. The ravages of Structural Adjustment Programs (and in many places the HIV/AIDS pandemic) ensures little room for social action beyond the promotion of livelihood survival strategies.

The promotion of an enabling environment for civic action around social policy change, improvement of livelihood strategies, structural adjustments and promotion of human and peoples rights has to be more clearly understood and internalized by the broad mass of civic organizations as they work towards building capacity as effective social change agents. The mentality of service provision as an end in itself is dominant in many of the smaller organizations.

NGOs in the region rarely challenge the structural causes of poverty. The sectoral focus remains on treating the symptoms of poverty and deprivation. Discussion around 'enabling environment' are still restricted to the relations with the State and sometimes donors. Issues of accountability, transparency, internal democracy, participation and empowerment are substantially clichés for donor funding proposal writers. Democracy, in all its manifestations has not been indigenized. Kenyans feel that they live in an undemocratic society because the state still controls and interferes in NGO activity. Mauritius NGOs feel that they live in a very democratic society for the opposite reason. Tanzanian and Madagascar NGOs feel that they live in a fairly democratic society because government is negotiating proposed legal and policy regimes for NGOs whilst Ugandans continue to remain unsatisfied with their lot.

Indicators of democratic environment do not presently take into account the levels of accountability that go beyond financial statements and annual reports to donors and audited accounts to government. Membership NGOs hold cyclical elections. Gender bias towards those of male origin persist and democratic practices and public domain transparency of action is reserved for the state. Self governance connotes unfettered freedom to associate, organize and promote the agendas of the piper who pays - mostly external donors. NGOs work in communities by sheer force of economic power and skills base rather than a pre-negotiated social contract with the community where the issues of democratic practice, accountability to the community and transparency of action of the NGO personnel and its policy have first been resolved.

Legitimacy of the NGO sector seems to emanate from its legally registered status and financial capacity rather than public acceptance. Some argue that if NGOs substitute state service provision, then their legitimacy derives from such action, or by virtue of acceptance of services and support by communities whilst others argue that legitimacy of the private sector is by virtue of fundamental right to associate and others promote the concept of legitimacy by default - no one has challenged our credentials, therefore we are legitimate. The issue is thorny and most NGOs in the region have avoided a detailed discussion. A minority, sometimes attacked as 'statists' have promoted the view that NGOs stand out in the public domain to do public good without seeking profit or reward - on this earth at least. Hence they must be legitimized by the public domain around a set of key values and indicators of credibility, accountability, transparency, democratic governance and pro-people action agendas. That whilst the doors of democratic indicators are not closed, NGOs must first satisfy the demand for an enabling environment vis a vis the public before NGOs can propose a enabling environment for the itself from the state. Whilst this is a hard position to take, the issue of an enabling environment cannot just remain a State v. NGO issue but must incorporate the

concerns for fundamental national values and alternative culture that NGOs envision within society.

#### Values of the Sector

NGO sector values, long taken for granted but otherwise little understood or practiced, have of late come under attack as a result of several international and local scandals. Stories abound in the region over scandalous individuals and NGOs.

The lashback has been to focus on national NGO codes of conduct, regulatory provisions in the law, threats of de registration by government, funding cuts or withdrawals by donors, bad press and winding up of several organizations. Tanzania and Mauritius are presently contemplating a code of conduct for NGOs whilst Kenya has one.

The Kenya Code of Conduct was developed by the membership of the NGO Council in 1992 around a set of seven core values of probity, self regulation, justice, service, cooperation, prudence and respect. These values express "the ethos of NGOs..." and each of the core values is unpacked and explained in the Code of Conduct. Government, at the request of the NGO Council, took over a year to register the final agreed draft of the Code as part of the self regulatory framework of the NGO sector. The purpose of the Code is to establish a set of core values that individuals buy into before they apply for registration as NGOs. The Code also sets up a Regulatory Committee made up of members of the NGO Council and an independent advocate appointed by the Law Society of Kenya. The second major purpose of the Code is to promote a value driven development agenda that has public support.

The Code came into effect sometimes in 1995 and to date over 15 complaints have been lodged with the Regulatory Committee against NGOs and their staff or officers. Under the Code, any citizen can lodge a complaint against a member organization. Non-members of the Council who work within the Council's Networks (Human Rights, Gender & Governance, Children, Peace, Participatory Training and a host of others) must, as a minimum, agree to abide by the Code as a voluntary measure.

Experience from the complaints received so far show that NGO deviance falls into several major categories. The nature of complaints vary from failure to respond to correspondence, misappropriation of funds and unlawful dismissal to breach of national security and racist practices. The allegedly deviant NGOs, particularly those alleged to have misappropriated funds fall into the two categories of those who are clearly misappropriating funds to those who have not done so but lack the capacity to write their books of account properly. In the latter case the NGO Council negotiates the particular NGO's Board and donors to put in place a proper audit, rewrite of the accounts and a capacity building program to train staff or engage qualified staff to manage the finances.

The NGO Sector in the region is generally conscious of the values it needs to promote. Legitimate concerns for lack of capacity, networking and information

and donor or sometimes voluntary membership support militate against the exercise of the full set of values.

Some of the areas of critical concern relate to the role of umbrella bodies and networks, the promotion of democratic internal governance, support for discriminatory practices against women, the disabled or poor communities.

There seems to be general agreement in the region that a Code of Conduct, advocacy campaigns around the ethical issues, capacity building initiatives and targeted self regulatory measures against persistent deviance within the membership will propel the sector forward towards acceptance of the Code.

Unresolved concerns around how NGO consensus is to be arrived at around the Code of Conduct, who is bound by the Code, how is it to be executed, the impartiality of guardians of the Code, the role of the state in managing deviance, the capacity of the sector to self regulate, the necessity for voluntary acceptance of the Code, the outcome of refusal to be bound by the Code, undesirability of imposition of a Code across the board and the possibility of NGOs in reality accepting the values contained in the Code still remain. Rushing into legislation may be dangerous. Learning for the experience of others may be useful. Necessity for an agreed value base remains a foregone conclusion if the sector is to move towards public acceptance and legitimacy as a homegrown democratic institution rather than a foreign imposition so long as the money continues to flow.

Whether there will be NGO in heaven or not seems to hinge on us.

#### Legal & Policy Regime

In order to manage political change, most governments in the region are promoting new legislation tailored to control political parties and NGOs. These two sectors are being removed from the umbrella of charities laws and given their own legislative covers.

*Many NGOs are outside the ambit of the law*  
Kenya passed the NGO Coordination Act in 1990 which has still not gained acceptance within the NGO sector and is due for further amendments. In the meantime there remain several thousand potential NGOs in Kenya who are outside the 'coordination and control' ambit of the NGO legislation, having been registered earlier as Companies limited by guarantee, Charitable Trusts, membership Societies, Cooperatives or even operating 'illegally' as community based 'Self-Help Groups' with the tacit consent of the state. NGOs in the meantime can only get registered if they first pass the security whetting conducted by 'Special Branch' police officers.

Ugandan NGO legislation dates back to 1989. The law also has a 'national security' focus. It is aimed at ensuring that no NGO can register under any of the associational laws (Companies, Trusts, Societies) unless it first has the security approval of the NGO Board. The non-political, non-threatening sanitary mark has to be imposed by the state before civil society organizations may proceed to gain corporate citizenship, the fundamental right to associate, assemble and organize notwithstanding.

The World Bank is currently pressurizing Madagascar to pass an NGO law. The draft laws presented to Parliament was promoted by the donor group and some external international NGO support rather than by indigenous NGOs. Its aim essentially is the same - managing a sector whose potential for activism is on the rise within a fast changing global environment.

Tanzania is presently debating a policy framework before an NGO law is passed. Tanzanians seem to have taken the wiser course of first promoting a draft policy paper on NGOs for discussion with the sector to seek their inputs on the policy framework and subsequent legislation. This move seems to stem from the nature of the state and its particular history over the past 30 years rather than enhanced benevolence of the state.

Mauritius, like all the other countries in the region, has no specific written policy on NGOs. NGOs are freely registered as associations and the state presently exercises little control over their operations - except in cases of extreme deviance. Presently the largest national umbrella body,, MACOSS, is seeking to pass a Code of Conduct and make other amendments to its statutory charter in order to meet the challenges of the state, adverse public perception and the proliferation of NGOs that number over 4,000.

The demands on the NGO sector in the region are increasing. Its public profile is low and credibility under attack. Legislation, around a set of specific values, seems to be the only way out. The balance of argument is between an unfettered human right for citizens to form organizations that exist independently of state control and public legitimacy in the marketplace and promoting broad public legitimacy by seeking a minimum legislative cover (to protect it from state excess) and self-regulating the sector voluntarily around core values and principles of operation.

Within the political domain, the sector also operates in a national vacuum of credible, committed and skilled leadership. The pressure on the sector to provide leadership to society in these times of change is high. The way forward to capture the opportunity suggests that the sector, not having the same public legitimacy as an elected government has, would have to seek refuge within a legislative umbrella that creates legitimate space for its self regulation.

Finally, one can surmise that states do not give up power easily. Where there is a lacuna of 'coordination', one can expect that legislation to tighten the space will come into being - sooner or later. Perhaps its is prudent to make proactive moves to focus on legislation at this point in time in order to negotiate a benevolent legal regime rather than wait for contradictions to sharpen and space to contract before becoming reactive. The example of Kenya as a reactive process and that of Tanzania and Mauritius as proactive processes are instructive in this regard.

The changing policy regime where there seems to be growing acceptance of NGO action will, in the short run prevail. There is some degree of relaxation of the 'state security' angle as governments find accommodation with the NGO sector and attempt to turn around the service provider NGOs to be better at the job within the broad goals set by national development plans. In most of the countries in the region, particularly after the spate of international conferences—around