

A GUIDE TO ESTABLISH AND SUSTAIN AFRICAN NGOS

LEGAL FRAMEWORK AND PROCESS FOR CREATING AN NGO

Introduction

The legal framework within which NGOs operate throughout the continent of Africa is most important to them. It describes their rights and responsibilities, it gives them certain privileges and immunities, and it defines the ways in which they relate to the state as regulator and to the people they serve. The legal framework may also define the ways in which NGOs can gain access to state funds, indirectly, through the tax system by virtue of tax exemptions and tax deductions for contributions, and directly, through state contracts and grants. However, it is very difficult to generalize about legal frameworks for a continent as diverse as Africa. Thus, this paper contains broad, general outlines of legal issues and the contexts in which they arise. All NGO leaders reading it should consult with their own legal advisers for assistance with respect to the law that applies in their own country.

General Background Information

The legal systems that apply in Africa south of the Sahara can generally be divided into three different types, with a fourth important influence, Islamic Law, having an impact in certain countries. The three different systems reflect the colonial powers that formerly occupied much of Africa. All the colonizers essentially imported the legal system with which they were familiar and caused it to be enacted in each colony. Thus, Anglophone Africa has a legal system that is quite similar to the legal system in England, while Francophone Africa reflects the French system. Other parts of Africa colonized by other powers (e.g., Belgium, Italy, the Netherlands, and Portugal) tend to reflect a European legal tradition that differs in important aspects from the French system with respect to how it affects NGOs. In addition to these four main influences and systems, the legal rules affecting NGOs in a particular country may reflect tribal traditions or customary law.

The principal differences between the legal systems derived from the one in England, on the one hand, and the ones in Western Europe, on the other, is that the English system is a common law system, which developed principally in the British Isles (and Great Britain's far-flung colonial empire), while the European systems have their roots in Roman law

and the Napoleonic Code. The terms used in the common law systems differ markedly from those used in European systems. In Anglophone Africa, for example, an NGO is "incorporated," while in countries whose legal systems have their principal roots in Western Europe, an NGO attains legal existence by being "registered."

But the differences are more fundamental than that. NGOs in civil law countries are generally organized as two different types of legal entities, associations and foundations. According to Roman law, associations are organizations of people, which are governed by their members, who elect the governing bodies of the association. Foundations, on the other hand, are organized around sum of money or an endowment, which they ordinarily invest, spending earnings on the endowment to do their good works. The principal difference between the French legal system and those derived from it, and the other European systems is that the French system does not generally permit foundations to have legal status. Foundations exist in France and in Francophone Africa, but they must be specially licensed by the state. In other civil law countries in Africa, foundations are permitted to achieve legal status by registration, but the form may not be in widespread use because of the requirement for an endowment.

NGOs in common law countries are not organized using the same forms as are used in civil law countries. They tend to be referred to as companies (or corporations) and societies, on the one hand, and trusts on the other. Trusts are not incorporated entities, but they do have a recognized legal existence for some purposes. The choice of form of organization in the common law system does not affect whether an NGO has members or an endowment, as it does in a civil law system.

Key Elements of the Legal Framework

1. How do NGOs achieve legal status?

Although many NGOs exist outside the legal framework in that they are not registered or incorporated, many want to have legal status. They may want to acquire legal status by registering or incorporating for a variety of reasons:

- * having legal status will clarify what the organization may and may not do;
- * legal status may carry with it certain privileges, such as limited liability for the organization;
- * NGOs may not be able to open bank accounts without having legal status; and
- * NGOs may not be entitled to tax exempt status and they may not have access to state grants and contracts unless they have legal status.

Once the decision is made that legal status is desirable, the NGO will need to go through certain formal procedures to become incorporated or registered. These will vary depending on the country, but, in general, certain steps are required:

- * the NGO must draw up a set of bylaws (sometimes known as statutes, or a charter, or articles of incorporation);
 - * the bylaws must contain certain things required by the law such as the names and addresses of the founders, the purposes of the NGO, the address where the NGO will operate, the kinds of governing bodies the NGO will have, how the NGO's assets will be disposed of in the event that it ceases to serve its purposes, the fact that members or founders may not receive distributions of profits, etc.;
 - * if the organization is a membership organization, the rights and duties of members must be stated;
 - * if the organization is a foundation, any minimum endowment requirement must be met and proven in the manner required by law;
 - * the bylaws must be delivered to the proper registry body, where they will be reviewed;
 - * all required registration fees must be paid;
 - * if there are no objections to the registration, the new NGO will be entered in the appropriate register and thereby become a juridical person.

In some countries NGOs that are operating in the public interest may also be required to obtain a "certificate of public interest" from the appropriate regulatory body. Tax exempt status and the ability to compete for certain grants and contracts may be tied to whether or not the NGO has qualified for a certificate of public interest.

2. How are NGOs held accountable to the state?

After an NGO has registered, it is permitted to conduct its business, to open a bank account in its own name, to invest its property, etc. However, any NGO will be required to file certain forms with appropriate government agencies in order that they may know what it is doing. These forms may be very elaborate or they may be very simple.

In addition to the tax authorities, which are discussed in the next segment, typical government bodies that may require reports from NGOs include:

- * local courts;
 - * local (county, provincial) offices of the Ministry of Justice or the Ministry of Interior;

* the Registrar of Companies;

* a ministry that serves in the field of fields in which the NGO is working (e.g. the Ministry of Education for a private school).

It is very important for NGOs to learn just what forms are required to be filed and when, so that any fines and penalties for late filing or failure to file will be avoided.

3. How do NGOs acquire tax exempt status?

Many countries in Africa permit NGOs to apply for tax exempt status, and they also permit NGOs operating in the public interest to receive contributions that are deductible for tax purposes by the donor. It is important to understand what it means to qualify for these special privileges, and understanding what it means requires NGO leaders to understand tax terminology. Before talking briefly about how tax exempt status can be obtained, this section explains the tax terms that will apply.

"Tax exempt status" at the national level generally means exemption from the **income tax**. However, in most countries NGOs will be required to pay tax on their unrelated business income, but not their **investment income** (e.g., interest on accounts or bonds and dividends on shares). Exemption from the national income tax may carry with it exemption from other national taxes and fees, such as **value-added tax (VAT)** and **customs duties**. Exemptions from local taxes and fees (e.g., **property taxes, stamp duties**, etc.) may also be available.

The **deduction** from the income tax for contributions to public benefit NGOs may be called the **"charitable contribution deduction."** It will generally apply to donations made by individuals and businesses, but some countries may restrict who is entitled to take the deduction. Although there may be **limitations** on the amount of the donation that is deductible (e.g., the deduction may be limited to 10% of the donor's income), this is still a valuable status to have when it is available because it means that the donor will receive a tax benefit and may therefore be willing to make a greater contribution to the NGO.

Filing for tax exemption is not easy. It will require the NGO to fill out proper forms and furnish additional information to the tax authorities. The additional information will include financial information as well as information about the NGO's programs. An NGO is usually required to file an application for exemption from each of the taxes or other fees described above, which means that the process may become quite complicated. But it may be worth it, because it will reduce the NGO's operating costs. NGOs that qualify for tax exempt status are generally required to file annual returns showing their receipts and expenditures, but if the receipts are below a certain minimum, they may be exempted from the annual filing requirement.

4. How do NGOs apply for state contracts and grants?

The laws of each country will prescribe the ways in which NGOs, like businesses and individuals, may apply for contracts and grants. This is an increasingly important issues for NGOs in many countries because national and local governments are seeking to privatize certain social services by contracting them out to the NGO sector. This form of state support has become increasingly important for NGOs in many countries in Africa.

Generally the **procurement law** of a country will prescribe the procedures that must be followed for a "**public tender**," specifying how notices of the tender must be made, what qualifications must be met, when the work must be completed, etc. The laws that deal with procurement generally require fair and open competitions so that all bidders will have equal access to the funds the government wants to spend.

If an NGO wins a government contract or grant, it will be required to file additional forms that account for the state funds. It may also be subject to special audits by the state.

5. What other laws are relevant to NGOs?

NGOs will need to comply with certain laws regardless of the substantive work they do. There are also special requirements for NGOs operating in certain social spheres. This section describes some of the generally applicable laws as well as those that may apply specially to certain types of NGOs.

- * NGOs will have to comply with all **labor** and other **employment laws** and they will ordinarily be required to pay **social taxes** for their employees.
- * NGOs will have to comply with all **laws that apply to their dealings with others**, such as landlords, contractors, suppliers, etc.
- * A country or a province may have very specific **fund raising legislation** that will require an NGO to register, use certain forms for receipts, make special reports, etc.
- * Where NGOs are permitted to use **lotteries** for fund raising, special rules will apply.

NGOs that operate in certain social spheres (e.g., education, eldercare, etc.) may be required to have special **licenses**.

NGOs that have rallies and large public meetings may be required to obtain special **permits** for those gatherings.

Summary and Conclusions

The legal framework within which NGOs in Africa operate is quite complicated and demands that NGOs pay close attention to their legal obligations. This guide can assist NGOs in understanding aspects of the law and how it will affect them in carrying out

their mission. It is important to stress that the guide is very broad and general. It cannot serve as a substitute for legal advice obtained from a qualified local lawyer who is familiar with the intricacies of the law of a particular country.

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