



## Statement of the International Center for Not-for-Profit Law (ICNL) to the Task Force on Proposed Amendments to the *Public Benefit Organisations (PBO) Act, 2013*

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Madam Chair, Esteemed Task Force Members and Other Assembled Colleagues,

My name is Emerson Sykes and I am the Legal Advisor for Africa programs at the International Center for Not-for-Profit Law, known as “ICNL.” It is my great honor to appear before you today. ICNL is an international organization that provides technical assistance, research and education to support the development of appropriate laws and regulatory systems for civil society organizations around the world. We have worked with colleagues in civil society and government in over 100 countries since 1992. We also work closely with the diplomatic and donor communities and private foundations.

In Kenya, ICNL has been supporting a variety of partners on issues related to the *PBO Act* since 2009. Over the course of the multi-year, multi-stakeholder process that led to the adoption of the *PBO Act*, ICNL provided comments on successive drafts of the law and supported consultations among government, civil society and the public. Our engagement has continued since the *PBO Act* was signed into law in January 2013. In the last 18 months, we have:

- prepared legal analyses of several proposed laws, amendments and regulations;
- made a presentation to the Justice and Legal Affairs Committee of the House of Representatives of the Kenya National Assembly on *The Statute Law (Miscellaneous Amendments) Bill, 2013*;
- funded an NGO Coordination Bureau consultation on draft regulations pursuant to the *PBO Act* in Mombasa; and
- provided technical and financial support to the CSO Reference Group in their quest for an enabling environment for civil society organizations in Kenya.

At the outset, I would like to acknowledge the important step taken by the Government of Kenya in establishing this Task Force to review proposed amendments to the *PBO Act*. It reflects the Government’s ongoing commitment to creating a regulatory environment that honors Kenya’s international and constitutional obligations to respect the freedom of association, assembly and expression. It is not simple or easy to craft a legal regime that addresses legitimate government regulatory concerns, while providing the space and encouragement for a flourishing civil society - an essential component of a free and democratic society. The Government, as well as you, the PBO Task Force, should be commended for your efforts.

Based on our work in Kenya and around the world, I’ve been asked to share lessons from international law and comparative examples relating to the regulation of civil society organizations. In my presentation I will focus on three themes that we have noted in debates around the regulation of PBOs: 1) government oversight of PBOs, 2) government support for and engagement with PBOs, and 3) PBOs’ access to funding, especially from international sources. In addressing each of these themes, I will briefly describe the relevant international law and norms and present illustrative comparative examples.

## *Government Oversight of PBOs*

When considering government oversight of PBOs, we take as a starting point the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), which enshrine the freedom of association, including the right to form and operate organizations. Both of these global legal instruments establish that any restriction on the freedom of association must pass a high standard of necessity and proportionality. Likewise, the African Charter on Human and Peoples' Rights and the African Charter on Democracy, Elections and Governance use similar language to describe the right to freely associate on the regional level. On the national level, Article 36 of Kenya's 2010 Constitution grants that "[e]very person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind." Indeed, Article 4(1) of the *PBO Act* provides that "[c]onsistent with its obligations to respect the freedoms of association and assembly, it is the duty of the Government to provide an enabling environment for public benefit organizations to be established and to operate."

Restrictions on the freedom of association under the Article 22 ICCPR must pass a three-part test: they must be 1) "prescribed by law" and 2) "necessary in a democratic society" in pursuance of 3) specified "legitimate" aims. The first prong requires that restrictions on the freedom of association be formally set out in law and that they are sufficiently clear and well-defined to provide guidance to individuals and organizations that are subject to the regulation. The second prong requires that where restrictions are made, "States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims." (United Nations Human Rights Council, General Comment No. 31 (2004), para. 6) The third prong limits the justifications for restrictions to "national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others."

Bearing in mind these limitations, it becomes clear that international law necessitates a "light touch" in regulating civil society. An ideal regulatory regime would require basic annual reporting that is proportionate to an organization's size. Additional oversight would only be exercised when it is clearly set forth in law, justified by legitimate aims, and necessary in a democratic society. For example, vague language that grants the PBO Authority unlimited power to restrict PBOs' operations, such as the imposition of "terms and conditions" on PBOs' registration, is impermissible under international law. One can imagine a variety of "terms and conditions" that would render the freedom of association meaningless. Applying the three-pronged test, these terms and conditions are not clearly defined and cannot be considered prescribed by law, and they are not necessary or proportionate in relation to any particular legitimate aim.

As a comparative example of excessive government oversight, in **Russia**, the law allows governmental representatives to attend all of an organization's events, including internal strategy sessions. The government also has the power to conduct audits and demand documents dealing with the details of an organization's governance, including day-to-day policy decisions, supervision of the organization's management, and oversight of its finances.<sup>1</sup> With such intrusive oversight, Russians can hardly be considered "free to associate" and many organizations have shut down in the wake of a succession of restrictive legislation.

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<sup>1</sup> ICNL, NGO Law Monitor: Russia, last modified November 24, 2014, <http://www.icnl.org/research/monitor/russia.html>

## ***Government Support for and Engagement with PBOs***

Vibrant and effective civil society requires not only the absence of undo government interference, but also support from and engagement with government. One of the enumerated objectives of the *PBO Act* is to “facilitate mechanisms for collaboration with public benefit organizations, including funding of public benefit organizations activities and involvement of public benefit organisations in the implementation of government projects.” Further, the Third Schedule to the *PBO Act* establishes a number of tax incentives for PBOs. Both of these clauses reflect international best practices, but proposed amendment would delete these provisions under the misguided notion that “PBOs are meant to compliment activities of Government, not the other way round.”

*Government funding* can be a double-edged sword. While access to government funding is critical to the survival of civil society in many countries, in other places accepting government funding is seen as a risk to organizations’ independence. Ideally, government funding is available to those organizations that wish to make use of it, but it is not required, and the acceptance of government funding does not infringe on an organizations’ independence any more than other donor funding.

*Tax incentives*, meanwhile, can be considered an international best practice. In most countries, organizations undertaking publicly beneficial activities are afforded some tax exemptions, though tax regimes vary widely. In any case, the rules governing tax exemptions and incentives should be clear and equitable.

*Engaging PBOs in policy-making* is not only an international best practice, but it is also mandated by the Kenyan Constitution. Of course, public participation encompasses more than outreach to PBOs, but public participation would be much less meaningful if individuals were not empowered to speak with united voices, though formal or informal organizations, on issues of public import.

In the **United States**, the non-profit sector is regulated primarily through the Internal Revenue Code. Tax incentives are granted to various organizations according to their activities. There are 29 varieties of tax exempt statuses in the Section 501c. Perhaps the best-known and closest equivalent to Kenyan PBOs is the so-called “501(c)3” organizations, which are formed for purely non-political purposes and are granted general tax exemptions. Meanwhile, “501(c)4” organizations may participate in some lobbying activities, as long as their primary activity is promoting social welfare. These organizations are granted limited tax exemptions. The approach in the US is not to ban categories of organizations from certain activities, but rather to afford different tax incentives based on the types of activities an organization carries out. In many other countries civil society organizations are prohibited from engaging in “political activities” without defining these terms. While prohibiting civil society organizations from participating in political campaigns is legitimate, we have seen broad prohibitions on undefined political activities used to restrict CSO policy advocacy. Some governments even cite 501(c)3 as a guide for such restrictions. However, this is a misreading of US law, since 501(c)3s can and do participate in policy advocacy. When analyzing legal requirements, it’s extremely important to look beyond the text and consider the legislative and interpretive context.

## ***PBOs Access to Funding***

Perhaps the most pressing issue regarding proposed amendments to the *PBO Act* is organizations right to access funding, especially from international sources. Restrictions on foreign funding have been a worrying global trend. This is despite the fact that the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association has clearly articulated that, “The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also seek, receive and use resources—human, material and financial—from domestic, foreign and international sources.” (A/HRC/23/39 - April 24, 2014)

Restrictions on foreign funding take a variety of forms, including a cap on the percentage of an organization’s budget that can come from international sources, as is the law in Ethiopia, or labeling organizations that receive significant funding from outside the country as “foreign agents” as in Russia. In both cases, the consequences of such restrictions have been devastating.

Quoting from a recent article on cross-border philanthropy by ICNL’s President Douglas Rutzen:

**Ethiopia** serves as the seminal example of caps on international funding. Under the 2009 *Proclamation to Provide for the Registration and Regulation of Charities and Societies*, “Ethiopian” charities and societies may not receive more than 10 percent of their total income from foreign sources. In addition, only “Ethiopian” charities and societies are legally allowed to work on disability rights, children’s rights, gender equality, conflict resolution, the efficiency of the justice system, and certain other objectives.

“Income from foreign sources” is broadly defined as “a donation or delivery or transfer made from foreign source of any article, currency or security. Foreign sources include the government agency or company of any foreign country; international agency or any person in a foreign country.”

The Proclamation has had a significant impact on civil society in Ethiopia. Between 2009 and 2011, the number of registered CSOs in Ethiopia decreased by 45 percent. In addition, most local human rights groups have been forced to close or scale back their operations. As but one example, the Human Rights Council, Ethiopia’s first independent CSO that monitored human rights, was forced to close nine of its twelve offices in 2009 due to lack of funding.

(“Aid Barriers and the Rise of Philanthropic Protectionism”, *International Journal for Not-for-Profit Law*, March 2015)

In the same article, Mr. Rutzen describes the Russian law this way:

In July 2012, President Putin of **Russia** signed a law requiring all non-commercial organizations that receive funds from abroad and engage in “political activities” to register with the Ministry of Justice as “foreign agents.” Under the law, “political activities” are broadly defined as “attempts to influence official decision-making or to shape public opinion for this objective.” Moreover, the “foreign agents” label attaches even if the international funding is used for purposes entirely unrelated to the “political activities” of the organization. This label is particularly problematic for Russian CSOs because, in Russian, the term “foreign agent” is synonymous with “foreign spy.”

Echoing the misunderstanding of the regulation of “political activities” in US law, some observers have confused the Russian law with the **United States** Foreign Agent Registration Act (or “FARA”). It is worth clarifying that FARA applies to all “persons” and contains an exemption for organizations engaged in “religious, scholastic, academic, or scientific pursuits or of the fine arts” while the Russian law solely targets civil society organizations. FARA also requires a connection between the international funding and an organization’s political activities, while the Russian legislation does not.

In closing, I would like to note that the *PBO Act* was signed into law 26 months ago, but it has yet to be commenced. We recommend immediately setting a commencement date for the Act and promulgating progressive regulations that will guide the implementation of the Act. Amendments would be most appropriately considered after the new regulatory regime is up and running and any problems have been identified.

I hope this presentation will prove useful in your deliberations and in the preparation of your report. I look forward to reading the report when it is made available.

I very much appreciate your time and attention and I’d be happy to answer any questions you might have. Thank you.

March 19, 2015  
Nairobi, Kenya