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Letter from the Editor

In this issue, the *International Journal of Not-for-Profit Law* devotes a special section to the challenges facing civil society in Africa. **Matildah Kaliba**, Lecturer and Researcher at the University of Zambia's Department of Developmental Studies, examines the relationship between the government and civil society organizations (CSOs) in Zambia. **Audace Gatavu**, an Attorney at Nibitegeka & Associates in Bujumbura, Burundi, analyzes Burundian law on assemblies and public demonstrations: its origins, its requirements, and its potential reform. **Dr. Maria Nassali**, a Lecturer at the School of Law at Uganda's Makerere University, provides an overview of the regulatory framework governing CSOs in Uganda. **Eghosa Osa Ekhator**, a Ph.D. candidate at the University of Hull in England, explains the role of CSOs in the Extractive Industries Transparency Initiative in Nigeria. **Daniel Messele Balcha**, a Ph.D. student at Charles University in Prague, assesses the impact of CSO regulations on organizations addressing HIV/AIDS issues in Ethiopia.

We feature two other articles as well. **Ignacio Uresandi**, Law Professor and Researcher at Universidad Argentina de la Empresa Investigation Institute in Buenos Aires, highlights provisions of labor law that diminish the effectiveness of CSOs in Argentina. Finally, a prominent social entrepreneur and policy expert discusses regulation of CSOs in Ecuador, in an interview with **Susan Appe**, assistant professor of Public Administration at the College of Community and Public Affairs, Binghamton University, part of the State University of New York system.

We thank Emerson Sykes, legal associate for Africa programs at the International Center for Not-for-Profit Law, for his help assembling the special section on Africa. We also gratefully acknowledge USAID for supporting the research behind two articles in this issue. As always, we thank our authors for sharing their expertise, too. And we invite readers to share their own expertise: We welcome manuscripts addressing legal aspects of civil society, philanthropy, and not-for-profit organizations around the world.

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Civil Society in Africa

**TOWARD AN AUTONOMOUS CIVIL SOCIETY:
RETHINKING STATE-CIVIL SOCIETY RELATIONS IN ZAMBIA**

MATILDAH KALIBA¹

It has been said that the postcolonial state in much of Africa has failed to emancipate its people from mass suffering while the markets have not ensured that economic benefits trickle down to the poor. Due to the limitation of these two actors, civil society has become a sine-qua-non to development by mediating the failures of the state and the market. Ironically, though, the effectiveness of civil society in much of Africa is dependent on its relations with the state.

This article looks at state-civil society relations in Zambia. While there is a plethora of issues, the article analyzes the relations using a legal lens to understand the environment within which civil society operates as well as the other cultural and political issues that impede civil society organizations (CSOs) from being independent and effective in Zambia. The study shows that the current relations between the two development actors hamper the effectiveness of CSOs. As such, civil society in Zambia lacks a sustained engagement with the government; instead it takes a reactionary approach to issues.

The policy goal of this study is that the government, civil society organizations and other stakeholders will take action to improve state-civil society relations on the basis of the findings and recommendations. One way would be to reform the legislative framework for civil society and thus provide a basis for enhancing people's participation in decision-making at all levels.

Introduction

Zambia has been making strides to develop in order to improve the living standards of its people and lift the poor out of poverty. The government has endeavored to improve the basic conditions of living through various infrastructure and social service delivery projects. However, development in its multidimensional sense goes beyond physical infrastructure and the delivery

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of social services to include the opening up of society to plurality of views in order to enhance development outcomes (Mutesa, 2010). At present, the vicious cycle of poverty threatens citizens' participation, leading to unequal development and distribution of wealth and thereby reinforcing a lack of platforms to facilitate participation. This paves the way for the emergence of authoritarian populists who threaten to reverse the strides made in the country's young democracy.

This situation shows the need for an effective civil society to play a complementary role to the state in the development process. However, it remains to be seen whether the nature of interaction between the state and civil society promotes the growth of a vibrant civil society and enhances development.

The first section of the article provides a brief overview of the concept of civil society and the importance of this sector in development. It then gives an analysis of current state-civil society relations, including a discussion of the NGO Act and how it compares to international instruments on freedom of expression, association, and assembly, as well as international principles that govern CSOs. Next, the article discusses the cultural and political factors that shape state-civil society relations and the challenges that hinder the robust participation of CSOs. This is followed by action points for civil society to reform the current legal framework. The final section offers recommendations and identifies new directions for research and analysis.

The Concept of Civil Society

To begin with, it is imperative to understand that civil society is a highly contested concept that is open to a myriad of definitions. Some scholars define it in terms of values and norms, as a collective noun, a space for action, and an antidote to the state. Despite these divergences, a common thread in the definitions is that civil society constitutes a dimension of society different from and sometimes antagonistic to the state. Most definitions also recognize the voluntary nature of civil society and its importance as a forum for independent public expression. Bratton (1994: 2) perceives the concept of civil society as a theoretical concept rather than an empirical one, in the sense that it is a "synthetic conceptual construct" that is not necessarily embodied in a single, identifiable structure. However, he distinguishes civil society from the family, the state, the market, and the political society. The distinction from political society implies that civil society does not include groups interested in acquiring political power, such as political parties. In other words, it is seen as presenting a critical path toward Aristotle's "good society" aimed at thwarting the hegemonic advances of the state from a Habermas point of view or thwarting unfettered market forces from Polanyi's perspective (Mitlin et al., 2007). The two views represent the theoretical or ideological considerations of civil society within development studies which lean toward either the post-Marxist approach or the neo-liberal school of thought.

At a conceptual level, civil society is said to be a historically bound concept that varies from one society to another. As used in development circles, civil society encompasses a larger population beyond relief NGOs, including groups such as social movement agents, human rights organizations and advocacy groups (Van Rooy, 2008).

Civil society has been referred to as "our last best hope" and a "key to good governance" by some scholars.² It has a unique role of expanding and promoting civic space by bringing

² See Michael Edwards's keynote address at his book launch of *Civil Society* (London: Polity).

citizens into the political sphere and mobilizing a range of popular voices to address the government on issues of interest. However, this role can be achieved only when civil society is given the space to act. State-civil society relations are central in defining the role CSOs can play in national development, because it is governments that must give civil society the space and autonomy to organize through the law (Desai, 2008).

State-Civil Society Relations in Zambia

Despite the general stability associated with Zambia, the space for civil society has been shrinking. As in much of Africa, there has been a backlash against civil society and democracy as a result of the postcolonial state's retention of excessive power, which in some cases has been used to silence opposing voices (Elone, 2009). The state has been known to use underhanded methods to reconquer the political arena and criminalize dissent, as if control of a country's government was a birthright for the ruling elites.³

While a wave of democracy has swept Zambia over the years (evidenced by the smooth transition of power through multiparty elections), the nature of this democracy still does not allow for the emergence of a vibrant civil society (Mutesa, 2009). CSOs remain sidelined and undermined. They do not enjoy the freedom and space to act freely and independently. It has been observed through history that Zambian CSOs have had to constantly negotiate for civic space whenever there has been a change in government⁴ (the presidency, to be precise). In this view, Diamond (1996) distinguishes between electoral democracy and liberal democracy. The former is concerned with electoral competition and calls for minimal levels of civic freedom, while the latter provides for a wide range of political and civic pluralism as well as individual and group freedoms. Political freedom of speech, free and independent media, and freedom of association are clearly being undermined in Zambia through the laws. This then casts Zambia's democracy within the "electoral democracy" tradition. Ironically, it takes an independent and effective civil society to transition the country's democracy from its current "electoral" status into a liberal democracy.

According to some CSOs interviewed, the relationship between the Zambian government and civil society organizations is laden "with suspicion, hostility and conflict."⁵ The government views CSOs involved in service provision as partners, whereas it finds those involved in advocacy and governance work to be unsettling and somewhat provocative. In like manner, CSOs involved in service provision get positive public media coverage, while the CSOs dealing with governance issues that may be critical of the government are rarely covered by the state media.⁶

The suspicious relationship between the two actors could be attributed to the fact that most CSOs are tied to their funders ideologically and financially, which poses a threat of external influence on state operations (Mweshi, 2009). As such, these groups are considered to be in a hurry to access political power while advancing foreign interests rather than the interest of the societies they purport to serve. It can also be argued that since the country exhibits electoral

³ See "Public Sphere Under Threat in Zambia as Press Freedom Violations Mount," Freedom House, June 2, 2014, https://www.ifex.org/zambia/2014/06/02/public_sphere/.

⁴ See historical analysis of civil society in Mutesa (2009).

⁵ Transcribed verbatim from respondent.

⁶ See CSO sustainability index, USAID.

democracy tendencies, the state lacks a strong sense of legitimacy and is therefore threatened by civic organizations. Liberal democracy governments welcome pluralistic views from different advocacy groups in society as these are seen to enhance their democratic societies. Nonetheless, the state has a vital role of shaping the relations between the two actors and devising effective rules of engagement so that they work as partners and not as adversaries.

State-Civil Society Relations Through the Legal Framework Lens

State-civil society relations in Zambia can be observed through the laws that the government makes to govern civil society and generally through the interactions of the two parties on a daily basis. The framework of laws and regulations governing the formation and operation of civic organizations often indicates whether the state and civil society have a positive relationship. An ideal framework is one that is fully enabling while encouraging some discipline. Governments around the world have justified the adoption of restrictive laws against civil society as necessary to defend national sovereignty against foreign influences in domestic affairs, citing cases where CSOs have been used as conduits of foreign influences; and even to protect citizens against terrorism and unscrupulous individuals masquerading as NGO leaders. However, these justifications should not undermine the fundamental human rights enshrined in national and international instruments (Clark, 2008).

In the case of Zambia, the legal framework governing the operations of CSOs is the controversial⁷ NGO Act of 2009. According to the ministry in charge of NGO registration, the Act came about to address the multiplicity of legislation for NGOs. Previously, five distinct pieces of legislation dealt with registration, organization, and regulations of NGO activities: the Companies Act (Cap. 388); the Lands and Deeds Registry Act (Cap. 185); the Trustee Act, 1898 of the United Kingdom; the Societies Act (Cap. 119); and the Adoptions Act (Cap. 54).

To put this discussion into context, it is important to understand that the NGO Act was first presented as a draft bill in 2007, when the Movement for Multi-party Democracy (MMD) was in power, but it was withdrawn following criticism. The bill was finally presented in 2009 and enacted by Parliament as NGO Act No. 16 of 2009 on August 28, 2009. At that time, it was reported in private media that the MMD was using the Act to hold onto the reins of power,⁸ due to its provisions seen as limiting civic space. Since presidential elections were looming two years from enactment of this Act, the then-opposition political party Patriotic Front (PF) assured NGOs that once it was voted into government, the NGO Act would be repealed, and the government and CSOs together would come up with a framework acceptable to all stakeholders. The PF had it enshrined in their manifesto that the relationship between

Civil society organisations and the State is essentially fraught with suspicion, antagonism and conflict due to lack of appreciation by the MMD government of the role of the civil society as a partner in national development. Consequently the civil society has found it difficult to play its meaningful role in the area of social justice, good governance and national development.

In order to enhance the role of the civil society and its relationship with the State the PF government shall:

⁷ I call it controversial due to the conflict that has emerged around it between some CSOs and the Government.

⁸ See *The Post*, November 10, 2009, http://www.postzambia.com/post-read_article.php?articleId=1646.

- Recognize the State and civil society as mutually interdependent and complementary partners in national development;
- Guarantee the active participation of civil society in matters of social justice and good governance;
- Promote constant dialogue between the State and the civil society;
- Review the Non-Governmental Organizations Act of 2009 so as to promote the above

After the 2011 general elections ushered the PF into government, civil society organizations were expectant. Despite its enactment in 2009, the NGO Act had never been implemented under the MMD regime. A clause within the Act states that it would come into effect on the day the minister in charge of NGOs deemed fit. It was not until July 15, 2013, that NGOs were called upon to register under the Act, during the reign of the Patriotic Front, which had not yet reviewed the Act as promised during the campaign. The PF government argued that it was just acting on laws put in place by the previous regime. However, this may also be construed as a case of finding “convenient laws” in place, making it difficult to keep their campaign promises to civil society.

A significant number of CSOs have declined to register under the new Act and have been issuing statements and petitions which, among other issues, remind the PF government to deliver on its campaign and manifesto promises. The current impasse surrounding this piece of legislation signals the need for a regulatory framework that is acceptable not only to the state but to all stakeholders.

This Act is fraught not just by its practical implications for NGOs, as discussed above, but also by the process in which it came to be. There was a lack of proper consultation with primary stakeholders, the NGOs themselves. In fact, submissions by NGOs when the bill was presented to Parliament were ignored (Mzyece, 2009). Among the contentious issues within the Act is the call for compulsory or mandatory registration of NGOs within 30 days of their formation or adoption of their constitutions, and the subsequent re-registration every five years, contained in sections 11 to 14. The concern here from organizations spoken to is that the law does not specify the time of processing the application, which can keep organizations in a state of uncertainty regarding their legal status even though they are allowed to operate until a decision is communicated to them. Further, the Act states that organizations can be denied registration on “public interest” grounds; however, the Act is not clear about what constitutes public interest, leaving it to the interpretation of the government officials responsible for reviewing applications. Further, calling for NGOs to re-register every five years is a potentially threat to NGOs critical of government policies, and it gives the state an opportunity to harass such organizations. This has further implications in limiting the extent to which an organization can be independent and act freely. For the government, it also imposes a great administrative workload on an already burdened Administration.

Further, sections 5 to 7 of the NGO Act provide for the establishment of three tiers of bureaucracy, with the NGO board at the top, followed by an NGO council comprised of NGO representatives voted in by the NGOs themselves, and finally an NGO congress. There are three issues of controversy here. First, the composition of the board is seen to be more government-dominated. The members need to be approved by the minister of community development. In

addition, only seven out of 15 members of the board are to be elected by the NGO congress subject to the minister's approval, with the other seven appointed by the minister—which could have serious negative implications for the independence of NGO sector. Only one member is an independent member of the board. The minister is also given the power to appoint the chairperson and vice chairperson from among the board members. Given such a composition of the board, its functions then become challenging in the following ways:

- 1) Approving the area of work of NGOs: This function gives the government-dominated board the power to determine NGOs' thematic and geographic areas of operation and in a way control their activities, which goes against the fundamental principles of freedom of expression, association, and assembly.
- 2) The power to provide policy guidelines to harmonize the activities of NGOs with the national development plan: This aspect co-opts NGOs into assisting in the fulfillment of the political priorities of the government reflected in the plan. It has the potential to impact upon the independence of the civil society sector. It also goes against the right of CSOs to operate free from unwarranted state interference.
- 3) The power to advise on strategies for efficient planning and coordination of activities of NGOs: This aspect treats NGOs as government subsidiaries, as opposed to independent entities free to formulate and execute action plans in line with identified priorities.

Furthermore, the Act in a way imposes regulations on NGOs by compelling them to draw up a code of conduct, requiring approval by the government-dominated NGO board and monitoring by a 12-member NGO council. Although members of the council are to be elected by NGOs themselves, its overstretched mandate could have serious repercussions on the autonomy of individual NGOs, which may not subscribe to the majority position adopted by the council.

Overall, the implementation of this Act not only interferes with and hampers the work of NGOs but also violates fundamental rights guaranteed in the Constitution of Zambia as well as some of Zambia's legal obligations under binding human rights instruments.

Despite all the weaknesses and problems posed by the Act, the PF government has maintained that the Act is intended to bring internal democracy and accountability to CSOs. They have argued that the democracy, transparency, and accountability that CSOs usually expect from other entities (government and private sector) should in fact begin with CSOs and that CSOs should operate in accordance with the values and principles they espouse.⁹ The government has called on organizations to register, but due to widespread defiance they have had to keep extending the deadline. In a bid to force organizations to register, the Ministry of Community Development is reported to have written to diplomatic missions and aid agencies in June 2014, cautioning them to work with only those NGOs registered under the NGO Act; however, the letter did not state the consequences for donors who did not comply. On the other hand, the "big" civil society organizations argue that they are willing to dialogue without the condition to "register first then discuss."¹⁰

⁹ See comments from former Justice Minister Wynter Kabimba, http://www.postzambia.com/post-read_article.php?articleId=35586.

¹⁰ This is according to one of the CSOs that has yet to register.

Effective Civil Society Engagement with State

While having a good legal framework for civil society is important, there are other cultural and political issues that interfere with maintaining positive state-civil society relations and ensuring that CSOs are independent and effective in Zambia. One such issue is the political orientation of the country, which is such that government can clamp down on their “enemies” using state apparatus. To start with, no clear or distinct political ideologies inform the different political parties in the country, so it is common to see politicians moving from one political party to another (usually the direction of these defections is towards the ruling party) in the name of “exercising one’s democratic right.” As a result, when a party gets into power, it is at liberty to change its course or adopt policies that differ from what was stated in the earlier manifesto that ushered it into power. When this happens, no one can hold government accountable and pressure them to deliver on their promises. This could explain why the PF government (which is currently a transition government following the demise of President Sata) was not in a hurry to deliver on its campaign promise of repealing the NGO Act when they ascended into power.

On the other hand, CSOs in Zambia have been exhibiting more of a reactionary approach to engaging with government. While Zambian CSOs easily mobilize into coalitions and social movements in times of crisis and always play a role at the defining moments of the country’s political history,¹¹ there is lack of a long-term engagement with the government. However, the level of engagement with the government has been characterized as reactive or crisis-mode rather than rigorous and sustained. For instance, after the transition from one-party state to multiparty politics in 1991, there was an observed decline in the visibility of civil society. The main reason advanced was that, with democracy in place, civil society had achieved their main aim of political mobilization.¹² Civil society was later seen more visibly toward the end of the 10-year rule of President Chiluba, when he wanted to amend the constitution to provide for a third-term clause. Once that battle was won, CSOs again went into hibernation.

With the development agenda of the early 2000s calling for more stakeholder participation in national development plans, the government introduced coordinating committees at the community, district, provincial, and national levels in order to strengthen and institutionalize CSO-government communication and engagement. Government officials, civil society groups, and, in some cases private-sector companies meet every three months to discuss vision, direction, and strategies for development. Other forums for CSO participation are the parliamentary portfolio committees, which examine how government is being run and how it is spending money. Committees working on different thematic areas each invite members of the public, CSOs, and other stakeholders to make submissions. The extent to which these submissions are taken on board is beyond the scope of this paper; however, in terms of effective participation, it has been observed that CSOs are given only short notice to participate in these committee meetings, which results in their either not being able to attend or if they do, lacking adequate preparations to make effective submissions (USAID, 2011).

¹¹ See Mutesa (2008).

¹² Mumba (2008), in Mutesa F. (ed.) *State Civil Society and Donor Relations in Zambia*. UNZA Press.

Other factors impede robust participation of local CSOs in the everyday running of government. Key factors highlighted by organizations interviewed as well as scholars in this field¹³ include the following:

- Citizens' participation in governance issues is limited to elections and political parties. There is a lack of institutionalized mechanisms for citizens' participation in decision-making, and government administrative structures are highly centralized.
- There is an observed lack of dialogue between the government and CSOs dealing with governance issues.
- According to Mweshi (2009), CSOs are greatly reliant on foreign donors for funding, and to some extent they compete with each other for donors. This has implications for the independence of the organizations' agendas and ideologies, and it places serious constraints on home-grown strategies for development. It is common for NGOs to change their strategies and missions to align with those of their foreign funders, and they promote a rhetoric that validates their existence only by compromising their character. This could also explain why the government wants to be kept abreast of any such changes, as is indicated in the controversial NGO Act.
- CSOs also suffer the effects of lacking representation at grassroots level. It is common to find NGOs at national level without constituencies at local level.
- Another factor that reinforces this reactionary approach is the lack of proper coordination and collaborations among CSOs. It is common to see a duplication of efforts in NGOs' areas of work.
- The Zambian media, which is a vehicle through which citizens can remain informed, has often had clashes with the government, evidenced by the arrest of some private journalists and the blocking of online papers that report negatively about the government.¹⁴ Private online media editors and contributors are forced to work anonymously for their own safety, while private radio stations have faced instances of program interruption by either governmental officials or ruling party cadres with a threat to revoke their operating licenses. Other factors such as literacy levels, poverty, and lack of electricity have affected access to electronic media, too.

In addition, there is no appropriate incentive system in place for Zambian CSOs, due to the high dependence on foreign funding noted above. This strikingly differs from most of their Western Europe and American counterparts, which are mainly founded and funded by people within society; as such, they are compelled to be effective in their own societies, because it matters what the public thinks about them. It then follows that the governments in such societies cannot easily attack CSOs; to do so would be akin to an attack on their its citizens. While the perception of CSOs in Zambia is positive and the public is generally supportive of CSOs' work

¹³ See CIVICUS Civil Society Index Analytical Report for Zambia (2010).

¹⁴ "Zambia Blocks Another Website, Re-arrests Reporter," Committee to Protect Journalists, July 30, 2013, <http://www.cpj.org/2013/07/zambia-blocks-another-website-re-arrests-reporter.php>.

(based on 2011 CSO sustainability index), this does not mean that the public perception of CSOs has a bearing on CSOs' effectiveness comparable to donor perceptions.

Way Forward: Practical Action Points Based on International Best Practices

In order to move forward on the NGO Act impasse, CSOs need to be unified and show a united front before questions of legitimacy arise in terms of representation. Already a good number of NGOs are reported to have registered under the Act, according to the Ministry of Community Development, Mother and Child Health. Civil society organizations therefore need to identify or map their pressure points and what can be done to position government officials to use their power effectively. The government and parliamentarians are ultimately responsible for developing and reforming legal frameworks for civil society. Therefore, it is important for advocacy efforts to be directed toward ensuring that the government and Parliament understand and address their concerns in amending legal provisions while accommodating government interests. To do so, CSOs discontented with the current Act should communicate and negotiate effectively with government officials and parliamentarians to develop mutual understanding (ICNL, 2008).

Further, calling on government to repeal the Act is not enough and may take time. To speed up the processes and quickly engage decision makers, civil society organizations need to develop an alternative model or law and use it as a basis for dialogue. This strategy is similar to the one adopted by Kenyan civil society organizations, who drafted a Public Benefit Organisation Bill in 2011 that was shared by the government agency responsible for registering NGOs, the Kenyan Law Reform Commission, and various members of Parliament. The bill was drafted following a consultative process with a number of civic organizations throughout the country. With the draft bill in place, the coalition was able to engage the Law Reform Commission and parliamentarians. Eventually the bill was accepted by a Parliament committee responsible for legal affairs in December 2011 and was submitted to the full Parliament. To date, Zambian civil society has been calling for the current Act to be repealed without providing an alternative. The Minister overseeing the registration of NGOs was quoted in local media saying that civil society organizations are pushing an already open door: "We have already told them [NGOs] to bring fresh amendments to us and we will consider them. For now we cannot operate in a vacuum, something has to be in put in place to guide their operations."¹⁵

In case there is lack of capacity among organizations to draft an alternative law, CSOs can always seek the help of both national and international experts on civil society law such as Law Association of Zambia (LAZ), International Center for Not for Profit Law (ICNL), American Bar Association, and Freedom House, among others.

Finally, CSOs should avoid politicizing issues related to developing an enabling legal framework. A key observation in the calls for reform of the NGO Act is that they are somewhat politicized. When the current Act was introduced in 2009 under the MMD regime, CSOs tended to seek sympathy from opposition political parties, and it was somehow looked at as an "MMD law." This could have influenced the Patriotic Front to include a clause in their manifesto on reviewing the NGO Act once they came into power, as a way of soliciting support from CSOs.

¹⁵ See "Government Willing to Make Amendments to the Controversial NGO Act—Katema," *Lusaka Times*, July 31, 2013, <http://www.lusakatimes.com/2013/07/31/government-willing-to-make-amendments-to-the-controversial-ngo-act-katema/>

Now that the Act has come into force under the PF regime, the messages from CSOs are framed with a political inclination. The leader of NGOCC speaking on behalf of 24 other CSOs was quoted in local media saying that “the PF is the most unresponsive government.” Alternatively, CSOs can move away from politicizing their messages to developing a message that speaks to the needs of the entire citizenry or society, showing how changing the legal framework will affect those needs. “An effective message should highlight how the legal framework for CSOs is linked to the development and prosperity of the country. It should include examples of how civil society’s work contributes to the government’s goal of social development and delivery of social services” (ICNL, 2012). This helps prevent the reform initiative from being politicized. An example from Iraq shows that during the advocacy efforts that led to the successful passage of the progressive Law 12 of 2010, civil society groups highlighted how a strong civil society sector could contribute to rebuilding the country and attracting foreign funding to support local development.

Conclusion

A vibrant civil society is a necessary ingredient for economic, social, and political development. It is the duty of every state to protect these civic liberties and promote the growth of an effective civil society. As has been noted, the Zambian NGO Act is fraught with clauses that are subject to discretionary application of the government of the day, leaving CSOs without any legal recourse. The implementation of the Act in its current form risks making CSOs a mere extension of state apparatus rather than effective and independent partners in development. The state-civil society relations are also shaped by the cultural and political issues.

In order to have positive relations, the state and civil society must hold open and honest dialogue, based on the understanding that there is a shared vision while respecting basic differences in approaches. Consultative mechanisms must be put in place to ensure that the state-CSO dialogue is not incidental but is one of strategic mutuality.

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Civil Society in Africa

**ANALYSIS OF THE LEGAL FRAMEWORK
FOR CIVIL SOCIETY IN BURUNDI:
CASE OF THE DECEMBER 2013 LAW
ON PUBLIC DEMONSTRATIONS AND ASSEMBLIES**

AUDACE GATAVU¹

Introduction

Freedom of peaceful assembly is a fundamental right provided by international instruments relating to human rights, and is present in the constitutions of nearly every country in the world.

The enjoyment of freedom of peaceful assembly must be guaranteed to individuals and groups of individuals, associations – informal or those with legal personality. This right has been recognized as one of the pillars of a healthy and functional democracy. Its exercise allows all persons living in a country to have the opportunity to express their opinions.²

Being able to hold peaceful assemblies is of crucial importance for the work of civil society actors, including those working to promote the fulfillment of economic, social, and cultural rights, for it allows them to publicly convey their message in order to achieve their goals. In several countries, however, the right to hold peaceful assemblies has been denied or restrained by state authorities in violation of international human rights standards. As a result, the right to take part in the conduct of public affairs, as ratified by Article 25 of the International Covenant on Civil and Political Rights (ICCPR), is restrained.³

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² OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly, second edition, Warsaw/Strasbourg, 2010, p. 23.

³ United Nations, General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, A/HRC/23/39, § 43.

The right to freedom of assembly in Burundi has been provided by different constitutions. However, the enjoyment of this right has always been restrained by public authorities through laws regulating public assemblies, laws that were extremely restrictive relative to positive provisions given by international legal instruments relating to human rights. The most recent one is the December 5, 2013, law 1/28 regulating public demonstrations and assemblies.

In our project, we provide an in-depth analysis of the provisions of that law with respect to fundamental principles espoused by international instruments and with regards to the law's practice.

The paper is divided into two chapters. The first is dedicated to general aspects of the right to freedom of assembly in Burundi and includes a historical overview (section 1) and the legal framework (section 2). The second chapter, consisting of the analysis of the law itself, includes a global analysis of the December 5, 2013, law (section 1) and various restrictions on freedom of assembly (section 2).

Throughout this analysis, we provide proposals for recommendations that support the reform of the present law.

Context

This project was achieved in the framework of a research scholarship granted by the American non-governmental legal organization International Center for Not-for-Profit Law (ICNL) based in Washington, DC, in collaboration with United States Agency for International Development (USAID). ICNL is an international organization that facilitates and supports the development of a favorable legal framework for the civil society sector. ICNL provides technical assistance through research and education to support the development of a favorable legal framework for civil society in many countries around the world.

It is in this context that ICNL supports legal practitioners through research grants so that they may contribute to law reform with the goal of creating an environment that allows the enjoyment of fundamental rights and freedoms. The organization has been working for a long time on the freedom of association and is extending its involvement on the freedom of peaceful assembly.

The project was conducted partly in Burundi on topics concerning Burundian legislation and practices, and then in Washington, DC on matters concerning international human rights law.

Methodology

The project was conducted following the documentary method that involves using publications, articles, and reports, as well as national and international legal tools: international conventions, the Constitution of the Republic of Burundi, the Arusha Peace and Reconciliation Agreement, and legislative texts.

In addition, we have consulted Burundian civil society organization leaders who sat with us and provided data on matters regarding freedom of peaceful assembly practices.

Finally, the project relies on information provided by the ICNL and the European Center for Not-for-Profit Law (ECNL) staff members, who shared experiences and good practices in the countries in which they operate.

I. Freedom of Assembly in Burundi

1. Historical overview

The evolution of the right to freedom of assembly has been strongly influenced by Burundi's political path since its independence from Belgian colonization. Although the various constitutions⁴ that governed the country have all provided for the right to freedom of assembly, there has always been a gap between the text and the people's actual enjoyment of the right.

After gaining independence in 1962,⁵ Burundi adopted a constitutional monarchy regime with a constitution greatly inspired by the Universal Declaration of Human Rights. The monarchy was ended after four years by a military coup d'état on November 28, 1966. The country has since known various military regimes⁶ deeply rooted in the ideology of the single party in power, UPRONA.⁷ The party outlined the overall political orientation of the nation and inspired state action. In this political context, all the principles governing a democratic society were completely nonexistent.

The democratization process in Burundi started around 1989, following the political transformations happening in Europe after the fall of the Berlin wall. During the La Baule conference in 1990, former French President François Mitterrand called for African heads of state to follow the example set by western countries and begin the democratization process lest they suffer economic and political sanctions from the international community.⁸

A constitutional commission was put in place in March 1991, its main function being the democratization of political life in the country. A new constitution was enacted in March 1992 recognizing political pluralism and the separation of powers, while proclaiming civil rights and public freedoms. Article 28 of this constitution declares: "freedom of peaceful assembly and association is guaranteed under the condition set by law."⁹

Burundi did not enjoy the benefits of democracy for long, for in October 1993, an unprecedented civil war struck the country following the assassination of the first democratically elected president, Melchior Ndadaye.

On July 25, 1996, a military coup suspended the 1992 Constitution, and subsequently banned the exercise of public freedoms, including in particular the right to freedom of peaceful assembly.

⁴ See the various constitutions that governed Burundi: www.uantwerpen.be/en/faculties/iob/research-and-service/centre-great-lakes/dpp-burundi/constitution/aper-u-hist-const/.

⁵ Burundi was under German rule prior to World War I, and under Belgian rule from 1918 to 1962.

⁶ Lieutenant Général Michel Micombero, 1966-1976 ; Colonel Jean Baptiste Bagaza, 1976- 1987; Major Pierre Buyoya, 1987-1993.

⁷ UPRONA: Union pour le Progrès National (Union for National Progress), the party that led the country to its independence.

⁸ François Mitterrand, speech at the La Baule conference, http://www1.rfi.fr/actu/fr/articles/037/article_20103.asp.

⁹ Article 28 of the Constitution of the Republic of Burundi of March 12, 1992, <http://confinder.richmond.edu/admin/docs/localburundi2.pdf>.

On August 28, 2000,¹⁰ after long periods of negotiations mediated first by Mwalimu Julius Nyerere, then by Nelson Mandela, the Arusha Peace and Reconciliation Agreement in Burundi was signed by Burundian political actors. The Arusha Agreement advocated the enactment of an inclusive constitution recognizing people's rights and freedoms.

Thus, the March 18, 2005, Constitution still in effect today was born. These two fundamental texts recognize the right to freedom of peaceful assembly as one that all persons must fully enjoy in Burundi.

2. *Legal framework of the right to freedom of peaceful assembly*

In this section we will consider legal texts, including international legal instruments, the Arusha Peace and Reconciliation Agreement in Burundi, and the March 18, 2005, Constitution of the Republic of Burundi.

A. **Regional and international legal instruments**

Burundi is party to relevant international legal instruments concerning human rights such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child.

In terms of regional obligations, Burundi is party to the African Charter on Human and Peoples' Rights and the Protocol Establishing the African Court on Human and Peoples' Rights. Furthermore, Burundi has recently joined the East African Community, whose basic principles, among others, are good governance, respect of the principles of democracy, rule of law, responsibility, transparency, social justice, equal opportunity, gender equality, as well as the recognition, promotion, and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

The table below contains legal instruments, provisions relevant to the right to freedom assembly, and Burundi's dates of accession to the treaties.

TREATY	PROVISIONS RELATING TO FREEDOM OF ASSEMBLY	DATE OF ACCESSION
INTERNATIONAL INSTRUMENTS		
Universal Declaration of Human Rights	Article 20 (1): <i>Everyone has the right to freedom of peaceful assembly and association.</i>	December 10, 1948

¹⁰Arusha Peace and Reconciliation Agreement in Burundi, <http://www.issafrika.org/AF/profiles/Burundi/arusha.pdf>

International Covenant on Civil and Political Rights	Article 21: <i>The right to peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.</i>	May 9, 1990
International Covenant on Economic, Social and Cultural Rights	Article 8: <i>The States Parties to the present Covenant undertake to ensure: d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.</i>	May 9, 1990
Convention on the Rights of the Child	Article 15: <i>1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.</i>	October 19, 1990

REGIONAL INSTRUMENTS		
African Charter on Human and Peoples' Rights	Article 11: <i>Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.</i>	July 28, 1989
Treaty Establishing the East African Community	Article 6: <i>The fundamental principles that shall govern the achievement of the objectives of the Community shall include: d) ...the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;</i> Article 7, 2. <i>The Member States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.</i>	July 1, 2007

B. The Arusha Peace and Reconciliation Agreement in Burundi

Seven years after the outbreak of civil war, political actors, with the help of the international community, reached a historic agreement that led to the end of the conflict in Burundi: the Arusha Peace and Reconciliation Agreement in Burundi.

In the chapter entitled “Nature and Historical Causes of the Conflict,” the agreement states that since independence and throughout the different regimes, a number of constant phenomena have given rise to conflict in Burundi: deliberate killings, widespread violence, and exclusion.¹¹

¹¹ Arusha Peace and Reconciliation Agreement in Burundi: Protocol I, Chapter I, Article 3, 1 <http://www.issafrica.org/AF/profiles/Burundi/arusha.pdf>.

In order to end these phenomena, parties to the agreement committed to adhere to the principles of rule of law, democracy, good governance, pluralism, respect of fundamental rights and freedoms of the individual, unity, solidarity, gender equality, mutual understanding, and tolerance between the various political and ethnic components of the Burundian people.

Thus, the Arusha agreement emphasizes that:

The rights and duties proclaimed and guaranteed inter alia by the Universal Declaration of Human Rights, the International Covenants on Human Rights, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child shall form an integral part of the Constitution of the Republic of Burundi. These fundamental rights shall not be limited or derogated from, except in justifiable circumstances acceptable in international law and set forth in the Constitution.¹²

Moreover, point 14 of the previously cited article of the Agreement provides for freedom of assembly under the following terms: "Freedom of assembly and association shall be guaranteed, as shall freedom to form non-profit-making associations or organizations in conformity with the law."¹³

In light of the above, it is clear that the Arusha Agreement has viewed the rights and freedoms proclaimed by international legal instruments, including the right to freedom of peaceful assembly, as one of the solutions to preventing recurrence of the Burundian conflict. The Arusha agreement remains a form of social contract that inspires political life in the country.

C. Constitution on the Republic of Burundi (March 18, 2005 Law No. 1/010)

The Constitution of the Republic of Burundi as enacted on March 18, 2005, embodies the implementation of recommendations stated in the Arusha Peace and Reconciliation Agreement.

The provisions concerning the rights to freedom of assembly provided by the Agreement have been integrated verbatim in the Constitution. Articles 19 and 32 of the Constitution pick up the dispositions provided above, respectively. The major innovation of the current constitution of the Republic of Burundi is the incorporation of international legal instruments into domestic law, facilitating their applicability without any other implementing measure.

D. Previous legislation on freedom of assembly

Freedom of assembly has been regulated by specific laws since the colonial period. However, rather than protecting and promoting the right to freedom of assembly, these texts have had the common goal of controlling and in a number of cases preventing individuals from fully enjoying this freedom. Their wording speaks volumes. Rather than regulating peaceful assemblies and gatherings, they regulate "demonstrations and public meetings."

These texts include Order No. 111/29 of Rwanda-Urundi, dated January 31, 1959, regulating public demonstrations and meetings; Order No. 111/6 of Rwanda-Urundi, dated

¹²Arusha Peace and Reconciliation Agreement in Burundi, Protocol II, Chapter I, Article 3, 1, <http://www.issafrica.org/AF/profiles/Burundi/arusha.pdf>.

¹³ Arusha Peace and Reconciliation Agreement in Burundi, Protocol II, Chapter I, Article 3, 14, <http://www.issafrica.org/AF/profiles/Burundi/arusha.pdf>.

January 18, 1962, regulating public gatherings; Decree No. 100/187/91, dated December 31, 1991, regulating public demonstrations and meetings.

The first chapter provides only a broad picture of the regulation of the right to freedom of assembly in Burundi. The remainder of the work focuses mainly on the current law on assemblies and public demonstrations. The objective is to show the extent to which this law complies with international standards regarding peaceful assemblies, both in regulation and in practice.

II. Analysis of the December 5, 2013, Law on Assemblies and Public Demonstrations

The root of the right to freedom of assembly can be found in regional and international legal instruments, as well as in the case law of the supervisory bodies of these treaties. The other root is in the constitution, which contains positive and protective provisions for the right to freedom of assembly.

However, the provisions in the constitution are often too broad to allow a just and effective implementation of the right to freedom of assembly. The vagueness of these provisions can easily lead to abuses of power by the authorities responsible for implementing this right. A law specifically regulating the exercise of freedom of assembly could be a solution to this problem.

Although nothing in the international legal instruments requires States to enact specific laws on freedom of assembly, such legislation can tremendously help protect the right against arbitrary administrative interference. Such legislation can in particular serve as a guide in the decision process by the administrative authorities and point out the circumstances in which this right may be hindered.

This research project therefore assesses whether the December 5, 2013, law on public assemblies and demonstrations is consistent with the special purpose of such a law, according to the international standards applicable concerning regulation of the right to freedom of assembly.

1. Protection or restriction of the right to peaceful assembly? Overall analysis of the text

This section is devoted to the form and content of the text in terms of principle, procedure, restrictions, and sanctions. This introductory analysis seeks to comprehensively deal with the content of the law and its tendency to protect or restrict the right to freedom of peaceful assembly in Burundi.

A. Title of the law

The law is entitled “The December 5 law No 1/28 regulating public demonstrations and assemblies.” The law clearly targets specific categories of gatherings of people, namely public demonstrations and assemblies. We believe that the law should have a title that encompasses all possible forms of gathering to comply with international standards on the right to freedom of assembly.

B. Architecture of the legal text

The text contains five chapters in total: a chapter on principles and definitions (3 articles); two chapters on procedure and restrictions (12 articles); one chapter on criminal and administrative sanctions (13 articles); and a chapter relating to final provisions (2 articles).

Where principles are concerned, it should be noted that the law only discusses one principle. Article 1 provides that: “public assemblies and demonstrations are free in Burundi.” Other than this lone statement in favor of the right to freedom of assembly, the remainder of the text consists of restrictions, administrative procedures governing these restrictions, and criminal and administrative sanctions.

In view of the above, and generally speaking, it is apparent that the law restricts the right to freedom of assembly more than it protects it.

C. General recommendations

- The law should be entitled: “The December 5, 2013 law on peaceful assemblies and gatherings in Burundi.”
- The law should provide principles ensuring the protection of the right to freedom of assembly articulated in the international instruments relating to human rights.
- The law should contain more protective provisions and fewer restrictions and sanctions.

2. *Restrictions on the right to hold a peaceful assembly*

Article 21 of the International Covenant on Civil and Political Rights guarantees the right to freedom of peaceful assembly under the following terms:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Burundi is party to the ICCPR. Moreover, Article 19 of its Constitution provides that all the international instruments relating to human rights are integral parts of the Constitution of the Republic of Burundi, and that the fundamental rights proclaimed by these instruments must not be subjected to any restriction or exemption, except in certain circumstances justifiable by public interest or the protection of a fundamental right.

The International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the Convention on the Rights of the Child provide legitimate reasons for restriction of a peaceful assembly. No restriction other than those stipulated in these provisions shall be prescribed by national law. Indeed, these restrictions themselves should be interpreted more restrictively to avoid abuses.

The Special Rapporteur on the right to peaceful assembly and the freedom of association reminds in his A/HRC/23/39/report that whenever authorities decide to restrict an assembly, they should provide assembly organizers, in writing, with “timely and fulsome reasons” which should

satisfy the strict test of necessity and proportionality of the restrictions imposed on the assembly pursuant to legitimate aims.¹⁴

The December 5, 2013, law provides a number of restrictions on the right to freedom of peaceful assembly:

- Prior declaration: Articles 4 and 7
- De facto ban on spontaneous gatherings: Articles 4 and 7 read in conjunction with Article 9
- Discretion on the part of the administration to ban any peaceful assembly: Articles 5 and 8
- Restrictions on recourse mechanisms: Article 5
- Time constraint: Article 11
- Responsibility of organizers to maintain public order during peaceful assemblies: Article 13
- Criminal and administrative sanctions: Articles 14 to 26
- Repression of counter-demonstrations: Article 18 paragraph 2

A. Prior declaration

Problem: Articles 4 and 7 provide that public demonstrations and assemblies must be subject to prior declaration. The declaration must include the identification of the members of the organizing office, the time and date of the demonstration, its purpose, its foreseeable involvement, and the intended itinerary of the procession or parade.

Analysis: The Special Rapporteur on the right to peaceful assembly and freedom of association believes that the exercise of fundamental freedoms should not be subject to prior declaration to the authorities, but rather to a process of prior notification in order to allow public authorities to facilitate the exercise of the right to peaceful assembly, to ensure public safety and order, and to protect the rights and freedoms of the rest of the population. This notification should undergo an assessment of proportionality that is not unduly bureaucratic, and be submitted within a period of time (48 hours, for example) determined prior to the scheduled date of the assembly.¹⁵

The law being analyzed does not explicitly state the need for the declaration. Although the idea of protecting the right to peaceful assembly cannot entirely be excluded, it is apparent that the law seeks to control and restrict the right to freedom of assembly. This claim can be made from the fact that, by law, the requirement of a prior declaration is directly linked to the

¹⁴ United Nations, General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, § 48, http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/23/39&referer=/english/&Lang=F.

¹⁵ United Nations, General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, § 47, http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/23/39&referer=/english/&Lang=F.

ability of the competent authority notified to either defer the assembly or ban it altogether. Furthermore, a prior declaration leading to a possible ban on the assembly becomes an authorization. Indeed, the law does not indicate the benefit of the information contained in the declaration. It can therefore be used to ban a peaceful assembly on the basis of its purpose, its organizers, its location, or the people planning to attend.

According to the Special Rapporteur, a notification should be considered overly bureaucratic if one of the following points is imposed on the organizers: that more than one organizer's name be mentioned; that only registered organizations be considered capable of organizing a gathering; that official identification documents such as passports or ID cards be presented; that details concerning the identity of other participating persons (members of security services, for example) be provided; that reasons for the gathering be specified, with respect to the principle of non-discrimination; and that the number of participants be stated, which is difficult to predict.¹⁶

Practice: Prior declaration operates as a prior authorization in the practice of the administration in Burundi.

In his June 18, 2014, letter, the Minister of the Interior wrote, in response to an administrative appeal of a demonstration banned by the Mayor of the town of Bujumbura: "... and therefore, the procession that you intend to hold on June 20, 2014 *cannot be permitted under any circumstances*"¹⁷ (emphasis added).

In response to a prior declaration by the president of OLUCOME,¹⁸ the Mayor of Bujumbura wrote: "...I regret to inform you that, following the animated press conference by the Attorney General of the Republic on April 4, 2014 regarding the Ernest MANIRUMVA file, which exposes the sentiment of certain civil society organizations, including OLUCOME to seek to confuse justice, *this authorization cannot be granted*"¹⁹ (emphasis added).

Furthermore, prior declaration (authorization) is required to exercise the right to freedom of assembly and all other forms of peaceful assembly. It must contain all the information provided by Articles 4 and 7 lest it be deemed inadmissible by the administrative authorities.²⁰

Recommendation: Prior declaration as provided by law and interpreted by the administration goes against Articles 19 and 32 of the Constitution of the Republic of Burundi and Article 21 of the ICCPR. Reform is necessary to differentiate gatherings that may pertain to the declaration and those that may not.

- A prior declaration must be required only for demonstrations of a great scale. Above all, it must serve the legitimate reason of ensuring public safety and order for peaceful assemblies.

¹⁶ Likewise, par. 54.

¹⁷ Letter from the Minister of the Interior No. 530/1161/CAB/2014 to Mr. Vice President of FORSC.

¹⁸ The Observatory for the Fight against Corruption and Economic Embezzlement (OLUCOME) planned to hold a demonstration for the commemoration of the fifth anniversary of Ernest Manirumva's assassination, former vice-president of the organization.

¹⁹ Letter from the Mayor of Bujumbura No. 531.17/618/CAB/2014 dated April 4, 2014, to Gabriel Rufyiri, President of OLUCOME.

²⁰ See FORSC's letter No. Ref 121/7/FORSC/2014 dated July 26, 2014, to the Mayor of Bujumbura.

- It should be a simple letter indicating intent to exercise the right to freedom of peaceful assembly and requesting protection of the assembly by the administration and the police.
- Where a declaration is required, it must not be interpreted as an authorization.

B. Spontaneous gathering

Problem: The requirement of a prior declaration provided by Articles 4 and 7 leaves no place for a spontaneous gathering. Indeed, Article 9 underlines that any assembly or gathering that does not comply with the law is unlawful and susceptible to sanction.

Analysis: The requirement of a prior declaration should not be so strict as to prohibit a demonstration or a spontaneous assembly. Spontaneous gatherings are generally considered as those occurring in response to an event, an incident, another gathering, or even when an organizer (if there is one) cannot meet the legal deadline for prior notification or when there are no organizers at all. These assemblies often occur at the same time as the triggering event, and the capacity to keep them spontaneous is crucial, for any lateness would weaken their message.²¹

Freedom of association is an intrinsic right to human beings, and its exercise can only be conditioned by an administrative procedure in the event of special circumstances specifically defined by legal provisions.

Practice: Spontaneous assemblies are not possible in Burundi because a prior declaration is required.

Recommendation: We propose reforming the law to provide the possibility for spontaneous gatherings to be conducted.

C. Discretion of the administration to ban a peaceful assembly

Problem: Articles 5 and 8 give discretionary power to the administrative authority notified to defer or ban an assembly if maintaining public order absolutely demands it.

Analysis: Maintaining public order is one of the legitimate reasons provided by Article 21 of the ICCPR to restrict freedom of peaceful assembly. However, this notion should not be interpreted so broadly as to allow restrictions when a disturbance of peace is merely hypothetical. The authority should produce material evidence demonstrating an imminent public disturbance.

According to international standards, restriction of the right to freedom of assembly on grounds of maintenance of public order should only be invoked when there is irrefutable and verifiable proof that the participants themselves will resort to violence.²²

The Special Rapporteur reminds in his report on the right to freedom of peaceful assembly and association that the exercise of the right to freedom of peaceful assembly can only be subject to restrictions “that are in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” In

²¹ OSCE/ODIHR, op. cit., 67.

²² Likewise, 51.

this context, he emphasizes once again that freedom must be the rule and restriction the exception.²³

Practice: The administration often violates the exercise of the right to freedom of peaceful assembly. Although Burundian law provides only public order as a basis for restricting freedom of assembly, in practice the administration invents reasons to ban even a properly registered assembly. This practice violates three principles: the principles of legality, proportionality, and good governance.

According to the principle of legality, all restrictions imposed must have a legal basis and comply with international legal instruments on human rights. Administrative authorities should not invoke justifications other than those explicitly provided by law. Moreover, the law must be specific enough to allow individuals to assess what conduct may constitute a violation as well as the consequences.²⁴

Where the principle of proportionality is concerned, any restriction imposed on freedom of assembly must be proportional to the legitimate goal sought by the administration.²⁵

As to the principle of good governance, restrictions imposed on an assembly should be promptly communicated in writing to the organizers to allow them to appeal the decision to an independent court that would give a ruling before the date of the event.²⁶

A few examples illustrate the practice:

On February 4, 2014, police prevented the Bar Association of Burundi from holding its general assembly with a verbal notice that was as unfounded as it was illegal, stating that the assembly was not *permitted* by the Mayor of Bujumbura.²⁷ Yet, statutory assemblies of organizations are explicitly excluded from the scope of application of the law on public assemblies and demonstrations, as per Article 2.

On February 18, 2014, police once again denied the Bar Association of Burundi to jointly hold a training seminar with the French Bar Associations without a written basis, because the police simply prohibited those lawyers from gaining access to the training room. Although the law does not require any form of statement for trainings that are scientific in nature, the Bar had notified the Mayor of Bujumbura about the training in writing as a courtesy.²⁸

In his response to the administrative appeal filed by the Forum for the Strengthening of Civil Society (FORSC) for the march in support of Pierre Claver Mbonimpa,²⁹ the Minister of

²³United Nations, General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, § 43, http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/23/39&referer=/english/&Lang=F.

²⁴ OSCE/ODIHR, op. cit., 16.

²⁵ *Id.*

²⁶ *Id.*

²⁷ For a reminder of the day's event (including the interview of President of the Lawyers' Association of Burundi), see http://www.youtube.com/watch?v=T3P_7wxGLkg.

²⁸ Amnesty International, *Rapport sur le Burundi, Le verrouillage, lorsque l'espace politique se retrécit*, 15, <http://reliefweb.int/sites/reliefweb.int/files/resources/Burundi%20-%20le%20verrouillage.pdf>.

²⁹ Pierre Claver Mbonimpa is a human rights defender in prison at the time this project was drafted, and president of the Association for the protection of prisoners' human rights.

the Interior invoked the pending criminal case (Public Prosecutor C/Pierre Mbonimpa) to ban the demonstration under the following terms: “Indeed, you claim to support Mr. Pierre Claver MBONIMPA in an ongoing judicial case before the court. It would therefore be wise to show patience and to allow the court time to render its ruling instead of distracting the public; consequently, the procession you intend to hold on June 20, 2014 cannot be permitted under any circumstances.”³⁰

The Mayor of Bujumbura recalled a press conference of the Attorney General of the Republic to deny a demonstration declared in good order: “...I regret to inform you that following the animated press conference by the Attorney General of the Republic on April 4, 2014 regarding the Ernest MANIRUMVA case, which exposes the attitude of certain civil society organizations as well as that of the head of OLUCOME to seek to confuse justice, this authorization cannot be allowed.”³¹

All the cases mentioned constitute serious violations of international human rights law (Article 21 of the ICCPR, Article 11 of the African Charter on Human and Peoples’ Rights, Article 15 of the Convention on the Rights of the Child), of the Constitution of the Republic of Burundi (Article 32), and of that same law citing Articles 4 (4), 5(2), 10(2), which stipulate that a decision of refusal must be duly justified.

Recommendation: Certain recommendations are relevant concerning the legitimate justification for restricting a peaceful assembly:

- The law must be reformed to provide only those restrictions allowed by Article 21 of the ICCPR.
- Legitimate restrictions must be interpreted in a restrictive manner and in conformity with international standards.
- The administration must keep from invoking justifications not provided by law to prohibit a peaceful assembly, as per Article 32 of the Constitution.³²
- The administration must address peaceful assembly organizers in writing, with appropriate justification.

D. Recourse mechanisms

Problem: According to Article 5, assembly organizers possess both a hierarchic and a judicial recourse to appeal an unfavorable decision concerning a peaceful assembly. However, the law is not specific as to time period within which the administrative court must render its ruling. The law merely states that the court shall rule according to the emergency procedure.

Analysis: Article 14 of the ICCPR provides that everyone has the right for his/her case to be fairly and publicly heard by a competent, independent, and impartial court established by law, which will rule without undue delay.

³⁰ Letter from the Minister of the Interior No. 530/1161/CAB/2014 dated June 18, 2014, to Vice President of FORSC.

³¹ Letter from the Mayor of Bujumura, No. 531.17/618?CAB/2014, dated April 4, 2014, to Gabriel Rufyiri, President of OLUCOME.

³² Article 32: “Freedom of assembly and association is guaranteed, as well as the right to establish associations or organizations *in accordance with the law.*”

The Constitution of the Republic of Burundi similarly provides that every person has the right, in a judicial or administrative procedure, for his/her case to be heard equitably and to be judged within a reasonable time period.³³

Indeed, the terms “without undue delay” and “reasonable time period” seek to protect those who resort to courts and tribunals, and whose interests can be compromised by an unjustly lengthy judicial procedure. In the present context, the interest in question is the legitimate exercise of the right to freedom of peaceful assembly.

Thus, organizers should have effective and efficient mechanisms to appeal a decision that they deem arbitrary. Such decisions should be communicated to the organizers within a reasonable time frame to allow organizers to hold a peaceful assembly that was previously banned.³⁴

Consequently, when the law uses vague terms for such a sensitive subject matter, it can constitute a breach for violations of the right to freedom of assembly.

Practice: Practice shows that not establishing time constraints on the Administrative Court process jeopardizes freedom of peaceful assembly. On June 26, 2014, the Forum for Strengthening Civil Society filed an appeal before the Administrative Court against the June 12 decision No. 531.17/1015/CAB/2014 by the Mayor of Bujumbura. Although the law provides that the Administrative Court adjudicate such a case according to the emergency procedure, the first public hearing was planned for over two months after the case was filed.

This delay is undue (Article 14 of the ICCPR) and in no way constitutes a reasonable time period (Article 38 of the Constitution) to rule on the illegality of a decision prohibiting a public demonstration.

Recommendation: The law should specify the deadline by which the Administrative Court should render its judgment. We recommend a 48-hour time period for the administrative appeal.

E. Time constraint

Problem: Article 11 provides that public assemblies and demonstrations cannot begin before 6 a.m. or extend beyond 6 p.m.

Analysis: The right to freedom of assembly is admittedly not absolute. However, the potential restrictions that it may be subjected to are limited to provisions of Article 21 of the ICCPR. Restricting freedom of assembly at night makes sense in certain situations for public demonstrations in poorly lit locales and for assemblies that may cause nighttime disturbances. However, certain assemblies may be held past 6 p.m. in secure and enclosed places. As long as assemblies are presumed peaceful where the law is concerned, there is no reason not to hold them at night.

Moreover, restricting peaceful assemblies between the hours of 6 a.m. and 6 p.m. is detrimental to the exercise of the right to freedom of assembly, on the basis that those are working hours for a majority of people. Instead of allowing peaceful assemblies only during the

³³ Article 38 of law No. 1/010, dated March 18, 2005, enacted from the Constitution of the Republic of Burundi.

³⁴ OSCE/ODIHR, *op. cit.*, 70.

day, the law should allow peaceful assemblies that pose no practical problem to be held at night, as well as alternative means of control and security for potentially dangerous assemblies.

Practice: Nighttime peaceful gatherings are nonexistent in Burundi.

Recommendation: The law should make distinctions between assemblies being held in enclosed spaces and public demonstrations. For the latter, the answer is not to ban them outright, but to regulate them on a case-by-case basis.

F. Maintaining public order in peaceful assemblies

Problem: Article 13: coordinating and monitoring assemblies and demonstrations falls to the organizing office, which is also responsible for policing the assembly and maintaining public order.

Analysis: It is the duty of the State and its agents to maintain public order, in this case, the police and local administration.

It is understandable that organizers collaborate with police and administrative authorities to maintain public order in an assembly or a demonstration. However, it is inconceivable in both national and international law that the primary responsibility for maintaining public order in this type of event should fall on people who lack the position, the training, and the means to achieve it.

It is an extremely important legal gap and an impediment to the exercise of the right to freedom of assembly. In a framework where a spontaneous assembly is not permitted, and where all assemblies are subject to prior declaration identifying three official organizers, it is difficult to find people who will commit to bear the responsibility of acting as administration and police and suffer the consequences in case of failure to control the crowd.

The law in South Africa on the regulation of assemblies is a good alternative. It states that the peaceful exercise of the right to assemble is the joint responsibility of event organizers, police, and local administration leaders. Together, these three groups form a “security triangle” with the joint responsibility to ensure order and safety during public events. The success of the security triangle is due to collective planning, cooperation between the three groups, and a willingness to negotiate a compromise when conflicts arise.

Practice: There is no available data regarding practice in this area.

Recommendation: The law should be clear on the responsibility of each of the relevant actors: the administration, the police, and the peaceful assembly organizers. Contrary to current law, the lead role should fall on the police and the administration, since they are responsible for law enforcement.

G. Criminal and civil responsibility

Problem: The last paragraph of Article 13 states that members of the organizing office may incur civil action for damages caused and criminal action for offenses committed during assembly activities, if assembly or demonstration organizers turn out to be at fault.

Analysis: Organizers have a responsibility to provide all possible efforts to uphold the law and maintain the peaceful nature of the assembly. They should not, however, be held liable for failing that responsibility if it is shown that they have provided reasonable efforts to do so.

Likewise, organizers should not be held liable for unlawful acts committed by participants. Individual liability should arise for participants or organizers who commit an offense or fail to carry out the rules and guidelines put in place by the administration and the police.³⁵

Furthermore, when an assembly escalates into public disorder, it is the State's responsibility to provide damage control. Organizers cannot be held liable for the actions of others.

In this respect, the law is not in accordance with international standards and national laws on individual criminal liability.

Practice: There is no data concerning practice in this area.

Recommendation: All provisions that bestow shared liability on the organizers for the actions of a few must be removed and replaced with a system of individual criminal liability.

The law should not include criminal dispositions since all potential offenses in assemblies are provided for in the Burundian penal code.

H. Ban on counterdemonstrations

Problem: Article 18, par. 2, imposes a fine of 100,000 to 500,000 Burundi francs on counterdemonstrators.

Analysis: Not only are counterdemonstrations banned, they are criminally punishable by a fine. Yet, everyone has the right to assemble as a counterdemonstrators to express disagreement with another demonstration. What is crucial in such circumstances is to protect the rights of each group to enjoy freedom of peaceful assembly. Instead of banning this type of demonstration, an emphasis should be placed on the State's duty to take measures to prevent the disruption of the original demonstration while also protecting the rights of the counterdemonstrator.³⁶

Practice: Practice is nonexistent, since this type of demonstration is strictly prohibited and punishable by law.

Recommendation: We recommend decriminalizing counterdemonstrations and regulating them in accordance with universally applicable guidelines.

Conclusion

Despite the existence of the right to freedom of assembly in Burundian legislation, its exercise has never fully been realized. Depending on the political climate, the exercise of the right to freedom of assembly has been subject to either de facto restrictions or restrictions based on text, legislation, or regulation.

The democratization process of the 1990s and the Arusha peace negotiations have brought about a renewed importance of the fundamental human rights principles, which have been integrated in national texts.

³⁵ *Id.*, 93.

³⁶ Likewise, 66.

However, there is a tendency to pass increasingly restrictive laws. The law regulating public demonstrations and assemblies is an example. The text contains a good number of restrictions to the exercise of the right to freedom of peaceful assembly.

We have analyzed these restrictions in the scope of international human rights law and of basic principles that stem from international practice. For each analysis, we have put forth recommendations aiming to reform the legal text.

Ultimately, we recommend a revision of the law paired with raising the awareness of administrative and police authorities responsible for implementing the law, thus ensuring that the people residing on Burundi territory actually enjoy the right to freedom of assembly.

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Civil Society in Africa

**POLITICS, POWER, AND ACCOUNTABILITY:
ADDRESSING THE ELEPHANT IN THE ROOM
IN THE QUEST FOR CIVIL SOCIETY ORGANIZATIONS'
RIGHT TO FREEDOM OF ASSOCIATION**

DR. MARIA NASSALI*

1. Introduction

The right to freedom of association is increasingly being illuminated in the international human rights arena, as demonstrated by the adoption of the Human Rights Defenders Declaration by the General Assembly in 1998 and the establishment of the mandate of Special Rapporteur on the same issue in 2010.¹ Simultaneously, there is an alarming global trend of clamping down on independent civil society spaces under the guise of combating terrorism, defending government's sovereignty, and safeguarding the public from bad governance of civil society organizations (CSOs).²

In the East African region, since September 11, 2001, there is an apprehension that CSOs can facilitate terrorism. Further, following the Arab and North Africa springs of 2012, East African governments have become intolerant to social protests.³ Government perceives CSOs as partners, appendages of government, foreign stooges, economic saboteurs, inciters of violence, or watchdogs, depending on the nature of their activities. Ugandan President Yoweri Museveni has publicly castigated CSOs with alternative views as "internal saboteurs and acting on behalf of foreign interests."⁴ Given that participation in associational life promotes political consciousness and encourages more involvement in politics, through voting, campaigning, and willingness to stand for elective office, it is one of the most restricted rights because it threatens those in power.⁵ As articulated by the former Chief Justice of Australia, Justice Gleeson, because government claim to represent the will of the people, it does not like to be checked and balanced which it deems as a threat or challenge to its power.⁶

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¹ ICNL & WMD, *Defending Civil Society Report*, 2d ed. (June 2012) at 3, 9.

² ICNL & WMD, *International Principles Protecting Civil Society*, <http://www.defendingcivilsociety.org/en/index.php/principles>

³ The EAC Deputy Secretary General in charge of Political Federation, <http://www.eac.int/about-eac/eacnews/981-2nd-political-dialogue.html>

⁴ Halima Abdalla, *Under Siege, Museveni Seeks Support on Oil Law, Aid Cuts*, EAST AFRICAN (15-21 December 2012) at 5.

⁵ M. EDWARDS, CIVIL SOCIETY 102 (2004).

⁶ Justice Nkabinde, keynote address, Judicial Symposium Chobe, 30 September 2014.

This article argues that in a democratic society, the state and a vibrant civil society are “two sides of the same coin and are complementary in improving society.”⁷ Civil society and the state are interdependent, with states expected to provide the legal and regulatory framework for civil society to independently function in order to play an oversight role over government’s accountability to its citizens.⁸

The article begins with the conceptual framework for the right to freedom of association in part 2. In part 3 it examines the legal and regulatory framework in Uganda to assess whether it supports the rights to freedom of association of CSOs. It proceeds with an analysis of the root cause of tension between CSOs and government as the struggle of power, resources, and influence in part 4. In part 5 it recommends the strengthening of CSOs’ political consciousness. Part 6 concludes.

2. *The Conceptual Framework*

Civil society has a right to autonomous existence as guaranteed under international human rights and the Uganda Constitution.⁹ This article is premised on the intersection of human rights and democracy discourses as mutually reinforcing, because democracy cannot exist without full respect for human rights. Conceptualized as a normative principle to constrain the abuse of power, human rights form the cornerstone of democratic governance in order to expand space for strengthening the rights and obligations of the citizens to participate in decisions that affect their lives and to hold the leadership accountable. The formation of associations provides an important beginning to organize and advocate for rights as well as engage governments in pursuit of common interests.¹⁰ In fact, only organized people can effectively struggle against oppression and repression by governments.¹¹

The article applies the three concepts of civil society identified by Edwards: civil society as associational life, as good society and public sphere, and as mutually reinforcing.¹² The first and dominant view of civil society is that of voluntary associations or organizations situated between the family and the state, which, though autonomous from the state, interact with it to advance their interests.¹³ The second school of thought conceptualizes civil society as “good society”: a desirable social order in which all institutions operate in ways that nurture positive

⁷ C.E. WELCH, PROTECTING HUMAN RIGHTS IN AFRICA: ROLES AND STRATEGIES OF NON-GOVERNMENTAL ORGANIZATIONS 44 (1995).

⁸ EDWARDS, *supra* note 5, at 24.

⁹ ICCPR (1966), Art. 22; African Charter, Art.10; Constitution of Uganda (1995), Art. 29.

¹⁰ AFRICAN COMMISSION, REPORT OF THE AFRICAN COMMISSION’S WORKING GROUPS OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES 57 (2005).

¹¹ C.M. PETER, HUMAN RIGHTS IN TANZANIA: SELECTED CASES AND MATERIALS 650 (2007).

¹² EDWARDS, *supra* note 5.

¹³ *Id.*; P. UVIN, HUMAN RIGHTS AND DEVELOPMENT (2004); NYANGABYAKI, CONTEMPORARY CIVIL SOCIETY AND DEMOCRATISATION PROCESS IN UGANDA: A PRELIMINARY EXPLORATION (2000); J. OLOKA-ONYANGO, CIVIL SOCIETY, DEMOCRATISATION AND FOREIGN DONORS IN CONTEMPORARY UGANDA: A CONCEPTUAL AND LITERATURE REVIEW 23 (2000); J. J. BARYA, THE STATE OF CIVIL SOCIETY IN UGANDA: AN ANALYSIS OF THE LEGAL AND POLITICO-ECONOMIC ASPECTS (2000); M. SWILLING & B. RUSSELL, THE SIZE AND SCOPE OF THE NON-PROFIT SECTOR IN SOUTH AFRICA (2002); M.G. Ngunyi, *Building Democracy in a Polarised Civil Society: The Transition to Multi-Party Democracy in Kenya*, in LAW AND THE STRUGGLE FOR DEMOCRACY IN EAST AFRICA (J. Oloka-Onyango, K. Kibwana, & C.M. Peter eds.) (1996).

social norms, such as tolerance, nondiscrimination, nonviolence, trust, cooperation, and rights.¹⁴ In its social role, civil society is seen as the reservoir of social capital and positive social norms that foster community-building, bonds of trust, cooperation, and reciprocity, and enriches the human condition.¹⁵ The third school of thought perceives civil society as part of the public sphere: an arena for argument and deliberation as well as for associational and institutional collaboration.¹⁶ The public sphere is an arena where societal differences, social problems, public policy, government action, and cultural and common identities are debated and developed. In this political role, civil society serves as a crucial counterweight to state and corporate power and as an essential pillar in promoting good governance.¹⁷ Civil society also provides channels through which people can have their voices heard in government decision-making and sharpens skills for political leadership.¹⁸ Thus, civil society has influenced, altered, and shaped the political discourse and the human rights terrain. Ostensibly, an integrated approach of the concept of civil society is useful in attacking all forms of inequities and promoting democratic spaces.¹⁹

The expectation that civil society serves as a countervailing force against government's abuse of power is a source of disharmony in the state-CSO relationship. The Oxford Dictionary defines *power* as the authority to do something, influence people or events, and strength. According to Lips, power is not a commodity but a process underpinning human relationships.²⁰ Power is related to human rights, such that whenever human rights violations occur, negative power relations are often prevalent. While activism is about challenging existing power structures and imbalances, unfortunately within the human rights corpus, power is largely ignored²¹ or treated as negative or corrupting. Inadvertently, the ambivalence about overtly challenging the abuse of power is constraining CSOs' capacity to collectively challenge government's intrusion into their independent organizing.

Building on this conceptual framework, the next section asks whether or not government should interfere in the internal functioning of CSOs by regulating their internal governance.

3. *The Legal Framework for the Operations of CSOs*

In Uganda, the Constitution provides for freedom of association²² and the right to freely participate in peaceful activities and to influence the policies of government through civic action.²³ Further, the National Objectives and Directive Principles of State Policy provide for the autonomy of civic organizations and their participation in public affairs,²⁴ and commit the state

¹⁴ EDWARDS, *supra* note 5, at 39.

¹⁵ *Id.* at 14; L. M. SALAMON ET AL., GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NON-PROFIT SECTOR 23 (2004).

¹⁶ EDWARDS, *supra* note 5, at 55.

¹⁷ *Id.* at 14-15.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 96.

²⁰ H.M. LIPS, WOMEN, MEN AND POWER 3-4 (1991).

²¹ M. MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 13 (2002).

²² *Id.*, Art. 29(e).

²³ *Id.*, Art. 38(2).

²⁴ *Id.*, Principle II (vi).

to respect the independence of institutions and NGOs working on protecting and promoting human rights.²⁵

Before 1989, CSOs registered either as Companies limited by guarantee under the Companies Act or as Trusts under the Trustees Incorporation Act.²⁶ Today, a majority of organizations are registered under the NGO Act. The NGO Act acknowledges the right of any organization to choose alternative registration and stresses that the Act only applies to NGOs registered under it.²⁷ However, given that organizations registered under the Companies Act or the Trustees Act are not subjected to the same stringent regulations as those under the NGO Act, this section focuses on the NGO Act to highlight the assault to freedom of association.

The first NGO law was enacted in 1989²⁸ to provide for the registration of NGOs and establish the NGO Board. The NGO law was amended in 2006 to strengthen government's monitoring role.²⁹ The 2006 law introduced some progressive provisions. The amendment incorporated gender representation by providing that a third of the NGO Board must be women.³⁰ An NGO automatically acquires legal personality on registration instead of having to undergo double registration under the Companies Act, as was originally the case.³¹ Lastly, it exempts Community Based Organizations (CBOs) from registering with the NGO Board and instead provides for registration with the District authorities, which takes the service closer to the people.³²

On the negative side, the law expands the function of the Board beyond registration to include the monitoring of NGOs.³³ Further, it retains provisions from the 1989 law, such as the representation of security organs on the NGO Board; the criminalization of non-registration³⁴; and the discretionary powers of the NGO Board to revoke a license in the public interest.³⁵ Although the law purports to include NGOs on the National NGO Board, there is no guarantee that the three public representatives will be NGO representatives,³⁶ because they are nominated by the government. Worse still, the law introduces a permit,³⁷ whose duration and conditions are to be prescribed by the Minister,³⁸ making the existence of NGOs precarious.

²⁵ *Id.*, Principle V (ii).

²⁶ Companies Act Cap 85, Trusteeship Act Cap 147, Partnership and Associations Act Cap 87.

²⁷ NGO Amendment Act (2006) § 2(1)a.

²⁸ Uganda NGO Act, Cap 113, formerly Statute 5 of 1989.

²⁹ NGO Amendment Act No. 25/2006.

³⁰ NGO Amendment Act (2006) § 4 (2).

³¹ NGO Amendment Act (2006) § 2 (3).

³² NGO Amendment Act (2006) §7(2).

³³ NGO Amendment Act (2006) § 7.

³⁴ NGO Amendment Act (2006) §§ 2(5), 2(6).

³⁵ NGO Amendment Act (2006) §10 (c).

³⁶ NGO Amendment Act (2006) § 4 (1).

³⁷ NGO Amendment Act (2006) § 2.

³⁸ NGO Amendment Act (2006) § 13.

The 2009 NGO Registration Regulations made the registration process more cumbersome. In addition to the constitution as a common registration requirement, a prospective NGO is supposed to specify the geographical area, field of operation, organizational structure, work plan, and a one-year budget, and provide written recommendations from the two sureties, two sub-county chiefs or Resident District Commissioners (RDCs).³⁹ While originally the government had proposed to have the NGO permit annually renewable, the NGO Regulations maintained the original position of having the permit renewable initially for twelve months and subsequently for thirty-six months and thereafter sixty months.⁴⁰ Further, the regulations retain the provision that recognizes that an NGO can engage in gainful activities for the economic interest of the organization.⁴¹ An NGO is supposed to give a seven days' notice to the Local Council and Resident District Commissioner before contacting the local communities.⁴²

The NGO Policy of 2010 was enacted after the Act, yet it is policy that guides the legal framework. Nonetheless, it has some positive attributes. Its vision of a "vibrant and accountable NGO sector enabling citizens' advancement and self-transformation"⁴³ is human-rights oriented. It commits government to respecting the autonomy of NGOs and is guided by the principles of respect for human rights, freedom of association, voluntarism, diversity, NGO autonomy, self-governance, self-regulation, dignity, mutual respect, trust, gender equity, and equality.⁴⁴ It clarifies that the District leadership does not have power to deregister an NGO but rather should refer the case to the NGO Board.⁴⁵ Adversely, the NGO Policy narrowly defines NGOs by placing emphasis on augmenting government's work,⁴⁶ with NGOs deemed as appendages of government. Further, it creates an NGO monitoring infrastructure at the District and Sub-County levels and subjects the self-regulation mechanism to the approval of the Board. The local governments are mandated to coordinate, monitor, and supervise the activities of NGOs,⁴⁷ which exposes NGOs to government arbitrariness. Furthermore, it does not provide for tax incentives to stimulate the development of local philanthropy.

Besides the specific NGO law, other laws and policies curtail the right to freedom of association. In 2007, the Ministry of Internal Affairs enacted the Police Declaration of Gazetted Areas Instrument, which among others compels 25 or more people to assemble in only specifically gazetted areas and to secure a permit for holding an assembly, demonstration, or procession, from the Inspector General of Police (IGP).⁴⁸

Further, the Public Order and Management Act of 2013 purports to bestow the same powers on the IGP which powers were challenged in the Constitutional Court in *Muwanga*

³⁹ NGO Registration Regulations (2009) 156-157.

⁴⁰ Uganda NGO Registration Regulations (2009) r.7.

⁴¹ Uganda NGO Registration Regulations (2009) r. 15.

⁴² Uganda NGO Registration Regulations (2009) r.13.

⁴³ NGO Policy (2010), at 19.

⁴⁴ *Id.*

⁴⁵ NGO Policy (2010), at 43-45.

⁴⁶ NGO Policy (2010), at 12.

⁴⁷ Local Government Act (2006) §§ 18(b), 27, 50(f).

⁴⁸ Police (Declaration of Gazetted Areas) Statutory Instrument No. 53 of 2007, r. 2, 3, 4 & 5.

Kivumbi.⁴⁹ Specifically, the police have powers to regulate the conduct of the public meetings in accordance with the law.⁵⁰ Moreover, a public meeting is broadly defined as any “gathering, assembly, procession or demonstration in a public space or premises held for purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest.”⁵¹ The organizers are required to provide notice of between three and fifteen days to the Police, outlining the consent of the owner of the venue, the site of the meeting, the estimated number of persons expected; further, the meeting must be held between 7 a.m. and 7 p.m.⁵² If the organizers fail to comply with the notice requirement or if they hold the meeting at different time, date, or route than is specified in the notice,⁵³ they are criminally liable for the offense of disobedience to statutory duty.⁵⁴

The government is also relying on criminal law to frustrate the use of civil disobedience as an accountability mechanism, through such laws as unlawful society, where three or more people associate for purposes of subverting of government, committing or inciting violence, or interfering with the administration of law;⁵⁵ unlawful assembly, where three or more people assemble to cause fear or breach of peace;⁵⁶ and inciting violence.⁵⁷

Progressively, to mitigate the erosion of the rights to freedom of expression and association, in 2011 the UHRC issued guidelines on public demonstrations,⁵⁸ underlining the Police’s duty to intervene only in cases of criminal behavior, breach of peace, anticipated imminent violent situations, or sight of dangerous weapons; to make arrests only where deemed appropriate; to disperse demonstrations in an orderly manner; and at all times to guarantee free and unrestricted media coverage.⁵⁹ The organizers are required to give written notification to the police, designate an officer to coordinate the activity, not violate the rights of others, and not disrupt the right of passage.⁶⁰

As observed by the National Development Plan, the current law constrains productive engagement between NGOs and the government.⁶¹ Thus the flourishing of NGOs in Uganda has not been due to a favorable legal environment. As propounded by Fisher, NGOs flourish when demand for services is not met, irrespective of whether the government is democratic or not,

⁴⁹ *Muwanga Kivumbi v. AG*, Constitutional Petition No. 9/2005.

⁵⁰ Public Order and Management Act (2013) § 3.

⁵¹ *Id.* § 4 (1).

⁵² *Id.* § 5.

⁵³ *Id.* § 5(5).

⁵⁴ *Id.* § 5(8).

⁵⁵ Uganda Penal Code Act, § 56.

⁵⁶ Uganda Penal Code Act, § 65.

⁵⁷ Uganda Penal Code Act, § 83.

⁵⁸ UHRC GUIDELINES ON PUBLIC DEMONSTRATIONS AND PROCESSIONS IN UGANDA 76-77 (2011).

⁵⁹ UHRC Annual Report (2011) 76-77.

⁶⁰ UHRC GUIDELINES, *supra* note 58, at 76-77.

⁶¹ National Development Plan (2010) at 28.

particularly in light of government incapacity to enforce repressive registration.⁶² Luckily, the NGO Board hardly has the capacity to enforce the law.

To mitigate the negative repercussions of the law, the NGO Forum and DENIVA have worked with the National NGO Board to develop the NGO regulations and Policy as well as strengthen the capacity of the NGO Board to understand its roles and responsibilities.⁶³

Having analyzed the law and highlighted the fact that it is aimed at controlling CSOs, the following discussion analyzes the underlying reasons for controlling CSOs' spaces.

4. *The Struggle for Power, Resources, and Influence*

Any organization or actor with influence and power must be subjected to pressure for accountability.⁶⁴ The increasing power and influence of CSOs has triggered public scrutiny of their own accountability for organizational resources. Unfortunately at the time of drafting the NGO Act in 2006, there was ambivalence about growing public cynicism over the CSO sector, particularly in the aftermath of the misappropriation of Global Alliance for Vaccine and Immunisation (GAVI) Fund, where Government NGOs (GONGOs) tainted the image of the sector. During the advocacy call-in radio programs organized by the sector, most callers attacked CSOs as thieves and commended government for streamlining the sector.

The scramble for scarce resources is a source of tension between CSOs and government. For example, the fact that in 2009 NGOs spent about US \$200 million, which is comparable to the World Bank Poverty Support Credit (PRSP) budget, has ignited antagonism.⁶⁵ Consequently, the Ministry of Finance Survey on the NGOs' revenue⁶⁶ recommended coordinating donor aid flows by the Ministry of Finance; monitoring by the Local Governments; revoking an NGO's license for failure to disclose the financial information; and making the registration and renewal of the NGO license stricter.⁶⁷

Worse still, the suspension of direct budgetary support to government for 2013, while maintaining support to projects, agencies, and civil society,⁶⁸ has aggravated state-civil society relations.⁶⁹ For example, the President during the Oil Bill debate questioned how ACODE could expend more Parliamentary allowances than government could provide and instructed the IGG to

⁶² J. FISHER, *NGOS AND THE POLITICAL DEVELOPMENT OF THE THIRD WORLD 2* (1998) at 68.

⁶³ R. Sewakiryanga, Statement by Civil Society Representative at the Launch of the National NGO Policy, 27 July 2012 at the Golf Course Hotel, Kampala, Uganda.

⁶⁴ EDWARDS, *supra* note 5, at 17; M. Robinson, *What Rights Can Add to Good Development Practice*, in *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT* (P. Alston & M. Robinson eds.) (2005) at 36.

⁶⁵ UGANDA GOVERNMENT, MINISTRY OF FINANCE, PLANNING AND ECONOMIC DEVELOPMENT (MOFPED) AND BELGIAN TECHNICAL COOPERATION (BTC) DATA COLLECTION ON DONOR SUPPORT IN LOCAL GOVERNMENT AND THE DEVELOPMENT OF A TOOL FOR TRACKING DONOR SUPPORT AT THE MICRO LEVEL 33, 37 (2009).

⁶⁶ Uganda NGO Board Records (2005) ADM/79/158/02, 11 April 2007.

⁶⁷ *Id.* at 9,13-14.

⁶⁸ Mark Lowcock, *Ugandan Citizens and Donors Must Not Tolerate Stealing of Public Funds*, *DAILY MONITOR*, 7 Dec. 2012, at 2; Samuel Sanya & Anne Mugisa, *Government to Cut Budget to Fund Critical Sectors*, *NEW VISION*, 5 Dec 2012, at 1.

⁶⁹ Abdalla, *supra* note 4, at 5.

investigate the asset base of NGO officials.⁷⁰ Moreover, the government's accusation that NGOs are promoting foreign interests is absurd given that both government and NGOs receive resources from the same donors.

Consequently, the future of independent organizations lies not only with government respect of rights, but also with civil society's coherence in defending its rights.⁷¹ In strengthening CSOs' voice, it is imperative that they strengthen their internal governance through self-regulation. However, while the NGO Forum and DENIVA have introduced the Quality Assurance Management (QuAM) as a peer-review mechanism to enhance good governance, it is voluntary and casually enforced. Consequently, on failure to self-regulate, the CSO sector is prone to being besieged by government with the legitimate excuse that it is filling the void created by the inability of the sector to self-regulate.

NGO operations are shaped and regulated within the frameworks that are determined by the state's political interests.⁷² Currently, the National Development Plan (NDP) predominantly perceives CSOs as "appendages of government whose programmes and financing should be integrated in the government plans."⁷³ Yet, successful partnership should be premised on the independence and autonomy of the parties. Thus the desire to align CSOs' work with government's priorities contradicts the very essence of advocacy work because it is the controversy which warrants alternative voices.

Given the vulnerability of CSOs when power fights back, there is preference for non-confrontational and non-contentious strategies that keep organizations apolitical, such as engaging issues that the state does not contest. This explains the weak coherent voice in constructively engaging government to safeguard their autonomy. In spite of the major coalitions such as the Human Rights Network (HURINET), Uganda Women's Network (UWONET), and NGO Forum and Development Network of Indigenous Associations (DENIVA) advocating against the 2006 law, only eight organizations⁷⁴ petitioned the President not to sign it. Expectedly, the President did not acknowledge the petition but instead summoned the NGOs working in Northern Uganda to his private home in Rwakitura, and warned against meddling in the internal security and political affairs.⁷⁵ By comparison, to underscore the importance of a collective voice, the charismatic churches through the National Fellowship of Born Again Pentecostal Churches (NFBAPC) held high-powered meetings with government and attended in

⁷⁰ Monitor Team, *Museveni Hits Back at MPs in the Oil Bill Row*, DAILY MONITOR, 14 Dec 2012, at 1; Henry Mulindwa & Dalton Kaweesa, *Bribery Claims Dog Debates, Ministers Go into Hiding*, RED PEPPER, 9 Dec. 2012, at 5; Vision Reporter, *NGOs React to President's Accusation*, NEW VISION, 15 Dec. 2012, at 5.

⁷¹ C.M. Peter, *The State and Independent Civil Society Organisations: The Case of Tanzania Women Council (BAWATA)*, in CIVIL SOCIETY AND DEMOCRATIC DEVELOPMENT IN TANZANIA (A.S. Kiondo & J.E. Nyang'oro eds. 2006b) at 117.

⁷² M.K. Juma, *The Compromised Brokers: NGOs and Displaced Populations in East Africa*, in HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA (Zezeza & McConaughay eds.) (2004) at 236.

⁷³ NDP 2010, at 28.

⁷⁴ NGO Forum, DENIVA, HURINET, Advocates Coalition for Development and Environment (ACODE), Uganda Child Rights Network, the African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN), Environmental Alert and Anti-Corruption Coalition of Uganda.

⁷⁵ HURINET notes from meeting with President Museveni's meeting with NGO working in Northern Uganda, 13 April 2006, 4:20-9:00 p.m.

large numbers of over a hundred.⁷⁶ Consequently, faith-based organizations were excluded from the ambit of the NGO Policy except those engaged in NGO-type activities.⁷⁷

Women's organizations are most notorious for implementing the NRM agenda without challenging the regime. At the 50th Anniversary dinner hosted by the Uganda Women's Network (UWONET) and the Uganda Women's Parliamentary Association (UWOPA), the President paternalistically cited the Biblical fourth commandment of "honor and obey your parents," equating the NRM under his leadership to the parent of the women's movement.⁷⁸

A comparative study of Ghana, Uganda, and South Africa established that close proximity to government can facilitate access to opportunities and information while simultaneously compromising a CSO's independent influence on legal and policy frameworks in situations of competing interests.⁷⁹ For example, the fact that the Ministry of Defense⁸⁰ presented the same NGO Amendment Bill of 2001 and 2004 in 2006 created the illusion of a long participatory process. However, the Act was passed in 2006, in less than three hours and without the NGOs' knowledge.⁸¹ Likewise, during the Petroleum Exploration and Development Bill of 2012 (Oil Bill) debates, two Coalitions, Oil Watch Coalition and the Civil Society Budget Advocacy Groups worked with Parliamentarians to contest the Minister's unilateral powers to negotiate, grant, and revoke licenses, but it was passed on account of the NRM's numerical strength.⁸² Similarly, while the collaboration between UWOPA and the women's movement resulted in the enactment of the Domestic Violence Act, the Anti-Female Cutting Act, and the Anti-Human Trafficking Act, the Marriage and Divorce Bill was withdrawn on the initiation of the NRM itself.

It is noteworthy that the NDP acknowledges that its relationship with CSOs is characterized by mutual suspicion and hostility.⁸³ CSOs perceived to be acting against government agendas or seeking accountability of government are stigmatized as partisan. This situation is exacerbated by the President's dominance of all aspects of government, policy, and political appointments, as well as ability to dictate the Parliamentarians' resolutions. Inadvertently, there is shrinking space for critical alternative organizing, owing to public political apathy and self-censorship of CSOs' watchdog role. For example, the Walk to Work (W2W)⁸⁴ against the high cost of living and the Black Monday campaigns against corruption have been

⁷⁶ National NGO Board, ADM/79/158/02, 11 April 2007, Min.01.04.07.

⁷⁷ NGO Policy (2010) 11.

⁷⁸ Interview with Rita Aciro, Executive Director, UWONET, 19 Nov. 2012.

⁷⁹ B. Nyangabyaki, S. Friedman & M. Robinson, CIVIL SOCIETY, DEMOCRACY ASSISTANCE AND PUBLIC POLICY IN AFRICA (unpublished), Sussex: Institute of Development Studies, 24 (2001).

⁸⁰ Although NGOs are under the Ministry of Internal Affairs, the NGO Bill was presented by the Ministry of Defence under the guise that some NGOs are a security threat.

⁸¹ Uganda Hansards, 4 April 2006, 10:34 a.m to 12:13 p.m.

⁸² Mulindwa & Kaweesa, *supra* note 70, at 5; Mercy Nalugo, *MPs Support Kadaga in Bid to Reject Bill*, DAILY MONITOR, 5 Dec. 2012, at 7; Henry Sekanjako, *Civil Society Present Petition to Kadaga*, NEW VISION, 6 Dec. 2012, at 6; Sheila Naturinda, *Government Insists on Oil Law Powers*, DAILY MONITOR, 7 Dec. 2012, at 1.

⁸³ GOU, THE NATIONAL DEVELOPMENT PLAN 28 (2010).

⁸⁴ This was a protest against the high cost of living spearheaded by the *For God and My Country* pressure group led by the opposition.

criminalized as inciting violence. In 2013, when a military man was appointed to head the Ministry of Internal Affairs, his inaugural address to Parliament unsurprisingly listed among his top priorities “restraining NGOs from engaging in activities different from what they registered for and enforcing stricter media regulations.”⁸⁵ Such obsessive surveillance is likely to stifle the CSO’s watchdog role.

Threats of deregistration have been targeted at NGOs that engage in issues considered political or contrary to the government’s positions. In 2011, a Uganda Land Alliance publication, *Impact of Land-Grabbing on Food Security and Wellbeing*, was perceived to be defaming the President and inciting economic sabotage.⁸⁶ In 2012, the Ministry of Ethics threatened to deregister NGOs contesting the Anti-homosexuality Bill.⁸⁷ Similarly, some District leaderships have misinterpreted their monitoring role of CSOs to include powers to shut down organizations in cases of disagreement, particularly those accused of interfering in local politics and criticizing government.⁸⁸ For their advocacy on the Oil Bill, ACODE, NAPE, and African Institute for Energy Governance were castigated as political, subversive, or engaged in economic sabotage.

A few NGOs have served as a “critical allies” of the state, capable of holding government accountable to its human rights obligations. The Black Monday Campaign stands out as an overt, well-organized campaign involving major Coalitions and Networks, NGO Forum, DENIVA, HURINET, and UWONET to challenge government over its political impunity for corruption. In the wake of the Office of the Prime Minister (OPM) scandal where over USD 160 million was stolen, 11 November 2011 was declared Black Monday with the closure of the NGO offices and wearing of black. However, although the Black Monday campaign was held within the law, and the Inspector General of Police, the Minister of Internal Affairs, and the President were duly notified, the police blocked the organizers from accessing the premises. The Police believe that the duty to “prevent and detect crime”⁸⁹ entitles them to disperse gatherings suspected of disrupting law and order,⁹⁰ particularly those seen as antithetical to government. Moreover, Black Monday activists continue to be apprehended by Police and their materials confiscated, though without any charges filed against them.⁹¹

In sum, CSOs have not consistently and effectively held government accountable to its human rights obligations, but rather work mainly as its pliant servant in an apolitical manner. Conceptualizing governance as a social contract warrants more dynamism of CSO political consciousness, which is the subject of the next section.

⁸⁵ <http://www.monitor.co.ug/News/National/Aronda-vows-to-deal-with-activists--NGOs/-/688334/1925558/-/oe0otq/-/index.html>.

⁸⁶ Interview with Obaikol, Executive Director, Uganda Land Alliance, 10 Nov. 2012.

⁸⁷ Interview with Ambassador Kangwagye, Chairperson NGO Board, 29 Nov. 2012.

⁸⁸ Mudangha Kolyangha, *NGOs in Budaka Face Expulsion*, SUNDAY MONITOR, 6 Jan. 2013, at 7.

⁸⁹ UGANDA CONST., Art 212 (c).

⁹⁰ Andrew Kawesi, Assistant Inspector General of Police, *Makerere University Public Dialogue*, HUMAN RIGHTS SITUATIONS IN THE COUNTRY, IN THE CONTEXT OF THE RULE OF LAW AND KEEPING LAW AND ORDER BY SECURITY AGENCIES, 16 Nov. 2012.

⁹¹ Solomon Arinaitwe, Richard Wanambwa, & Ismail Musal Ladu, *Activists Held Over Graft Flyers*, DAILY MONITOR, 8 Jan. 2013, at 7; NTV Tonight News Bulletin, Aired the arrests of Arthur Larok, Country Director of Action Aid, Leonard Okello, Executive Chairman of Uhuru Institute, and Rtd. Bishop of Kampala, Zac Niringiye.

5. *Strengthening CSO's Political Consciousness*

In order for CSOs to effectively engage the state, they must appreciate that human rights struggles are political struggles. The linkages between civil and political society are “natural, useful and should be encouraged,” without necessarily being partisan.⁹² Yet while it is important that CSOs are not partisan, they need not be ideologically neutral. Promoting human rights entails addressing the power relations in the political and social struggle for societal transformation.⁹³ The UDHR acknowledgment that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,” makes human rights integral to the political realm.⁹⁴ Because democracy means a government of the people, by the people, and for the people, democracy is about people, and it is only good governance that can deliver development.⁹⁵

This article argues that any successful struggle for social justice is first and foremost a political struggle “to redefine the subjects and their entitlements.”⁹⁶ Even human rights education is political education because it enables citizens to participate from an informed point of view.⁹⁷ Boulie argues that being apolitical is a façade:⁹⁸

As educationists, CSOs provide training ground for democratic citizenship; develop political skills and new leaders; stimulate political participation and educate the broader citizenry on a wide range of public interest issues. As watch dogs, they act as a check on the State's inclination towards centralising power and evading civic accountability. As service deliverers, they supplement government programmes by providing goods and services directly to the people who need them. Often, overlooked are their political role-supplementing political parties as varied and flexible mechanisms through which citizens define and articulate a broad range of interests and exert their demands on government.

CSOs deepen democracy through such actions as championing the cause of the marginalized, operating as interest groups, influencing policies, educating and mobilizing citizens to hold power accountable, and contributing to political and human rights consciousness.

⁹² Edwards, *supra* note 5, at 26.

⁹³ S. GUTTO, HUMAN AND PEOPLE'S RIGHTS FOR THE OPPRESSED: CRITICAL ESSAYS THEORY AND PRACTICE FROM THE SOCIOLOGY OF LAW PERSPECTIVES 134 (1993); S. DICKLITCH, THE ELUSIVE PROMISE OF NGOS 18, 24 (1988).

⁹⁴ M.K. Bromley, *The International Human Rights Law Group: Human Rights and Access to Justice in Post-Conflict Environments*, in NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE (Welch Jr. ed.) (2001) at 149.

⁹⁵ Julius Ihonvbere, Good Governance and Economic Bliss, <http://julius.ihonvbere.com/2009/10/good-governance-and-economic-bliss/2/>.

⁹⁶ Mamdani (2002), 59, www.africaaction.org/rtable/rtb2.pdf.

⁹⁷ S. Koenig, *Human Rights Education, Human Rights, Culture and the Community of Non-Governmental Organisations: The Birth of a Political Ideology for the 21st Century*, in HUMAN RIGHTS EDUCATION: ACHIEVEMENTS AND CHALLENGES, INSTITUTE FOR HUMAN RIGHTS 125 (Akermark et al. eds.) (1998) [Abo Akademi University in collaboration with the Finnish National Commission for UNESCO and UNESCO].

⁹⁸ J. Boulie, *Putting the Voluntary Sector Back on Map in the Development Agenda and the Voluntary Sector*, 1 QUARTERLY JOURNAL OF THE SOUTH AFRICAN NGO COALITION AND INTERFUND 22 (1997).

Yet human rights organizations claim to be neutral and nonpolitical in order to appease donors and governments.⁹⁹

Evidently, the line drawn between political and nonpolitical is just a nuance, for obviously the struggle for political participation must be fought in the political arena.¹⁰⁰ Politics means who gets what, when, and how, or the distribution of power in terms of resources and influence for the common good.¹⁰¹ In effect, being apolitical amounts to being political in the face of rampant corruption, violations of rights, and exclusion of the majority of the populace from decision-making. Inadvertently, by accepting the myth of being nonpolitical or apolitical, CSOs side with the status quo. However, in Uganda, an honest discussion that interrogates CSOs' stand in negotiating the political discourse is yet to evolve.¹⁰²

6. Conclusion

The UDHR underlines the idea that respect of human rights counters rebellion¹⁰³ by reassuring the public that government will ensure the enjoyment of rights, be a neutral arbiter in disputes, and serve as a mechanism to access public resources. Government is expected to provide the legal and regulatory framework for civil society to accomplish its watchdog role. In reality, government is paternalistic in engaging CSOs. Consequently, the law is geared more towards controlling CSO actions to restrain them from participating in politics than towards facilitating CSOs' democratic organizing and independent space. Government is antagonistic towards CSOs' oversight role, particularly in contested strategies and priorities. Further, the competition over donor resources has conflicted the government and CSOs' relationship, with the President publicly accusing CSOs of being economic saboteurs and foreign pawns.

Cognizant that human rights and struggle are two sides of the same coin, because human rights is not a favor but an entitlement that must be claimed even when the law denies those rights,¹⁰⁴ it is incumbent on CSOs to organize and struggle for their rights to freedom of association. The right to participate in the governance of one's country is not reserved for politicians but it is a right equally applicable to all citizens.¹⁰⁵ The right to freedom of association is the inherent cornerstone of all African social relationships, with each person having a right and duty to contribute, argue, disagree, and agree for their mutual benefit. CSOs do not render the state irrelevant, but complement government by expanding pluralism and diversity of opinions and holding it accountable to its human rights obligations. Hence, the need for CSOs' collective

⁹⁹ C.A. Odinkalu, *Why More Africans Don't Speak the Human Rights Language*, *Carnegie Council on Ethics and International Affairs Human Rights Dialogue: Human Rights in Times of Conflict—Humanitarian Interventions*, Series 2, Number 5, 3 (2001).

¹⁰⁰ K. Kibwana, *The Right to Civil Disobedience*, in *SEARCH FOR FREEDOM AND PROSPERITY CONSTITUTIONAL REFORM IN EAST AFRICA* 194 (K. Kibwana, C.M. Peter & J. Oloka-Onyango eds.) (1996).

¹⁰¹ K. Umar and J.O. Kuye, *Rationalism and the Problematique in Policy Making and Analysis: The Case of Public Policy Targeting in Africa*, 41 *JOURNAL OF PUBLIC ADMINISTRATION* 807, 817 (2006).

¹⁰² W. Mutua, *Introduction: Human rights NGOs in East Africa: Defining the Challenges*, in *HUMAN RIGHTS NGOs IN EAST AFRICA: POLITICAL AND NORMATIVE TENSIONS* 9 (M. Mutua ed.) (2009).

¹⁰³ UDHR (1948), Preamble.

¹⁰⁴ C. Heyns, *Struggle Approach to Human Rights*, in *HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA: A READER* 15-16 (C. Heyns & K. Stefiszyn eds.) (2006).

¹⁰⁵ *Christopher Mtikila v. AG*, High Court of Dodoma, Civil Case No. 5 of 1993, discussing the constitutionality of § 40 of the Police Force ordinance 1953, in Peter, *supra* note 11, at 694.

voice and identity coupled with the imperative to self-regulate in order to circumvent government's undue interference in the internal functions of CSOs.

The work of civil society is essentially political, albeit not necessarily partisan, because social justice entails challenging the status quo of unequal power relations. CSOs strengthen political pluralism, enhance citizens' political consciousness for informed engagement, and serve as watchdogs of government. Being apolitical is complicit in fostering inequity and abuse of power. It is incumbent on CSOs to ensure that they act coherently in order to protect their autonomy and legitimacy so that they can advance a human rights culture. Conversely, CSOs are vulnerable to being dominated as mere inputs into the government's agenda.

Civil Society in Africa

**THE ROLES OF CIVIL SOCIETY ORGANIZATIONS
IN THE EXTRACTIVE INDUSTRIES
TRANSPARENCY INITIATIVE IN NIGERIA**

EGHOSA OSA EKHATOR¹

Due to the failings of the regulatory framework in the oil and gas sector in Nigeria, Civil Society Organizations (CSOs) tend to act as watchdogs over the activities of government. This article focuses on the Extractive Industries Transparency Initiative (EITI), which has been localized in the oil and gas sector and domesticated as a law in Nigeria. The article highlights the roles of CSOs in the initiative.

Introduction

Civil Society Organizations (CSOs) have played major roles in the development of international multi-stakeholder codes. Multi-stakeholder codes result from collaboration among a diverse range of actors, including states, CSOs, multinational corporations (MNCs), and even scholars.² For example, the Voluntary Principles on Security and Human Rights in the Extractive Sector (VPSHR), which was initiated by the governments of the United States and the United Kingdom, was the product of collaboration and negotiations among governments, MNCs, CSOs, and others.³

CSOs played major roles in the development of the Extractive Industries Transparency Initiative (EITI). The EITI, launched in 2002, has been described as

a coalition of governments, companies, civil-society groups, investors and international organisations, and is conceived of as a standard for monitoring compliance with contract disclosure and revenue-transparency criteria to ensure that companies publish what they pay and governments disclose what they receive from the extraction and export of natural resources. Member countries voluntarily adopt the standard, and seek “validation” status through compliance.⁴

Currently, there are 31 compliant countries and 17 candidate countries; 36 countries have produced EITI reports.⁵

¹ Eghosa Osa Ekhaton is a Ph.D. candidate at the Law School, University of Hull.

² Oshionebo, E., *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (2009).

³ Mujih, E., *Regulating Multinationals in Developing Countries: A Case Study of the Chad- Cameroon Oil and Pipeline Project* (2012)

⁴ Acosta, A. M. “The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources,” 31 (§ 1) *Development Policy Review* §§ 89-105, at § 92 (2013).

⁵ EITI website, <https://eiti.org/countries>.

Nigeria signed on to the EITI in 2003, and its application commenced in February 2004 as part of the economic reforms of the Obasanjo administration.⁶ Section 1(1) of the Nigerian Extractive Industries Transparency Initiative (NEITI) Act⁷ establishes the EITI in Nigeria. The overarching objective of the NEITI Act is to promote and ensure due process in the payments made by extractive companies⁸ to the federal government of Nigeria.⁹ The NEITI is one of the few laws regulating Nigeria's oil and gas industry that expressly provides for the participation of CSOs in its activities.¹⁰ The law provides for the inclusion of members of CSOs in the National Stakeholders Working Group (NSWG)—the governing body of the NEITI—to promote transparency and accountability in revenue payments in the oil and gas industry. Section 6 states:

S.6 (2)(a) In making the appointment into the NSWG, the President shall include:

- (i) representative of the extractive industry companies,
- (ii) representative of Civil Society,
- (iii) representative of Labour Unions in the extractive industries
- (iv) experts in the extractive industry and
- (v) one member from each of the six geographical zones.

⁶ Civil Society Legislative Advocacy Centre (CISLAC), "Implementing Nigeria Extractive Industries Transparency Initiative for Impact: Some Policy Options," <http://www.cislacnigeria.net/posts/publications/briefs/>. Mr Obasanjo was one of the major drivers of the localization of EITI in Nigeria. To buttress this assertion, prior to the localization of EITI in Nigeria, "the Obasanjo administration took certain practical steps to implement the EITI process in Nigeria by creating a NEITI secretariat headed by Obiageli Ezekwesili, well regarded within the presidency and donor community for her excellent bureaucratic skills and commitment to due process in budgetary matters." Abutudu, M. & Garuba, D., "Natural Resource Governance and EITI Implementation in Nigeria," 47 *Current African Issues* 12 (2011). Simply, the EITI "is a global coalition of governments, companies and civil society working together to improve openness and accountable management of revenues from natural resources." <http://eiti.org/eiti>.

⁷ Nigeria Extractive Industries Transparency Initiative Act (NEITI) (2007).

⁸ Section 21 of the NEITI Act defines an extractive industry company as "any company in Nigeria that is engaged in the business of prospecting, mining, extracting, processing and distributing minerals and gas, including oil, gold, coal, bitumen, diamonds, precious stones and such like; and includes any agency or body responsible for the payment of extractive industry proceeds to the Federal Government or its Statutory Recipient." In addition to the audits conducted for the oil and gas sector, the NEITI has also conducted audits for the solid minerals industry in Nigeria. See the NEITI website for the copies of audits on the solid minerals industry in Nigeria, <http://neiti.org.ng/index.php?q=documents/neiti-audit-reports-solid-minerals>.

⁹ Generally see section 2 of the NEITI Act which enunciates the primary objectives of the Act.

¹⁰ Professor Asobie, a former chairman of the NSWG, has argued that CSOs are an integral constituent of the EITI multi-stakeholder group (MSG) which comprises the government, private sector, and civil society. He states thus "[o]ne of the six EITI criteria is that civil society is actively engaged as a participant in the design, monitoring and evaluation of the whole process of EITI and contributes effectively towards public debate on the outcome. This has indeed been borne out by the Nigerian experience, since 2004." Asobie, A., "Foreword," in *Civil Society in the NEITI Process* 6-7 (2012), <http://www.neiti.org.ng/index.php?q=pages/civil-society-neiti-process>. Also, the NEITI Act has been argued to have introduced "compulsory regulation of CSR into corporate governance" in the oil and gas industry in Nigeria. See Ihugba, B.U., "Compulsory Regulation of CSR: A Case Study of Nigeria," 5(2) *Journal of Politics and Law* 68-81 at 61 (2012), <http://www.ccsenet.org/journal/index.php/jpl/article/view/15639/0>

Furthermore, the NEITI has always engaged CSOs in its activities as a means of improving transparency and opening the process to the Nigerian public. This deliberate strategy of NEITI's involvement with NGOs can be traced to the onset of the EITI implementation or localization in Nigeria, when a coalition of CSOs led by Publish What You Pay through its different activities sensitized the Nigerian public to the inherent benefits accruing from the implementation of the EITI to the extractive companies, government, and the public.¹¹ Furthermore, a host of other CSOs have been active in the EITI localization by providing input, and the NEITI board (management) has provided training and support to enhance the capacity of CSOs' effective participation in the NEITI in Nigeria.¹²

CSO Participation in NEITI Process in Nigeria

As part of the structure of the NEITI process, CSOs are on the governing board, NSWG. The NEITI also has a Civil Society Steering Committee, in which CSOs and the NEITI board are partners in the various outreach programs and activities organized by the NEITI.¹³ Furthermore, the NEITI employs a permanent, full-time Civil Society Liaison Officer.¹⁴ Many CSOs, both local and international have been at the forefront of publicizing the activities of the NEITI and EITI. To further accentuate the symbiotic relationship between the NEITI and CSOs in Nigeria, a Memorandum of Understanding (MOU) was developed in 2006 to promote the CSO contribution to the NEITI process.¹⁵

CSOs play major roles in the NEITI process in Nigeria. However, in comparison with the other stakeholders (government and oil multinational corporations) in the NEITI process whose roles appear to be "clearly defined and streamlined, that of the civil society still remain unclear" in Nigeria.¹⁶ To remedy this anomaly, the NEITI has organized a series of activities and engaged in consultation with CSOs in different parts of the country to determine the roles of CSOs in the NEITI process.¹⁷ The consultation has entailed meetings with a plethora of CSOs in Nigeria, and from these deliberations some consensus has emerged. The consensus can be broken into the general and specific roles expected to be played by CSOs in the NEITI.¹⁸ The general roles of CSOs in the NEITI process include the following:

(a) Identification: Here, CSOs averred that part of their duties or aims is to ensure that major issues of public interest central to the NEITI process are brought to the fore so that members of the public can also engage in its debate.¹⁹ Some of the major issues highlighted by CSOs include the various oil and mining license issuance procedures and the environment. The

¹¹ Asobie, *supra* note 10; Ewere, A.O., *NEITI and Good Governance in Nigerian Oil Industry* (2011).

¹² Asobie, *supra* note 10.

¹³ NEITI Handbook (2013), <http://www.neiti.org.ng/index.php?q=publications/neiti-handbook>,

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Civil Society in the NEITI Process*, *supra* note 10, at 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

consensus of the CSOs is that governance will improve in Nigeria only if these major issues are identifiable focal points of advocacy.²⁰

(b) Agenda Setting: Agenda setting is one of the core responsibilities of CSOs. CSOs averred that one of their roles in the NEITI process is to ascertain issues pertaining to the NEITI mandate and use them as premises for the national and international engagement with oil multinational corporations (MNCs) and the government on means to improve transparency and accountability via the NEITI.²¹

(c) Public Education and Enlightenment: CSOs engage in many outreach programs or activities such as workshops, conferences, road shows, and town hall meetings to inform the public on the issues of transparency in oil revenue payment and the NEITI process in Nigeria. This is especially paramount in Nigeria because of low literacy levels and because government-organized activities and events are viewed with suspicion.²² Thus, it can be argued that many Nigerian trust CSOs more than the government.

(d) Agents of Change and Social Mobilization: CSOs in Nigeria are well known as great mobilization agents. In respect to the NEITI process, CSOs are also “agents of change and social mobilisation.”²³ CSO activities include mobilizing public opinion to support the NEITI process, acting as pressure groups to influence policy formulation and the legislative process, engaging in peaceful protests, and writing petitions.²⁴

(e) Monitoring and Oversight: CSOs are expected to monitor the policies and events in the extractive sector and report correctly with facts in order to improve governance in the sector.²⁵ However, this role of CSOs has to be community-based and people-centered.²⁶

(f) Advisory: The CSOs are supposed to provide impartial advice to the NEITI management or board.

(g) Whistle-Blowing: CSOs are supposed to expose any problems regarding oil transparency payments in the oil and gas sector in Nigeria. Also, whistle-blowing by CSOs can be a means of drawing attention to areas where the NEITI is failing. CSOs engaging in whistle-blowing should be equipped with adequate information, integrity, and competence.²⁷

(h) Observation: It is within the remit of CSOs to observe some activities of the NEITI in tandem with the secretariat of the NEITI.²⁸ These include budget preparation, projects, conferences, and meetings.²⁹

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 24.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

(i) Feedback: CSOs also engage in feedback as part of their core roles in the NEITI process. CSOs are supposed to provide feedback on their engagement with the process to their immediate constituency and to the public at large.

Furthermore, some specific roles are provided for CSOs under the NEITI Act. These include membership of the NEITI governing board (NSWG), remediation issues arising from NEITI audits, NEITI-legislative engagement, dissemination of audit reports, and community participation.³⁰

Weaknesses of CSO Participation in the EITI Process in Nigeria

However, CSO participation in the NEITI is not foolproof, and it has been subjected to strident criticism by various stakeholders.³¹ One major pitfall of CSO participation in the NEITI process is that some CSOs are divided and suffer from internal strife that weakens them.³² For example, the intractable disagreements in the Publish What You Pay coalition led to the formation of another CSO called the Coalition for Accountability and Transparency in Extractive Industry, Forestry and Fisheries in Nigeria.³³ Thus, it has been posited that CSOs have difficulties in managing internal crises in Nigeria due mainly to personality clashes, and such conflicts are exacerbated by the government's eagerness to fan the embers of discord.³⁴ Government and its agencies exploit such conflicts to put a lid on the activities of CSOs and deprive the polity of quality opposition to their policies.³⁵

Another inherent weakness of CSO participation in the NEITI process is accentuated by Section 6(a) of the NEITI Act, which grants powers to the President of Nigeria to appoint the members of the governing board (NSWG) including CSO representatives. This proviso is prone to abuse by the President because such appointments may be dispensed on the basis of political patronage, especially as the NEITI is an arm (department) of the Presidency. To redress this anomaly, NEITI has signed on to an MOU with CSOs and consults with them before a CSO representative is appointed to the governing board. However, the CSOs are unable to elect their representatives directly to the NSWG, and their choice is still subject to governmental approval or ratification. In other words, the CSO representatives are picked by the government.

Another weakness in the CSO participation in the NEITI process relates to the legitimacy issues inherent in CSOs in Nigeria. It is argued that the NEITI focus is on Abuja- or city-based NGOs to the detriment of local NGOs that are closer to the oil-producing communities in the Niger Delta.³⁶ Thus, capacity-building of CSOs is invariably skewed to the groups in the cities, to the detriment of local CSOs. The NEITI secretariat tends to consider CSOs based in Abuja or

³⁰ *Id.*

³¹ See generally Ewere, *supra* note 11; Ihugba, *supra* note 10; Shaxon, N., "Nigeria Extractive Industries Transparency Initiative: Just a Glorious Audit" (Nov. 2009), <http://eiti.org/document/shaxson-neiti-glorious-audit>.

³² Abutudu & Garuba, *supra* note 6; Shaxson, *supra* note 31.

³³ Abutudu & Garuba, *supra* note 6.

³⁴ *Id.*

³⁵ *Id.* Also see Ewere, *supra* note 11. Concerning the self-aggrandizement by leaders of certain CSOs, a former Minister of Finance in Nigeria has described such CSOs as "non-governmental individuals." Shaxon, *supra* note 31, at 25.

³⁶ Shaxon, *supra* note 31.

Lagos (and other big cities) as the most significant in the NEITI process (and the extractive industry).³⁷ The implication of this is that many local and rural CSOs might be excluded from the NEITI process. In Nigeria, local CSOs are closer to the people and the oil-producing communities in the Niger Delta. Moreover, the NEITI Act has been criticized for its apparent silence on environmental issues.³⁸ The contention is that if the NEITI had taken the views of local CSOs based in the oil-producing communities, the blatant omission of environmental issues from the mandate of the NEITI Act could have been avoided.³⁹ Recently, the NEITI tried to address some of the factors militating against effective CSO participation in the NEITI process by engaging in extensive nationwide consultations with CSOs.

Another weakness in the NEITI process is that the government and the NEITI appear to be using the contribution of CSOs as means of achieving credibility and legitimacy in the eyes of the international community and donors instead of achieving a high level of transparency and accountability in the extractive sector in Nigeria.⁴⁰ The contention is that the NEITI and the government appears to be more focused on attaining international “validity” rather than actualizing the mandate of the NEITI Act.

Conclusion

This short article has highlighted the contribution of CSOs to the NEITI process in Nigeria. Notwithstanding the assertions about the inherent weaknesses of CSOs in NEITI process, CSO participation has improved the transparency and accountability in the computation of oil revenue payments in Nigeria.

³⁷ Abutudu & Garuba, *supra* note 6.

³⁸ *Id.*

³⁹ Bassey, N., “The Environmental Black Hole in NEITI,” in Sofiri Joab-Peterside, Ekanem Bassey, & Naomi Goyo (eds.), *Domestication of Extractive Industries Transparency Initiative in Nigeria: Gaps Between Commitment and Implementation – A Civil Society Assessment of the Performance of Nigeria Extractive Industries Transparency Initiative* (2010), cited in Abutudu & Garuba, *supra* note 6.

⁴⁰ Abutudu & Garuba, *supra* note 6.

Civil Society in Africa

THE IMPACT OF CHARITIES AND SOCIETIES PROCLAMATION NO. 621/2009 ON ADDRESSING HIV/AIDS ISSUES IN ETHIOPIA

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This study explores the effects of the 2009 Charities and Societies Proclamation on addressing HIV/AIDS issues in Ethiopia. The proclamation and the subsequent regulation ratified by the council of ministers provide guidelines for registering and regulating charities and societies. Many stakeholders maintain that the law reflects the government's interest in strictly controlling NGOs (nongovernmental organizations) and limiting their area of engagement, particularly concerning human rights. The study relies on document analysis, a partner tool survey, and semi-structured interviews with the public, private, and NGO sector representatives at the national level and in the three regions. It concludes that the 2009 law has significant effects on partnership endeavors to address HIV/AIDS issues.

1. Introduction

In 2009, the government of Ethiopia ratified the Charities and Societies Proclamation. The proclamation and the regulation subsequently endorsed by the council of ministers provide guidelines for the registration and regulation of charities and societies. The law gives the government vast control over NGO activities. It prohibits national organizations that receive more than 10 percent of their funding from abroad from undertaking human rights activities. It also prohibits human rights activities by foreign NGOs, including campaigning for gender equality, children's rights, disabled persons' rights, and conflict resolution.

Though the law does not explicitly refer to HIV/AIDS, work on the issues is affected by this law. A number of human right issues are attached to HIV/AIDS (Beagle 2013; Utyasheva & Pradichit 2013). Even the HIV/AIDS policy itself suggests combining HIV/AIDS work with other issues (MOH 1998).

This study explores the effects of the 2009 Charities and Societies Proclamation in addressing the HIV/AIDS issue in general and partnership forums in particular.

The Rawls principle of justice emphasizes the necessity of maximizing the advantages of the least preferred. It underlines that fair treatment of citizens results when a society insures equal opportunity to all to succeed and when there is equality in the eyes of the law. Rawls suggests two principles to regulate the distribution of social and economic advantages across society. The first principle states that "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." The second principle states that social

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and economic qualities are to be arranged so that they are both reasonably expected to be to everyone's advantage and attached to positions and offices open to all (Rawls 1971).

Another important consideration of the normative model is that of reducing inequality. This model draws attention to the undesirable aspects to the functioning of market relations. The market does not concern itself with the type of resource individuals use to assert themselves or to the needs of the individual. Under otherwise similar circumstances, some people are gifted with large resources while others lack the resources to satisfy their basic needs. Therefore, the market alone does not promote justice. According to the human dignity model, further, each person has innate value, regardless of his or her contributions to society's well-being. The concept of dignified survival depends on concrete cultural and economic realities of a given country (Potůček et al. 2003). Tarantola (2008) and Tarantola et al. (2008) discuss the interdependent nature of health and human rights.

Providing equal opportunities regardless of state of health or social background is essential when it comes to HIV/AIDS victims. The needs of HIV/AIDS-affected communities are high. HIV/AIDS affects the fundamental human attachments of family life and exposes children to stigma and discrimination. Stigma and discrimination prevent governments and communities from effectively responding by intensifying violations of these children's rights—particularly their access to education, social services, and community and family support (UNAIDS/WHO 2004). Because the prevalence of HIV/AIDS has resulted in high numbers of orphans and vulnerable children, not only those who are directly affected by HIV/AIDS but also increasing number of children face social problems.

Children orphaned or made vulnerable by AIDS are more likely to be malnourished, less likely to be educated, and more likely to be abused and suffer severe psychosocial distress. In many communities, traditional ways of caring for orphans and vulnerable children, such as the extended family, are being severely strained by the impacts of HIV/AIDS. As the number of orphans and vulnerable children increases and an ever larger number of adults is affected by HIV/AIDS, family networks have come under severe strain (Strobbe et al. 2010).

Therefore, there needs to be a legal environment that helps communities care for the children and families left vulnerable by HIV/AIDS. Moreover, due to the magnitude and multifaceted nature of the HIV/AIDS problem, there is a high need for multi-sectoral ways of addressing the problem. These can only be achieved by strong partnership relations among the major actors involved, including the public, the for-profit sector, and the not-for-profit sector, which is the main concern of this study.

2. Methodology

The research makes use of interviews with representatives of the major actors, a partner tool survey,² and document analysis. The key informants are individuals representing the three sectors—the public sector, business (for profit), and the NGO (not-for-profit) sector—as well as HIV/AIDS Prevention and Control Office (HAPCO) representatives both at the national level

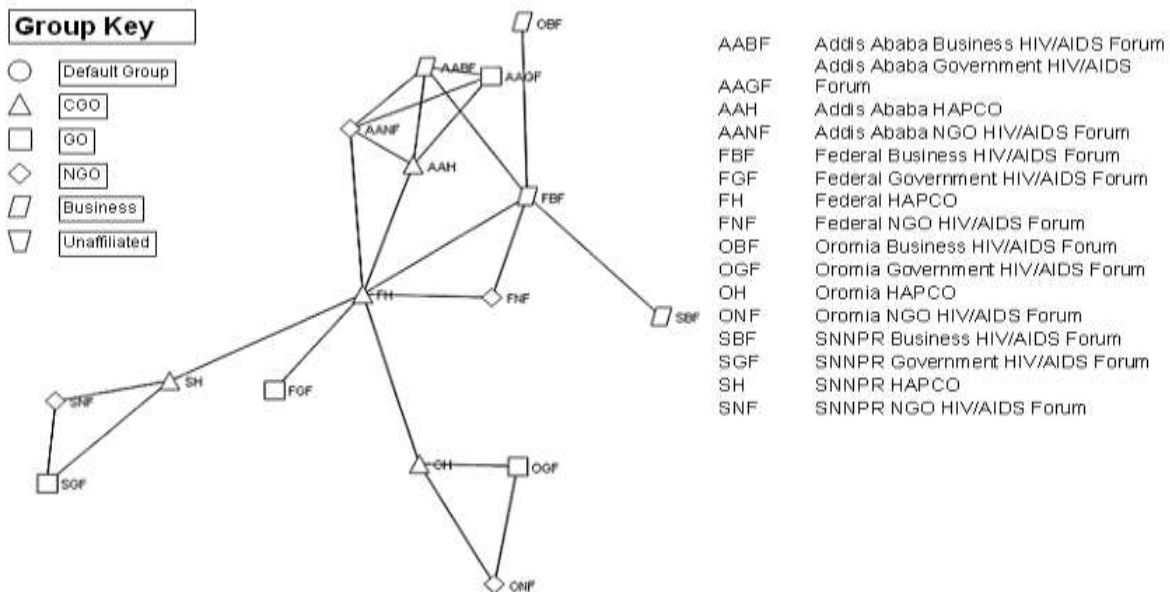
² PARTNER tool survey is a Social Network Analysis Tool to Collect, Analyze, & Interpret Data to Improve Collaboration within Community Networks which is available at <http://www.partnertool.net/>.

and at three regions: Oromia Region,³ Southern Nations, Nationalities, and Peoples' Region⁴ (SNNPR), and Addis Ababa.⁵ Though HAPCO is a government institution, it is included among the key informants because it is coordinating the HIV/AIDS partnership forums. A total of 13 key informants and four others who provided important information have been interviewed using semi-structured interviews. Additionally, a partnership tool online and a paper survey were used to collect data from the key informants representing the partnership sub-forums and HAPCO. Both primary and secondary data are used in the research. The partner tool social-network analysis and thematic analysis are used to identify and analyze the dominant themes. Using these themes as categories of the analysis, the partnership practice has been compared, to understand how partnerships among the public, business, and the NGO sectors are affected by the Charities and Societies Proclamation No. 621/2009.

3. Result

The Charities and Societies Proclamation No. 621/2009 is the most recent NGO law, which was adopted by the Ethiopian Parliament in January 2009. It gives the government broad, unrestricted control over NGO activities, which allows government to interfere in the operation and management of NGOs. This power is exercised particularly against those NGOs focusing on human rights. Most HIV/AIDS programs are interrelated with human rights and other programs carried out by national and international organizations, so the law has hindered efforts to address the problem of HIV/AIDS. The following sections present a short description of the partnership

Graph 1 – HIV/AIDS Partnership Forums Map



³ The Oromia Region is selected because it is one of the nine ethnically based regions of Ethiopia. It covers 284,538 square kilometers. The 2007 census reported its population at more than 27 million, making it the largest state in both population and area.

⁴ Southern Nations, Nationalities, and Peoples' Region (SNNPR) is selected because it is one of the nine ethnic divisions of Ethiopia. It is also referred as little Ethiopia. Nearly 50 ethnic groups live in the region. Diversity is a symbol of the region.

⁵ Addis Ababa is selected because it is the capital of Ethiopia. It is the largest city in Ethiopia, with a population of 3,384,569, according to the 2007 census, with an annual growth rate of 3.8%.

forums, the results for the major outcomes of the HIV/AIDS partnership forum, the effects of the law in limiting financing for HIV/AIDS partnership forums, the mismatch between expectations from partnerships and the working environment, and finally the effects of reregistering.

3.1. Description of the Partnership Forums

Before looking at the major outcomes reported of the HIV/AIDS partnership forums, it is worth describing the HIV/AIDS partnership forums. As we can see from graph 1, the partnership forums are mainly working in their respective areas and have no or limited connections with partnership forums that exist in other parts of the country.

The partnership forums map shows that the Federal Government HIV/AIDS Forum (FGF) has only the single connection with the Federal HAPCO (FH). Even if the partnership forums are created in accordance with where they are located, there is no question about the FGF’s strong influence over regional government sub-forums (SGF, OGF, and AAGF). Therefore, creating new connections will be highly beneficial. This is true also for both the federal NGO HIV/AIDS forum (FNF) as well as the federal business HIV/AIDS forum (FBF). Even if there is no active representation of the business sector in the Oromia region or in SNNPR, the federal business HIV/AIDS forum claims to have representatives in these regions who work together. In the case of Addis Ababa, the same people representing FBF also represent Addis Ababa business HIV/AIDS forum (AABF). Moreover, we see that only the FH has established a relationship with regional HAPCOs.

3.2. Major Outcomes of the HIV/AIDS Partnership Forum

All of the stakeholders believe that the HIV/AIDS partnership forums have a number of benefits. Principal benefits cited include improvements in knowledge-sharing, resource-sharing, community support, public awareness, and communication. According to stakeholders, these benefits result largely from the HIV/AIDS partnership forums’ success in bringing together diverse stakeholders, meeting regularly, exchanging information and knowledge, fostering informal relationships among partnership members, facilitating collective decision-making, and enabling shared goals and efforts to achieve them.

Table 1 - Major Outcomes of the HIV/AIDS Partnership Forum

<i>Major Outcomes of the HIV/AIDS Partnership Forum</i>	<i>Percentage</i>
Health education services, health literacy, educational resources	8.6%
Improved services	8.6%
Reduction of health disparities	2.9%
Improved resource sharing	11.4%
Increased knowledge sharing	25.7%
Community support	11.4%
Public awareness	11.4%
Policy, law, and/or regulation	5.7%
Improved health outcomes	2.9%
Improved communication	11.4%

Table 2 shows the specific aspects of the HIV/AIDS partnership forum identified as having contributed to the outcomes presented in table 1. The assumption that partnership paves the way for resource-sharing was not reflected in the survey. But some have indicated that they have benefitted from particular forms resource-sharing, such as sharing experts during trainings and workshops. A large number of those surveyed also believe that exchanging information and knowledge have contributed substantially to the success of the partnerships (33.3%).

Table 2 – Important Aspects of the HIV/AIDS Partnership Forum

<i>Important Aspects</i>	<i>Percentage</i>
Bringing together diverse stakeholders	25%
Meeting regularly	8.3%
Exchanging info/knowledge	33.3%
Sharing resources	0%
Informal relationships created	16.7%
Collective decision-making	4.2%
Having a shared mission, goals	12.5%

However, most of the respondents believe that the success of the HIV/AIDS partnership forum is being tested due to the law. The following sections provide details.

3.3. Limitation of Finance for HIV/AIDS Partnership Forums

The major effect of the Charities and Societies Proclamation No. 621/2009 is related to accessing finances from foreign sources. Without such funds, many NGOs could not carry out their work.

The 30/70 percent guideline introduced in this legislation directly affects partnership efforts. According to Article 88, No. 1, “Any charity or society shall allocate not less than 70 percent of the expenses in the budget year for the implementation of its purpose and an amount not exceeding 30 percent for its administrative activities.” This law has affected initiatives to form partnerships or consortiums of NGOs working to address HIV/AIDS. The 30/70 percent limit makes running such partnerships as independently registered organizations difficult, because they tend to incur higher administrative costs.

One effort to establish a partnership in the Oromia region failed, according to a respondent: “We had planned to create consortium of NGOs working on HIV and health issues and to have legal status from federal charities and society agency. We talked to them and the reply was, because it has no program of its own, if you create consortium you can run only using members’ contribution for admin cost. You cannot pool other funding. You cannot get funding for this purpose because you are working on coordination and capacity-building. It has been a year now. For this reason, we are discouraged and we left the idea of creating consortium. There is negative effect of the new law if you want to register and operate on legal basis.”

With the 30/70 percent law as well as the government’s initiative to “confer various incentives to a charity or society that allocate more than 80% of its total income for operational

purposes or demonstrate outstanding performance” (Article 88, No. 2 of CSP), the government seeks to minimize administrative costs and maximize benefits for project beneficiaries. However, because the law does not carve out exceptions for partnerships or “consortiums,” as the law calls them, there is the unintended effect of discouraging such partnerships. One interviewee said, “There are many rules and guideline for CSOs to follow ... but in general it seems 30/70 guideline [law] affects partnership forums [because] partnership, networking, capacity building and related activities are conducted by admin costs.”

The data from the partner tool survey also confirms how significantly the Charities and Societies Proclamation No. 621/2009 has affected HIV/AIDS partnership forums. Even though only 19.2% of respondents expressly cited the law’s effect on partnerships, the qualitative data shows a substantial decrease in funding since the law came into effect. Here it is also worth noting other causes for the limitations in funding (46.2%), which is indicated as the major factor affecting HIV/AIDS partnership forums.

Table 3 – Major Factors Affecting HIV/AIDS Partnership Forums

Major Factors Affecting HIV/AIDS Partnership Forums	Percentage
Limited funding	46.2%
Lack of trust	7.7%
Unhealthy competition for funding among members	15.4%
Lack of interest	11.5%
The new NGO law	19.2%

3.4. The Question of Survival

The principal cause of the limitations on funding is the restriction on foreign funding. The Charities and Societies Proclamation No. 621/2009 limits the funding that NGOs can receive from international sources. Under Article 2 of the law, “‘Ethiopian Charities’ or ‘Ethiopian Societies’ shall mean those Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they use not more than ten percent of their funds which is received from foreign sources.” This restriction hobbles many local NGOs, which are working effectively with communities.

There are two important issues to stress here. One is the lack of local financial sources and the significant dependence of local or Ethiopian NGOs on foreign funding, which is discussed here. The other is the limitation on Ethiopian charities’ and societies’ areas of work, which is discussed in section 3.5 in more detail.

The lack of local financial sources and the dependence on foreign funding has been the practice for local and Ethiopian NGOs for quite a long period of time. Due to this fact, many NGOs undertake income-generating activities (IGA). Moreover, some NGOs are able to cover their training and other project-related costs by selling their products. For instance, some produce furniture while training AIDS orphans and vulnerable children in wood and metal work, and others produce agricultural products or cloths by training HIV/AIDS-positive people in urban

agriculture and tailoring. As a result, most favor efforts to help such products come to market and to enable the NGOs to be self-sufficient and even expand their number of beneficiaries.

But the same law that limits NGOs' foreign funding also sets tough criteria for conducting income-generating activities. Article 103 of the CSP sets forth prerequisites that must be met in order to engage in income-generating activities. Under the law, the NGO must receive written approval of the agency; proceeds must not be distributed among members or beneficiaries; proceeds must be used to further the purposes for which the charity or society is established; and the work must be incidental to achieving the NGO's purposes. Moreover, the law makes it difficult for NGOs to engage in IGA activities. Under the CSP, charities and societies must follow the registration and licensing requirements and procedures laid down in other laws for activities related to trade, investment, and other profit-making activities. These factors make it exceedingly difficult for Ethiopian NGOs to generate 90% of their funding locally. For these reasons, the law creates a difficult environment for Ethiopian NGOs to generate income from local sources.

Such restrictions, accordingly, are contrary to the principle that social and economic qualities are to be arranged so that they are reasonably expected to be to everyone's advantage (Rawls 1971). Moreover, in reducing inequality, the law does not give adequate consideration to the undesirable aspects of market relations. For example, the market is not concerned with the type of resources used by individuals. Under similar circumstances, some people are gifted with large resources while others lack the resources to satisfy their basic needs. This signifies the importance of supplementing the market with a redistribution of resources (Potůček et al. 2003).

But the restrictions discussed above not only put the existence of some NGOs in question. They also discourage those socially and economically disadvantaged citizens from actively engaging in the betterment of their socioeconomic status.

3.5. Big Expectation in a Restricted Environment

In addition to all its other hindrances on NGOs, the Charities and Societies Proclamation No. 621/2009, Article 14 limits particular fields of engagement to Ethiopian charities. It specifies fifteen areas of work that "only Ethiopian Charities and societies" can engage in; Ethiopian residents and foreign charities cannot take part. Those areas include "the advancement of human and democratic rights," "the promotion of equality of nations, nationalities and peoples and that of gender and religion," "the promotion of the rights of the disabled and children's rights," "the promotion of conflict resolution or reconciliation," and "the promotion of the efficiency of the justice and law enforcement services."

Many respondents question how Ethiopian charities can take on these big challenges, especially in light of the financial and legal restrictions. As a result, many NGOs are abandoning their programs addressing these issues and shifting to other areas where such restrictions do not apply. If any areas of work are to be limited to Ethiopian charities, most respondents believe that the law must be changed to provide a more positive environment for their work.

As was earlier discussed, there is significant interdependence between human rights and HIV/AIDS. Most of the domains restricted to Ethiopian charities overlap with HIV/AIDS work.

Table 4 shows the effects of the Charities and Societies Proclamation No. 621/2009 on HIV/AIDS partnership forums. As we can see, the law clearly played a negative role. It decreased the number of HIV/AIDS partnership forum members (37.5%). It discouraged HIV/AIDS partnership forums (25%). It had some unintended negative effects on HIV/AIDS partnership forums, such as limiting funding (18.8%).

Table 4 – Effects of the Charities and Societies Proclamation No. 621/2009 on HIV/AIDS Partnership Forums

Effects of the Charities and Societies Proclamation No. 621/2009	Percentage
Has some unintended negative effects on HIV/AIDS partnership forum (e.g., by limiting funding)	18.8%
Has no effect at all on the HIV/AIDS partnership forum	12.5%
Encouraged/strengthened the HIV/AIDS partnership forum	6.3%
Discouraged/weakened the HIV/AIDS partnership forum	25%
Decreased the number of HIV/AIDS partnership forum/sub-forum members	37.5%
Increased the number of HIV/AIDS partnership forum/sub-forum members	0%

In sum, even though HIV/AIDS is not explicitly mentioned in the Charities and Societies Proclamation No. 621/2009, the general restrictions in the law make it harder for HIV/AIDS partnership forums as well as local and nationwide NGOs to fulfill what is expected of them.

3.6. Effects of Re-registration

Under Charities and Societies Council of Ministers Regulation No. 168/2009, Article 10, No. 2, “The effects of re-registration shall commence only a year after the effective date of the proclamation and not immediately after re-registration.” Because of this provision, most international NGOs can no longer continue being members of consortiums with Ethiopian charities. The effect is well presented by one of the respondents: “Soon after its establishment we had about 107 members because we are mainly working on capacity building like proposal writing, fund raising, fund management, and project management and the number of members kept increasing due to these benefits Now there are 45 members because we are reregistered at the national level as Ethiopian Residents’ Charity Organization⁶ Network. Since we have this new registration, the institutions which can be members to us are only Ethiopian Resident Charity Organizations.”

⁶ According to Charities and Societies Proclamation No. 621/2009, based on where the organization was established, its source of income, the composition of its membership, and its membership residential status, a charity or society is given one of three legal designations:

1. Ethiopian Charities or Societies: Charities or Societies formed under the laws of Ethiopia, whose members are all Ethiopians, generate income from Ethiopia, and are wholly controlled by Ethiopians. These organizations may not receive more than 10% of their resources from foreign sources (Article 2 of CSP).
2. Ethiopian Resident Charities or Societies: Ethiopian Charities or Societies that receive more than 10% of their resources from foreign sources (Article 2 of CSP).
3. Foreign Charities: Charities formed under the laws of foreign countries, or whose membership includes foreigners, or foreigners control the organization, or the organization receives funds from foreign sources (Article 2 of CSP).

In the survey, 69.2% of respondents indicated that the number of HIV/AIDS forum members is decreasing. In the process, partnership institutions have lost significant opportunities to gain experience from well-established foreign charities. They have lost financial resources as well, with fewer members making contributions. The major reasons for these declines are the restrictions in the Charities and Societies Proclamation No. 621/2009.

4. Conclusion

The study concludes that the 2009 Charities and Societies Proclamation No. 621/2009 has both implicit and explicit effects on addressing HIV/AIDS issues in general and on creating and running HIV/AIDS partnership forums in particular. Even though HIV/AIDS is not explicitly mentioned in the law, the general restrictions make it harder for HIV/AIDS partnership forums to fulfill what is expected of them. When organizations withdraw, the partnership forums lose finances, in-kind resources like meeting space, community connections, paid staff, facilitation and leadership, data resources, information and feedback, and specific expertise. Accordingly, the law has had the unintended effect of weakening HIV/AIDS partnership forums and, in turn, diminishing the effectiveness of NGOs' efforts to address HIV/AIDS.

Currently, the partnership forums work mainly in their respective areas or regions, with limited or no connections to partnership forums in other parts of the country. Only the federal HAPCO has an established relationship with regional HAPCOs. Nurturing such links also among similar sub-partnership forums across regions and the federal HIV/AIDS sub-partnership forums can promote the sharing of resources and experiences .

The law must create an environment more favorable to addressing HIV/AIDS issues. First, it should create exceptions for HIV/AIDS partnership forums, so that they can be created at various levels. Second, understanding their unique nature, the law should let independently created partnership forums seek funding and use it to coordinate their efforts. This could include aiding their income-generating activities in consideration of their vulnerability to compete in the market, as long as they use their financial gains to further their objectives. Third, in light of the interdependence between HIV/AIDS and human rights, the law should ease the 10 percent limit for not-for-profit organizations working exclusively on HIV/AIDS issues.

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Article

FRAMEWORK OF NGO LABOR LAW IN ARGENTINA

IGNACIO URESANDI¹

As in most developing states, NGO activity in Argentina has increased considerably from the middle of the 20th century. Today it covers a wide scope of social interests, such as economic development and wealth redistribution, public health, environmental care, and human rights protection. The size and structure of the NGOs varies extensively, from small and unregistered grassroots organizations to company-supported foundations with administrative bureaucracies and financial resources that municipal governments would envy. But labor law and public policies aimed at promoting volunteering do not recognize the heterogeneous nature of the non-profit sector or the differences between that sector and the for-profit sector. In this article, we highlight three aspects of this unidimensional legal framework and their impact on the workforce of NGOs—employees as well as volunteers.

I. Public Registration and Volunteer Legislation

Under the Federal Government, the *National Center of Community Organizations* (hereinafter CENOC), which functions under the orbit of the Social Development Ministry in the Capital City, is responsible for registering and promoting the work of non-profit organizations, regardless of their size or purpose. The CENOC carries out its statutory obligations through numerous programs and direct actions, such as funding specific projects of grassroots organizations, tutoring and mentoring community leaders, and providing technical and technological support to small endeavors.

Most relevantly, the CENOC is in charge of registering all social institutions and systematizing their aims and their resources, including personnel. This task should be the cornerstone of its work, given the opportunities to increase the efficiency of state programs through synergy with local needs and efforts. Unfortunately, this goal is far from accomplished. Although much progress has been made, it is estimated that the 9,010 institutions registered to date represent less than 60 percent of the organizations in the state. In addition, only 5,023 of the institutions have juridical personality.² Informality, lack of organization, and geographical dispersal are the main difficulties.

Many NGOs suffer as a consequence, because all of the incentives and benefits stipulated by legislation apply solely to registered and juridically constituted institutions. Unregistered grassroots NGOs perform important work using many volunteers as is, but their impact would be greatly enhanced by the public support that registration could bring.

Legislation provides numerous incentives for volunteer service, particularly from the volunteer's point of view. Specifically, Law 25.855 of *Social Volunteering Promotion* indicates that volunteers are entitled to receive training and coaching by both the institution and the public

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² "Acerca de la Constitución del Tercer Sector en la Argentina," Ikei Iñiguez, Lopez Burgos, Mayer y Sola Álvarez, CENOC, 2013, in www.cenoc.gov.ar/publicaciones.

office (Article 6.b); are entitled to be reimbursed for all expenses made at the service of the organization (Article 6.e); must be granted insurance against labor illness and accidents (Article 6.g); and must be granted certification of the labor provided upon ending the relationship with the organization, which must be considered at the moment of applying to public service (Article 6.h). All of these are available only if the NGO registers with the CENOC, which then provides volunteers with official identification.

In sum, more NGOs ought to be registered in order to extend the application of the volunteering law. Undoubtedly, this is a task depending more on the political and administrative sphere than on the legal one. Nonetheless, such an effort must be made to strengthen volunteer service for NGOs, as it is the real engine of their work.

II. Labor Law for Dependent Employees

As was noted above, most of NGOs' manpower comes from volunteers. Of the 193,909 total NGO workers, according to the latest data published by the CENOC, 29,574 are payroll employees and 164,335 are volunteers. The employee category mainly comprises managers and administrative staff. As is typical outside Argentina, the positions generally entail regular to low wages and high volatility due to variations in financial capacity.³ Lack of proper registration and posing employees as volunteers can also be described as regular practices, although it should be noted that these practices are common among Argentina's small and medium for-profit companies as well. The national informality rate has been reported at 27% of the workforce in all fields of labor.⁴

The principal legal aspects of most labor relationships in Argentina—such as duration of the work day, licenses, vacations, and termination of contract—are regulated by the *Labor Contract Law* 20.744, in force since 1974. It has been interpreted by scholars to apply equally to lucrative and non-lucrative activities, as it defines *labor*, first, to encompass “all lawful activity rendered to someone capable to direct it, in return of a wage” (Article 4); and, second, as “the instrumental organization of personal, impersonal, material and immaterial means, ordered under a direction for the accomplishment of economical *or* beneficial ends.”⁵

Hence, non-profits are generally treated on the same basis as private businesses. The juridical nature of the contract is the same, and so are the circumstances surrounding the labor relationship. However, a different solution is necessary. Legislation should be enacted in order to provide the third sector with legal remedies suitable to their particular needs. In this light, it has been remarked that more flexibility should be given to the duration of the contract,

³ BACCARO Lucio, “*Civil Society, NGOs, and Decent Work Policies: Sorting out the Issues*,” International Institute for Labour Studies, ILO, Genève (2001), p. 12.

⁴ VASAN Sudha, “*NGOs as Employers: Need for Accountability*,” *Economic and Political Weekly*, Vol. 39, No 22 (2004), p. 2197; ARIAS Omar, DEMOMBYNES Gabriel, MORENO Juan Martín, ROFMAN Rafael “*Informalidad, protección social y Mercado de trabajo en Argentina*,” in “Aportes a una nueva visión de la informalidad laboral en la Argentina,” World Bank and Ministry of Labor (2008), p. 86, available at http://www.trabajo.gov.ar/downloads/biblioteca_libros/aportes_a_una_vision_de_la_informalidad_laboral.pdf

⁵ VAZQUEZ VIALARD Antonio, “*Tratado de Derecho del Trabajo*,” Editorial Astrea, 1985, Tomo I, p. 152.

contemplating the possibility of determining its extension in advance, in accordance with the duration of a project's funding.⁶

III. Labor Taxation

As in other realms, tax law on labor in Argentina is identical for lucrative and non-lucrative entities. This is perhaps the most controversial element of non-profit legislation, as it relates to NGOs' funding difficulties. Argentinean NGOs, like other employers, commonly complain that tax pressure on labor becomes a deterrent for contracting long-term employees.

Labor taxes include contributions and payments to the following systems: Social Security (Law. 24.241), Healthcare (Laws 23.660 and 23.6614), Child and Family Support (Law 24.714) and the Public Unemployment Fund (Law 24.013). In addition, employers must acquire insurance against labor accidents and illnesses as well as life insurance for every employee. All of these payments can total 40 percent of the gross salary.⁷

There is consensus that such burdens cannot be reduced or eliminated for NGOs without jeopardizing employees' retirement or the Social Security funding system as a whole. Nonetheless, innovative approaches for addressing labor taxes can promote employment at NGOs. For instance, as in other legislation, the payment rate might be capped when the gross salaries paid by the NGO reach a certain sum.⁸

Although not addressed specifically to the third sector, two laws promote NGO employment by providing valuable financial resources. The recently enacted Law 26940 seeks to reduce informality and lack of registration. As an incentive, it cuts one-third of the labor taxes for companies with fewer than 80 employees. In addition, Law 26.476, in force since 2008, provides small and mid-size companies with a 50 percent reduction of labor taxes for every new employee hired for a twelve-month period, provided that the number of workers already on the payroll remains constant.

The long-term challenge is to adjust the tax burden in a way that recognizes the distinct nature of NGOs, so the payroll can remain as constant as possible despite oscillating income. Doing so may require a differential tax rate for non-profit institutions that removes time limitations on labor taxes reduction.

⁶ de NIEVES NIETO Nuria, "Las relaciones de trabajo en las entidades sin ánimo de lucro (trabajadores asalariados, cooperantes internacionales, socios-trabajadores y voluntarios)," *Revista del Ministerio de Trabajo e Inmigración* Nro 83, Madrid, p. 382.

⁷ "Tributos vigentes en la República argentina a nivel nacional," Dirección Nacional de Investigaciones y Análisis Fiscal, Subsecretaría de Ingresos Públicos, Secretaría de Hacienda, Ministerio de Economía y Finanzas Públicas (2014) at http://www.mecon.gov.ar/sip/dniaf/tributos_vigentes.pdf.

⁸ BATER Paul, HONDIUS Frits, KESSLER LIEBER Penina, "The tax treatment of NGOs: legal, fiscal and ethical standards for promoting NGOs and their activities," *Kluwer Law International* (2004), p. 321.

Article

CIVIL SOCIETY ORGANIZATIONS RESPOND TO NEW REGULATION IN ECUADOR: AN INTERVIEW WITH ORAZIO BELLETTINI CEDEÑO

SUSAN APPE¹

Since we talked with Ecuadorian social entrepreneur and policy expert Orazio Belletini Cedeño in 2011,² the Collective of Civil Society Organizations legally formalized into the Ecuadorian Confederation of Civil Society Organizations in 2013. During that same year, after almost five years of no regulatory reform, the Ecuadorian Presidential Office released Executive Decree No. 16.³ Replacing the 2008 Decree No. 982, Decree No. 16 adds new requirements for legal status, a new registry for civil society organizations, and further obligations for international organizations seeking to work in Ecuador. The Confederation's concerns about the new Decree were widely covered in the media and have continued a public debate about the role and the regulation of civil society organizations in Ecuador.

Under Decree No. 16, the government revoked the legal status an active environmental civil society organization, *Fundación Pachamama*, in 2013 because of its involvement in protests against mining development in Ecuador. Government officials alleged that *Fundación Pachamama* was "straying from its statutory objectives" and endangering "internal security and public peace."⁴ The organization remains shut down as of late 2014. It is exploring options to take the case to the Inter-American Court of Human Rights.⁵ The broader issue of freedom of association in Ecuador was brought to a hearing at the Inter-American Commission on Human Rights in 2014.⁶ As a legalized, formal Confederation, civil society organizations in Ecuador responded to Decree No. 16 and *Pachamama's* closing.

Belletini sat down to talk about the developing role of the new Ecuadorian Confederation of Civil Society Organizations, the sector's regulation in Ecuador, the closing of

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² Appe, S. (2011). Interview: Civil Society Organizations Respond to Government Regulations in Ecuador. *International Journal of Not-for-Profit Law*. 13(3), 27-32, http://www.icnl.org/research/journal/vol13iss3/special_4.htm.

³ Presidencia de la República del Ecuador [The Office of the President] (2013, June 4). Executive Decree No. 16, <http://www.inclusion.gob.ec/wp-content/uploads/downloads/2014/11/Decreto-Ejecutivo-16.pdf>.

⁴ Solano, G. (2013, December 5). Ecuador shuts down nonprofit environmental group. *The World Post*, <http://www.huffingtonpost.com/huff-wires/20131205/lt-ecuador-environmental-ngo/>.

⁵ <http://www.pachamama.org/advocacy/fundacion-pachamama>.

⁶ Ahuja, P. (2014, March 30). Situation of the Right to Freedom of Association and Environmental Defenders in Ecuador, <http://hrbrief.org/2014/03/situation-of-the-right-to-freedom-of-association-and-environmental-defenders-in-ecuador/>.

Pachamama, and opportunities for relations between civil society, the state, the universities, and the private sector. The transcript is lightly edited for clarity and concision.

We have seen changes in Ecuador since 2011: the creation of a formal national Confederation of Civil Society Organizations and the imposition of a new regulation, Decree No. 16. Let's start with the Confederation.

Historically in Ecuador, there have been spaces to form civil society organizations around themes—for example, the environment or health. There have been networks around these themes as well as regional networks. But Ecuador differs from other Latin American countries. For example, the Confederation of Colombian Nongovernmental Organizations and the Communication and Development Institute in Uruguay are platforms that bring together the sector. In Ecuador, we have not had that.

We have taken a step forward with the formation of the Confederation. We have started by generating levels of trust and by finding goals that we could achieve better together than alone. But we still face several challenges to consolidate a space in which organizations can work across different sectors and regions with the aim to strengthen civil society

With the Collective, some people in 2009 said that we should create a space, legalize it, elect a board of directors, and have a membership fee. However, we had to arrive at that point after trust and collaboration have been built. If we had taken the other route and made the space more formal immediately, with a board of directors and the rest, the Confederation would not exist. I do not have any doubts about this. Part of the challenge of the sector has been creating and generating these spaces to meet—spaces of knowledge creation and of trust that allow us to work together.

We have important work to do. The Decree No. 982 of 2008 and now Decree No. 16, put into place in June 2013, are contrary to our constitutional rights. This has not been a matter of debate in the Confederation. The challenge has been agreeing on which parts of the regulation limit fundamental rights and affect citizen organizations, no matter the size or the sector.

What did the Confederation agree on? What are its messages related to the 2013 regulation, Decree No. 16?

As the Confederation, we have taken steps forward, as outlined on the website.⁷ We have met with the National Secretary of Politics Management, the new state liaison to civil society. We have shared three overarching messages.

The first message is a continuation from our position with Decree No. 982, and it is very important to begin the dialogue with the state around this issue. It is that organized civil society, the Confederation specifically, agrees with a legal framework for civil society organizations. For five years we have had this message. We believe that a good legal framework would make civil society better, because it would assure levels of quality and transparency that would help us recuperate the legitimacy and credibility we have lost. It would help achieve more direct and concrete participation rights and rights to associate. Therefore, the first message is that we agree with a legal framework.

⁷ See <http://www.confederacionecuatorianaosc.org/>.

The second message around Decree No. 16 is that we acknowledge that the state has a legal framework that not only regulates but also fosters civil society. The Decree cites three mechanisms by which the state is going to foster the development of civil society. First, it promises to create a competitive grant fund. This is a proposal that the Collective and the Confederation have been making for many years. Resources are not coming in from international cooperation. Civil society organizations produce public goods and contribute to public policy, and we believe that it is important for the state to finance some of their activities in a transparent and nonpartisan manner. Second, the Decree incorporates capacity-building programs, something we have been seeking for many years. Ecuadorian universities do not offer specialized academic programs about civil society. One school of law has a program related to nonprofit law, but there are no masters-level or certification programs about managing nongovernmental organizations. Recognizing this gap, Decree No. 16 promises to create training programs. Third, under the Decree, the state is going to assume its responsibility for helping smaller, low-capacity organizations complete the regulatory requirements. The three mechanisms come from civil society, not from the state. In these ways, Decree No. 16 not only regulates but also fosters civil society.

Our third message is that we remain very worried about Decree No. 16, just as we worried about Decree No. 982. We consider some elements of the Decree unconstitutional. As with Decree No. 982, it was difficult for the different organizations in the Confederation to agree on which elements those are. The Confederation has an enormous diversity of organizations working in different sectors, with different levels of institutionalization, some fifty years old and others only five years old, some working very closely with the state and others not. It was difficult, but we found three elements to focus on.

So what has the Confederation decided to focus on?

First, the causes for dissolution in the Decree No. 16 worry us. The state eliminated some that were in the Decree No. 982, but Decree No. 16 now prohibits activities related to public policy. We have told public officials and authorities from the National Secretary of Politics Management that the right to participate in public policies is established in the constitution. Citizens are guaranteed the right to participate in public policy formulation. How can you prohibit this and dissolve an organization for an activity which is constitutionally guaranteed? Also, an organization can be dissolved for activities that disrupt the “public peace.” In practice, what does that mean? If a civil society organization goes to a march in favor of fundamental rights is this cause for dissolution? These causes for dissolution continue to be unconstitutional.

The second thing that worries us is similar to elements of Decree No. 982. In Decree No. 16, an organization must respond to requests for information. A ministry could ask for documentation from twenty years back. We have said to the public officials that not even the state has the administrative capacity to maintain twenty-year old archives. Why are we going to demand this from an organization? And why is failure to achieve it cause for dissolution? We have said that needs to be corrected.

And third, Decree No. 16 says that an organization must open its membership to any person who wants to join. Imagine someone opposed to the use of contraception who wants to join an organization that promotes sexual rights with the aim of changing the organization’s agenda. Under Decree No. 16, the organization must admit this person as a member despite the radical philosophical differences. But this violates the right of freedom of association. You have

the right to associate with persons who you choose, persons who share values and goals. This is the third worry that we expressed to the National Secretary of Politics Management.

The meetings were positive, and they resulted in two agreements.

First, the three mechanisms to strengthen the sector are good; the challenge is to implement them. How should the competitive grant fund and the capacity-building programs be designed? We told the National Secretary of Politics Management to count on the Confederation to help design the programs, because who better knows the capacities that are needed to strengthen civil society? They told us they would work with us.

The other agreement concerns the three things that worry us. We argued that Decree No. 16 is unconstitutional, and that this does not make the state look good. They said in response that they do not want to dissolve an organization for working on public policy. Rather, they explained that some organizations use their work on public policy to serve political ends. Our response was that as written, it can be interpreted to allow a public official to close an organization for working to enrich public policies. We agreed that this part of the Decree No. 16 needs to be rewritten in order to leave no room for discretion.

Unfortunately, neither of these two agreements has been completed. But we still consider them advances. We sat at a table and said that we propose *this* and that we want to change *this* together with you. The Collective never achieved this. I believe that the public officials and authorities from the National Secretary of Politics Management see a stance that is more consolidated and more formal than under the Collective.

Until now these parts of Decree No. 16 have not changed, but you are still meeting with the National Secretary of Politics Management?

There have been changes in leadership at the National Secretary of Politics Management, which is an enormous problem. We have sent a letter to the new Secretary. We have the expectation that we will meet and tell the new Secretary all that we have accomplished with the hope to continue working together.

When Decree No. 16 came out and Pachamama was closed, you were in the media discussing the case. Talk about the role of the Confederation in these types of cases.

After the dissolution in the case of *Pachamama*, we made a public pronouncement and reached out to some media outlets. What we did was so delicate. As the Confederation, we could not defend *Pachamama*. We said, rather, that dissolution must be an outcome of an investigation and a process. We argued for the right of an organization like *Pachamama* to present evidence and have the opportunity to defend itself adequately. We also argued that an organization must have reasonable guarantees that an independent body will listen to all sides and reach a decision with reasonable levels of independence.

Ecuador is a very polarized country and society. Some said *Pachamama* is guilty. Others said *Pachamama* is innocent. The Confederation could not say that *Pachamama* is innocent or guilty. Rather, we championed the right of *Pachamama* to defend itself, as we would do for any citizen or civil society organization. I believe that the Confederation achieved a balance in a complicated debate. That is our role.

The Confederation is pushing collective accountability. It is starting the process of its third report. How is this part of the Confederation's vision?

When we began, there was a level of self-learning, looking at ourselves as a sector and recognizing the reasons that the state was using in trying to justify the restrictive regulations in Decree No. 982. The state said that no one knows what these organizations do, no one knows for whom they are working, no one knows what interests they have. They used this argument: These are not organizations without profits; they are organizations without objectives. No one knows what they do with their resources. No one knows how much the directors and employees make.

The truth is that individual organizations exercise transparency, but as a sector, we have been careless. We have not communicated to society what we do with our resources, where they come from, how we contribute, and how many people we benefit. We have forgotten the visibility of our role, and in doing so, we have lost our credibility and legitimacy. Now in the face of this gigantic attack, with regulations as restrictive as the Decree No. 982 and now the Decree No. 16, no one is defending us. There are not editorials about it. No beneficiaries are saying, for example, How can you attack this organization that has been so helpful to my family? We have lost credibility and legitimacy. We need to be much more proactive and tell the country why we are here.

In its first year of collective accountability, 37 organizations came together; in its second, 102 organizations. It has been a very important process.

The second report allowed us to say that 2.6 million Ecuadorians benefit from 102 organizations—that is almost 20 percent of the population. As such, civil society makes a significant contribution and complements the work of the state.

The process also had a political effect. The two reports allowed us to demonstrate that civil society organizations are key to the development of Ecuador, especially for those with less opportunity. In addition, the collective transparency process enabled us to spotlight the fact that these organizations have a profound conviction about their ethical responsibility, and they manage resources that benefit many people. We are signaling that important organizations are voluntarily accountable. They tell the country where their money is coming from and what they are doing with it.

With the reports, we are committing ourselves to ethics and transparency. This has helped reduce pressures from the state. But it is still complicated. International cooperation traditionally supported the process of civil society, but it has stepped back from the country and the programs that it had financed. Because Ecuador is labeled upper middle income, these resources do not exist anymore.

The third accountability report has had many challenges, because it has not received one dollar of support from international funders. I met with funders from Europe and the United States, international foundations, and they all said what a useful, valuable report this is. I told them that with more resources, we could have a video, we could do testimonies, we could present it in the 24 provinces of the country and invite the private sector—but we need resources. The response was, unfortunately, we have no resources.

It is a challenge, but I think it speaks to the increased legitimacy of the process in the Confederation. We managed to get US\$6,000 from members. Sure, that is not a huge amount, but in these times of tight resources, it allows us to bring together information, prepare the report, and hold a public event for its presentation. Despite limited resources, organizations were willing to give US\$50, US\$100, or US\$200. This speaks to their commitment to accountability.

When is the third report going to be released?

The report will come out during the first quarter of 2015.

To finish up, you are president of the Confederation with a two-year term. As the first president, what do you see as the vision for the Confederation over the next five years?

We always had the objectives of a dialogue about a legal framework and collective accountability reporting. These two objectives remain. There is a third objective that we have developed as a Confederation, which we did not have as the Collective. This objective, which will be fundamental over the next few years, is to strengthen civil society organizations.

There are few financial resources for this, so we are going to have to be very creative. We also have to be very generous among ourselves—supporting each other, collaborating more in networks, and sharing resources, methodologies, and data. One of the Confederation's most important roles is enabling the organizations to collaborate and synergize.

Part of the process is opening up dialogues with other sectors in society to find win-win relations that allow us to increase the sustainability of organizations. I will give you two concrete examples.

The first is the most obvious: relations with universities. Universities, according to the 2010 Law of Higher Education in Ecuador, are obligated to conduct research and to make links to communities. Universities in Ecuador, and I am generalizing a bit, know little about doing research or about making links to communities in a systematic and organized way. Their experiences with communities have been spontaneous and rare. Civil society organizations know very well how to link to communities. This we have already done. Some, like *Grupo Faro* and others, know how to conduct research too. This is a win-win relationship. We know how to do it, but we do not have resources. The universities do not know how to do it, but they have more resources. It is a good match.

The second is relations with the private sector. Ecuador now has the label of upper middle income, as I mentioned. In part because of this, the international cooperation is shrinking. This has a positive side. The private sector is managing much greater resources than it did ten to twenty years back, and it needs to develop socially responsible practices. Businesses do not necessarily know how to be socially responsible. Again, we feel that this can be a win-win relationship with civil society organizations. We know how to improve transparency and how to be effective with interventions in communities. We believe the Confederation can help produce a dialogue about this.

Part of the problem of not having collaborations among civil society organizations and universities and civil society organizations and the private sector is that we do not know each other. The Confederation can be the connector enabling the sectors to better know each other. From there, we can find opportunities to collaborate. This is our vision for the Confederation and civil society in Ecuador.