

## A BRIEF ANALYSIS OF THE NON-GOVERNMENTAL ORGANIZATIONS BILL, 2015

‘It is the responsibility of civil society to drive action and [ensure] change’  
– *Professor Sheila Meintjes*<sup>1</sup>

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### I. General Overview

Civil Society Organizations, including Non-Governmental Organizations (NGOs) can be traced as far back as the 1950s—mostly as emergency relief organizations. The development of the CSO sector is attributed largely to “the resurgence of the neo-liberal, free market ideology, which sought to reduce the role and influence of the state.”<sup>2</sup> Over the years, the role of civil society has been critical in the areas of protection and promotion of human rights, and to ensure transparency, accountability and good governance within the State. According to Clarke, “Civil society [is] closely linked with democratization, and it came to be seen as a solution to the problems of development policy implementation, bypassing corrupt and inefficient organs of the state.”<sup>3</sup> Over all, CSOs, particularly NGOs have been and continue to be at the forefront to supplementing government initiatives to deliver crucial services of health, food, education and emergency relief to the poor, elderly and most vulnerable persons within the community. They operate closer to the people and as they are innovative, cost-effective and efficient; they have been an easy reach to by the most-at-risk populations—especially in instances where there is need for urgent interventions. This is more critical in Uganda’s situation where public service is anything but efficient.

In Uganda, the NGO sector is guided by a number of legal and policy instruments which include among others; The 1995 Uganda Constitution, the Non-Governmental Organizations Registration Act 1989, the Non-Governmental Organizations Registration (Amendment) Act 2006, the NGO Registration Regulations 2009, The Companies Act 1961, The Income Tax Act 1997, The Value Added Tax (Amendment) Act 2005, the National NGO Policies 2008 and 2010 and the NGO initiated and led Quality Assurance Mechanism.

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Institute for Justice and Reconciliation Conference, ‘A National Priority? TRC Recommendations and the Need for Redress’, 28–30 October 2008, Cited in Jackee Budesta Batanda, ‘The Role of Civil Society in Advocating for Transitional Justice in Uganda,’ accessed at [http://www.ijr.org.za/publications/pdfs/IJR%20APFellowsProgrammeOP1\\_%20Civil%20Society%20and%20TJ%20in%20Uganda\\_%20J%20Batanda%20Budesta.pdf](http://www.ijr.org.za/publications/pdfs/IJR%20APFellowsProgrammeOP1_%20Civil%20Society%20and%20TJ%20in%20Uganda_%20J%20Batanda%20Budesta.pdf).

<sup>2</sup> Denis Muhangi, ‘Study of Civil Society Organizations in Uganda,’ accessed at [http://uphold.jsi.com/Docs/Resources/Research/CivilSociety/civil\\_society\\_organisation\\_mapping\\_study\\_phase2.pdf](http://uphold.jsi.com/Docs/Resources/Research/CivilSociety/civil_society_organisation_mapping_study_phase2.pdf)

<sup>3</sup>Ron Clarke, ‘Civil Society and its Role in Development,’ Handbook on Development Policy and Management, 2003

In essence, all these instruments are intended to regulate and give effect to the constitutional right of every Ugandan to engage in peaceful activities and influence the policies of Government through civic organizations.<sup>4</sup> This is also premised on Article 29(1e) which guarantees every person the right to freedom of association, including the freedom to form and join associations or unions, including trade unions and political and other civic organizations. Similarly, CSOs enhance the Governments' desire and promotion of the right to development by encouraging private initiative and self-reliance so as to facilitate rapid and equitable development.<sup>5</sup>

In the same spirit, local governments have greatly relied on the services of NGOs to provide important services to the needy within their communities. This is within the overall plan of Government, through its overarching policy framework, the Poverty Eradication Action Plan (PEAP), that recognizes Civil Society as an important actor and influencer in the promotion of grass root capacity building and democracy. Specifically, Government fully acknowledges and recognizes the key role NGOs play in improving accountability of public institutions including Ministries, Departments and Agencies, and promoting demand for public services by society generally and marginalized groups in particular.<sup>6</sup>

CSOs play important functions within the country; including, Promoting political accountability, creation of a vibrant citizenry in networks that help promote government programs which also helps in building relations between people and ensures cohesion, and creating and promoting alternatives. The current political structure in Uganda has shown that politicians have vested interests in all matters arising. The general good of the people has often been sacrificed for party/caucus interests. It has been evident that politicians and civil servants tend to constrain new thinking and ideas and are often driven by ideology only intended to cement their place on the political plane, hence hindering national development.

This paper discusses some provisions of the NGO Bill 2015 and how they affect the general working space of CSOs. It is intended to highlight a few contentious issues that need to be critically analyzed by Parliament in the course of its legislative power and oversight role, so as to ensure that any law that is passed will strengthen the sector and its partnerships with government but not to further stifle the already volatile political space within which CSOs operate.

## **II. The NGO Bill 2015**

On April 10, 2015, the Government of Uganda introduced the Non-Governmental Organizations Bill 2015 with the objective of *inter alia*, repealing and replacing the NGO Act Cap. 113, providing a conducive and an enabling environment for the NGO sector, to strengthen and promote the capacity of NGOs and their mutual partnership with Government, and to make

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<sup>4</sup>Article 38 of the Constitution of Uganda 1995

<sup>5</sup> The Constitution of Uganda 1995, Objective IX, National Objectives and Directive Principles of State Policy

<sup>6</sup>2008 National NGO Policy, accessed at <http://www.icnl.org/research/library/files/Uganda/policy.pdf>.

provision for the corporate status of the National Board for Non-Governmental Organizations and strengthen its capacity to register, regulate, coordinate and monitor NGO activities.

Generally, this bill is a welcome step as the NGO sector with its regulating framework has been awash with glaring gaps that needed reform. Without prejudice to the fact that the NGO law is being changed for the second time within a space of ten years, the current legal framework has been overtaken by a much more rigor and progressive CSO movement which could not conform to the NGO Act as it is. However, the intention of the drafters of the bill spells detachment from the practical realities<sup>7</sup> and is more focused on the perception that “...the rapid growth of non-governmental organizations has led to subversive methods of work and activities, which in turn undermine accountability and transparency in the sector..”<sup>8</sup> Similarly, the fact that there may be some NGOs operating ‘subversively,’ the law cannot be drafted with a general trait of looking at all NGOs as subversive in nature. In order to address the gaps within the law, the Authorities responsible for regulating the sector need to be strengthened—albeit with input and total engagement of CSO leadership, not by equipping them with security operatives with little or no knowledge and experience in CSO work.

Any government with the desire and will to reach to all its citizenry and ensure total participation in the affairs of the state, to ensure growth and development should be working to open up space to engage CSOs. Meaningful participation of the governed in their governance is the hall mark of democracy and can only be assured through optimal exercise of the freedom of expression, [assembly and association.]<sup>9</sup> However, a closer scrutiny of the NGO bill, paints a dire picture which seems intended to suffocate further the ever shrinking space that CSOs find themselves in today. A few of the most contentious provisions in the proposed law are briefly discussed below.

#### **a. Unfettered Discretionary powers of the NGO Board**

The first issue with the bill is the unfettered discretionary powers that it gives the NGO Board<sup>10</sup> (herein after referred to as the Board). The NGO Bill appears to give the board excessive powers to take any disciplinary action, to incorporate an organization, or revoke its permit, which raises concerns that these powers can easily be abused. Some specific clauses of concern include 7(1) (b), which states that “*The Board shall have power to summon and discipline organizations.*” However, this clause lacks any qualifications about when and how powers will be utilized. In addition, clause 7(1) (b) (v) says that the board’s disciplinary actions can include “*any...disciplinary action that the Board may deem fit.*” A similarly vague clause is 31(4) (e), which states that “*An organization shall not be registered under this Act for any other reason*

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<sup>7</sup> The NGO policy 2010 that was consultatively developed by thorough multi-stakeholder engagement proper captures these realities.

<sup>8</sup> Clause 2 of the Bill

<sup>9</sup> Charles Onyango Obbo and Andrew Mwenda Vs Attorney General, Constitutional Appeal No.2 of 2002.

<sup>10</sup> Part II of the Bill established the National Board for Non-Governmental Organizations, laying out its functions and powers in Clauses 6 and 7 respectively.

*that the Board may deem relevant.*” This is too much unfettered power to the board, without qualifications or conditions, which is bound to be abused.

This bill also gives the Board indiscriminate power over investigation and revocation of permits. In clause 33(1) (d), the bill states that *“The Board may revoke the permit of an organization if ... it is in the public interest to do so.”* Public interest has always been a historically vague term, utilized by governments to justify actions that would otherwise be illegal, or at least difficult. It is possible that the term “public interest” may be used in a similar way under this bill. In respect to discretionary powers, the final clause of concern is 37(1). This clause allows the Board to authorize inspection and information requests *“at any reasonable time.”* The perimeters of a “reasonable time” is not defined in the interpretation clause, therefore there are concerns this could be abused. A solution that could rectify the problems in these clauses is that the powers of the board should be qualified and the Board should not be allowed to take action as they deem fit.

#### **b. Lack of a proper complaints procedure**

The second area of concern is the lack of a proper complaints procedure pertaining to NGOs. This bill makes the Board the complainant, the prosecutor and the judge in the matter, a fact that opens up the possibility of abuse of this power. These powers are also in contradiction to the process of natural justice, since the clause<sup>11</sup> requires an NGO to show cause why its permit should not be revoked whereas natural justice requires that it should be the complainants (the Board) that prove why they intend to revoke a permit. (He who alleges must prove)

The specific clauses of concern in this case are Clause 33(1) and 33(2). Clause 33(1) lists the reasons that a permit may be revoked, concluding with *“The Board may revoke the permit of an organization if ... it is in the public interest to do so.”* As mentioned in the previous section, this vagueness raises concerns about possible indiscriminate measures by the Board. Clause 33(2) provides for the appeal of a decision to revoke a permit, but has serious problems both of procedure and clarity. It puts the burden of proof on the defendant (the organization), making them effectively guilty until proven innocent, in contravention with the presumption of innocence, a practice so standard that it is included in the Universal Declaration of Human Rights, and the Ugandan Constitution, Clause 28(3)(a). Though this clause may not be directly in violation of the constitution, it certainly violates it in spirit.

There are also issues with the clarity of Clause 33(2), especially if read in context. Clause 33(3) states that *“where the board revokes a permit, it shall inform ... the holder of the permit of the reason why the permit has been revoked.”*<sup>12</sup> Since Clause 33(3) seems to say that the board is only obliged to inform the permit holder of the reason for the revocation after their permit has

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<sup>11</sup> Clause 33 (2) Before the board revokes a permit under this section, it shall by notice in writing request the holder of the permit to show cause why the permit should not be revoked within 30 days from the date of notice.

<sup>12</sup> This is clearly contrary to the **Right to a fair hearing** as envisaged in **Article 28 of the 1995 constitution of Uganda as Amended.**

been revoked, there is a potential that the board could inform an organization of their intent to revoke a permit, but without informing the organization of the reason behind it. The organization would then have 30 days to lodge an appeal, but without any foreknowledge of what they were being accused of. Using criminal justice as an analogy, it would be as if a person was arrested and told to defend themselves in court, without being told what they were being accused of only to be told the charges after being sentenced.

The proposal to these concerns is threefold. First, a proper complaints procedure should be created, with greater clarity of what exactly constitutes an action worthy of revocation of a permit. Second, the burden of proof should be shifted to the Board, in order to align this bill with the rules of natural justice. Finally, there should be a clear procedure for informing the accused organization of the charges against them before they are asked to mount a defense against them. In fact, this can be set straight if the Bill establishes an independent body or Tribunal other than the NGO Board to which complaints against NGOs are lodged.

### c. Double punishment for the same offence

Another issue with the bill is regarding double punishment for the same offence.<sup>13</sup> The bill provides for both the NGO and its employees/directors to be punished for the same offence. Clause 31(10) deals with what constitutes an offence, and makes organizations liable to pay a fine for a convicted offence. However, Clause 31(11) states that “*where an organization commits an offence...any director or officer of the organization...also commits an offence and is liable.*” Given the corporate status that organizations get after incorporation, they can sue or be sued in their own names. Choosing to hold the employees of those organizations personally liable for the actions of NGO amounts to “Lifting the corporate Veil,”<sup>14</sup>—a doctrine only permissible through Court as a judicial exception. The bill should therefore draw a clear line between when employs of an Organization can be held personally liable, and when an NGO can be held liable.

Ironically, the Bill in clause 38 protects people acting on behalf of the board from liability.<sup>15</sup> It is not in dispute that government has vicarious liability for the actions of its employees but where they are given discretionary powers that may be abused, it is important to “*open a window*” through which they can be held personally liable for some of their actions. The High Court in the case of *Comdel Forex Bureau V. Attorney General*<sup>16</sup> stated that police officers can be held personally liable for some of the actions done in the course of duty.

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<sup>13</sup> In the Case of **Attorney General V Uganda Law Society, Constitutional Appeal No 1 of 2006**, the Supreme Court in View of the Double Jeopardy Rule and Article 28(9) of the Ugandan Constitution, condemned anything that seeks to put an accused person at a risk of being punished twice for the same office.

<sup>14</sup> The principle of lifting the corporate veil relates to the act of looking beyond a company as a legal personality and identifying the individual(s) in a company who is responsible for the acts or omissions complained of. In such cases, no action is taken against the company for those acts or omissions.

<sup>15</sup> Clause 38. **Protection from Liability.** A member of the Board of Directors, an officer or an employee of the Board or a person acting on directions of the board is not personally liable for any act or omission done or omitted to be done in good faith in the exercise of the function of the board.

<sup>16</sup> High Court Civil Suit No. 0497 of 2012 before Justice Henry Peter Adonyo

The bill should in the same spirit be seen to use the phrase “done in good faith” which is subjective and can thus be interpreted.

**d. Inspection of NGOs**

There are also issues with the inspection procedure for NGOs. Clause 37 is not clear on the procedure of inspection, the notice to the organization and proof that whoever seeks to inspect is actually from the Board. In addition, in the event of any excesses or illegalities in the execution of their duties, Clause 38<sup>17</sup> protects them from liability.

Clause 37 deals with inspection, and as mentioned above, it simply states that the Board can authorize inspection and information requests “at any reasonable time,” but doesn’t provide any clarity on how the investigation should be carried out. Clause 38 provides indemnity for any action or inaction of a Board officer assuming the action or inaction is done “in good faith in the exercise of the functions of the Board.” This could potentially indemnify Board officers from illegal searches, or any other unlawful interference with the operations of NGOs without notice. This concern could be rectified by clearly laying out the procedures for inspection of an organization. As mentioned, officers of the board should be held liable for the actions they do in excess of their duty in the course of carrying out their work just like the case is with the police.

**e. Re-registration of existing NGOs:**

Clause 51 of the bill provides that, “*an organization which existed before the commencing of this Act...., may continue to operate but shall apply for registration within six month after the commencement of this Act*” This in essences means automatic deregistration of organizations that shall have not re-registered within six months of the passing the bill.

This in legal terms means that the bill if passed will have retrospective effect, which is contrary to basic principles of legislative drafting. More so, the practicality of the NGO board having the capacity to re-register the organizations in tens of thousands is a very ambitious target that may cause the entire Civil Society to shut down. Such action would also stifle funding or development partners’ support for NGOs whose long term existence is uncertain.

This clause should therefore be deleted or at worst, require already existing organizations to submit their NGO particulars to the Board as they continue to operate.

**f. Submission of Annual Returns**

The final issue relates to the submission of annual returns. The provision (Clause 36) requires annual returns to be submitted to the board at national, district and sub county level.

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<sup>17</sup> *Supra*

This process is not only tedious but also unrealistic for organizations that operate across the country. The bill should specifically state what information should be submitted at what level, as opposed to having an organization submit returns, estimates and any other information at all administrative levels in the country.

Without prejudice to the above suggestion, the NGOs can deposit the information with the NGO Board from where it can be requested by other administrative entities in case of need.

### **III. Conclusion**

Ugandan Civil Society Organizations have, independently and through umbrella organizations such as the National NGO Forum and Development Network of Indigenous Voluntary Associations (DENIVA), welcomed government efforts to establish a proper legal and policy framework for their operation. Their argument is that a streamlined legal framework is the cornerstone of a free and democratically governed society. This attitude can be seen in the forward of the National NGO Policy 2010 where the tremendous contribution of CSOs led to the production of a nationally accepted policy. However, the concern with the particular bill is insofar as it narrows down the space within which NGOs operate.

One of the keys in making civil society pluralistic and ‘civil’ is an emphasis on negotiation and discussion, rather than the imposition of ideology and curtailment of dissent. The genesis of the NGO Bill 2015 triggers a more dark life for the operations of NGOs in this overly strained political arena. The security focus with which the law was proposed triggers a more complex partnership between CSOs and government in their different roles in a democratic society. This has already triggered self-censorship by some NGOs in fear of the repercussions of the law—hence suffocating a vibrant civil society in its endeavors to ensure that issues of accountability, transparency and good governance remain crucial and core in all political undertakings. It is from this premise, that any measures proposed to regulate the sector should be driven by concerted efforts between government and the CSO sector and intended to create a more conducive environment for CSOs, so as to strengthen the government/CSO partnerships, at the same time exposing and rooting out any such factions within the sector that may harbor subversive tendencies.