

RULES AND REGULATION AFFECTING CIVIL SOCIETY SPACE

Background Paper for Working Session Two¹

BACKGROUND

The Commonwealth, both as an organisation and as individual states, has affirmed its clear commitment to democracy and good governance in numerous declarations over the years. Importantly, what is essential is not just the formal expressions of democracy – regular elections and parliamentary processes – but substantive, *participatory* democracy. What this means, in practice, is that democratic government needs to be not only *for* the people, but *of* the people and *by* the people. It is not enough that people are able to exercise their vote every few years. Meaningful democracy requires that people are supported and encouraged to actively engage in their own governance.

Civil society (i.e. non-governmental organisations (NGOs), the media, academics and many other community sector groups) has a vital role to play in this context. While it is true that many civil society groups focus primarily on providing services to the community, experience has shown that civil society groups have also often been key facilitators of government-citizen dialogue as well as having an important monitoring role of government activities. Civil society group's strength and importance to democracy stem from the fact that they provide a key means for channelling the views and needs of the broader public due to the power that collectivity and solidarity can give to individual voices. Civil society groups often act as a medium for individuals who may either not be comfortable engaging directly with government or who may just not know how to have the views put forward to policy-makers.

There are many issues that affect the livelihood and effectiveness of civil society. Generally, the main restrictions on civil society are caused by the laws that regulate the various branches of civil society. Government procedure, bureaucracy and inefficiency of public officers can also be as damaging to NGOs as a restrictive law. The attitude of governments around the Commonwealth towards civil society varies greatly and, consequently, so do the laws they enact to regulate it. There are various laws that can restrict civil society, such as restrictions on the media and on NGO registration, as well as restrictions on the freedom of expression and freedom of assembly. The subject matter can be very wide and it is important to keep this in mind in order to understand the large extent to which civil society is affected in so many areas by so many varying aspects of the law.

One area, which deserves to be examined in particular, is that of laws, rules and regulations that affect NGOs – these could be either specific NGO Acts or other legislation which directly or indirectly affect the livelihood and work of NGOs. Whilst the term 'civil society organisation' (CSO) encompasses many more different types of organisations than non-governmental organisations (NGOs), this paper focuses primarily on laws that affect NGOs. This choice was made in order to narrow down the focus of the discussion to one that is more easily manageable.

When discussing laws which affect NGOs, most people immediately think simply about an Act which deals specifically with NGOs – such as an NGO Act. Many do not realise that NGOs in every country are affected by many more laws than one can imagine. Often they are partially regulated, or at least affected, by various laws including:

- The Constitution of the country - which affects NGOs by safeguarding rights such as the right to freedom of assembly, freedom of association etc. which enable the organisations to exist in the first place;
- International human rights law - such as the *International Covenant on Civil and Political Rights (ICCPR)* - which also protect rights which enable NGOs to exist and perform their duties;
- The Companies Act;
- Laws dealing with charity and collection of funds;
- Laws regulating foreign donations and funding;
- Income tax and other tax laws;

¹ Prepared by Andrew Galea Debono, Commonwealth Human Rights Initiative, October 2005

- Laws which deal with public or private trusts;
- Laws dealing with societies;
- Laws dealing with religious institutions (when the NGO is religious based);

The constitution of a country as well as a number of international conventions that a country has ratified provide the legal basis for the setting up of an NGO. The right to freedom of expression, right to associate and right to freedom of assembly are three of the fundamental rights upon which the right to set up an NGO is based. These rights cannot be derogated from without a very valid reason which should conform to the norms of the constitution as well as to the standards of international law.

In countries where there is no specific Act dealing with civil society or NGOs, NGOs find themselves falling under many different laws all at the same time – often creating confusion, overlapping and also a lot of unnecessary bureaucracy for the organisation involved. Many of the laws affecting NGOs are very old and are severely outdated. In certain countries, some laws were promulgated during a time when there was a very different political situation in the country from that of today and therefore certain restrictions or procedures are no longer relevant. Even in situations where the country has not gone through any particular political change, the role of civil society has expanded and become more important and complex thus requiring more up-to-date, efficient and streamlined laws and procedures to deal with NGOs.

It may often be the case that despite having a strong law dealing with NGOs, the government might lack the resources to correctly enforce those laws or set up efficient mechanisms. Where legislation needs to be reviewed, governments might also not place complex reviews of legislation affecting NGOs on the list of their priorities. In such cases, the civil society sector can contribute by examining the current system and proposing an effective long-term plan for improving the system. NGOs can also contribute by increased self-evaluation, public awareness and self-regulation. It is important that NGOs are involved in the development of a better system, rather than it being left solely to government.

Main Issues Which Affect NGOs

Registration and Termination: The issue of registration is vital since this involves situations where NGOs have problems being formed in the first place. Registration of NGOs is generally a desired feature in the law in order to avoid or limit the chances of NGOs set up with the wrong intentions (for instance, the practice in some countries of establishing an “NGO” to receive grants which are then used for private purposes). However, governments must not abuse the registration procedure in order to limit legitimate NGOs from being formed. Sometimes the criteria required for registration are so ridiculously complex that it makes it almost impossible for NGOs to officially register with the government. Other times, the procedure is so time consuming and complex that it can delay the formation of an NGO by many months and actually discourage people from trying to form and register NGOs. Powers to the authorities to arbitrarily terminate the registration of an NGO is of obvious concern since this would discourage NGOs from voicing any opinion which the government might disagree with - such as criticising the human rights situation in the country. Procedure for the winding up of a registered organisation in certain countries can be initiated by the government and involves a management take over by a government official before the organisation has a chance to challenge the decision. This often leads to the demise of the organisation due to bad management on the part of the government official even in cases where the organisation eventually manages to overturn the government decision.

Finances: From a financial point of view, tax exemptions are very important since NGOs do not aim to make a profit and often find themselves reliant on external funding. Financial aid such as tax exemptions from the government can provide a boost to the NGO and eliminate what could be a big financial obstacle to the running of the NGO. Limitations on tax exemptions or complicated application procedures for such exemptions can create problems for NGOs. Certain countries such as India and Bangladesh have laws that regulate and tend to limit the possibility of obtaining foreign funding. Foreign funding for NGOs, especially those in developing countries, is often vital for their existence. Restrictions on the use of foreign funding or obstacles (generally by means of complicated application procedure) for those applying to obtain such funding can seriously compromise the work of the NGO or even the livelihood of the NGO itself.

Limitation of Activities: Limitations on NGO activity are generally imposed indirectly through the interpretation of some very vaguely worded laws rather than by clear and specific terms in the law. Whilst limitations clearly laid down in the law might cause an outcry, interpretation of wide definitions in the law in order to restrict NGO activity is more likely to go unnoticed despite the fact that it is equally damaging. Limitations can also be psychologically induced by other laws. For example, if a government can arbitrarily revoke the registration of NGOs in a particular country, it is likely that NGOs in that country would not undertake activities that might not be seen in good light by the government.

Monitoring: Whilst giving freedom to civil society to function with flexibility is positive, too much freedom can lead to abuses by certain groups or individuals calling themselves an “NGO”, thus giving civil society a bad name. There have been cases in various countries of NGOs using grants for other (often personal) purposes than that for which the grant was obtained - or obtaining grants when the NGO doesn't actually exist except on paper. Situations like these have a negative impact on the many honest NGOs and create a situation of low trust in NGOs. This, in turn, leads to a situation where funding is not easily obtained and where the public is less ready to contribute to the sector. Therefore, whilst too many restrictions hamper the work of NGOs, it is important to have laws regulating accountability and monitoring of civil society so as to maintain a high trust level and good functioning on NGOs. Self-monitoring should also be encouraged through the enactment of the appropriate legal framework.

COUNTRY CASE STUDIES

Australia²:

- At present there are more than twenty different ways to incorporate non-profit organisations (which includes NGOs). Such a vast number of ways to register goes beyond a positive flexibility and actually leads to much confusion and the possibility of over-lapping. Fundraising is similarly affected by several different regimes across states and territories. It must be noted that this situation is a product of the federal system which affects many types of organisations and not specifically targeted at NGOs to purposely over-regulate them.
- In Australia not-for-profits are registered with the Australian Taxation Office regulated by the Australian Federal Government.
- However each state has its own charitable fundraising Acts defining who and how organisations can raise funds. In New South Wales it is the Charities Fundraising Act 1991 and is managed by the department of gaming and racing.
- The tax law area is the one where the greatest confusion for NGOs is to be found. It is impossible to find any set of principles underpinning tax legislation that designates tax concessions. There are no clear links between the concessions provided and public disclosure requirements therefore it is not clear what standards are required to benefit from these concessions.
- Some feel that a fundamental review of the system is necessary, as they feel that the complexity and rigidity of Australia's current non-profit laws place a costly compliance burden while failing to adequately protect funders and donors and other stakeholders such as volunteers and beneficiaries. On the other hand there are other people involved in civil society who believe that it is relatively easy to set up an organisation and that the laws regarding incorporated associations at least provided a method of some sort of democratic legitimacy.
- Some civil society groups feel that NGO regulations should be revised to provide a clear and consistent framework which reflects the contemporary economic environment and encourages NGOs to function better.

Bangladesh³:

² www.pathwaysaustralia.com.au , www.philanthropy.org.au

³ Sumaiya Khair and Saira Rahman Khan, *Philanthropy and Law in South Asia*, ed. Mark Sidel and Iftkhar Zaman – Published by APPC (Asia Pacific Philanthropy Consortium) 2004.

- Bangladesh has more than one law which can be used for registering an NGO, thus creating confusion as to which is more beneficial for the organisation to use.
- NGOs seeking registration need clearance from the Home Ministry, requiring Special branch and National Security Intelligence of the government to examine applications as to anti-social or anti-state activities. There are no definitions of these terms - leaving much room for government discretion.
- Receiving clearance for registration from the Home Ministry may take between 3 to 6 months which can be sometimes speeded up if the organisation has personal contacts with government officials.
- The government formed the *NGO Affairs Bureau (NGOAB)* in 1990 to regulate the affairs of NGOs within the Ministry of Establishment. The NGOAB cut down on bureaucratic complexities that made registration difficult before – but the process of seeking approval is still arduous requiring lots of paperwork and unnecessary bureaucracy. Worryingly, the NGOAB reserves the right to reject applications if it is not satisfied with the organisation's papers or plans and the organisation has no right to appeal. The NGOAB also has the authority to terminate registration of any NGO before it can plead its case.
- Most of the main legislation dealing with the regulation of NGOs and also that dealing with the flow of foreign funds to NGOs dates back to the time when the country was under martial – one of the main laws even dates back to when the territory was still East Pakistan. Whilst the restrictions which existed in these laws might have been justified at the time due to the political situation in the country, nowadays they are no longer justified.
- The old laws should be repealed to make way for newer laws which allow more space and less restrictions for NGOs and civil society. The old laws are plagued by administrative and procedural bottlenecks.
- The *Foreign Contributions (Regulation) Ordinance 1982* imposes greater restrictions on NGOs for government approval of foreign funds than the older law which it amended. NGOs must face many successive stages of approval to receive foreign funds. These procedures must be streamlined and any ambiguities in the law should be removed.
- On a positive note, recent pressure from the donor groups and civil society leaders successfully convinced the Bangladeshi government to abandon the plan to introduce the proposed *Foreign Donations (Voluntary Activities) Regulation (Amendment) Bill, 2004*. Civil society groups in Bangladesh had alleged that this Bill was a governmental attempt to control dissent and take over NGOs. It prohibited “political activity” by NGOs and controlled the expenditure of its project activities. The proposed legislation also empowered the government to cancel NGOs' registration and dissolve them.

Fiji⁴:

- The *Charitable Trust Act* is the only legislation which deals with the various forms of organisations in Fiji – including NGOs. Therefore, all NGOs seek incorporation under the *Charitable Trust Act*.
- The *Charitable Trust Act* in its current form is not able to cater for the diversity of NGOs which fall under it. The Act is in need of review to deal with the development of the voluntary and the charitable sectors in Fiji. The Act needs to be able to clearly regulate the different forms and sizes of NGOs. The structure and basis of the different organisations - which are either referred to as Community Based Organisations (CBOs), Civil Society Organisations (CSOs) and Non-Governmental Organisations (NGOs) - are not adequately reflected in the *Charitable Trust Act*.
- Section 3 of the Act contains an exhaustive list of ‘charitable purposes’ which an NGO must perform to qualify for registration under the Act. It would therefore mean that any organisation that does not fall with the scope of charity mentioned in the section of the Act could not apply for incorporation as a charity in Fiji.
- The process of obtaining recognition as a charity is primarily an administrative matter and largely outside the direct control of other institutions - including the Courts. Organisations seeking charitable status under the Act must apply in writing for incorporation under the provisions of the Act to the Registrar of Titles who has the power under the Act to grant or

⁴ Chaitanya Lakshman, A Report for the International Centre for Non-Profit Law (ICNL), June 2004 - www.icnl.org

withhold registration. The Registrar is the only judge and solely determines whether the proposed purposes are, in law, charitable or not. The act does not outline the process whereby those who have been refused registration can seek recourse.

- Section 13 (1) of the Act provides for the cancellation of incorporation of a trust (NGO or Charity) and it empowers the Registrar of Titles with the discretion to cancel registration. The Registrar is required to serve a notice in writing to the Board of Trustees of the charity and publish a notice once in the Republic Gazette and in a newspaper circulating in Fiji. The trustees of an organisation have thirty days from the publication of such notice within which to show why the incorporation of the charity (as a Board of Trustees) should not be cancelled. If the Trustees fail to satisfy the Registrar then the incorporation of the Board may be cancelled by notice in the gazette. Following the cancellation of the incorporation, any of the Trustees may within thirty days of the notification of the cancellation appeal to the High Court against the decision of the Registrar and the high Court has the power to confirm or set aside such cancellation or make such other orders as in the circumstances seems just and equitable.
- The Charitable Trust Act caused controversy in June 2001 following the de-registration by the Registrar of Titles of the Citizens' Constitutional Forum (CCF) - an NGO that was duly registered under the Charitable Trust Act. The de-registration was decided on for alleged 'political involvement' of the CCF. At the time CCF was involved in taking the Interim Administration to court for its breach of the re-instated 1997 Constitution. The CCF was established in 1993 by a group of citizens who were pushing for a new Constitution for all Fiji citizens which they believed would be more fair to all. The Registrar considered that the CCF's charitable status should be cancelled as its objects and activities amounted to "political objects and goals and activities" and as such were not within the meaning of 'charitable purposes'. CCF responded to the Registrar, outlining its position, but this response was rejected and CCF's incorporation as a charitable trust was cancelled. Due to the fact that the CCF did not challenge the Registrar's decision in the Courts, it is still unclear from a judicial point of view whether the activities of CCF amounted to 'political activity'. This case involving CCF showed the need for clear guidelines to protect those that are involved in advocacy programmes and actively involved in promoting human rights and the freedoms of individuals and groups from the potentially unfair discretion of the Registrar.

India⁵:

- The various laws under which NGOs register themselves leads to diversity in legal status amongst NGOs and therefore also to a lack of uniformity on issues of accountability and governance. The fact that there is no policy framework for NGO laws makes a uniform central law a very difficult goal to achieve.
- Laws related to registration are very old. For example, the Societies Registration Act dates back to 1860 and the Indian Trusts Act dates back to 1882. These laws need to be amended or updated to reflect present needs of NGOs.
- Registration procedures often take months. Most state laws dealing with registration do not lay down a maximum timeframe in which registration should be processed.
- Registration law does not differentiate between different categories of organization therefore creating a situation where a public school (which makes profit) is also registered under the same law as NGOs.
- Tax laws dealing with NGOs need to be amended to bring them more up to date with the current financial reality of NGOs.
- In the states of Maharashtra and Gujarat, societies (in India most NGOs are registered as societies) are required to register under the Bombay Public Trusts Act 1950 for regulatory purposes. They therefore must register both as societies and as trusts increasing the bureaucracy of registration and also forcing them to pay a contribution which societies in other states do not pay.
- There is the need for Indian Parliament to enact central law for all India which would be uniformly applicable to all NGOs in any state of the country instead of the current system

⁵ Snjay Agarwal and Noshir Dadrawala, *Philanthropy and Law in South Asia*, ed. Mark Sidel and Iftikhar Zaman – Published by APPC (Asia Pacific Philanthropy Consortium) 2004; and Voluntary Action Network India (VANI) report

where NGOs can be a trust, society or company. This would create more uniformity and avoid conflict of laws.

- Under the *Foreign Contribution (Regulation) Act (FCRA)*, NGOs face several serious restrictions regarding the permission to receive and use foreign funds. These restrictions have a negative impact on the livelihood and work of several NGOs.
- The proposal for a new Bill called the *Foreign Contribution Management and Control (FCMC)* is being discussed at the moment. Civil society in India, with Voluntary Action Network India (VANI) in the forefront, is putting pressure on the government not to go ahead with it. The proposed Bill would bring about even more restrictions on NGOs instead of improving the situation:
 1. Already registered organisations who currently have approval to receive foreign funds would need to re-register within two years instead of automatically keeping on receiving foreign funds;
 2. NGOs would need to obtain a renewal certificate every five years;
 3. Foreign funding will not be allowed for organisations of a political nature. The proposed Bill does not define clearly the term "organisation of political nature". This could affect many organisations working for political rights
 4. The proposed bill has provisions such as suspension and cancellation of registration certificate in case of a breach of the procedure related to foreign funds. The offence committed would be of a criminal and not civil nature (unlike the laws dealing with the mechanism of the corporate sector – FEMA);
 5. It restricts associations not to exceed 30% of the total foreign contribution on administrative expenses. The rules may also specify unrealistic parameters of what amounts to administrative costs and what does not. This restriction might prove to be a severely damaging blow to many NGOs.
- NGOs could be regulated by a positive mechanism such as FEMA which currently deals only with the corporate sector. The corporate sector has benefited greatly by FEMA and it is believed that NGOs could also benefit from such a positive law. The major differences in FEMA and the proposed FCMC show a major difference in attitude by the government towards the corporate sector and the civil society sector.

Kenya⁶:

- Before the 1990 Non Government Organisations Act was enacted, Kenya did not have a specific legislative framework governing the operations of the NGO sector. The Kenya National Council of Social Services (KNCSS), formed in 1964 as a quasi-official institution under the Ministry of Culture and Social services to coordinate NGO activities and to give advice to the government on the sector, proved to be inadequate. The KNCSS was therefore replaced by the statutory scheme of the NGO Act.
- The NGO Act not only provides a state mechanism under the NGO Coordination Board but also establishes a system for self regulation by establishing the Kenya National Council of NGOs (KNC). Section 23 of the Act gives the KNC self-regulatory powers, and it can adopt its own rules and proceedings. The Act obliges the Council to adopt a code of conduct for NGOs, and in addition the Minister may make rules under the Act generally. In 1992, the Minister made the NGO Coordination Regulations which sets out specific procedural and substantive requirements including for registration.
- Until the NGO Act came into force, NGOs were registered under ordinary civil laws including the Companies Act, the Societies Act and the Trustees Act as well as administratively under the Ministry of Culture and Social Services. The NGO Act sets out a more elaborate mechanism for registration than before. Initially, the law had provided for renewal of registration of NGOs every three years but that provision was repealed to allow for perpetual existence.
- Application fees for registration are believed by some to be too high for a number of NGOs.
- Section 14 of the Act empowers the Board to refuse registration of an applicant if satisfied that its proposed activities or procedures are not in the national interest or if satisfied the applicant has given false information in the process of registration. In this regard, the Board

⁶ [http://www.civicus.org/new/media/Resisting%20Repression%20\(Merged\)%20Final.doc](http://www.civicus.org/new/media/Resisting%20Repression%20(Merged)%20Final.doc) - Written by: Barney Afako - Justice Resources Kampala, Uganda

may act on the recommendation of the Kenya National Council of NGOs (KNC). However, an applicant can appeal from the decision of the Board; initially to the relevant Minister, and from the minister to the High Court within 28 days of receipt of the decision. Thus when the legal campaigning NGO Clarion challenged its deregistration in the High Court, it was re-registered before the matter could be determined. Previously, the Minister's power to deregister an NGO for making a false statement was final but under an amendment, section 34 (2) now provides for appeal to the High Court from that decision.

- In 1995, the Council prepared the NGO Code of Conduct setting out the principles and benchmarks for the operations of NGOs. These included such values as probity; self-regulation; justice; service; cooperation; prudence and respect. In practice there are numerous networks of NGOs which bring together organisations working in particular fields. Even though the NGO Coordination Act set out to harmonise the framework governing NGOs there still exists parallel mechanisms for registration. This is because NGOs can also be companies and thus registered under the Companies Act, though most were originally registered under the Societies Act.

Malawi⁷:

- The Non-Governmental Organisation Act in Malawi was introduced in 2001 and was a result of six years of consultations with NGOs.
- Under the Act it is mandatory for NGOs to register. There are exemptions to this requirement including for informal organisations that do not have a written constitution.
- The NGO Board consists of ten members: three ex-officio members who are the Secretaries of three Ministries, and seven members (at least three must be women) who are appointed by the Minister in consultation with the designated NGO coordinating body - the Council for Non-Governmental Organisation in Malawi (CONGOMA).
- The Board registers and regulates NGO operations. The Board has a specific period of time in which it must decide on the application for registration. To be registered under the Act, an NGO must have at least two directors or trustees who are citizens of Malawi. An NGO's application for registration must include:
 1. approval from the Ministry responsible for the activities to be undertaken by the NGO,
 2. proof of membership in CONGOMA,
 3. a plan of the activities which the NGO intends to undertake,
 4. the NGO's source of funding,
 5. a statement that the NGO shall not engage in "partisan politics including electioneering and politicking",
 6. and personal details, including the nationalities of the trustees, directors and other executive board members.
- Failure to comply with the provisions of the Act and engagement in partisan politics are the main grounds for the Board to cancel or suspend registration. NGOs may appeal a Board decision to cancel or suspend registration to the High Court for judicial review.
- The Act allows registered NGOs to engage in public and other forms of fundraising, as long as they comply with the reporting requirements prescribed in the Act. An NGO which contravenes the provisions of the Act shall be guilty of an offence and liable on conviction to a fine.

Malta⁸:

- The White Paper for the Voluntary Organisations Act aims to help the credibility of voluntary organisations and to strengthen the sector while providing support and certain privileges. It also aims to regulate the sector in a more coordinated manner, proposing to deal with the existing lacunae confronting the sector. The proposals were made by Family and Social Solidarity Minister and incorporate some of the thoughts and ideas of groups and individuals who had presented their suggestions and concerns to the ministry.

⁷ <http://www.sdn.org.mw/ngo/bill-2000/> and <http://hrw.org/backgrounder/africa/zimbabwe/2004/12/6.htm>

⁸ <http://www.geocities.com/inizjamed/ngosinmalta.htm>

- The White Paper and proposed legislation were presented for public consultation on July 29th 2005 with the consultation period extending to the end of October 2005. This gives the voluntary sector, civil society and other interested parties the opportunity to put forward their views before the Bill is debated in Parliament.
- User-friendly, non-technical language has been used as much as possible in the drafting of the legislation so that it will be easily understood by non-legal persons.
- The White Paper outlines the functions of the NGO Commissioner, the set-up of the Voluntary Organisations Fund and the role of the National Council for the Voluntary Sector.
- It seems as if the commissioner will be appointed by the Minister for the Family and Social Solidarity. On the other hand, civil society organisations feel that the commissioner should undergo a selection process in parliament.
- So far, there is been no regulatory framework to protect voluntary organisations, their clients, or society. Thanks to their recognition under the proposed law, NGOs will have easier access to Voluntary Organisation Fund and to international and European projects. This recognition will also safeguard the interests of clients and the public at large since the organisations will automatically become more transparent and responsible for their actions. Nevertheless, the White Paper is careful not to burden small NGOs with administrative work. The larger organisations will automatically be dealing with larger sums so they will be expected to hand in more intricate reports.
- The adoption of a form of legal status, although encouraged, remains optional, due to the difference of the nature and structure of the individual entities or groups. The sector, however, will still fall under the purview of supervisory authorities in the interest of the public.
- According to the NGO White Paper, the commissioner for NGOs will be able to prevent organisations from being recognised by the state “on moral grounds”. How this will be interpreted is unclear.
- Amendments to the civil code dealing with the concept of legal personality are being proposed. Members of the executive will no longer be liable or legally responsible for their organisation’s actions.
- There is some concern at the vagueness of the definition of what is a ‘voluntary organisation’ which might bring about situations where a government agency might be eligible to benefit from privileges which are normally afforded to NGOs.
- Some representatives of NGOs, whilst welcoming the White Paper, expressed their disappointment at the lack of formal consultation regarding the White Paper. NGOs which spent months researching NGO law complained that they are not sure on how closely the government looked at the NGO law working group.

Mozambique⁹:

- Registration is mandatory for foreign but not local NGOs. The registration and activities of foreign NGOs are regulated by Decree 55/98. This legal framework for foreign NGOs has been justified due to their complementary role to government initiatives in rehabilitation and development – in line with the decree’s definition of NGOs as non-profit organisations involved in emergency programs, rehabilitation or development.
- Authorisation for foreign NGOs is given by the Minister for Foreign Affairs and Cooperation. This authorisation is given to NGOs whose activities conform with the Government programme which means that the NGOs must work for the creation of capacity within their Mozambican partner organisations and therefore ensure the sustainability of their activities.
- Foreign NGOs which are authorised to register are issued two-year renewable permits by the Ministry. Foreign NGOs are forbidden to conduct or promote acts of a political nature. Foreign employees working for foreign NGOs must conform with the Labour Law, Decree 8/98. Inter alia, the partner organisation and the foreign NGO must verify that no Mozambican has the necessary qualifications before an expatriate may be hired. It must be noted that this law is applicable not only to NGOs but to all organisations.
- Although there is no mandatory registration for local NGOs, a large percentage register with the Ministry of Justice because registration is believed to ensure greater donor funding, presumably due to higher level of credibility.

⁹ <http://hrw.org/backgrounder/africa/zimbabwe/2004/12/6.htm>

Namibia¹⁰:

- Namibia is still undergoing changes which will hopefully see the development of a partnership policy between the government and NGOs. There are calls for a review of the current laws and regulations affecting civil society organisations which will be undertaken by an Advisory Committee made up of both government and civil society representatives.
- The review of the law aims to include a Registration Act that will harmonise and consolidate existing laws regulating civic organisations and will establish a transparent registration process under the control of a single agency. The new law will seek to establish minimum criteria for competence and governance, enhance transparency and accountability, and improve coordination within the sector. Registration will be voluntary. The idea behind the inclusion of this registration process is that registration and a legal status will enable NGOs to attract more donor funds.

Pakistan¹¹:

- The current laws as well as the implementing systems and procedures do not reflect the recent changes in the civil society sector which has expanded its focus from the tradition service delivery to their more recent expansion into development, advocacy and research. It was only with the creation of the Income Tax Ordinance, 2001 that the term 'non-profit' was defined.
- It is felt that while the government has for some time been speaking of an more user-friendly environment for NGOs (the NGO Bill 1994, the NGO Bill 1999 and the NGO Ordinance 2002) the government has not really shown much concrete support to the sector. No changes have been made to ease the process of registration, reporting and obtaining tax exemptions. There is also still much discretionary implementation on the part of the government.
- There are eleven laws through which an NGO can be registered – and each of these eleven laws grants it a certain status. Each law limits the organisation's activities to those permitted by that specific law and has a distinct set of rules governing registration.
- The Industries Department, which is responsible for registration of societies and companies, only have procedures written down in English thus rendering them inaccessible to many people and organisations around the country.
- Procedures generally tend to be complicated and costly. For example, registration under section 42 of the Companies Ordinance requires that a draft of the Memorandum and Articles of Association has to be printed and submitted to the Corporate Law Authority in Islamabad, which may require several meetings spread out over several months. These meetings may result in the changing and reprinting of the documents before a licence is obtained and submission to the Registrar. Once the registration process has been completed, an application for tax exemption is made to the income tax department. It is then that one realises that yet another set of conditions must be incorporated into the Memorandum and Articles. In the case of companies, modifications to the Memorandum and Articles require fresh approval from the Exchange Commission of Pakistan.
- The enforcement mechanisms in some cases are inadequate or unclear.
- Three of the most important procedures which can be used for registration do not specify any time period for acceptance or rejection of an application. Even the 1st stage of the Companies Ordinance 1984 suffers from this same problem.
- There is the need for uniformity of the definitions of 'charitable purposes' and 'non-profit organisation' throughout all the 17 laws.
- The diversity in the laws relating to governance and accountability has led to an environment of friction and hostility between the government and NGOs.
- While the Income Tax Ordinance 2001 and the Income Tax Rules 2002 are more sympathetic to NGOs, they continue to suffer from discretion of interpretation. No criteria for recognition has been specified. Too much discretion is given to the Commissioner of Income Tax. This should change to restrict discretion and create a clear and specific definition.

¹⁰ <http://hrw.org/backgrounder/africa/zimbabwe/2004/12/6.htm>

¹¹ Zafar Hameed Ismail and Qadeer Baig, *Philanthropy and Law in South Asia*, ed. Mark Sidel and Iftkhar Zaman – Published by APPC (Asia Pacific Philanthropy Consortium) 2004.

- The 2001 Income Tax Ordinance (Section 61) restricts “in-kind” donations only to property – ignoring the fact that NGOs also received donations in the form of free services of experts for their projects with payroll costs borne by the donor. “In-kind” donations in Section 61 should include “goods, articles and services”.
- The difficulties with the registration procedure led to a situation where a 2002 study showed that of the nearly 45,000 estimated non-profit organisation, more than 34% preferred not to register themselves even under the *Voluntary Social Welfare Agencies (Registration and Control Ordinance) 1961* where this is mandatory.
- Under the 1976 amendments of the 1860 Societies Act, power to suspend the governing body of society is in the hands of the government without any judicial process.
- The 1860 Societies Act and its amendments do not provide for the possibility of creating incorporated juristic entities and limited liability of the members.
- A new law needs to be enacted for the registration, facilitation and monitoring of NGOs. The government must at least repeal the *Voluntary Social Welfare Agencies (Registration and Control Ordinance) 1961* which has often proven to be the cause of friction between NGOs and the government.
- The *Charitable Funds (Registration of Collection) Act* requires that an NGO must seek approval at district level for a concerted campaign to raise funds. Much discretion to local officials to grant or deny approval is given, without the official needing to give a reason for his decision. This Act should be repealed due to considerable discretion in either granting or rejecting the application for a campaign to raise funds without specifying a reason.
- There is a lack of uniformity on level of auditing required under different laws. Some NGOs require much higher standards than others.
- The government has the right to order a management take-over for an NGO by government officials if it deems this necessary. The procedure regulating such a take-over allows for arbitrary actions by the government. The law provides for an opportunity to be heard against such action – but in practice this is denied. The costs of such court cases are high and even if the NGO wins an appeal against such a take-over, the length of time it takes is very long and much damage to the NGO is generally already done by that time.
- The legislation proposed through the government’s ‘Enabling Environment’ for NGOs should be enacted and must include provisions for the establishment and empowerment of a truly independent Charity Commission and to ensure that a widely acceptable code of conduct is developed, implemented and monitored for adherence. The Charity Commission should have a mandate of registration, rating and monitoring.
- Procedure for approval, renewal and withdrawal of approval of a trust or welfare institution for the purpose of a comprehensive tax exemption rests on very restrictive premises. These restrictive conditions should be removed.

South Africa¹²:

- The new legislation adopted after the Transition in the 1990s (i.e. the Non-profit Organisations [NPO] Act and the changes in the tax laws) have been generally well formulated, but there is a feeling that they are not working as well as they should. The NPO Act No.71 of 1997, which came into operation in South Africa on September 1st 1998, was a result of a long process of negotiations between the state and civil society organisations. The Act hopes to set and maintain adequate standards of governance, accountability and transparency by creating a voluntary registration facility for NPOs. There are currently a few examinations into the possibility for reforms to improve the system.
- NGOs feel that, in most instances, it is not the legislation itself that is causing the greatest difficulties but actually the application of the legislation. The necessity is felt for discussion of alternatives to the current system.
- The largest problem with the NPO Act is that the NPO Directorate is severely under-resourced. The Directorate would be strengthened if it were moved to a more powerful position in government, perhaps by having it report to the Office of the Deputy President. The Ministry of Social Welfare has a vast range of other duties, and not all NPOs conduct social welfare services.

¹² [http://www.civicus.org/new/media/Resisting%20Repression%20\(Merged\)%20Final.doc](http://www.civicus.org/new/media/Resisting%20Repression%20(Merged)%20Final.doc) - Written by: Barney Afako - Justice Resources Kampala, Uganda and <http://hrw.org/backgrounder/africa/zimbabwe/2004/12/6.htm>

- One major criticism is the over-centralisation of the procedure which can make processes more time-consuming and costly for NGOs. There is centralisation of registration and oversight in South Africa under all but one of the pieces of legislation. Registration must be done in Pretoria. There are no provincial registration bodies or branches of the NPO Directorate. It is felt that such branches could simplify registration as well as reduce costs for smaller organisations.
- Many NGOs complain that there are too many steps for registration. This is especially felt because the NPO Act requires a “third” step, which is not entirely necessary for Section 21 Companies - which are registered with the Department of Trade and Industry (DTI) - and charitable trusts.
- There are suggestions for a review of the Companies Act in order to encapsulate the registration and oversight of Section 21 Companies within the DTI and to provide for more effective governance of Section 21 companies.
- For an NPO to register, its founding document or constitution must comply with various requirements. The only grounds for the Directorate to refuse to register an NPO is if it is not satisfied that the NPO has complied with the mandatory registration requirements. Time limits are specified for administrative action in the registration process. The Director must consider and decide on an application to register within two months of receiving an application. Registered NPOs must comply with information and reporting provisions and formalities. Non-compliance may result in the cancellation of registration.
- NPOs can appeal to an Arbitration Tribunal against the Directorate’s decisions on registration and de-registration. The Minister appoints at least seven persons to constitute a panel of arbitrators, following a public and transparent nomination process. The chairperson, designated from the members of the panel by the Minister, appoints no more than three panelists to serve on the Arbitration Tribunal.
- It is an offence to cause an NPO, when it is being wound up or dissolved, to transfer its remaining assets other than to an NPO having similar objectives. The only other offences in the statute arise from an NPO’s fraudulent practices, such as falsely misrepresenting itself as being registered. The penalties for a person convicted of an offence in terms of the Act may be a fine or imprisonment or both.
- Amendments to the Income Tax Act were made in 2001 (with subsequent changes). These amendments improved the fiscal benefits for public benefit organisations (PBOs) and their donors. Nevertheless it is felt that tax benefits are generally too limited and the system for obtaining them is too complicated. Under the current legal regime, NPOs may register as Section 21 Companies with the Department of Trade and Industry (DTI); Trusts, under the Trust Property Control Act, with the Master of the High Court; Not-for-profit cooperatives with the DTI; and, as NPOs, they can register under the NPO Act, with the NPO Directorate in the Department of Social Development. Tax simplification and changes in the trading rules were announced by Finance Minister Trevor Manuel in his 2005 Budget.
- The Fund Raising Act was repealed after 1996 and no fund raising regulations have replaced it. The fact that there is no regulation of fund raising is an issue of concern as this situation can lead to abuse and a resultant low credibility in the system of fund raising by potential donors.
- The Charities Aid Foundation Southern Africa (CAFSA) Governance Initiative proposes certain reforms such as a “Code of Good Governance” and an “independent regulatory authority” for all NPOs. The GuideStar project of the Nelson Mandela Foundation (NMF), proposes to develop a new online resource for publication of NPO reports and financial information. The Non-profit Consortium (NPC) has discussed a more in-depth reform of the tax system

Sri Lanka¹³:

- The legal regime in Sri Lanka doesn’t have any generally applicable set of criteria for the formation of NGOs. NGOs can therefore be created under any of the many laws that apply to the formation of ‘entities’, either in the form of companies, associations of natural persons, or trusts. This results in many available options – each involving various degrees of formality,

¹³ Arttha Wikramanyake, *Philanthropy and Law in South Asia*, ed. Mark Sidel and Iftkhar Zaman – Published by APPC (Asia Pacific Philanthropy Consortium) 2004.

- responsibilities and other legal consequences. Many groups (usually community based organisations) frequently carry out such activities without any registration at all.
- The current legal framework causes confusion arising out of the many existing relevant legal structures. These laws have been created in an ad-hoc manner and need to be streamlined by an overall law which would cover the whole sector. There is a great need for uniformity in the laws affecting civil society. There main drawbacks with the current legal framework are:
 1. the multiplicity of regulators;
 2. overlapping laws and regulations;
 3. lack of common standards by which the performance of such entities can be measured;
 4. the many opportunities it creates for “regulatory arbitrage” that extends as far as “non-regulation”.
 - NGOs operate under varying degrees of regulatory conformity and the growth of unethical operations tarnish the credibility of the whole sector.
 - There is need for comprehensive review and reform of laws on formation and registration to ensure commonality in regulatory and supervisory focus of the law. This process must be on a large scale and will take much time and effort. Whilst short and medium term plans are necessary to improve the current situation, there is much work that needs to be done and a long-term plan for a major overhaul of the whole system needs to be enacted. The government might currently not have the resources to place such a plan high on the list of their priorities, though the civil society sector can contribute by examining the current system and studying the effectiveness of a positive long-term plan for improving and rendering it more clear, effective and efficient. NGOs can also further contribute by increased self-evaluation, public awareness and self-regulation.
 - Though there is no specific provision in the law prohibiting NGOs from engaging in any activity or sector of activity, there are indirect limits and restrictions on the manner and scope of activities. Organisations are restrained from engaging in any activities that are contrary to their constituent documents or those activities outside the purview of the special laws under which they qualified for registration. One must note that these restrictions do not apply only to NGOs but to all entities so it is not a restrictive measure targeted at NGOs. There do not appear to be unjustified or inequitable restrictions or prohibitions on the activities of NGOs. The restrictions, when they exist, are generally non-discriminatory or can be legitimately justified on simple basis that the entities concerned have been afforded special status or incentives because their activities are limits to those specified in such laws.
 - The law does not clearly define and comprehensively identify the entities that qualify under the Inland Revenue Act – thus NGOs will only find out if they met with the criteria at the time that returns are due. There should be clear guidelines for this.
 - There should be a consolidation of material such as case law, administrative decisions, rules and regulations.
 - There is the need for certain specific standards for the laws dealing with supervision and monitoring of NGO activity through audits, management, reporting requirements and other disclosure. The current legal system regulating this area is complicated, expensive and difficult to adhere to and, as a consequence, is practically ignored.

Tanzania¹⁴:

- The NGO Act came into force in January 2004 and contains certain restraints on NGO independence. Apart from providing for compulsory registration, it attempts to attach NGO operation to the national plan. It is illegal to form NGO coalitions that may undertake activities seen as overlapping those of the NGO Council. Consequently a few district authorities have used the NGO Act to refuse some NGOs from conducting activities in their districts.
- There is a Non-Governmental Organisations Co-ordination Board which regulates NGOs and which consists of ten members. The chair is appointed by the President, on the recommendation of the Minister responsible for NGOs. The Minister appoints four NGO representatives, on the recommendation of the National Council for Non-Governmental Organisations (an umbrella organisation for non-governmental organisations established in terms of the 2002 NGO Act, and five government representatives.

¹⁴ <http://hrw.org/backgrounder/africa/zimbabwe/2004/12/6.htm>

- The National Council for NGOs, composed of NGO appointees to represent their interests, must establish rules of procedure for efficient administration and co-ordination of the activities of NGOs, develop and cause to be adopted a code of conduct, and establish other regulations to facilitate self regulation of NGOs. The Board must approve the code of conduct. NGOs registered in terms of the Act may engage in legally acceptable fundraising activities.
- The 2004 Act provides for mandatory registration of NGOs. At least one founding member of the NGO must apply for registration with the required information - including the organisation's constitution, and details of office-bearers and founding members.
- The Act stipulates time periods within which the Board must accept a registration application or notify an applicant of a rejection. The Board can reject an application if it feels that the activities of the organisation are not in the public interest or are contrary to written law, or that the application has false or misleading information, or that the organisation should not be registered on the Council's recommendation. An applicant who is dissatisfied with the Board's decision to reject an application or to suspend or cancel registration may apply to the Board to review its earlier decision. Alternatively, the applicant may appeal to the Minister who, within two months, must take a decision. The Minister may uphold, reject, or vary the Board's decision, require it to revise or review its decision, or require it to get further information from the appellant before further consideration.
- The Act provides for offences and penalties. Offences include conducting fund raising activities contrary to the Act, operating without registration, or violating the code of conduct, regulations or rules made under the Act. The penalty for an offence may be a fine or imprisonment or both.
- International NGOs are defined as organisations that are established outside the mainland of Tanzania. There are certain requirements for international NGOs in Tanzania: they must encourage and promote the capacities and abilities of other NGOs, participate in the activities of the Council, and not create competition or misunderstanding among NGOs

Uganda¹⁵:

- The *Ugandan Constitution (article 29(1) (e))* guarantees every one the right to freedom of association - which includes the right to join and form civic organisations. It is also expressly provides that "every Ugandan has the right to participate in peaceful activities to influence the policies of government through civic organisations."
- Uganda is party to both the *International Covenant on Civil and Political Rights (ICCPR)* and the *African Charter on Human and Peoples' Rights (ACHPR)* and is therefore obliged to protect and promote the enjoyment of all rights contained therein including the freedom of association through civic organisations.
- Under the current law, all NGOs are required to register with the National Board for Non-Governmental Organisations (NGO Board) which then issues a Certificate of Registration to a successful applicant subject to conditions or directions it may deem fit. NGOs are also periodically required to renew their Certificates of Registration which involves producing several documents to the NGO Board. The NGO Board has the power to grant or refuse registration, and to revoke registration once granted if the board deems it "in the public interest to do so." In the case of the revocation of registration, the NGO Board is not even required to provide detailed reasons or disclose evidence in support of its decision to revoke registration. The NGO is denied recourse to the courts or an independent judicial body, being permitted to appeal only to the minister responsible for appointing the NGO board.
- It is felt that there are unnecessary delays in the registration of NGOs. There is no period of time within which the Board should respond to an applicant to ensure that an applying NGO avoids waiting for too long. A fixed period of time together with a mechanism for appeal if the applicant has not been notified of the board's decision within a stipulated period of time would help speed up registration procedures.
- The members of the NGO Board are appointed by the minister of internal affairs. They are mostly officials of different government ministries, but they include representatives of Uganda's Internal and External Security Organisations (ISO and ESO). There are also two

¹⁵ [http://www.civicus.org/new/media/Resisting%20Repression%20\(Merged\)%20Final.doc](http://www.civicus.org/new/media/Resisting%20Repression%20(Merged)%20Final.doc) - Written by: Barney Afako - Justice Resources Kampala, Uganda

members of the public appointed to sit on the board, but it includes no NGO representatives. Appeals against NGO board decisions can be made to the minister of internal affairs, but there is no provision for judicial oversight or challenge to the board's decisions.

- The Board is located in the Ministry of Internal Affairs, but civil society wishes it to be housed in at least in a Ministry responsible for social and development as in most countries as where it placed right now portrays the work of NGOs to be more of a security issue.
- There is much concern about the *Non-Governmental Organisations Registration (Amendment) Bill 2001*. This Bill is meant to amend the *Non-Governmental Organisations Registration Act Cap 113* and was tabled in Parliament in 2001 from where it was referred to the Committee on Defence and Internal Affairs for scrutiny. The Bill has been considered by the Committee and withdrawn on a number of occasions. The NGO community feel that the Bill, if passed in its present form, would violate fundamental human rights and freedoms enshrined in the Constitution and internationally recognised standards and democratic practice. NGOs are concerned about the new Bill for several reasons:
 1. According to the Memorandum of the Bill, its objectives include “monitoring” the operations of non-governmental organisations. NGOs fear that the term “monitoring” implies policing rather than regulating their activities.
 2. The new Bill proposes that in addition to a Registration Certificate, an organisation must have a valid Permit in order to operate in Uganda. The Bill vests wide powers in the Minister to determine the periodicity of such Permit. NGOs fear that the Minister could prescribe for a period so short as to constrain the activities of NGOs. The periodicity of the Permit would be better determined by Parliament.
 3. The Bill provides that an NGO shall not be registered if its proposed functions contravene government policy, plan or public interest. This goes against the concept of democracy where government policy should be open to criticism and challenge with a view to causing improvement. This concept is also recognised by the Constitution of Uganda.
 4. The Bill seeks to punish an NGO and its staff for the same offence committed in course of their work. This does not conform with the general principle that a company is independent from its members and that liability does not extend to them unless certain safeguards which are well established in corporate law have been breached. The liability of the members of an organisation should not be automatic whenever a company is found to be in breach of the law.

The United Kingdom:

- Most NGOs, though not all, are registered as charities with the UK Charity Commission. The work of the commission is based on legislation which is currently under review in order to bring it up to date. The new Charities Bill is a result of lobbying from the Charities Bill Campaign, headed by the National Council for Voluntary Organisations (NCVO), and pre-legislative scrutiny of a draft bill by a joint committee of both houses of parliament. The bill received its first reading in the House of Lords on December 20th 2004 and was reintroduced on May 18th 2005.
- Under the current laws, charity institutions (and therefore most NGOs) can only fall under one of four specific categories: the prevention and relief of poverty and the advancement of education, religion and health. Therefore NGOs such as Greenpeace and Amnesty International cannot qualify for the status of a charity institution. The Bill has introduced a new list of 12 charitable purposes designed to better reflect public perception of charitable causes including the advancement of human rights. Therefore more NGOs will be able to qualify as charitable institutions and benefit from the financial advantages which this category obtains.
- There is concern regarding the inclusion of the requirement that an organisation needs to prove that it works “for public benefit” in the new bill. Currently, an NGO simply needs to prove that that it is working to a charitable purpose as defined in law. The term “public benefit” is not defined in the new bill. Therefore, the Charity Commission will have the discretion to decide, on a case-by-case basis, whether an organisation meets this requirement - although it is unclear exactly how the public benefits test will be structured.
- The Charity Commission has the power to strip an organisation of its charitable status. The new charities bill lays out the creation of an independent charity appeal tribunal which allows charities to appeal against decisions taken by the Charity Commission.

- NGOs are currently allowed by law to self-regulate their fundraising practices. This will still be the case under the new Bill – but the Bill warns that if the voluntary sector proves unable to allay public concerns over charitable fundraising, then the Home Office has the power to step in and introduce regulatory measures.
- Many NGOs are also registered as Limited Liability Companies - particularly if they are involved in trading. Therefore they are subject to Company Law which is administered by the Companies House. All NGOs must also comply with relevant employment and tax law.
- After the final reading in the UK House of Commons in July 2005 of the UK Racial and Religious Hatred Bill, NGOs and religious organisations feared that the freedom of speech would be impaired and that it would have impact on the work of NGOs by resulting in restrained atmosphere of work. The UK has ratified the ICCPR, which stipulates that the freedom of religion cannot be derogated from not even in times of emergency.

Zimbabwe¹⁶:

- NGOs are regulated by the Private Voluntary Organisations Act – a very outdated piece of legislation which gives the government significant power to control NGOs. In its 2002 report on Zimbabwe, the African Commission for Human and People's Rights recommended that the government repeal the PVO Act because it limited civil liberties.
- Since 2002, civic organisations deemed to be engaged in activities that oppose the government have been targets of the government's repressive laws, notably the Public Order and Security Act and the Access to Information and Protection of Privacy Act.
- The PVO Act is deemed to limit civil liberties by the African Commission for Human and People's Rights.
- The PVO Act gives the Minister of Public Service, Labour and Social Welfare absolute control over the appointment of the NGO Council - which decides on registration and de-registration.
- New burdens are placed on non-governmental organisations, including that they must register annually and pay annual registration fees.
- In the PVO Act, there is no right of appeal, other than to the Minister, for organisations that seek to challenge NGO Council decisions on registration and de-registration.
- The Public Order and Security Act (POSA) was enacted in January 2002 and is considered as part of an overall strategy by the government authorities to hinder the campaigning activities of the opposition party MDP in the run-up to the presidential elections in March 2002. POSA is used to restrict their rights to freely assemble, criticise the government and President, and engage in, advocate or organise acts of peaceful civil 'disobedience'¹⁷.
- Under the Access to Information and Protection of Privacy Act (AIPPA), journalists and media houses are required to register with the government-appointed Media and Information Commission. This Act limits freedom of expression by means of vague wording and by giving strict control of the media to the Commission and to the Minister of Information.
- The 2004 Non-Governmental Organisations (NGO) Bill risked adversely affecting, and effectively eliminating, all organisations involved in promoting and defending human rights if it ever came into force. The Bill faced much opposition from civil society both in Zimbabwe and abroad. President Mugabe eventually chose not to sign it into law, after which there was a six month window in which it could have been resubmitted. This period is now over, so any new NGO legislation has to be introduced from scratch.

¹⁶ Zimbabwe withdrew from the Commonwealth in December 2003 but the human rights situation in Zimbabwe is still a matter of major concern for civil society around the Commonwealth.

¹⁷ <http://web.amnesty.org/library/Index/ENGAFR460152003?open&of=ENG-ZWE>