

**TOWARDS AN ENABLING NGO REGULATORY
FRAMEWORK IN UGANDA: COMPARATIVE
EXPERIENCES FROM EASTERN AND SOUTHERN AFRICA**

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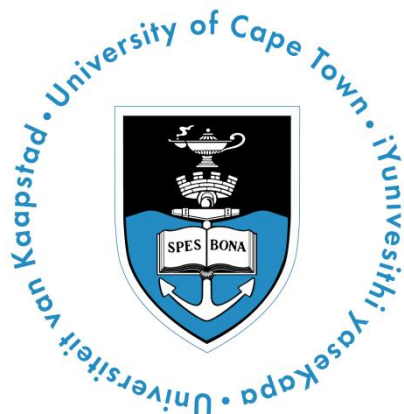
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ABSTRACT

Thesis Title:

Towards an Enabling NGO Regulatory Framework in Uganda: Comparative Experiences from Eastern and Southern Africa

Uganda, like many other sub-Saharan African countries, has experienced a rapid increase in the number of NGOs since the 1990s. This growth can be attributed to the democratic reforms introduced by the National Resistance Movement (NRM) Government since 1986. Among these reforms was the promulgation of the Uganda Constitution, 1995, with an extensive bill of rights.

The increase in NGO activities brought two important challenges: the challenge of their legitimacy and competition for political space. The Uganda Government reacted by imposing a state-led NGO regulatory framework seemingly to ensure the accountability and transparency of NGOs.

This thesis investigates the existing regulatory models for NGOs and explores possible reforms to establish an appropriate NGO regulatory framework that upholds internationally accepted human rights principles in Uganda. The thesis investigates these issues within the historical context of Uganda and Africa in general, as well as theories of democracies that stresses participation, accountability and respect for individual liberties, in particular, the right to freedom of association.

The thesis concludes that the regulatory framework of NGOs in Uganda does not meet the basic requirements for the right to freedom of association as provided in Uganda's Constitution, and the international and regional human rights treaties to which Uganda is a party.

The thesis finds that Uganda's NGO regulatory framework is controlling, and burdensome, and does not create a conducive environment for inclusiveness and public participation. The thesis proposes a state-NGO led regulatory model that allows for self-regulation alongside minimal state regulation of NGOs. This model would entail the establishment of an autonomous NGO regulatory authority in Uganda composed of members selected autonomously by NGOs and 'decriminalisation' of NGO activities, reducing the powers of the state-led regulatory model, and increasing the involvement of NGOs in the state-led regulatory framework.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ECOSOC	Economic and Social Council
CBO	Community Based Organisation
CLARION	Centre for Law and Research
Co E	Council of Europe
COWE	Children, Orphans and Women Empowerment
CSP	Charities and Societies Proclamation
CSO	Civil Society Organisation
ECHR	European Convention on Human Rights
FHRI	Foundation for Human Rights Initiative
ICCPR	International Covenant on Civil and Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICHRP	International Council of Human Rights Policy
NCVSS	National Council of Voluntary Social Service
NGO	Non-Governmental Organisation
NPO	Non-Profit Organisation
NRM	National Resistance Movement
OAU	Organisation of African Unity
PBO	Public Benefit Organisation
PVO	Private Voluntary Organisation
PVOB	Private Voluntary Organisations Board
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN HRC	United Nations Human Rights Committee

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CHAPTER 1

INTRODUCTION

1. 0. BACKGROUND TO THE STUDY

The 1990's witnessed the blossoming of a global associational revolution.¹ Among the new players were Non-Governmental Organisations (NGOs) who in the last two decades have become a distinctive sector within civil society. NGOs have been engaged in all sectors of social life such as relief, rehabilitation, health, education, development, peace, human rights and environmental issues just to mention but a few.² According to Kjaerum NGOs have four functions:

- to articulate citizen demands through active participation and consciousness raising,
- to encourage diversity and growth of different opinions,
- to assist in integrating groups in civil society and within the political process, and
- to serve as early warning mechanisms and act as a buffer against both the state and the market structure.³

NGOs, it has been argued, are increasingly becoming an important force because of claims that they are efficient and effective, innovative, flexible, independent and responsive to the plight of the poor at the grassroots level.⁴

The neo-liberal theory of economics considers that state-centred development is not productive since it results in inefficient resource allocation and there is not sufficient economic incentive for public sector management to remedy the situation. With the cutting back on public sector spending in many sub-Saharan African countries, NGOs have carried

¹ L M Salamon, SW Sokolowski and R List 'Global Civil Society: An Overview' in L M Salamon, S W Sokolowski and Associates (eds) *Global Civil Society: Dimensions of the Non-profit Sector, Volume 2* (John Hopkins University, Bloomfield, CT: Kumarian Press, 2004) 1.

² Arupa Gunlugu 'Historical Evolution of NGOs: NGO Proliferation in the Post-Cold War Era (2003) 4 *Journal of Turkish Weekly* 299-326.

³ Morten Kjaerum 'The Contributions of Voluntary Organizations to the Development of Democratic Governance' in Ann McKinstry & Birgit Lindsnaes (eds) *The Role of Voluntary Organizations in Emerging Democracies : Experiences and Strategies in Eastern and Central Europe and in South Africa* (New York and Copenhagen: Institute of International Education and Danish Centre for Human Rights, 1993) 15-16.

⁴ Gunlugu op cit note 2.

out functions that were previously managed by the state. This has had implications for the NGO sector. Among these is the rapid rise in the number of NGOs. For example, in the field of human rights, the African Commission on Human and Peoples' Rights (African Commission) has granted observer status to over 231 human rights organisations since 1989⁵, the United Nations Economic and Social Council (ECOSOC) had accredited 3172 NGOs with UN Consultative Status by May 2009⁶, while the Council of Europe has to date granted participatory status to over 400 NGOs⁷.

In the area of democracy promotion, NGOs are increasingly acting as a counter-weight to state power when they monitor human rights violations, promote civic consciousness and advance political pluralism. NGOs have taken on a watch-dog role in pursuit of liberal values and the advancement of the 'liberal democracy model'. This model, built around rule of law principles and constitutionalism, is very much anchored in western liberal values and makes NGOs a key feature of the liberal tradition.⁸ The liberal democracy model advances the theory of a liberal democratic state whose values are good government, better delivery of services and political empowerment. Under the liberal democracy model, emphasis is on protection of the individual against the state. It presupposes that the African state is liberal yet most sub-Saharan states do not fully and consistently follow a liberal ideology. Edward and Hulme have argued that 'NGO expansion is seen as complementing the counter-revolution in development theory that underpins the policies of structural adjustment favoured by official donors. NGOs are seen as the 'private non-profit' sector, the performance of which advances the 'public bad' and the 'private good' ideology of the new orthodoxy'.⁹

The state-NGO relationship is therefore one of uneasy co-existence. The state sees itself as the embodiment of popular wishes and best placed to determine what individual rights are and therefore resists any attempts by NGOs to open up the political space. To governments in transition, the NGO action to advance human rights is clearly a political struggle. The state sees itself as the repository of sovereignty and key actor within its borders. The NGOs do not

⁵ Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and Non-Governmental Organizations Having Observer Status with the Commission (Banjul 31 October 1998), available at <http://www.achpr.org/sessions/24th/resolution/30>

⁶ www.un.org/esa/coordination/ngo/.

⁷ Council of Europe Participatory Status, available at http://www.coe.int/t/ngo/particip_status_intro_en.as

⁸ Antonio Cassese 'The General Assembly: Historical Perspectives' in Philip Alston (ed) *The United Nations and Human Rights: A Critical Perspective* (Oxford: Clarendon Press, 1992) 26, 31.

⁹ M Edwards and D Hulme *Making a Difference: NGOs and Development in Changing World* (London: Earth scan, 1992) 20.

contest this central role but insist on the receptivity of the state to the popular wishes of the people they claim to represent.

States in emerging democracies are still weak. They have not built strong institutions to guarantee the aspirations of the people they govern. They do not therefore know what to make of these human rights NGOs which demand accountability and responsive government, and more so how to relate to them. The reaction to NGO actions therefore varies from suppression and co-option to partial independence. Mutua argues that ‘it seems fair to conclude that a settled culture of state-civil society relations remains experimental, at best they are in a state of flux’.¹⁰

Beyond the contest for political space, NGOs face a challenge of legitimacy. The rapid rise in the number of NGOs has not been matched by an increase in the quality of their work, resulting in many common problems regarding accountability and transparency. NGOs have been accused of failing to put public resources to proper use, to be ethical in the conduct of their business, to account to the communities they serve and to uphold principles of democratic governance in the management of their internal affairs. Some NGOs have not been able to provide information on the money that they receive and where they have done so, they have provided inaccurate figures.¹¹ NGOs have come under strong scrutiny in East and Southern Africa. Difficult questions are being asked. What are their agendas? Are they independent, fair and credible? Are they accountable and democratic?

States have continually sought to regulate the operations of NGOs in a bid to promote their effectiveness, transparency and public accountability. However, states are imposing restrictive legal frameworks that have the effect of undermining the space that these NGOs seek to open, their autonomy and independence, important elements to effective human rights advocacy. In many African countries, NGOs that play an advocacy role are subject to complicated regulations aimed at suppressing them. The state has the power to regulate but how to achieve this without undermining the very ethos of a democratic society and undermining the existence of these NGOs is the dilemma. To what extent can states regulate the operations of NGOs without undermining the individual’s right to associate? What

¹⁰ Makau Mutua ‘Human Rights NGOs in East Africa: Defining the Challenges’ in Makau Mutua (ed) *Human Rights NGOs in East Africa: Political and Normative Tensions* (Philadelphia: University of Pennsylvania Press, 2009) 15.

¹¹ Barr, Fafchamps and Owen *Non-Governmental Organizations in Uganda: A report to the Government of Uganda* (Centre for the Study of African Economies, Oxford University, 2003) 21.

therefore remains is to define the relationship that can promote a strong society, and a strong and accountable state.¹²

The key issue is how to ensure effective citizen participation, to make the state more accountable and responsive to citizen demands and to uphold democracy without undermining state authority. Mindful of the overriding goal of African human rights NGOs, which according to Wiseberg is ‘to open or keep open the political system of their countries, keep the governments accountable for their actions, document human rights abuses perpetrated against victims and press governments for corrective action’,¹³ how does one ensure harmonious power relations between the two?

1. 1. OUTLINE OF RESEARCH PROBLEM

Human Rights NGOs have made important contributions to the struggle for human rights and democratic development in sub-Saharan Africa. They hold states accountable for their actions, promote civic consciousness, and involve citizens in decision-making processes. Indeed, NGOs enjoy an enviable position in advancing the human rights discourse.

In spite of the invaluable contribution NGOs make to democracy and the human rights movement, they are faced with the challenge of credibility and effectiveness. NGOs are plagued with a challenge of legitimacy, which raises questions about their mandate, independence, funding, and accountability.

States in East and Southern Africa have, however, ratified international and regional human rights treaties that provide for the right to freedom of association and which impose obligations on the state to respect and protect the enjoyment of the right.¹⁴ States have also domesticated these human rights treaties and afforded protection to these rights in their national constitutions. For example, Uganda’s Constitution recognises the right of every

¹²Nelson Kasfir ‘Civil Society, the state and Democracy in Africa’ in Nelson Kasfir (ed) *Civil Society and Democracy in Africa: Critical Perspectives* (Newbury, London: Frank Cass Co. Ltd, 1998) 41.

¹³Laurie Wiseberg as quoted in ‘Civil Society and Human Rights NGOs: Themes for the late 1990s in Africa’ in Claude Welch, Emerson (eds) *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: Pennsylvania Press, 1995) 42-74 at 73.

¹⁴ Article 20 (1) of the Universal Declaration of Human Rights (1948), UN General Assembly Resolution 217 A (111), available at UN Doc A/810 at 71 (1948), Article 22(1) of the International Covenant on Civil and Political Rights (1966), UN General Assembly Resolution 2200A(XXI) 16 December 1966 available at 21 UN General Assembly Ordinary Resolution Supplement (No 16) at 52 UN Doc A/6316 (1966), 999 U.N.T.S. 171, Article 5 of the UN Declaration of Human Rights Defenders (1998), UN General Assembly Resolution A/53/144, available at E/CN.4/2000/95 and Article 10(1) of the African Charter on Human and Peoples’ Rights (1981), available at OAU Doc.CAB/LEG/67/3 Rev.5,

person to the right to freedom of association,¹⁵ so do the constitutions of Kenya,¹⁶ Malawi,¹⁷ Zimbabwe¹⁸ and South Africa.¹⁹

As it is shown later, states have, despite these treaty obligations, reacted by imposing restrictive regulatory frameworks within which Government monitors and registers NGOs. For example, the NRM government enacted the Non-Governmental Organisations Registration (Amendment) Act of 2006 that restricts NGO activities and subjects them to the control of a Government Board comprising of government and security personnel. Subsequently, NGO Regulations No 19 of 2007 were adopted. The regulations restrict NGO activities and bring into question the available space, functionality, and rationale for regulation of NGOs, and the application of international human rights principles namely, rights to freedom of association, right to operate free from unwarranted state interference,²⁰ and the state's duty to protect.²¹ As the court observed in *Christopher Mtikila v AG*,²² a law which limits or derogates from the basic rights of the individual must be lawful and be free from arbitrary abuse by those in authority and be reasonably necessary to achieve the intended objective. There is therefore a challenge of balancing the state obligation to regulate and the duty to uphold human rights principles. Uganda like many other states in East and Southern Africa faces a similar challenge.

This study therefore investigates the existing regulatory models and possible reforms to ensure an appropriate NGO regulatory framework that upholds the internationally accepted human rights principles in Uganda. The thesis seeks to demonstrate two basic aspects: (a) that the existing NGO regulatory model does not meet the basic requirements of the right to freedom of association as prescribed in the Uganda Constitution of 1995, and international and regional human rights treaties to which Uganda is a party, and (b) identify areas of possible reform for an appropriate regulatory model. The thesis argues for a more enabling regulatory framework that promotes NGO accountability while making it possible for the state to respect the right to associate. The thesis is premised on the idea that achieving an

¹⁵ Article 29 (1) (e) of the Constitution of the Republic of Uganda (as amended) 1995.

¹⁶ Article 36(1) of the Constitution of Kenya, 2010.

¹⁷ Article 32 (1) of the Constitution of Malawi, 1994.

¹⁸ Article 58(1) of the Constitution of Zimbabwe (Amendment) No 20, 2013.

¹⁹ Article 18 of the Constitution of South Africa, 1994.

²⁰ Article 3 of the UN Declaration of Human Rights Defenders (1998), Adopted on 16 December 1998, and UN General Assembly Resolution A/53/144, available at E/CN.4/2000/95.

²¹ Article 2 of the International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI) 16 December 1966 available at 21 UN General Assembly Ordinary Resolution Supplement (No 16) at 52 UN Doc. A/6316 (1966), 999 U. N. T. S. 171 [accessed on 22 September 2010].

²² High Court of Dodoma, Civil Case No 5 of 1993.

appropriate regulatory framework will require reform in the existing law which takes into account principles of constitutional and international law relating to the right to freedom of association; global trends in NGO regulation,²³ and most importantly, the need to ensure the accountability, effectiveness and active participation of NGOs. These factors are based on the requirements of the right to freedom of association that entitle an individual to the right to form an association, and to operate such association free from unwarranted state interference provided the objectives for which it is set are lawful.²⁴

1. 2. RESEARCH OBJECTIVE

As noted above, the aim of this thesis is to demonstrate that Uganda's NGO regulatory framework does not comply with the internationally accepted human rights principles, and more importantly, to suggest a model for ensuring compliance with these standards.

1.3. SPECIFIC OBJECTIVES

- To provide an historical account of the emergence, growth and relationship of NGOs with the state in Africa.
- To examine the concept of democracy and provide a normative framework for its application in the regulation of NGOs in Africa.
- To discuss the question of legitimacy of NGOs in Eastern and Southern Africa.
- To examine the regulatory framework governing NGOs under international law.
- To investigate the reason why states regulate NGOs using case studies of the legal framework in selected countries in Eastern and Southern Africa.
- To discuss the regulatory regime and its impact on the functioning of NGOs in Uganda.

²³ The Criteria of countries chosen for comparative review are set out in below (section 1.7).

²⁴ UN Human Rights Committee Resolution 15/21, [http: // www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?](http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?)

- To make recommendations for an appropriate regulatory model for NGOs in Uganda.

1. 4. SIGNIFICANCE OF THE STUDY

The NRM government has made some reforms since it came to power in 1986. Among these democratic reforms was the adoption of the Constitution of Uganda, 1995, that guarantees rights to association, expression and assembly.²⁵ As Uganda continues on a democratic path, it is expected that the existing NGO regulatory framework will be subject to scrutiny and court challenge. Already, the NGO Registration (Amendment) Act, 2006 has been a subject of court litigation in the case of *Kaggwa Andrew & Ors v The Minister of Internal Affairs*,²⁶ where the applicants, being members of Caring for Orphans, Women, and the Elderly (COWE), an NGO registered under the Non-Governmental Organisations Registration Statute, 1989 challenged the powers of the National Board of NGOs to cancel their registration certificate in the ‘public interest’. The applicants were aggrieved by the decision of the NGO Board to de-register their organization without an opportunity to be heard and the decision of the Minister of Internal Affairs to uphold the Board’s decision on appeal. The applicants sought a declaration that the decision of the National Board to revoke the registration of COWE without a hearing and giving reasons was null and void. The court held that the right to be notified of the charges against it and to be heard in response to those allegations is a fundamental requirement of natural justice and the failure to comply with it rendered the Board decision null and void. The court granted the declaration and directed the NGO Board to re-instate the registration of COWE as an NGO.²⁷ Presently, the Human Rights Network, a coalition of human rights NGOs, has petitioned the constitutional court, seeking a declaration that the NGO Registration (Amendment) Act, 2006 restricts the freedom of NGOs to operate freely and violates the constitutional provisions on the right to freedom of association.²⁸ At the time of writing, the case had yet to be listed for hearing.

Uganda is currently considering a review of all legislation that does not meet her constitutional obligations. Where such review takes place, it should be comprehensive and well informed. Such a review process can benefit from a wealth of experiences within the Eastern and Southern Africa sub-region as well as borrow any good practices from within the Council of Europe and the United Nations. For example, the United Nations Human Rights

²⁵ Article 29(1) (e) of the Constitution of Uganda, 1995.

²⁶ HCT-00-CV-MC-0105 of 2002.

²⁷ Ibid.

²⁸ Constitutional Petition No 9/2005.

Council has recommended that Uganda simplifies the NGO registration requirements and eases the heavy administrative burdens on NGOs, such as the yearly registration obligations.²⁹ It is hoped that this study will contribute such knowledge, on which the process of reviewing the current NGO Act could draw from.

1.5. LITERATURE REVIEW

There is substantial literature on NGOs in sub-Saharan Africa but it mostly focuses on their emergence, growth and roles. There is hardly any significant literature on the regulation of NGOs in Eastern and Southern Africa. Much of the writing on the evolution of NGOs underscores how NGOs have drawn inspiration from the global economic crisis of the 1970s and the trend towards globalisation witnessed over the 1980 and 1990s. Several authors attribute NGO growth to the collapse of the Berlin Wall and the failure of the post-colonial state in the 1980s. State despotism and inspiration of the international human rights movement are singled out as causal factors in this upsurge of African human rights NGOs in the 1990s. Zeleza, Tandon and Mohanty, and Welch make similar observations and hold that these two factors largely shape the NGO scope, mandate, philosophy, structures and relationships.³⁰

Although these authors agree on the historical development of NGOs, Cassese and Pinkney assert that the NGO revolution was a direct consequence of the western liberal tradition whose main preoccupation is the advancement of the liberal democratic state.³¹ None of these authors, however, directly addresses the issue of state regulation and its impact on NGOs, a subject of this study. Critics of human rights and the liberal democracy model have been questioning the value of NGOs and have raised issues of legitimacy and pondered over state regulation. Cassese, for example, has argued that liberalism, political democracy and human

²⁹ United Nations Human Rights Council, Nineteenth Session Agenda item 6 Universal Periodic Review, A/HRC/19/16 Report of the Working Group on the Universal Periodic Review –Uganda. 22 December 2011, paragraphs 113.18, 113.19 available at <http://reproductiverights.org/sites/crr.civicaactions.net/files> [accessed 19 May 2014].

³⁰ Paul Tiyambe Zeleza ‘Introduction: The Struggle for Human Rights in Africa’ in Paul Tiyambe Zeleza & Philip J McConaughy (eds) *Human Rights, Rule of Law and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004), Rajesh Tandon & Ranjita Mohanty ‘Civil Society and Governance: Issues and Problematics’ in Rajesh Tandon & Ranjita Mohanty (eds) *Does Civil Society Matter* (New Delhi: Sage Publications, 2004), Claude E Welch Jr. ‘Human Rights and Development in Africa: Non-Governmental Organizations’ in Paul Tiyambe Zeleza & Philip J McConaughy (eds) *Human Rights, the Rule of Law and Development in Africa* (Philadelphia: Pennsylvania Press, 2004) 198, 200.

³¹ Antonio Cassese ‘The General Assembly: Historical Perspectives’ in Philip Alston (ed) *The United Nations and Human Rights : A Critical Perspective* (Oxford: Clarendon Press, 1992) 26, 31, Robert Pinkney (ed) *Democracy in the Third World* (Boulder, Colo: Lynne Publishers, 2003) 10, 12.

rights are intrinsically part of the same historical and philosophical tradition.³² Although Cassese has argued that human rights are an imposition of western values on the rest of the world, and views NGOs as agents of foreign interests, he questions the capacity of the state to police itself given that it is the guarantor of rights and the main abuser.³³

Although the importance of NGOs is underscored by Donnelly and Bratton to include documenting the plight of victims, pressing governments for corrective action, standard setting and speaking on behalf of those who suffer,³⁴ Bratton raises the key question relevant to this study: how to balance central political control with the autonomy of civic organizations.³⁵ There are many scholars whose writings are of value in understanding the NGO construct and why states are prompted to restrict their activities. For example, Wiseberg who presents a case study of NGOs during the Derg regime in Ethiopia, and the communist view of development, puts the adoption of the Charities and Societies Proclamation of Ethiopia in a proper context.³⁶ She sees the Proclamation as an inevitable consequence of their belief in group ideology and state domination.³⁷

NGO legitimacy has often been cited as an underlying reason for state control. The lack of a strong social base, external dependence, as well as a predatory legal and regulatory regime contributes significantly to the crisis of legitimacy. Chazan, Kasfir, and Gyimah-Boadi have noted the lack of a strong social base, patronage, and a weak material base as issues that affect NGO legitimacy.³⁸ No in-depth discussion has been undertaken to propose how this crisis can be overcome.

In the East African context, a recent book by Mutua helps us to understand the contemporary challenges faced by NGOs in this region.³⁹ Although the study addresses a range of topics

³² Antonio Cassese *Human Rights in a Changing World* (Cambridge: Polity Press, 1990) 183.

³³ Ibid

³⁴ Jack Donnelly 'Human Rights and Western Liberalism' in Abdullahi A An-Na'im & Francis M Deng (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (Philadelphia: University of Pennsylvania Press, 1990) 31.

³⁵ Michael Bratton 'The Politics of Government-NGO Relations in Africa' in Welch, Claude Emerson (ed) *Protecting human rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) 74.

³⁶ Laurie Wiseberg *Defending Human Rights Defenders: The Importance of Freedom of Association for Human Rights NGOs* (Montreal: International Centre for Human Rights and Democratic Development, 1993).

³⁷ Ibid.

³⁸ Chazan was quoted in Nelson Kasfir (ed) *Civil Society and Democracy in Africa* (London: Frank Cass Co. Ltd, 1998)7, Emmanuel Gyimah-Boadi 'Civil Society and Democratic Development' in E Gyimah-Boadi (ed) *Democratic Reform in Africa, The Quality of Progress* (Boulder, London: Lynne Rienner Publishers, 2004) 117.

³⁹ Makau Mutua (ed) *Human Rights NGOs in East Africa Africa: Political and Normative Tensions*. (Philadelphia: University of Pennsylvania, 2009).

touching on social and economic rights, gender, strategies for social change, and the challenge of the legitimacy of NGOs, it does not address the problem of state regulation and how it impacts on NGOs in the region.

Bazaara's studies on the growth of civil society in Uganda are helpful in understanding the link between civil society and democratisation in Uganda.⁴⁰ The studies help in highlighting the nature of citizen efforts in engaging the state but fall short of showing how policy frameworks have impacted on the freedom of citizens to operate.

The research by Mamdani and Oloka-Onyango is instructive.⁴¹ It demonstrates very clearly how the state has used the law to control the activities of civil society. In a very analytical sense it shows how 'draw back' clauses have been used by the state to stifle fundamental freedoms enshrined in the constitution. The research however falls short of proposing any possible areas for reform and suggesting how state regulation can be improved to promote the sustainability of NGOs.

The writings of Barya are equally illuminating although they do not go far enough in the context of this study.⁴² The 'statisation of civil society', a major finding of this book, which the author decries, is helpful in raising the red flag about the dangers of such a model and its potential to stifle the growth of civic associations. The research however fails to make any recommendations on what an appropriate regulatory model would be which renders the work to be of limited value to this study.

Finally, Maria Nassali's thesis on NGOs, Governance and Human Rights in Kenya, Tanzania, Uganda and South Africa focuses on internal governance and accountability of NGOs, in particular, on transparency and accountability of NGOs. Although the thesis makes reference

⁴⁰ Nyangabyaki Bazaara *Legal and Policy Frameworks for Citizen Participation in East Africa: Do they Create Potential for Improved Governance*, Kampala: Centre for Basic Research, Working Paper No 82/2003, See also *Contemporary Civil Society and the Democratization in Uganda: A Preliminary Exploration*, Kampala: Center for Basic Research, Working Paper No 54/2000.

⁴¹ Mahmood Mamdani and Joe Oloka-Onyango (eds) *Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism* (Kampala: Centre for Basic Research, 1994), See also Joe Oloka-Onyango *Governance, State Structures and Constitutionalism in Contemporary Uganda*, Kampala: Center for Basic Research, Working Paper No 52/1993. See also M Mamdani (ed) *Pluralism and the Right of Association*, Kampala: Centre for Basic Research Publications, 2003.

⁴² John Jean Barya *The State of Civil-Society in Uganda: An Analysis of the Legal and Politico-Economic Aspects*, Kampala: Centre for Basic Research, Working Paper No 58/2000.

to reporting obligations of NGOs under the NGO laws in those countries, it does not discuss the existing regulatory models and their impact on the functioning of NGOs.⁴³

In light of the above observations, the relevance of this study is justified.

1. 6. LIMITATIONS TO THE STUDY

This study encountered one major limitation. This was the definitional challenge. The ‘terms’ used and the ‘meanings’ associated with the term ‘NGO’ in each country varied greatly. The NGO laws define and apply the term ‘NGO’ differently in each country yet there is no international instrument that defines the term ‘NGO’. Whereas in some countries, an ‘NGO’ refers to a Non-Governmental Organisation, in others it could be a Public Benefit Organisation, a Trust, a Company or a Private Voluntary Organisation, making comparisons between countries more complex.⁴⁴

1.7. RESEARCH METHODOLOGY AND COUNTRIES CHOSEN FOR COMPARATIVE STUDY

In responding to the problem statement, the thesis takes a descriptive and analytical approach of the NGO regulatory framework from a comparative perspective. The study focuses on Uganda and makes comparisons with selected countries in Eastern and Southern Africa.

The study has relied on primary and secondary sources to address the issues that arise from the problem statement. At the primary level, data is drawn from international instruments and customary principles applicable to NGOs and binding upon states, as found in treaties, legislation (domestic and foreign), statutes, subsidiary legislation, case law, official records, government reports, archival records, United Nations and other intergovernmental

⁴³ Ann Marie Nassali *Non-Governmental Organizations (NGOs), Governance and Human Rights in Kenya, Tanzania, Uganda and South Africa: Conceptual and Strategic Questions* LLD Thesis, University of Pretoria, 2009 (unpublished).

⁴⁴ In South Africa, the Non-Profit Organizations Act No 71 of 1997 defines a ‘non-profit organization’ to mean a trust, company or other association established for a public purpose; in Namibia the Civic Organizations Partnership Policy refers to them as civic organizations; in Ethiopia they are referred to as Charities and Societies under the Charities and Societies Proclamation, 2009; in Zimbabwe, they are known as Private Voluntary Organizations under the Private Voluntary Organizations Act of 1995; in Kenya, the Public Benefits Organizations Act, 2013 defines them as Public Benefit organizations. Malawi and Uganda describe them as Non-Governmental Organizations under their respective laws, the Malawi NGO Act of 2000 and the Non-Governmental Organizations Registration (amendment) Act, 2006 of Uganda.

organization official documentation, *aides memoirs*, travaux preparatoires to treaty documents, Parliamentary hansard, and decisions of regional and international treaty bodies. The focus on national instruments is limited to those countries that have been profiled for the case study.

At the secondary level, information has been obtained from books, journal articles, internet sources and to a limited extent newspaper articles. Writings of academics, media, civil society organisations, commentators, and government officials have been useful.

Although the thesis is not presented as a comparative study, there are several countries in Eastern and Southern Africa whose regulatory frameworks have contributed to shaping this thesis. All the countries surveyed are mainly common law jurisdictions who have adopted NGO regulatory frameworks relevant to this study: Ethiopia, Kenya, Malawi, Namibia, South Africa, and Zimbabwe. Each country profiled was chosen based on whether it applies one of the three regulatory models: state regulation, state-NGO regulation or self-regulation. Ethiopia and Zimbabwe have adopted state regulation; Kenya and Malawi apply state-NGO regulation, with Namibia and South Africa bordering on self-regulation. There were many other jurisdictions to consider but for pragmatic reasons, these were chosen.

1. 8. CONCLUSION AND CHAPTER SYNOPSIS

This thesis is divided into eight chapters.

This Chapter has introduced the study topic and provided the background to the study. It provides a brief history of NGOs in sub-Saharan Africa highlighting the important role that they play in advancing democracy and human rights principles but hastened to warn of the uneasy relationship with the state. It identified the two major challenges facing NGOs; one being the contest over political space, and second, the challenge of legitimacy and used them to justify why states regulate NGOs. The chapter presented the research problem, the research objective, the significance of the study as well as the research methodology used in the study.

Chapter 2 provides a historical account of NGOs in sub-Saharan Africa at different stages of Africa's political development: the pre-colonial, colonial and post-colonial periods, and provides a working definition of NGOs. It also provides a theoretical justification for the emergence and growth of NGOs in Africa, situating them in the global development discourse. This is crucial for an understanding of the legal framework governing NGOs in Eastern and Southern Africa.

Chapter 3 examines the concept of democracy and adopts a normative framework within which an assessment of the regulatory framework is done in Chapter 6. Understanding the concept of democracy and the underlying principles and the enabling environment provides useful data against which the appropriateness of a particular regulatory model is determined.

Chapter 4 discusses the vexed issue of the legitimacy of NGOs in Eastern and Southern Africa. Aware of the identity of NGOs, it seeks to establish the underlying causes of state-NGO tensions, and what the challenges to the credibility and effectiveness of NGOs are. Applying a human rights discourse to NGOs, that stresses accountability, transparency, participation, empowerment, and equity it proposes how these issues could be addressed in order to restore public confidence in the NGO sector.

Chapter 5 examines the regulatory framework governing NGOs under international law. In particular it discusses the international human rights framework within which NGOs operate. It takes a hard look at the regulatory framework for NGOs within the United Nations, the

African Union and the Council of Europe. The chapter looks at the registration procedures within these human rights mechanisms to establish possible lessons or standards for an appropriate regulatory framework for Uganda.

Chapter 6 investigates how and why states regulate NGOs. Using case studies of the existing legal framework in six countries of Eastern and Southern Africa, the chapter undertakes a comparative review of the NGO regulatory framework in selected countries: Ethiopia, Kenya, Malawi, Namibia, South Africa and Zimbabwe. The study makes an attempt at drawing a link between democracy, civic space and the regulatory regime and draws conclusions on the suitability of each model.

Chapter 7 examines the regulatory framework governing NGOs and its impact on the sustainability of NGOs in Uganda. Taking a historical account of the NGO movement in Uganda, the chapter examines the nature of democratic spaces and how the regulatory regime has impacted on them.

Chapter 8 revisits the major questions investigated in this study. It summarises the main findings and conclusions set out in each of the chapters and sets out the key recommendations for the improvements for an acceptable regulatory framework of NGOs in Uganda.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF NGOs IN AFRICA

2.0. INTRODUCTION

Domestic human rights NGOs are a relatively new phenomenon in Africa. They proliferated in the 1980s and have increasingly become important players in the defence of human rights. In an age of rights, they play a primary role in focusing the international community on human rights issues. NGOs monitor the actions of governments and pressure them to act according to human rights principles. Beyond monitoring human rights violations, NGOs educate, promote, challenge and defend citizen interests. According to Korten, NGOs are seen as vehicles for democratisation and an essential component of a thriving civil society.⁴⁵ Korten argues that NGOs are increasingly acting as a counter-weight to state power, protecting human rights, opening up channels of communication and participation, providing a training ground for social activities and promoting pluralism.⁴⁶

But the growth of NGOs in Africa over the past two decades is also seen as a dilemma. Not only have NGOs assumed a distinctive sector within civil society, but they have made claims of being efficient and effective, innovative, flexible and responsible. As citizens exercise their rights to freedom of association, a wide array of organisations and associations that operate in civil society continue to grow in all areas whether political, religious, artistic, sporting or commercial.

Protagonists have since the beginning of the century been engaged in a debate on the historic evolution of NGOs. Difficult questions are being asked. What are NGOs? How have they evolved? What explains their considerable growth?

This chapter provides an historical account of the development of NGOs in sub-Saharan Africa during the pre-colonial, colonial and post-colonial periods. The aim here is to explain

⁴⁵ David C Korten 'The Role of Nongovernmental Organizations in Development: Changing Patterns and Perspectives' in Samuel Paul and Arturo Israel (eds) *Nongovernmental Organizations and the World Bank* (Washington D.C, The World Bank Publications, 1991) 91.

⁴⁶ Ibid.

their emergence, growth and relationship with the state. This historic narrative is in no way exhaustive. Equally important are the philosophical and theoretical principles that explain the emergence of NGOs across Africa in the 1980s and 1990s.

The chapter has two parts. Part One makes an attempt at defining NGOs within the broader context of civil society. Part Two examines the nature of state-NGO relations at different periods of Africa's political development.

2. 1. NGOs AND CIVIL SOCIETY

Defining the term 'NGO' outside the term 'civil society' is fraught with difficulties. Not only are NGOs part of civil society, the term also finds expression in a wide array of associations including clubs, political groups, community based organizations, self-help groups, religious, artistic, sporting, professional associations and charities, among many others. Civil society too is restrictive because it excludes every organ in society that operates outside government. What then is the meaning of civil society?

2. 1. 1. The Concept of 'Civil Society' in Africa

The term 'civil society' is riddled with conceptual and definitional challenges. According to Chabal, 'civil society' is 'a vast ensemble of constantly changing groups and individuals whose only common ground is their exclusion from the state, their consciousness of their externality and their potential opposition to the state'.⁴⁷ Chabal further argues that civil society 'consists not just of those who are not part of the state but also all those who may have become powerless or disenfranchised; all who feel they are without due access to the state'.⁴⁸ Emerson holds a similar view. He argues that 'civil society' is an arena where manifold social movements and civil organisations from all classes attempt to constitute themselves in an ensemble of arrangements so that they can express themselves and advance their interests'.⁴⁹

Whereas it can be contended that civil society comprises non-state actors, the overemphasis on 'exclusion from and opposition to the state' that Chabal stresses is not entirely accurate. It is not necessarily correct that civil society in contemporary Africa does not often have 'formal

⁴⁷ Patrick Chabal 'Civil Society' in Patrick Chabal (ed) *Power in Africa: An Essay in Political Interpretation* (Hounds mill, Basingstoke: Macmillan Press, 1994) 83.

⁴⁸ Ibid.

⁴⁹ Claude Emerson 'Civil Society and Human Rights NGOs: Themes for the 1990s in Africa' Welch, Claude Emerson (eds) *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) 43.

power' but it is not without power.⁵⁰ This thesis agrees with Chabal to the extent that he argues that 'whether individually, collectively, by avoidance, stealth or confrontation, civil society in post-colonial Africa has been responding to the state'.⁵¹ It would appear in my view and therefore much in agreement with Bratton that civil society 'need not be of necessity antistatist', associational life is likely to thrive in the presence of an effective state and weak states can sometimes become stronger and more legitimate by permitting a measure of pluralism in associational life.⁵²

In this thesis it is contended that there is a contested 'space' between the 'family and the state'. This space, which in my view commands a number of actors who are outside the direct control of the state have interests that they seek to safeguard, among them 'freedom'. It is these actors who in their constant effort to expand this 'freedom' constitute 'civil society'. Gramsci agrees. He views civil society as 'autonomous organisations outside the direct control of the state' who provide a safeguard against totalitarian statism thereby turning necessity into freedom, buttressing society against tyranny and working to build a foundation for a more decent and tolerant existence.⁵³ Consistent with this thinking Cohen has likewise argued that 'the desire to expand degrees of freedom, irrespective of how free or coercive a regime could be, breeds an irreducible quantity of freely negotiable interactions'.⁵⁴ It is this urge for interaction that justifies the existence of civil society in my view.

Azarya has, in his 'statist theory' argued that 'incorporation or disengagement from the state draws attention to various groups and sectors in the civil society as they respond to state actions or anticipated state actions which lead to a perceived change in the field of opportunities of given groups or individuals'.⁵⁵ According to Fatton, this 'statist theory' is based on two principal processes; the 'shrinking realm of the state obligations and expanding sphere of the market or in contrast the authoritarian reach of the state and its regiment

⁵⁰ Ibid, 84

⁵¹ Ibid.

⁵² Michael Bratton 'Beyond the State: Civil Society and Associational Life in Africa' (1989) 41, 3 *World Politics*, 428-429.

⁵³ A Gramsci quoted in Ronald Cohen 'Endless Teardrops: Prolegomena to the Study of Human Rights in Africa' Ronald Cohen, Goran Hyden and Nagan (eds) *Human Rights and Governance in Africa* (Gainesville: University Press of Florida, 1993) 30.

⁵⁴ Ronald Cohen 'Endless Teardrops: Prolegomena to the Study of Human Rights in Africa' in Ronald Cohen, Goran Hyden and Nagan (eds) *Human Rights and Governance in Africa* (Gainesville: University of Florida, 1993) 27.

⁵⁵ Victor Azarya 'Reordering State-Society Relations: Incorporation and Disengagement' in Donald Rothchild and Naomi Chazan (eds) *The Precarious Balance: State and Society in Africa* (Boulder, Colorado: West view Press, 1988) 5-6.

network of control, that of necessity makes subordinate classes retreat into their own spaces for survival and engage in all sorts of self-help activities'.⁵⁶

In the case of incorporation, large sections of the population associate with the state and take part in its activities in order to share its resources; such activities might be initiated by individuals or groups solicited by the state.⁵⁷

Disengagement, by contrast, is the 'tendency to withdraw from the state', a response often in protest against unpopular government policies.⁵⁸ Such activities of disengagement include 'parallel markets, brain drain, and non-compliance with laws'.⁵⁹ Traditional structures take centre stage as the ordinary population seeks protection from instability and arbitrariness of state channels. This thesis however contends that Azarya's postulation of incorporation or disengagement falls short of encouraging 'participation', a much more desirable approach to state-society relations. Participation in this sense is understood according to Ndegwa, with whom I agree, to 'strengthen the checks on abuses of power and influence'.⁶⁰

Much as the focus is on engagement of the state, a much more focussed view of civil society consisting of 'organizations that are autonomous, voluntary and protected by the rule of law, organized to influence policy makers, mobilise public opinion and hold governments accountable at all levels' is preferred.⁶¹ In its broad sense civil society would include the 'civic community of neighbourhood associations, political parties, grass-roots support organisations and social movements which complement state and market and form the informal sector of the polity'.⁶²

Whether viewed from a narrow or broad sense, civil society is conditioned by three qualities: human rights practices of the state, a concern for the public or common good (education, healthcare, social security, etc) and the welfare of others.⁶³ These qualities are underpinned by three elements; the relationship between the state and the citizenry, is it fair to the majority to guarantee emergence of an environment in which human rights safeguards emerge; the degree

⁵⁶ Victor Azarya 'Re-ordering State-society relations' in Robert Fatton Jr. (ed) *Predatory Rule, State and Civil Society in Africa* (Boulder and London: Lynne Rienner Publishers, 1992) 74.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Stephen Ndegwa 'Civil Society and Political Change in Africa: The Case of Non-Governmental Organizations in Kenya.' (1994) 35, No 1-2 *International Journal of Comparative Sociology*, 19-36.

⁶¹ Larry Diamond 'Is the Third Wave Over?' (1996) 7, (3) *Journal of Democracy*, 15.

⁶² B.C Smith 'The State in the Third World,' in B.C. Smith (ed) *Understanding Third World Politics: Theories of Political Change and Development* (Basingstoke: Palgrave, Macmillan, 1989) 268.

⁶³ Gramsci op cit note 9 at 31-32.

to which the norms and values of society propagate a concern for the public or common good, and a cultural feature that goes beyond duty to a personal involvement in the welfare of others.⁶⁴

The pursuit of these values evokes a response from individuals or a group of individuals in association with others who constitute civil society. This view is also supported by Tandon and Mohanty who argue that ‘conceptualisation of civil society is rooted in two traditions; the revolutionary imagery of civil society where people counter pose themselves against state power and in the process either replace it or reform it or the Tocquevillean interpretation of civic associations performing the role of watchdogs in a democracy’.⁶⁵

In this thesis civil society is to be viewed more as a ‘watchdog’ that curbs any authoritarian tendencies of the democratic state. This thesis narrows the definition of civil society to a civil society organisation which can be defined as an NGO whose primary purpose is to influence public policy. That public policy objective would include, as Kasfir puts it, ‘making the African state more democratic, more transparent and more accountable’.⁶⁶ The civil society organisation in this sense enjoys autonomy from the state, has an important goal of supporting democracy by ‘deepening policy accountability and widening participation’.⁶⁷

Deepening policy accountability and widening participation would necessitate such NGO to ‘monitor the exercise of state power, stimulate political participation, educate people in democracy, represent interests, and hold rulers accountable to their citizens’.⁶⁸ Such civil society organisations according to Gyimah would include; ‘human rights advocacy groups, independent press, civil liberties organisations, middle class professional bodies (bar associations/law societies)’ who would monitor and keep governments under check.⁶⁹ Indeed

⁶⁴ Ibid.

⁶⁵ Rajesh Tandon and Ranjita Mohanty ‘Civil Society and Governance: Issues and Problematics’ in Rajesh Tandon and Ranjita Mohanty (eds) *Does Civil Society Matter: Governance in Contemporary India* (New Delhi: Sage Publications, 2004) 11-13.

⁶⁶ Nelson Kasfir ‘The Conventional Notion of Civil Society: A Critique’ in Nelson Kasfir(ed) *Civil Society and Democracy in Africa: Critical Perspectives* (Newbury, London: Frank Cass Co. Ltd, 1998) 1.

⁶⁷ Harry Blair ‘Donors, Democratization and Civil Society: Relating Theory to Practice’ in David Hulme and Michael Edwards (ed) *NGOs, States and Donors: Too Close for Comfort?* (Basingstoke: Macmillan in association with Save the Children, 1997) 24-29.

⁶⁸ B C Smith ‘Understanding Theories of Imperialism and Colonialism’ in B C Smith (ed) *Understanding Third World Politics: Theories of Political Change and Development* (China: Palgrave, Macmillan, 1989) 268.

⁶⁹ E.Gyimah -Boadi ‘Civil Society and Democratic Development’ in E-Gyimah-Boadi (ed) *Democratic Reform in Africa: The Quality of Progress* (Boulder, London: Lynne Rienner Publishers, 2004) 100.

it is within civil society that public opinion is formed and it is through ‘independent associations’ that individuals can have some influence on government decision-making.⁷⁰

In conclusion, despite varying viewpoints on civil society, civil society organisations seek to influence public policy, promote democracy and broaden space for citizen participation. Within this broad context of civil society, one finds NGOs. What are NGOs?

2. 1. 2. Defining NGOs

There is no universally agreed definition of the term ‘NGO’. Depending on who uses the term and the purpose for which it is put, it could have different meanings. The Economic and Social Council (ECOSOC) defines an NGO as ‘any organisation that is not established by a governmental entity or intergovernmental agreement’.⁷¹ Meanwhile, the World Bank defines NGOs as ‘groups and institutions that are entirely or largely independent of government and characterised primarily by humanitarian or co-operative rather than commercial objectives’.⁷² Read strictly, both intergovernmental agencies define NGOs in terms of the functions that they perform.

Another approach has been to define NGOs in terms of what they are not. For example, Edwards and Hulme identify four defining characteristics to distinguish NGOs from other organs in civil society: they are voluntary, dependent, not-for-profit and not self-serving.⁷³ Kamminga has a similar view. He defines NGOs by what they are not. Four elements constitute his criteria of an NGO: that NGOs are private structures, since they are not established or controlled by states, that NGOs do not contest political power, as such they are not opposition parties, armed groups or liberation movements, that NGOs do not seek financial profit, they are therefore non-profit making and despite occasional engagement in protests, NGOs are law abiding.⁷⁴

⁷⁰ Dwayne Woods ‘Civil Society in Europe and Africa: Limiting State Power through a Public Sphere (1992) 35 *African Studies Review* 94.

⁷¹ Economic and Social Council Resolution 196/31 paragraph 12, available at, <http://www.2.ohchr.org/documents/ecosoc/res/1996/eres1996-31.htm>. [Accessed 19 October 2011].

⁷² The World Bank *Operational Directive on NGOs*, Directive No 14 of August 1970.

⁷³ M Edwards and D Hulme *Making a Difference: NGOs and Development in Changing World* (London: Earth scan, 1992) 20.

⁷⁴ MT Kamminga ‘The Evolving status of NGOs under international law: a threat to the inter-state system?’ in P Alston (ed) *Non-state Actors and Human Rights* (New York, Oxford: Oxford University Press, 2005) 96.

The Commonwealth Foundation also distinguishes NGOs using four criteria: ‘voluntary, managed and controlled independently, non-profit making and not self- serving’.⁷⁵ For the International Council of Human Rights Policy (ICHRP), NGOs are defined in terms of human rights protection and promotion. The ICHRP on its part defines NGOs as groups working on ‘advocacy and seeking to influence policies of public authorities, mainly human rights, democracy and governance’.⁷⁶

In Africa, as Nassali observes, NGOs are defined in legalistic terms.⁷⁷ For example, in Malawi, an NGO is defined as ‘Non-Governmental Organisation constituted for a public benefit purpose to which the provisions of the NGO Act apply’.⁷⁸ In Uganda, an NGO is defined broadly as an ‘organisation established to provide voluntary services including religious, educational, literacy, scientific, social or charitable services to the community’.⁷⁹ In Kenya, an NGO is defined as a ‘private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the promotion of social welfare, development, charity or research through mobilization of resources’.⁸⁰ Meanwhile South Africa defines a non-profit organisation as a ‘trust, company or other association of persons, established for a public purpose; and the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered’.⁸¹

Whatever the definition of the term ‘NGO’, this thesis focuses on ‘NGOs’ as a part of civil society. It could be a foundation, national organisation, trust, professional association, informal association or community- based group.

⁷⁵ Commonwealth Foundation, Guidelines for Good Policy and Practices (1995) Guideline 1.

⁷⁶ International Council for Human Rights Policy (2003) Deserving Trust, http://www.ichrp.org/credo.md/archiva/documente/Human_Rights_NGO_Accountability.doc, at 2 and 25.

⁷⁷ Ann Marie Nassali *Non-Governmental Organizations (NGOs), Governance and Human Rights in Kenya, Tanzania, Uganda and South Africa: Conceptual and Strategic Questions* LLD Thesis, University of Pretoria, 2009 (Unpublished) 29.

⁷⁸ Section 2 of the Malawi Non- Governmental Organizations Act of 2000.

⁷⁹ Section 1(d) of the Uganda Non- Governmental Registration Act of 1989. The definition is extracted from the Trustees Incorporation Ordinance No 11 of 1939 (now Chapter 147, Laws of Uganda).

⁸⁰ Section 2 of the Kenya Non-Governmental Organizations Co-ordination Act No 19 of 1990. Meanwhile, Section 5(1) of the newly enacted Kenya Public Benefit Organizations Act No 13 of 2013 defines a public benefit organization as a voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan, non-profit making and which is organized and operated locally, nationally or internationally, engages in public benefit activities and is registered as such by the Authority.

⁸¹ Section 1 of the South Africa Non-Profit Organizations Act No 71 of 1997.

In the next section is an examination of the historical evolution of NGOs in Africa, and in particular, the nature of state-NGO relations at different periods of Africa's political development.

2. 2. THE PRE-COLONIAL PERIOD

Pre-colonial Africa is known to have harboured many forms of socio-political organisation ranging from centralised kingdoms such as Buganda, Bunyoro-Kitara, in East Africa; the Ashanti, Benin, Yoruba and Igbo of West Africa, Bemba and Kuba of Central Africa, the Swazi and Zulu of South Africa to stateless societies in many parts of Africa. Pre-colonial Africa was, according to Fernyhough, 'pre-capitalist, predominantly agrarian, relatively decentralised politically and characterised by communal social relations'.⁸² In centralised kingdoms such as Ashanti and Benin of West Africa and Buganda in East Africa, 'the kingdoms were built around centralised bureaucracies; most Africans lived in rural areas and stateless societies were organised around the 'family, kinship group and clan', and often migrated from one area to another in the face of war, disease, drought and economic need'.⁸³

African society is known to have been built around 'traditions and myths'. Owusu, writing about African society has also argued that the daily lives of Africans were among others informed by a 'legacy of pre-colonial traditions and institutions'.⁸⁴ At the centre of these traditions were well defined 'myths of origin' that defined the societal political cultures. These myths according to Chazan highlighted the 'centrality of human beings in the social order projected an essentially pragmatic view of political life, delineated principles of social differentiation, division of labour and access to valued resources'.⁸⁵

Did these African traditions value human rights of the individual and were they permissive of the rights of expression and association essential for civil society growth? Did they permit independent views to flourish? The views on the human rights tradition of pre-colonial Africa are rather divided. Like many non-western pre-industrial societies, traditional African institutions tended to highlight the importance of the community above the individual, often emphasising duties and obligations to the community. Mojekwu who takes a rather positive

⁸² Timothy Fernyhough 'Human Rights and Pre-colonial Africa' in Ronald Cohen, Goran Hyden and Winston P Nagan (ed) *Human Rights and Governance in Africa* (Gainesville: University of Florida, 1993) 39.

⁸³ Paul Carnmack, David Pool and William Tordoff (eds) *Politics: A Comparative Introduction* (London: Macmillan Education Ltd, 1988) 12.

⁸⁴ Maxwell Owusu 'Custom and Coups in Africa: Toward a Juridical Interpretation of Civil Order and Disorder in Ghana' (1985) 23 4 *Journal of Modern African Studies* 5-6.

⁸⁵ Naomi Chazan 'The Africanization of Political Change: Some Aspects of the Dynamics of Political Cultures in Ghana and Nigeria' (1978) 21 2 *African Studies Review* 16-22.

view of pre-colonial Africa has posited that the ‘concepts of human rights have been basic to Africa since antiquity, emphasising a communitarian ideology’.⁸⁶ He presupposes that rights of expression and association existed in pre-colonial Africa. It could be argued that in some societies individuals in pre-colonial Africa enjoyed rights of free speech, conscience and religion although in varying degrees. In Igbo land for example, adult males and elder women could attend and express their views at meetings of their lineage. In Benin, members of palace associations, and hereditary chiefs could speak openly before the *Oba (king)*.

Wai portrays an even brighter picture of pre-colonial Africa when he asserts that ‘individuals in pre-colonial Africa may have enjoyed greater freedom’.⁸⁷ Wai claims that human rights are not founded in western values of ‘individualism’ alone but are equally a product of distinctive African cultural milieus.⁸⁸ Nyerere and Kaunda express a strong view of support of both Mojekwu and Wai when they claim that the ‘communitarian tradition’ is known to have affirmed collective rights and the reciprocal commitments Africans had to their communities in return for the protection of their human dignity.⁸⁹

It naturally follows that human dignity by extension was affirmed within the ‘extended family and community’ context.⁹⁰ Although Mojekwu, Nyerere and Kaunda ‘applaud the communitarian approach to human rights in pre-colonial Africa’ this thesis views the lack of ‘individual liberty’ as highly restrictive of the freedom of expression and association at the time and argue that pre-colonial Africa had ‘little concern for human rights’, much in agreement with Eze.⁹¹ In the circumstances, ‘space’ for civil society action would be difficult to come by.

Mojekwu, in yet another rather persuasive approach has argued that human rights in Africa were founded on ‘communal principle and practice’ and therefore ‘human dignity and justice’ rested on membership within the community (the clan, lineage, age grade, generation, village or family) which validated an individual’s claim to human rights.⁹² What then, were the rights

⁸⁶ Christopher Chukwuemeka Mojekwu, Victor Chikezie Uchendu, Leo F. van Hoey (ed) *African Society, Culture and Politics: an introduction to African Studies* (Washington: University Press of America, 1978) 85.

⁸⁷ Wai Dunstan ‘Human Rights in Sub-Saharan Africa’ in Adamantia Pollis and Peter Schwab (eds) *Human Rights, Cultural and Ideological Perspectives* (New York: Praeger, 1979) 116-118.

⁸⁸ Ibid.

⁸⁹ Kenneth D Kaunda *A humanist in Africa: letters to Colin M. Morris* (London: Longmans, 1966) 22-28; Julius Kambarage Nyerere *Ujamaa: essays on Socialism* (Dar es Salaam: Oxford University Press, 1968) 11-12.

⁹⁰ Fernyhough op cit note 79 at 29, 47.

⁹¹ Osita C Eze *Human Rights in Africa: Some Selected problems* (Lagos: Nigerian Institute of International Affairs in Cooperation with MacMillan, 1984)13.

⁹² Woods op cit note 67 at 43.

of the individual within this society? What happens to those who felt oppressed and left out of the decision making or seen as outcasts, did they have the space to check the excesses of those in authority? Nyerere, in what could be viewed as a defensive view argues that the ‘communitarian perspective’ rendered the pre-colonial African society to be more ‘egalitarian’, and therefore perceived to have an absence of exploitative classes’.⁹³

Nothing could be further from the truth in my view as Bayart has noted:

traditional African politics assumed a highly personal aura; power was vested in particular authority figures who even when carefully supervised developed paternalistic and even highly authoritarian styles. Examples include Zulu of Southern Africa, jihad states of West Africa (Sokoto, Macina), Buganda and Bunyoro-Kitara of Eastern Africa.⁹⁴

Whereas it is on record that pre-colonial Africa had a great commitment to their clans and extended families and community, it is presumptuous to conclude that personal freedom was valued or that space could be yielded to those who sought to dissent. As Donnelly has put it:

It appears that the community permits the individual to enjoy human rights but has the prior right to deny that enjoyment. The community can always amend individual duties required for its own well being, though this may detract from human rights....in most instances community, group or people really mean the state and the ruling elites within it.⁹⁵

What is described as an ‘egalitarian society’ by Nyerere was indeed very prescriptive. African society cherished the principle of ‘deference and fear’. The unfettered obedience to elders, clan heads, and village chiefs was widespread. Although Marasinghe has argued that ‘village democracy existed’, this thesis contends that this was a ‘preserve of the hereditary chiefs and royalty’.⁹⁶ For example, even though the Yoruba regarded the freedom to speak and express an opinion as a common right, it was highly restricted to a ‘hierarchy of respect for parents, heads of households and elders’.⁹⁷ In Buganda it was only the *kabaka’s* (*king*)

⁹³ Dunstan op cit note 84 at 107-108.

⁹⁴ Jean-Francois Bayart ‘Civil Society in Africa’ in Patrick Chabal (ed) *Political Domination in Africa: Reflections on the Limits of Power* (London: Cambridge University Press, 1986) 72.

⁹⁵ Jack Donnelly Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights (1982) 76 (2) *American Political Science Review* 312.

⁹⁶ Marasinghe Lakshman ‘Traditional Conceptions of Human Rights in Africa’ in Welch and Meltzer (ed) *Human Rights and Development in Africa* (Albany: State University of New York Press, 1984) 37-39.

⁹⁷ Ibid.

most senior and trusted officials who could ‘remonstrate with the king openly without reprisal’.⁹⁸ In Swaziland only the king’s mother, his kinsmen and his council could criticise the king openly.⁹⁹ There was clearly no room for organised civil society to emerge or even grow.

The lack of ‘civic space’ for formal opposition can easily be inferred from the view held by Nyerere when he argues that:

Although African tribes did not have modern form of political parties or non – governmental organisations, they had their own ways of democratic governance. Traditional African societies had powerful chiefs but were not dictatorships. Elders would sit under a tree, talk until they agree.¹⁰⁰

It is evident from Nyerere’s admission that ‘citizen participation’ was not central to the decision making process, consultations were restricted to the high and mighty, often those who held authority; there was hardly room for the citizen to dissent.

Chabal echoes Nyerere’s view when he notes that:

pre-colonial African societies operated according to certain sets of moral, religious and philosophical principles. There were rights, duties and obligations. The notion of the ‘individual’ was not pronounced as the ‘community’.¹⁰¹

There were instances when ‘authority figures’ who deviated would be subject to ‘curbs or checks’. Many pre-colonial societies had a machinery to oversee rulers, monitor their actions and call them to account when they failed to fulfil their obligations. Such sanctions against abuse of power included ‘gossip, ridicule, and spread of rumour or imposition of sanctions’.¹⁰² But even then this power to check on ‘errant’ leaders could only be exercised by the royalty or council of elders or chiefs. The subject or citizen could hardly express formal opposition, to do so, attracted very severe punishment that would include such a person being excommunicated, being given away as a slave or sacrificed. For example, among the Swazi, the responsibility of preventing abuses of royal power lay with the *liqoqo* (council chiefs), in

⁹⁸ Fernyhough op cit note 79 at 60-61.

⁹⁹ Ibid.

¹⁰⁰ Mwalimu Julius K Nyerere ‘Reflections on Empowerment’ in Richard Sandbrook and Mohamed Halfani (eds) *Empowering People: Building Community, Civil Associations and Legality in Africa* (Toronto: University of Toronto, Centre for Urban and Community Studies, 1993) 15-16.

¹⁰¹ Patrick Chabal *Power in Africa: An essay in Political Competition* (Hounds mill, Basingstoke: MacMillan Press, 1994) 87.

¹⁰² Robert Smith *Kingdoms of the Yoruba* (London: Nethuen, 1976) 79-82.

Lesotho reducing rights abuses by Moshoeshoe's state lay with the *pitso*, chiefs and in Buganda it was the *Lukiiko* (King's council).¹⁰³

The lack of room for popular dissent or space to express dissatisfaction with the authority by the subordinate class accounts for the diverse forms of protest and resistance that ranged from 'overt' to 'hidden' resistance in many parts of pre-colonial Africa. There were 'passive' voices and 'active' voices. There were 'defiant, radical, differential as well as conformist voices'.¹⁰⁴ Like in many other pre-industrial societies where space for civil society action was constrained and where social contradictions were prevalent, there were instances when subordinate classes protested or rebellions became rife. While some societies like Yoruba, Asante, and Benin were permissive of rights, others were autocratic like Swazi, Baganda and Zulu as noted above.

As Chazan observes, 'formal opposition was either circumscribed or considered subversive', and this accounts for internal conflicts, which led to factionalism in some societies and disintegration in others.¹⁰⁵ It would appear therefore that at the time of colonisation, pre-colonial Africa presented a mixture of both limited democratic and autocratic precepts and structures. Whereas in some societies there was room for consultation and participation within existing authority structures, others were highly autocratic and no form of dissent was allowed. It was not uncommon in different areas of pre-colonial Africa for democratic traditions and principles to run parallel to authoritarian norms. Without any political opening, it would be foolhardy to expect independent associations to be established to check arbitrary action and broaden citizen participation. The 'authority structures' dominated every aspect of society, civic space was constrained and civil society hardly existed.

In conclusion, pre-colonial Africa was a diverse society, ranging from highly centralised kingdoms to clans and stateless societies. Daily life revolved around traditions, customs and myths. Politics was highly personalised with authority figures who lived authoritarian lifestyles. The concept of 'deference' was strong as elders, chiefs, clan heads and royalty were to be respected and revered. Although some societies allowed freedom of speech and expression, this had to be exercised within the 'community' as membership constituted the basis for rights. There was hardly a 'rights discourse' that could be professed in public.

¹⁰³ Fernyhough op cit note 79 at 58-59.

¹⁰⁴ Fernyhough op cit note 79 at 52-53.

¹⁰⁵ Naomi Chazan 'Between Liberalism and Statism: African Political Cultures and Democracy' in Larry Diamond (ed) *Political Culture and Democracy in Developing Countries* (Boulder and London: Lynne Publishers, 1993) 71.

Because the emphasis was ‘rule over people’, with so much emphasis on ‘wisdom and justice’ of rulers, and limited regard to ‘laws and procedures’, there was hardly any freedom for individuals to organise independently and monitor those in authority.¹⁰⁶ With a ‘patrimonial’ form of governance, and without a ‘rights discourse’, there was hardly any meaningful civil society that existed at the advent of colonialism. A ‘public realm’ that could form a seedbed for the emergence of civil society in Africa was yet to evolve. Did the spaces widen under colonial rule?

2.3. THE COLONIAL PERIOD

As noted above, pre-colonial Africa had a ‘patrimonial’ governance system, and with highly ‘paternalistic and authoritarian styles,’ there was hardly any space available to exercise rights of association and expression in public, with the exception of a few societies in which such exercise had to consider communal social relations. Did the situation get any better during colonialism?

European contact with East Africa is traced back to the early 15th Century when Europeans began trade along the West coast and thereafter spread into the interior, establishing the Trans-Sahara route linking the West with the Maghreb.¹⁰⁷ Europe had just undergone an industrial revolution while pre-colonial Africa was still a pre-capitalist, pre-industrial, predominantly agrarian society, decentralised politically with communal social relations.¹⁰⁸

The Europeans were mainly in search of raw materials for their industries and protected markets for their manufactured goods. For easy access to raw materials, the colonialists established an infrastructure comprising of railways, roads, and harbours within their colonies. For example, in East Africa, the Imperial British East Africa Company built the East African railway linking Mombasa, Kampala to Dar es Salaam in Tanzania. Side by side with this economic infrastructure, colonialists built schools, hospitals, and churches to provide education, control disease and spread their faith.

¹⁰⁶ Goran Hyden ‘The Challenges of Domesticating Rights in Africa’ in Ronald Cohen, Goran Hyden and Winston P Nagan (eds) *Human Rights and Governance in Africa* (Gainesville: University Press of Florida, 1993) 259.

¹⁰⁷ Paul Carnmack, David Pool and William Tordoff *Third World Politics: A Comparative Introduction* (London: MacMillan Education Ltd, 1988) 13.

¹⁰⁸ Fernyhough op cit note 79 at 39.

Unlike the pre-colonial, pre-capitalist mode of production, colonization introduced a ‘capitalist system of production’.¹⁰⁹ Alongside this capitalist mode of production, the colonisers introduced a different system of governance that was ‘rule oriented’.¹¹⁰ This system of governance based on British colonial policy stressed ‘indirect rule’, that is between the European and the African population, a system of chiefs was introduced who served as their agents. According to Chazan, ‘the colonial structures were grafted upon and did not displace pre-existing institutions’.¹¹¹ The newly introduced system of chiefs run the colonial administration, in effect de-linking the African population from the traditional institutions of authority that existed among some societies like the Baganda, Yoruba, Asante, and Benin. As a result, communal divisions grew between the chiefs and their people.

This system of governance bred a lot of resentment among the African population. It had no regard for ‘traditional values’. Carnmack, Pool and Tordoff have noted that ‘until the Second World War, colonial rule was authoritarian, bureaucratic, and paternalistic and psychologically instilled in the Africans the concept of European superiority’.¹¹² Unlike the pre-colonial period, the contact between the population and their colonial masters was ‘indirect’; contact was through an agent, the chief. This bureaucracy based on ‘rules and procedures created a vertical relationship between the governors and the governed. Indeed Bayart has argued that ‘without regard to existing structures, the colonial state stressed functional utility, law and order but not participation and reciprocity’.¹¹³

Like the pre-colonial state, the colonial state was a very ‘dominant state’. Chabal argues that it sought to ‘modernise’ traditional society by decreeing a distinction between the ‘individual and the community’ thereby creating a ‘civil society’ along European lines.¹¹⁴ Unlike in Europe where ‘civil society’ grew organically, this separation of the ‘individual and the community, religious and temporal, civic and political’ was bound to raise tension in a society that was hitherto very ‘paternalistic’. In this sense as Makau observes:

the colonial state sought to replicate civil society in Europe in the eighteenth century which was co-terminous with the state; in this case a citizen devoted complete

¹⁰⁹ Ibid.

¹¹⁰ Hyden op cit note 103 at 260.

¹¹¹ Chazan op cit note 102 at 72.

¹¹² Carnmack, Pool and Tordoff op cit note 104 at 16.

¹¹³ Bayart op cit note 91 at 112.

¹¹⁴ Chabal op cit note 44 at 87.

obedience, dependence, and fealty to the state, such citizen would act in accordance with the laws and would not engage in acts harmful to other citizens.¹¹⁵

In doing this, the colonial state wanted ‘total obedience’ to its ‘rules’ and sought to pre-empt any opposition from its subjects, thereby undermining the prospect of developing a civil society. Beyond the ‘dominant character’, the colonial state was also a ‘bureaucratic’ state.¹¹⁶ Laws were made by the colonial state, passed on to its ‘agents’ to implement and to pass sentence on those who did not comply. In this respect the colonial state was not only ‘centralised but coercive’. The local structures were only accountable to the colonial state which in turn was only accountable to the imperial government.¹¹⁷

The African reaction to the colonial state was confrontation, resulting in a form of resistance among Africans. The notion that Europeans were forcing a new civilisation onto the Africans precipitated a ‘new social and political consciousness’ among the Africans.¹¹⁸ This social and political consciousness resulted in a self-conscious opposition to the colonial state in what eventually grew into a ‘civil society’ that organised itself around the pro-independence movement after the Second World War (1939-1945).

The Second World War marked an important watershed for the African colonial state. During this War Africans were recruited to fight side by side with their colonial masters. This action altered the earlier belief that the colonial state was ‘militarily superior’ and shattered the ‘myth of invincibility’ upon which the colonial state was built.¹¹⁹ Although the ‘allied powers’ won the war, they were much weakened.¹²⁰ Secondly, this period marked the ‘second wave’ of democratisation that swept the globe.¹²¹ According to Huntington, the allied powers promoted democratic reform among the defeated powers of West Germany, Italy, Austria, Japan and Korea after the war and it was a contradiction to continue depriving their colonial subjects the enjoyment of similar values.¹²² The Africans who fought side by side with the ‘allied powers’ soon discovered that the western system of governance treated citizens with ‘equal rights’ and began to agitate for equal rights back home.

¹¹⁵ Mutua op cit note 10 at 13-14.

¹¹⁶ Hyden op cit note 103 at 259.

¹¹⁷ Carnmack, Pool and Tordoff op cit note 104 at 76.

¹¹⁸ Hyden op cit note 103 at 260.

¹¹⁹ Azarya op cit note 53 at 14.

¹²⁰ Ibid.

¹²¹ Samuel P Huntington *The Third Wave of Democratization in the Late Twentieth Century* (Norman and London: University of Oklahoma Press, 1993) 19.

¹²² Ibid.

Hyden notes that initially the Africans demanded civil rights (one man one vote, freedom of expression and association) but the denial of such rights within the colonies soon became a rallying point for a collective expression which culminated in a call for ‘self-determination or independence’ as the nationalist movements in Africa began to gather momentum after World War II.¹²³ Soon after the war, the demand for self- determination took centre stage.¹²⁴ A new ‘rights consciousness’ had evolved and was now directed against domination by outsiders. This new urge for ‘democratic values’ as well as rising nationalism in overseas colonies prompted the imperial states to initiate a process of decolonisation.¹²⁵

The process of decolonisation was spearheaded by colonially dependent elites who had benefitted from the western education, and Christianity introduced by the colonial rulers. The teaching in the colonially founded church missionary schools and churches had imbibed in them ‘democratic ideals ‘including ‘participation, accountability, and popular mobilisation’ although these had hardly impacted on the colonial system of governance.¹²⁶ When the anti-colonial struggle began, it was unfortunately limited to the ‘right to choose and change one’s own government’ and much less to a broader struggle for democracy.¹²⁷ This thesis contends that here lies the broader challenge of promoting democracy in Africa because the opportunity to ground the struggle on broader democratic principles was lost as the post- independence leaders conceptualised the struggle as a struggle for independence only and therefore a conquest of the colonial state.

The independence struggle symbolised a significant civil society action after World War II as ‘associational space’ was loosened due to the changing international environment. The anti-colonial agitators were ceded ‘space’ to form voluntary associations to defend their interests and to articulate grievances of their ethnic constituencies such as racial segregation, punitive taxes, land alienation and native registration ordinances.¹²⁸ With respect to civic associations Drah notes that:

¹²³ Hyden op cit note 103 at 261.

¹²⁴ Kwame Ninsin ‘Citizenship, Participation and Democracy’, in F K Drah (ed) *The Search for Democracy in Ghana* (Accra: Asempa, 1987) 73.

¹²⁵ Crawford Young ‘The African Colonial State and its Political Legacy’ in Donald Rothchild and Naomi Chazan (eds) *The Precarious Balance: State and Society in Africa* (Boulder, Colorado: West view Press, 1988) 52.

¹²⁶ Chazan op cit note 102 at 72-73.

¹²⁷ Ibid.

¹²⁸ Chabal op cit note 44 at 75.

During the colonial period freedom of association in the political sphere was restricted. However, colonial regimes were relatively liberal with regard to the formation of non-governmental and labour organisations. So important were the institutions of civil society during this time that it was civic organisations, particularly trade unions, which played a key role in the struggle for independence and produced many of the first generation of Presidents and Ministers in Africa.¹²⁹

Mamdani holds a contrary view. He argues that the colonial period marked the third moment in the history of civil society when the state held a firm grip on civil society, thereby restricting the space for civic action.¹³⁰

Given the capitalist mode of production, the colonial state depended on these trade unions and the labour movement to rally farmers and to promote collective bargaining on pricing of raw materials. When it became clear that the colonial state had to be self-sufficient after the Second World War, formation of these civic associations was encouraged to the advantage of their leaders who led the independence movement. These leaders later turned these civic associations into political parties that pioneered the march to independence. In British East Africa, for example, the Tanganyika African Union (TANU) in Tanzania, Kenya African Union (KANU) in Kenya and Uganda People's Congress /Kabaka Yekka (UPC/KY) in Uganda were founded around the 1950's, a few years after the Second World War.

The architects of the anti-colonial struggle notably Julius Nyerere in Tanzania, Kenneth Kaunda of Zambia, Jomo Kenyatta of Kenya, Kwame Nkrumah of Ghana and Namdi Azikiwe of Nigeria conducted the campaign on two fronts; a campaign against the injustice of foreign domination and the right of the governed to shape their destiny.¹³¹ Through rallies, petitions, demonstrations, strikes, they seized the available space to engage the colonial state. Although the struggle promoted the right to self-determination, it was lacking in so far as promoting self expression, individual rights and political democracy among Africans was concerned. Scholars such as Mazrui have criticized the independence struggle to have been

¹²⁹ FK Drah 'The Concept of Civil Society in Africa: A View Point' in Drah, F.K and M Oquaye (eds) *Civil Society in Ghana* (Accra: Friedrich Ebert Stiftung, 1996) 1-29.

¹³⁰ M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain Publishers, 1996) 21.

¹³¹ Chazan op cit note 102 at 74-75.

short on democracy and instead embedded a ‘power cult, and a culture of elite groups that continue to inhibit democracy in Africa’.¹³²

As independence drew closer, the space for civil society grew wider. The colonial state sought to improve its relations between the individual and the state. On state-civil society relations at independence Chabal notes that:

All legal, economic, racial and political restrictions on colonial subjects were removed. State power to arbitrarily discriminate against certain individuals or groups was abolished. The post-colonial state was a state for all citizens regardless of their position in the colonial order.¹³³

The colonial state also undertook political liberalisation by expanding the public realm. Principles of political accountability to increase legitimacy of the state were embraced. At independence particularly in ‘British Africa’, the colonial powers created political institutions modelled around the ‘Westminster system type of government’, with structures that emphasised accountability to citizens.¹³⁴ Among these were independence constitutions that entrenched a ‘bill of rights’, recognising individual rights and obligations; defined the powers of the executive, legislature and judiciary; espousing limited government built on values of pluralism, tolerance and state obligations.¹³⁵

Regrettably the new ‘political elite’ did not respect this public realm created by the colonial powers arguably on the following grounds; that it was ‘too little, too late’, given that the arena for public policy making had been a preserve of the Europeans with a few of their trusted elites.¹³⁶ Secondly, the public realm was too closely associated with exploitation and repression among the African population for it to enjoy respect for such institutions.¹³⁷ Thirdly, at the time of independence, the political leadership, culture or tradition that would be committed or defend such institutions was lacking.¹³⁸ Although these institutions were

¹³² Ali Mazrui *Political Values and the Educated Class in Africa* (London: Heinemann, 1978) 9.

¹³³ Chabal op cit note 44 at 78.

¹³⁴ Chazan op cit note 102 at 78.

¹³⁵ Ibid.

¹³⁶ Peter Anyang’Nyong’o ‘The Decline of Democracy and the Rise of Authoritarian and Factionalist politics in Kenya’ (1983-84) 6 3 *Horn of Africa* 25.

¹³⁷ Peter Ekeh ‘Colonialism and the Two Publics in Africa: A Theoretical Statement’ (1975) 17 1 *Comparative Studies in Society and History* 91-112.

¹³⁸ Chazan op cit note 102 at 80.

handed over at independence, save for a few countries like Benin, Botswana, Senegal and the Gambia, they were short-lived to make an impact on the struggle for democracy in Africa.

At the beginning of the 1960's in most of sub-Saharan Africa, the Union Jack was lowered and power was handed over to the newly independent African States by the British colonial governors.

In conclusion, prior to the Second World War colonial rule like its predecessor, pre-colonial Africa was authoritarian but unlike pre-colonial Africa which was 'patrimonial', colonial rule was 'rule oriented' and therefore 'bureaucratic'.¹³⁹ This type of rule was highly resented by the Africans who always preferred 'direct contact' with their leaders often leading to open confrontation and rebellion. The public realm was dominated by Europeans and a few of their trusted political elites, thereby restricting public policy making to a few. Following the Second World War, the process of decolonisation began due to the 'wind of change' that blew across the globe necessitating institutional changes to bring about democratic reform. The colonial state 'opened up' and 'space' was created for civic associations that formed the seedbed for the independence movement across Africa. At the time of independence 'civil society' was very vibrant in Africa and a new sense of 'rights-consciousness' swept across the continent. Did this new found freedom last past independence?

2. 4. THE POST-COLONIAL PERIOD

Despite the progress registered at the time of independence, what followed was a narrowing of the civic space and the erosion of the newly found democratic freedoms. But why this democratic reversal?

At independence, post-colonial leaders inherited states that differed in many respects. While some were immense like Sudan, Zaire and Nigeria, others like the Gambia, Lesotho, Swaziland, Rwanda and Burundi were so small in both size and population to be economically viable as independent states.¹⁴⁰ Others like Uganda, Ghana and Nigeria had within them powerful centralised kingdoms who still preferred their 'patrimonial' systems of

¹³⁹ Hyden op cit note 103 at 57.

¹⁴⁰ Paul Carnmack et al 'State and Society in Africa' in Paul Carnmack, David Pool and William Tordoff (ed) *Third World Politics: A Comparative Introduction* (London: MacMillan Education Ltd, 1988) 51-52.

governance.¹⁴¹ Unlike the colonial state which could draw on resources of the imperial state, the post- colonial state had limited resources at its disposal to discharge its obligations.¹⁴² In view of this resource constraint Lofchie has noted that:

The new African leaders had to depend on primary produce. The manufacturing industries that had been established, mostly in towns, were capital intensive and depended on importation of costly machinery from Europe; even the jobs created were few. Attempts at diversification with industrialisation as a key strategy made little progress. Urban migration and urban unemployment grew. The prevailing pattern of social inequality was deepened and increased, social conflict was the result.¹⁴³

Beyond the challenge of economic viability of their states, these leaders also inherited a ‘Western style of government’ and ‘Westminster type’ constitution that required them to promote individual rights and ensure political accountability to their citizens. Soon these post-independence leaders came under pressure from civil society to deliver services and as the state reneged on its obligations, disappointment and discontent grew within the population.

The nationalist leaders adopted a strategy to respond to this challenge in what they described as the search for a new identity for Africa.¹⁴⁴ Under this strategy they adopted ‘a development’ ideology which prioritised unity above ‘rights’, and in so doing tightened their control of citizens.¹⁴⁵ Part of this ‘development agenda’ was to demand unity, to dismiss ‘rights talk’ as bourgeois inventions and to stress ‘duty’ rather than rights.¹⁴⁶ The process involved dismantling competitive institutions, centralisation of administration and the introduction of single party rule.

Commenting on this process Rothschild and Chazan have observed thus:

Using populist politics African leaders concentrated upon securing, extending and transforming the institutions of rule that they had inherited. They impeded certain

¹⁴¹ Ibid.

¹⁴² Chabal op cit note 44 at 79.

¹⁴³ M F.Lofchie *The State of the Nation: Constraints on Development in Independent Africa* (Berkeley: University of California Press, 1971) 272-273.

¹⁴⁴ Hyden op cit note 103 at 261-263.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

institutions that placed checks on their power while facilitating others that they thought would increase their control.¹⁴⁷

The first casualty of these draconian measures are the civic associations and competitive institutions which these African leaders saw as their immediate threat. Among these were rival political parties and groups which were silenced, opposition leaders who were harassed, co-opted or exiled.¹⁴⁸ Republican constitutions were introduced to replace the independence constitutions that the post-colonial state had inherited on grounds that these independence constitutions were ‘cumbersome to implement and that they took little account of ethnic and regional cleavages’.¹⁴⁹ Instead these republican constitutions centralised decision making, effectively downgraded the participatory and representative institutions and introduced ‘personal rule’.¹⁵⁰

This personal rule phenomenon effectively introduced ‘patronage politics’, which undermined the growth of institutions. And as a form of governance it relied heavily on individual personal qualities.¹⁵¹ This explains why in Africa, regimes are credited to individuals such as the Obote regime, Amin regime, Kenyatta regime, Moi regime and why democratic institutions are weak.

Unlike the independence constitutions that had an elaborate bill of rights, these republican constitutions introduced the ‘public interest’ provisions under which the post-independence state curtailed personal liberties on grounds such as the ‘the public good’.¹⁵² Within ten years of independence, many African countries, with the exception of Botswana and the Gambia, had amended their independence constitutions to introduce ‘one-party rule’.¹⁵³

For example, in Uganda, Milton Obote suspended the 1966 Constitution and replaced it with the republican Constitution of 1967 under which kingdoms were abolished. Uganda became a one-party state and UPC the only political party; in Kenya, Jommo Kenyatta amended Kenya’s Constitution making Kenya a one-party state and KANU the only recognised

¹⁴⁷ Donald Rothschild and Naomi Chazan ‘*The Precarious Balance: State and Society in Africa* (Boulder, Colorado: West view Press, 1988) ix.

¹⁴⁸ Nelson Kasfir ‘Introduction: Relating class to state in Africa’ (1983) 21 3 *Journal of Commonwealth and Comparative Politics* 4.

¹⁴⁹ Don Ronen ‘The Challenges of Democracy in Africa: Some Introductory Observations’ in Dov Ronen (ed) *Democracy and Pluralism in Africa* (Boulder: Lynne Rienner Publishers, 1986) 1-6.

¹⁵⁰ Ibid.

¹⁵¹ Hyden op cit note 103 at 272.

¹⁵² Ali A Mazrui ‘Political Engineering in Africa’ (1983) 35 2 *International Social Science Journal* 4.

¹⁵³ Ibid.

political party. Nyerere introduced Ujamaa in Tanzania, making Tanzania a one-party state and CCM the only political party. In Malawi Banda ruled under a one-party dictatorship.¹⁵⁴

The effect of these authoritarian measures on civil society in Africa in my view was far reaching. The state grew stronger and civil society was weakened. Constructive criticism was discouraged, active involvement in politics was not tolerated, and risk-taking was discouraged.¹⁵⁵ In sharp contrast, ruler privilege and abuse of office was perceived as a necessary evil and bureaucratic corruption was condoned.¹⁵⁶ Bayart summarises the civil society situation at the time so well:

That as the arena of legitimate political action shrank, larger sections of civil society were disenfranchised, and the space grew less. The politics of civil society became increasingly illegal, civil society voices were muffled, if not silenced altogether. Where access to the state was increasingly shut out and civil society silenced, for example, in Chad, Uganda, Guinea, and Kenya, opposition to the state grew. Legitimacy of the state was eroded, absolute rule was instituted and coercion became the norm. Where there was an attempt at ensuring legitimacy, civil society was co-opted.¹⁵⁷

The weakening of civil society in Africa at this time can be attributed to three major factors; the ‘single party’ ideology that these post-independence states adopted, the nature of state-civil society relations at the time and the doctrine of state sovereignty.

First, the single-party ideology was opposed to competitive politics as well as civil and political rights. The architects of this ideology namely Kwame Nkrumah, Sekou Toure and Julius Nyerere had argued that African society was ‘classless’ and ‘communitarian’ in nature and therefore opposed to ‘individualism’ which the pluralist ideology espoused.¹⁵⁸ The single party ideology advocated for a ‘state-centred’ approach to development and therefore the nationalist leaders demonised ‘active citizen’ engagement.¹⁵⁹ Given this emphasis of a ‘communalist approach’, civil society was disempowered because ‘interest group pluralism’

¹⁵⁴Virginia Kamowa *Civil society and Policy Making in Malawi* <http://www.polis.leeds.ac.uk/research/students/kai> [accessed 17 October 2012].

¹⁵⁵ Jan Kees van Donge and Athumani J Liviga ‘Tanzania Political Culture and the Cabinet’ (1986) 24 4 *Journal of Modern African Studies* 619-639.

¹⁵⁶ Monday V. Ekpo *Bureaucratic Corruption in Sub-Saharan Africa: Towards a Search for Causes and Consequences* (Washington D.C: University Press of America, 1979) 92-109.

¹⁵⁷ Bayart op cit note 91 at 91.

¹⁵⁸ Hyden op cit note 103 at 261.

¹⁵⁹ Ibid.

was seen to be detrimental to the single-party ideology.¹⁶⁰ In advancing this ideology, the post-colonial state behaved much like its predecessor and in many ways the post-colonial state was a replica of the colonial state before decolonisation took place.

Second, state-civil society relations were impeded by these authoritarian measures which were adopted at a time when the 'rights discourse' was just taking shape. At the time of independence, 'civic space' had just been opened by the colonial state having been restricted during the pre-colonial period and the larger part of colonialism. Civic associations (political parties, trade unions) had hardly taken root. In fact the independence elections had been based on ethnic, social and religious considerations. Moreover, democratic institutions take time to grow and without a democratic culture within the local population such institutions could not be expected to have developed the necessary structures to resist. As Pinkney observes, 'the deep colonial penetration in Africa had left no opportunity for society to develop and nurture its own political institutions'.¹⁶¹ Coincidentally, these nationalistic leaders had been at the helm of these civic associations before coming to power and knew how best to emasculate them.

Unlike in Europe or Asia, the post-colonial state is seen more as an imposition of the colonial state, in that it did not grow organically from and against civil society, is structurally deficient without deep legitimacy and is without any putative power over civil society.¹⁶² Given this legitimacy crisis, the state and civil society have been involved in a protracted struggle in which the state has sought to capture and manage civil society and in reaction, civil society has been preoccupied with the 'politics of counter-hegemony'.¹⁶³ In view of this struggle Chabal has noted that:

at independence, civil society in Africa possessed formal power through the system of representation established by decolonisation but soon that representation was lost almost everywhere in Africa and civil society became devoid of formal power.¹⁶⁴

It is therefore argued in this thesis that the process of resisting this forcible capture against these post-colonial leaders who overnight wielded so much power and wealth in order to re-

¹⁶⁰ Stephen N Ndegwa *The Two Faces of Civil Society; NGOs and Politics in Africa* (West Hartford, Connecticut: Kumarian Press, 1996) 17.

¹⁶¹ Robert Pinkney 'State, Civil Society and Democracy' in Robert Pinkney (ed) *Democracy in the Third World* (Boulder, London: Lynne Rienner Publishers, 2003) 90.

¹⁶² Bayart op cit note 91 at 112.

¹⁶³ Chabal op cit note 44 at 84.

¹⁶⁴ Patrick Chabal 'Revolutionary Democracy in Africa' in Chabal P. (ed) *Political domination in Africa* (Cambridge: Cambridge University Press, 1986) 15.

appropriate some power weakened civil society so much. It is also argued that the forcible control of civil society could be a useful indication of the ‘power’ that civil society had accumulated at independence.

Third, at independence the post-colonial state was very protective of its ‘sovereignty’ to the extent that this principle of state sovereignty was entrenched in the Organisation of African Unity Charter pre-empting any act by any African government to meddle in the affairs of another.¹⁶⁵ Under the cover of state sovereignty these post-colonial leaders committed human rights violations without any close scrutiny of member states or any colonial power, who regrettably chose to keep a distance to avoid being accused of neo-colonialism. In countries like Uganda, Kenya, Ethiopia, Liberia, Somalia and Sudan, human rights abuses took place without such states being held accountable.¹⁶⁶ It is for this reason that Babu questions the ‘moral responsibility’ of these post- independence African leaders who he asserts ‘by default held power only by denying the democratic rights of their opponents’.¹⁶⁷ It was not until much later in the 1970s that external human rights organisations like Amnesty International, Africa Watch and some donor countries like Canada began to express concern about these violations in some African states.

The 1960’s to 1970s were marked by domination of ‘one party’ states in most of Africa with the exception of a few countries like Botswana, Gambia and Mauritius. Many of these countries adopted ‘marxist or communist ideologies’ such as the ‘Move to the Left’ in Uganda’, and ‘Ujamaa’ in Tanzania. Ruling parties institutionalised themselves in power and alienated other civil society organisations from the political process. The post-colonial state was characterised by ‘high levels of bureaucracy and misuse of scarce resources, official corruption, and state failure to deliver essential services (social, medical and educational services were on decline)’.¹⁶⁸ Given these ‘democratic haemorrhages,’ one would have expected the former colonial powers to intervene. This was not the case. Instead the former colonial powers were pre-occupied with the protection of markets for their goods at home,

¹⁶⁵ Principle III of the Organisation of African Charter 1963 states that ‘the member states, in pursuit of the purposes stated in Article solemnly affirm and declare (a) the sovereign equality of all Member States and (2) their adherence to the principles of Non-interference in the internal affairs of states. See also Hyden op cit note 103 at 275.

¹⁶⁶ Ibid.

¹⁶⁷ Babu A. M. ‘Struggle for Democracy’ (1991) 6 *Africa Events* 30-31.

¹⁶⁸ Richard Sandbrook *The Politics of Africa’s Economic Stagnation* (Cambridge, New York: Cambridge University Press, 1986) 112-113.

and the supply of raw materials for their industries.¹⁶⁹ It is my contention that the colonial powers preferred not to antagonise these African leaders at the time because of the ‘ideological war’ between the East and West, co-operation was to them a useful strategy to continue economic ties with Africa.

Faced with authoritarian regimes and economic decline, voices of civil society began to re-emerge to put a limit to state power and misuse of public resources in Africa. These were mainly ‘social, cultural, economic, professional and religious organisations’ that often spoke out against the excesses of the state.¹⁷⁰ For example, the Catholic Commission for Peace and Justice (CCPJ) in Zimbabwe became outspoken on human rights, peace and justice in the early 1960s. These associations raised questions of governance, conduct and accountability of public institutions.¹⁷¹ Unfortunately the situation did not get any better.

During the 1970s and 1980s many African countries were in a state of collapse. The state could not deliver even the most basic services. Basic commodities were scarce. State-civil society relations were at their lowest. The post-colonial phenomenon of ‘single party’ states and African socialism had become discredited. Unlike ‘multi-party states’ like Botswana, the Gambia, Mauritius and Namibia, marxist states like Ethiopia, Angola, and Mozambique were severely hit and countries like Uganda, Kenya, and Tanzania were not much better.¹⁷²

At the global level, the final phase of European decolonisation was taking place. According to Huntington’s ‘Third Wave of Democratisation’, this wave was attributed to the global economic growth as well as the economic crisis of the 1960s.¹⁷³ The economic growth in the 1960s in some countries such as South Korea had led to improvements in education and high standards of living, and expansion of the middle class who embraced democratic values. In the Eastern European countries that had single-party and autocratic rule, the economies were in a crisis and were therefore unable to continue support to ‘friendly’ sub-Saharan countries which triggered revolts and coups leading to the collapse of states in former communist and military dictatorships in East, Central Europe, Latin America and Africa.¹⁷⁴

¹⁶⁹ Samuel A Nyachoga ‘Civil Society’ in Paul J. Kaiser, F Wafula Okumu (eds) *Democratic Transitions in East Africa* (Burlington: Ash gate Publishing Company, 2004) 103-119,155-160.

¹⁷⁰ Bayart op cit note 91 at 114-115.

¹⁷¹ Ibid.

¹⁷² Francis Fukuyama the *End of History and the Last Man* (New York: Free Press, 2006) 35.

¹⁷³ Huntington op cit note 118 at 40-93.

¹⁷⁴ Ibid.

Faced with a social, political and economic crisis and loss of support from their allies in Eastern Europe, and unable to deliver basic services to the population, the African states had one option-to liberalise. African countries that hitherto were ‘one party’ states began to undertake democratic reforms in the 1980s by amending their constitutions to allow ‘political reforms’ to take place.¹⁷⁵ Countries such as Cote d’Ivoire, Cameroon, and later Kenya, Tanzania, Uganda and Senegal amended their ‘one-party’ constitution to allow multiparty competition.¹⁷⁶

This ‘new wave of democracy’ led to the rebirth of ‘associational life’, creating ‘autonomous spaces’ for ordinary men and women to take collective action as a counter to state power.¹⁷⁷ The relationship between the state and society changed, presenting a shift from ‘authoritarianism to democracy’ and with it a ‘more pluralist model’ led to the rebirth of ‘civil society’ in Africa.¹⁷⁸ Popular forces, some dating back to the pre-colonial and colonial periods resurfaced while other ‘new constructs’ proliferated.¹⁷⁹ Among these new constructs are ‘domestic human rights NGOs’ which according to Wiseberg play two absolutely indispensable functions: keeping the political process open or creating political space for democratic forces, and information gathering, evaluation and dissemination.¹⁸⁰

In East Africa, for example, the human rights NGO sector has grown rapidly in the last two decades covering a broad spectrum of issues; women’s rights, child rights, environmental protection, refugees, transitional justice, media freedom and accountability, and presently ‘account for the most critical voices against the state’.¹⁸¹ NGOs continue to play a lead role in the struggle to open up political space, advancing the cause of human rights and holding the state accountable for its actions. Notwithstanding this important contribution to the democratisation process in Africa, the NGO– state relationship remains one of mistrust as the state in sub-Saharan Africa seeks to ‘closely regulate, monitor, co-opt or muzzle NGOs’.¹⁸²

In conclusion, the post-colonial state in Africa is a ‘predatory state’, in as far as it muzzled other actors to tighten its grip on power. As it restricted the ‘associational space’, it narrowed the space for democratic forces to operate and civil society effectively came under attack.

¹⁷⁵ Chapter 3 (3.2.1) deals with the subject in detail.

¹⁷⁶ Chazan op cit note 102 at 80

¹⁷⁷ Tandon and Mohanty op cit note 62 at 9.

¹⁷⁸ Pinkney op cit note 157 at 94.

¹⁷⁹ Michael Bratton ‘Beyond the State: Civil Society and Associational life in Africa’ (1989) 41 3 *World Politics* 407-430.

¹⁸⁰ Wiseberg op cit note 34.

¹⁸¹ Mutua op cit note 10 at 5.

¹⁸² Ibid.

Once civil society was effectively silenced, the state undermined other accountability structures such as the independence constitutions which were amended to introduce ‘one-party rule’ in most states of Africa.

However, when the economic crisis of the 1960s struck, these single-party states could hardly withstand the new economic pressures. They could hardly deliver even the most basic services to the population. The state was in decline. With no one to turn to, the post-colonial state had one option left- to liberalise. This democratic reform process reopened the space for popular forces and therefore triggered the ‘rebirth of associational life’ in Africa in the 1980s.

Among the new forces that have emerged since the 1980s are domestic human rights NGOs whose foremost mandate is to keep the political process open, advance the cause of human rights and promote respect for the rule of law and democracy in Africa. These domestic human rights NGOs which have proliferated since the 1990s are, notwithstanding their contribution to democracy in contest with the state for political space.¹⁸³

2. 5. CONCLUSION

This chapter set out to provide an historical account of the development of NGOs in sub-Saharan Africa, and in particular, to examine the nature of state-NGO relations at different periods of Africa’s political development.

NGOs, as the discussion has shown, are part of civil society. Defining an NGO has its own difficulties however, it is argued here that NGOs have four common attributes: voluntary, dependent, not-for-profit and not self-serving. NGOs may be formal or informal.

State-NGO relations have been adversarial in much of Africa. Apart from the independence period when Africa witnessed a new wave of democracy and the rebirth of associational life, civil society has been under threat during most of Africa’s political development. For instance, during the pre-colonial period, the state was highly personalised and any form of dissent had to be expressed within the community. With a ‘patrimonial’ form of governance and hierarchical society, associational space was restricted and no meaningful form of civil society growth was possible.

¹⁸³ Ibid.

The colonial period was not any better. Colonial rule was ‘rule oriented’ and bureaucratic. Civil society space was restricted and public policy making was a preserve of Europeans and a few of their trusted political elites. It was not until the Second World War that the colonial state opened up political space due to the decolonisation process that took place soon thereafter. Once the spaces were opened, the demand for rights to freedom of association, expression and assembly were heightened, civil society flourished, and the struggle for independence spread across the continent.

The post-colonial period was however characterised by a reversal process; associational space was restricted as the state sought to tighten its grip on power. Civil society was systematically muzzled, as one-party states were instituted across Africa. Without a strong civil society, corruption, abuse of office and a breakdown of democratic structures took centre stage. Civil society only regained prominence when the wind of change blew across Africa in the 1980s bringing with it democratic reforms and the rebirth of associational life. With this rebirth, domestic human rights NGOs emerged and have since taken centre-stage to promote democracy, respect for human rights and the rule of law in Africa.

But what is democracy and which democracy model is best suited to the free functioning of NGOs in Africa? To this the discussion turns in Chapter Three.

CHAPTER 3

THEORETICAL PERSPECTIVES OF DEMOCRACY IN AFRICA

3. 0. INTRODUCTION

In Chapter Two, the discussion of the historical development of NGOs in Africa concluded that state-NGO relations have been adversarial in much of Africa.¹⁸⁴ With the exception of the independence period, civil society space has been constrained.¹⁸⁵ The wind of change that swept across Africa in the 1980s called for a shift in political governance, necessitating constitutional reforms, construction of democratic institutions and extension of basic freedoms. From one party dictatorships and military rule, most states in sub-Saharan Africa had to adopt some form of political pluralism and constitutional order whereby political power and its exercise were subject to legal and democratic control.¹⁸⁶ The constitutional change process also meant loosening state restrictions on civic associational life.¹⁸⁷ It is this act of ‘pluralising’ society that opened space for domestic human rights NGOs to emerge and since then to promote democracy, respect for human rights and the rule of law.

‘Democracy’ is however a much contested notion. Different groups conceptualize democracy in different ways. For example, the National Resistance Movement (NRM) in Uganda adopted Nyerere’s idea of *African* democracy and called it *popular* democracy.¹⁸⁸ The NRM argues that unlike multi-party democracy which is divisive and diminishes participation,

¹⁸⁴ Chapter 2 (section 2.5).

¹⁸⁵ Ibid.

¹⁸⁶ Article 19 ‘Freedom of Association and Assembly: Unions, NGOs and Political Freedom in sub-Saharan Africa,’ March, 2001, 1.

¹⁸⁷ Ibid.

¹⁸⁸ Nyangabyaki Bazaara ‘Legal and Policy Frameworks for Citizen Participation in East Africa: Do they Create Potential for Improved Governance?’ Kampala: Centre for Basic Research, Working Paper No 82/2003, 2003, 5.

popular democracy enables everyone to participate directly in decision-making.¹⁸⁹ Multi-party advocates on their part equate democracy to a multi-party system.¹⁹⁰

Notwithstanding the democratic reform process which has been slow and agonising, the key challenge for the post-colonial state however remains; how to create democratic societies and address the deficit of democracy in sub-Saharan Africa?¹⁹¹ How can an enabling environment be created for NGOs to operate free from unnecessary restrictions?

This Chapter therefore seeks to address three interrelated issues: first, what is our theory of democracy? Second, what are the pre-conditions necessary for democracy to thrive? And third, which model of democracy would allow the free and effective functioning of NGOs in Africa?

The discussion will in no way be exhaustive. It will be restricted to a review of existing theories and models of democracy in order to provide a more nuanced understanding of the theory of democracy as it will be applied in this study.

3. 1. DEMOCRACY AS A UNIVERSAL VALUE

Despite being contested, the concept of democracy as a ‘universal value’ is not in dispute. There are two major theories of democracy that help us to understand democracy as a universal value; the ‘democratic theory’ and the ‘competitive theories’ of democracy. Other theories of democracy namely, the ‘economic theory of democracy,’ the ‘contemporary theory of democracy’ and the ‘participatory theory of democracy’ either modify or reinforce these two principal theories.

Under the democratic theory, attributed to Rosseau, Mill and Cole, democracy is defined as the ‘rule or power of the people’.¹⁹² ‘*Demos*’ is a Greek word meaning ‘the people’.¹⁹³ The theory postulates that political power is held by the many rather than the few since ‘democracy is the power of the people’.¹⁹⁴ The theory also recognises the ‘majority as

¹⁸⁹ Ibid.

¹⁹⁰ Expedit Ddungu ‘Popular Forms and the Question of Democracy: The Case of Resistance Councils in Uganda’ in Mahmood Mamdani and Joe Oloka Onyango (eds) *Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism* (Kampala: Centre for Basic Research, 1994) 368.

¹⁹¹ Mutua op cit note 10 at 3.

¹⁹² Carole Pateman *Participation and Democratic Theory* (London: Cambridge University Press, 1970) 21.

¹⁹³ Jack Lively *Democracy* (London: Western Printing Services Ltd, 1980) 52-110.

¹⁹⁴ Ibid.

sovereign'.¹⁹⁵ Among the ancient Greeks, democracy 'is government of the people, for the people and by the people'.¹⁹⁶ The democratic theory in its articulation of democracy raises a number of issues: Who controls power? How is power distributed? And what is the relationship between those who govern and those they govern?

The competitive theory of democracy, a brain child of Schumpeter, in contrast to the democratic theory views democracy as a 'political method' (institutional arrangement) for arriving at political, legislative and administrative decisions, in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.¹⁹⁷ Unlike the democratic theory, the competitive theory views democracy as a method whose 'primary purpose is to vest power of deciding political issues in the electorate'.¹⁹⁸ In both theories, there is an underlying emphasis on 'participation', whether by the majority in reference to the democratic theory or 'elected representatives' under the competitive theory. In retrospect, however, both theories do raise similar issues as noted above.

In addressing the issue of 'who controls power', one should consider what the purpose of democracy is. Both theories do agree that the ultimate goal of democracy is to achieve 'political equality', which is defined as 'the operating principle' of democracy.¹⁹⁹

Bellamy reasserts the same principle when he argues that:

the primal principle of democracy is the worth and dignity of the individual. That dignity, consisting in the equality of human nature, is essentially the same in all individuals, and therefore equality is the vital principle of democracy.²⁰⁰

The question to ask is who controls power in a democracy?

3. 1.1. Who controls power?

Who controls power then comes down to who makes decisions in the community and how those who make the decisions reach them? In the democratic theory, it would imply that those who make the decisions must be the majority, since democracy is government in which the

¹⁹⁵ Claude Ake *The Feasibility of Democracy in Africa* (Dakar: Council for the Development of Social Science Research in Africa, Antony Rowe Ltd, 2003) 7.

¹⁹⁶ Ibid.

¹⁹⁷ Pateman op cit note 187 at 269.

¹⁹⁸ Ibid.

¹⁹⁹ Pateman op cit note 187 at 146.

²⁰⁰ E Bellamy *Equality* (New York: D Appleton Century, 1936) 27.

will of the majority prevails.²⁰¹ If this were to be so, is there a danger of excluding the minority in the decision-making process, and if not, does this undermine ‘political equality’?

Dahl, in his theory of ‘the rule of minorities’ argues that such a ‘tyranny of the majority’ is an illusion because ‘majorities do not decide’.²⁰² Dahl’s position may not be entirely correct considering that in most African states, there is neglect of the minority and respecting minority rights and voices is still a challenge. In parliamentary democracies, the party in power often has the majority in parliament. The opposition is always in the minority and when an issue is to be voted for, it is always the majority who decide. For example, in Uganda, the National Resistance Movement (NRM) has the majority in parliament and is the majority party; party decisions are taken in ‘party caucuses’ and party members have to vote for party positions. The majority take the decision, but is this democracy? Democracy can be adversely affected by this ‘majoritarian principle’. For example, using its majority in parliament, the NRM tabled an ‘Omnibus’ Constitutional Amendment Bill in February 2005. The bill, sought to amend among other provisions, article 105(2) of the 1995 Constitution of Uganda to remove presidential term limits, and contrary to popular opinion, the article was amended.²⁰³

Dahl had also argued that the tyranny of the majority would be resolved when ‘all the active and legitimate groups’ in the population could make themselves heard at some crucial stage in the process of decision-making.²⁰⁴ This, in my view raises another democracy related challenge for African states and this is the issue of ‘responsiveness’. Responsiveness of government to the preferences of its citizens is a key characteristic of a democracy. Would a state that entrenches a bill of rights in its constitution, and denies its citizens the liberty to exercise them be regarded as responsive? Would consultations be adequate when the findings of special tribunals appointed to probe the conduct of public officials are never implemented to construe a regime as responsive? Many African states point to the existence of a bill of rights sometimes with ‘draw back’ clauses in their constitution to be an indicator of democracy yet citizens are not at liberty to enjoy them.

Przeworski argues that responsiveness should be construed in terms of liberties or freedoms or rights and only when both ‘contestation and participation’ are possible should one hold the

²⁰¹ James Bryce *Modern Democracies* (London: Macmillan Publishers, 1923) 26.

²⁰² Pateman op cit note 187 at 145-150.

²⁰³ Danwood M Chirwa and Lia Nijzink *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (Tokyo, New York, Paris: United Nations University Press, 2012) 55.

²⁰⁴ *Ibid.*

regime as democratic.²⁰⁵ Przeworski is correct in as far as the existence of rights in a constitution is in itself a useful beginning, but when the opportunity to exercise such rights is denied, an important indicator of democracy is lost. Indeed many African states face a challenge of implementing rights in their policy and programme implementation despite having them in the constitution.

For instance, it was not until the adoption of the Vienna Declaration and Programme of Action 1993 that states began to think about developing a Human Rights Action Plan inspite of having human rights provisions in their constitutions.²⁰⁶ Only a few countries like Austria, South Africa, Sweden and Netherlands are known to have Human Rights Action Plans. Beyond legislating for rights, Huntington holds that democracy should be viewed in terms of civil and political rights and when ‘the right to speak, publish, assemble and organise’ exists, can one then hold the state to be democratic.²⁰⁷ Huntington argues, that ‘the rights to speak, publish, assemble and organise are necessary to political debate and the conduct of electoral campaigns’.²⁰⁸ These rights, in my view, are the most contested rights. In many sub-Saharan African countries, citizens have been denied the right to speak, to assemble or organise.²⁰⁹ The opposition in many of these countries such as Uganda, Ethiopia, Malawi, Zimbabwe and Rwanda cannot hold rallies freely or publish.²¹⁰ Press is censored and human rights defenders are under attack for expressing their independent views.

Under the competitive theory, responsiveness is defined in terms of elections. It is stated under this theory, that ‘competition for leadership’ is the distinctive feature of democracy; that there is democracy when leaders compete for votes, that elections provide a mechanism of control by non-leaders.²¹¹ Nothing in my view can be further from the truth in sub-Saharan Africa. Elections have proved to be a disaster in many countries in Africa. The post-independence elections were held on ethnic, social and religious considerations in many countries. Since the return to multi-party politics in the 1980s, there are few countries that are

²⁰⁵ Adam Przeworski et al (eds) *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* (Cambridge: University Press, 2000) 33.

²⁰⁶ Adopted 25 June 1993, available at A/CONF.15723 [accessed 12 February 2012].

²⁰⁷ Samuel P Huntington *The Third Wave, Democratization in the Late Twentieth Century* (Norman and London: University of Oklahoma Press, 1993) 7.

²⁰⁸ Ibid.

²⁰⁹ See Freedom House ‘Freedom in the World’ *International Journal of Not-for Profit Laws* available at <http://www.icnl.org/research/trends/trends3-3.html>

²¹⁰ Ibid.

²¹¹ Pateman op cit note 187 at 4-5.

known to have held free and fair elections in Africa. The few could include South Africa in 1994, Malawi in 1994, Botswana, and Zambia in 1994, and Kenya in 2002. More and more countries have held flawed and disputed elections. For instance, Uganda, in 1980, 2006, and 2011; Kenya in 2007, Ethiopia 2010, Rwanda in 2010, and Zimbabwe in 2007. These elections can hardly be used as a measure of control since the will of the people is not respected. The right to vote and to be voted for cannot be held to matter when voters are disenfranchised. It is therefore far-fetched to expect leaders who emerge out of 'rigged' elections to be responsive to the popular will.

3. 1. 2 How is power distributed?

The next issue to be addressed is the distribution of power. The democratic theory makes two basic assumptions: that government behaviour is influenced largely by the constitutional system through which they emerge and that governments pursue policies in the general interest or the common good.²¹² The presumption may be valid for those countries that uphold the constitutional framework under which they are elected. The experience in sub-Saharan Africa has been rather different. At independence, African states inherited a 'Westminster system' of governance but within ten years, as it was noted in Chapter Two, the majority of them had amended their constitutions and adopted 'one- party, single rule,' and effectively introducing 'personal rule'.²¹³ Under such constitutional framework power is not shared, it is a monopoly of the ruling party.

The constitutions of most sub-Saharan African countries do provide for three branches of government: the executive, legislature and judiciary, and power is distributed among the three organs. Whereas Parliament has a tripartite mandate; oversight, representation and legislation, with the party in power having a majority in parliament, the two branches are often intertwined. Consider this scenario; where the Speaker of Parliament is also the Vice-Chairperson of the ruling party as it is in Uganda's 9th Parliament. Would one expect a fair distribution and exercise of power?

How does one explain distribution of power where the judiciary being the third arm of government is filled with appointments of 'cadre judges', judges who are loyal to the ruling party as it is the case in Uganda? The appointment of judges is done by the President who submits his nominees to the Appointments Committee of Parliament to debate and approve.

²¹² Pateman op cit note 187 at 111-112.

²¹³ Chapter 2 (2.4).

The Speaker of Parliament chairs the Appointments Committee and yet the Speaker is the Vice-chairperson, Eastern region, of the ruling party in power. How do you expect an independent decision from such a committee given its institutional design?

According to the constitutional design of most African countries, the judiciary is made up of Presidential appointees.²¹⁴ When a matter involves an issue of extreme national importance such as a referendum or election petition, it is the President who has the discretion to nominate the ‘Panel of judges’ to hear the matter. Can such a Panel of judges so appointed to preside over a matter in which the President has an interest exercise judicial independence, and show a fair dispersal of power?

Democratic theory also envisages that decisions made by one arm of government would be respected by another but this may not necessarily always be the case. Where matters of human rights have been adjudicated by courts in many African countries, the executive has been reluctant to implement the court rulings. This is often the case when the right to speak, organise, associate and assemble has been adjudicated upon. For example, in *Muwanga Kivumbi v AG*, the applicant sought a constitutional court interpretation of the ‘right to associate and assemble’ following persistent arrests of members of his group, *Popular Resistance Against Life Presidency*, who campaigned for the restoration of presidential term limits in Uganda’s constitution.²¹⁵ The court ruled in his favour and decreed that the right to associate and assemble did not require police permission. Notwithstanding this constitutional court ruling, the Uganda police continued to disband his rallies and to arrest political opposition activists. In 2011, the Uganda government tabled a bill, ‘The Public Order Management Bill, 2010’ which in effect seeks to undermine the court ruling by restoring the power of the police to grant permission to citizens who wish to organise and assemble contrary to the provisions of the Constitution.²¹⁶

Distribution of power also entails a deliberate effort through an institutional framework to have all legitimate voices heard. For example, article 78 1 (c) of the 1995 Constitution of

²¹⁴ For example, Article 142(1) of the Constitution of Uganda, 1995 mandates the President to appoint judicial officers with the approval of Parliament, Article 166(1) of the Constitution of Kenya, 2010 mandates the President to appoint judicial officers on the recommendation of the Judicial Service Commission, while Article 180 (1) of the Constitution of Zimbabwe also mandates the President to appoint judicial officers on the recommendation of the Judicial Service Commission.

²¹⁵ Constitutional Petition No 9/05.

²¹⁶ The Public Order Management Bill, 2010 was enacted into law in November 2013 and assented to by the President. See The Public Order Management Act of 2013. Section 8(1) of the Public Order Management Act 2013 grants power to the Inspector General of Police or any other officer authorized by him to stop or prevent the holding of a public meeting contrary to the Act.

Uganda provides for representation of special interest groups in parliament namely the army, youth, workers, persons with disabilities and any other groups as parliament may determine. This is a good practice that increases the political bargaining power of these under-represented groups. Legislation that is directed at addressing their concerns has since been enacted, such as the Disability Act 2005, Employment Act, 2010, however these groups have been discredited for becoming an extension of the ruling party and for failing to advocate for their members' interests.

Distribution of power would also require that those who hold power would seek to make decisions for the satisfaction of the 'common good'. In a democracy, the overriding goal is to 'stimulate civic virtue, action and judgement' based on a concern for the common good.²¹⁷ There is therefore an underlying presumption that decisions that are made do not serve individual interest. If this were so, then group competition would be encouraged. But experience has shown that states have interpreted 'the common good principle' to deny citizens their fundamental rights. In many African constitutions, rights are abridged 'in public interest'. For example, article 43 of the 1995 Uganda Constitution provides that 'these rights are subject to 'public interest' and public interest may not mean in article 43(a) political persecution. But in practice, the reverse seems to be the case, as opposition political rallies are dispersed 'in public interest' and political party activists are persecuted.

3. 1. 3. What is the relationship between those who govern and the governed?

Democratic theory also raises another fundamental issue; the relationship between the governors and those who are governed. Two concerns are important here: how to safeguard liberties and enhance participation. Democracy unlike dictatorship and monarchy, places a high premium on the defence of liberties. A democratic system would put in place constitutional safeguards against arbitrary action of the state thereby ensuring restraint on the government.²¹⁸ This defence of liberty in turn creates obligations on the state that would include 'accountability, security of person and property, respect for constitutional safeguards, rule of law, freedom of expression and association and popular control over authority'.²¹⁹ What then are these constitutional safeguards that NGOs should monitor, that this theory of democracy envisages?

²¹⁷ Jean-Jacques Rousseau 'The Social Contract,' Book III, Chapter IV in *The Social Contract and Discourse* (Everyman ed,1947)55.

²¹⁸ Pateman op cit note 187 at 127.

²¹⁹ Ibid.

Among these constitutional safeguards is the bill of rights. Have ‘rights’ been entrenched in the constitution under an elaborate bill of rights? These would include civil, political, economic, social and cultural rights. Are they subject to ‘draw back clauses’? African states have often sought to undermine these rights with the inclusion of ‘exception clauses’, which as it will be noted in Chapter Five, must meet accepted criteria to restrict the enjoyment of these rights.

Beyond entrenchment of these rights in the constitution is a requirement for mechanisms of popular control of authority. Democratic theory envisages that mechanisms are put in place to oversee implementation of these ‘rights’ and appropriate safeguards are entrenched to afford them sufficient protection and independence within the constitution. These mechanisms to ensure human rights protection would include but are not limited to: the judiciary, Human Rights Commissions, Ombudsman, and civil society organisations. The idea of having strong checks and balances is envisaged as an important indicator of democracy. To ensure that there are regular checks on government behaviour, ‘the existence of active groups (NGOs), internally democratic who check arbitrary action of leaders and keep them accountable for their actions’ is recognised.²²⁰

Popular control of authority is achieved when ‘participation’ is made possible. Participation is viewed as a very important ingredient of democracy under the democratic theory. Participation confers many benefits to democracy. First, it upholds the concept of ‘active citizenship’ which as Lively argues, ensures that ‘through participation citizens would realize their wants and satisfy their needs and in turn improve their lives’.²²¹ When individuals participate in the decision making process, it helps them to understand the rules better and appreciate social norms. Participation confers a ‘sense of freedom’ on the individual. Democratic theorists argue that ‘democratic citizens find self-expression and self-fulfilment through participation’.²²² But participation in my view should be based on voluntary co-operation to be meaningful and the ‘art of persuasion’ is essential in a democracy.

Within the framework of this thesis, active involvement of the citizenry, organised in voluntary associations would be key to enhancing participation in the formulation of public policies. Democracy remains an abstract notion unless people understand its workings and

²²⁰ Robert Pinkney *Democracy in the Third World* (Boulder, London: Lynne Rienner Publishers, 2003) 94.

²²¹ Pateman op cit note 187 at 134.

²²² Jon Roper *Democracy and its critics: Anglo-American Democratic Thought in the Nineteenth Century* (London: Unwin Hyman Ltd, 1984) 204.

how it transforms people's lives. This conceptual appreciation of democracy is only made possible when citizens are informed, go beyond elections and make their demands known to government. To achieve this, Downs observes, 'government should seek to enhance the political influence of intermediaries such as interest groups which in turn keep the government informed about what people want'.²²³

When participation is enhanced, the danger of having a 'passive society' which hardly makes demands is effectively overcome. Mill, one of the well known participatory theorists, convincingly argues that 'broadening participation avoids social conformity, allows people to have a greater role in shaping public policy and stimulates the active rather than the passive character of political life'.²²⁴ In broad agreement, Pinkney neatly sums up the three key functions of participation in a democracy to include; education for the individual to enable him/her distinguish between his/her own impulses and desires, to increase the value of individual freedom and to promote an individual's sense of belonging to the community.²²⁵ It can therefore be argued that a participatory process would ensure realisation of individual rights, furtherance of the common good and ultimately political equality.

To complete the cycle, democratic theory vouches for 'popular rule'. This is meant to dispel the underlying presumption that power could be vested in the 'hands of the few' even if those issues discussed above are resolved in the affirmative. Personal rule or rule of the few as noted in Chapter Two is a common feature of dictatorships and one-party states. Neither should popular rule be understood to mean that all shall be involved in decision making because to do so would breed anarchy. Democracy is to be understood in the context of the totality of all issues considered above: that a democracy is responsive, guarantees liberties, encourages participation and ultimately promotes political equality.

In conclusion, this thesis argues that the two principal theories of democracy discussed above underscore the realization of political equality as the ultimate goal of democracy. To achieve political equality, the theories stress the defence of liberties, citizen participation in public decision making and respect for minorities.

The thesis identified key elements of democracy by answering three key questions: who controls power, how is power distributed and what is the relationship between the governors

²²³ Anthony Downs *An Economic Theory of Democracy* (New York: Harper Collins, 1957) 29.

²²⁴ John Stuart Mill 'Representative Government' in Everyman (ed) *Utilitarianism, Liberty and Representative Government* (1944) 193.

²²⁵ Pateman op cit note 187 at 22-27.

and those governed? These three issues point to the current challenges facing the democratic reform process in Africa.

Notwithstanding any contestation of the concept of democracy, our theory of democracy is grounded on the pursuit of equality. Therefore, when NGOs set out to promote democracy, respect for human rights and rule of law in Africa, it is all about enhancing equality, civic participation and making the state more responsive to the demands of its citizens. What then are the pre-conditions necessary for democracy to thrive?

3. 2. DEEPENING DEMOCRACY IN AFRICA

Democracy as a value has to be nurtured. Both the theory and practice of democracy require an enabling environment to thrive. Democratic theorists single out three major factors that influence the deepening of democracy in Africa which are the subject of discussion. These are: the degree of economic development, civic culture and state-NGO relations.

3. 2. 1. The Degree of Economic Development

The degree of economic development of a country has a strong bearing on the practice of democracy. Among the economic indicators that determine economic progress is the ‘degree of industrialisation, urbanisation, and level of education’.²²⁶

Where a society has a higher average level of economic progress, such society is more affluent, it tends to have a larger middle class, is well educated, and has elites who can make their views on different issues known to the state. The state is equally more ‘responsive’. Where a society is less well to do, it relies more on the state as the provider; a clientele relationship develops, associational spaces are restricted and the state is ‘less responsive’, putting democracy at stake.

Lipset in his hypothesis agrees. He argues that ‘the more well to do a nation, the greater the chances that it will sustain democracy’.²²⁷ To demonstrate this nexus the thesis undertakes a short review of democracy in sub-Saharan Africa.

²²⁶ Martin Seymour Lipset ‘Some Social Requisites of Democracy: Economic Development and Political Legitimacy’ (1959) 53 *American Science Review*, 75.

²²⁷ Ibid.

In Chapter Two it was noted that pre-colonial Africa was a ‘pre-capitalist, predominantly agrarian, relatively decentralised politically and characterised by communal social relations.’²²⁸ Most Africans lived in rural areas and carried out peasant farming and for others who were stateless; they migrated frequently from one area to another in the face of war, disease, drought and economic need.²²⁹ For these societies, survival was their highest priority and as earlier noted, any exercise of rights to freedom of expression and association were restricted to membership to the community. Pre-colonial Africa practiced a ‘patrimonial’ form of governance, society was poor and the state was undemocratic.

When colonial rule was introduced in the early nineteenth century, the prime motivation was economic. The colonial state introduced a capitalist mode of production and the focus was to produce raw materials to feed their industries in Europe and to develop protected markets for their manufactured goods.²³⁰ The colonial state was a dominant economic actor, levying taxes, developing markets and introducing new crops.²³¹ For example, the colonial state introduced coffee in Uganda, tea in Kenya, and cocoa in Ghana whose market was in Europe. The colonial state also established an economic infrastructure of roads, railways, and harbours and industries which were highly dependent on their home industries in Europe. This created a dependency relationship with the colonial powers. Under the circumstances the relationship was more dependent than responsive. The colonial state was only accountable to the imperial government not subjects of the state. Colonial rule, until the Second World War was authoritarian, bureaucratic, paternalistic and forceful.²³²

Following the decolonisation process and independence struggles, the post-colonial state that emerged in the 1960s was characterised by ‘high concentration of power’ in the hands of the state.²³³ The post-colonial state had limited resources at its disposal, and attempts at industrialization were not successful either. The ‘political elite’ at the time appropriated the little that was available to their advantage and social inequality deepened. Under the circumstances as Ihonvbere observes, the state was ‘the largest investor, employer, importer

²²⁸ Chapter 2 (2. 2). See Timothy Fernyhough ‘Human Rights and Pre-colonial Africa’ in Ronald Cohen, Goran Hyden and Winston P. Nagan (ed) *Human Rights and Governance in Africa* (Gainesville: University of Florida, 1993) 39.

²²⁹ Paul Carnmack, David Pool and William Tordoff (eds) *Politics: A Comparative Introduction* (London: Macmillan Education Ltd, 1988) 12.

²³⁰ Walter Rodney How *Europe Underdeveloped Africa* (Dar es Salaam: Tanzania Publishing House, 1972) 162.

²³¹ Ibid.

²³² Chapter 2 (2. 3).

²³³ Baffour Agyeman-Duah ‘Global Transformation and Political Reforms in Africa: The Case of Ghana’ in George Akeya Agbango (ed) *Issues and Trends in Contemporary African Politics: Stability, Development and Democratization* (New York: Peter Lang, Publishing Inc 1998) 125.

and exporter'.²³⁴ With economic stagnation, there were high levels of unemployment and social inequality, a dependency relationship blossomed, associational spaces were restricted and democracy at its lowest.

When the global economic crisis of the 1980s struck, African economies were worst hit. The World Bank responded by imposing 'a structural adjustment programme' which linked 'economic progress with democracy'.²³⁵ This new 'economic reform package' demystified state institutions, opened new spaces, revitalised African economies and with this came a renewed interest in democracy. Ihonvbere could not have put it any better than when he states that:

With structural adjustment, there was the proletarianization of the middle class bringing with it intellectuals and professionals into the ranks of workers, peasants and unemployed. The state and its institutions were demystified. Popular groups were encouraged to form new organizations, ask new questions and make demands for accountability, participation, social justice and basic human needs on the state. There were renewed interests in democracy, democratization, empowerment and the need to mount a fundamental challenge to the dictators on the African landscape.²³⁶

Whereas it is argued that economic progress provides much more impetus for democracy, does this mean that poorer countries cannot have democracy? It is possible to have democracy in poorer countries provided the population is educated and democratic institutions do exist. Indeed, there are poor countries that can be held to have democracy such as Ghana, Mauritius and Zambia, but sustainability of democracy in these poorer countries then becomes the central issue.²³⁷ Poor countries are more vulnerable to economic shocks and the emergence of military dictatorships. Przerworski has noted, that 'democracy may survive in poor countries given good levels of education of the population and existence of institutions but unlike

²³⁴ Julius O Ihonvbere, 'Democratization in Africa: Challenges and Prospects' in George Akeya Agbango (ed) *Issues and Trends in Contemporary African Politics: Stability, Development and Democratization* (New York: Peter Lang Publishing Inc.1988) 288.

²³⁵ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington, D.C: The World Bank, 1989).

²³⁶ Julius O. Ihonvbere 'Democratization in Africa: Challenges and Prospects' in George Akeya Agbango (ed) *Issues and Trends in Contemporary African Politics: Stability, Development and Democratization* (New York: Peter Lang Publishing Inc.1998) 295.

²³⁷ According to the Freedom House report 'Freedom in the World 2014', China and Indonesia have good economies but experienced a backlash in their democracy ratings in 2013 available at <http://www.freedomhouse.org/report/freedom-world/free> (accessed on 17 May 2014).

wealthier countries, poor countries are particularly more vulnerable to military interventions and machination of rulers'.²³⁸

A wealthier and more educated population will encourage the spread of democratic institutions, and is more inclined to insist on civic obligations and equal participation of citizens rendering democracy and ultimately political equality possible.

3. 2. 2. Civic Culture

Civic culture is an important determinant of democracy. But what is civic culture? Civic culture refers to a 'system of values and beliefs' that defines the 'context and meaning of political actions'.²³⁹ Is there civic culture in Africa?

Answering this question poses a significant challenge; first African society is not homogenous and had varying experiences during colonial rule under the British and the French. Whereas the British used 'indirect rule', the French had more direct contact with the population, behavioural patterns therefore vary widely within Africa.

Generally, African society is known to have been built around 'traditions and myths' which varied from community to community. These 'myths of origin' defined societal political cultures. African political culture had a strong sense of 'deference' to leadership. A leader in Africa was rarely questioned. For example, among the Baganda, it was always believed that a leader is 'always right'. Africans believe leaders are born and power comes from God. Leaders demand loyalty from their subjects and seniority is extolled. African society attached a lot of importance to 'duties' to the community and 'individual rights' were not pronounced.²⁴⁰

During colonialism, there was little regard for traditional values. Leadership was based on 'rules and orders' and much force was used. There was hardly any 'participation or reciprocity'.²⁴¹ African response took the form of confrontation and rebellion against a feeling of domination. The new sense of social and political consciousness that developed among Africans during the pro-independence movement is not known to have lasted beyond the independence struggles as the political elites who took charge of the post-colonial state are

²³⁸ Przeworski op cit note 200 at 137-273.

²³⁹ George Sorensen *Democracy and Democratization* (Boulder, Colorado: West View, 1993) 26.

²⁴⁰ Patrick Chabal *Power in Africa: An essay in Political Competition* (Hounds mill, Basingstoke: Macmillan Press, 1994) 87.

²⁴¹ Bayart op cit note 91 at 112.

known to have resorted to patronage politics.²⁴² Therefore history does not show us any attempt by the African leadership to develop a consensus on democracy.

A scrutiny of African political systems also reveals that one of its most apparent weaknesses is the weakness of the 'civic public realm'.²⁴³ Three reasons can be advanced to explain this weakness: one, that individual citizens have little or no loyalty to institutions of governance. Loyalty tilts towards the home, community or religion. Africans believe more in their tribes, clans or religions. Second, is political patronage. Governance is based more on the personal attributes of a leader at the expense of institutions. This 'personal rule' phenomenon endangers the evolution of institutions. Third, is the transient nature of social relations among people. Africans, it is argued, tend not to have a strong attachment to their community, and easily adopt more rewarding relations as situations change.²⁴⁴

It is further argued that a common feature of African politics is the prevalence of informal over formal systems of governance. African politics is personalised. African politics, it is argued, relies more on 'power than on exchange, state rather than the market'.²⁴⁵

Developing a civic culture supportive of democracy in Africa has to overcome the challenge of leadership. African leadership does not have a history of positive practices of democracy. African leaders have a negative perception of democracy and view it as 'foreign'. No one portrays this negative attitude towards democracy better than Salim, former Secretary General of the then Organisation of African Unity (OAU) who said, 'democracy is not a revelation, how it is expressed, how it is given concrete form, of necessity, varies from society to society. One should avoid the temptation of decreeing a so-called perfect model of democracy'.²⁴⁶

The lack of a civic culture in Africa creates a backlash for NGOs as well. Without a prodemocratic consensus, African states would continue to restrict the space for NGOs choking them in the process and continue to view them as 'alien, subversive, seditious and unpatriotic'.²⁴⁷ Other factors to consider in promoting a civic culture would be to provide civic education to the community in order to develop a politically conscious population,

²⁴² Goran Hyden *Beyond Ujamaa in Tanzania: Underdevelopment and Un-captured Peasantry* (London: Heinemann, 1980) 30.

²⁴³ Peter Ekeh 'Colonialism and the Two Publics in Africa: A Theoretical Statement,' (1975) 17 1 *Comparative Studies in Society and History* 91-112.

²⁴⁴ Hyden op cit note 103 at 271-274.

²⁴⁵ Ibid.

²⁴⁶ Salim Ahmed Salim (November 1990) *Africa Recovery* 29.

²⁴⁷ Makau op cit note 10 at 27.

increase information flow using social media, and increase literacy levels to enhance participation in decision making.

3. 2. 3. State-NGO relations

A discussion of state-NGO relations raises an important issue, whether the state is part of society or whether the two are distinct spaces? Two significant viewpoints have been advanced. First, Hegel's theory of the 'modern state and civil society' advances the view that the state is different from society and in a democracy, the state is controlled by and serves the society.²⁴⁸ This Hegelian view sees the state and civil society as distinct spaces, each one seeking to influence the other.²⁴⁹ This liberal view is hinged on the human desire for freedom which is recognised by the state through the grant of rights.²⁵⁰ On the other hand, Marx's social theory posits that the state is a product of society and therefore the state and society are one and occupy the same space.²⁵¹

The two theories are of significance to our discourse. Whereas the liberal theory would be favourable to the opening of 'associational spaces' to advance democracy, the marxist theory has compelling validity to advocates of the 'communitarian theory' who prioritise duties and obligations against individual rights. State-society relations are then perceived differently. For example, in Tanzania under Ujamaa, the community was considered supreme. NGOs, until the 1980s would not be welcome. Nyerere, who was the architect of 'Ujamaa', is on record for having applauded the 'communitarian approach of collective rights'.²⁵²

Notwithstanding the two theoretical perspectives on state-society relations, democratic theory considers the relations between the two, a key ingredient of democracy. The theory raises three concerns; how to safeguard liberties, how to exercise restraint on government and how to secure a mechanism of popular control of authority.

²⁴⁸ Robert M MacIver 'The Community and the State', idem (ed) *The Web of Government* (New York: Macmillan, 1948) 192-208.

²⁴⁹ Z.A Pelczynski 'Introduction: The Significance of Hegel's Separation of the State and Civil Society' in Z.A Pelczynski (ed) *The State and Civil Society: Studies in Hegel's Political Philosophy* (Cambridge: Cambridge University Press, 1984) 1-13.

²⁵⁰ Ibid.

²⁵¹ Victor Azarya 'Reordering State-Society Relations: Incorporation and Disengagement' in Donald Rothschild and Naomi Chazan (ed) *The Precarious Balance: State and Society in Africa* (Boulder, Colorado: West view Press, 1988) 10.

²⁵² Julius Kambarage Nyerere *Ujamaa: essays on Socialism* (Dar es Salaam: Oxford University Press, 1968) 11-12.

Addressing these three interrelated concerns requires the presence of active pressure groups. In a pluralist society, the presence of a ‘complex of independent organizations and social groupings’ mediating between the individual and the state is healthy for democracy.²⁵³ Apart from holding the state accountable for its actions, popular groups maintain a delicate balance, on one hand keeping the people involved in public policy and decision making and on the other making the state aware of people’s demands. Eckstein reaffirms this in his theory of ‘stable democracy’ when he argues that, ‘stability depends upon patterns of authority within the government system being congruent with those in other social institutions’.²⁵⁴ It would be in the interest of the state, in my view, and more broadly democracy, if the state encouraged the existence of interest groups to mediate between it and society.

In conclusion, the deepening of democracy in Africa would require economic progress, promotion of a civic culture and improvement of state-NGO relations. Broadening the ‘space’ would require addressing an additional challenge of leadership in Africa which, as noted above, harbours negative attitudes towards democracy. This enabling environment is not only conducive to the growth of democracy but would also improve the spaces available for civic participation and NGO sustainability in particular. If democracy were to be deepened, what model of democracy would enhance civic participation and the free and effective functioning of NGOs in Africa?

3.3. MODELS OF DEMOCRACY

There are several modes of governance besides democracy. Other forms include military rule, one-party rule, aristocracy or personal rule, however, democracy is the most preferred form because it guarantees political equality as noted above.²⁵⁵

In discussing existing models of democracy and making a case for the most appropriate model that affords the highest levels of civic participation, the discussion is guided by two major considerations: the ultimate goal of democracy which is political equality and the core

²⁵³ Pateman op cit note 187 at 71.

²⁵⁴ Eckstein *The Theory in Division and Cohesion in Democracy: A Study of Norway* (Princeton: Princeton University Press, 1966).

²⁵⁵ Pinkney op cit note 214 at 7.

mandate of NGOs being the protection of the individual against arbitrary action of the state, and keeping the political space open for other democratic forces to operate.²⁵⁶

There are several models of democracy but for our discussion the study shall confine itself to only three which are relevant to Africa namely; liberal democracy, electoral democracy and participatory democracy.

3. 3. 1. Liberal Democracy

Liberal democracy is what post-colonial Africa inherited at independence. Under this model of democracy the powers of government are limited by law and laid out in the constitution. At independence many African states inherited a ‘Westminster style’ of government with a ‘Westminster type’ constitution.²⁵⁷ The Westminster system provided for a parliamentary government and a two-party system.²⁵⁸ The powers of government were spread out between the executive, legislature and the judiciary.²⁵⁹ The independence constitution had an elaborate ‘bill of rights’. For example, the Constitution of Uganda, 1962 provided for ‘equality before the law, freedom of speech, association and assembly, right to vote and freedom from discrimination.’²⁶⁰

Despite the extensive provision of rights in these constitutions, they also contained ‘drawback’ clauses providing restrictions to these rights. For example, Article 26(2) of the constitution provided for the limitation of the same rights in the interest of defence, public safety, public order, public morality or public health; for the purpose of protecting the rights of others or to impose restrictions on public officers.²⁶¹ The independence constitutions were also weak on protective mechanisms rendering these ‘rights’ more of a myth than a reality.

There were other positive features of this model, for example, clear separation of the state from society, individuals and groups were well represented and protected from other groups

²⁵⁶ Laurie S Wiseberg ‘*Defending Human Rights Defenders: The Importance of Freedom of Association for Human Rights NGOs*’ (Montreal: International Centre for Democratic Development, 1993) 4-6.

²⁵⁷ Naomi Chazan ‘Between Liberalism and Statism: African Political Cultures and Democracy’ in Larry Diamond (ed) *Political Culture and Democracy in Developing Countries* (Boulder and London: Lynne Publishers, 1993) 78.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Article 26 (1) of Uganda Constitution of 1962.

²⁶¹ Article 26(2) of Uganda Constitution of 1962

and the state, and representative government through competitive elections was encouraged.²⁶²

Liberal democracy had some negative attributes too. The system allowed limited citizen participation. Beyond elections, the citizen had limited room for making the state accountable for its actions. As Dryzek noted, liberal democracy provided limited channels for social movements and organised interest groups to exercise influence on government and placed constitutional restrictions on democratic rights in the interest of security.²⁶³

In this sense liberal democracy is inconsistent with the democratic theory. It champions representative democracy in contrast to the idea of popular power, because instead of advancing sovereignty of the people it heralds the sovereignty of the law.²⁶⁴ Democracy is reduced to multi-party electoral competition and little in terms of active civic participation. The idea of ‘group competition’ is however positive in the sense that interest groups through competition encourage ‘bargaining, consensus-building and inclusiveness’.²⁶⁵ However, in the negative sense, this group competition neglects accountability and the rights of individuals.

As a model of democracy, liberal democracy upholds the ‘protectionist view’ of democracy under which a citizen is protected against the state. To critics this is ‘negative freedom’ given that the focus is on the individual rather than the collective.²⁶⁶ Individual rights override community interests, much to the dislike of the community.

Given its representative character and limited application of popular rule, African leaders found it easy to adopt liberal democracy at the time of independence although they abandoned it within ten years in preference to one-party rule. To African leaders this model of democracy demanded more in terms of structures and less accountability, little in terms of citizen participation, and although it offered some measure of protection against the state, it was less responsive to civil society. The African state found it easier to restrict freedoms, and as noted in our earlier discussion, the political elite found it easier to exploit the population. Although it provided for competitive elections, it lacked a mechanism to safeguard the independence elections from ethnic, social and political bias.

²⁶² Pinkney op cit note 214 at 11.

²⁶³ John S Dryzek and Patrick Dunleavy *Theories of the Democratic State* (Basingstoke: Palgrave, Macmillan Publishers, 2009) 18.

²⁶⁴ Claude Ake ‘The Travails of Democracy’ in Claude Ake (ed) *The Feasibility of Democracy in Africa* (Dakar: Council for the Development of Social Science Research in Africa, 2003) 9.

²⁶⁵ Ibid

²⁶⁶ Ibid.

As a model of democracy, liberal democracy falls short of guaranteeing democracy, citizen participation, and accountable government and ultimately does not guarantee political equality. As Decalo observed and with whom this thesis agrees, ‘liberal democracy satisfies political pluralism but not democratic deepening’.²⁶⁷

Liberal democracy, as the discussion has shown, falls short of guaranteeing political equality and does not provide the environmental conditions necessary for the growth of democracy in Africa. It is therefore contended in this thesis that liberal democracy would not enhance civic participation, as it is not the most suitable model of democracy for NGOs in Africa.

3. 3. 2. Electoral Democracy

Electoral democracy mirrors liberal democracy in so far as it champions representative government and competitive elections. Electoral democracy, as a model of democracy, affords citizens the right to vote in elections. It is a model of democracy that African states adopted at independence, then abandoned when they introduced one-party rule. It was also re-introduced following the democratic reform process in the 1980s. When ‘structural adjustment’ was imposed on the African states in the 1980s, there was a renewed interest in democracy as multi-party competition was re-introduced.²⁶⁸ This followed the amendment of the one-party state constitution in many countries of Africa that had hitherto provided for one-party rule. For example, Kenya, Tanzania, Uganda, Malawi, and Zambia all held multi-party elections in the 1980s or early 1990s.

As observed in the earlier discussion of the competitive theory of democracy, competition for votes is presumed to provide a mechanism of control of the leaders by non-leaders.²⁶⁹ This presumption raises a number of issues; does the constitutional framework guarantee fairness in electoral competition? Are there sufficient safeguards to resolve disputes? Are governments once elected responsive to the demands of their people?

²⁶⁷ Samuel Decalo ‘The Process, Prospects and Constraints of Democratization in Africa’ (1992) 91 *African Affairs* 8.

²⁶⁸ World Bank op cit note 229.

²⁶⁹ Pateman op cit note 187 at 269.

In most of sub-Saharan Africa, the constitution provides for the right to vote.²⁷⁰ The right to universal adult suffrage is always entrenched. An Electoral Commission to conduct elections is provided for but several issues arise with respect to the appointment process of the electoral body, the rules governing elections, and the participation of civil society in the electoral process. Is the electoral body independent? Are the rules fair to all? Is civil society participation recognised?

The independence of the electoral body has been a subject of dispute in most countries in Africa. The electoral body is often appointed by the party in power and its ability to render a fair and impartial vote is always in question.²⁷¹ In Kenya, elections held in 2007 were highly disputed and resulted in post-election violence. In Uganda, elections held in 1980 were disputed and resulted in a civil war that brought the NRM government to power in 1986. Subsequent elections held in Uganda in 2001, 2006 and 2011 have led to similar electoral disputes. In many other countries such as Zimbabwe, Ethiopia, Burundi, the Democratic Republic of Congo, the story is similar. In each of these countries citizens have disputed the outcome of the vote, the independence of the electoral body, the fairness of the election rules, and have often contested the disenfranchisement of citizens.

What about dispute resolution? Are there adequate mechanisms to provide redress? The fairness of the courts as well as the electoral body are key determinants. The independence of courts is dictated by the appointment process, the electoral rules and the parties to the dispute. Bias may always be imputed where courts are perceived to be less independent, for example, in Uganda judges have been accused of bias in deciding election disputes.²⁷²

The overriding issue is whether electoral democracy can achieve political equality and guarantee active civic participation. Despite elections being held in many countries in Africa, degrees of freedom and fairness vary significantly, and structural problems, mainly poverty, inequality, corruption, incompetence and ethnic and religious conflict continue to afflict the region. There is always the danger that as soon as the voters have cast their votes, their existence as a group lapses until the time when another election is held.²⁷³ In many respects electoral democracy continues to harbour similar constraints like liberal democracy and as a

²⁷⁰ Article 59(1) of the Constitution of Uganda, 1995 provides that ‘every citizen of Uganda of eighteen years or above has a right to vote’.

²⁷¹ Article 62 of the Constitution of Uganda, 1995 provides that ‘the Electoral Commission shall be independent’. The practice is however different.

²⁷² Chirwa and Nijzink op cit note 198 at 57.

²⁷³ Rousseau, John Stuart Mill and G D H Cole quoted in ‘a participatory theory of democracy’ Carole Pateman (ed) *Participation and Democratic Theory* (London: Cambridge University Press, 1970) 40.

model of democracy affords limited civic participation beyond elections. For the reasons noted above, this thesis argues that electoral democracy is not the best model of democracy to guarantee equality and the free functioning of NGOs in Africa.

3.3.3. Participatory Democracy

Democratic Theory makes a presumption that to achieve political equality, democracy must defend liberties, broaden citizen participation in decision making and respect minorities. Each of these interrelated goals carries with it the *idea of participation*. The idea of representative government that is epitomised in both the liberal and electoral models of democracy is limited in its emphasis on the centrality of the individual in the decision making process. As noted earlier, the liberal model of democracy upholds the supremacy of the law. The electoral model of democracy, as discussed above, focuses more on competition for elections.

The participatory model of democracy is to be conceptualised as one with an edge above the other two; for it combines both representation and participation of the individual in governance. At the core of a participatory political system is the centrality of the individual in the decision-making process. When individuals are enabled to decide, the ‘policy result’ is more likely to protect individual rights and interests and further public interest.²⁷⁴ This brings to the fore the idea of the ‘common good’. Is it only for the individual to decide? Participatory theorists argue that where organised associations are formed, these should be ‘as numerous and as equal in political power’.²⁷⁵ In this sense this model of democracy advocates for the existence of associations which should be ‘free to control their affairs without state interference’ as part of a democracy. But what else does participation offer?

Participation can lead to fair sharing and removal of existing inequalities. When individuals decide, both their ‘private and public interests’ are protected by the law because the law then serves individual actions. Rousseau argues that participation ‘ensures good government’ because its central function is an ‘educative one’. The individual learns to be a ‘public and private citizen’.²⁷⁶ This thinking lends support to the argument that ‘it is of no use having universal suffrage’ if an individual has not been prepared for his participation at the local

²⁷⁴ Ibid. 23-26.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

level where he learns democracy. Through education, the individual would acquire civic values and leadership qualities.

Beyond education perhaps the most significant value of participation is its guarantee of ‘freedom’. It is argued in this thesis that when an individual participates, he or she becomes socially responsible for his actions and his or her sense of freedom is increased. The individual acquires greater control over his or her course of life and the environment. What remains doubtful is whether such freedom would not easily come under threat from existing institutions which seek to impose their authority over the individual’.²⁷⁷

It is also argued that participation increases among individuals a ‘sense of belonging’ to the community. Where individuals participate, they see themselves ‘as one of’, and inequalities among them, whether rich or poor, matter less.

Participatory democracy as a model of democracy brings with it the essential elements of a system of governance that would place the individual at the centre of the decision making process. It recognizes and accommodates the idea of the plurality of associations and the value of freedom. For countries that are in a transition to democracy particularly the countries of sub-Saharan Africa, this model of democracy would be best placed to address the current deficit and accord the highest levels of civic and NGO participation in governance. Both the liberal and the electoral model of democracy fall short of this important principle and have, despite being adopted since independence, failed to deliver on this promise. This thesis therefore agrees with Schumpeter, that ‘no system which debar the mass of non-rulers from playing a part in the process of decision-making can be deemed democratic and no definition of democracy that excludes such a role is tenable’.²⁷⁸ Participatory democracy fits our theory of democracy as applied to this study.

3. 4. CONCLUSION

This Chapter set out to review the current theories of democracy in order to adapt a model of democracy that would allow the free and effective functioning of NGOs in Africa. Besides adapting the relevant conceptual framework, the thesis sets out to inquire into the conditions necessary for such a model to thrive.

²⁷⁷ Ibid.

²⁷⁸ A Joseph Schumpeter *Capitalism, Socialism and Democracy* (London: Unwin University Books, 1952) 242.

Democracy upholds the principle of active civic participation in the decision-making process, political equality and state responsiveness to the preferences of its citizens. Participatory democracy speaks to the three core concerns of democracy namely: who controls power, how is power distributed and the relationship between those who are governed and those who govern.

With regard to the issue of who controls power, participatory democracy recognises that the majority make the decisions while respecting minority views. All active and legitimate groups are heard in the decision-making process. The state is responsive to the demands of its citizens. Under this model of democracy both contestation and participation are possible. Representation is based on majority votes provided the rules of fair play apply. Competition for position of leadership is allowed based on fair rules of the game. Within this conceptual framework, the rights to freedom of speech, association and assembly are respected.

With respect to the issue of how power is distributed, the model provides that there is a constitutional framework that influences the conduct of government. A separation of powers between the executive, legislature and judiciary exists. All the three organs of government respect the institutional mandate of each other. For example, the executive respects the decisions of the courts and the legislative and oversight functions of parliament. Under this model, the institutional framework in place provides for all legitimate voices to be heard: the youth, women, disabled, refugees and the minorities. The decisions made are for the common good, and individual interest is secondary.

The model also addresses itself to the relationship between those who govern and the governed. It provides for a constitutional framework that has safeguards to deter the state from taking arbitrary actions against individuals and respects individual liberties. It provides for a bill of rights to promote participation and active citizenship. Finally, the model recognises the value of organised voluntary associations including NGOs in the formulation of public policies.

Participatory democracy would also require an enabling environment to thrive. Such an environment would be dictated by the degree of economic development, civic culture and existing state-NGO relations. The downside to this model is, to the chagrin of many states, it calls for a leadership that subscribes to democracy as a universal value.

In Chapter Four, the discussion addresses the vexed issue of legitimacy of NGOs in Eastern and Southern Africa to understand the underlying state-NGO tensions and challenges to active civic participation in the region.

CHAPTER 4

THE LEGITIMACY OF NGOS

4. 0. INTRODUCTION

In Chapter Three, the discussion on the theoretical perspectives of democracy in Africa underscored three important elements of democracy: active civic participation, the protection of liberties and state responsiveness to citizen demands.²⁷⁹ It was noted that participation promotes active citizenship which in turn confers a sense of freedom to the individual.²⁸⁰ Democracy, it was argued, depends on the existence of an enabling environment which is often dictated by the degree of economic development, civic culture and the nature of state-NGO relations in a given state.²⁸¹

Where an enabling environment exists, pressure groups have sought to involve people in the decision- making process and in holding the state accountable for its actions.²⁸² Through NGOs, individuals enjoy freedom of expression and association, and are able to participate in their own governance, and through participation, individuals promote critical consciousness and decision making.²⁸³

Notwithstanding the invaluable contribution NGOs make to democracy, NGOs have come under strong scrutiny in East and Southern Africa.²⁸⁴ NGOs are increasingly being challenged about their legitimacy and democratic governance practices. Difficult questions are being asked. What are their agendas? Are these NGOs accountable and transparent? Are they independent, fair, and credible? How participatory and democratic are they?²⁸⁵

²⁷⁹ Chapter 3 (section 3.1).

²⁸⁰ Chapter 3 (section 3. 1. 3).

²⁸¹ Chapter 3 (section 3. 2).

²⁸² Chapter 3 (section 3. 3. 3).

²⁸³ M Darrow and A Tomas 'Power, Capture and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 *Human Rights Quarterly* 471-538 at 538. See also F Butler 'Building a Human Rights Culture' in Harvey (ed) *Human Rights in the Community: Rights as Agents of Change* (Oxford: Hart, 2005) 63-78.

²⁸⁴ Mutua op cit note 10 at 5-7.

²⁸⁵ M Moore and S Stewart 'Corporate Governance for NGOs?' in D Eade (ed) *Development NGOs and Civil Society* (Oxfam GB, 2000) 80 -81.

This Chapter discusses the vexed issue of the legitimacy of NGOs in Eastern and Southern Africa. What are the underlying causes of state-NGO tensions and, what are the challenges to the credibility and effectiveness of NGOs?

4. 1. THE CONCEPT OF THE LEGITIMACY OF NGOs

Given the varied application of the term ‘legitimacy’, this section begins with a discussion of the term and how it applies to NGOs. ‘Legitimacy’ as applied to NGOs has a broad meaning. Brown defines legitimacy to be a right for an organisation to be and to do something in society, in this sense such organization being lawful, admissible and justified in its course of action.²⁸⁶ Legitimacy could also mean that the institution acts with authority that is accepted as proper, moral and just.²⁸⁷ Relatedly, legitimacy could as well refer to the beliefs and attitudes that people have towards NGOs.²⁸⁸ The beliefs and attitudes are often dictated by several factors: indigenoussness, effectiveness, representativeness, institutionalisation, responsiveness and sustainability of an organisation.²⁸⁹

For NGOs to be legitimate, they must be accountable.²⁹⁰ But what does accountability mean? ‘Accountability’ means taking responsibility for one’s actions or presenting accounts to someone else.²⁹¹ Kakumba and Fourie identify three reasons why accountability is important to NGOs: to check abuse of authority by the leaders of NGOs, to provide assurance for the proper use of resources, and to promote continuous improvement in the delivery of services.²⁹² Accountability would therefore go beyond compliance with laws to ensuring proper delivery of justice and the participation of beneficiaries in decision- making.²⁹³

²⁸⁶ L David Brown ‘Civil Society Legitimacy: A Discussion Guide’ in L David Brown (ed) *Practice Research Engagement for Civil Society in a Globalizing World* (Cambridge, Mass: Hauser Centre, 2001) 63-80.

²⁸⁷ Kenneth Anderson ‘The Ottawa Convention, Banning Landmines: The Role of International Non-Governmental Organizations and the Idea of International Civil Society’ (2000) 11 *European Journal of International Law* 91 at 92.

²⁸⁸ Charles Taylor *Reconciling Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill Queen’s University Press, 1993) 64.

²⁸⁹ Mutua op cit note 10 at 26.

²⁹⁰ International Council for Human Rights Policy *Deserving Trust*, available, www.iiied.Org/pubs/pdfs/Go2251.pdf

²⁹¹ Ibid. 12.

²⁹² U Kakumba and D J Fourie ‘Revitalizing Accountability in Public Management Reform: Issues and Challenges for Developing Countries’ (2007) 42 (7) *Journal of Public Administration* 650- 663.

²⁹³ Darrow and Tomas op cit note 276 at 488 and 514.

Murungi outlines five sources of legitimacy for NGOs that are equally relevant to our discussion:

- First, is the strong moral conviction of an NGO to articulate public concerns on the basis of universally recognised rights and freedoms of speech, assembly and association;
- Second, is political legitimacy based on community approval of the voluntary association in which the association asserts peoples' sovereignty;
- Third, is performance legitimacy based on results arising from the NGO's activities, knowledge, and expertise.
- Fourth, is legal legitimacy arising from compliance with the statutory requirements. Legal recognition is however a double-edged sword that could enhance or undermine the credibility of an organisation since registration could be extended to less credible groups and,
- Fifth, is legitimacy derived from the accountability and transparency of the NGO.²⁹⁴

These five sources can be summed up into five factors that affect the legitimacy of NGOs: legality, indigenusness, independence, representativeness, and accountability, to which the study now turns.

4. 2. LEGALITY OF NGOs

The status of NGOs under international law has been a subject of debate. Do NGOs have any rights under international law? If not, what justifies their existence and the right to operate? The liberal school of thought holds that states are the primary duty bearers and it is the duty of states to protect individuals not just against violations of their rights by the state and its agents, but also against acts committed by private actors that violate human rights.²⁹⁵ According to this view, human rights are state-centric and it is the obligation of states to ensure that private actors do not violate human rights.²⁹⁶ Even though NGOs are associations of individuals, this school of thought does not recognise the existence of NGOs as rights

²⁹⁴ Betty K Murungi 'To Whom, for What, And About What? The Legitimacy of Human Rights NGOs in Kenya in Makau Mutua (ed) *Human Rights NGOs in East Africa Political and Normative Tensions* (Philadelphia: University of Pennsylvania Press, 2006) 37-47.

²⁹⁵ General Comment No 31 on Article 2 of the International Covenant on Civil and Political Rights (ICCPR), entered into force 23 March 1976, General Assembly Resolution 2200 A (xxiii), available at UN Doc. CCPR/74/CRP.4/Rev.6 (2004).

²⁹⁶ Articles 1 and 55 of the United Nations Charter, Adopted 26 June 1945, entered into force 24 October 1945, available at 557 U.N.T.S. 143 [accessed on 19 September 2012].

holders or duty bearers under human rights and international public law. Brownlie argues that ‘to qualify as a legal entity under international law, an entity must have the capacities to make claims in respect of breaches of international law, make treaties and agreements valid on the international plane and enjoy the privileges and immunities from national jurisdiction’.²⁹⁷

Notwithstanding this view, international law recognises NGOs as a means through which individuals can exercise their rights. These rights have been codified in various international instruments to which states are parties. Beginning with the Universal Declaration of Human Rights (UDHR), the duty of every individual to promote respect for these rights has been recognised. The UDHR obliges ‘every individual and every organ of society to strive by teaching and education to promote respect for these rights and freedoms’.²⁹⁸ The right of individuals to freedom of peaceful assembly and association has also been recognised.²⁹⁹ Though not legally binding, the rights enshrined in the UDHR have been codified in legally binding instruments to which states are parties.

The International Covenant on Civil and Political Rights (ICCPR), mindful of the obligation of states to promote universal respect for, and observance of, human rights and freedoms, provides that the ‘individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the Covenant’.³⁰⁰ Likewise, the UN Declaration of Human Rights Defenders recognizes the right of everyone, individually, or in association with others, to promote and protect human rights and fundamental freedoms.³⁰¹

Within the African human rights system, the African Charter on Human and Peoples’ Rights (African Charter), ratified by African states, provides a more expansive approach to the issue of rights and duties.³⁰² The African Charter provides that ‘. . . the enjoyment of rights and

²⁹⁷ Ian Brownlie *Principles of International Law* (Oxford: Oxford University Press, 1998) 57.

²⁹⁸ Preamble to the Universal Declaration of Human Rights, (UDHR) General Assembly Resolution 217a (111) 10 December 1948, available at UN. Doc. A/810 at 71 (1948) [accessed on 19 September 2012].

²⁹⁹ Ibid Article 20(1) of the UDHR.

³⁰⁰ Preamble to the International Covenant on Civil and Political Rights (1966), General Assembly Resolution 2200A (xxi) 16 December 1966, available at 21 UN.GAOR Supp. (No 16) at 52, U.N.Doc.A/6316 (1966), 999 U.N.T.S. 171.

³⁰¹ Article 5 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Adopted on 9 December 1998, GA Res A/53/144, available at E/CN.4/2000/95 [accessed on 19 September 2012].

³⁰² For example, the status of ratification of the African Charter on Human and Peoples Rights’ (ACHPR) of some selected countries stands as follows: Ethiopia (15 June 1998), Kenya (23 January 1992), Malawi (17 November 1989), Namibia (30 July 1992), Uganda (10 May 1986), South Africa (9 July 1996), and Zimbabwe (30 May 1986).

freedoms also implies the performance of duties on the part of everyone'.³⁰³ Unlike the ICCPR, the African Charter does not place the responsibility for human rights promotion, defence, and protection solely on the state but the society as a whole.³⁰⁴ The individual therefore is not only a bearer of rights but has corresponding duties, either alone or in association with others.³⁰⁵ In view of this finding, Nassali argues that 'although the individual is the principal and central subject of human rights, NGOs, as a collection of individuals who come together for collective action also have the same responsibilities as the individuals therein'.³⁰⁶

At the national level, states have ratified these international and regional human rights instruments, thereby granting citizens the rights to establish NGOs.³⁰⁷ All the constitutions of countries in sub-Saharan Africa provide for the right to freedom of association.³⁰⁸ National constitutions bear provisions that confer responsibilities to protect rights on states as well as rights to individuals to form associations. For example, the Constitution of Ethiopia recognises the right of every person to freedom of association for any cause or purpose with the exception of organisations formed in violation of laws, or illegally to subvert the constitutional order, or which promote activities that are prohibited.³⁰⁹ The Constitution of Uganda recognises the right of every person to freedom of association, which includes the freedom to form and join associations, or unions, including trade unions and political and other civic organisations.³¹⁰ The Constitution of Zimbabwe recognises the right of every person to freedom of assembly and association, and the right not to assemble or associate with others.³¹¹ The Constitution of Namibia, likewise, provides for freedom of association, which includes freedom to form and join associations or unions, including trade unions and political parties.³¹²

³⁰³ Preamble to the African Charter on Human and Peoples' Rights, Adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5. [accessed on 19 September 2012].

³⁰⁴ Ibid. Article 27(1) of the African Charter on Human and Peoples' Rights (1981).

³⁰⁵ Ibid. Article 10(1) of the African Charter on Human and Peoples' Rights (1981).

³⁰⁶ Nassali op cit note 74 at 57.

³⁰⁷ For example, the status of ratification of the International Covenant on Civil and Political Rights (CCPR) of some selected countries stands as follows: Ethiopia (11 June 1993), Kenya (1 May 1972), Malawi (22 December 1993), Namibia (28 November 1994), South Africa (10 December 1998), Uganda (21 June 1995) and Zimbabwe (12 May 1991).

³⁰⁸ Ethiopia, article 31, Kenya, article 36(1), Malawi, article 32(1), Namibia, article 21 (e), South Africa, Clause 18, Tanzania, article 20, Uganda, article 29, and Zimbabwe, article 58(1).

³⁰⁹ Article 31 of the Ethiopian Constitution, 1995, Proclamation No 1 of 1995.

³¹⁰ Article 29(1) (e) of the Constitution of the Republic of Uganda (as amended) 1995.

³¹¹ Article 58(1) of the Constitution of Zimbabwe, (amendment) No.20, 2013.

³¹² Article 21 (e) of the Constitution of Namibia, 1990.

Individuals therefore have the right to form NGOs under national and international law. And upon registration such NGOs acquire legal recognition. NGOs also acquire ‘derivative legality’ upon the grant of ‘observer Status’ before regional bodies.³¹³ Despite this formal recognition, NGOs remain curious phenomena. Are they an imposition of the West? This has attracted considerable debate. Are they indigenous, foreign or neo-liberal?

4. 3. NGOs AS A NEO-LIBERAL CONSTRUCT

‘NGOs’, like democracy, is a contested concept.³¹⁴ NGOs, it has been argued, are a ‘neo-liberal’ construct.³¹⁵ They arose in the 1980s and proliferated in the 1990s following the collapse of the Soviet Union and East European regimes, and the subsequent democratisation drive in Africa.³¹⁶ With the collapse of socialism, the post-colonial state, unable to deliver services without the support of its benefactors, had to institute democratic reforms.³¹⁷

As already noted in Chapter Two, the democratic reform process has blossomed into a ‘global associational revolution’.³¹⁸ Within this revolution are associational groupings, civil society organisations (CSOs), and NGOs.³¹⁹ Broadly speaking, CSOs and NGOs are part of ‘civil society’, a political expression which serves as a counter-weight to state and corporate power.³²⁰ Unlike civil society in Europe that is a product of the bourgeois revolution, the rise of NGOs in sub-Saharan Africa is seen more as a direct response to the dysfunction and despotism of the post-colonial state.³²¹ NGOs are promoted as new agents of change, custodians of ‘good governance’ and a recipe for the better delivery of services.³²² Makau argues, that ‘the whittling away of absolute power due to the end of Cold War politics

³¹³ See ECOSOC Resolution 1996/31 adopted at the 49th Plenary Meeting of ECOSOC on 25th July, 1996, ACHPR Resolution 33(XX) 99 adopted within the framework of Article 45(1) of the ACHPR, and Council of Europe, Committee of Ministers Resolution (2003) 8, adopted by the Committee of Ministers on 19 December 2003.

³¹⁴ Smith op cit note 59 at 109-273.

³¹⁵ Michael Bratton ‘Beyond the State: Civil Society and Associational life in Africa’ (1989) 41 (3) *World Politics* 405, at 407-430.

³¹⁶ I G Shivji ‘Globalization and Popular Resistance’ in Joseph Semboja, Juma Mwapachu & Eduard Jansen (eds) *Local Perspectives on Globalization: The African Case* (Dar es Salaam: REPOA, Mkuki na Nyota, 2002) 26-28.

³¹⁷ Chapter 2 (section 2.4).

³¹⁸ Chapter 1 (section 1.0), see Sokolowski and List op cit note 1 at 1-60.

³¹⁹ Chapter 2 (section 2.1).

³²⁰ Edwards *Civil Society* (London: Polity, 2004) 14-15.

³²¹ Claude E Welch *Protecting Human Rights in Africa: Strategies and Roles of Nongovernmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) 42-43.

³²² J O Kuye and U Kakumba *Governance Perspectives in Emerging and Developing Nations of the World: Reflections on Recent Development Initiatives in Africa* Paper Presented at the IASIA Conference, Abu Dhabi, and 9-14 July 2007.

afforded an opportunity to pro-democracy forces to open the political space necessary for the establishment of human rights groups'.³²³

In the neo-liberal discourse, the existence of a plurality of autonomous associations which constitute independent centres of power to check abuses of central authority is crucial to securing greater accountability from the regime.³²⁴ Within this neo-liberal paradigm, NGOs would perform several democratic functions which include; empowerment, educative, watchdog, and advocacy roles.³²⁵ Under this neo-liberal framework, NGOs, consistent with the Western tradition, it is argued, arose primarily to control and check state actions against the individual.³²⁶

But herein lies another challenge of the legitimacy of NGOs in the region. In the neo-liberal discourse, the African state is cast as a villain.³²⁷ The discourse demonises African bureaucracies as corrupt, incapable and unable to learn.³²⁸ According to the World Bank report, the state in Africa is described as 'corrupt, dictatorial, with no capacity to manage resources, bloated, and based on nepotism'.³²⁹ In this discourse, mentors and monitors to oversee the state are needed and NGOs are prescribed as such.³³⁰ NGOs which are conflated with civil society are presented as the third sector, the other sectors being the state and the private sector.³³¹ This dichotomisation of society, however, poses serious political implications for NGOs.

Among these political implications is the perception by African states of NGOs as agents of imperialism.³³² Are NGOs, as Cassese argues, an imposition, used to spread a western philosophy of human values on the rest of the world?³³³ Shivji argues that 'NGOs arose as donors became disenchanted with states; they took a fancy to NGOs thus undermining the

³²³ Makau Mutua 'African Human Rights Organizations: Questions of Context and Legitimacy' in Paul Tiyambe Zeleza & Philip J. McConaughay (eds) *Human Rights, The Rule of Law & Development in Africa* (Philadelphia: Pennsylvania Press, 2004) 194-226.

³²⁴ Susan Dicklitch *The Elusive Promise of NGOs in Africa* (London: MacMillan Press Ltd, 1998) 9-10.

³²⁵ Ibid.

³²⁶ Peter Willets 'Introduction' in Peter Willets (ed) *Conscience of the World: The Influence of Non-Governmental Organizations in the UN System* (Washington: The Brookings Institute, 1996) 1-14.

³²⁷ Issa Shivji *Silences in NGO Discourse: The Role and Future of NGOs in Africa* (Nairobi: Fahamu, 2006) 25.

³²⁸ Ibid.

³²⁹ World Bank *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (Washington D. C, 1981) 20.

³³⁰ Ibid.

³³¹ Ibid.26.

³³² Ibid.

³³³ Ibid.

state and its institutions'.³³⁴ NGOs are thus perceived as, essentially pressure groups to keep those in power, the state and the government on their toes.³³⁵

It has been argued, that this exertion of pressure by NGOs undermines governmental authority and is unacceptable.³³⁶ Governments go on the offensive when their propriety and respectability is challenged.³³⁷ The tendency of such states is to deny or, to label human rights groups as 'subversive, alien, seditious or terrorist'.³³⁸ This condescending attitude of states is double-edged. As noted earlier, states recognise the role that NGOs play in the development of human rights standards and in the enforcement of human rights in international and domestic settings.³³⁹ For example, since the end of the Second World War, the Western based-NGOs have been instrumental in the creation of the United Nations and its subsidiary bodies.³⁴⁰ NGOs were active in the discussions that secured human rights in the UN Charter.³⁴¹ NGOs with UN Consultative status submit alternative reports to the Office of the United Nations High Commissioner for Human Rights (OHCHR) who compiles a report for submission to the UN Human Rights Council for consideration during state party proceedings.³⁴² It is ironic, as Wiseberg notes that states know that the *raison d'être* of many NGOs is to put pressure on governments and to 'hold their feet to the fire' and yet they disparage them.³⁴³

Ideologically, human rights NGOs are viewed by African states as part of the neo-liberal tradition, a model built on traditional western liberal values, which, to critics, is bent on promoting political democracy.³⁴⁴ Are NGOs indigenous or are they truly a creation of western capitalism? It is for a fact that NGOs are a phenomenon of the post-independence period; however, their origins are rooted in the civil society struggles against imperialism and neo-liberalism. The origin of civil society in Africa, it is argued, is traced to the rise of

³³⁴ Ibid. 56.

³³⁵ Makau op cit note 10 at 5-7.

³³⁶ Marina Ottaway 'Civil Society and the State in the Developing World' in Peter Burnell and Vicky Randall (eds) *Politics in the Developing World* (Oxford: Oxford University Press, 2008) 178.

³³⁷ Laurie S Wiseberg 'The Role of NGOs in the Protection and Enforcement of Human Rights' in Janus Symonides (ed) *Human Rights : International Protection, Monitoring , Enforcement* (UNESCO, 2003) 347-365.

³³⁸ Mutua op cit note 10 at 27.

³³⁹ M T Kamminga 'The Evolving status of NGOs under International Law: A Threat to the Inter-state system?' in Alston (ed) *Non-state actors and human rights* (New York, Oxford: Oxford University Press, 2005) 93-111.

³⁴⁰ M Keck and Sicking *Activist beyond borders: Advocacy Network in International Politics* (Catha and London: Cornell University Press, 1998) 85-86.

³⁴¹ Ibid.

³⁴² The United Nations Consultative Process, available at <http://www.mandit.org/en/faq/themes> id=203.

³⁴³ Wiseberg op cit note 328 at 348.

³⁴⁴ Chapter 1 (section 1.0).

capitalism, and efforts to challenge the authoritarian colonial state in Africa.³⁴⁵ Civic organisations played a key role in demanding direct participation in policy making and legislation to secure the interests of Africans against the colonial state.³⁴⁶ For instance, the seeds of the nationalist liberation movement that culminated in the independence of many countries in Africa in the 1960s can be traced to civil society, of which NGOs, are a only a recent expression.³⁴⁷ Whether in Kenya, Malawi, Namibia, South Africa, Uganda or any other country in East and Southern Africa, civil society organisations were actively involved in the struggle for independence.

It is also argued here that the 1980's marked a resurgence of civil society, a time when the principle of liberal democracy ran counter to benevolent authoritarianism of the post-independent state.³⁴⁸ As the state retreated, civil society organisations became the leading development agent and occupied the space that the state had dominated.³⁴⁹ This rejuvenation of civil society in the post-cold war era was instrumental to the democratization process in the 1990s. Characteristic of the democratization process were political reforms that led to the repeal of single-party legislation and the holding of multi-party elections in most countries in the region. Kenya, for example, repealed the single-party legislation that opened the country to multiparty elections in 1992 and 1997; Tanzania instituted reforms leading to multiparty elections in 1993, Uganda instituted reforms, moving from a no-party system in 1996 to multi-party rule in 2006.³⁵⁰ South Africa witnessed a political revival as the apartheid state began to make concessions, repealing legislation that restricted political space necessary for NGOs to grow and flourish, and giving way to democracy in 1994.³⁵¹

Besides their democratising role, NGOs have been central in the development of the international human rights system. For example, NGOs have taken centre stage in promoting these human rights norms and processes through the exercise of the duty to consult.³⁵² Article

³⁴⁵ Ludeki Chweya 'Civil Society and Consolidation of Democracy in Africa: Current Trends' in Duncan Okello (ed) *Civil Society in the Third Republic* (Nairobi: National Council of NGOs, 2004) 42.

³⁴⁶ Ludeki Chweya *Democratization and Civil Service Reform in Kenya* PhD Thesis, Queen's University at Kingston, 2003, 56.

³⁴⁷ Ludeki op cit note 65 at 34. For example, in Kenya, the Kikuyu Central Association (KCA), Ukamba Members Association and the Kavirondo Taxpayers Welfare Association; in Uganda, the Young Bataka Association of 1920 and the Young Basoga Association of 1922 were the first form of organized dissent against the colonial state.

³⁴⁸ Ibid.

³⁴⁹ Ibid. 36.

³⁵⁰ Ibid. 37.

³⁵¹ F W Jjuuko 'Political Parties, NGOs and Civil Society in Uganda' in Joseph Oloka-Onyango, Kivutha Kibwana, Chris Maina Peter (eds) *Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996) 60.

³⁵² Wiseberg op cit note 328 at 351.

71 of the UN Charter establishes the duty to consult NGOs.³⁵³ States have since consulted NGOs and the practice has become widespread within the UN and the African human rights system, the latest being the UN Security Council, which as Charnovits observes, appeared to be off-limits for NGOs, and many UN bodies including ECOSOC and the UN Human Rights Council.³⁵⁴ This duty to consult provides a framework within which the Economic and Social Council makes arrangements for consultative status with NGOs.³⁵⁵ Indeed, under ECOSOC resolution 288B (X), the first NGOs were granted ECOSOC status in 1948.³⁵⁶ Since 1948, NGOs, at the national, regional, and international level have actively participated in the work of the United Nations and its subsidiary bodies. Since 1945, a range of human rights declarations and or, treaties have been adopted and ratified by states with the participation of NGOs, the most recent being the United Nations Declaration of Human Rights Defenders.³⁵⁷

NGOs are increasingly becoming important players within civil society, serving as a useful intermediary between the family as a primary unit of society and the myriad agencies of the state.³⁵⁸ For this reason, this thesis argues, that in as much as a democratic state and civil society are two sides of the same coin, an NGO and government are complementary, each fulfilling different functions but both presumably dedicated to improving society'.³⁵⁹ It is further argued that the acceptance of the international human rights regime by African states, through the domestication of international human rights standards legitimises the existence of NGOs. For this reason and other reasons given above, the claim that NGOs are merely an extension of the Western based human rights movement is misplaced as NGOs have justified their existence in other ways.³⁶⁰

³⁵³ See United Nations Charter, Chapter X, Article 71, Adopted 26 June 1945. Article 71 of the UN Charter mandates the ECOSOC to make suitable arrangements for consultations with NGOs.

³⁵⁴ Charnovits 'Non-Governmental Organizations and International Law' (2006) 100 *American Journal of International Law* 348-350 at 350.

³⁵⁵ Adopted 26 June 1945 entered into force 24 October 1945, available at 557 U.N.T.S 143 [accessed on 18 September 2012].

³⁵⁶ Reference Document on the Participation of Civil Society in United Nations Conferences and Special Sessions of the General Assembly during the 1990s, 55th Session of the United Nations General Assembly, 1 August 2001 [accessed on 18 September 2012].

³⁵⁷ Adopted on 9 December 1988, General Assembly Resolution A/53/144. Most relevant of these international and regional human rights instruments to our study is the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the African Charter on Human and Peoples Rights (1981).

³⁵⁸ Claude E Welch 'Civil Society and Human Rights NGOs: Themes for the 1990s in Africa' in Welch Claude, Emerson (ed) *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania, 1995) 44.

³⁵⁹ Ibid.

³⁶⁰ Charnovitz op cit note 345 at 348-350. These Western based NGOs known to have moulded public opinion and effected change include: the British and Foreign Anti-Slavery Society (1839), French based League for Human Rights (1898). The 1940's witnessed the emergence of other groups most pronounced among them is

Unfortunately states that are illiberal and undemocratic hardly share this view. As it was noted in the introductory chapter, the value of ‘rights’, is questioned, and imperatives of ‘statehood’ are advanced.³⁶¹ A contest over political space arises when NGOs monitor and report on governmental human rights abuses. Bratton captures this underlying tension very well when he notes ‘that NGOs that specialize in human rights advocacy have been slow to gain access to, and take root in Africa. This slow approach has more to do with African governments that are sensitive to the barest hint of negative international publicity about the management of public dissent’.³⁶² Yet, the quest for political democracy has always enlisted NGO involvement and accounts for this ideological fix. The idea of political democracy entails making the citizen a key factor in the political society. NGOs, as a key factor in civil society inevitably became an important feature of this political landscape. Notwithstanding this ideological myth, the work of NGOs in promoting democracy can no longer be ignored. Key issues however arise; how deep, effective and independent are NGOs?

4. 4. INDEPENDENCE OF NGOs

The issue of depth and independence of NGOs presents another challenge to the legitimacy of NGOs. Key questions arise. How do NGOs determine their mandate? How are they funded? This section discusses two inter-related aspects that affect the credibility and reliability of NGOs namely; the mandate and the funding of NGOs.

4. 4. 1. Mandate of NGOs

Critics argue that NGOs have no ‘grand theory’ to account for the work that they do.³⁶³ NGO activism, it is argued, is based on an ‘act now, think later’ mantra.³⁶⁴ Much of NGO work, it is argued, is based on ‘activism’ without any attempt to interrogate the underlying theoretical or philosophical premises or outlooks.³⁶⁵ This school of thought holds the view that most advocacy NGOs focus on particular areas of their activity such as human rights, gender, development, environment and governance without questioning the theoretical outlook of

Amnesty International (AI), Human Rights Watch (HRW) and the International Federation of Human Rights Defenders (FIDH).

³⁶¹ Chapter 1 (Section 1.4).

³⁶² Michael Bratton ‘The Politics of Government-NGO Relations in Africa’ in Welch, Claude Emerson (ed) *Protecting human rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) 74.

³⁶³ Shivji op cit note 318 at 30.

³⁶⁴ Anderson op cit note 280 at 36.

³⁶⁵ Ibid.

these issues.³⁶⁶ Without a theory to explain their actions, NGOs can hardly be successful in their mission. Cabral, who subscribes to the relevance of a theory to every practice, has argued that ‘every practice produces a theory and nobody has made a successful revolution without a revolutionary theory’.³⁶⁷ This lack of a ‘grand theory’ has lent credence to current thinking that contrary to NGO belief that their work is for the ‘pro-poor,’ NGO roles and actions advance neo-liberalism which does not serve the large majority of the people, but instead advances ‘free enterprise’.³⁶⁸

The ‘pro-poor’ ideology is premised on the the state as the guarantor of law and order, the private sector as the engine of growth, and the voluntary sector being assigned the role of social welfare for the less privileged.³⁶⁹ Given this thinking, how do NGOs determine their vision, mission, objectives, and working methods, and without perpetuating the status quo?³⁷⁰ How do NGOs avoid being, as Commins puts it, ‘safety nets’ for the poor and oblivious of their ‘transformative function’?³⁷¹

As it was noted earlier, NGOs derive their legal legitimacy from international human rights treaties, which states ratify and domesticate in national constitutions.³⁷² National constitutions have codified these rights in a bill of rights giving individuals the freedom to choose who to represent and what issues to advance. This creates a presumption that individuals enjoy freedoms to expression, association and assembly and the right to participate in matters that affect them. Participation enables individuals to collectively determine their priorities and needs in order to protect and, advance their rights and interests.³⁷³ Expanding the space for peoples’ participation in the institutions of the state should be a priority for NGOs. The Declaration on the Right to Development,³⁷⁴ also recognises development as a process whose objective is the ‘constant improvement of the

³⁶⁶ Ibid.

³⁶⁷ Amilcar Cabral ‘The Weapon of Theory’ in Amilcar Cabral (ed.) *Revolution in Guinea* (London: Heinemann, 1969) 75.

³⁶⁸ Ibid.

³⁶⁹ Murungi op cit note 287 at 39.

³⁷⁰ F Manji & Carol O’Coill ‘The Missionary Position: NGOs and Development in Africa’ (2002) 78 (3) *International Affairs* 567-583.

³⁷¹ S Commins ‘NGOs: Ladles in the Global Soup Kitchen?’ in D Eade (ed) *Development, NGOs and Civil Society* (London: Oxfam GB, 2000) 229-245.

³⁷² Article 20 of the Universal Declaration of Human Rights (1948), article 22 (1) of the International Covenant on Civil and Political Rights (1966) , article 5 of the UN Declaration of Human Rights Defenders and article 10 (1) of the African Charter on Human and Peoples Rights (1981).

³⁷³ T J Scott ‘Evaluating Development-Oriented NGOs’ in Welch (ed) *NGOs and Human Rights: Promise and Performance* (Philadelphia: University of Pennsylvania Press, 2001) 215-228.

³⁷⁴ UN Declaration on the Right to Development, Adopted 4 December 1986, UN Doc. A/RES/41/128 [accessed 18 September 2012].

well-being of all people on the basis of their active, free and meaningful participation . . .³⁷⁵ NGOs are therefore expected to mobilise people, enhance their skills, and empower them to question the status quo.³⁷⁶ In doing this, NGOs promote critical consciousness and decision making upon which active citizenship thrives.³⁷⁷ Achieving such transformation requires *effective participation*, which this thesis notes is a missing link in nascent African democracies.

States have a legitimate concern to ask whether NGOs are operating lawfully or not. To dissipate the argument whether ‘NGOs are merely foot soldiers’ of capitalism, which they perpetuate, NGOs, need to identify their *niche*. NGOs need to define their vision, mission, and objectives clearly within the human rights framework. Having a well defined vision, mission, and objectives as well as working methods that are consistent therewith, increases the legitimacy and credibility of the NGO.³⁷⁸ With a clear set of issues to address, clarity of underlying causes and with appropriate capacity, NGOs would become effective players, and go beyond understanding the root causes to making their clients into active citizens.³⁷⁹ As Thaw observes, the success of an NGO is measured by the extent to which it achieves its identified mission or programme or mandate.³⁸⁰

But beyond the issue of vision and mission is the broad question of the working methods. It is argued that NGOs as a ‘conscience of the people’ lie at the intersection between power and powerlessness. NGOs seek to promote civil and political rights and have increasingly joined the fray to advocate for economic, social and cultural rights. Promoting human rights is a political question. It involves mobilising, educating, engaging, and conscientizing the population, activities which are inherently political. Does engagement in political activities delegitimize NGOs? As Wiseberg notes:

One function that NGOs perform in the defence of human rights is to keep the political system open to other elements of civil society. In working for freedom of association, freedom of opinion, freedom of expression and freedom of assembly, human rights

³⁷⁵ Ibid. Article 1. See paragraph 10 of the African Charter on Popular Participation (1990).

³⁷⁶ C McCrudden ‘Mainstreaming Human Rights’ in Harvey (ed) *Human Rights in the Community: Rights as Agents for Change* (Oxford: Hart, 2005) 7-27.

³⁷⁷ Darrow and Tomas *op cit* note 276 at 506.

³⁷⁸ P F Drucker *Managing the Non-profit organizations: Practices and Principles* (London, Oxford: Butterworth Heinemann) 39.

³⁷⁹ L Diamond *Civil Society and the Development of Democracy* Working Paper 1997/101 9 (Madrid: Juan March Institute, 1997) 29-42.

³⁸⁰ D Thaw ‘Stepping into the river of change’ in Edwards and Fowler (eds) *The Earth scan Reader on NGO Management* (London: Earth scan, 2002) 146-163.

NGOs make it possible for civil society to function; they create political space for democratic forces and therefore for democracy.³⁸¹

Democratizing society of necessity draws NGOs into policy and legislative advocacy. Policy making, it is argued, is inherently a ‘sovereign activity’ that states undertake on behalf of the people. It involves a lot of political activism and entails a terrain of intense conflicts of interest.³⁸² Should states restrict NGOs from participating in political activities? I argue to the contrary.

Demanding change implicitly makes NGOs defend interests, whether of workers, women, children or the political society. NGOs work for ‘participation rights’ for the people. Being non-political limits the political space within which NGOs can influence change. As Shivji observes, ‘NGOs cannot be pro-people and pro-change without being anti-status quo. NGOs must engage in critical discourse and political activism rather than assume false neutrality and non-partisanship’.³⁸³

NGOs should not have any political party affiliation as this threatens their autonomy and objectivity, and may subject them to political patronage. Being independent of the state and being non-partisan, however, should not preclude an NGO from collaborating with or supporting a political group or governmental agency. Experiences among states however differ. For example, Malawi does not register NGOs engaged in partisan politics including electioneering and politicking.³⁸⁴ Unlike Malawi, Kenya, allows NGOs to express views on any issue or policy that is or may be debated or discussed in the course of a political campaign or election.³⁸⁵

4.4.2. Funding of NGOs

The next issue is the funding of NGOs which raises an additional issue of legitimacy. How should NGOs be funded? Should NGOs accept donor funding or, in the alternative, government funding? One school of thought believes that NGOs working on political and

³⁸¹ Wiseberg op cit note 328 at 364.

³⁸² Shivji op cit note 318 at 44.

³⁸³ Ibid.

³⁸⁴ Section 20(3) (vi) NGO Act 2000 of Malawi.

³⁸⁵ Section 66(2) of the Public Benefits Organizations Act No 18 of 2013.

democratic reform would be compromised if they receive fiscal support from government.³⁸⁶ A divergent view holds that foreign funding is a threat to the independence of NGOs since ‘he who pays the piper calls the tune’.³⁸⁷ In practice, the majority of NGOs in the sub-region depend on either donor funding or governments to support their activities. Oloka-Onyango observes that many NGOs would not survive without donor aid.³⁸⁸ For example, about 75% of NGOs in East Africa depended on foreign grants in 2004.³⁸⁹ Like the NGOs in East Africa, donor funding to NGOs in South Africa, is estimated at 45%.³⁹⁰ Hearn argues that the push for human rights in Uganda owes its origins to donor funding.³⁹¹ Donors, it is argued, exert a lot of influence on policies, strategies and agendas of NGOs.³⁹² Donor funding raises the issue of state sovereignty. There is an underlying fear that donor funding raises the prospect of foreign powers interfering with the internal affairs of African states thereby undermining state authority. The donor shift that views NGOs as alternatives for donor support is also feared to undermine state authority. African states are reminded of the experiences of colonialism. Donor funding allegedly contributes to unhealthy competition among NGOs, erodes creativity, alienates NGOs from the people they seek to serve and, is seen by states as a threat to national sovereignty.³⁹³

Away from donor influence, donors have also been criticised for stifling NGO activism by encouraging a less critical engagement with states.³⁹⁴ Is it plausible to discredit the source of funding or is the ability of the NGOs to execute the mandate that one should be weary of?

³⁸⁶ I Smillie ‘At Sea in a Sieve’? Trends and Issues in the Relationship between Northern NGOs and Northern Governments’ in Smillie and Hendricks (eds) *Stakeholders Government- NGO Partnership for the International Development* (London: Earthscan, 1999) 7-35.

³⁸⁷ Shivji op cit note 318 at 54.

³⁸⁸ J. Oloka-Onyango *On the Barricades : Civil Society and the Role of Human and Women’s Organizations in the Formulation of the Bill of Rights of Uganda’s 1995 Constitution*, Kampala: Centre for Basic Research, Working Paper No. 60/2000, 34.

³⁸⁹ Mamdani and Peter Otim *Non-Governmental Organizations (NGOs in East Africa: Report of the Training Needs*, Centre for Basic Research, Consultancy Report No.1,1994, 8.

³⁹⁰ The Non-Profit Organisations (NPO) Impact Assessment (2005) 30.

³⁹¹ Julie Hearn *Foreign Political Aid, Democratization, and Civil Society in Uganda in the 1990s* Kampala: Centre for Basic Research, Working Paper No. 53, 24.

³⁹² De Coninck ‘the state, civil society and development policy in Uganda: Where are we coming from’ in Brock, McGee and Gaventa (Eds) *Unpacking Policy: Knowledge, Actors and Spaces in Poverty Reduction in Uganda and Nigeria* (Kampala: Fountain Publishers, 2004) 51-74.

³⁹³ Obiora Chinedu Okafor *Legitimizing Human Rights NGOs: Lessons from Nigeria* (Trenton, NJ: Africa World Press Inc, 2006) 219; See Dicklitch op cit note 315 at 160.

³⁹⁴ F W Jjuuko ‘Political Parties, NGOs and Civil Society in Uganda’ in Joseph Oloka-Onyango, Kivutha Kibwana, Chris Maina Peter (eds) *Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996) 180-198 at 194.

This thesis argues that it is not government or donor funding to NGOs that should be the primary concern. Accepting government funding should not pose a major challenge since as it was noted; NGOs and government are two sides of the same coin.³⁹⁵ Bazaara argues that where the state and the non-profit sector cooperate, the state earmarks a role for the non-profit sector and subsidizes it.³⁹⁶ The primary issue should be that of disclosure of funding sources. Does the NGO disclose its funding sources in order to ‘safeguard its autonomy’ and, be held accountable to its constituency?³⁹⁷ Is the duty to disclose the source of funding open-ended? What about funding sources that prefer to remain anonymous? Should the NGO be compelled to reveal the source?

This thesis argues that although disclosure of funding sources should be encouraged, the NGO should also be free to exercise the freedom from non-disclosure to protect funding sources that may prefer anonymity. Beyond disclosure of funding sources, the NGO should be able to strike a balance between maintaining its autonomy and having external funding. The answer lies in having ‘strategic partnerships’.³⁹⁸ Foreign donors have increasingly adopted the ‘partnership’ approach. For example, the Ford Foundation, Open Society, HIVOS, and the European Union hold annual reflection meetings with their partners. Although a novel idea, in a region where most states depend on donor funding and treat human rights as an ‘anathema’, would they be in support of this approach? Moreover, most African states are neither democratic nor pro-people.³⁹⁹ Experiences vary. For example, Ethiopia restricts foreign funding towards human rights and advocacy activities to not more than 10%.⁴⁰⁰ Kenya requires NGOs to receive not more than 15% of their funding from external donors.⁴⁰¹

On the side of government funding, this thesis is of the view that having a funding mechanism set up by government that is transparently and independently managed would address the threat of state interference in NGO activities. NGOs ought to ‘explore the

³⁹⁵ Welch op cit note 349 at 44.

³⁹⁶ Nyangabyaki Bazaara *A Critical Analysis of the Historical Development of the Non-Profit Sector in Uganda* Kampala: Centre for Basic Research, Working Paper No 79/2002, 2002, 23.

³⁹⁷ Nassali op cit note 74 at 212.

³⁹⁸ The Democracy Governance Facility (DGF) in Uganda is a funding mechanism that works on the principle of ‘strategic partnership’ with NGOs. Bi-annual meetings are held with partners to discuss progress, identify gaps, and stress ownership of projects. Each year the partner groups meet with DGF team to review the performance of this partnership.

³⁹⁹ Brown op cit note 279 at 46.

⁴⁰⁰ Section 14 of the Charities and Societies Proclamation No. 621 of 2009.

⁴⁰¹ Section 27 (2) of the Statute Law (Miscellaneous) Amendments Bill of 2013.

possibility of an NGO-controlled fund that the state would finance'.⁴⁰² It would appear therefore, that where an NGO accepts government funding, or for example, where an NGO provides services to a government agency (humanitarian, consulting or otherwise), it should not bow to undue outside influence, otherwise it risks being a 'fake or rogue' NGO.⁴⁰³

Donor dependency affects the legitimacy of NGOs in as far as it is a threat to their autonomy. In view of this challenge, widening the local revenue base for NGOs is seen as a progressive approach. Fundraising from the private sector, investing in purchase of bonds, as well as generating income from membership subscriptions and donations are possible avenues that could be explored. Local fundraising would improve current credibility ratings of NGOs and contribute substantially to improving accountability of NGOs as well. Good as the options may be, NGOs may have to overcome potential challenges. Among these is poor philanthropy. The private sector, besides the possibility of dictating the agenda, is under pressure from the current economic meltdown, and is, in most African countries still underdeveloped.⁴⁰⁴

Despite the obstacles stated above, widening the local resource base would contribute significantly to narrowing the credibility gap, would address the 'conceptual and physical distance' between most NGOs and the ordinary poor and consequently promote active participation of communities.

But who elects NGOs to assume the moral high ground? How democratic are they? Who holds the NGOs accountable? In the next section the focus is on the challenge of the democratic legitimacy for NGOs.

4.5. DEMOCRATIC LEGITIMACY

Unlike the popular organizations like trade unions, the church, farmers' associations, which as Barkan argues, 'are grassroots, member-oriented, democratically-run and (mostly) locally-funded', NGOs cannot claim serious democratic roots in the community.⁴⁰⁵ NGOs, save for a few community-based groups are located in urban areas, composed largely of the educated

⁴⁰² Makau Mutua 'Domestic Human Rights Organizations in Africa: Problems and Perspectives' (1994) 22 (2) *Issue: A Journal of Opinion*, 31.

⁴⁰³ Welch op cit note 349 at 14.

⁴⁰⁴ George E Edwards 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs' (2010) 18 *Michigan State Journal of International Law* 165 at 165.

⁴⁰⁵ J D Barkan M L McNulty and M A O Ayeni 'Hometown Voluntary Associations, Local Development, and the Emergence of Civil Society in Western Nigeria' (1991) 29 *Journal of Modern African Studies* 458 at 478.

elite who are often disconnected to the social reality of the poor rural majority whom they claim to represent.⁴⁰⁶ Even the few NGOs that have a membership, is not significant to guarantee them legitimacy. Without a strong membership how does an NGO set its agenda, make decisions and make its advocacy people-driven? Can an organization advocate on behalf of the general public or specific groups or individuals without being representative?

Legitimacy, as noted earlier, has many elements; moral, legal, political, performance and democratic. NGOs can acquire legitimacy in the way they operate, the issues they address and the rights they promote in a democratic society. The international human rights law regime and the constitutional framework create choices for individuals who form associations. Among these is the legal obligation to register under the law. All the constitutions of Eastern and Southern Africa provide for the right to freedom of association.⁴⁰⁷ The question is whether the requirement to register is mandatory? Where an NGO is allowed to operate, what matters is its ability to deliver on its mandate. Where an organisation has a clear and concise mission and is able to achieve results, its legitimacy and credibility will be enhanced.⁴⁰⁸ Anderson puts it even more bluntly, that ‘the glory of organizations of civil society is not democratic legitimacy, but the ability to be a pressure group’.⁴⁰⁹ Being a membership organisation does not necessarily make an NGO accountable.⁴¹⁰

To some what matters is the fidelity of an NGO to its core mandate. Unlike states, NGOs do not have coercive power, financial power or even authority that derives from representation’.⁴¹¹ What matters is the impact of their work which is dependent on the execution of their core mandate.⁴¹² An NGO can have legitimacy if it is able to execute its core mandate. Execution of its mandate makes the NGO effective but as a ‘voice of the voiceless’, does this make it democratic if it is alienated from the people it claims to represent?

⁴⁰⁶ Moore and Stewart op cit note 278 at 30.

⁴⁰⁷ Op cit note 301-305.

⁴⁰⁸ P F Drucker *Managing the Non-Profit Organization: Practices and Principles* (London, Oxford: Butterworth, Heinemann, 1990) 39.

⁴⁰⁹ Anderson op cit note 280 at 92.

⁴¹⁰ A Bebbington and R Riddell ‘Heavy Hands, Holding Hands? Donors, Intermediary NGOs and Civil Society Organizations’ in Hulmes and Edwards (eds) *NGOs, State and Donors: Too Close for Comfort* (New York, London: Palgrave Macmillan, 1997) 107-127 at 111.

⁴¹¹ Lisa Jordan *Mechanisms for NGO Accountability* (Global Public Policy Institute, 2005) Research Paper Series No 3, 13.

⁴¹² Ibid.

Effectiveness in my view does not offer an NGO democratic legitimacy. Edwards holds a similar view. He argues that NGOs pledge to be democratic consistent with the human right to representation.⁴¹³ Gutto asks, is it not the involvement of the people in rights struggles that has given these struggles the appropriate content?⁴¹⁴ Lister, like Edwards, argues that NGOs do not have to be membership- based to be legitimate but they should be accountable for what they do.⁴¹⁵ Lehr-Lehnardt, unlike Gutto, argues that NGOs do not need full democracy in their internal processes provided they adhere to the theory of rights.⁴¹⁶

Addressing the NGO deficit to achieve democratic legitimacy requires NGOs to take deliberate steps in four key areas: First, is the need for accountability to a broad spectrum of stakeholders; members, donors, peers, partner institutions both governmental and non-governmental.⁴¹⁷ This could be achieved through carrying out membership meetings, joint projects and issuance of regular reports. Other accountability measures would include needs assessment surveys, programme reviews (mid- and end-of term) and, strategic assessment meetings.⁴¹⁸ Second, is the over-riding need to adopt democratic structures that encourage participatory decision- making. The demand to popularise the human rights struggle is overwhelming.⁴¹⁹ NGOs need to deepen their roots among the communities and adopt a ‘mass social movement model’ (grassroots-based, member-oriented, locally funded and activist in nature).⁴²⁰ Third, NGOs should be focussed on their primary agenda and resist the temptation to do what is in ‘vogue’.⁴²¹ The idea of active citizenship obligates NGOs to expand spaces for peoples’ participation in the institutions of the state. As Ihonvbere has argued, this

⁴¹³ Edwards op cit note 311 at 13.

⁴¹⁴ S B O Gutto ‘Non-Governmental Organizations, Peoples’ Participation and the African Commission on Human and Peoples’ Rights: Emerging Challenges to the Regional Protection of Human Rights’ in B Andreassen and T Swine heart (eds) *Human Rights in Developing Countries Year Book* (Oslo: Scandinavian University Press, 1992) 33-42.

⁴¹⁵ S Lister *NGOs Legitimacy: Technical Issue or Social Construct* Institute of Development Studies, U.K. in *Critique of Anthropology*, <http://coa.sagepub.com/cgi/content/abstract/23/2/175>. [accessed on 19 September 2012].

⁴¹⁶ R Lehr-Lehnardt *NGO legitimacy: Reassessing democracy, accountability and transparency* (Cornell Law School, LLM Paper Series), available at <http://www.lsr.nellco.org/cornell/lps/clacp/6>. 47-48.

⁴¹⁷ L Diamond *Civil Society and the Development of Democracy* Working Paper 1997/101 (Madrid: Juan March Institute, 1997) 29-42.

⁴¹⁸ A E Sibanda ‘Voicing a Peasant Alternative: The Organization of Rural Associations for Progress (ORAP) in Zimbabwe’ in Romdhane and Moyo (ed) *Peasant Organizations and Democratization in Africa* (Dakar: Codesria, 2002) 315-540 at 318.

⁴¹⁹ Shivji op cit note 3187 at 24.

⁴²⁰ Okafor op cit note 384 at 109, 227- 228. Okafor advances a Theory which I find persuasive that ‘where a human rights community in Africa has operated in a mass social movement mode, it has been able to wield influence within its target polity and where this has not been the case, the converse has been true’. Examples include the African National Congress (ANC) in South Africa, United Action for Democracy (UAD) in Nigeria and the Zambian Labour-led Pro-Democracy Movement. See Makau Mutua ‘A Discussion on the Legitimacy of Human Rights NGOs in Africa’ (1997) *Africa Legal Aid Quarterly* 28.

⁴²¹ Nassali op cit note 74 at 130.

requires a systematic and sustained mass mobilisation as a basic activist strategy.⁴²² And finally, NGOs should ensure fiscal accountability that goes side by side with effective reporting.⁴²³ So, to whom do they account?

4. 6. ACCOUNTABILITY

The question is, ‘To whom and in what ways are NGOs accountable?’ The principle of accountability requires an NGO not only to adhere to its vision and mission, it should fulfil reporting requirements, be ethical in the conduct of its business and involve a wide range of stakeholders in carrying out activities.⁴²⁴ NGOs have an obligation to provide accurate financial and progress reports to their constituency- Government, members, donors, and the people they serve.⁴²⁵ Wyatt describes an NGO which is accountable as one whose activities are driven by its mission, whose internal systems safeguard the public trust and one which uses its resources in accordance with its purposes.⁴²⁶

4. 6. 1. Accountability to Government

Accountability to Government requires associations to register under the law in order to pursue legitimate associational life. In a democratic society, the state is obliged to provide the legal and regulatory framework within which NGOs operate.⁴²⁷ Does this require Government to establish special oversight mechanisms? The Lawyers Committee for Human Rights (LCHR) argues that ordinary criminal and civil laws are adequate to protect against fraud and abuse of the public trust.⁴²⁸ The duty to operate within the law establishes a corresponding obligation on the part of government to establish a body that provides the oversight. As it will be noted in Chapter 6, the countries in East and Southern Africa have adopted regulatory laws that establish National Boards for the registration and monitoring of NGOs. But would this require NGOs to undertake mandatory registration with such a body? Does Government

⁴²² J Ihonvbere ‘Where is the Third Wave? A Critical Evaluation of Africa’s Non-Transition to Democracy’ (1996) 43 (4) *Africa Today* at 349.

⁴²³ Isabelle Jacques, *Strengthening Democratic Governance: The Role of Civil Society*, Report on Wilton Park Conference S06/10(2006) at <http://www.wiltonpark.org.uk/documents/conferences/WPS06-10/pdf/WPSO6-10.pdf> [accessed on 19 September 2012].

⁴²⁴ Nassali op cit note 28 at 130.

⁴²⁵ Ibid. Commonwealth Foundation NGO Guidelines, Guideline 9.

⁴²⁶ M Wyatt *A Handbook of NGO Governance, the Central and Eastern European Working Group on Non-Profit Governance* (Hungary: European Centre for Not-For Profit Law, 2004) 1.

⁴²⁷ Welch op cit note 349 at 44.

⁴²⁸ Lawyers Committee for Human Rights ‘*The Neglected Right: Freedom of association in international human rights law*’ (New York: Lawyers Committee for Human Rights, 1997) 22.

have a duty in exercise of its regulatory function not to interfere with legitimate associational life? In *Christopher Mitkila v AG*, the High Court in Tanzania addressed itself to the issue and held that a law which limits or derogates from the basic rights of the individual must be lawful and be free from arbitrary abuse by those in authority and be reasonably necessary to achieve the intended objective.⁴²⁹

As it will be noted in Chapter 5, NGOs are required to register in order to be accountable and transparent, and to fulfil reporting requirements to Government.⁴³⁰ And in case of mandatory registration, what registration procedures are required? Registration procedures must be quick, straightforward, inexpensive, and where denial of registration takes place, such a decision must be subject to judicial review.⁴³¹ Indeed, as it was noted in Chapter 6, most NGO laws require NGOs to declare their objectives, promoters, Boards of Directors, activities and sources of funding.⁴³² Difficulties have been encountered where associations formed to carry out activities dubbed ‘prohibited activities’ have shied away from having themselves registered. For example, the Citizens Coalition for Constitutional Change in Kenya (4Cs), the Citizens Coalition for Electoral Democracy in Uganda (CCEDU), Kenya Women Political Caucus (KWPC); each of these groups have had to operate under host organisations. Would the inability to register make them less accountable? This thesis argues that provided they operate transparently within the host organisation, they should be able to assert their right to freedom of association which is enshrined in the constitutions of most states in Eastern and Southern Africa.⁴³³ Where the NGO law requires periodic reporting to the regulatory body, a default by the NGO may not only amount to a breach but could render the NGO less accountable. For example, Nassali reports that an Impact study of Non Profit Organisations (NPOs) recorded two thousand one hundred organisations to have been de-registered in South Africa for non-reporting in 2004.⁴³⁴ There are also efforts at self-regulation. For example, NGOs in Uganda launched a self-regulating instrument, the NGO Quality Assurance Mechanism (QuAM) in September 2006. QuAM is designed to promote adherence by Civil Society Organizations to accept ethical standards and operational norms. Among these

⁴²⁹ *Christopher Mitkila v AG*, High Court of Dodoma, Civil Case No. 5 of 1993.

⁴³⁰ Welch op cit note 349 at 44.

⁴³¹ Lawyers Committee for Human Rights op cit note 419 at 22.

⁴³² Uganda NGO Act, 2006; PBO Act, 2013, Tanzania NGO Act, 2002, Malawi NGO Act, 2000; South Africa, NPO Act, 1997, Zimbabwe PVO Act, 1995.

⁴³³ Article 29(1) Uganda Constitution, Article 52 Kenya Constitution, Clause 18, South African Constitution, and Article 20, Tanzania Constitution.

⁴³⁴ Nassali op cit note 74 at 110. An Impact Assessment Study of Non-Profit Organizations in South Africa conducted in 2004 showed a poor record of legal reporting by NPOs.

minimum standards is ethical governance, effective management of resources, a clear work plan, mission and vision including policies and procedures to ensure transparency and accountability.⁴³⁵

4. 6. 2. Accountability to Members

Membership organisations have an obligation to account to their membership (the General Assembly) which is often the highest decision-making body.⁴³⁶ Being a membership organisation may not be mandatory but where such membership exists, NGO actions and policies should be controlled by the membership for the NGO to be legitimate.⁴³⁷ However, critics argue that being membership-based does not guarantee democratic governance nor being accountable.⁴³⁸ In support of this view, Nassali reports, that in a comparative study of Uganda, Ghana and South Africa conducted by the Institute of Development Studies, Sussex, it found that a large membership does not guarantee that an NGO is democratically governed.⁴³⁹

Even if a large membership does not guarantee democratic governance of an NGO, the payment of membership contributions and holding regular elections for the Board of Directors of NGOs is an important accountability mechanism to the membership. Where members contribute financially to the activities of the NGO, however nominal, it places them in a position to hold the NGO accountable. For example, the Foundation for Human Rights Initiative (FHRI) derives much of its funding from donors, but with a membership of over 1000 members, each paying Uganda shillings 250,000 (USD 250), this entitles them to a right to elect the leadership of the organisation and to participate in its activities.⁴⁴⁰

Not all NGOs are membership-based. Some NGOs have nominated or appointed Boards of Directors. For example, the Lawyers for Human Rights (LHR) in South Africa amended its

⁴³⁵ Uganda National NGO Forum and Development Network of Indigenous Voluntary Associations (DENIVA) 'Our Code of Honour: The NGO Quality Assurance Certification Mechanism (QuAM)' September, 2006.

⁴³⁶ John-Jean B. Barya *The State of Civil Society in Uganda: An Analysis of the Legal and Politico-Economic Aspects* Kampala: Centre for Basic Research, Working Paper No.58/2000, 33; see M Mamdani and Peter Otim *Non-Governmental Organizations (NGOs) in East Africa : Report of the Training Needs*, Centre for Basic Research Consultancy Report No.1, 5.

⁴³⁷ Economic and Social Council Resolution 1996/31, paragraph 12.

⁴³⁸ A Bebbington and R Riddell 'Heavy hands, holding hands Donors, Intermediary NGOs and Civil Society organizations', in Hulmes and Edwards (eds) *NGOs, state and donors: Too close for comfort* (New York, London: Palgrave/Macmillan, 1997), 107-127 at 111.

⁴³⁹ Nassali op cit note 74 at 123.

⁴⁴⁰ Foundation for Human Rights Initiative, membership brochure, available at www.fhri.or.ug

constitution to remove the membership from the decision-making body, arguing that managing people was expensive.⁴⁴¹ Barr, Fafchamps, and Owen report that in Uganda, only a half of NGOs elect their Boards while a third appoint or nominate them.⁴⁴² Would such nominated Boards be accountable? I argue in the affirmative. Winston, likewise argues, that NGOs with self-perpetuating Boards can be democratically governed and accountable.⁴⁴³ Notwithstanding any differences in opinion, NGOs ought to apply democratic principles in the conduct of their business, and in doing so, be accountable to their members.

4. 6. 3. Accountability to the People

The key issue to consider is how do the beneficiaries participate in the activities of the NGO? Are they central to the design and implementation of the programmes of the NGO? Accountability to beneficiaries can take several forms: baseline surveys to determine the priority needs of the community, review of strategic plans, evaluation of programmes, and fiscal accountability. What is questioned is the quality of the consultations, are beneficiaries central to the decision-making process? Do beneficiaries hold NGOs accountable to their actions? NGOs have come under scrutiny for using communities to endorse pre-conceived ideas. Dicklitch, for example, questions the top-down approach of the consultations, and argues that the beneficiaries become objects of the NGO work rather than the focus of their accountability.⁴⁴⁴

Being accountable to the people would mean engaging the victims in identifying the root causes of the inequality. An NGO needs to be accountable: Does it speak for the poor, about the poor or as the poor?⁴⁴⁵ Being accountable to the beneficiaries requires NGOs to monitor the impact of their work on the intended beneficiaries. Is it making a difference in the lives of the people they seek to improve? Understanding the shortfalls and lessons learnt enhances the accountability and transparency of the organisation.⁴⁴⁶ This thesis agrees with Orlin that NGOs need to publicise their mission, objectives, methods of work, achievements, challenges,

⁴⁴¹ Nassali op cit note 74 at 124.

⁴⁴² Barr, Fafchamps and Owen op cit note 11 at 29.

⁴⁴³ M E Winston 'Assessing the effectiveness of international human rights NGOs: Amnesty International', in Welch (ed) *NGOs and human rights: Promise and Performance* (Philadelphia: University of Pennsylvania Press, 2001) 25-54 at 31.

⁴⁴⁴ Dicklitch op cit note 315 at 131,160.

⁴⁴⁵ International Council for Human Rights Policy by *What authority? The legitimacy and accountability of Non-Governmental Organisations*, Paper presented by Hugo Slim at the meeting on Global trends and human rights-Before and after 9/11, available at www.Jha.Ac/articles/a082.htm [accessed 26 December 2013].

⁴⁴⁶ Edwards and Hulme 'NGO Performance and Accountability: Introduction and Overview' in Edwards and Fowler (eds) *The Earth scan reader on NGO Management* (London: Earth scan, 2002) 190, 197.

areas of work, governance structures, funding and activity reports among the communities they serve to increase accountability.⁴⁴⁷

4. 6. 4. Accountability to Donors

Donor funding comes with obligations: to account for the funds received and to show results for the money spent. Nassali reports that until the 1990s, donors were more concerned with financial accountability, and little attention was paid to good governance practices.⁴⁴⁸ Accountability to donors should in my view, include monitoring the impact of the work done by the NGO and ensuring that reports about expenditures made are available to the target groups. Evaluations that promote organisational learning are necessary in promoting good practices and cost effectiveness.⁴⁴⁹ What sort of reporting would therefore satisfy accounting obligations to the donor?

It is the argument of this thesis that such reporting would require an NGO to provide Audited Accounts by a Certified Management Accountant accompanied with a Management Letter explaining weaknesses in the organisation annually to members, donors and government. In practice, few NGOs adhere to this requirement. For example, Barr, Fafchamps and Owen reported that only one-third of NGOs in Uganda provide information about their income and not all accounts were accurate.⁴⁵⁰ Improving fiscal accountability may require NGOs to establish links with the private sector to tap new management practices. Using social media such as website face book, twitter, NGOs would keep the donors and the public informed about their activities; and any ‘breaking news’, energising the sector and thus deepen democratic accountability.

At the sector-wide level, mechanisms are necessary to check unscrupulous NGOs to enforce standards as donors have often limited themselves to withdrawing funding instead of prosecuting dubious NGOs. The adoption of Codes of Conduct that promote self-regulation is an important measure of checking errant behaviour of NGOs. For example, in Uganda, the adoption of the Quality Assurance Mechanism (QUAM) by the Development Network of Indigenous Voluntary Associations (DENIVA) and the NGO Forum is an attempt at self-

⁴⁴⁷ S T Orlin ‘The Local Non-Governmental Organization: The Human Rights Gatekeeper’ in Akermark et al (eds) *Human Rights Education: Achievements and Challenges* (Helsinki: Abo Akademi University in collaboration with the Finnish National Commission for UNESCO, 1998) 129-147 at 137.

⁴⁴⁸ Nassali op cit note 74 at 138.

⁴⁴⁹ Scott op cit note 364 at 212-213.

⁴⁵⁰ Barr, Fafchamps and Owen op cit note 11 at 21.

regulation.⁴⁵¹ In Kenya, the NGO Council is mandated to prepare the Code of Conduct for self-regulation of NGOs.⁴⁵² The major downside to the enforcement of these Codes of Conduct is the ineffective policing structures, but if well enforced, the ability of the sector to police itself would promote accountability and ultimately enhance the legitimacy of NGOs.

4.7. CONCLUSION

This Chapter set out to discuss the challenges to the legitimacy of NGOs. These challenges include; the legality, indigenusness, representativeness, independence, and accountability of NGOs.

The legality of NGOs has been a subject of debate. Do NGOs have any legal status in international law and how does this impact on their acceptability? The study has established that the right of every one, individually or in association with others, to promote and protect human rights is recognised under international and regional human rights treaties to which African states are parties. The right to freedom of association including the right to form associations has been domesticated under African constitutions which individuals have invoked to form NGOs. Under national legal frameworks, NGOs have been established, and through registration are able to acquire legal recognition.

The acceptability of NGOs has been affected by the wide belief that NGOs are an imposition of the West. Are NGOs indigenous to Africa or are they a creation of capitalism? Though NGOs are a phenomenon of the associational revolution that marked the post- 1980 period, they have been instrumental in the development of international human rights standards. Though a more recent creation, NGOs have their origins in the civil society struggles against imperialism and colonialism in Africa. The nationalist liberation movements that led to independence in most African countries such as Namibia, Kenya, Uganda, and Malawi have their origins in civil society. NGOs have been key to the democratisation process in Africa as single party states such as Kenya, Malawi, and Uganda opened up to multi-party democracy. For these reasons, NGOs have justified their existence in Africa, and it is no longer plausible to perceive them as foreign whose only motivation is to contain the African state and its excesses.

⁴⁵¹ DENIVA and NGO FORUM *The NGO Code of Honor: The Quality Assurance Certification Mechanism* (Kampala: DENIVA and NGO FORUM, 2006).

⁴⁵² Section 7 (a) to (h) of the NGO Coordination Act No 19 of 1990; Section 24(1) of the Public Benefits Organizations Act No 18 of 2013 provides that ‘each forum of public benefit organizations shall maintain a code and standards by which its members shall be bound’.

Aside from being seen as a neo-liberal construct, NGOs have been criticised for not being representative. Are NGOs democratic and representative? The issue casts doubts about the credibility of NGOs for not being ‘mass movements’. The study argues that where an NGO is membership-based, it should adopt democratic structures that encourage participatory decision-making. Membership, however, is not a panacea to democratic legitimacy; having a clear mission and ability to deliver results can enhance the legitimacy of NGOs.

Beyond democratic legitimacy, is the broader issue of public accountability. To whom and in what ways are NGOs accountable? NGOs have been accused of being unaccountable to various stakeholders. NGOs have accountability obligations to Government, members, communities, donors and the sector at large. Whether NGO laws are enabling or not, registration and fulfilment of reporting obligations helps the NGO to pursue legitimate associational life. The issue for further discussion is whether such registration should be mandatory.

Where the NGO is membership-based, the study argues that NGO actions and policies should be controlled by members. This can be achieved through the payment of membership fees and the holding of regular elections for the NGO leadership. However, NGOs should avoid top-down methods of consultation and decision-making.

Accountability to donors has taken the form of financial reporting without any attention to monitoring results among the target group. NGOs should do more to promote organizational learning as this would have the effect of improving efficiency and cost effectiveness of programmes implemented by the NGOs.

At the sector-wide level, NGOs should adopt self-regulatory mechanisms to improve on self-policing and ultimately strengthen accountability to the broad spectrum of stakeholders.

Having discussed these challenges to the legitimacy of NGOs, the question to ask, does international law envision an appropriate regulatory framework for NGOs? To this the discussion turns in Chapter 5.

CHAPTER 5

THE REGULATORY FRAMEWORK GOVERNING NGOs UNDER INTERNATIONAL LAW

5. 0. INTRODUCTION

Despite their contribution to democracy and respect for human rights, NGOs in Eastern and Southern Africa face several challenges to their legitimacy. Chapter Four identified these constraints to include, the legality, indigenusness, independence, representativeness and accountability of NGOs.⁴⁵³ These challenges affect the credibility and effectiveness of NGOs and contribute to state-NGO tensions.

In a democratic society, the state is obliged to provide the legal and regulatory framework within which NGOs operate.⁴⁵⁴ The duty to operate within the law establishes a corresponding obligation on the part of government to appoint a body that provides the oversight on NGOs.⁴⁵⁵ At the national level states have adopted national constitutions that grant citizens the rights to establish NGOs.⁴⁵⁶ NGO laws have been enacted to provide for the regulation of NGOs, and National Boards on NGOs have been appointed. These Boards are regulatory mechanisms within which Government monitors and registers NGOs. NGOs have to register in order to be accountable and transparent, and to fulfil reporting requirements to Government. Is such registration of NGOs mandatory? In case of registration, what sort of registration procedures should be envisaged? Are NGOs restricted in carrying out certain activities?

On the broader issue of public accountability and transparency, NGOs have to fulfil reporting obligations to multiple stakeholders: Government, members, communities and donors.⁴⁵⁷ The NGO regulatory bodies have powers over NGOs. Should these powers be controlling, restrictive or enabling? Does the exercise of such powers permit interference in the management of NGOs?

This Chapter seeks to answer two fundamental questions: Does international law envision an appropriate regulatory framework that permits NGOs to operate without undue restrictions? If

⁴⁵³ Chapter 4 (see section 4.1).

⁴⁵⁴ Chapter 4 (see section 4.6.1).

⁴⁵⁵ Chapter 4 (see section 4.6.1).

⁴⁵⁶ Chapter 4 (section 4.2).

⁴⁵⁷ Chapter 4 (see section 4.6).

some form of regulation is essential, what would be the salient features of such a regulatory model?

Answers to these questions would advance this thesis in so far as they provide the standards necessary for an enabling regulatory regime which promotes active public participation and the free functioning of NGOs.

5. 1. THE RIGHT TO FREEDOM OF ASSOCIATION

The right of individuals to form associations is integral to the right to freedom of association. States have however made laws regulating the right of individuals to form and operate NGOs. Does the regulation of the freedom of association meet the internationally accepted requirements of this right? To understand this right and its application to NGOs, this section discusses three inter-related issues: the right to form and join associations, the requirement that they pursue a lawful purpose and the right to register NGOs.

5. 1. 1. The Right to Form and Join Associations (NGOs)

The right to freedom of association is not expressly defined by the UN Human Rights Committee. However, the right to freedom of association, including the rights of individuals to form, join and participate in associations, and through such associations, to promote human rights causes, is recognised in international and regional treaties and declarations.⁴⁵⁸ These treaties and declarations include; the Universal Declaration of Human Rights (UDHR),⁴⁵⁹ the International Covenant on Civil and Political Rights (ICCPR),⁴⁶⁰ and the United Nations Declaration on Human Rights Defenders (Defenders Declaration).⁴⁶¹ At the regional level, the African Charter on Human and Peoples' Rights (ACHPR),⁴⁶² the European Convention on

⁴⁵⁸ Article 20(1) of the Universal Declaration of Human Rights (1948), Article 22(1) of the International Covenant on Civil and Political Rights (1966), Article 5 of the UN Declaration of Human Rights Defenders (1998), Article 10(1) of the African Charter on Human and Peoples' Rights (1981), Article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and Article 16 of the Inter-American Convention of Human Rights (1969).

⁴⁵⁹ Adopted 10 December 1948, UN General Assembly Resolution 217 A (III), available at UN Doc A/810 at 71 (1948).

⁴⁶⁰ Adopted on 16 December 1966, UN General Assembly Resolution 2200A (XXI), 21 UNGAOR Supp (No 16) at 52, UN Doc A/6316, 999 UNTS 171, entered into force on 23 March 1976.

⁴⁶¹ Adopted on 9 December 1998, UN General Assembly Resolution A/53/144, available at E/CN. 4/2000/95.

⁴⁶² Adopted 26 June 1981 available at OAU Doc. CAB/LEG/67/3 Rev.5, entered into force 21 October 1986.

Human Rights (ECHR),⁴⁶³ and the Inter-American Convention on Human Rights (IACHR) provide for this right.⁴⁶⁴

Within the African human rights system, African states with the exception of South Sudan have ratified both the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights, and have made specific provisions for the right to freedom of association in their Constitutions, thereby making the right to association enforceable within their jurisdiction.⁴⁶⁵ But what does the right to association mean?

At a minimum, every individual has the right to freedom of association. The Universal Declaration of Human Rights (UDHR) recognises the right of individuals to peaceful assembly or association.⁴⁶⁶ It states that ‘everyone has the right to freedom of peaceful assembly and association’.⁴⁶⁷ No qualification of the right to association is implied or expressly stated, indicating a universal recognition of the freedom of individuals to come together for a common purpose. However, the International Covenant on Civil and Political Rights (ICCPR) recognises not only the right of individuals to associate with others but also the right to form associations.⁴⁶⁸ The ICCPR provides that ‘everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests’.⁴⁶⁹

The ICCPR limits the enjoyment of the right to freedom of association only to such restrictions that are acceptable in a democratic society.⁴⁷⁰ Though not legally binding, the Defenders Declaration does not restrict the right of individuals to form associations or NGOs on particular grounds. It states that ‘for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels, to form, join and participate in non-governmental

⁴⁶³ Adopted 1950, available at www.hrcr.org/docs/Eur_Convention/euroconv.html [accessed 2 January 2014].

⁴⁶⁴ Adopted 1969, available at www.hrcr.org/docs/American_Convention/oashr4.html [accessed 2 January 2014].

⁴⁶⁵ Chapter 4 (section 4.2).

⁴⁶⁶ Article 20 of the Universal Declaration of Human Rights (1948), UN General Assembly Resolution 217a (111) 10 December 1948, available at UN Doc. A/810 at 71 (1948).

⁴⁶⁷ Ibid.

⁴⁶⁸ Article 22(1) of the International Covenant on Civil and Political Rights (1966) UN General Assembly Resolution 2200A (xxi) 16 December 1966, available at 21 UN GAOR Supp. (No 16) at 52, UN Doc.A/6316 (1966), 999 U.N.T.S. 171.

⁴⁶⁹ Ibid.

⁴⁷⁰ Article 22(2) of the International Covenant on Civil and Political Rights (1966).

organizations, associations or groups.⁴⁷¹ The Defenders Declaration expressly recognises the formation of both domestic and international NGOs.⁴⁷²

These treaties and declarations recognise the right to freedom of association as cognisant of the right of individuals to organise themselves in associations to pursue common interests. In its General Comment, the United Nations Human Rights Committee (UN HRC), the body that interprets the ICCPR, notes that the right to freedom of association imposes an obligation on the state to respect and protect the enjoyment of the right.⁴⁷³ The obligation to respect requires states parties to the Covenant not to take any measures that result in denying or limiting access to the enjoyment of the right. Such actions or policies that contravene the obligation to respect include the adoption of laws or policies or repeal of pre-existing domestic law that is incompatible with standards set by the Covenant.⁴⁷⁴ NGO laws that interfere with the right of individuals to form NGOs would be in breach of this right. The right to freedom of association also imposes an obligation on the state to protect the enjoyment of the right by taking all necessary measures to ensure that individuals under their jurisdiction are protected from breaches of this right by third parties, be they individuals, groups or corporations.⁴⁷⁵ The state therefore has a duty to regulate the actions of third parties from denying or limiting the enjoyment of the right.⁴⁷⁶ The state would be acting lawfully to monitor NGO activities to ensure that they are accountable to its stakeholders, including government, members, communities and donors within the meaning of this right.

The UN HRC observes that in a democracy, the state should provide the space and the legal framework for individuals to organize in the form of associations in order to express their political opinions and to hold leaders accountable.⁴⁷⁷ The obligation to respect this right, without unnecessary restrictions, is also upheld by Sekaggya, the UN Special Rapporteur on Human Rights Defenders, who in her report, argues that individuals have rights to form

⁴⁷¹ Article 5 (b) of the UN Declaration of Human Rights Defenders (1998), Adopted on 9 December 1998, GA Resolution A/53/144, available at E/CN.4/2000/95.

⁴⁷² Ibid.

⁴⁷³ General Comment No 12 paragraph 15, General Comment No.13 paragraph 46, General Comment No.14 paragraphs 34-37.

⁴⁷⁴ General Comment No 14 paragraph 50, General Comment No 13 paragraph 59, General Comment No 14 paragraph 19.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ UN Human Rights Committee Resolution.15/21 (October 2010). For full text of resolution see <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement> [accessed 30 September 2012].

associations.⁴⁷⁸ Sekaggya contends that the right to freedom of association has a collective dimension, entitling individuals who have formed an association (NGO) to perform activities within its declared objectives'.⁴⁷⁹ Nowak argues likewise, and contends that the right to freedom of association obligates states not to prohibit the formation of an NGO provided its objectives are lawful.⁴⁸⁰ Within the meaning of this right to association, unwarranted interference in the affairs of an NGO is proscribed.

Within the African human rights system, the African Charter on Human and Peoples' Rights also recognizes the 'right of every individual to free association provided that he abides by the law'.⁴⁸¹ Unlike the ICCPR, the ACHPR makes the enjoyment of the right to associate contingent on the provisions of the law.⁴⁸² Are restrictive laws permissible? This may not be the case. Like the UN HRC, the African Commission on Human and Peoples' Rights (ACHPR), in its interpretation of article 10(1) of the African Charter on Human and Peoples Rights (ACHPR), recognises the right of individuals to form associations. The ACHPR holds that 'citizens are free to join associations, in order to attain various ends'.⁴⁸³ The African Charter, like the ICCPR, recognises the collective dimension of the right to associate and does not permit unnecessary restrictions.

Within the European human rights system, the right of individuals to form associations, as an integral component of the right to associate, is recognised much like the ICCPR. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), it is provided that 'everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests'.⁴⁸⁴ The right of individuals to form associations including NGOs is respected, and reaffirmed by the European Court of Human Rights (ECHR) which held that 'freedom of association broadly embraces the right of individuals to form associations, political parties, religious organisations, trade unions... and various other forms of

⁴⁷⁸ Margaret Sekaggya, UN Special Rapporteur on the Situation of Human Rights Defenders *Commentary to the Declaration on Human Rights Defenders* (July 2011) 60-65.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Manfred Nowak 'UN Covenant on Civil and Political Rights, CCPR Commentary 2nd Revised Edition (N P Engel, 2005) 498.

⁴⁸¹ Article 10(1) of the African Charter on Human and Peoples Rights' (1981, adopted 26 June 1981 available at OAU Doc. CAB/LEG/67/3 Rev.5, entered into force 21 October 1986.

⁴⁸² *Ibid.*

⁴⁸³ (2000) AHRLR 186 (ACHPR 1995).

⁴⁸⁴ Article 11 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

associations'.⁴⁸⁵ The ECHR notes in the *Sidiropoulos* case that the right to form an association is an inherent part of the right set forth in article 11 of the European Convention of Human Rights.⁴⁸⁶ The ECHR, like the ICCPR and the ACHPR, does not permit unwarranted restrictions on the enjoyment of the right to association.

The American Convention on Human Rights (ACHR), like the ICCPR, recognises the right of every one to freedom of association.⁴⁸⁷ The ACHR provides that 'everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes'.⁴⁸⁸ Unlike the other treaties, the ACHR defines the purposes for which persons can associate including political purposes and, by implication, human rights.⁴⁸⁹

The treaties without exception recognise the right to freedom of association as a right that enables individuals to interact for a common purpose. Jilani, former UN Special Rapporteur on Human Rights Defenders, argues that the right to freedom of association enables individuals to interact and organize among themselves collectively to express, promote, pursue and defend common interests.⁴⁹⁰ The right to form associations including NGOs, within the law is asserted. According to the Privy Council decision in *Collymore v Attorney General*, freedom of association was defined to mean the 'freedom to enter into consensual arrangements to promote the common interests or objects of the associating group, However, the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of parliament are inimical to the peace, order, and good governance of the country'.⁴⁹¹

From the above discussion, it is concluded that the right to freedom of association means that individuals are permitted to form associations, including NGOs, for the promotion of human rights as a common purpose. State regulation is permitted, provided it does not interfere with the enjoyment of the right. Would such associations and NGOs be free to pursue objectives that are declared unlawful?

⁴⁸⁵ See *Sidiropoulos and Others v Greece*, ECHR, 10 July 1998, Reports of Judgments and Decisions, 1998-IV paragraph.40.

⁴⁸⁶ Ibid.

⁴⁸⁷ American Convention on Human Rights, Adopted 1969, available at www.hrcr.org/docs/American_Convention/oashr4.html [accessed 2 January 2014].

⁴⁸⁸ Article 16(1) of the American Convention on Human Rights (1969).

⁴⁸⁹ Ibid.

⁴⁹⁰ Hina Jilani Report submitted by the Special Representative of the Secretary General on Human Rights Defenders, in accordance with General Assembly Resolution 58/178, paragraph 46, Page 12.

⁴⁹¹ *Collymore v Attorney General* [1970] AC 532 at 547.

5. 1. 2. Lawful Purpose

International law recognises the right of individuals to form associations provided the purpose for which they are formed is ‘lawful’. But what does lawful purpose mean? Lawful purpose is not expressly defined. ‘Lawful purpose’ would imply that the objective for which the association is formed is not ‘against the law’ or ‘legitimate government aim’ necessary in a ‘democratic society’.⁴⁹² Objectives that are pursued by an NGO that contravene these requirements would be prohibited. For example, the ICCPR limits the right of association to such restrictions ‘prescribed by law in the interests of national security or public safety, public order, public health or the protection of the rights and freedoms of others’.⁴⁹³ Edwards defines lawful purpose to mean that which is consistent with human rights norms.⁴⁹⁴ What amounts to ‘unlawful purpose’ should be prescribed by law. For such a law to be accepted it must meet the standard of ‘legality and proportionality’.

‘Legality’ presupposes that the law specifying the restriction is introduced through proper government procedures such as an Act of Parliament, not government decrees or administrative orders.⁴⁹⁵ The restriction imposed by the law must also be precise, not arbitrary, and made accessible to the public to enable the NGO regulate her conduct accordingly.⁴⁹⁶ The restriction must also be proportionate. What is ‘proportionate’ was defined by the UN HRC to refer to ‘the nature of the right, the importance of the limitation, nature and extent of the limitation, relation between the limitation and its purpose and, whether any less restrictive measure would achieve the purpose’.⁴⁹⁷ In *Velichkin v Belarus*, the UNHRC held that ‘for the restriction to be prescribed by law, it must conform to the strict tests of necessity and proportionality’.⁴⁹⁸ What amounts to being necessary and proportionate is determined by the UNHRC to be ‘such restrictions that must be applied only for those purposes for which they were prescribed, and must directly relate to the specific need on

⁴⁹² Article 22(2) of the International Covenant on Civil and Political Rights (1966), Article 29(3) of the African Charter on Human and Peoples Rights (1981) Article 11(2) of the European Convention on Human Rights and Fundamental Freedoms (1950).Article 16(2) of the American Convention on Human Rights (1969).

⁴⁹³ Article 22 (2) of the International Covenant on Civil and Political Rights (1966).

⁴⁹⁴ George E Edwards ‘Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21Century :Ten Attributes of Highly Successful Human Rights NGOs’ (2010) 18 *Michigan State Journal of International Law* 165 at 13.

⁴⁹⁵ Communication No.157/1983, views adopted on March 1986 [accessed 3 October 2012].

⁴⁹⁶ United Nations Human Rights General Comment No 27 [accessed 3 October 2012].

⁴⁹⁷ United Nations Human Rights Committee General Comment No 15 of 1994.

⁴⁹⁸ Communication No 1022/2001, views adopted on 20 October 2005.

which they were predicated'.⁴⁹⁹ Unnecessary restrictions in the affairs of NGOs are not permitted. For example, the UN HRC observes that the free functioning of NGOs is essential for the protection of human rights.⁵⁰⁰ According to La Rue, the UN Special Rapporteur on Freedom of Expression, the burden of demonstrating the necessity of the limitation lies with the state.⁵⁰¹

Activities of NGOs could be prohibited in pursuance of a 'legitimate government aim' particularly state sovereignty, public safety or the protection of the rights and freedoms of others.⁵⁰² For example, regulatory laws that deny the formation or carrying out of certain NGO activities could be justified on grounds of national security or protection of state sovereignty. This thesis argues that in view of this restriction, activities that promote terrorism, hate speech, unfair discrimination or genocide would merit this prohibition. According to the UN HRC, such a law that imposes the restriction on the freedom of association should not put in jeopardy the right itself.⁵⁰³ Laws that grant power to authorities to prohibit activities on grounds of disturbance to public order or state security without detailing how such activities impact on state security may not meet this test.⁵⁰⁴ For example, in Egypt, the law on NGOs prohibits participation in political, extremist or terrorist activity without defining what these terms mean.⁵⁰⁵ In Malawi, the NGO Board of Malawi may cancel or suspend registration of an NGO, if it is satisfied that the NGO is engaged in partisan politics, including electioneering and politicking.⁵⁰⁶ What constitutes 'electioneering and politicking' is not defined. In Uganda, an organisation may not be registered if the objectives of the organisation as specified in its constitution are in 'contravention of the law'.⁵⁰⁷ What amounts to 'contravention of the law' is not defined.

⁴⁹⁹United Nations Human Rights Committee General Comment No 22, Official Records of the General Assembly, Forty-Eighth Session, Supplement No 40 (A/48/40) Annex vi.

⁵⁰⁰ ICCPR, A/53/40, Volume 1 (1998) 26, paragraph 40.

⁵⁰¹ Frank La-Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council 14th Session, A/HRC/14/23, available at <http://www2.ohchr.org/english/bodies/hrcouncil/doc>.

⁵⁰² Article 22(2) of the International Covenant on Civil and Political Rights (1966).

⁵⁰³United Nations Human Rights Committee General Comment No 27, Official Records of the General Assembly, Fifty-Fifth Session, Supplement NO 40 Volume 1 (A/55/40) Annex VI, Section A.

⁵⁰⁴ International Center for Not-for-Profit Law and World Movement for Democracy *Defending Civil Society Report: Confronting Challenges to Democracy in the 21st Century*, 34-39.

⁵⁰⁵ Ibid. 17

⁵⁰⁶ Section 23(1) (a), (b), (c) and 23(2) of the Malawi NGO Act of 2000.

⁵⁰⁷ Section 4 (d) of the Non-Governmental Organizations Registration (Amendment) Act of 2006.

Even where the law prohibits an activity of an NGO or restricts its operations, such law ‘must be necessary in a democratic society’ to declare such activity as unlawful.⁵⁰⁸ What constitutes ‘necessary in a democratic society’ has been interpreted by the UN HRC as an obligation on states to impose such measures only when they are proportionate to the legitimate aim, and under no circumstance should a restriction be invoked to impair the essence of the Covenant right.⁵⁰⁹ In his report to the UN General Assembly, the UN Special Rapporteur on Freedom of Association has defined the ‘necessary’ test to imply that any measures taken must not only be ‘proportionate to the legitimate aim pursued, but must meet a pressing social need for such restriction to be accepted’.⁵¹⁰ The UN HRC does not define what a ‘democratic society’ is. To appreciate what such a society is recourse is made to the Siracusa Principles which defines such a democratic society as one ‘where the existence and functioning of a plurality of associations, including those which promote ideas not favourable to government or the majority of the population, are permitted to operate’.⁵¹¹

Unlike the ICCPR, the African Charter on Human and Peoples’ Rights subjects the right to free association to restrictions such as being ‘law abiding,⁵¹² state security, defence of national independence and territorial integrity, preservation of positive African values and the promotion of the moral well-being of society’.⁵¹³ The ACHPR permits restrictions on NGO activities provided such restrictions are provided by law.⁵¹⁴ However, for such a law to be permissible, it must be proportionate and necessary. Not only should the law be valid, it should be precise and accessible. What amounts to ‘proportionate and necessary’ was an issue in *Constitutional Rights Project and Others v Nigeria*, where the Nigerian Government issued a decree proscribing specific newspapers. The ACHPR, referring to article 9(2) ruled that:

The justification of limitations must be strictly proportionate with and absolutely necessary, a limitation may not erode a right such that the right itself becomes illusory.

⁵⁰⁸ Article 22(2) of the International Covenant on Civil and Political Rights (1966).

⁵⁰⁹ United Nations Human Rights Committee General Comment No 31(6), Nature of the General Obligations imposed on State Parties to the Covenant, 26 May 2004.

⁵¹⁰ Maina Kiai Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, UN Human Rights Committee Twentieth Session, A/HRC/20/27 available at http://www.ohchr.org/Documents/HR_Bodies/HR_Council.

⁵¹¹ Principles 19-21 The Syracuse Principles on National Security, Freedom of Expression and Access to Information, 1995, available at www.article19.org [accessed 3 October 2012].

⁵¹² Article 10(1) of the African Charter on Human and Peoples’ Rights (1981).

⁵¹³ Article 29 (3) (5), and (7) of the African Charter on Human and Peoples’ Rights (1981).

⁵¹⁴ Article 10(1) of the African Charter on Human and Peoples’ Rights (1981).

For the government to proscribe a particular publication by name is thus disproportionate and not necessary.⁵¹⁵

With regard to the preciseness of the law, the Johannesburg Principles provide useful guidance; the law must be valid, accessible, unambiguous, drawn narrowly and with precision, so as to enable individuals to foresee whether a particular action is unlawful.⁵¹⁶ Regulatory laws that encourage arbitrary decision-making against NGOs do not meet this requirement.

The ACHPR like the ICCPR does not permit unnecessary state interference in the affairs of associations once they are formed. For example, in *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*, the Civil Liberties Organisation (CLO), a Nigerian NGO protested against the Legal Practitioners [Amendment] Decree which established a new governing body of the Nigerian Bar Association, namely the Body of Benchers, replacing the one elected by the attorneys themselves, with functions to prescribe practising fees and to discipline legal practitioners.⁵¹⁷ The ACHPR held that the right to freedom of association provided in Article 10(1) of the ACHPR, requires the state to abstain from interfering with the free formation of associations, that citizens must have the capacity to join, without state interference, in associations in order to attain various ends, and that the right to freedom of association imposes a duty on states not to enact laws that would override constitutional provisions that guarantee the enjoyment of the right. Consequently, a violation of Nigerian lawyers' right to freedom of association had occurred.⁵¹⁸

Like the ICCPR, the ECHR prohibits activities that are a threat to national security or public safety, promote disorder or crime, or threaten public health or morals or infringe on the rights of others.⁵¹⁹ However, the restriction to the right to freedom of association provided in Article 11(2) of the ECHR must be justifiable.⁵²⁰ The state may not prohibit the formation of an association merely because it could be a threat to national security. For example, in the *Freedom and Democracy Party Case*, the Turkish government argued before the European Court of Human Rights that some organisations that do not pursue Turkish interests

⁵¹⁵ (2000) AHRLR 227 (ACHPR 1999).

⁵¹⁶ Principle 1. 1 (a) The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995)

⁵¹⁷ Nigerian Decree No 21 of 1993.

⁵¹⁸ (2000) AHRLR 186 (ACHPR 1995).

⁵¹⁹ Article 11(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

⁵²⁰ P van Dijk and GJH van Hoof *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1998) 591.

threatened national security and the territorial integrity of the country.⁵²¹ The ECHR held that in such cases it is the agendas or activities of the organisations in question that could be regarded as a threat, rather than the fact that such organisations may be established.⁵²² The Council of Europe has adopted a similar approach. States may not restrict the range of objectives an NGO may pursue provided such objectives are consistent with the requirements of a democratic state.⁵²³

Like the ECHR, the ACHR prohibits activities that are threat to national security, public order or the rights and freedoms of others.⁵²⁴ It does not prohibit the formation of associations per se but requires their activities to be lawful. In its interpretation of the ACHR, the Inter-American Commission of Human Rights (IACHR) observes that the ACHR permits individuals to join others for the achievement of a legal goal, a requirement similar to the ‘lawful purpose’ under the ICCPR.⁵²⁵

The ‘lawful purpose’ requirement for associations including NGOs is a principle that is recognised in international law. It applies to the objectives, activities or agenda of NGOs and does not prohibit their formation. For any restriction to be permitted on grounds of unlawful purpose it must be prescribed by law and, such a law must be consistent with human rights principles of equality, equity and non-discrimination. The requirement of lawful purpose does not permit unwarranted state interference in the management of the internal affairs of the NGOs. Given that the right to freedom of association imposes an obligation on states to regulate NGOs, is registration of NGOs mandatory?

5. 1. 3. The Right to Register NGOs

As it was noted above, international law recognises the right of individuals to form, join, and participate in associations to pursue common interests provided the purpose for which they are formed is legal or lawful. But does the right to associate require associations so formed to be registered in order to operate? And in case of registration, how onerous is the registration process? The right to freedom of association does not make registration compulsory. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not make this a requirement. By implication however, the right to freedom of

⁵²¹ *Freedom and Democracy Party (OZDEP) v Turkey*, 8 December 1999.

⁵²² *Ibid.*

⁵²³ Council of Europe, *Fundamental Principles*, Strasbourg 13 November 2002, 2.

⁵²⁴ Article 16(2) of the American Convention on Human Rights (1969).

⁵²⁵ Inter-American Commission on Human Rights, *Advisory Opinion OC-5/85* of November 13, 1985. See opinion of Judge Rafael Nieto-Navia.

association includes the right to associate formally or informally. An individual who forms an association has an option: whether to operate without legal entity status or to seek and obtain legal entity status.

But where individuals associate to act collectively to achieve a common objective, such as the pursuit of human rights, international law encourages them to acquire a legal status. The UN HRC, in its interpretation of Article 22(1) of the ICCPR observes that ‘citizens should acquire a legal entity status in order to act collectively in a field of mutual interest’.⁵²⁶ Acquiring a legal entity status would of necessity require the association to register with a recognised body that gives it legal status, making registration necessary but not compulsory.

Neither do the regional treaties require NGOs to register before they can operate. The existing body of legal opinion suggests that registration should be voluntary. Jilani, UN Special Rapporteur on Human Rights Defenders, argues strongly in favour of voluntary registration. She argues that ‘the right to freedom of association exempts NGOs from registration if they so wish. NGOs should be allowed to exist and carry out their activities without having to register’.⁵²⁷ Edwards, however, argues strongly in favour of registration for NGOs to avoid operating illegally. He contends that ‘non-registration of an NGO may render the NGO illegal under its national law, making it difficult to raise funds openly and, recruit new members, which would severely diminish its capacity’.⁵²⁸ McBride argues likewise when he notes that registration is required for formal associations that have acquired a degree of stability.⁵²⁹

But where NGOs once formed, require legal benefits such as capacity to enter into contracts, open bank accounts, hire staff, and so on, it is the argument of this thesis that they need to register in order to obtain legal personality. Notwithstanding the voluntary requirement for registration, NGOs in many countries must register in order to operate. In some countries governments impose conditions that compromise the independence of NGOs, and make it difficult for NGOs to register and to function. For example, NGOs in oppressive countries are subjected to burdensome registration regulations, government harassment, reprisal,

⁵²⁶ ICCPR, A/53/40, Vol 1 (1998) 26 paragraph 155.

⁵²⁷ Hina Jilani, Report submitted by UN Special Representative of the Secretary General on the Situation of Human Rights Defenders in accordance with GA Res.58/178 (1 October 2004) [accessed 1 October 2012].

⁵²⁸ Edwards op cit note 311 at 14.

⁵²⁹ Jeremy McBride *International Law and Jurisprudence in Support of Civil Society, Enabling Civil Society* (Public Interest Law Initiative, 2003) 25-26.

discrimination, threats or intimidation.⁵³⁰ Where registration of NGOs is required, international law takes interest in the registration process. Is the registration process burdensome?

Where NGOs seek registration, it is an accepted principle that the process shall be speedy, apolitical, accessible, objective and inexpensive. However, unnecessary delays occasioned by state officials have been experienced while entering NGOs in national registers in many countries. Regulatory bodies often impose burdensome registration requirements. Decision making may be slow and arbitrary. In some cases the regulatory body may reject an application to register without giving reasons. In some cases, the law may not stipulate the time frame within which a decision on an application should be made.

In other cases the criteria for approving or rejecting an application may be so vague so as to give a broad discretion to the authorities to make arbitrary decisions. To this the UN HRC has called upon states to ensure that citizens should be able to acquire a legal entity status without undue delay.⁵³¹ Undue delay would mean that the process is objective, transparent and, in accordance with the law, provided the law does not encourage arbitrary decision-making. The ACHPR holds a similar view. The ACHPR has held that states have the responsibility to ensure that the procedure for entering human rights organisations in the public registries will not impede their work and that it will have a declaratory and not a constitutive effect.

Within the European human rights system, the Council of Europe has addressed itself to the process of registering NGOs. The Council of Europe has called on states to ensure that the rules governing the acquisition of legal personality of an NGO, where this is not automatic, be objectively framed and not be left to the discretion of the relevant authority.⁵³²

The Americas take a similar approach. States are discouraged from adopting laws and policies that delay or deny registration of NGOs. The IACHR has called on states to refrain

⁵³⁰ For example harassment and intimidation of NGOs is reported to have occurred in Belarus, Ethiopia, Eritrea, Moldova, Uganda, Uzbekistan, and Zimbabwe, see International Center for Not-for-Profit Law 'Recent Laws and Legislative Proposals to Restrict Civil Society Organizations' (2006) 8 *The International Journal of Not-For-Profit Law*, 76.

⁵³¹ ICCPR A/53/40 Volume 1 (1998) 26, paragraph 155.

⁵³² Council of Europe Recommendation on Legal Status of NGOs, Section IV, 28-29.

from using laws and policies regarding registration of NGOs that use vague, imprecise and broad definitions and whose motive is to restrict their establishment and operation.⁵³³

Although registration of NGOs is not compulsory, international law recognises the global practice of registering NGOs in order to operate smoothly and within the law. The regulatory regime should be free from arbitrary decision-making. Delays in registration are not permitted neither is unwarranted state interference allowed once an NGO has been registered. Mindful of the state obligation to regulate the operation of NGOs, what form of regulatory model does international law envisage? Are there useful features that meet these requirements?

5. 2. REGULATION OF NGOs UNDER INTERNATIONAL LAW

As noted above, the right to freedom of association imposes an obligation on states to take measures to ensure that individuals within their jurisdiction are protected from possible breaches by individuals or third parties. States are therefore permitted to regulate the operation of NGOs through regulatory laws provided such laws do not impede their operations.⁵³⁴ It is also an accepted international law principle that the registration process of NGOs shall be speedy, apolitical, accessible, objective and inexpensive.⁵³⁵ This section therefore takes a deeper look at the United Nations, African and European regulatory models to draw possible lessons for an appropriate regulatory framework for Uganda.

5. 2. 1. The United Nations NGO Consultative Process

The United Nations regulatory regime is a state-led regulatory model. It takes the form of a Consultative Process, a procedure similar to the registration of NGOs in many countries. It is a mechanism by which states vet NGOs to ensure that they are credible enough for them to gain access and participate actively in the work of the United Nations. Under this Consultative Status arrangement, states use accreditation to determine NGOs that are legitimate to participate in the work of the United Nations bodies. Having a ‘consultative status’ means that an NGO has obtained the right to take part in a process of consultation,

⁵³³ Inter-American Commission on Human Rights ‘*Report on the Situation of Human Rights Defenders in the Americas*’ Doc.OEA/Se.L/V/II.124,Doc.5 rev.1 (7 March 2006) Recommendation 16.

⁵³⁴ Ibid.

⁵³⁵ ICCPR A/53/40 Volume 1 (1998) 26,paragraph 155.

that is expressing its views on issues discussed in meetings or to place items on the agenda.⁵³⁶ Unlike states that have a right to participation (either as voting members or observers), ECOSOC consultative status only allows an NGO an opportunity to accredit its representative to the meeting and to have a say in such meeting.

The UN Consultative Process provides for a regulatory body for NGOs as the UN Committee on Non-Governmental Organisations (the NGO Committee), an intergovernmental body comprising of state representatives of 19 UN Member States.⁵³⁷ The NGO Committee does not have NGO representation. For example, in 2011, the Committee was dominated with countries which have questionable human rights records. The Committee was composed of five countries (Russia, Sudan, China, Kyrgyzstan, and Cuba) which are ‘not free,’ eight countries (Turkey, Burundi, Mozambique, Senegal, Pakistan, Morocco, Nicaragua and Venezuela) which are ‘partly free’ and only six states (Belgium, Israel, United States, Bulgaria, India and Peru) which are ‘free’.⁵³⁸

The NGO Committee is set up within the framework of Article 71 of the United Nations Charter (UN Charter) which provides the legal framework for NGO participation in the work of the United Nations.⁵³⁹ Under Article 71 of the UN Charter, the Economic and Social Council is mandated to make arrangements for consultation with NGOs whether international or national with a priority on international groups. Under ECOSOC resolution 1296 of 1968, a criteria was established for NGO Participation at the United Nations. Before ECOSOC resolution 1296 of 1968, accreditation of NGOs was handled by NGO Liaison officers. The system was found to be inadequate due to the growing numbers of NGOs as well as the increasing concerns of accountability and transparency of NGOs that were being admitted to participate in UN Bodies.

To promote NGO participation in the UN System, and to ensure accountability and transparency of NGOs, UN Member states reviewed ECOSOC resolution 1296 and replaced it with ECOSOC resolution 1996/31 providing for the regulation and registration of NGOs

⁵³⁶ The United Nations Consultative Process, available at http://www.mandit.org/en/faq/themes_id=203 [accessed 21 January 2014].

⁵³⁷ Resolutions and Decisions of the Economic and Social Council, Economic and Social Council, Official Records, 1996, Supplement No.1,48th Plenary Meeting, 24th July 1996,ECOSOC Resolution 1996/31,Part IX,paragraph 60 and 61, available at <http://csonet.org/content/documents/199631.pdf>

⁵³⁸ Freedom House ‘Special Report: The UN Human Rights Council Report Card 2009-2010’ (September 15, 2010) 18. The Freedom House Report ‘*Freedom in the World*’ ranks countries as either ‘free, partly free, or not free’ based on its Democracy rankings.

⁵³⁹ United Nations Charter, Chapter X, Article 71 Adopted 26 June 1945, entered into force 24 October 1945; available at 557 U.N.T.S 143 [accessed 20 January 2014].

working in the field of human rights.⁵⁴⁰ The review process provided little participation of NGOs, driven mainly by the Assembly of States.

The accreditation process is compulsory. The NGO Committee has wide discretionary powers. It can accept or defer an application for accreditation on political grounds. The process of accrediting an NGO has four stages and is lengthy. Registration requirements are burdensome. The accreditation process begins with the registration of an organization profile submitted on line to the NGO Branch in New York where an officer reviews the profile and confirms acceptance of the registration by e-mail.⁵⁴¹ The organization has to wait for a notification of acceptance of the registration to proceed with the submission of documents. No time limit is given for this notification. Once notification of acceptance of registration is received, the organization can then submit a formal application supported by a range of supporting documentation (which includes an online questionnaire and summary duly filled-in, a copy of the constitution/charter and statutes, a copy of the registration certificate with proof that the organization has been in existence for at least two years, and its most recent financial statement and annual report).⁵⁴² Prior registration in the home country is mandatory for an NGO to submit its application.⁵⁴³

The application has to be received by 1 June of the year before the NGO wishes to be considered for recommendation by the NGO Committee. Before the application is received by the NGO Committee, it is screened by the NGO Branch.⁵⁴⁴ The screening process takes place between 1 June and the date the NGO Committee meets to review applications.⁵⁴⁵ An officer at the NGO Branch has discretion to reject an application if he is not satisfied with the application. He has no time limit within which he must make a decision whether to return the application or to forward it to the NGO Committee for consideration.

If the NGO Branch is satisfied with the application, the file is forwarded to the NGO Committee for consideration. Upon receipt of the application, the NGO Committee makes such an application an agenda item for the next sitting of the Committee. The Committee then sends a letter to the NGO informing it of the upcoming session, and may invite no more

⁵⁴⁰ ECOSOC Resolution 1996/31 adopted at the 49th Plenary Meeting of ECOSOC on 25 July 1996 [accessed 20 January 2014].

⁵⁴¹ UN NGO Branch Department of Economic and Social Affairs ,available at <http://csonet.org/index.php?menu=34>

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

than two NGO representatives to be present during the session, making the review process participatory. The NGO Committee sits only twice a year, in January and May or June to consider applications for consultative status.⁵⁴⁶ The Committee has power to demand additional information and, without any warning and clear guidelines, may ask questions of the NGO. It is a requirement that the NGO replies fast or else a decision is made to defer the application to a future session. Through the exercise of such arbitrary power, the NGO Committee makes unnecessary demands for additional information, which may happen several times, making the accreditation process often lengthy and costly. Where the Committee defers an application, it gives reasons, obtainable from the Secretariat of the Committee. ECOSOC resolution 1996/31 does not provide for a right of appeal against the decision of the Committee. In practice, applications can take between 1 to 3 years for a grant of consultative status, signalling undue delay in considering of applications.

If the NGO Committee decides to grant consultative status, it notifies the applicant organisation accordingly.⁵⁴⁷ However, the final decision is made by ECOSOC comprised of 54 member states upon consideration of the NGO Committee report. There are instances where the NGO Committee has rejected an application only to be accepted by ECOSOC. For example, using a ‘no action’ motion that can put on hold indefinitely an application, a U.S based NGO, the International Gay and Lesbian Human Rights Commission (IGLHRC) survived rejection by a narrow vote of the Council.⁵⁴⁸ In such cases, the applicant has had to lobby ECOSOC member states through their diplomatic missions which makes the process highly political, lengthy and expensive.⁵⁴⁹

The NGO Committee has power to suspend or revoke consultative status on four main grounds. These according to the UN ECOSOC res.1996/31 are; first, consultative status must be suspended for up to three years or withdrawn if an NGO abuses the status by engaging in a pattern of acts contrary to the purposes and principles of the UN Charter. These acts include unsubstantiated or politically motivated acts against Member states of the United Nations incompatible with those purposes and principles, in particular the breach of peace and

⁵⁴⁶ Ibid.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ In an interview with the East and Horn of Africa Human Rights Defender Project (EAHRDP), I was informed that the NGO made its first application for UN Consultative status in 2008. In May 2010 it resubmitted its application to the NGO Branch. In December 2011 the NGO Branch requested for additional information. The NGO Branch forwarded its application to the NGO Committee at its January –February session 2012. The ECOSOC Council approved its application in July 2012 after intense political lobbying, four years after its initial application. (Interview with Hassan Shire, August 2012).

security, and abuse of fundamental human rights. Second, if substantiated evidence exists that the NGO engages in internationally recognised criminal acts such as illicit drugs or arms trade or money laundering, then its consultative status could be withdrawn. Third, the failure of the NGO in consultative status to make a positive contribution to the work of the United Nations for a period of three years is a ground for suspension. Fourth, the NGO Committee can also suspend consultative status of NGOs for any administrative errors such as failure to submit UN quadrennial reports by a set deadline under UN ECOSOC Resolution 2008/4. Where the Committee exercises its power to suspend consultative status, there is no right of appeal against its decision.

In practice, the NGO Committee has abused its powers to suspend consultative status for alleged acts such as distributing ‘aggressive publications’, being perceived as a ‘political organization, or being a non-governmental organisation perceived to have ‘links with separatist organisations’.⁵⁵⁰

The UN NGO Consultative Process, as the discussion has shown, is a state-led regulatory model. Although state-controlled, it offers five useful elements that could be adopted for an appropriate regulatory framework of NGOs. First; is the representation of NGOs at the Committee session when an application is being reviewed. This makes the process of considering the application more participatory. Second, deferring an application with reasons gives the NGO an opportunity to provide additional information necessary to complete the process. Third, having ECOSOC, another layer of authority with a larger majority to make the final decision on an application affords an NGO the opportunity to present its case and have a more objective decision in the absence of a right of appeal. Fourth, the requirement to report every four years limits the burden of regular reporting and its associated state interference. And finally, the grounds upon which the Committee can suspend or revoke the consultative status are laid out, and consistent with Article 22(2) of the ICCPR.

Mindful of the powers of the NGO Committee and the UN Accreditation process, what lessons does the African human rights Observer Status Procedure offer?

5. 2. 2. The African Human Rights NGO Observer Status Procedure

Like the United Nations NGO Consultative Procedure, the African human rights NGO Observer Status Procedure is a state-led regulatory model. NGOs seeking to participate in the

⁵⁵⁰ E/2000/88, *Report of the Committee on Non-Governmental Organizations*, 13 July 2000, paragraphs. 70 ff.

work of the African Commission on Human Rights have to apply to the African Commission on Human Rights for a grant of ‘Observer Status’.⁵⁵¹ The grant of Observer status allows representatives of NGOs to participate directly in the Commission’s activities. Under Rules 75 and 76 of the Rules of Procedure, NGOs with observer status are informed of the days and agenda of the Commission Sessions, attend public Sessions of the Commission, receive all documents and final communiqués of the Session, submit ‘shadow’ reports about the situation of human rights in their home countries, and present their activity reports to the Commission once every two years.⁵⁵²

Unlike the UN Accreditation procedure, which is a three-tier process, slow and lengthy, (NGO Branch, NGO Committee and ECOSOC), the African Observer status procedure is shorter and less arduous. The Criteria for the grant of Observer status are spelt out under a resolution of the ACHPR adopted within the framework of Article 45(1) of the ACHPR and the Rules of Procedure.⁵⁵³ Under these Rules of Procedure, an organization seeking observer status with the ACHPR should demonstrate that its objectives and activities are in consonance with the fundamental principles of the African Union Charter and the African Charter on Human and Peoples’ Rights.⁵⁵⁴

Under these Rules of Procedure, the regulatory body for the grant of observer status is the ACHPR comprising of state representatives.⁵⁵⁵ The ACHPR does not have NGO representation. The ACHPR has wide discretionary powers. It can accept or reject an application for grant of observer status with or without reasons. Registration requirements are onerous. An organization seeking for the grant of observer status has to submit a written application addressed to the Secretariat of the Commission at least three months prior to the ordinary session of the Commission at which a decision on the application is to be made.⁵⁵⁶ The organisation has to submit its statutes as proof of its legal existence, a list of its members, its constituent organs, sources of funding including its last financial statement, a statement of its activities covering past and present activities, a plan of action and all relevant information

⁵⁵¹ Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples’ Rights, ACHPR/Res.33 (XXV)99 available at <http://www1.umn.edu/humanrts/africa/res33-99.html>

⁵⁵² Ibid.

⁵⁵³ Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations working in the Field of Human and Peoples’ Rights, Resolution ACHPR/ Res. 33 (XX) 99.

⁵⁵⁴ Ibid. Chapter I, paragraph 2.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid. Chapter I, paragraph 3.

that would be helpful in determining the identity of the organization, its purpose and objectives as well as its field of activities.⁵⁵⁷

The registration process is mandatory. Unlike the UN Consultative procedure, it is less onerous. The application for observer status is subject to a two-tier screening process; first it is processed by the African Commission Secretariat which must ensure that the applicant meets the eligibility criteria. The review of the application is undertaken by a rapporteur designated by the African Commission Bureau and thereafter the application is forwarded to the Commissioners for a decision. Following the review of the Criteria for the Grant of Observer status, it is now a requirement for the representatives of NGOs that have applied for observer status to be present and to be interviewed during the consideration of their application, which to some extent allows minimal participation.⁵⁵⁸ Once the African Commission makes a decision, the applicant is notified without delay.⁵⁵⁹

Like the UN Accreditation procedure, prior registration in the home country is mandatory for an organisation seeking for a grant of observer status. Grounds upon which an application can be denied can be broad and arbitrary. There are instances when NGO applications for observer status have been denied mainly due to inadequate documentation or where the Commission deems the NGO objectives to be ‘unlawful’. For example, the Commission rejected an application by the Coalition of African Lesbians (CAL) in 2010 giving reason that the activities of the said organisation do not promote and protect any of the rights enshrined in the African Charter, a decision interpreted to be discriminatory and at best a confirmation of its earlier ruling in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, in which the African Commission held that discrimination based on sexual orientation would not be a prohibited ground under Article 2 of the African Charter.⁵⁶⁰ The decision also contrasts with an earlier Commission resolution which guarantees the right to freedom of association and states that

⁵⁵⁷ Ibid. Chapter I, paragraph 3(b).

⁵⁵⁸ Resolution on the Cooperation between the African Commission on Human and Peoples’ Rights and Non-Governmental Organizations having Observer Status with the Commission (Banjul 31 October 1998), available at <http://www.achpr.org/sessions/24th/resolution/30> [accessed 22 January 2014].

⁵⁵⁹ The interviewing of applicants for Observer status follows the decision of the African Commission on Human and Peoples’ Rights made at its 24th Ordinary Session held in Banjul, The Gambia from 22nd to 31st October 1998 ‘requiring representatives of NGOs that have applied for Observer status to be present to be interviewed during the consideration of their application’.

⁵⁶⁰ ACHPR Communication 245/2002. See paragraph 33 of the 28th Activity Report of the African Commission on Human and Peoples’ Rights, 2010, Executive Council Seventeenth Ordinary session, 19-23 July 2010, Kampala, Uganda.

the regulation of the exercise of the right to freedom of association should be consistent with the state's obligations under the African Charter on Human and Peoples' Rights.⁵⁶¹

Grounds for the revocation of observer status are not defined either. With the exception of a persistent failure of an NGO to submit its activity report every two years to the Commission, no other specific ground is laid out.⁵⁶² It could however be argued that the Commission is guided by such considerations as the possible threat to the security of the state and the preservation of African positive values in reaching a decision on an application as provided under Article 29 of the ACHPR. No time limit is provided for the Commission to make its decision and neither does a right of appeal exist where the Commission revokes the grant of observer status.

Like the UN model, the African regulatory model is state-driven and provides for compulsory registration. The African NGO Observer status procedure, similar to the UN model, permits minimal NGO participation in the determination of an application. Both the United Nations and African regulatory framework have broad discretionary powers. No appeal mechanism exists under both arrangements. The UN system, contrary to the African procedure, is less prone to arbitrary-decision making. Although less stringent in comparison to the UN procedure, the African procedure imposes strict conditions, and does not meet a regulatory model that is inclusive, participatory and more enabling. Given these shortcomings, does the European model offer a better experience? To this the discussion turns in the next section.

5. 2. 3. The European INGO Participatory Status Procedure

The Council of Europe (CoE) provides a more inclusive, accountable and participatory regulatory model. Unlike the previous models discussed above, the European participatory status procedure is a state-NGO led regulatory model, where a state regulatory body works alongside an independent, democratically-elected body of international non-governmental organisations with participatory status known as the INGO Liaison Committee to accredit NGOs with participatory status. Unlike the UN 'consultative status' that allows NGOs to attend meetings, express their views on the agenda of the meeting without full rights of

⁵⁶¹ Article 3 ACHPR /Res. 5(XI) 92: Resolution on the Right to Freedom of Association (1992).

⁵⁶² At its Twenty-Fourth Ordinary Session held in Banjul, The Gambia, in 1988, the African Commission on Human and Peoples' Rights took the decision to revoke observer status of any NGO that did not submit any activity reports at the 27th Ordinary Session, following a decision of the Conference of the Heads of States and Government of the OAU at its Thirty-Fourth Ordinary Session [AHG/Dec.126 (XXXIV) Paragraph 3. No revocation of NGO observer status is known to have been effected in practice despite such decision having been made by the ACHPR.

participation, the participatory status of the CoE provides for full co-operation of NGOs in the work of the Council of Europe (CoE) including; contributing to specific projects and the work of intergovernmental Committees, making statements both oral or written to the Parliamentary Assembly and the Congress of Local and Regional Authorities as well as addressing seminars and meetings convened by the CoE.⁵⁶³ The participatory nature of the European model is noted by the Committee of Ministers who, in their resolution, stress the importance of an active and constructive role of NGOs in promoting democracy.⁵⁶⁴

The regulator is the Secretary General whose powers are deliberately freed from arbitrary decision-making, considering that his or her decision is subject to the decision of the Committee of Ministers of CoE, the Members of the Parliamentary Assembly and the Congress of Local and Regional Authorities, as well as the opinion of the INGO Liaison Committee.

Registration requirements are burdensome. An INGO seeking to apply for participatory status has to fulfil certain conditions. Among these is the requirement of being representative in the field of its competence, being representative at the European level in most member states, and being able to contribute to the work of the CoE.⁵⁶⁵ This, as noted before, is to ensure that the organisation is credible and accountable. Having satisfied the above requirements, an INGO applicant has to submit to the Secretary General of the CoE three copies of the application, containing the INGO's statute, list of its member organisations including an estimate of the number of members in each organisation, a report of its activities for the previous two years, a declaration that it accepts the principles of the CoE, reasons for applying, how it will contribute and participate in the activities of the CoE, practical cooperation already in place with the CoE and how it plans to publicise the work of the CoE. In practice, these requirements may be too burdensome to groups in their formative stage. Although registration is compulsory, the Rules of Procedure allow the Secretariat of the CoE to co-operate with the INGO on an adhoc basis pending the final determination of the application unlike the UN procedure that allows participation in UN work only on grant of the status.

⁵⁶³ Council of Europe, Committee of Ministers Resolution Resolution (2003)8, Adopted by the Committee of Ministers on 19 December 2003 at the 861st Meeting of the Ministers' Deputies, available at http://www.coe.int/t/ngo/Articles/Resolution_203_8_en.asp [accessed 22 January 2014].

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

Unlike the NGO Committee or NGO Branch of the United Nations which do not have a time-limit within which to respond to an application, the Secretary General of the CoE must make a decision with reasons and commit the list of NGOs to which he or she intends to grant participatory status to the INGO Liaison Committee, and receive their opinion within two months of receiving the communication. At the end of the two months' period, the Secretary General must submit his decision with reasons, as well as any comments from the Liaison Committee for approval to the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities to avoid arbitrariness in the decision-making process. In the absence of any objections, the applicant NGOs would be added to the list three months later. Should there be any objection to the decision of the Secretary General, the decision of the Committee of Ministers would be deferred until a recommendation of the competent committees of the Parliamentary Assembly or the Congress of Local and Regional Authorities is received.

Powers to withdraw participatory status are not arbitrary either. Grounds for revocation of participatory status are defined. They include the failure of the INGO to comply with the obligations and rules as set out, and a continuous inability to carry out its activities.⁵⁶⁶ The Secretary General must inform the INGO in question of an intention to withdraw the participatory status and give the INGO two months within which to respond. A decision of the Secretary General to withdraw the participatory status is subject to the same procedure, as described for the grant of the status. A time limit of three months is provided for the removal of the NGO from the list, demonstrating a reasonable degree of consistency. Even where an application is rejected or the participatory status is revoked, an INGO may submit a fresh application after a period of two years after the date of the decision. The UN provides for a suspension of three years, however, the African model is silent on a possible action of an NGO whose application has been denied or whose status has been revoked.

In what appears to be good practice, both the UN model and the European model require NGOs to submit a report of their activity every four years. This, in my view, is a reasonable period that ensures minimum state interference once an organisation has been registered.

⁵⁶⁶ Ibid. Paragraph 16.

5. 3. CONCLUSION

As noted above, the right to freedom of association entitles individuals to the right to form associations, including NGOs. Individuals have, within these associations, the rights to perform activities within their declared objectives, subject to permissible restrictions. These restrictions do not permit unwarranted state interference in the activities of the organisation. The right to freedom of association also imposes a duty on the state to regulate the activities of the organisation to avoid breaches by third parties, promote transparency and accountability, provided such regulatory laws do not encourage arbitrary decision-making.

NGOs are permitted to perform activities within their declared objectives, provided such objectives are lawful. The formation of an organisation may not be prohibited per se but its activities, agenda or objectives that may be a threat to national security, territorial integrity, public order and good governance may be restricted. Where the law restricts the performance of certain activities, it must be precise and consistent with the human rights principles of equity, equality and non-discrimination.

Registration is not compulsory for anyone to enjoy the right to associate although it is encouraged in order for NGOs to operate freely and in accordance with the law. Where registration is required for an NGO to operate, it must be speedy, apolitical, accessible, objective and inexpensive. States are encouraged to avoid adopting laws and policies that delay or deny the registration of NGOs. Mindful of these requirements, a review of the UN, African and European regulatory models has identified important lessons for our study.

First, an enabling regulatory model should go beyond ‘consultation’ to encouraging the ‘active public participation’ of NGOs. The active and constructive role of NGOs in promoting democratic pluralism should be recognised. The European model that grants ‘participatory status’ to INGOs presents an important innovation where registration is designed to foster cooperation, unlike the UN and the African models where registration is meant only to offer permission to NGOs to attend and express their views in meetings by virtue of their ‘consultative’ or ‘observer status’.

Second, it seems that the involvement of NGOs in the determination of applications for registration reduces arbitrary decision-making. For example, although participation of NGOs is minimal, both the UN and African models permit representatives of NGOs to participate in sessions where individual applications are being considered. The UN Committee on NGOs

and the African Commission invites representatives of NGOs to answer questions about individual applications during sessions at which such individual applications are being considered. The European model provides even a better example. The Secretary General of the Council of Europe is required to present his decision together with the file of the applicant to the INGO Liaison Committee for an opinion before he or she submits the decision as well as the opinion to the Committee of Ministers of the Council of Europe for a final approval.

Third, specifying the criteria for registration provides a measure of certainty to the registration process. The three models have onerous registration requirements. The UN Committee on NGOs often asks for additional information which may cause undue delay. Unlike the UN and African models, the European model provides a time-limit within which a decision on an application must be made. On average, an application for participatory status takes five months from the date of application, while it takes between 1-3 years in the UN system.

Fourth, the ‘Tier approach’ in the decision-making process limits the broad and discretionary powers of the regulatory body. For example, the UN model subjects the decision of the UN Committee on NGOs comprising of 19 state representatives to ECOSOC composed of 54 state representatives. Under the European participatory status procedure, the decision of the Secretary General of the Council of Europe has to be ratified by the Committee of Ministers, and in case of an objection, by the Permanent Assembly and the Congress of Local and Regional Authorities of Europe. Unlike these two models, the African Commission on Human Rights has broad powers considering that their decision to deny or revoke an application is not subject to review.

Fifth, is the reporting period for an organisation once it has been registered. The UN and the Council of Europe require NGOs to submit every four years a report on their activity compared to two years which the African Commission provides for. A period of four years is considered reasonable to avoid unnecessary state interference.

Sixth, grounds on which a registration or ‘status’ can be revoked should be clearly laid out. The UN has laid down four grounds (criminal acts such as illicit drugs, arms trade, money laundering, failure to perform, failure to report and politically motivated acts against member states); the Council of Europe prioritizes acts contrary to the purposes of the Council of Europe, and acts prejudicial to the participatory status including the failure of the NGO to perform its activities), while the African Commission has revoked observer status for NGOs that have neglected to submit activity reports every two years.

Finally, notice should be given where the regulator intends to revoke the registration or 'status', and a 'cooling period' be indicated as a measure of respect to the right to freedom of association. For example, the Council of Europe gives two months to an NGO to respond to its intention to withdraw participatory status, and a fresh application can be received after a period of two years following the date of the decision. Neither the UN Committee on NGOs or the African Commission on Human Rights has a time- limit within which to notify an NGO of a suspension or revocation of its status. The UN has a time frame of three years for a suspension.

Alongside these elements, is a growing interest in self-regulation of NGOs to promote transparency and public accountability. The first attempt at exploring alternative models of regulation was the appointment of a Panel of Eminent Persons on UN Relations with Civil Society (the Cardoso Panel).⁵⁶⁷ According to the Cardoso Panel, NGOs should adopt Codes of Conduct and self-policing mechanisms to enable them to adopt responsible, ethical and efficient conduct. For example, the big NGOs (such as Amnesty International, Oxfam International, Greenpeace International and World Vision International) have adopted an 'NGO Accountability Charter' to which they commit themselves to good governance, transparency, non-discrimination, financial, accounting and reporting requirements; minimum organisational structure, decision-making requirements as well as stakeholder participation.⁵⁶⁸

In conclusion, this thesis argues therefore, that the six elements identified above, taken together with the recommendation for self-regulation are key to securing an NGO regulatory framework that is enabling and respects the right to freedom of association.

Aware of these standards, does the NGO regulatory regime in East and Southern Africa guarantee the associational space necessary for active public participation and the free functioning of NGOs in the region? To this I turn in the next chapter.

⁵⁶⁷ See Cardoso Report, proposals 6,12,19 UN website <http://www.Un.ngls.org/ngorelations.htm>

⁵⁶⁸ See http://www.amnesty.org/resources/downloads/NGO-Accountability_Charter.pdf [accessed 8 October 2012].

CHAPTER 6

A COMPARATIVE REVIEW OF THE EXISTING NGO REGULATORY FRAMEWORK IN EAST AND SOUTHERN AFRICA

6. 0. INTRODUCTION

In an earlier discussion of the regulatory framework of NGOs under international law it was established that individuals have the rights to association, expression, and peaceful assembly.⁵⁶⁹ These procedural rights are subject to permissible restrictions provided such restrictions are prescribed by law, are in the interest of a legitimate government aim, and are necessary in a democratic society.⁵⁷⁰

It can also be argued that government has an obligation to regulate the operations of NGOs in order to promote transparency, accountability, and the realisation of the common good.⁵⁷¹ But this it must do fully aware of the need to strike a delicate balance between providing the necessary oversight to protect the public interest in NGOs and the freedom of NGOs to operate without undue interference by the government. Indeed, it is argued here that in a democratic society, the state is obliged to provide the legal and regulatory framework for civil society to function independently.⁵⁷²

A discussion of the existing NGO regulatory framework in selected countries of Eastern and Southern Africa would have to answer the polemical question: How and why do states regulate NGOs? And if they have to, what are the shortcomings of the existing models?

Using case studies of the legal framework governing NGOs in six countries: Ethiopia, Kenya, Malawi, Namibia, Zimbabwe, and South Africa, this chapter examines the existing regulatory models and questions whether there is a link between democracy, associational space and the regulatory regime for NGOs in the region.

⁵⁶⁹ Chapter 5 (section 5.1).

⁵⁷⁰ Article 22(2) of the International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, United Nations General Assembly Ordinary Resolution 2200A (XXI), 21UNGAOR Supplement (No 16) at 52, UN Doc.A/6316, 999 UNTS 171, entered into force on 23 March 1976.

⁵⁷¹ Welch op cit note 349 at 44.

⁵⁷² M Edwards *Civil Society* (London: Polity, 2004) 24.

6. 1. WHY ETHIOPIA, KENYA, MALAWI, NAMIBIA, ZIMBABWE, AND SOUTH AFRICA?

As was observed in the Introductory Chapter, the state in much of Eastern and Southern Africa has had an uneasy relationship with advocacy NGOs.⁵⁷³ The reaction of the state to NGO actions varies from suppression, co-option to partial independence.⁵⁷⁴ This relationship is determined largely by the nature of the regulatory framework in place. To understand the nature of existing regulation in this region, the study profiles six countries which apply one of the three regulatory models; state regulation, state/self-regulation, and self-regulation. These countries are Ethiopia, Kenya, Malawi, Namibia, South Africa, and Zimbabwe.

First, each of these countries presents a rich history of the democratic struggle, and demonstrates how differences in political systems and behavioural patterns contribute to the narrowing or broadening of associational space.

Second, the choice of countries has also been dictated by current global democracy rankings. For example, Freedom House in its report: *Freedom in the World* classifies them as follows: Kenya (Partly Free), South Africa (Free) and Zimbabwe (Not Free).⁵⁷⁵ Ethiopia, (Not Free), Malawi (Partly Free), and Namibia (Free).⁵⁷⁶

Third, each of these countries has adopted one of the two dominant regulatory models; state regulation in Zimbabwe and Ethiopia, state/self-regulation in Kenya and Malawi while a strong debate on self-regulation rages on in South Africa and Namibia.

Using historical, legal, and political analysis, this Chapter takes a critical look at the mutation of state-civil society relations in these countries and the extent to which prevalent models of NGO regulation uphold civic participation and associational rights.

⁵⁷³ Chapter 1 (section 1.0).

⁵⁷⁴ Ibid.

⁵⁷⁵ International Center for-Not-For-Profit Law 'NGO Laws in Sub-Saharan Africa: Global Trends in NGO Law' (2012) 3 *International Journal of Not-for-Profit Laws* 1 at 2, <http://www.icnl.org/research/trends/trends3-3.html>. Freedom House: Freedom in the World ranks countries on a scale of 1-7 on political and civil liberties as free, partly free, and not free.

⁵⁷⁶ Ibid.

6. 2. THE HISTORICAL AND POLITICAL CONTEXT

Any mention of the term NGO regulation in Africa evokes negative feelings within the civil society sector and tends to portray a sense of denial and democratic decline in many countries on the continent. But is civil society regulation bad or does it in any way mean strangulation of the sector? The fact is that state regulation of NGOs is necessary and is an international practice. As already noted in Chapter 5, three arguments are given to justify NGO regulation: first, it is invoked to defend state sovereignty.⁵⁷⁷ Through regulation the state argues that it is able to check ‘prohibited activities’ such as terrorist financing that NGOs could be engaged in.⁵⁷⁸ Second, it is argued that state regulation provides an accountability tool through which the ‘common good’ is protected.⁵⁷⁹ This, it is argued, ensures that unscrupulous NGOs do not exploit the public. Third, it is a mechanism for promoting good governance within the sector; and for promoting accountability, transparency and respect for diversity.⁵⁸⁰ What is at stake is the amount of associational space afforded to NGOs when a state exercises its power to regulate, should it be enabling or controlling?

As Lindblom observes ‘NGOs are neither good nor bad’.⁵⁸¹ Neither do NGOs have an unequivocal claim to the high moral ground. What is at stake is the right to *free political expression* and the space for civil society to enjoy this right. Franck describes this right to free political expression as inclusive of the rights to freedom of thought, freedom of association, and freedom of expression as provided in the International Covenant on Civil and Political Rights.⁵⁸² According to the Markus Principle of ‘democratic inclusion,’ the right to free political expression entitles every individual, alone or in association with others, a right to a say in decision-making that affects them.⁵⁸³ This right to full participation was declared by the UN Commission on Human Rights when it affirmed that the rights to democratic governance include such rights as the rights to freedom of opinion and expression, of thought,

⁵⁷⁷ Anna-Karin Lindblom ‘The Main Issues and their Context’ in Anna-Karin Lindblom (ed) *Non-governmental Organizations in International Law* (Cambridge, New York: Cambridge University Press, 2005) 3.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*

⁵⁸² Thomas Franck ‘The Emerging Right to democratic Governance’ 1992) 86 *American Journal of International Law*, 46 at 61. See Articles 19, 21, 22 of the ICCPR.

⁵⁸³ Susan Markus *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: Oxford University Press, 2000) 109,119.

conscience and religion, and of peaceful association and assembly.⁵⁸⁴ It is this right to democratic governance which civil society exercises by creating new social spaces.

In what could be seen as a major democratisation drive, Africa has seen a proliferation of NGOs since the 1980s.⁵⁸⁵ This growth is indicative of the associational space that opened up following the fall of the Berlin Wall, as Africa made major strides in embracing multi-party politics, pluralism, democratic governance and political stability. Citizens became major players in their own governance and through civil society formations they pushed openly for political inclusiveness and wider social space for more voices for political participation. Beyond ‘gap filling’ through the provision of welfare services, civil society groups sought to reform the state and politics generally in society through raising awareness, and mobilising the ordinary people to hold their governments accountable.

Walters argues that ‘the relationship between the state and the NGOs then became more of a political question that impinged on the legitimacy of the various types of organisations to exercise power’.⁵⁸⁶ In dictatorships and one party states that dominated much of Africa during the post-colonial period all NGO work was seen to be outside the framework of any legitimate social order or governance and was perceived more as part of oppositional political forces.⁵⁸⁷ The state under such regimes saw civil society as a threat to their power, and through the use of legal and extra-judicial means, it began to constrain activism and the vibrancy within civil society. The relationship was mediated most directly through a range of legislation under which the state determined who had the right to assert leadership, organise people and allocate resources.⁵⁸⁸ Underlying this state response too, was a belief by the one-party state that it was the ‘authentic voice of the people’ and as such represented the aspirations, concerns, and needs of the people and there was therefore no place for any other organisation.⁵⁸⁹

⁵⁸⁴ Paragraph 2 and 6 of the Preamble, *Promotion of the Right to Democracy*, 28 April 1999, available at E/CN.4/RES/1999/57.

⁵⁸⁵ Jjuuko op cit note 342 at 60.

⁵⁸⁶ Shirley Walters *Non-governmental Organizations (NGOs) and the South African State: Present and Future Relations, an Exploratory Paper* (Centre for Adult and Continuing Education, University of Western Cape, 1990) 2.

⁵⁸⁷ Mutua op cit note 10 at 27.

⁵⁸⁸ Mutua op cit note 10 at 2.

⁵⁸⁹ Makau op cit note 10 at 6.

For example, from the 1920s until 1963, when Kenya was under colonial rule, civil society organisations were actively involved in the struggle for independence.⁵⁹⁰ *Harambee* (self-help) formed the foundation for non-profit initiatives which were galvanised around relief and development. After independence these self-help initiatives became politicised as the ruling party, the Kenya African National Union (KANU) began to monitor and control their activities. Through the Societies Act of 1968 the state controlled the registration and activities of associational organisations and invoked the Trade Dispute Act of 1965 to ban industrial action, and in so doing restricted associational rights.⁵⁹¹

NGOs in Kenya became more active between the 1980s and 1990s, when the demand for constitutional reform and good governance was renewed. The end of Cold War politics heralded a new era of political revival as NGOs and pro-democracy groups in Kenya contested the exclusion of citizens from participation and competitive politics. The growth of civic organisations around the 1990s, as Kameri-Mbote observes, was due to the growing need to protect associational rights.⁵⁹² With the growth of civil society at this time and the return of political pluralism under which the rights to freedom of association, expression, and assembly became more pronounced, state regulation of civic organisations became inevitable. It is within this political context of renewed optimism, suspicion, and fear that the previous law on NGOs in Kenya, the NGO Coordination Act No 19 of 1990 was enacted.⁵⁹³

Like Kenya, civil society in Zimbabwe has had an uneasy relationship with the state. The colonial Rhodesian government did not view civic organisations as entities with unlimited rights to define their own agenda. The state saw civic organisations as an appendage of the state to be monitored and controlled.⁵⁹⁴ For this reason the colonial government enacted the Private and Voluntary Organisations (PVO) Act No 63 of 1966 to control and monitor groups which the state believed were linked to the liberation movement, and disseminated information about the human rights situation in Rhodesia, now Zimbabwe. As long as the

⁵⁹⁰ Ludeki Chweya 'Civil Society and Consolidation of Democracy in Africa: Current Trends' in Duncan Okello (ed) *Civil Society in the Third Republic* (Nairobi: National Council of NGOs, 2004) 26-35.

⁵⁹¹ Priscilla Wamucii and Peter Idwasi 'The Legislative Environment for Civil Society in Kenya' in Moyo Bhekinkosi (ed) (*Dis*) - *enabling the Public Sphere: Civil Society Regulation in Africa* (Midrand: Southern Africa Trust, 2010) 247-267 at 250.

⁵⁹² Patricia Kameri-Mbote *The Operational Environment and Constraints for NGOs in Kenya* (International Environmental Law Research Centre, Geneva: Switzerland, 2000-2) 1, available at <http://www.ielrc.org/content/w0002.pdf> [accessed 17 October 2012].

⁵⁹³ See the newly enacted Public Benefit Organizations (PBO) Act No 18 of 2013.

⁵⁹⁴ James Muzondidya and Lynette Nyathi Ndlovu 'The Legislative and Operational Environment for Civil Society in Zimbabwe' in Moyo Bhekinkosi (ed) (*Dis*)-*enabling the Public Sphere: Civil Society Regulation in Africa* (Midrand: Southern Africa Trust, 2010) 25-47 at 27.

Private and Voluntary Organizations Act was in force, civil society organisations concentrated more on humanitarian activities to avoid the wrath of the colonial state.⁵⁹⁵ Under this Act, civic organisations were prohibited from certain activities such as political education among Africans and advocacy for democratic rights for Africans.⁵⁹⁶ To the Rhodesian state such ‘prohibited activities’ amounted to political incitement and the promotion of terrorism against which the state was justified to defend itself.⁵⁹⁷

Aware of the need to control activities of groups like the Catholic Commission for Peace and Justice (CCPJZ) that investigated and documented human rights abuses of the Rhodesian Security Forces, the colonial government enacted the Unlawful Organizations Act of 1959, which was used to ban African political groups and any other colonial resistance movements and any groups perceived as such.⁵⁹⁸ Throughout the colonial period the state applied the law strictly, invoked other repressive laws such as the Law and Order Maintenance (LOMA) Act of 1962, which empowered the police to detain and restrict citizens without trial. The Unlawful Organizations Act of 1959 was also invoked to ban all organisations suspected of undermining the colonial state and to detain and deport critics of the Rhodesian colonial administration.⁵⁹⁹ Civil society groups found it increasingly difficult to operate in an environment characterised by fear, threats, intimidation, harassment and unjustified state control.

In what appears to be common practice of post-colonial governments in Africa that restricted associational rights, the post-independence government of Zimbabwe retained the Private and Voluntary Organizations Act of 1966 which it renamed the Private Voluntary Organisations Act of 1995 (PVO Act) with minor amendments and modifications to govern the registration and operations of NGOs and civil society groups in Zimbabwe. The preamble of the PVO Act makes it clear what the intention of government is in the introductory paragraph, which states that its purpose is ‘to provide for the registration of private voluntary organisations, the control of the collection of contributions for the objects of such organisations and of certain institutions, and for matters incidental thereto’.⁶⁰⁰

⁵⁹⁵ Ibid. at 29.

⁵⁹⁶ Ibid at 29.

⁵⁹⁷ Ibid.

⁵⁹⁸ R H Randolph *Dawn in Zimbabwe: The Catholic Church in the New Order: A report on the activities of the Catholic Church in Zimbabwe for the five years, 1977-1981* (Gweru: Mambo, 1985).

⁵⁹⁹ J Muzondidya and Nyathi-Ndlovu op cit note 569 at 30. Among the groups that were proscribed was the Northern Rhodesian African National Congress whose activities were deemed to ‘disturb’ the peace.

⁶⁰⁰ Ibid at 29.

The amendment came in the wake of a major shift of the work of civil society organisations in Zimbabwe from relief and welfare to campaigning for democratic space and reforms in the 1990s. And regardless of the right to public participation the amendment was carried out without consultation with stakeholders.⁶⁰¹ The proposed amendments are reported to have come to the knowledge of NGOs at the second reading stage in parliament.⁶⁰² What followed thereafter were reports of state harassment and intimidation of civil society organisations and allegations of being an extension of the political opposition.⁶⁰³

In South Africa, state-civil society relations are best described by White, who in his treatise on '*Constructing a Democratic Developmental State*', argues that civil society in South Africa functioned as an 'idealised counter-image, an embodiment of social virtue confronting political vice; the realm of freedom versus the realm of coercion, of participation versus hierarchy, pluralism versus conformity, spontaneity versus manipulation and purity versus corruption'.⁶⁰⁴

In many ways this observation holds value for the developments that characterised the struggle against apartheid and the democratic movement of the post apartheid era in South Africa. Unlike many countries in the region, where civil society was suppressed, the transition from authoritarianism under apartheid to democracy in South Africa enlisted full civil society involvement. Walters observes that 'since the mid-1970s there has been a proliferation of NGOs in South Africa with the growth of the sector reaching an all time high during the latter part of the 1980s despite severe repressive action by the state'.⁶⁰⁵ Relations between the state and civil society during the apartheid era were adversarial, similar to the experiences of other countries under colonial rule.

But unlike other civil societies elsewhere in Africa, the South African civil society has a strong tradition of resistance and has jealously guarded its autonomy. Civil society was strongly instrumental in challenging the injustices of the apartheid regime. The apartheid state imposed a range of legislation to control the operations of civic groups. Among these was the Fundraising Act No 107 of 1978 (Fundraising Act of South Africa), Group Areas Act

⁶⁰¹ N Mashumba and C Maroleng *Tightening the Noose: Narrowing the Democratic Space for NGOs in Zimbabwe* (ISS Situation Report, 24 September 2004) 2.

⁶⁰² The Herald 8 February 1995, 182 '*State to introduce Bill to monitor activities of NGOs*'. The bill came up for the Second Reading in Parliament on 7 February 1995.

⁶⁰³ Muzondidya and Nyati Ndlovu op cit note 569 at 32.

⁶⁰⁴ G White '*Constructing a Democratic Developmental State*' in G White and M Robinson (ed) *The Democratic Developmental State: Political and Institutional Design* (Oxford: Oxford University Press) 77.

⁶⁰⁵ Walters op cit note 561 at 6, 1.

No 41 of 1950, and the Movement of Black Persons Act No 45 of 1959, through which the state regulated and intimidated NGOs. For example, under the Fundraising Act of South Africa, any group or civil society organisation that wished to raise funds had to register with the Department of Welfare. The Fundraising Act of South Africa gave broad discretion to the state officials to decide whether such civil society group or NGO should be allowed to register, raise funds or exist at all.⁶⁰⁶ The apartheid state believed that political power was the monopoly of the state and regarded the work of NGOs as an inappropriate challenge to this monopoly, considering that civil society groups had worked closely with pro-democracy forces to open up the closed system.⁶⁰⁷

The 1980's was in many ways a period of political revival in South Africa. Due to international pressure, the apartheid state had begun to make more concessions. This created more political space for organisations to grow and flourish.⁶⁰⁸ Not only was there numerical growth in civil society, civil society groups adopted and emphasised participatory democratic practices.⁶⁰⁹ A strong democratic culture was beginning to revive. When apartheid gave way to democracy in 1994, NGOs were treading a democratic path and in search of their autonomy they were keen to counter authoritarian practices by the state. The post-apartheid state had to be mindful of the role of civil society in promoting development, democracy, and good governance, and it is against that background that the Non-Profit Organisations Act No 71 of 1997 which repealed the Fundraising Act of South Africa was enacted.

In other countries like Ethiopia, Malawi, and Namibia which were under colonial or military rule, state-civil society relations were not better. Moyo argues, whose views are accepted in this thesis, that in much of colonial Africa, civil society was the bedrock for the struggle against colonialism and other forms of oppression; associational life, whether overtly or covertly, was instrumental in the fight for political and civil rights.⁶¹⁰ State-civil society relations were therefore to a large extent adversarial in much of post-colonial Africa.

⁶⁰⁶ Siphamandla Zondi and Dimpho Motsamai 'South Africa: Reflections on the Legislative Framework for Civil Society' in Bhekinkosi Moyo (ed) (*Dis*) - *enabling the Public Sphere: Civil Society Regulation in Africa (Volume 1)* (Midrand South Africa: Southern Africa Trust, 2010) 66.

⁶⁰⁷ Bhekinkosi Moyo *Regulation or Strangulation? NGO Laws in Africa, Part 1: South Africa* available at <http://www.thoughtleader.co.za/bhekinkosimoyo/2008/10/05/regulation-or-strangulation-ngo-laws-in-africa-part-1-south-africa/> [accessed 17 October 2012].

⁶⁰⁸ Jjuuko op cit note 342 at 60.

⁶⁰⁹ Walters op cit note 561 at 6.

⁶¹⁰ Bhekinkosi Moyo 'Introduction' in Bhekinkosi Moyo (ed) (*Dis*)-*enabling the Public Sphere: Civil Society Regulation in Africa (volume1)* (Midrand, South Africa: Southern Africa Trust, 2010) 8-9.

In Malawi, pressure groups akin to civil society existed during colonial rule. These groups, characteristic of civil society during the colonial period were mainly pre-occupied with the struggle for freedom and independence. With restrictions of rights to association and assembly, such groups could only operate outside the legally accepted spaces. But on attaining independence, Banda ruled under a one-party dictatorship.⁶¹¹ Under Banda, even these constricted spaces could hardly exist. Civic associations were restricted when Banda removed the Bill of Rights from the Constitution of 1964 in 1966. The regime that was characterised by oppression and abuse of human rights created a culture of silence. Policy-advocacy NGOs and political parties were banned and civic participation was rendered impossible.⁶¹²

The end of Banda's rule in 1994 ushered in a new beginning for Malawi. The advent of political pluralism and multi-party democracy brought with it new opportunities. A bill of rights was entrenched in the new Malawian Constitution adopted in 1994 creating more space for NGOs to operate.⁶¹³ Like elsewhere in Africa, Malawi registered an impressive growth of NGOs.⁶¹⁴ But this new found freedom did not last long as some NGOs were perceived to be exceeding their operational criteria.⁶¹⁵ New laws and a regulatory framework targeting the operations of NGOs were deemed necessary. Later, the opposition to the campaign for the removal of presidential term limits (third term campaign) brought the state into further conflict with NGOs who were seen to be engaged in politics and electioneering.⁶¹⁶ As the Malawian state became less democratic and less open it became more intolerant of NGOs. And within this climate of distrust, and the urge to control and limit public space, the Non-Governmental Organisations Act of 2000 (Malawi NGO Act) was formulated.

⁶¹¹ Virginia Kamowa *Civil Society and Policy Making in Malawi* <http://www.polis.leeds.ac.uk/research/students/kai> [accessed 17 October 2012].

⁶¹² Francis Ng'ambi 'The Legislative Environment for Civil Society in Malawi' in Bhengkosi Moyo (ed) (*Dis - enabling the Public Sphere: Civil Society Regulation in Africa* (volume 1) (Midrand, South Africa: Southern Africa Trust, 2010) 161-177 at 162.

⁶¹³ Article 32 of the Malawi Constitution Act No 20 of 1994 provides for freedom of association and states that: (1) 'Every person shall have the right to freedom of association, which shall, include the freedom to form associations and, (2) 'No person may be compelled to belong to an association'.

⁶¹⁴ *Ibid.* at 165.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*

In Ethiopia, civil society was slow to take root. During the rule of the Derg (a military junta) civil society was severely restricted.⁶¹⁷ Autonomous associations typical of civil society hardly existed. The concept of human rights was derived from a soviet model, emphasising economic development through highly centralised control.⁶¹⁸ To the regime, procedural rights like freedom of expression, association, and assembly were marginal to what they described as ‘greater tasks of mobilisation around economic development’.⁶¹⁹

It was not until the fall of the Derg regime in 1991 that domestic advocacy organisations emerged. The Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF) adopted the EPRD Charter which proclaimed democratic values, and Article 2 of the Charter recognised participation, freedom, fair and proper representation as the basis of government.⁶²⁰ With this pronouncement political space expanded giving room for human rights groups to emerge, such as the Ethiopian Human Rights Council, the Ethiopian Congress for Democracy and the Inter-Africa Group.⁶²¹ But this honeymoon was short-lived as the Revolutionary Government of Ethiopia was soon to demonstrate its reluctance to embrace independent civic groups. In 2009 the axe fell. The Government of Ethiopia adopted the Proclamation for the Registration and Regulation of Charities and Societies (CSP), one of the most controversial and restrictive NGO laws to date.⁶²²

Namibia, on the other hand, has a lot in common with South Africa. The struggle for independence in Namibia gained much support from civil society groups. Before independence, civil society organisations, mainly the church, trade unions, students, women and human rights groups were supportive of social protection issues whilst being highly critical of the colonial regime.⁶²³ After Namibia gained independence in 1990, the space was liberalised for civic action as the first democratically elected government recognised the

⁶¹⁷ Dessalegn Rahmato ‘Civil Society and the State: The Challenge of Democratization in Ethiopia’ in Bhikinkosi Moyo (ed) *(Dis)-enabling the Public Sphere: Civil Society Regulation in Africa* (Volume 1) (Midrand, South Africa: Southern Africa Trust, 2010) 191-219 at 195.

⁶¹⁸ Claude E Welch ‘The Context of Human Rights in Africa: Issues in Four Countries’ in Welch Claude Emerson (ed) *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) 6-13.

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

⁶²¹ Welch op cit note 349 at 6-13.

⁶²² Charities and Societies Proclamation (Proclamation No. 621/2009; See NGO Law Monitor: Ethiopia, available at <http://www.icnl.org/research/monitor/ethiopia.html> [accessed on 17 October 2012].

⁶²³ Norman Tjombe ‘The Legislative Environment for Civil Society in Namibia’ in Bhikinkosi Moyo (ed) *(Dis)-enabling the Public Sphere: Civil Society Regulation in Africa* (Volume 1) (Midrand, South Africa: Southern Africa Trust, 2010) 99-115 at 102.

importance of non-governmental organisations despite occasional tensions that arose.⁶²⁴ Freedom of association is guaranteed under the Namibian Constitution⁶²⁵ and Namibia reportedly has one of the most liberal legislative frameworks for the existence of civil society in Southern Africa.⁶²⁶ The Government of Namibia adopted the Civic Organisations Partnership Policy in 2005 to govern the relationship between the state and civil society in an open and participatory process.⁶²⁷ Efforts to draft an NGO Law, the Registration of Partnership Law, stalled when NGOs opposed it on grounds that the exercise was being carried out in a climate of suspicion.⁶²⁸

This survey of the historical and political context of the six countries (Kenya, Zimbabwe, South Africa, Malawi, Ethiopia and Namibia) shows a rather uniform pattern of state–civil society relations during the colonial period and military dictatorships. Generally, state-civil society relations were adversarial, based on suspicion of civil society, a desire by the state to control civic groups and little regard for civic participation and associational rights. The 1980s to 1990s, however, marked a new beginning in most of these countries as the fall of the Berlin Wall brought new pressures on African states to open up the space for democracy. In many of these countries, states quickly enacted new laws to pre-emptively counter any potential threat to their power and to control the public space. Muzondidya and Nyathi-Ndlovu observe that at the heart of such laws was a ‘broader political strategy to decapitate any opposition, and that even countries with friendly NGO legislation showed a tendency to control and repress civic expression and agency’.⁶²⁹

The survey above also shows, as is substantiated by the discussion to follow, that there is a clear divide between states which are working towards establishing enabling laws and regulations to support NGOs (e.g. Namibia, South Africa); states which have less enabling laws for NGOs (e.g. Kenya, Malawi) and those that, being suspicious of NGOs, are enacting laws and adopting regulations to restrict and narrow the space for NGOs (e.g. Zimbabwe, Ethiopia). What is not in dispute though is that sub-Saharan Africa has witnessed a proliferation of laws that govern the activities of NGOs in recent years, some progressive and

⁶²⁴ Ibid.

⁶²⁵ Article 21(1) (e) of the Namibian Constitution, 1990 provides that ‘All persons shall have the right to freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties’.

⁶²⁶ Tjombe op cit note 598 at 98.

⁶²⁷ Ibid.

⁶²⁸ Ibid, 110.

⁶²⁹ Muzondidya and Nyathi-Ndlovu op cit note 569 at 8-9.

others restrictive, bringing the right to civic participation and associational rights into question, to which the discussion now turns.

6. 3. THE LEGAL AND REGULATORY FRAMEWORK OF NGOs

Active public participation and associational space are crucial to the defence of liberties. Associational space is guaranteed when NGOs have freedom to operate without interference and are permitted to exercise rights to freedom of association, expression, and assembly. In examining the legislative and regulatory framework, two principal areas for comparative review form the core of this analysis: the legislative process, and existing registration practices. The regulatory models for interrogation are: *the state-led regulatory model, the combined state-led/self-regulatory model and the self-regulatory model.*

Under a state-led regulatory model, the regulatory framework of NGOs is entirely state-driven. The NGO law provides for a National Board (or its equivalent) for the registration, monitoring, and regulation of NGOs without any or with little participation of NGOs. In contrast to the state-led model, the state-led/NGO regulatory (hybrid) model provides for a National Board for NGOs whose membership includes NGOs, and alongside this statutory body is a self-regulating agency for NGOs. Meanwhile, the self-regulation model entrusts the supervision of NGOs to a self-regulatory body of NGOs and the state plays an oversight role.

There is wide acceptance that there must be some form of regulation of the activities of NGOs to promote their transparency and accountability, and to protect citizens against possible abuse. The duty of the state to regulate is also juridical; derived from the juridical social contract that rights may be abridged under permissible grounds in return for security, peace and order.⁶³⁰ States feel the urge to regulate in order to safeguard state legitimacy and the undesirable infringing of state sovereignty by NGOs.⁶³¹ This, as noted in chapter 5, is only acceptable where the restriction is prescribed by law, is in the interest of a legitimate government aim, and is necessary in a democratic state.⁶³² Where state sovereignty

⁶³⁰ Article 22 paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR).

⁶³¹ Kameri-Mbote op cit note 567 at 5.

⁶³² Article 22 paragraph 2 of the ICCPR; See also U.S State Department, Guiding Principles, No.2, and Principle 2(2) of the Declaration of Principles on Freedom of Expression in Africa (2002). See also Chapter 5 (section 5.2).

considerations arise, such interference is justified only in situations that present a ‘clear and present danger’.⁶³³

6.3.1. The Legislative Process

In this section the question to ask, was the legislative process participatory? And, what were the reasons for enacting these laws? To what extent were NGOs involved in formulating the NGO laws? And, is there a link between the legislative process and the outcome?

In the enactment of the NGO laws in the countries under review, the participation of NGOs in the legislative process varies according to the state of democracy in each country. And as noted earlier, Zimbabwe and Ethiopia have a state-led model.

In Zimbabwe, the PVO Act of 1995 is a carry-over from the colonial state.⁶³⁴ The PVO Act was enacted by the Rhodesian government in 1966 when civil society was increasingly critical of government.⁶³⁵ The colonial state wanted more control over the sector so that it could monitor its activities and intervene whenever it felt such activities threatened the existence of the state.⁶³⁶ The aim of government in enacting the law is evident from the introductory paragraph of the PVO Act which states its purpose as being ‘to provide for the registration of private voluntary organisations, the control of the collection of contributions for the objects of such organisations and of certain institutions and for matters incidental thereto’.⁶³⁷

It was not until the mid-1990s, when civil society, which had been apolitical since Zimbabwe became independent in 1980, became assertive and critical of the Zimbabwean government.⁶³⁸ Rising levels of poverty, unemployment, corruption and abuse of human rights prompted NGOs to speak out, engage in policy advocacy, civic education, and election monitoring activities.⁶³⁹ As a result, state-civil society relations deteriorated and government heightened its crackdown on civic activism. The government responded to this growing activism by tightening its control of civic action through partisan constitutional amendments or the

⁶³³ Principle 29, The Syracuse Principles on National Security, Freedom of Expression and Access to Information, 1995, available at www.article19.org [accessed 20 October 2012].

⁶³⁴ Mashumba and Maroleng op cit note 576 at 2.

⁶³⁵ Muzondidya and Nyati-Ndlovu op cit note 569 at 28.

⁶³⁶ Ibid at 30.

⁶³⁷ The Preamble to the Private Voluntary Organizations Act of 1966.

⁶³⁸ S R Dorman ‘Rocking the Boat: Church, NGOs and Democratization in Zimbabwe’ (2002) 101 *African Affairs* 75-92.

⁶³⁹ Ibid. at 82-83.

adoption of legal and extra-legal instruments.⁶⁴⁰ One such action was the amendment of the PVO Act in 1995, and, as noted earlier, it was amended without much public participation.⁶⁴¹ To restrict the operating space even further government introduced the Non-Governmental Organisations Bill of 2004, (NGO Bill) described by most critics as one of the ‘most restrictive laws for civil society in Africa’.⁶⁴² The aim of the Bill had been to curtail NGO activities on issues of governance.⁶⁴³ NGOs only came to know about the NGO Bill when it was on the floor of Parliament during the second reading.⁶⁴⁴

The NGO Bill intended to repeal the PVO Act but (did not become law due to lack of Presidential assent,) but as Muzondidya and Nyathi-Ndlovu argue, ‘its provisions have been incorporated into other laws or enforced through de facto means’.⁶⁴⁵ Like the PVO Act, the debate on the NGO Bill did not involve NGOs. When NGOs began a campaign to have it repealed, government simply issued a public notice warning that NGOs that would not register in accordance with section 6 of the PVO Act risked prosecution.⁶⁴⁶ Apart from the PVO Act and the NGO Bill, the governing policy on the Operations of Non-Governmental Organisations in Humanitarian and Development Assistance in Zimbabwe was also ‘unilaterally announced by the government without consulting any of the civil societies in its drafting’.⁶⁴⁷

Like Zimbabwe, the adoption of the Charities and Societies Proclamation (CSP) of 2009 in Ethiopia was controversial. The CSP was a product of a fierce debate and contention between the Government of Ethiopia and civil society.⁶⁴⁸ The legislation had its roots in the conflict between human rights NGOs and the Government in matters related to the May 2005 National Elections in Ethiopia.⁶⁴⁹ Civil Society organisations particularly human rights groups were

⁶⁴⁰ J Mapuva and L Muyongwa ‘A Critique of the Key Legislative Framework Guiding Civil Liberties in Zimbabwe’ (2012) 15 (4) *P.E.R* 125-231 at 125.

⁶⁴¹ The PVO Act of 1966 has been amended several times: in 1976, 1981, 1995, 2000, 2002, and 2005. The National Association of Non-Governmental Organizations (NANGO) made recommendations calling for a wholesome reform of the PVO Act of 1966 but this was ignored.

⁶⁴² Mapuva and Muyongwa op cit note 615 at 134. For example, Section 9 (4) of the NGO Bill of 2004 seeks to ban foreign NGOs concerned principally with ‘issues of governance’ and NGOs receiving foreign funding for the ‘promotion and protection of human rights and political governance issues’ from being registered.

⁶⁴³ The NGO Network Alliance Project, available at <http://www.kubatana.net/html/archive/legisl/0905> [accessed on 20 October 2013].

⁶⁴⁴ ‘State to introduce Bill to monitor activities of NGOs’ *The Herald* 8 February 1995, 182.

⁶⁴⁵ Muzondidya and Nyathi-Ndlovu op cit note 569 at 35.

⁶⁴⁶ Tamuka H Muzondo ‘*The potential impact of the NGO Bill on the Role of NGOs in the Protection and Promotion of Human Rights in Zimbabwe*’ (Master Thesis) University of Cape Town, 2009) 7.

⁶⁴⁷ Muzondidya and Nyathi-Ndlovu op cit note 569 at 11, 41.

⁶⁴⁸ Debebe Hailegebriel ‘Ethiopia’ (2010) 12 (3) *The International Journal for Not-for-Profit Law*, available at http://www.icnl.org/research/journal/vol12.iss.3/special_3.htm [accessed on 19 October 2013].

⁶⁴⁹ *Ibid.*

active in monitoring and exposing human rights violations during the 2005 Elections. Government accused NGOs of being impartial and being pro-opposition.⁶⁵⁰ Since the 2005 Elections, Government began to see NGOs as a threat to its hold over the political space. With a skeptical and hostile attitude towards human rights organisations, Government enacted the CSP to reflect the Ethiopian People Revolutionary Democratic Front (EPRDF) policy position towards NGOs.⁶⁵¹ The policy document questions the role of NGOs in the development process and describes them as ‘rent seeking, unaccountable, and representing foreign interests’.⁶⁵² The underlying motivation of the law was given among others, to ensure the citizens’ right to association enshrined in the Constitution of Ethiopia,⁶⁵³ to ensure the accountability, transparency and consistency of CSOs to the public and, to provide varieties of measures to be taken against CSOs in case of fault.⁶⁵⁴

The draft CSP No 00 of 2008 (the Proclamation) was presented for discussion with CSOs and other interested parties.⁶⁵⁵ A number of consultative meetings were held between CSO representatives and Government officials.⁶⁵⁶ CSOs met with the Prime Minister and the Ministry of Justice officials.⁶⁵⁷ CSOs thereafter established a Task Force to pursue continuous dialogue with government officials. The Taskforce made commentaries on the draft law, and organised Round table meetings for discussions. Although some of the provisions in the draft were changed, it is argued that civil society input did not have a meaningful impact on the final outcome of the Proclamation. Hailegebriel argues that government officials were resistant to constructive dialogue, and most of the revisions were more technical and cosmetic rather than substantive.⁶⁵⁸

⁶⁵⁰ Bahru Zewd ‘*The Role of NGOs in Protecting Democratic Values, the Ethiopian Experience: The Challenge of Democracy from Below* (Forum for Social Studies, 2002) 125-129.

⁶⁵¹ See the Ethiopian People Revolutionary Democratic Front (EPDRP) Policy Document ‘*Revolutionary Democracy and Struggle for the Development of Democratic Rule*, (EPDRF, 2006).

⁶⁵² Ibid.

⁶⁵³ The Ethiopian Constitution of 1995 provides under Article 31 of the Constitution that ‘every person has the right to freedom of association for any cause or purpose however organisations formed for an illegal cause or to subvert the constitutional order or promote such activities is prohibited’.

⁶⁵⁴ The Preamble of the CSP; See also The Minutes of the Legal and Administrative Affairs of the House of Peoples Representatives of Ethiopia, 24 December 2008.

⁶⁵⁵ S Mandeep Tiwana *Analysis of the Ethiopian Charities and Societies Proclamation 00/2008* (CIVICUS, 2008) 1.

⁶⁵⁶ Heilegebriel op cit note 623.

⁶⁵⁷ Ibid.

⁶⁵⁸ Hailegebriel op cit note 623. Restrictive provisions in the Draft CSP that were toned down include among others: (i) the power to refuse registration on ground that a charity is *likely* to be used for unlawful purpose or purposes prejudicial to public peace, welfare or good order and instead raised to *sufficient reason to believe* that a charity is to be used for the above purpose(s); the requirement to renew the license of registration every year was extended to every three years, and the overbroad grounds to refuse or cancel a license for ‘public collections’ on such grounds as a person not ‘being a fit and proper person’ were removed.

Kenya, like Malawi, has a hybrid model. In Kenya, the process of enacting the NGO law was initiated by government that felt the need to have some form of legislation to regulate NGO operations.⁶⁵⁹ The President, who reportedly had strained relations with NGOs because of their vigorous advocacy for democratic reform, issued a presidential Directive in 1989 creating a directorate to co-ordinate NGOs under the Office of the President.⁶⁶⁰ The directive overshadowed a cabinet paper that had previously been presented by the Ministry of Culture and Social Services that co-ordinated them.⁶⁶¹ The reasons given for this action were three-fold: first, that some NGOs were unscrupulous; second, that Kenya had to fulfil her international commitments under Chapter 27 of Agenda 21, Principle 10 of the 1992 Rio Declaration, which required states parties to take concrete measures to facilitate NGO coordination for effective environmental management; and third, that NGOs were perceived as a potential threat to national sovereignty given that donors showed greater attention to them in civil rights matters.⁶⁶² Indeed, the ‘Memorandum of Objects and Reasons’ Clause of the NGO Act gives the reasons for making this law as being to ‘provide for the registration and co-ordination of NGOs in Kenya’.⁶⁶³

Following this directive, the President appointed an inter-ministerial Task-Force on NGOs.⁶⁶⁴ The study of the inter-ministerial committee recommended the co-ordination of the NGO sector. A draft NGO bill was presented and, during debates on this bill, NGOs lobbied for representation on the proposed NGO Co-ordination Board and the insertion of provisions on self-regulation.⁶⁶⁵ The NGO Act made provision for this, and established a governmental agency, the NGO Co-ordination Board.⁶⁶⁶ The NGO Act also established a self-regulatory agency known as the Kenya National Council of NGOs with powers to adopt its own structures, rules and proceedings, and to ensure self-regulation of NGOs by adopting a Code of Conduct and regulations there under.⁶⁶⁷ Despite the inclusion of NGO demands in the NGO Act, due to lack of relevant consultation with NGOs during the legislative process, NGOs

⁶⁵⁹ Kameri-Mbote op cit note 567 at 4.

⁶⁶⁰ Ibid.

⁶⁶¹ R Munio and B Musumba *Analysis of Community based organizations in Kenya: The Case of Machakos and Nairobi Districts* (Nairobi: Ford Foundation, 1995). The report notes that the first attempts to regulate NGOs in Kenya were in 1984 when the Kenya Government established the Kenya National Council for Social Services (KNCSS) housed under the Ministry of Culture and Social Services.

⁶⁶² Kameri-Mbote op cit note 567 at 4.

⁶⁶³ Memorandum of Objects and Reasons Clause of the Non-Governmental Organizations Coordination Act No 19 of 1990.

⁶⁶⁴ Kameri-Mbote op cit note 567 at 4.

⁶⁶⁵ Ibid.

⁶⁶⁶ Section 3(1) of the NGO Coordination Act No 19 of 1990.

⁶⁶⁷ Section 23 of the NGO Coordination Act No 19 of 1990.

found the law to be unsatisfactory and restrictive. NGOs protested against the restrictive law.⁶⁶⁸ NGOs held a series of meetings with relevant government departments, for example, the President's Office and the Attorney General to agree on a compromise position.⁶⁶⁹ After lengthy discussions, a process of amending several sections of the Act was undertaken which resulted in the adoption of the Miscellaneous (Amendments) Act No 12 of 1991.

Amendments were effected in three areas. First, section 13(1) that required NGOs to register every three years was amended. The period was extended to five years.⁶⁷⁰ The three-year period was considered restrictive considering that NGOs can be perpetual entities if they so desire.⁶⁷¹ Second, the powers of the Minister were limited in circumstances of disagreement between an NGO and the Minister.⁶⁷² Whereas the Minister was the final arbiter, the change enabled NGOs to exercise the right to appeal to the High Court in the event of such disagreement.⁶⁷³ Third, the membership of the NGO Council on the National Board of NGOs was increased from five to seven members which gave the NGO Council a higher prominence on the Board.⁶⁷⁴

Malawi, on the other hand, presents a rather interesting experience. Under colonial rule, the state was less permissive of the activities of civil society. When Malawi became independent in 1964, relations entered a new phase under the Banda government. The relationship was characterised by suspicion and mistrust and more control was exerted on the activities of NGOs.⁶⁷⁵ Following the 1994 democratisation process and, the creation of space for NGOs to operate, a proliferation of NGOs took place.⁶⁷⁶ Government exerted limited regulation and monitoring which resulted into duplication of efforts among NGOs.⁶⁷⁷ NGOs were increasingly being perceived as lacking in transparency, accountability and focus.⁶⁷⁸ As Government contemplated measures to regulate the sector, NGOs on their own began a campaign for a self-regulatory policy to control the operations of NGOs.⁶⁷⁹ The NGOs submitted proposals to Cabinet, seeking, among other things, tax exemption benefits and

⁶⁶⁸ Kameri-Mbote op cit note 567 at 12.

⁶⁶⁹ Ibid.

⁶⁷⁰ Section 13(1) of the NGO Act No 19 of 1990.

⁶⁷¹ Kameri-Mbote op cit note 567 at 12.

⁶⁷² Section 19(3A) of the Kenya Gazette Supplement No 85 Act No 8 of 1992.

⁶⁷³ Section 34 (3) of the Kenya Gazette Supplement No 85 Act No 8 of 1992.

⁶⁷⁴ Section 4(1) of the Kenya Gazette Supplement No 85 Act No 8 of 1992.

⁶⁷⁵ Esme Chipso Kadzamira and Denis Kunje *The Changing Roles of Non-Governmental Organizations in Education in Malawi* (Zomba, Centre for Educational Research Training, University of Malawi, 2002) 8.

⁶⁷⁶ Nga'mbi op cit note 587 at 163.

⁶⁷⁷ Ibid at 9.

⁶⁷⁸ Kadzamira and Kunje op cit note 650 at 9.

⁶⁷⁹ Ng'ambi op cit note 587 at 165.

access to government financing.⁶⁸⁰ The government of Malawi set up an NGO/Government task force to examine the proposals with a view to developing an NGO law. Government gave three reasons for enacting a law to regulate the activities of NGOs: first, the lack of financial accountability and transparency on the part of some NGOs; second, the feeling that some NGOs were crossing the boundaries of operation and venturing into politics and that a new law would stop that; and third, that there was a need to regulate NGO operations and locate them on the basis of need.⁶⁸¹

In what could be seen as a perplexing turn of events, an NGO bill was hastily tabled in Parliament, passed into law and swiftly assented to by the President amidst protests from NGOs.⁶⁸² As noted earlier, a climate of distrust between NGOs and Government and the resultant tensions created by human rights advocacy NGOs could have undermined the dialogue process.⁶⁸³ Nonetheless, the underlying reasons for this law have been stated among others, as being the development of a strong independent civil society in Malawi . . . for public benefit purposes,⁶⁸⁴ promotion of donor and public confidence in the NGO sector . . . and principles of fiduciary integrity, public accountability, and democratic decision-making⁶⁸⁵ . . . and, to affirm human rights provisions enshrined in the Constitution of Malawi.⁶⁸⁶ However, two principal areas of disagreement continue to create difficulties; one, being the requirement for compulsory registration with the regulatory body and, the other being the provision for compulsory membership with the Council for Non-Governmental Organisations in Malawi (CONGOMA).⁶⁸⁷

As noted earlier, South Africa and Namibia are more inclined towards a self-regulatory model. Like other sub-Saharan African countries, South Africa's Constitution guarantees everyone the right to freedom of association.⁶⁸⁸ Within this constitutional framework, there are three legal structures for non-profit organisations (NPOs) which are most commonly adopted in South Africa. These are voluntary associations (VAs), trusts and Section 21

⁶⁸⁰ Ibid.

⁶⁸¹ Kadzamira and Kunje op cit note 650 at 10.

⁶⁸² Ibid, at 167.

⁶⁸³ Kadzamira and Kunje op cit note 650 at 9.

⁶⁸⁴ Section 3 (a) of the Malawi Non-Governmental Organizations Act of 2000.

⁶⁸⁵ Section 3(c) of the Malawi Non-Governmental Organizations Act of 2000.

⁶⁸⁶ Section 3(e) of the Malawi Non-Governmental Organisations Act of 2000.

⁶⁸⁷ Section 20(3) (v) of the Malawi Non-Governmental Organizations Act of 2000. NGOs argue that compulsory membership is inconsistent with Article 32 (2) of the Malawi Constitution which prohibits a person from being compelled to belong to an association.

⁶⁸⁸ Section 18 of the Constitution of South Africa (as amended) No 108 of 1996 states that 'everyone has the right to freedom of association'.

companies.⁶⁸⁹ VAs require agreements and are governed by common law; a Trust is incorporated by lodging a trust deed with the High Court while a Section 21 company is governed by the new Companies Act of 2010.⁶⁹⁰ If an organisation chooses to register as an NPO, then it would be governed by the Non-Profit Organisations Act No 71 of 1997 (NPO Act) which is the subject of this study.

The process of formulating the NPO Act involved ‘lengthy and rigorous consultations negotiated between the state and civil society organisations’.⁶⁹¹ The participatory approach to the formulation of the NPO Act can be seen in the lengthy consultations among various stakeholders including government, civil society, and development partners. For example, in a report of an independent study into an enabling environment for NGOs, it is stated that provincial NGO sectoral coalitions and umbrella CBO organisations made recommendations on all aspects of the NPO Act.⁶⁹² South Africa, in a more inclusive and consultative approach also convened the Non-profit Organisations Summit at which the Policy Framework on Non-profit Organisations Law (the Policy Document) was circulated for discussion.⁶⁹³ Moreover, the NPO Act spells out this progressive nature when it states that the ‘Act is aimed at creating an enabling environment which will enable NPOs to flourish, establish a regulatory framework within which NPOs can conduct their affairs and, encourage NPOs to maintain adequate standards of governance, transparency, and public accountability’.⁶⁹⁴ In what could be argued as a positive approach to state-NGO relations, the preamble of the NPO Act recognises civil society as a ‘development partner for which the Act is to provide an environment in which NPOs can flourish, and conduct their affairs’.⁶⁹⁵

⁶⁸⁹ Section 1(x) of the NPO Act No 71 of 1997 defines ‘non-profit organisation’ to mean a trust, company or other association of persons (a) established for a public purpose and, ((b) the income and property of which are not distributable to its members or office bearers except as reasonable compensation for services rendered. See also Brewis Tessa *The Legal Environment for Non-Profit Organizations in South Africa* (NPO Management Program, May 2007) 2.

⁶⁹⁰ South Africa Companies (Amendment) Act No 3 of 2010.

⁶⁹¹ Zondia and Motsamai op cit note 581 at 67.

⁶⁹² Development Resources Center ‘Report of the National Workshop of the Independent Study into an Enabling Environment for NGOs held on 22nd-23rd November, 1994. On perusing this report I find that almost all proposals in the report are contained in the NPO Act, 1997.

⁶⁹³ The South African Non-profit Organizations Summit, 15-17 August 2012 was hosted by the National Department of Social Development with the objective of creating a platform for effective partnerships between the government and the nonprofit sector as mandated by the Nonprofit Organizations Act [Act 71] of 1997.

⁶⁹⁴ Section 2 of the Non Profit Organizations Act No 71 of 1997.

⁶⁹⁵ Preamble to the NPO Act No 71 of 1997; see Parliamentary Liaison Office ‘The Non-Profit Organizations Act 71 of 1997’ Briefing Paper No.3.

Namibia has a Civic Organisations Partnership Policy (the policy) which, like the NPO Act, was adopted in an open and consultative manner.⁶⁹⁶ Namibia does not have an NGO law because earlier attempts to draft the Registration of Partnerships Act was opposed by NGOs and, given Namibia's belief in a participatory approach, the process was halted.⁶⁹⁷ Instead the Policy proposes the enactment of a Code of Good Practice (the Code of Procedures) to provide for partnership with and reporting arrangements to government by civic groups, a term that includes NGOs.⁶⁹⁸

So, was the legislative process in each country above, participatory, and did it reflect the outcome? The countries surveyed have different experiences but reflect a common pattern. Countries that have a state-led model exhibit the least form of NGO participation. Even where some limited participation was allowed, for instance, in Ethiopia, the views of NGOs were largely ignored, and the amendments were largely cosmetic.⁶⁹⁹ In Zimbabwe and Ethiopia, the motivation for the law is to control NGOs.⁷⁰⁰ Countries that adopted a state-NGO-led model allowed more NGO participation, although the degree of involvement varies. Amendments were made in some areas of the law, for instance, Kenya effected amendments to the NGO Co-ordination Act to accommodate several demands of NGOs.⁷⁰¹ Malawi was less permissive of NGO demands. Unlike Zimbabwe and Ethiopia who focus on control of NGOs, in both Kenya and Malawi, the purpose of the law is to co-ordinate NGOs.⁷⁰² On the other hand, South Africa and Namibia demonstrate the highest levels of NGO participation and respect for civil society space. Namibia, for example, halted the legislative process because of the discomfort exhibited by NGOs. The NPO Act, much like the Policy in Namibia is designed to create an enabling environment for NGOs to operate. In all the countries surveyed, despite varying levels of NGO participation, there is a common thread in the NGO law, which is to provide for the registration of NGOs and, to promote transparency and public accountability in the NGO sector.⁷⁰³

⁶⁹⁶ Tjombe op cit note 598 at 98.

⁶⁹⁷ Ibid.

⁶⁹⁸ General Notice 99 of 2007, Code of Procedure for the Registration and Operations of Non-Governmental Organizations.

⁶⁹⁹ Heilgebriel op cit note 623.

⁷⁰⁰ Preamble Public Voluntary Organizations Act of 1995; Preamble Charities and Societies Proclamation of 2009.

⁷⁰¹ Kenya Gazette Supplement No 85, Act No 8 of 1992.

⁷⁰² Memorandum of Objects and Reasons clause of the NGO Co-ordination Act No 19 of 1990 and Section 3 of the Malawi Non-Governmental Organisations Act of 2000.

⁷⁰³ Preamble of PVO Act of 1995; Preamble of CSP of 2009; Memorandum and Objects Clause of NGO Coordination Act of 1990; Section 3 of the Malawi NGO Act of 2000 and Section 2 of the NPO Act of 1997.

6. 3. 2. Registration

As noted before, international law recognises the right of individuals to form, join, and participate in an association provided the purpose for which it is formed is legal or lawful.⁷⁰⁴ The right to freedom of association does not make registration compulsory although many countries require NGOs to register in order to operate.⁷⁰⁵ When the right to register is exercised in order to operate lawfully, the registration system should be truly accessible, clear, speedy, apolitical and inexpensive.⁷⁰⁶ This is necessary to avoid the possibility of government manipulating the regulations to interfere with legitimate associational life. Once registered the NGO has a right to operate free from unwarranted state interference.⁷⁰⁷ This section examines the registration process in these countries. How are the regulatory bodies established? What are the criteria for their appointment, membership, security of tenure and level of independence?

6. 3. 2. 1. The NGO Regulatory Mechanism

In South Africa, the national Department responsible for Welfare is the administrative body for non-profit organisations (NPOs).⁷⁰⁸ Under the NPO Act, the Directorate for NPOs is the body charged with registration of NPOs as legal entities, as well as the coordination and implementation of policies in the non-profit sector.⁷⁰⁹ The Director of NPOs is designated by the Minister for Welfare and Population Development following a public call for nominations.⁷¹⁰ The list of nominees is published for comments. Extensive consultations with the public are mandatory.⁷¹¹ The NPO Directorate is governed by regulations made under the NPO Act which require the Directorate to observe the principles of accountability, responsibility, transparency, and customer care in all its operations.⁷¹²

Although the NPO Act provides for the NPO Directorate within the Department of Welfare as the regulatory body, the policy document proposes to establish a self-regulatory NPO Council along the lines of the Charities Commission of England and Wales and a new entity to be called ‘The South African Non-profit Organisations Regulatory Authority’ which would

⁷⁰⁴ Chapter 5 (section 5.1.1.).

⁷⁰⁵ Ibid.

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid.

⁷⁰⁸ Section 1 (1) (ix) of the Non Profit Organizations Act No 71 of 1997.

⁷⁰⁹ Section 4 of the Non Profit Organizations Act No 71 of 1997.

⁷¹⁰ Section 1(1) (viii) and 8 of the Non Profit Organisations Act No of 1997.

⁷¹¹ Zondia and Motsamai op cit note 581 at 71-73.

⁷¹² Section 26 of the Non Profit Organisations Act No 71 of 1997.

deal with the registration of non-profit organisations, investigate complaints, enforce compliance, raise awareness and education, and provide public access to information.⁷¹³ If the Policy Document is implemented, a new approach to NGO regulation would have been set because unlike in other countries where NGO co-ordination boards fall under a parent ministry and are subject to state control, the regulatory authority would be autonomous and theoretically free from control of or directive from any government body. This would require a repeal of the NPO Act to bring the policy in conformity with the law.

In Namibia, the primary regulator of non-profit companies is the Registrar of Companies located in the Ministry of Trade and Industry. There is no specific NGO law at present in Namibia and NGOs are registered as non-profit 'section 21 companies'.⁷¹⁴ Non-profit companies could be trusts, foundations, voluntary organisations or community-based groups. The Civic Organisations Partnership Policy proposes that the new bill establish a transparent and voluntary registration process.

In Kenya, NGOs are required to register with a semi-autonomous governmental agency, the NGO Co-ordination Board.⁷¹⁵ However, Kenya has recently enacted a new law, the Public Benefit Organizations Act of 2013 (PBO Act) to repeal the NGO Coordination Act. Despite this new development, the Rules and Regulations to govern the implementation of the PBO Act are yet to be adopted for the Act to enter into force. At the time of writing this thesis, it is the NGO Co-ordination Act which is in use.

The NGO Coordination Board consists of 21 government appointees, not less than five and not more than seven of whom are appointed by the Minister on the strength of their knowledge or experience in development issues, hold office for three years but are eligible for re-appointment.⁷¹⁶ Five members are appointed by the Minister on the recommendation of a self-regulatory agency, the National Council of NGOs, to serve for a period of three years.⁷¹⁷ The chairperson is appointed by the President.⁷¹⁸ Six of the members occupy positions by virtue of their offices.⁷¹⁹ The Executive Director, appointed by the Minister, is an ex-officio

⁷¹³ International Center for Not for Profit Law 'NGO Law Monitor: South Africa' (Research Center, 2012) 8 [accessed 20 October 2012].

⁷¹⁴ Section 21 Companies Act 1973 (No.61 of 19973).

⁷¹⁵ Section 3(1) of the NGO Co-ordination Act No 19 of 1990.

⁷¹⁶ Section 4 (1) (b) and 4 (2) of the NGO Coordination Act No 19 of 1990.

⁷¹⁷ Section 4 (1) (i) and 4 (2) of the NGO Coordination Act No 19 of 1990.

⁷¹⁸ Section 4 (1) (a) of the NGO Coordination Act 19 of 1990.

⁷¹⁹ Section 4(1) (b), (c), (d) (e), (h) and (g) of the NGO Coordination Act No 19 of 1990. These are the Attorney General, Permanent Secretary in the Office of the President, Treasury, Economic Planning, Foreign Affairs and, Social Service.

member and secretary to the Board with no voting rights.⁷²⁰ Unlike the Director of NPOs in South Africa, who, being an appointee of the Minister but whose appointment attracts public nomination, the Executive Director is directly appointed by the Minister to head the NGO Coordination Bureau, the organ responsible for the day to day management.⁷²¹ The quorum for the transaction of business of the NGO Coordination Board is eleven, including the Chairperson and at least seven members appointed by the Minister.⁷²² Decisions can be made with only one representative of NGOs since all questions are determined by a simple majority of the votes of the members present.⁷²³ Although the NGO Coordination Board is a body corporate, it is dominated by state appointees.⁷²⁴ Even though members are eligible for reappointment, the NGO Coordination Act does not spell out the number of terms one can serve nor the criteria to be followed by the Minister when making such appointments.⁷²⁵

In Malawi, the NGO Board of Malawi is a body corporate charged with the duty to register and regulate NGOs under the NGO Act of Malawi.⁷²⁶ The NGO Board of Malawi is composed of ten members, seven of whom are appointed by the Minister in consultation with CONGOMA to serve for three years and are eligible for one more term.⁷²⁷ Three members are there by virtue of their offices.⁷²⁸ Although the parent ministry for the management and oversight of NGOs is the Ministry of Gender, Children and Women Development, the actual registration is in the office of the Registrar of Companies within the Ministry of Justice and Constitutional Affairs.⁷²⁹ Unlike the Executive Director who is appointed by the Minister in Kenya, the NGO Board of Malawi appoints the Registrar who is the Chief Executive and Secretary to the Board.⁷³⁰ In contrast with the NGO Coordination Board of Kenya which is state-controlled, the NGO Board of Malawi is theoretically insulated against any external interference.⁷³¹ The members of the NGO Board of Malawi can be removed or substituted at any time by the Minister however, consultation of CONGOMA is required.⁷³² Appointments

⁷²⁰ Section 5(1) and (2) of the NGO Coordination Act No 19 of 1990.

⁷²¹ Section 5 (1) of the NGO Coordination Act No 19 of 1990.

⁷²² Section 4(1) (b) and (i) of the NGO Coordination Act No 19 of 1990.

⁷²³ Section 6(5) of the NGO Coordination Act No 19 of 1990.

⁷²⁴ Section 3(2) of the NGO Coordination Act No 19 of 1990.

⁷²⁵ Section 4(2) of the NGO Coordination Act No 19 of 1990.

⁷²⁶ Section 6(1) of the NGO Act of Malawi of 2000.

⁷²⁷ Section 7(a) and 10 (1) of the NGO Act of Malawi of 2000.

⁷²⁸ Section 7(b) of the NGO Act of Malawi of 2000 provides that the Secretary for Gender, Youth and Community Services; the Secretary for Justice; and the Secretary to the Treasury are ex-officio members.

⁷²⁹ Ng'ambi op cit note 44 at 167.

⁷³⁰ Section 19(1) of the NGO Act of Malawi of 2000.

⁷³¹ Section 6 (2) of the NGO Act of Malawi of 2000 provides that 'The Board shall function without political or religious bias or interference by donors, the government, an organ of the state or a political party'.

⁷³² Section 9 of the NGO Act of Malawi of 2000.

or changes in the membership of the Board must be published in the Gazette.⁷³³ Incapacity or any circumstance that would disqualify a member from appointment is given among the reasons upon which membership of the Board can be terminated.⁷³⁴

In Zimbabwe, the Registrar and the PVO Board, a body made up of representatives from ministries and five PVO representatives appointed by the Minister of Labour and Social Services are in charge of registration and coordination of PVOs.⁷³⁵ One representative is appointed by the Minister from among persons nominated for that purpose by the PVO or Ministry for a period not exceeding three years as the case may be.⁷³⁶ However, the Minister may decline to appoint a person nominated whether from a PVO or Ministry and appoint a person of his own choice to the PVO Board irrespective of whether such person would represent the views of the body in question.⁷³⁷ Unlike the Director of NPOs in South Africa or the Executive Director in Kenya or the Registrar in Malawi, who are either appointed or designated by the Minister or the Board, the Registrar of PVOs holds Office of the Director of Social Welfare.⁷³⁸ No criterion is given for a person to be appointed to the PVO Board.

The NGO Bill, 2004, which was not assented to and is discussed here to reflect the underlying government policy, had provided that the Minister responsible for the implementation of the Act would appoint a Registrar and a 14 member NGO Council, five of whom would be NGO representatives, to regulate and supervise NGO operations.⁷³⁹ The NGO Bill had specified that only public servants at the level of Permanent Secretaries would be eligible for nomination and appointment to the NGO Council.⁷⁴⁰

In Ethiopia, the Charities and Societies Agency (the Agency) established within the Ministry of Justice is responsible for licensing and registration of Charities and Societies.⁷⁴¹ The Agency comprises of the Charities and Societies Board (the Board) and the Director General.⁷⁴² The Board has seven members who are nominated by the Government.⁷⁴³ Two of

⁷³³ Section 11(2) of the NGO Act of Malawi of 2000.

⁷³⁴ Section 10(2) of the NGO Act of Malawi of 2000.

⁷³⁵ Section 3(1) and 3(2) (d) of the PVO Act of 1995.

⁷³⁶ The Ministries represented on the PVO Board are; Public Service, Labour and Social Welfare, Health and Child Welfare, Justice, Finance, Co-operatives and Foreign Affairs.

⁷³⁷ Section 3(4) (1) of the PVO Act of 1995.

⁷³⁸ The office of the Director of Social Welfare is a public office and forms part of the Public Service.

⁷³⁹ Section 3-15 of the NGO Bill, 2004.

⁷⁴⁰ Section 3-15 of the NGO Bill, 2004.

⁷⁴¹ Section 4(1) Charities and Societies Proclamation No 621 of 2009.

⁷⁴² Section 7(1) and (2) Charities and Societies Proclamation No 621 of 2009.

⁷⁴³ Section 8(1) Charities and Societies Proclamation No 621 of 2009.

the board members are nominated from the Charities and Societies.⁷⁴⁴ The Director General appointed by the Government is the chief executive of the Agency.⁷⁴⁵ As chief executive, the Director General implements the general directions issued by the Ministry.⁷⁴⁶ Whereas the Board approves directives issued by the Agency, the Agency is only accountable to the Ministry.⁷⁴⁷ Unlike other countries discussed here before, where the regulatory body is restricted to matters concerning NGOs, the Agency is also designated as a Sector Administrator; which is a Federal Executive Office assigned by the Ministry to among other functions to supervise and control the operational activities of charities and societies.⁷⁴⁸ No specific criteria is provided for the appointment of the Director General or members of the Board.

The public involvement in the appointment process of the NPO Directorate presents a radical departure from other countries discussed here where the appointment of the regulatory body is in the exclusive domain of the state. The degree of independence of the regulatory body also varies; the NPO Directorate of South Africa is more independent, the NGO Coordination Board of Kenya is state controlled and, the NGO Board of Malawi is equally more independent. The PVO Board of Zimbabwe and, the Agency and Charities and Societies Board of Ethiopia, are an appendage of the state. The appointment process is most transparent in South Africa, less transparent in Kenya and Malawi and, least so in Zimbabwe and Ethiopia.

6. 3. 2. 2. Powers of the Board

This section examines the powers of the regulatory bodies; are they controlling or enabling? To what extent do these powers limit the space for NGOs to operate?

In Zimbabwe, the PVO Board (PVOB) has wide discretionary powers. The PVOB has power to accept or reject an application for registration of an NGO without giving any reasons.⁷⁴⁹ The PVOB can reject an application if it appears to the Board that it is not *bonafide*.⁷⁵⁰ What is bonafide is not defined, but the NGO Bill gives such prohibition to include a foreign PVO

⁷⁴⁴ Section 8 (1) Charities and Societies Proclamation No 621 of 2009.

⁷⁴⁵ Section 7(2) Charities and Societies Proclamation No 621 of 2009.

⁷⁴⁶ Section 11(1) Charities and Societies Proclamation No 621 of 2009.

⁷⁴⁷ Section 4(2) and 9(4) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁴⁸ Section 66(2) and 67 (3) Charities and Societies Proclamation No 621 of 2009.

⁷⁴⁹ Section 4(a) of the PVO Act of 1995.

⁷⁵⁰ Section 9(5) (b) (i) of the PVO Act of 1995.

whose work addresses issues of political governance and human rights.⁷⁵¹ The PVOB may also deny an application on mere speculation that the organisation *appears* unable to comply with the PVO Act.⁷⁵² Neither does the PVO Act provide a time-limit within which an application should be considered, although the PVO Act criminalises a PVO which operates without being registered.⁷⁵³ Where the PVOB accepts an application for registration it directs the Registrar to issue a certificate of registration on such conditions as it may impose.⁷⁵⁴ However, the period for the renewal of the certificate is not prescribed, which leaves such decision to the discretion of the PVOB. Where the PVOB rejects an application for registration, the Registrar must notify the applicant of its decision and the grounds on which the rejection is based.⁷⁵⁵ No time frame is given within which the Registrar must notify the applicant of its decision.

The PVOB is only accountable to the Minister of Labour and Social Services, who appears to have excessive powers.⁷⁵⁶ For example, the Minister is empowered to inspect the internal operations and activities of any PVO, including its books of accounts and, any documents as he deems it necessary. The inspection can be done with or without notice.⁷⁵⁷ The PVO Act also grants the PVOB powers to deregister NGOs either by amending or cancelling the certificate of registration.⁷⁵⁸ The PVO Act requires the Registrar to notify the PVO of its intention to cancel or amend the certificate, and gives ninety days within which the PVO must show cause why such action should not be taken.⁷⁵⁹ Where the PVOB cancels the certificate, such cancellation should be published in the Gazette.⁷⁶⁰

⁷⁵¹ Section 9(4) of the NGO Bill, 2004.

⁷⁵² Section 9(5) (b) of the PVO Act of 1995.

⁷⁵³ Section 6 (3) and 3(a) of the PVO Act of 1995. A person found guilty of managing a PVO which is not registered is liable to a fine or imprisonment not exceeding three months or both.

⁷⁵⁴ Section 9 (5) (a) of the PVO Act of 1995.

⁷⁵⁵ Section 9 (6) of the PVO Act of 1995.

⁷⁵⁶ Section 14 (2) of the PVO Act of 1995. The PVO Act empowers the Minister to confirm the decision of the Board or, give such other decision as in his opinion the Board ought to have given, and may instruct the Board to do everything necessary to give effect to his decision.

⁷⁵⁷ Section 20(1) (a) of the Private Voluntary Organisations Act of 1995. See also N Mashumba and C Maroleng *Tightening the Noose: Narrowing the Democratic Space for NGOs in Zimbabwe* (ISS Situational Report, 2004) 3.

⁷⁵⁸ Section 10 (1) of the Private Voluntary Organisations Act of 1995. Grounds for deregistration include, (a) failure to comply with any condition of registration, (d) if the PVO ceases to function as a PVO, (e) if the objects for which it was registered are merely ancillary to other objects of the organization and, (i) if the PVO has failed to submit any report or return. See Section 7(c) of the Code of Procedure for the Registration and Operations of Non-Governmental Organizations in Zimbabwe, General Notice 99 of 2007.

⁷⁵⁹ Section 10(3) and 10(4) of the Private Voluntary Organizations Act of 1995.

⁷⁶⁰ Section 10(5) of the Private Voluntary Organizations Act of 1995.

The PVO Act empowers the Minister to appoint any public officer to inspect and examine any NGO accounts including any documents relating to the affairs of the organisation.⁷⁶¹ In practice it is organisations that are deemed political that have been subjected to this scrutiny. The Minister also has power to suspend the executive committee of NGOs in case of misconduct and even appoint trustees to take over control of an NGO pending further investigations.⁷⁶² Appeals against the decision of the PVOB lie to the Minister who is also the appointing authority.⁷⁶³ The Minister may confirm the decision of the PVOB or decide otherwise.⁷⁶⁴ No express provision exists under the PVO Act for a right to judicial review or appeal to a tribunal which limits the space for PVOs to challenge the broad powers of the PVOB.

As noted in the previous chapter, the exercise of broad powers is a threat to freedom of association. For example, freedom of association implies a right, on the part of associations, once they are formed, to operate free from government controls.⁷⁶⁵ The arbitrary take-over of an association does not only violate the right to form and participate in an organisation but would also amount to a denial of the right to continue that association.⁷⁶⁶ The arbitrary take-over of management or leadership of an NGO would amount to unwarranted interference as was held in the *AWC* case. In this case the executive committee of a grassroots NGO, the Association of Women's Clubs (AWC) which was formally gazetted was suspended indefinitely and stopped from exercising its roles and responsibilities.⁷⁶⁷ The Zimbabwe government replaced them with a caretaker committee comprising of ZANU-PF women's league members. The suspended executive committee challenged the constitutionality of the act before the Supreme Court of Zimbabwe on grounds that they were denied the right to be heard. The court ruled in their favour.⁷⁶⁸

⁷⁶¹ Section 20 (1) of the Private Voluntary Organizations Act of 1995.

⁷⁶² Section 21(1) and 22(1) of the Private Voluntary Organizations Act of 1995.

⁷⁶³ Section 14(1) of the PVO Act of 1995, See Section 6 of the Code of Procedure for the Registration and Operations of Non-Governmental Organizations in Zimbabwe, General Notice 99 of 2007.

⁷⁶⁴ Section 14(2) of the Private Voluntary Organizations Act of 1995.

⁷⁶⁵ Stephen Neff *Report of Mission to Egypt* (Human Rights First, 1995) 1-2.

⁷⁶⁶ An Analysis of the Zimbabwean Non-Governmental Organizations Bill, 2004 (International Bar Association, unpublished) 11.

⁷⁶⁷ Government of Zimbabwe, Government Gazette Extra-ordinary, Volume LXXIII, No 59A, 2nd November 1995.

⁷⁶⁸ [*Holland & Ors v Minister of the Public Service, Labour and Social Welfare*, Zimbabwe Law Reports, 1977(1) 186]

In Ethiopia, the Charities and Societies Agency (the Agency) has broad and arbitrary powers. The Agency has power to licence, register and supervise charities and societies.⁷⁶⁹ Where an application for registration is made, the Agency must issue the certificate within 30 days from the date of application.⁷⁷⁰ Renewal of registration is required every three years.⁷⁷¹ Where the Agency declines to issue a certificate of registration, the applicant may apply to the Charities and Societies Board not later than 15 days from the time prescribed for the grant of the certificate, however, no time limit is provided for the Board to make a decision. No provision is made for an appeal against the decision of the Board either to the Minister or court to challenge their broad powers. The CSP grants the Agency excessive discretion in the registration process.⁷⁷² For example, the Agency issued the Guidelines on Determining the Administrative and Operational Costs of CSOs without consulting with any organization.⁷⁷³

As a Sector Administrator, the Agency supervises and controls the operational activities of charities and Societies.⁷⁷⁴ The Agency can reject an application for registration on mere suspicion that the proposed charity or society is likely to be used for unlawful purposes or purposes prejudicial to public peace, welfare or good order.⁷⁷⁵ What is ‘unlawful’ is not defined. The Agency has power to institute inquiries of a charity or society from time to time either generally or for a particular purpose.⁷⁷⁶ Where a society plans to hold a General Assembly, it must notify the Agency in writing of the time and place of the meeting not later than seven working days prior to such meeting.⁷⁷⁷ In what appears a threat to freedom of association, the Agency may order the removal including suspension of an officer of a charity or society who in its opinion does not meet its requirements and assign another person as an officer.⁷⁷⁸

⁷⁶⁹ Section 6(1) (a) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁷⁰ Section 68(1) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁷¹ Section 76(1) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁷² See Section 7 (Articles 84-94) of the CSP. The Agency has unlimited authority to exercise control over the operations of a charity or society. For example, in 2011, in exercise of this unlimited power, the Agency froze the bank accounts of the Ethiopian Women Lawyers Association and the Ethiopian Human Rights Council, ordered the closure of seven CSOs and in 2012 warned 476 CSOs because they allegedly breached the provisions of the CSP.

⁷⁷³ In November 2011, the Agency issued guidelines retroactively requiring all charities and societies to adhere to a ‘70/30’ regulation limiting administrative costs to 30% of their budgets.

⁷⁷⁴ Section 67(3) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁷⁵ Section 69(2) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁷⁶ Section 84(1) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁷⁷ Section 86 of the Charities and Societies Proclamation No 621 of 2009.

⁷⁷⁸ Section 91 of the Charities and Societies Proclamation No 621 of 2009.

The Agency also has power to suspend a licence on several grounds including contravention by the charity of its directives or its orders.⁷⁷⁹ The Agency has power to cancel registration on a range of grounds including suspicion that the license has been used for unlawful purposes or purposes prejudicial to public peace, welfare or security.⁷⁸⁰ Where the Agency exercises power to cancel a registration, it is empowered to dissolve the charity or society however the decision can only be effected by a decision of the Federal High Court.⁷⁸¹

In Kenya, the NGO Coordination Board has wide discretionary powers. It can accept or deny an application for registration.⁷⁸² Before the PBO Act, if the Board accepted an application for registration, it would issue a certificate of registration on such terms and conditions as the Board could prescribe for a period of five years.⁷⁸³ No guidelines were provided for the formulation of the terms and conditions attached to a certificate of registration.

The NGO Act did not specify the length of time for which an application could be considered by the Board. The Board had discretionary power to demand additional information as the Board would prescribe. This was subject to abuse as the Board made unnecessary requests making the application process unnecessarily lengthy and costly.⁷⁸⁴ The Board could refuse an application if it was satisfied that the applicant's proposed activities or procedures were not in the 'national interest' or the applicant gave false information.⁷⁸⁵ National interest was not defined. But Regulation 21(1) of the NGO Coordination Rules, 1992 which prohibits NGOs from becoming connected with any groups of a political nature, established outside Kenya, without the consent of the Board, provides an important indication of the restriction. The Board could also reject an application if it was satisfied, on the recommendation of the NGO Council, that the applicant should not be registered.⁷⁸⁶ Where the Board refused an application, it was not bound to give reasons for the refusal. In practice the period was

⁷⁷⁹ Section 92(1) of the Charities and Societies Proclamation No 621 of 2009. Other grounds include failure to comply with the Agency's orders within the time limit set by the Agency, submission of falsified accounts and reports or, failure, within the appropriate time to provide the Agency with information required by the Agency.

⁷⁸⁰ Section 92(2) (b) of the Charities and Societies Proclamation No 621 of 2009. Other grounds include fraud, failure to renew the licence, or failure to rectify causes for the suspension of the licence within the time limit set by the Agency.

⁷⁸¹ Section 93(1) and (2) of the Charities and Societies Proclamation No 621 of 2009.

⁷⁸² Section 12 and 14 of the NGO Coordination Act No 19 of 1990.

⁷⁸³ Section 13 of the NGO Coordination Act No 19 of 1990.

⁷⁸⁴ Kameri-Mbote op cit note 561 at 6-13.

⁷⁸⁵ Section 14 (a) and (b) of the NGO Act No 19 of 1990.

⁷⁸⁶ Section 14(c) of the NGO Coordination Act, 1990 (repealed). Under Section 16 (1) of the PBO Act, the Authority may refuse to register any organization on grounds that the application does not comply with the requirements of the Act, objectives of the proposed organization contravene any written law, the applicant has committed breaches of the Act, other laws or regulations, applicant gives false or misleading information or the name of the proposed organization is similar to the name of other organization.

prolonged ranging from ninety days to two years.⁷⁸⁷ This slow process represented a barrier to the operation of NGOs.

The Board had power to regulate all NGOs operating in Kenya.⁷⁸⁸ This includes the receipt and discussion of NGO reports, approving reports of the NGO Council and, the Code of Conduct prepared by the Council for self-regulation of NGOs in Kenya.⁷⁸⁹ The Board operates through a Bureau that receives and processes applications for registration, tax waivers and de-registration.⁷⁹⁰ However, the physical capacity of the Board in terms of human and financial resources is limited.⁷⁹¹ The Bureau's office situated in Nairobi has a total of 50 staff with a clientele of 6000, making its role in registering NGOs only perfunctory.⁷⁹²

The Board also had discretionary power to cancel or suspend a certificate.⁷⁹³ Where the Board did so, notification of such action took effect within fourteen days of the service of notice.⁷⁹⁴ The Board had also power to strike off the register any organization which failed to show proof of its existence within thirty days from the date it was served with such notice.⁷⁹⁵ These provisions gave very wide discretion to the Board, which allowed it to exercise these powers arbitrarily. For example, the abuse of discretion arose in de-registering of the Centre for Law and Research International (*CLARION*). *CLARION* was registered in 1994. On 20 February, 1995, it was deregistered by the NGO Board on grounds that it had published reports that damaged the credibility of the Government of Kenya in breach of its terms of registration.

CLARION did not receive any notice of the intended cancellation, neither was it granted a right to a fair hearing. The Board did not define which reports were offensive. *CLARION* made an appeal to the High Court and its registration was restored by the High Court in June 1996 shortly after the Board had rescinded its decision.⁷⁹⁶ It turned out that the decision to deregister *CLARION* was a unilateral decision of the Chairperson of the Board who had

⁷⁸⁷ F Kisinga 'The Process of Reviewing the NGO Coordination Act, 1990: A Step-by –Step Road Map' (1990) 11 4 *International Journal of Not-for-Profit –Law* 55-72.

⁷⁸⁸ Section 7 of the NGO Coordination Act No 19 of 1990.

⁷⁸⁹ Section 7 (a) to (h) of the NGO Coordination Act No 19 of 1990.

⁷⁹⁰ Wamuccii and Idwasi op cit. note 566 at 255.

⁷⁹¹ International Centre for Not-for-Profit Law 'NGO Law in Kenya' (2009) 11 4 *International Journal of Not-for-Profit Law* available at http://www.icnl.org/research/journal/vol11iss4/art_2.htm

⁷⁹² Ibid.

⁷⁹³ Section 16(1) of the NGO Coordination Act No 19 of 1990. The grounds for cancellation of the certificate include; violation of the terms and conditions attached to the certificate, breach of the Act and, upon satisfactory recommendation for the cancellation of the certificate.

⁷⁹⁴ Section 16(2) of the NGO Coordination Act No 19 of 1990.

⁷⁹⁵ Section 18 (3) of the NGO Coordination Act No 19 of 1990.

⁷⁹⁶ Kibwana K. 'The Role of Civil Society in Africa's Democratization and Rebirth' in Wanjala,S.& Kibwana K. (ed) *Democratization and Law Reform in Kenya* (Nairobi: Claripress Ltd, 1997) 385-396.

abused his discretion. The court found that the purported de-registration of *CLARION* was a violation of its freedom of association contrary to the Constitution of Kenya.⁷⁹⁷

Earlier, in 1998, six policy advocacy NGOs had been deregistered on allegations of being involved in ‘terrorist’ activities but were reinstated when government failed to prove its claims.⁷⁹⁸ In 1995, more than one hundred NGOs were denied registration on grounds of national interest or public security.⁷⁹⁹ In 1999, during the launch of new accountability standards government warned NGOs not to engage in subversive activities or else they risked to be de-registered.⁸⁰⁰

Appeals against the decision of the Board lie to the Minister within thirty days of the decision.⁸⁰¹ If the Minister decides against the applicant, then an appeal can be lodged to the High Court against the decision of the Minister within twenty-eight days of the receipt of the decision of the Minister.⁸⁰² But until 1992 when the right of appeal against the Ministers’ decision to the High Court was introduced under the Statute Law (Miscellaneous Amendments) Act, 1992, the Minister’s decision to de-register an NGO for uttering a false document was final.⁸⁰³

However, under the PBO Act, the PBO Authority can accept or reject an application for registration.⁸⁰⁴ Where the PBO Authority accepts an application, it would issue a certificate of registration in the prescribed form.⁸⁰⁵ The issue of the certificate must be done within sixty days from the date of application or else the organisation is presumed to have been registered.⁸⁰⁶ If the Authority is not satisfied with the application, it must notify the applicant giving reasons for its decision and invite the applicant to rectify the anomaly within a period not exceeding thirty days from the date of the notice.⁸⁰⁷ If the applicant fails to comply then the PBO Authority would decline to register the application giving reasons of its decision within the remaining period in the original sixty day period.⁸⁰⁸ Where the PBO Authority

⁷⁹⁷ Article 80 of the old Constitution and now Article 36 (1) of the new Constitution of Kenya, 2010 guarantees the right to freedom to assemble and associate including the right to form or belong to an association.

⁷⁹⁸ Kameri-Mbote op cit note 567 at 14.

⁷⁹⁹ Kameri-Mbote op cit note 567 at 17.

⁸⁰⁰ Kameri-Mbote op cit note 567 at 16.

⁸⁰¹ Section 19(1) of the NGO Coordination Act No 19 of 1990.

⁸⁰² Section 3A of the NGO Coordination Act No 19 of 1990.

⁸⁰³ Section 34 (3) Miscellaneous (Amendments) Act of NGOs Act, 1991.

⁸⁰⁴⁸⁰⁴ Section 16 of the PBO Act No 18 of 2013.

⁸⁰⁵ Section 10 (1) of the PBO Act No 18 of 2013.

⁸⁰⁶ Section 12 of the PBO Act No 18 of 2013.

⁸⁰⁷ Section 9 (2) of the PBO Act No 18 of 2013.

⁸⁰⁸ Section 9 (5) of the PBO Act No 18 of 2013.

refuses to accept the application, it must notify the applicant, giving reasons for its refusal within fourteen days of its decision.⁸⁰⁹ Grounds for refusal of registration are broad and may be subject to abuse.⁸¹⁰ Unlike the NGO Act, the PBO Act establishes a Tribunal to which appeals lie.⁸¹¹ Where a complainant is dissatisfied with the decision of the Tribunal, an appeal may lie to the High Court and the decision of the High Court is final.⁸¹² In practice, the appeal process as it is is a burdensome procedure particularly for small organisations.

The powers of the NGO Board in Malawi are provided for in Sections 20(4) and 21(1) of the NGO Act. These powers include: the authority to accept or reject an application which it must do within a period of 90 days.⁸¹³ Where it accepts an application, it must issue a certificate of registration as proof.⁸¹⁴ NGOs acquire corporate personality upon registration and can engage in public interest initiatives.⁸¹⁵ Where the NGO Board rejects an application, it must give reasons for doing so.⁸¹⁶ However, the grounds for the rejection of an application are not spelt out. The NGO Board also has power to cancel or suspend the registration of an NGO if it is satisfied that the NGO has ceased to exist, has failed to comply with the Act, that the NGO is engaged in partisan politics, including electioneering and politicking or where the coordinating body has recommended it for cancellation or suspension.⁸¹⁷ The law also makes provision for a right of an NGO to be heard either orally or in writing.⁸¹⁸ Whereas the NGO Board may exercise its power for good cause, the denial of NGOs to engage in electioneering and politicking is inconsistent with democratic practice. It amounts to a denial of freedom of expression and assembly which is a basic foundation of a democratic society.⁸¹⁹ The discretion to determine whether to reject or accept an application may also be subject to abuse. Any NGO which is aggrieved with a decision of the NGO Board may apply to the High Court for judicial review.⁸²⁰

⁸⁰⁹ 16(2) of the PBO Act No 18 of 2013.

⁸¹⁰ Section 16(1) of the PBO Act No 18 of 2013. Grounds for refusal of registration include; non-compliance with the requirements of the PBO Act, where objectives of the proposed PBO contravene any written law, where applicant organization has committed breaches of the PBO Act or other laws or regulations, the applicant gives false information or the name of the proposed PBO is similar to the name of other institution, organization or entity.

⁸¹¹ Section 50(1), 51(1) and 52(1) of the PBO Act No 18 of 2013.

⁸¹² Section 52(11) of the PBO Act No 18 of 2013.

⁸¹³ Section 20 (4) (a) of the Malawi NGO Act of 2000.

⁸¹⁴ Section 21(1) of the Malawi NGO Act of 2000.

⁸¹⁵ Section 21 (2) (a) and (b) of the Malawi NGO Act of 2000.

⁸¹⁶ Section 20(4) (b) of the Malawi NGO Act of 2000.

⁸¹⁷ See Sections 23 (1) (a), (b), (c) and 23(2) of the NGO Act, 2000.

⁸¹⁸ See Sections 23 (3) (2) of the NGO Act, 2000.

⁸¹⁹ In re: *Munhumeso & Ors* 1994(1) ZLR 49 (s).

⁸²⁰ See Section 23(4) of the NGO Act, 2000.

In South Africa, registration of NPOs is the responsibility of the Directorate.⁸²¹ The NPO Directorate has power to register or deny registration to an NPO.⁸²² Registration is conducted in a transparent and accountable manner. The Act limits the time periods within which administrative action takes place, in order to reduce bureaucratic discretion. The Directorate can only refuse to register an NPO if it is not satisfied that the NPO has complied with the mandatory requirements for registration. For example, where an NPO applies for registration, the Director must consider the application within two months of receiving the application, and, if satisfied with the application, register the applicant.⁸²³ The NGO Law Monitor however notes that significant delays are reported to cause applications to take even six months to be completed.⁸²⁴ The Director must issue a certificate of registration as proof and, such organisation becomes a body corporate.⁸²⁵

Applicants who experience dissatisfaction are able to enforce administrative compliance. For example, if the Director is dissatisfied with the application, he must notify the applicant in writing, giving reasons for the decision and, inform the applicant that he has one month to rectify the anomaly.⁸²⁶ Where the applicant receives the notice and does not comply within the prescribed period, the Director must notify the applicant in writing of the refusal to register, and the reasons for it.⁸²⁷ But unlike Zimbabwe and Ethiopia, applicants have a right of appeal to a tribunal and a court of law, consistent with the Constitution of South Africa.⁸²⁸ Indeed, within one month of receipt of a notice of refusal, the organization may appeal against the decision by submitting a complaint to the Directorate for consideration by an Arbitration Tribunal.⁸²⁹ The Tribunal has three months within which it must consider the Appeal and declare its decision with reasons.⁸³⁰

The Director also has power to cancel registration.⁸³¹ Where cancellation of registration is done, the NPO has the right to appeal against the cancellation to an Arbitration Tribunal.⁸³²

⁸²¹ Section 4 of the NPO Act No 71 of 1997.

⁸²² Section 13 and 14 of the NPO Act No 71 of 1997.

⁸²³ Section 13 (2) of the NPO Act No 71 of 1997.

⁸²⁴ International Center for Not-for –Profit Law op cit note 145.

⁸²⁵ Section 15(1) and (16) (1) of the NPO Act No 71 of 1997.

⁸²⁶ Section 13 (3) of the NPO Act No 71 of 1997.

⁸²⁷ Section 13 (5) and (6) of the NPO Act No 71 of 1997.

⁸²⁸ Section 36(1) of the Constitution of South Africa guarantees the right of civil society groups to claim their rights by means of a judicial process in courts.

⁸²⁹ Section 14(1) of the NPO Act No 71 of 1997.

⁸³⁰ Section 14 (2) of the NPO Act No 71 of 1997.

⁸³¹ Section 21(1) of the NPO Act No 71 of 1997. Grounds for cancellation of certificate include breach of the NPO's constitution, material false representation in its reports (narrative, financial or any other submitted to the Director) or failure to comply with notice issued to such organization by the Director.

The Tribunal must make a decision and communicate its decision to the appellant within three months of receiving the notice of appeal.⁸³³ Unlike Ethiopia, Malawi, and Zimbabwe, South Africa does not prohibit NPOs from criticising the government or advocating politically unpopular causes, a position which has been adopted by the PBO Act.⁸³⁴ The only limitation is that NPOs that have tax exemption cannot use their resources to support or oppose or advance the causes of any political party.

In Namibia, the Registrar of Companies has power to register NPOs under the Companies Act.⁸³⁵ The Registrar may impose a fine or imprisonment for an NPO that fails to file audited annual financial statements.

Unlike South Africa where bureaucratic discretion is limited, the regulatory bodies in Ethiopia, Kenya, Malawi and Zimbabwe have broad discretionary powers which may be subject to arbitrary decision making and abuse. Without a right of appeal for judicial review in Ethiopia and Zimbabwe, the broad powers enjoyed by the NGO Boards are more controlling than facilitative, and therefore pose a threat to the freedom of association.

6. 3. 2. 3. Registration requirements

This section examines the registration requirements, how onerous are they? Is it easy to register? How strict are the requirements?

Zimbabwe imposes strict registration conditions. Registration is mandatory under the PVO Act.⁸³⁶ Failure to register attracts penalties, including fines and imprisonment.⁸³⁷ An NGO seeking registration has to lodge with the Registrar an application together with the constitution of the organisation.⁸³⁸ The application must be supported with the following: application Form PVO 1, Form PVO 2 and proof of advertisement, copies of the organisations' constitution, curriculum vitae of the members of the executive committee, proof of notification to local authorities of intent to register, police criminal clearance

⁸³² Section 22(1) of the NPO Act No 71 of 1997.

⁸³³ Section 22 (2) of the NPO Act No 71 of 1997.

⁸³⁴ Section 66(1) of the PBO Act, 2013 permits PBOs to engage in public policy and political activities in Kenya.

⁸³⁵ Section 21 Companies Act No 61 of 1973.

⁸³⁶ Section 6(1) of the PVO Act of 1995 provides that 'No PVO shall commence or continue to carry on its activities unless it has been registered in respect of the particular object or objects in furtherance of which it is being conducted.

⁸³⁷ Section 6(3a) of the PVO Act of 1995 provides for a fine not exceeding level four (\$ 3750) or imprisonment for a period not exceeding three months or to both such fine and imprisonment.

⁸³⁸ Section 9 (1) of the PVO Act of 1995.

certificates, and a detailed work plan for the next three years.⁸³⁹ The Registrar may demand additional information as he may deem necessary.⁸⁴⁰ Once an application for registration has been lodged with the Registrar of PVOs, the PVO in question, at its own cost, has to publish a notice as prescribed by the PVO Act in the national newspapers, calling for any objections to be lodged with the Registrar of PVOs within 21 days.⁸⁴¹ Any person may within the prescribed period lodge an objection to the grant of the application with the Registrar, and the Registrar must submit such objection to the PVOB.⁸⁴² The applicant has to submit proof to the Registrar that such notice has been published.⁸⁴³ Registration papers are lodged with the Registrar of PVOs, who is also the Director of Social Welfare in the Ministry of Labour and Social Affairs, who thereafter, submits the application to the PVOB.⁸⁴⁴

Ethiopia requires all charities and societies to register.⁸⁴⁵ An organisation must apply for registration within three months of its formation.⁸⁴⁶ Failure to register within the prescribed period is a ground for dissolution of the organisation.⁸⁴⁷ Unlike Zimbabwe, registration requirements are less onerous. An application for registration requires particulars including; goals, objectives and activities as per the form, a copy of the rules of the organisation, and such information as the Agency may require.⁸⁴⁸ A registration fee must be paid upon application.⁸⁴⁹ The CSP does not prohibit participation in activities that include the advancement of human and democratic rights, but places restrictions on NGOs that receive more than 10% of funding from foreign sources from engaging in human rights and advocacy activities.⁸⁵⁰

⁸³⁹ General Notice 99 of 2007, Section 2 of the Code of Procedure for the Registration and Operations of NGOs in Zimbabwe.

⁸⁴⁰ Section 9 (4) of the PVO Act of 1995.

⁸⁴¹ Section 9(2) of the PVO Act of 1995; see also Muzondidya and Nyathi-Ndlovu op cit note 26 at 35.

⁸⁴² Section 9 (3) of the PVO Act of 1995.

⁸⁴³ Section 9(2) of the PVO Act of 1995.

⁸⁴⁴ Section 9(5) of the Private Voluntary Organisations Act of 1995.

⁸⁴⁵ See Article 68 of the Proclamation for the Registration and Regulation of Charities and Societies, 2009. A local charity or society has to furnish the Agency with an application indicating particulars concerning its goals, a copy of its rules and such similar documents as the Agency may require.

⁸⁴⁶ Section 64(2) of the Proclamation for the Registration and Regulation of Charities and Societies No 621 of 2009.

⁸⁴⁷ Section 65(4) of the Proclamation for the Registration of Charities and Societies No 621 of 2009.

⁸⁴⁸ Section 68 (3) of the Proclamation for the Registration and Regulation of Charities and Societies No 621 of 2009.

⁸⁴⁹ Section 68 (5) of the Proclamation for the Registration and Regulation of Charities and Societies No 621 of 2009.

⁸⁵⁰ Section 2 (3) and Section 14 of the Proclamation for the Registration and Regulation of Charities and Societies No 621 of 2009.

In Kenya, registration of NGOs is mandatory.⁸⁵¹ It is illegal for any person to operate an NGO without registration and a certificate.⁸⁵² Persons convicted of this offence face stiff penalties including paying a fine or imprisonment and being disqualified from holding office in any NGO for ten years.⁸⁵³ The registration of NGOs is governed by the NGO Act,⁸⁵⁴ the Statute Law Miscellaneous (Amendments) Act No 12 of 1991, and the NGO Coordination Regulations, 1992. An organisation seeking registration from the NGO Coordination Board has to seek approval of its name, and once approved, the organisation has thirty days to file its application.⁸⁵⁵ The registration requirements are burdensome. An application for registration must be submitted to the Executive Director of the Bureau in a prescribed form.⁸⁵⁶ Registration requirements include; minutes of the meeting authorising the application to be filed, two copies of the constitution, five copies of a letter from the sponsor, two current photographs of the applicant endorsed by the sponsor or referee, personal details of three of the NGO officers, notification of the registered office and postal address of the proposed organisation, sectors of proposed operations, the districts, divisions and locations of proposed activities, proposed average annual budget, duration of activities, all sources of funding, national and international affiliations and, such information as the Board may require.⁸⁵⁷ An application fee of \$150 for local organisations is required, which could be prohibitive for a small organisation.⁸⁵⁸

Like Kenya, it is a mandatory requirement for NGOs to register in order to operate in Malawi.⁸⁵⁹ The registration process is lengthy. An NGO seeking to register must have a minimum of two of its directors or trustees as citizens of Malawi.⁸⁶⁰ An application for registration must be in a prescribed form accompanied by: a certified copy of its constitution, registration fees as prescribed by the Board, a plan of action of its activities, a Memorandum of Understanding from the line Ministry, proof that the NGO is a member of CONGOMA, a

⁸⁵¹ Section 10(1) of the NGO Coordination Act No 19 of 1990; Section 6(1) and Section 7(a) of the PBO Act No 18 of 2013.

⁸⁵² Section 22 of the NGO Coordination Act No 19 of 1990; See Section 7 of the PBO Act No 18 of 2013 provides that 'No organization shall purport to be a public benefit organization unless that organization is registered under the Act'.

⁸⁵³ Section 22 (2) and (3) provide for a fine not exceeding fifty thousand shillings (\$ 500) or, imprisonment of eighteen months or both.

⁸⁵⁴ Repealed, replaced by the Public Benefits Organizations Act, 2013 (PBO Act).

⁸⁵⁵ Section 8 of the NGO Coordination Regulations of 1992.

⁸⁵⁶ Section 10(2) of the NGO Coordination Act No 19 of 1992.

⁸⁵⁷ Section 10 (3) of the NGO Coordination Act No 19 of 1990.

⁸⁵⁸ See Section 10 (3) of the NGO Act, 1990. See Section 8 of the PBO Act, details the requirements for an application for registration to include: a copy of the constitution, names and addresses of the founders , objects of the organization, postal and physical address, the prescribed fee and other particulars as may be required'.

⁸⁵⁹ Section 20 (1) of the Malawi NGO Act of 2000.

⁸⁶⁰ Section 20 (2) of the Malawi NGO Act of 2000.

statement that the NGO shall not engage in partisan politics including electioneering and politics and, the source of its funding.⁸⁶¹ The prescribed form must bear the following particulars: the name of the NGO, physical and postal address, contact details, full details of Trustees or Directors, contact details of auditors acceptable to the Board and, audited accounts, annual financial statements and annual report in respect of existing organisations.⁸⁶²

There are three registration avenues. An applicant has to secure approval from the parent Ministry; proof of membership of CONGOMA, before submitting an application to the NGO Board of Malawi. These are onerous requirements.

In South Africa, registration of NPOs is voluntary and no prior state authorisation is required for an organisation to operate legally.⁸⁶³ An NPO seeking to register under the NPO Act must have a constitution which provides for all matters relevant to conducting its affairs.⁸⁶⁴ The applicant organisation is required to fulfil minimal requirements: a prescribed form which is properly completed two copies of its constitution and such other information as may be required to assist the Director to determine whether the NPO meets the requirements for registration.⁸⁶⁵

Like South Africa, Namibia encourages voluntary registration for NGOs.⁸⁶⁶ Namibia has minimal requirements for registration. The process of incorporation necessitates filing a memorandum of association. For a section 21 company, registration would require the following: the constitution of the organisation, a membership list, or a list of its board of directors or trustees, the last financial and annual report, an organisational structure, staffing, services provided, and an indication of its partnership potential.⁸⁶⁷

Unlike Ethiopia, Kenya, Malawi and Zimbabwe which require mandatory registration, South Africa and Namibia provide for voluntary registration. Zimbabwe, Kenya and Malawi have onerous registration requirements while Ethiopia is less burdensome. South Africa and Namibia have minimal requirements for registration making it easier to register NGOs to operate. Whereas Ethiopia, Malawi, Zimbabwe, and, until recently, Kenya impose

⁸⁶¹ Section 20 (3) of the Malawi NGO Act of 2000.

⁸⁶² Section 20(b) (i) to (v) of the Malawi NGO Act of 2000.

⁸⁶³ Section 12(1) of the Non Profit Organisations Act No 71 of 1997 provides that ‘Any non-profit organisation that is not an organ of the state may apply to the Director for registration’.

⁸⁶⁴ Section 12(3) of the Non Profit Organizations Act No 71 of 1997.

⁸⁶⁵ Section 13 (1) of the NPO Act No 71 of 1997.

⁸⁶⁶ See 3.2 of the Civic Organizations Partnership Policy, 2005, available at <http://unpan1.un.org/intradoc/groups/public/documents/CPSI29465/UNPANO.pdf> [accessed 23 October 2012].

⁸⁶⁷ Section 4.2.3 of the Civic Organizations Partnership Policy, 2005.

restrictions on NGOs that engage in human rights and advocacy activities, both South Africa and Namibia encourage civic participation including human rights and democracy activities.

6. 4. CONCLUSION

This comparative review has examined the regulatory regime in six countries (Kenya, Zimbabwe, South Africa, Malawi, Namibia, and Ethiopia), with particular reference to existing models (state-led, state-NGO-led, and self-regulation).

The survey shows that the legislative process in a state-led model is non-participatory. For instance, in Ethiopia and Zimbabwe, NGO participation in the legislative process was very minimal. In contrast with the state-NGO-led model, there was more participation of NGOs in the enactment of the NGO Acts of Kenya and Malawi. For example, in Kenya, consultation of NGOs in making the law led to amendments to the NGO Act to accommodate the NGO demands. The highest levels of NGO participation were exhibited with self-regulation. In particular, South Africa and Namibia encouraged the highest levels of civic participation and respect for civil society space.

The reasons for enacting the NGO law also vary. Whereas the purpose of the PVO Act in Zimbabwe and the CSP in Ethiopia is to regulate NGOs; the NGO Acts of Kenya and Malawi seek to coordinate NGOs, while the NPO Act of South Africa and the Civic Organisations Partnership Policy of Namibia, and have a goal of enhancing the environment for civic participation and partnership.

Relatedly, the appointment process of the regulatory body in a state-led model is less inclusive. For example, the appointment of the Charities and Societies Agency in Ethiopia and, to a lesser degree, the PVOB in Zimbabwe, was the exclusive domain of the state. Kenya and Malawi allowed considerable NGO involvement in the appointment of the NGO Coordination Board and the NGO Board of Malawi respectively. South Africa, on the other hand, allowed public involvement in the appointment of the NPO Directorate. The appointment process was, therefore, most transparent and accountable in a self-regulatory model, less transparent in a state-NGO-led, and, least, in a state-led model.

Considering the powers of the regulatory body, the powers of the NGO Board are more controlling and restrictive of civil society space in a state-led model. For example, the PVOB in Zimbabwe and the Charities and Societies Agency in Ethiopia have wide discretionary powers which may be subject to abuse and arbitrary decision making. The powers of both

boards are not subject to judicial review. The NGO Boards of Kenya and Malawi have wide discretionary powers but their discretion is subject to judicial review. The Directorate in South Africa, despite having discretionary power, is subject to administrative review to reduce bureaucratic discretion, as well as being prone to judicial review of its decisions.

Finally, registration requirements are more onerous in both the state-led and state-NGO-led regulatory models. For example, Ethiopia, Kenya, Malawi, and Zimbabwe require mandatory registration. Stiff penalties are imposed in case of failure to register in Zimbabwe and Kenya. Although the registration requirements are less burdensome in Ethiopia compared to Malawi and Kenya, restrictions on NGOs that engage in human and democratic rights are imposed in Ethiopia and Malawi. South Africa and Namibia, on their part, encourage voluntary registration. Both countries have minimal requirements for registration, arguably making it more inclusive, participatory, and more enabling.

This thesis therefore argues that each regulatory model has particular relevance to the political context in that country. Where governments are fragile and less democratic (Ethiopia, Zimbabwe), the regulatory framework of NGOs is state-led, more controlling, and restrictive of civil society space. In countries which are relatively more democratic (Kenya, Malawi), the regulatory framework is state-NGO led, NGO laws are less controlling and subject to judicial oversight. In constitutional democracies (South Africa, Namibia), the regulatory regime is more inclusive, accountable, more participatory, and self-regulation is more apparent. Mindful of these findings, Chapter 7 discusses the regulatory framework governing NGOs in Uganda. Does it guarantee the democratic space for active civic participation?

CHAPTER 7

THE REGULATORY FRAMEWORK GOVERNING NGOs AND ITS IMPACT ON NGO SUSTAINABILITY IN UGANDA

7.0. INTRODUCTION

The struggle for independence in Uganda is largely attributed to the efforts of pro-democracy forces: trade unions, cooperatives, political parties, and youth groups.⁸⁶⁸ Though credited for this historic achievement, civil society in Uganda has been the subject of state regulation during most of Uganda's political history: through constitutional restrictions, administrative sanctions, judicial, policy, and legal barriers. NGOs, which are a dominant feature of civil society and are mainly a product of the pro-democratic reforms of the late 1980s onward, have had to face the brunt of these restrictions.⁸⁶⁹

In Chapter Six, a comparative review of the regulatory framework of NGOs in six selected African countries in sub-Saharan Africa (Ethiopia, Kenya, Malawi, Namibia, South Africa, and Zimbabwe) demonstrated a strong link between democracy, associational space, and the regulatory regime for NGOs.⁸⁷⁰ Where democratic space is constrained, state regulation is invariably the dominant regulatory framework, and the freedom for NGOs to operate is likewise restricted.⁸⁷¹

This Chapter seeks to answer two basic questions: first, how has the regulatory regime affected the democratic spaces available for active citizen participation during the pre-and post-independence period in Uganda? Secondly, how has this affected the contribution of NGOs to the democratic process? The objective is to advance an argument for a more enabling regulatory framework that would promote active citizen participation in Uganda.

⁸⁶⁸ Bazaara op cit note 38 at 3.

⁸⁶⁹ Chapter 2 (section 2.4). See also Nyangabyaki Bazaara *Contemporary Civil Society and the Democratization Process in Uganda: A Preliminary Exploration*, Kampala: Centre for Basic Research, Working Paper No. 54, 2000, 2. See Akiiki B Mujaju, *Civil Society in Uganda* (Paper presented at a Conference on 'Civil Society Issues in Eastern Africa' organized by the Centre for Basic Research held at the Fairway Hotel, Kampala, 12-14 December 1977).

⁸⁷⁰ Chapter 6 (section 6.3).

⁸⁷¹ Chapter 6 (section 6.4).

In order to analyse the impact of the regulatory model on civic participation and NGO space in Uganda, the chapter begins by reviewing the theory of democracy and the concept of civic participation. It then follows this with an historical analysis of the legal and policy framework for the regulation of NGOs in Uganda. The chapter will then examine the current NGO regulatory regime, and by way of conclusion draw lessons about the regulatory framework and its impact on NGO sustainability, and the theory of participatory democracy.

7.1 DEMOCRACY AND CIVIC PARTICIPATION

Few subjects raise as much controversy and debate as the notion of democracy in Africa. To some legal analysts, democracy is about the right to stand, be elected and to elect their leaders, and ultimately the right to organize and assemble.⁸⁷² This creates the impression that the notion of democracy is all about a peaceful change of leadership and the holding of regular elections.⁸⁷³ Indeed, Ddungu has argued that in Uganda the dominant view among advocates of multi-party democracy is that of liberal democracy, given that democracy is often equated with the existence of a multi-party system.⁸⁷⁴

Whereas it is undisputed that holding free and fair elections is important to a democracy, what then is the value of active citizen groups in a democracy, if the focus is primarily on elections and political parties? Are they important in the decision-making process? Central to the concept of democracy is the idea of civic participation and the right to organise. When individuals organise they form associations to have their voices heard, make decisions, and hold their leaders accountable. But no other right creates so much consternation and fear among those that govern in Uganda than the right to organise. Successive regimes in Uganda have sought to proscribe the right to organise, and yet without its express recognition and implementation no political system can be considered to be democratic in its broadest sense.⁸⁷⁵ From the pre-colonial period up to the current National Resistance Movement (NRM) government, the right to organise has been under threat. For instance, opposition political parties were declared ‘proscribed assemblies’ in Uganda by Milton Obote in 1969.⁸⁷⁶

⁸⁷² Bazaara op cit note 183 at 5.

⁸⁷³ Ibid.

⁸⁷⁴ Ddungu op cit note 185 at 368.

⁸⁷⁵ Joe Oloka Onyango *Governance, State Structures, and Constitutionalism in Contemporary Uganda*, Kampala: Centre for Basic Research Working Paper No. 52/1993, 1993, 31.

⁸⁷⁶ In 1967 Obote abrogated the 1962 independence Constitution, and following an attempted assassination of Obote in 1969, he banned opposition political parties except the Uganda People’s Congress (UPC) effectively

Idi Amin banned political parties in 1971.⁸⁷⁷ Museveni suspended the operation of parties in 1986, thereby limiting the right of an individual to organise.⁸⁷⁸ It would be presumptuous therefore to talk of democracy without affording the people the right to organise and participate in the decision-making process.

Mamdani argues that when President Museveni restricted political parties from operating and introduced the Resistance Council system, later renamed Local Councils (LCs), he asserted that this was ‘popular democracy’ and that Ugandans had a right to participate in governance.⁸⁷⁹ This is, in my view, a classic example, of the right to associate being mistakenly interpreted as a right of participation.⁸⁸⁰ Inherent in the right to organise is the freedom of choice. Every one under the NRM system had to belong to an LC without any other political choice.⁸⁸¹ Although LCs effectively replaced the unelected colonial chiefs who were unaccountable, these too, were simply ‘watchdogs’ in that they were only used to legitimise a state structure that denied the individual the right to organise.⁸⁸² As is the case in

making Uganda a one-party state. See J Oloka-Onyango, *Judicial Power and Constitutionalism in Uganda* Kampala, Centre for Basic Research, 1993, 26.

⁸⁷⁷ See Decree 14 of 1971.

⁸⁷⁸ Museveni claimed that under a ‘gentleman’s agreement’ between the Movement (NRM) and opposition parties, an understanding had been reached between them suspending their operations. Political parties were effectively banned in 1993 when the Constituent Assembly Statute expressly prevented political parties from participating in the exercise. See John-Jean B Barya *The State of Civil Society in Uganda: An Analysis of the Legal and Politico-Economic Aspects* Kampala, Centre for Basic Research, Working Paper No. 58/2000, 23.

⁸⁷⁹ M Mamdani and *Fire Does Not Always Beget Ash: Critical Reflections on the NRM* (Kampala: Monitor Publications Ltd) 103. See Gaaki Kigambo, *Uganda in the Spotlight over Raid on Media Houses, The East African*, and May 25-31, 2013. Quotes President Museveni when he was sworn in on 29 January 1986, ‘... the people of Africa, the people of Uganda, are entitled to a democratic government. It is not a favour from any regime. The sovereign people must be the public, not the government’. See also Nelson Kasfir, ‘No-Party Democracy in Uganda’, (1998) 9, 2 *Journal of Democracy*, 61.

⁸⁸⁰ M Mamdani *Pluralism and the Right of Association* Kampala: Centre for Basic Research publications, 1993, 33.

⁸⁸¹ Under Legal Notice No. 1 of 1986, political parties were suspended. Museveni argued that political parties were divisive yet the NRM needed more time to restore security and essential services before Ugandans could choose a political system to follow. Those who tried to organize political party rallies were either arrested and/or prosecuted. For example, Michael Kaggwa of the DP mobilisers Group was arrested when he tried to hold a rally at the Constitutional Square in 1989.

⁸⁸² *Ibid.*

a multi-party democracy, the no-party democracy embodies a strong notion of representation but a weak sense of participation.⁸⁸³

At a minimum, democracy should have a strong element of participation, one where citizens share decision making powers at every level of governance; participation that is empowering and has the effect of transforming individuals from subjects into citizens.⁸⁸⁴ Both participation and the active involvement of the citizenry in voluntary associations free from state interference lie at the core of democratic governance. Democracy, therefore, goes beyond representation and confirms the right to participate.⁸⁸⁵ Not only does this right to participation improve performance but it also promotes critical consciousness and decision-making as a basis of active citizenship in order to enable the people to have a stake in their governance and conditions of life.⁸⁸⁶

As Mamdani rightly observes, democracy has not only representative but participatory aspects as well.⁸⁸⁷ In a democracy, NGOs are given space to organise and to hold the state accountable for any abuses that occur.⁸⁸⁸ There is less reprisal, intimidation, and name-calling for those who express dissent. Constructive criticism is allowed. In a participatory democracy, NGOs are autonomous, internally democratic, and accountable to their membership and beneficiaries.⁸⁸⁹ NGOs provide the necessary checks and balances against the state. Unlike states that choose to ignore the demands of the electorate, in a democracy, the ‘rights and the interests of the community’ are similar to those of the state, and therefore the state is responsive to these demands and stands to lose the vote should it fail to take corrective action when they have been violated.⁸⁹⁰ The regulatory regime in this democratic model provides opportunities for the growth of civic associations, providing space, motivation and better linkages with state actors. On this basis the discussion can now turn to an examination of the legal and policy regime for NGOs during Uganda’s constitutional and political history. Did it provide democratic spaces for effective civic action?

⁸⁸³ Ibid. 124-125.

⁸⁸⁴ Chapter 3 (section 3.1), see Bazaara op cit note 38 at 3.

⁸⁸⁵ Chapter 3 (section 3.1.3), see Paterman op cit note 187 at 40.

⁸⁸⁶ M Darrow and A Tomas op cit note 276 at 471-538.

⁸⁸⁷ Mamdani op cit note 854 at 125.

⁸⁸⁸ Bazaara op cit note 387 at 30-33.

⁸⁸⁹ Chapter 3 (section 3.3.3).

⁸⁹⁰ Huntington op cit note 202 at 35.

7.2. NGOs IN UGANDA: THE LEGAL AND POLICY FRAMEWORK

7.2.1. The Pre-colonial Period

Little can be said of associational life during Uganda's pre-colonial period. Not only was society preoccupied with survival but both the predominantly Nilotic communities of the north and the Bantu of the south lived different lifestyles. While the Luo speaking north, with the exception of the Karimojong who were pastoralists, others were mainly hunters and gatherers; the Bantu, mainly Baganda in the central region, the Banyankore and Banyoro in the western part were agriculturalists.⁸⁹¹

As noted in chapter 2, the Bantu who organised themselves around Kingdoms, mainly Ankole, Buganda, Bunyoro, and Toro, had similar practices characterised by authoritarian rule with limited democratic spaces for meaningful self-expression.⁸⁹² For example, within Buganda, it was the Bataka (clan heads) and the Lukiiko who provided some check on the king. Within these kingdoms the use of myths, tradition, customs, and rituals symbolised everyday life.⁸⁹³ Individual discontent was often expressed in form of gossip, rumours or ridicule.⁸⁹⁴

Among the communities of the north, society was more segmented. Due to frequent movements in search of water and grass for their animals, there was more room for different tribes to make independent choices.⁸⁹⁵

Whereas it can be argued that voluntary groups did exist during the pre-colonial period in the form of 'self-help groups, co-operative production, distribution, consumption, and accumulation organised around communal or kinship ties', there is little evidence to show any active citizen engagement with those in authority.⁸⁹⁶ Given the patriarchal form of leadership,

⁸⁹¹ Thomas P Ofcansky 'History' in Thomas P Ofcansky (ed) *Uganda: Tarnished Pearl of Africa* (Boulder: West View Press, 1996) 15.

⁸⁹² Chapter 2 (section 2.2), see Fernyhough op cit note 79 at 60-61.

⁸⁹³ Chapter 2 (section 2.2), see Uzoigwe *Kabalega Abarusura: The Military Factor in Bunyoro* (Kampala: University of East Africa, 1969) 1-20.

⁸⁹⁴ Chapter 2 (section 2.2).

⁸⁹⁵ Ofcansky op cit note 865 at 15.

⁸⁹⁶ Chapter 2 (section 2.2), see Zie Gariyo, *NGOs and Development in East Africa: The view from Below*, Paper presented to a Workshop on NGOs and Development: Performance and Accountability in the New World Order, University of Manchester, June, 27-29, 1994.

one cannot talk of meaningful democratic spaces in existence allowing organised forms of expression. Society was governed on the principle of deference and fear. It is argued that in such societies that were based on narrow class structures, ‘competition was intense, intrigue was prevalent, and ruthless-seeking was the norm of political behaviour’.⁸⁹⁷

Although Bazaara concurs with Gariyo that associational life did exist in pre-colonial Uganda, the nature of associational life was so rudimentary that no meaningful citizen participation was allowed.⁸⁹⁸ Thus no form of regulation was needed. The myths, traditions, customs, and rituals at the time dictated the nature of ‘state’ responses to any form of dissent.

7.2.2. The Colonial Period (1894 to 1945)

There is little evidence of associational life in Uganda before the 1920s. Most groups that existed before this period were in the form of self-help groups reflective of the character of the colonial state. Broad agreement seems to have emerged that active citizen participation was not possible under colonial rule due to the undemocratic nature of the colonial government.⁸⁹⁹ The colonial state carried over the phenomenon of the chief who, though unelected and unaccountable to the citizens, wielded executive, legislative, and administrative powers.⁹⁰⁰ This ‘indirect rule’, it is argued, had the effect of killing the soul of the community, destroying its associational life, bastardising its traditional structures of authority and replacing them with a new realm of chieftaincies that expropriated and subverted traditional administrative structures and consensual orientations.⁹⁰¹ Although it is a fact that colonial rule was autocratic, it is misleading to argue that pre-colonial rule was consultative and therefore any better.

There was little in terms of citizen participation during this period. Associational life during this period was charity-oriented; designed to mobilise people towards self-help and a less demanding state of accountability. For example, the establishment of educational and health institutions in the form of non-governmental hospitals to treat the sick and mission schools to promote education, dominates much of citizen action. The colonial state encouraged the

⁸⁹⁷ Uzoigwe op cit note 867 at 35.

⁸⁹⁸ Chapter 2 (section 2.2), see Bazaara op cit note 387 at 2.

⁸⁹⁹ Chapter 2 (section 2.3), see Ake op cit note 190 at 212.

⁹⁰⁰ Eric Masinde Aseka *Transformational Leadership in East Africa: Politics, Ideology and Community* (Kampala: Centre for Basic Research, Fountain Publishers, 2005) 86.

⁹⁰¹ *Ibid*, 212.

Church Missionary Society (CMS) to establish hospitals such as Mengo Mission Hospital and schools such as Kings College, Budo (1906), Gayaza High School (1905), Busoga College Mwiru (1911), and Mbarara High School (1911).⁹⁰² Under the Church of Uganda Social Services organisation founded in 1877, a number of agencies such as Sanyu Babies Home (1929), the Mothers Union (1908), the Boys Brigade (1933), Uganda Boy Scouts Association (1915) and Uganda Girl Guides Association (1914) were established.⁹⁰³ Much of the voluntary action was in the form of humanitarian and missionary work which had little to do with political activity. It was colonial policy to encourage humanitarian activity and to exclude the people from any actions involving the exercise of state power.⁹⁰⁴

The legal and policy framework reflected a similar attitude. The Buganda (1900), Toro (1900), Ankole (1901) and Bunyoro (1933) Agreements, and the 1901 Order-in-Council that brought Uganda under colonial rule did not reflect the interests of the people. Instead, they were concerned with the interests of the British Crown.⁹⁰⁵ The emphasis was on law and order, and collecting taxes, symbolising law-governed behaviour as the norm.⁹⁰⁶

Things began to change around the 1920s when for the first time there was citizen engagement of the colonial state and the creation of moderate spaces for dissent began to be tolerated. This was sparked off by a new generation of youth that had benefited from colonial education, and who had become of age.⁹⁰⁷ More politically conscious, they had become aware of the social injustices that existed at the time. Alongside these groups were chiefs and clerks, who in search of privileges were determined to resist the controlling nature of the colonial administration and to protest against social injustices that had resulted in the re-distribution of land under various colonial agreements.⁹⁰⁸ The first organised form of dissent was the Young Bataka Association in 1920, followed by associations of urban workers and peasants.⁹⁰⁹ This was followed by the Young Basoga Association (1922) and then the Young Men of Toro (1922), who protested against excessive rents charged by landowners against tenants and

⁹⁰² National Council of Social Services *Voluntary Social and Medical Services in Uganda: A Handbook of Information and Directory of Organization* (Kampala: National Council of Social Services, 1964) 7-8.

⁹⁰³ Bazaara op cit note 387 at 4.

⁹⁰⁴ Oloka- Onyango op cit note 850 at 4.

⁹⁰⁵ Ibid

⁹⁰⁶ Ibid

⁹⁰⁷ Bazaara op cit note 387 at 4-6.

⁹⁰⁸ Bazaara op cit note 387 at 4-6.

⁹⁰⁹ Phares Mutibwa *Uganda since Independence: A Story of Unfulfilled Hopes* (Kampala: Fountain Publishers, 1992) x.

against high taxes imposed by the colonial administration.⁹¹⁰ This turn of events marked the birth of active associational life for the first time in Uganda's political history, which through advocacy and lobbying agitated for reform of the colonial system.⁹¹¹ As Nsibambi argues, civil society at this time would best be categorised as 'more of an ensemble of free associations with the political and organisational capacities to co-ordinate their activities and also determine or influence the type, sequence and development of state policy significantly'.⁹¹²

This birth of civic associations and the loosening of democratic spaces were not by accident. It was a response by the colonial state to the agitation of these organizations that forced the British to open up space.⁹¹³ The colonial state reacted to the danger of restricting political space in a situation where it sought to encourage production, increase taxes, and promote community development in the colonies.⁹¹⁴ This change of approach is reflected in the legal and policy framework that encouraged charity work as well as the activities of civic associations at the time. For example, the enactment of the 1928 *Busulu and Envujjo* law that placed a ceiling on the amount of rent a landlord could charge a tenant; and the Colonial Development and Welfare Act 1929 that encouraged the formation of voluntary organisations through which Africans could voice dissent.⁹¹⁵ Prior to 1929, British colonial policy had given less thought to ways of promoting the welfare of colonial peoples and more particularly to how and when the local peoples were to be brought in for consultation.⁹¹⁶

The Colonial Development and Welfare Act 1929 was an attempt by the colonial government to increase expenditures in social services in the colonies but did not go far enough.⁹¹⁷ The Colonial Development and Welfare Act 1940, which was passed following the recommendations of the Moyne Commission report, marked a major shift in colonial policy that saw the beginning of a new social and political movement that culminated in the

⁹¹⁰ Dan Mudoola 'The Young Basoga and Abataka Association: A Case Study in Chiefly Politics in Colonial Busoga', (1976) 38 *The Uganda Journal*, 30-39.

⁹¹¹ Bazaara op cit note 387 at 5-7.

⁹¹² Apolo Nsibambi *Decentralization and Civil Society in Uganda: The Quest for Good Governance* (Kampala: Fountain Publishers, 2000) 7.

⁹¹³ Ibid

⁹¹⁴ Ibid

⁹¹⁵ Bazaara op cit note 387 at 6.

⁹¹⁶ E.R Wicker 'Colonial Development and Welfare, 1929-1957: The Evolution of a Policy' (1958) 7, 4 *Social and Economic Studies*, 170- 192, 170-171.

⁹¹⁷ Ibid. 180.

formation of trade unions, civic associations, and political parties.⁹¹⁸ And as Basdeo notes, the *Moyne Report* marked a turning point in colonial attitudes.⁹¹⁹ The Colonial Development and Welfare Act 1940 allowed individuals to form associations within the control of the state through which they would express their grievances, a measure that could thwart their involvement in politics.⁹²⁰ Though Kevin Singh argues that these welfare efforts were merely ‘palliative given the circumstances’, this thesis argues that the 1940 Act was a major breakthrough in stimulating civic action.⁹²¹

7.2.3. The Pre-Independence Period (1945 to 1962)

Notwithstanding the limited spaces available for citizen participation, the 1940s heralded the beginning of what was to emerge as a vibrant civil society characterised by the dynamic growth of popular organisations and civic associations more than at any time during colonial rule in Uganda. The period was characterised by major protests and uprisings spearheaded by trade unions, youth associations, and co-operatives during this period but considerable civil society activism as well. For example, the number of civic associations registered grew; in support of the view that with the opening of associational spaces, citizen participation grows.⁹²² As the end of the Second World War drew close, the demand for self-determination and the right to association intensified. In the wake of this democratic transition came the demand for independence, freedom, and democracy. Described as the ‘first wind of change’, the decolonisation process brought with it widespread aspirations for freedom that were engineered by a powerful nationalist movement. Given this new wind of change the colonial powers opted to cede more space which as history shows brought with it the exercise of multi-party politics for the first time in Uganda’s history.⁹²³

⁹¹⁸ Ibid. 189.

⁹¹⁹ Basdeo Sahadeo ‘Walter Citrine and the British Caribbean Worker’s Movement during the Commission Hearing’, (1983) 18 *Journal of Caribbean History* 2, 46.

⁹²⁰ F M P Cowen and R W Shenton ‘*Doctrines of Development*’ (London: Routledge, 1996) 310.

⁹²¹ Singh Kevin ‘*Race and Class Struggles in a Colonial State* (Calgary: University of Calgary Press, 1994) 190.

⁹²² Bazaara op cit note 844 at 33. Bazaara notes a steady increase in the number of NGOs registered: from 1900-1910 (0), 1911-1920 (3), 1931-1940 (7), 1941-1950 (15), 1951-1960 (38) and 1960-1964 (7).

⁹²³ Mamdani op cit note 860 at 520. Taking advantage of the expanded public realm, a number of political parties were formed to agitate for independence. Among these was Uganda National Congress (UNC) in 1952; the Democratic Party (DP in 1956); the Progressive Party (1957); Uganda Peoples’ Union (1958) which merged with UNC to form Uganda People’s Congress (1960). The UPC allied with Kabaka Yekka (KY) in the April, 1962 general elections to form the first independence government in 1962.

But this freedom for civic associations and popular organisations to operate was not without restrictions. The colonial state limited the autonomy of social movements through a system of state regulation of civic associations and popular organisations.⁹²⁴ With registration the colonial state had more options, to choose whom to register and to reject.⁹²⁵ Initially, the state had suppressed the uprisings of peasants and workers' strikes but realised that it was better off with state regulation since registration could confer rights to and duties on an organisation at the whim of the state. To achieve this goal the colonial state established the National Council of Voluntary Social Services in 1953 (NCVSS) to co-ordinate and monitor the activities of non-profit organisations.⁹²⁶ It has been argued that among the objectives of the NCVSS was to monitor that government subsidies were not used for political purposes, more so against the colonial state.⁹²⁷ A series of enactments constrained the rights to freedom of association and assembly. For example, Section 54 (2) (ii) of the Penal Code Ordinance of 1951 gave power to the Governor to issue an Order- in Council declaring a society as 'unlawful and dangerous' to the good government of Uganda.⁹²⁸

7.2.4. The Independence and Post-Independence Period (1962 to 1986)

If citizen participation was symbolic during the colonial period, it was largely non-existent before the 1980's. Not only did the post-colonial state control popular associations but it stifled any emerging institutions of civil society.⁹²⁹ The freedom for non-profit organisations to function was completely eroded when Prime Minister Obote abrogated the 1962 Constitution and replaced it with the 1966 interim constitution, dubbed the 'pigeon-hole' constitution; and subsequently replaced it with the 1967 republican constitution.⁹³⁰ Following

⁹²⁴ Bazaara op cit note 387 at 6-11.

⁹²⁵ Mamdani and Oloka-Onyango op cit note 39 at 522.

⁹²⁶ Bazaara op cit note 387 at 10.

⁹²⁷ Ibid

⁹²⁸ Mamdani and Oloka-Onyango op cit note 39 at 539-542.

⁹²⁹ Chapter 2 (section 2.4), see Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain Publishers, 1996) 21. Mamdani argues that the post-colonial state marks the fourth moment in the history of civil society; the moment of the collapse of an embryonic indigenous civil society, of trade unions and autonomous civil organizations, and its absorption into political society; it is the time when civil society-based social movements became demobilized and political movements statized.

⁹³⁰ James Tumusiime 'Obote's First Term, 1962-1971' in James Tumusiime (ed) *Uganda: 30 Years 1962-1992* (Kampala: Fountain Publishers, 1995) 34. Tumusiime notes that Obote introduced the notion of 'One Government, One Nation'. Kingdoms were abolished and Uganda declared a republic. Obote placed all executive powers in the hands of the President and declared UPC as the only legitimate political voice.

an attempted assassination in 1969, Obote outlawed opposition parties and by default made Uganda a one-party state, an act which increased his powers and made popular participation virtually impossible.⁹³¹ Using the 1967 Constitution to restrict the freedoms to expression, association, and assembly, Obote expanded the scope of limitations and enacted additional legislation that put more barriers on the freedom of organisations to operate. For example, Article 18 of the 1967 Constitution not only replicated Article 26 (2) of the 1962 Constitution but it expanded the scope of limitations to include ‘persons detained or whose movement is restricted or where necessary for the regulation of industrial labour disputes, proper management of trade unions, co-operatives or associations’.⁹³²

Beyond the restrictive constitutional framework were a number of laws that closed what had remained of the associational space. Most notorious of these was the Public Order and Security Act of 1967 under which a person could be detained without trial.⁹³³ The Penal (Unlawful Societies) Order No. 2 of 1969⁹³⁴ re-enacted Section 54(2) of the 1951 Penal Code Ordinance of 1951, declaring organisations and political parties unlawful. Section 54(2) (b) revised Section 54(1) of the 1951 Penal Code to bring the number of persons who could constitute an ‘unlawful society’ down from ten to two. At the time Obote was overthrown by Idi Amin in 1971, there were more than 50 political prisoners in detention without trial.⁹³⁵ If the colonial state emasculated the individual’s right to participate in decision-making, Obote’s regime liquidated it. Without democracy, democratic spaces closed and civic participation became anathema.

Like its predecessor, Amin’s dictatorship proscribed all forms of political activity. Amin issued Legal Notice No.1 of 1971 that suspended several sections of the 1967 Constitution. In

⁹³¹ Irving Gershenberg ‘Slouching towards Socialism: Obote’s Uganda’ (1972) 15, 1 *African Studies Review*, 79-95.

⁹³² Article 26 (2) of the 1962 Constitution limited the freedom of assembly and association in ‘the interest of defence, public safety, public order, public morality, or public health; for the purpose of protecting the rights or freedoms of other persons or to impose restrictions on public officers’. See Barya op cit note 40 at 8.

⁹³³ Public Order and Security Act No 20 of 1967.

⁹³⁴ Statutory Instrument No 233 of 1969.

⁹³⁵ Masinde op cit note 874 at 277.

1977, he issued a decree that created the National Council of Women with the objective of controlling all women's organisations in Uganda.⁹³⁶

7.3. NGOs IN UGANDA: RELEVANCE, GROWTH AND LEGITIMACY

7.3.1. Theoretical and Constitutional Framework

The 1980s in Uganda were characterised by a re-opening of democratic space following the overthrow of Amin in 1979.⁹³⁷ A resurgence of active citizen participation in the form of self-help groups and NGOs took place particularly with the ascendancy of the National Resistance Movement (NRM) government to power in 1986. The NRM spearheaded the writing of the 1995 Constitution, which was promulgated on 9 October, 1995. The Constitution provides a broad framework for citizen participation and respect for human rights.

Chapter 4 of the Constitution provides for a bill of rights. Article 29(1) (e) of the Constitution provides, that 'every person shall have a right to 'freedom of association which shall include, freedom to form and join associations, including trade unions and political and other civic organisations'. Article 38(2) provides that 'every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations'. These rights are not absolute, but are subject to limitations. Thus, Article 43 (1) provides, 'in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest'. Article 43(2) (c) further states that 'public interest' shall not permit, any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society. . . '. Under the National Objectives and Directive Principles of State Policy, Directive Principle V (ii), it is provided that 'the state shall guarantee and respect the independence of non-governmental organisations which protect and promote human rights'. In addition, Directive Principle II

⁹³⁶ Article 4 of the 1977 Decree read, 'For the avoidance of doubt, it is hereby declared that with effect from the commencement of this decree, no women's or girl's voluntary organizations shall continue to exist or to be formed except in accordance with the provisions of this decree'. See HMK Tadia 'Changes and Continuities in the Position of Women in Uganda' in D Paul Wiebe and P Cole Dodge (eds) *Beyond Crisis: Development Issues in Uganda* (Kampala: Makerere Institute of Social Research, 1987) 88.

⁹³⁷ Nelson Kasfir 'Movement, Democracy, Legitimacy and Power in Uganda' in Justus Mugaju and Oloka Onyango (eds.) *No -Party Democracy in Uganda: Myths and Realities* (Kampala, Fountain Publishers, 2000) 60.

(vii), states that ‘civic organisations shall retain their autonomy in pursuit of their declared objectives’.

The regulatory framework governing NGOs comprises of: the Non-Governmental Organisations Registration Act of 1989 (NGO Act),⁹³⁸ the Non-Governmental Organisations Registration (Amendment) Act of 2006, the Non-Governmental Registration Regulations, 2009, and the National NGO Policy 2010. At the Local Government level, districts are mandated to monitor and coordinate the work of NGOs under the Local Governments Act of 1997.⁹³⁹ The NGO Registration (Amendment) Act, 2006 confers legal personality on any organisation that is registered under it.⁹⁴⁰ Before the amendment, for such organisation to acquire legal personality, it must register as a company under the Companies Act of 1961⁹⁴¹ or the Trustees Incorporation Act of 1939.⁹⁴²

But what does the right to freedom of association mean under Uganda’s Constitution? What are the permissible limitations to the enjoyment of this right? Uganda ratified the ICCPR and is party to the ACHPR.⁹⁴³ The Constitution of Uganda, 1995 is the supreme law but it has to be interpreted in accordance with Uganda’s treaty obligations.

The Constitutional Court of Uganda has addressed itself to this issue in a number of cases. For example, in *Dr. Sam Lyomoki & Ors v The Attorney General*,⁹⁴⁴ the petitioners brought a petition under Article 137 of the Constitution and the Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions seeking declarations among others, ‘that Section 6(3) of the Trade Union Act, 1976 which establishes the National Organisation of Trade Unions (Uganda) was, inconsistent with, and contravenes article 29 (1) (e) of the Constitution which provides for the right to freedom of association, including trade unions and political and other civic organisations. The Constitutional Court observed that the Constitution did not define what the expression ‘freedom of association’ means, however, relying on the Privy Council decision in *Collymore v. Attorney General*,⁹⁴⁵ the court held, that ‘freedom of association’ means the right of a person to enter into

⁹³⁸ Chapter 113 Laws of Uganda, entered into force 29 September 1989.

⁹³⁹ Local Government Act No 1 of 1997.

⁹⁴⁰ Section 4(c) of the NGO Registration (Amendment) Act, 2006.

⁹⁴¹ Companies Act, Chapter 110 of 1961.

⁹⁴² Trustees Incorporation Act, Chapter 165 of 1939.

⁹⁴³ Chapter 4 (section 4.2).

⁹⁴⁴ Constitutional Petition No 8/ 2004. Article 40(3) (a) recognizes every worker’s right to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests.

⁹⁴⁵ [1970] AC 532 at 547.

consensual arrangements to promote a common interest or objects of the association, it does not authorise any acts that are a threat to peace, order and good governance of the country

Does the right to freedom of association permit any limitations that are inconsistent with Article 43(1) of Uganda's Constitution? The Supreme Court in *Onyango Obbo and Another v Attorney General*,⁹⁴⁶ held that 'any law that limits the enjoyment of the right would be in violation of the Constitution', and as it was observed in chapter 5, derogations are only permissible where such interference is prescribed by law, in the interests of a legitimate government aim, and necessary in a democratic society.⁹⁴⁷ Similarly, in *Paul K Ssemogerere, Olum and Kafire v Attorney General*, the Supreme Court held that all laws, rules or regulations or decisions of any authority in conflict with Article 43(2)(c) are unconstitutional.⁹⁴⁸ Within this constitutional and legal framework, Uganda has witnessed the emergence and growth of NGOs.

7.3.2. The Growth and Legitimacy of NGOs in Uganda

NGOs in Uganda embrace a broad range, differing in scale and character. Their activities also vary, ranging from agriculture, health care, education, and environment conservation, women in development, poverty reduction, research, training and human rights.⁹⁴⁹ Since 1986, Uganda has experienced a phenomenal increase in the number of NGOs as shown in the Table below.

⁹⁴⁶ Constitutional Appeal No 2/02, East Africa Law Reports, (2004) 1 EA.

⁹⁴⁷ Article 22(2) of the International Covenant on Civil and Political Rights (1966), See The Guiding Principles on Non-Governmental Organizations (US State Department, 14 December 2006). States that 'individuals should be permitted to form, join, and participate in NGOs of their choosing in the exercise of the rights to freedom of expression, peaceful assembly, and association.

⁹⁴⁸ Constitutional Appeal No 1, 1977 East Africa Law Reports [2004] 1 EA 274.

⁹⁴⁹ Jjuuko op cit note 342 at 193.

Table 1: NGO Growth in Uganda (1986-2013) ⁹⁵⁰	
Year	Number of NGOs Registered
1986- 1990	21
1990- 1996	1, 000
1996- 2000	3, 500
2000- 2005	5, 200
2005- 2012	10, 000
2013	10, 336

(Source: DENIVA and TROCAIRE Report ‘*Survey on the value of CSOs contribution to National Development in Uganda*’, June 2012) 5.

As can be seen from Table 1 above, there has been a dramatic increase in the number of NGOs registered since 2005.

Unlike charity and development-oriented NGOs, indigenous human rights NGOs are a more recent phenomenon. Until 1985, when the very first human rights organisation, the Uganda Human Rights Activists (UHRA) established by Ugandan exiles in Sweden was relocated to Uganda, reporting on human rights in Uganda was mainly a pre-occupation of Ugandan exiles in Europe and the United States.⁹⁵¹ For example, during Amin’s regime, the Human Rights Group, Action Group and Uganda Freedom Union led the campaign against human rights abuses perpetrated by Idi Amin’s regime.⁹⁵² Established in Kampala in 1985 with a mission to monitor the human rights situation, expose human rights abuses and hold the state accountable to its human rights record, UHRA was very outspoken in the early years of the

⁹⁵⁰ Simon Nangiro Apolot Lowot, Secretary, National NGO Board, 29 May, 2013.

⁹⁵¹ Oloka-Onyango op cit note 379 at 19.

⁹⁵² Masinde op cit note 874 at 331. Human Rights Group was led by Dr. George Kanyeihamba; Paul Muwanga headed the Action Group while Godfrey Binaiisa led the Uganda Freedom Union. All these groups were based in London, United Kingdom and the United States.

NRM government.⁹⁵³ UHRA published a quarterly magazine, *The Activist* which documented human rights abuses particularly torture, extra-judicial executions, arbitrary arrests and detention without trial perpetrated by the Museveni regime. Until 1987 when the Secretary General of UHRA was arrested for purportedly inciting people against the NRM government, the group periodically issued human rights reports that criticised the government's human rights record in the northern part of Uganda.⁹⁵⁴

The imprisonment of the human rights defender had a negative effect on human rights and democracy advocacy work in Uganda. It was not until a decade later in 1998 that a domestic human rights organisation, the Foundation for Human Rights Initiative (FHRI), released another human rights report on Uganda. Between 1987 and 1998, human rights reports were regularly issued by Amnesty International, a global human rights advocacy group.⁹⁵⁵

The Association of Women Lawyers (FIDA-U), that had been established as early as 1974 but had remained inactive, was revived to promote the rights of women.⁹⁵⁶ FIDA-U inaugurated its first legal aid clinic in 1988. The group had as its primary objective the empowerment of women with legal rights and the provision of legal aid to indigent women and children. The Uganda Law Society (ULS), a professional association of lawyers established under the Uganda Law Society Act, 1956, which had been dormant due to the excesses of Idi Amin was later revived as an advocacy group to provide legal aid and monitor human rights violations in

⁹⁵³ Nyangabyaki Bazaara *Contemporary Civil Society and the Democratization Process in Uganda: A Preliminary Exploration*, Kampala: Centre for Basic Research, Working Paper No. 54/ 2000, 43.

⁹⁵⁴ A Zachary Lomo 'The Struggle for the Protection of Human Rights in Uganda: A Critical Analysis of the work of Human Rights Organizations' (1999) 5, 2 *East African Journal of Peace and Human Rights*, 161-174. UHRA issued a report in November 1987 in which it alleged that fifty prisoners had been killed in Luzira Prison. It cited torture of persons kept in ungazetted detention centres and compared the National Resistance Army (NRA) of Museveni to the defunct Uganda Army under Amin.

⁹⁵⁵ M Louise Pirouet 'Human Rights Issues in Museveni's Uganda' in Holger Bernt and Hansen Michael Twaddle (eds) *Changing Uganda: The Dilemmas of Structural Adjustment and Revolutionary Change* (Kampala: Fountain Publishers, 1991) 198. Amnesty International's 1989 report, *Uganda, the Human Rights Record 1986-1989* documents a catalogue of human rights abuses perpetrated by the army in northern Uganda and in its assessment of NRM's performance noted that it was less favourable after four years in power than it was in the early months.

⁹⁵⁶ Barya op cit note 40 at 8.

the country.⁹⁵⁷ The three premier human rights groups broadly took on an empowerment, advocacy and watchdog role.

Until 1989, when the Non-Governmental Organisations Registration Statute 1989, was enacted, there was no legislation to govern the activities of NGOs.⁹⁵⁸ It would appear that other than political parties whose activities had been restricted, the NRM government had not envisaged the emergence of human rights NGOs. Notwithstanding policy declarations to the contrary, what the state preferred most were NGOs that provide services such as, legal aid, health, and education.⁹⁵⁹ As gap-filling NGOs they would be apolitical and, focused on service provision, thereby buttressing the legitimacy of the regime. Gap-filling NGOs would not be catalysts for the development of a democratic society, a trend that the advocacy NGOs were perceived to have embarked on.

At present there are over 20 NGOs of 10,000 plus organisations working in the field of human rights. Many more groups occasionally speak about human rights and democracy issues in Uganda too.⁹⁶⁰ The range of actions that these NGOs engage in include; legal education and empowerment, law reform, research and monitoring, co-ordination, and networking.

⁹⁵⁷ Uganda Law Society was established on 27 December, 1956, Vol. VII, 1964, Laws of Uganda.

⁹⁵⁸ See Chapter 113 Laws of Uganda, entered into force on September 1989.

⁹⁵⁹ The Hansard, Parliament of Uganda, Bill: Second Reading, 'The Non-Governmental Organisations Registration Bill, 1989', 20 June, 1989, 335.

⁹⁶⁰ Among these are: Action for Development (ACFODE), African Center for the Treatment of Torture Victims (ACTV), Association of Women Lawyers (FIDA), East and Horn Human Rights Defender Project (EAHRDP), Foundation for African Development (FAD), Foundation for Human Rights Initiative (FHRI), Forum for Women in Democracy (FOWODE), Human Rights Concern, Human Rights Focus (HURIFO), Human Rights Network (HURINET), Legal Aid Project of the Uganda Law Society, National Union of Disabled Persons of Uganda, (NUDIPU), National Association of Women's Organizations in Uganda (NAWOU), Uganda Christian Lawyers Fraternity (UCLF), Uganda Gender Resource Centre (UGRC), Uganda Journalists Association (UJA), Uganda Journalists Human Rights Network (UJHRN), Uganda Prisoner's Aid Foundation, Uganda Women's Network (UWONET). Three NGOs have ceased to operate: Uganda Human Rights Activists (UHRA), Uganda Journalists Safety Committee (UJSC) and the Uganda Human Rights Education and Documentation Centre (UHEDOC). Other NGOs that occasionally report on democracy and human rights are: Action for Development and Environment (ACODE), Development Network of Indigenous Voluntary Associations (DENIVA), Uganda National NGO Forum (NGO FORUM),) and the Uganda Democracy Monitoring Platform. A number of Coalitions exist to advocate for specific human rights concerns as well. These include: The Anti Corruption Coalition, The Coalition against Torture (CAT), The Coalition on Human Rights, and Constitutional Law, The

7.4. THE LEGAL AND REGULATORY FRAMEWORK: ENABLING OR CONTROLLING?

The ascendancy of the NRM government to power in 1986 marked a turning point in the rebirth of NGOs in Uganda. Not only did the NRM introduce democratic reforms but it put in place the 1995 Constitution which guaranteed the rights to association, expression, and assembly.⁹⁶¹ Restrictions were placed on political pluralism, but the space for civil society was appreciably liberalised, and indeed NGO numbers rose.⁹⁶² However, in 1989, the state enacted the Non-Governmental Organisations Registration Statute 1989.⁹⁶³ Was the legislative process participatory, and did it reflect the outcome?

7.4.1. The Non-Governmental Organisations Registration Act 1989

7.4.1.1. The Legislative Process

Historically, efforts to enact a law to control voluntary organisations in Uganda began much earlier. In 1985, a Bill entitled the ‘National Council of Voluntary Social Services 1985’ was tabled before Parliament.⁹⁶⁴ The Bill sought to compel social and voluntary organisations operating in Uganda to be registered with the National Council of Voluntary Social Services (NCVSS).⁹⁶⁵ NCVSS operated under the Ministry of Relief and Social Rehabilitation. The NCVSS Bill did not become law due to the change of government in 1986.

However in 1989, Government tabled the Non-Governmental Organisations Registration Bill, 1989 (NGO Bill) which was enacted into law as the Non-Governmental Organisations Registration Act No 5 of 1989 (NGO Act). The NGO Bill was drafted and tabled before Parliament by the Minister of Internal Affairs following discussion and adoption of a Cabinet

Uganda Governance Monitoring Platform, The Citizens Coalition on Electoral Democracy (CCEDU), and The Democracy Monitoring Group (DEM-GROUP) and the National Coalition of Human Rights Defenders.

⁹⁶¹ Article 29(e) of the constitution provides for freedom of association which includes the freedom to form and join associations or unions, including trade unions and political and other civic organizations.

⁹⁶² Chapter 7 (section 7.3.2).

⁹⁶³ Chapter 113 Laws of Uganda, entered into force on 29 September 1989.

⁹⁶⁴ The Hansard, Parliament of Uganda, Bill: Second Reading, ‘The Non-Governmental Organizations Registration Bill, 1989’, 20 June, 1989, 335.

⁹⁶⁵ Ibid.

Memorandum by Government.⁹⁶⁶ The reasons given for the introduction of the bill were stated as follows: ‘to legalise, formalise, recognise and streamline NGOs’.⁹⁶⁷

During the debate on the NGO bill and the subsequent amendment, the issue of participation of NGOs in decision-making on matters concerning their registration and operation was raised. The principle of partnership and trust was ably argued by some members of Parliament in favour of including NGOs on the National Board of Non-Governmental Organisations (NGO Board), the body established to register, guide and monitor NGOs in Uganda. Although the government, while responding to questions on the floor of Parliament, recognised the involvement of NGOs as a healthy democratic process, the proposal for their representation on the NGO Board was dismissed on grounds that involving NGOs would hamper government policy and undermine the policy goal of directing and guiding them.⁹⁶⁸ Consequently, section 4(2) of the NGO Act, now section 6(2) as amended excludes NGOs from membership of the NGO Board.⁹⁶⁹ Neither does the section make provision for any form of consultation of NGOs in the appointment process. Instead, the section empowers the Minister of Internal Affairs to appoint thirteen members of the Board, three of whom are drawn from the public and the rest from selected government ministries including security officials, without consulting NGOs.⁹⁷⁰

There is no evidence that NGOs participated in the formulation of the NGO Act of 1989, nor the Non-Governmental Organizations Regulations of 1990.⁹⁷¹ Given that the NGO Act of 1989 preceded the Uganda Constitution 1995, the procedure of making laws had not been laid out clearly, hence the absence of well laid out procedures for consulting the public. However, since the adoption of the Constitution, the procedure has been provided. Article 79(1) of the

⁹⁶⁶ The Hansard, Parliament of Uganda, 1989.

⁹⁶⁷ The Hansard, Parliament of Uganda, Bill: Second Reading, ‘The Non-Governmental Organisations Registration Bill, 1989’ 20 June 1989, 336.

⁹⁶⁸ The Hansard, Parliamentary of Uganda, Bill: Second Reading, ‘The Non-Governmental Organizations Registration Bill, 1989’, 20 June 1989, 335.

⁹⁶⁹ Section 6 (2) of the Non-Governmental Organizations Registration (Amendment) Act of 2006 states ‘The Board shall consist of the following- (a) three members from the public one of whom shall be a female (b) one member from each of the Ministries responsible for the following- (i) internal affairs (ii) justice and constitutional affairs (iii) local governments (iv) health (v) agriculture, animal industry and fisheries (vi) gender and social development (vii) education and sports. The two security agencies include; the Internal Security Organization and the External Security Organization.

⁹⁷⁰ Ibid

⁹⁷¹ Statutory Instrument 9/ 1990.

Constitution mandates Parliament to make laws. Under Article 91(1) of the Constitution, Parliament exercises this power through bills passed by parliament and assented to by the President. In the discharge of this function, Parliament appoints Committees who have powers to discuss and make recommendations on all bills laid before Parliament.⁹⁷² Following their Rules of Procedure, the Committees of Parliament have power to summon any person, including private individuals to summon or appear before them to give evidence.⁹⁷³ Therefore, unlike the state-driven process of enacting the NGO Act 1989, the amendment process attracted strong input from NGOs.⁹⁷⁴

Between 1999 and 2006, Government initiated a process to amend the NGO Registration Act 1989. The Ministry of Internal Affairs like before, drafted a bill, the NGO Registration (Amendment) Bill, 2001 (NGO Bill, 2001). NGOs were invited to make submissions on the bill before the Defence and Internal Affairs Committee of Parliament. NGOs expressed their concerns in several meetings and memos to the Committee.⁹⁷⁵ Six concerns were raised before the Committee. First, that Article (1) (e) of the NGO Bill had a narrow definition of an ‘NGO’, and there was a risk that the state would curtail the work of NGOs in the areas of democracy, governance and human rights.⁹⁷⁶ Second, that Article (2) provided for unfettered administrative discretion to the NGO Board to impose conditions in the certificate of registration as they may think fit.⁹⁷⁷ Third, that Article 2(4) which prohibited the registration of NGOs whose objectives are ‘in contravention of the law’ was prescriptive.⁹⁷⁸ Fourth, that Article 2(5) which ‘criminalises’ an organisation which acts contrary to the conditions or directions specified in its annual permit or carries out any activity without a valid permit was inconsistent with the right to freedom of association provided in Article 29(1)(e) of the Constitution.⁹⁷⁹ Fifth, that Article 4(1) restricted membership to the NGO Board only to

⁹⁷² Article 90(1) of the Constitution of the Republic of Uganda (as amended) 1995.

⁹⁷³ Article 90(2) of the Constitution of the Republic of Uganda (as amended) 1995.

⁹⁷⁴ See ‘Civil Society come out strongly against the new NGO Bill’ 12 May 2006 available at <http://humanrightshouse.org/Articles/7322.html>

⁹⁷⁵ NGO Forum and Deniva (2006) ‘Narrowing Space for NGO Operations in Uganda: An Analysis of the Implications of the 2006 NGO (Registration (Amendment) Act 2006’ available at <http://www.wmd.org/documents/DCS/Uganda09.pdf>

⁹⁷⁶ See Chapter 2 (section 2.1.2). Section 1(d) of the NGO Act defines an ‘NGO’ to mean an ‘organization which is a non-governmental organization established to provide voluntary services including religious, educational, literary, scientific, social or charitable services to the community or any part thereof’.

⁹⁷⁷ See NGO Forum ‘The NGO Act, Regulations and Policy in Uganda: The History, Contentions and Suggestions’ (A Briefing Paper, 2009) 2-3, available at <http://www.wmd.org/documents/DCS/Uganda09.pdf>

⁹⁷⁸ Ibid

⁹⁷⁹ Ibid

Government appointees and left out NGOs was not inclusive and, did not constitute democratic representation.⁹⁸⁰ Sixth, that Article 9 that restricted the right of appeal of an organisation aggrieved by the decision of the board to the Minister of Internal Affairs, gave arbitrary power to the Minister, and limited the right to judicial review.⁹⁸¹

Notwithstanding these submissions and meetings with the Committee, without further consultations, the NGO Bill was passed on 7 April 2006, at a hasty parliamentary session without any meaningful consideration of the proposals. The NGOs petitioned the President, who, without affording them a hearing, assented to the Act on 25 May 2006.⁹⁸²

The process of adopting the NGO Regulations 2009 was much similar. The Ministry of Internal Affairs developed the regulations to facilitate the implementation of the NGO Registration (Amendment) Act, 2006 without the participation of NGOs. NGOs petitioned the Minister of Internal Affairs expressing concerns over some provisions.⁹⁸³ Dissatisfaction was expressed against Regulation 5(1) that provides for burdensome registration requirements, and Regulation 13 that prohibits an organisation from carrying out any activity without giving seven days' notice to the Local Councils and Resident District Commissioner; Regulation 17(3) that provides for involuntary dissolution of an NGO by the Board and, Regulation 19(1) that requires a self-regulatory body to register with the Board.⁹⁸⁴ A meeting of NGOs, the NGO Board, and the Minister was held on 15 January 2008 to consult on the regulations. It was agreed that a Government- NGO Committee be set up to review the regulations. Despite the input of NGOs in the joint committee, the regulations were adopted without any significant changes.⁹⁸⁵

The adoption of the National Policy on NGOs (policy) was more participatory. The Office of the Prime Minister initiated a process of developing the Policy in 2007.⁹⁸⁶ NGOs were invited to make submissions. The views of the NGOs were considered in the final policy. Among these was the acknowledgment by government of the role NGOs play in promoting public accountability, that a stronger NGO sector can contribute to a culture of civic inclusiveness and participation, that the NGO sector must be vibrant and accountable to promote citizen

⁹⁸⁰ Ibid

⁹⁸¹ Ibid.

⁹⁸² Ibid.

⁹⁸³ NGO Forum op cit note 947 at 5.

⁹⁸⁴ Ibid.

⁹⁸⁵ Ibid.

⁹⁸⁶ Ibid, at 6-8.

transformation. However, NGOs raised concerns on provisions in the policy that restrict NGOs from participating in politics, and the onerous requirements for registration.

As it was noted in Chapter 6, where the views of NGOs were ignored like Zimbabwe and Ethiopia, the NGO Act was restrictive and controlling, just like the NGO Act of 1989 and 2006, as well as the NGO Regulations of 2009. And in cases where the legislative process was inclusive and participatory like South Africa, just like the process of adopting the NGO Policy 2010, the NGO framework is enabling.⁹⁸⁷ Mindful of the legislative process, how is the regulatory body constituted? What is the criterion for its appointment, membership, security of tenure and level of independence?

7.4.1.2. The NGO Regulatory Mechanism

The NGO Act 1989 establishes a National Board for NGOs (NGO Board) to register, monitor, regulate, and advise Government on NGOs.⁹⁸⁸ The NGO Board is composed of twelve members, appointed by the Minister of Internal Affairs, one from each of the following ministries: internal affairs, justice and constitutional affairs, lands and surveys, finance, planning and economic development, foreign affairs, local government, women in development, office of the Prime Minister, two from state security agencies and two members from the public.⁹⁸⁹ The two members from the public were appointed without any consultations with NGOs nor were they drawn from the NGO sector. The Board has its secretariat located in the Ministry of Internal Affairs headed by a Secretary who is a public servant, appointed by the Minister.⁹⁹⁰ The NGO Board is state-controlled. The members of the Board can be removed or substituted any time by the Minister for failure to perform their functions.⁹⁹¹ Members are appointed for a term of three years, and are eligible for reappointment although the number of terms is not prescribed.⁹⁹² Unlike the NGO Coordination Board of Kenya whose membership comprises of representatives of NGOs, the NGO Board is state-dominated. No criterion is given for a person to be appointed to the NGO Board. The next section examines the powers of the Board. Are they controlling or enabling?

⁹⁸⁷ Chapter 6 (section 6.3.1).

⁹⁸⁸ Section 4 (1) of the Non-Governmental Organizations Registration Act 1989.

⁹⁸⁹ Section 4 (2) of the Non-Governmental Organizations Act of 1989.

⁹⁹⁰ Section 6 (1) of the Non-Governmental Organizations Act of 1989.

⁹⁹¹ Section 4 (5) of the Non-Governmental Organizations Act of 1989.

⁹⁹² Section 4 (4) of the Non-Governmental Organizations Act of 1989.

7.4.1.3. Powers of the NGO Board

The NGO Board has broad discretionary powers. The Board has power to accept or reject an application for registration of an NGO without giving any categorical reasons.⁹⁹³ The NGO Regulations set twenty-one days within which the Board has to notify an organisation of its decision to reject an application.⁹⁹⁴ The Act does not provide objective reasons on which an NGO application can be denied. Decisions are subject to the discretion of the Board to accept or reject an application for registration. Is the denial of registration based on false, inadequate information, or duplication of efforts? The answer lies only with the Board. The NGO Act does not set a time- limit within which the district local government must consider an application for registration in case of a community based organisation (CBO). Like the Board, the district local government can deny registration of a CBO without giving any reasons. Using such powers, the Board has rejected several applications for registration of NGOs. For example, the National Organisation for Youth in Development (NAYODE) was denied registration on grounds that it could unite and co-ordinate all youth organisations in the country against the state.⁹⁹⁵ The Pan African Movement was denied registration on grounds that it had political objectives.⁹⁹⁶ The NGO Forum had on several occasions had its application denied for fear of becoming a platform for opposition politics.⁹⁹⁷

If the Board rejects an application for registration, the applicant aggrieved by the decision may within one month of the date of notification of the decision appeal to the Minister who makes a final determination of the matter.⁹⁹⁸ No time limit is provided within which the Minister must hear the appeal neither does the Act make provision for an appeal against the decision of the Minister. However, under Article 42 of the 1995 Constitution, an aggrieved person may appeal to the High Court in respect of any administrative decision taken against him or her.

If the Board accepts an application for registration, it issues a certificate of registration in Form B or a permit in Form C of the schedule of the NGO Regulations 2009, subject to such

⁹⁹³ Section 8 (a) of the Non-Governmental Organizations Act of 1989.

⁹⁹⁴ NGO Regulations, 2009, Regulation 9(1).

⁹⁹⁵ Barya op cit note 118 at 14.

⁹⁹⁶ Barya op cit note 118 at 31.

⁹⁹⁷ Barya op cit note 118 at 14.

⁹⁹⁸ Section 9 of the Non-Governmental Organizations Registration Act of 1989.

conditions as it deems fit.⁹⁹⁹ Such conditions include restrictions to the operational area, activities, and staffing requirements.¹⁰⁰⁰ For example, under Regulation 18(3) the district local government issues a certificate of registration specifying the area of operation and the activities the organisation is authorised to implement. Regulation 14 of the NGO Regulations 2009 requires every organisation to submit to the NGO Board a chart showing its structure and staffing, particularly specifying: foreign workforce requirements and a planned period to replace foreign employees with qualified Ugandans.

The Board also has power to renew a certificate of registration. The certificate is issued in the first instance for a period of one year. Thereafter, the certificate is renewed for three years, and thereafter once every five years on condition that the NGO fulfils the requirements for renewal. Receipt of a certificate of registration is not adequate. Besides the application for a certificate of registration, an organisation has to apply for a permit from the Board which is renewed annually.¹⁰⁰¹

The Board may also revoke a certificate of registration and incorporation on three grounds: first, if the organisation does not operate in accordance with its constitution; second, if it contravenes any of the conditions or directions inserted in the certificate, and third, if in the opinion of the Board it is in the ‘public interest’ to do so.¹⁰⁰² However, ‘public interest’ is not defined. Regulation 16 of the NGO Regulations also requires NGOs to submit to the Board annual returns in Form C as specified in the schedule to the regulations and any information that the Board may consider to be in ‘public interest’. ‘Public interest’ is a vague and overbroad ground that could result in unwarranted state interference in the affairs of the organisation. As noted earlier, the 1995 Constitution restricts ‘public interest’ to actions that do not limit the enjoyment of rights and freedoms beyond what is acceptable in a democratic society.¹⁰⁰³ This was reaffirmed by the Supreme Court decision of *Paul K Ssemogerere, Olum and Kafire v Attorney General*¹⁰⁰⁴ where the Supreme Court held that all laws, rules or regulations or decisions of any authority in conflict with the standard set in Article 43(2) (c)

⁹⁹⁹ Section 2(2) of the Non-Governmental Organizations Registration Act, 1989, See Regulation 6 of the NGO Regulations 2009.

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ Regulations 7 and 8 of the NGO Regulations, 2009.

¹⁰⁰² Section 10 of the Non-Governmental Organisations Registration Act of 1989.

¹⁰⁰³ Article 43(2) (c) of the Constitution of Uganda of 1995.

¹⁰⁰⁴ Constitutional Appeal No 1, 1997 East Africa Law Reports [2004] 1 EA 274.

are unconstitutional. Moreover, once organisations are registered under the NGO Act 2006, they become a body corporate, can sue or are sued.¹⁰⁰⁵

The power to revoke a certificate is prescriptive and may be subject to arbitrary use. For example, in the case of *Kaggwa Andrew & Ors v The Minister of Internal Affairs*,¹⁰⁰⁶ the applicants were members of an NGO, COWE. COWE was registered under the Non-Governmental Organisations Registration Act, 1989 on 27th July, 2001 and a certificate duly issued. On 4th April, 2002 the Secretary to the National Board of NGOs notified them of the revocation of their registration in the ‘public interest’. The applicants were aggrieved with the decision and appealed to the Minister of Internal Affairs who upheld the Board’s decision to de-register them without giving any reasons. The court invoked Article 42 of the Constitution and ruled that COWE was entitled to a fair hearing and should have been notified of the grounds upon which the certificate was cancelled. It accordingly declared the Board’s decision null and void, and directed the NGO Board to re-instate COWE as a Non-Governmental Organisation. Notwithstanding the affirmation of the right to be heard, no reform of the NGO Act took place neither did the Court direct itself to the unconstitutionality of the NGO Act, and therefore the decision in this case could not be relied on in other cases where registration was denied. This case illustrates the arbitrariness of the Board’s powers. The NGO Act can be used as an instrument of control and a threat to the right of individuals to operate without unnecessary interference. For example, the Uganda Human Rights Documentation Centre (UHEDOC) was deregistered allegedly for campaigning against corruption in 1999¹⁰⁰⁷; the Uganda Banyarwanda Cultural Development Association (UMUBANO) was deregistered in 2012 allegedly because of in-fighting and in public interest. M/S Atlas Logistique, a French company registered by the Board in July 1994, and involved in providing logistical support to organisations that extended relief to Rwanda and Eastern Congo had its certificate cancelled on 30 May 1995 without giving any reasons.¹⁰⁰⁸

As noted in Chapter six, the exercise of broad powers is a threat to the freedom of association. With a wide bureaucratic discretion, and without a right of appeal for judicial review, the

¹⁰⁰⁵ Section 4 (c) of the NGO (Amendment) Act, 2006 states ‘Upon the registration of an organization under this Act and the registration under this section, the Organization shall become a body corporate with perpetual succession and with power to sue and be sued in its corporate name’.

¹⁰⁰⁶ See HCT-00-CV-MC-0105 of 2002.

¹⁰⁰⁷ Dicklitch op cit note 152 at 131 and 160.

¹⁰⁰⁸ Barya op cit note 40 at 31.

powers enjoyed by the NGO Board may be more controlling than facilitative.¹⁰⁰⁹ What about the registration requirements, are they onerous? Is it easy to register?

7.4.1.4. Registration requirements

The NGO Act 1989 imposes strict registration conditions. The NGO Act does not permit individuals to act collectively through unregistered organisations.¹⁰¹⁰ The registration requirement extends to Community Based Organisations which must register before they operate.¹⁰¹¹ The law makes it illegal to operate without a valid permit.¹⁰¹² There are penalties for carrying out activities through unregistered organisations which include the payment of a fine or imprisonment or both.¹⁰¹³ Beyond the mandatory requirement for a valid permit the NGO Act also provides for burdensome registration procedures.

¹⁰⁰⁹ Chapter 6 (section 6.3.2.2).

¹⁰¹⁰ Section 4(a) (1) of the NGO Registration (Amendment) Act, 2006 provides ‘No Organization shall operate in Uganda unless it has been duly registered with the Board established under Section 3 of this Act and has a valid permit issued by the Board’.

¹⁰¹¹ Regulation 18(1) of the Non-Governmental Organizations Registration Regulations, 2009 states ‘As required by section 7 of the Act, Community Based Organizations shall not be incorporated under the Act but shall register with the district local government of the area where they operate’.

¹⁰¹² See Public Notice ‘*Updating the National NGO Registry*’ New Vision August 28 2013. As per the Notice all NGOs are required to update their files within a period of three months failure of which would lead to automatic deregistration in accordance with Section.8 (c) of the NGO Act, Cap.113 and Regulation 16(d) of the NGO Regulations, 2009.

¹⁰¹³ Section 4 (e) of the NGO Act (as amended), 2006 makes it an offence for an organization to carry out an activity without a valid permit or to contravene any of the provisions of the Act; making it an offence punishable on conviction to a fine not exceeding twenty five currency points(\$100). A currency point is equivalent to twenty thousand shillings (about \$4 to a currency point). In case of an offence involving contravention of any of the provisions of the Act, any director or officer of such organization whose act or omission gave rise to the offence is liable on conviction to a fine not exceeding fifty currency points (\$200) or imprisonment not exceeding one year or both. In case of an offence that involves carrying out any activity without a valid permit or certificate of incorporation or operates contrary to the conditions or directions specified in the permit, such officer is liable to a fine not exceeding twenty currency points (\$80) or imprisonment not exceeding six months or both.

Organisations must submit an application for registration to the Secretary to the NGO Board.¹⁰¹⁴ Section 2 of the NGO Act and Regulation 5 of the NGO Regulations list the information required for an application for registration. Such information includes an application form (Form A), specification of the area of intended operation (geographic area and field of operation), organisational chart, a valid reservation of name by the Uganda Registration Services Bureau (URSB), two copies of the organisation's constitution, a work plan and budget for one year, a chart showing organisational structure of the organisation, written recommendation by two sureties, and if it is a local organisation, a written recommendation by the Chairperson of the Local Government Executive Committee of the sub-county council and by the Resident District Commissioner. The application has to be signed by at least two promoters.¹⁰¹⁵

Before submitting to the NGO Board, the applicant must reserve a name with the Uganda Registration Services Bureau (URSB). After reserving the name, an application is lodged with the NGO Board which issues a certificate of registration and incorporation. Each of these applications has to be accompanied by a prescribed fee, a Return in Form D and documents specified in the guidelines.¹⁰¹⁶ The fee payable is two currency points (\$8) in case of a certificate of registration and a similar fee for the permit. The renewal of both the certificate and permit also attracts fees. After acquiring a certificate of registration and incorporation, the organisation is required to register both the constitution and resolutions at the USRB under the Registration of Documents Act, Cap. 81.¹⁰¹⁷

The application process detailed above is unnecessarily lengthy, and lacks procedural safeguards. While there are no legal barriers per se, NGOs seeking registration may be subject to bureaucratic delays. The involvement of political leaders at every level of the registration process may cause undue delay and unwarranted state interference. The periodic renewal of the certificate of registration and the permit gives broad discretion to the

¹⁰¹⁴ See Section 2, and 3(1) of the Non- Governmental Organizations Act of 1989. See Section 4 of the Non-Governmental Organizations Registration (Amendment) Act of 2006; Regulation 3 of the NGO Regulations 2009.

¹⁰¹⁵ See Regulation 5(2) of the NGO Regulations, 2009.

¹⁰¹⁶ Form D is issued in accordance with Regulation 8. Information required includes name of the organization, area of operation, sector of intervention, and activities in previous work plan, activities accomplished, sources of funding, constraints /challenges, solutions, future plans, names of promoters and their photographs.

¹⁰¹⁷ See Guidelines on Registration of NGOs at the NGO Board issued in accordance with the Non-Governmental Organizations Registration Regulations, 2009.

authorities to deny or delay registration. The range of authorities involved including the USRB, Local Councils, District Resident Commissioners, sureties, and ultimately the NGO Board, makes the process burdensome.

Unlike Ethiopia and South Africa, as noted in Chapter six, Uganda has onerous registration requirements that make registration of NGOs a lengthy and burdensome process.¹⁰¹⁸

7.5. CONCLUSION

Article 38(2) of the Constitution of Uganda 1995 provides that ‘every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations’. Indeed, Uganda has witnessed an increase in the number of organisations since 1986, partly in response to the democratic process and an enabling constitutional framework that guarantees the right to freedom of association.

Notwithstanding this favourable constitutional framework, the NGO regulatory framework as the discussion has shown, presents several difficulties. For example, the legislative process, despite efforts to involve the NGOs did not accommodate their views. The Non-Governmental Organisations Registration Act of 1989 and its amendment, the Non-Governmental Organisations Registration (amendment) Act of 2006 grant unfettered powers to the NGO Board that may be subject to arbitrary decision-making. The lack of representation of NGOs on the NGO Board does not meet the requirements of participatory democracy. Unlike the NGO Co-ordination Board of Kenya and the NGO Board of Malawi which have representation of NGOs, the NGOs in Uganda cannot actively participate in appraising prospective applicants for registration by the Board to ensure accountability and transparency of applicants.

The registration process needs to be simplified. The current system of registering NGOs that separates registration and incorporation is costly and time consuming. A single legal regime of registration that grants legal personality to an organisation duly registered with the NGO Board is overdue.

While international law permits states to regulate NGOs, compulsory registration is reminiscent of states that seek to control civic action. Registration of NGOs should be

¹⁰¹⁸ Chapter 6 (section 6.3.2.3).

encouraged to promote coordination and ensure transparency and accountability within the NGO sector, but it should be done under conditions that allow freedom of NGOs to operate without undue interference. For example, the requirement of an annual permit alongside a certificate of registration is controlling and burdensome.

Although Uganda is credited for providing space for citizen participation, which accounts for the rapid growth of the NGO sector, it needs to adopt a regulatory framework that is inclusive and participatory. Besides this, the NGO sector should adopt a mechanism of self-policing to promote accountability, transparency and effectiveness.

The thesis has established that the current regulatory framework falls short of a model that is accessible, clear, speedy, apolitical, participatory, and inexpensive. The next chapter will provide possible solutions to the shortcomings identified above.

CHAPTER 8 CONCLUSION

8. 0. INTRODUCTION

This study set out to investigate the existing regulatory models and possible reforms to ensuring an appropriate NGO regulatory framework that upholds the internationally accepted human rights principles in Uganda. The study has revolved around two major interrelated issues. The first was whether the existing NGO regulatory model meets the basic requirements of the right to freedom of association as prescribed in the Constitution of Uganda, 1995, and international and regional human rights treaties to which Uganda is a party, and the second was to identify areas of possible reform for an appropriate regulatory model. Its aim was to demonstrate that Uganda's regulatory framework of NGOs does not meet the basic requirements of the right to freedom of association, and more importantly, to suggest possible reforms.

The study began by giving a brief history of NGOs in Africa. An attempt was made to define the term 'NGO' within the broader context of civil society. Given the definitional challenge experienced in the study of the varied meaning associated with the term NGO, it was appropriate to secure a working definition to be applied to this thesis. A theoretical perspective of democracy provided a normative framework within which an appraisal of the NGO regulatory regime could be done. Through a comparative study of the regulatory framework in six countries in Eastern and Southern Africa, mainly common law countries, the three regulatory models: state-led, state-NGO led, and self-regulation were analysed against international human rights and democratic principles.

Considering the two major questions investigated, two arguments can be advanced in this thesis: that the regulatory framework of NGOs in Uganda does not meet the basic requirements for the right to freedom of association; and that the new model of regulation in Uganda must take into account the following: relevant principles of constitutional and international law relevant to freedom of association; emerging global trends and above all NGO effectiveness. It is the view of this thesis that the value of these factors has been ably demonstrated. The main findings and conclusions of the study as set out in the various chapters are as follows:

8. 1. MAIN FINDINGS AND CONCLUSIONS

8. 1. 1. Participatory democracy provides the best model for NGOs to function

The place and value of NGOs has been a subject of intense debate. In chapters 2 and 3 this study has examined the issue by taking an historical account of the evolution of NGOs in Africa, by reviewing the various theories of democracy and by appraising relevant constitutional as well as international and regional treaty provisions. It found that participatory democracy as a model of democracy affords maximum space for individuals and interest groups to enjoy the right to form associations free from unnecessary state interference. This model typically provides for a constitutional framework within which citizens can hold the state accountable, safeguards against arbitrary actions against individuals, and incorporates a bill of rights that would promote participation and active citizenship. This means that where a state is democratic, it would not adopt a more restrictive regulatory model, instead it would adopt a model that is more empowering, upholds the ‘sovereignty of the people’ and encourages active interest group participation. Are NGOs accountable, participatory and democratic?

8. 1. 2. NGOs must address the challenge of legitimacy and democratic governance

The human rights discourse that forms the *esprit de corps* of the human rights movement demands that NGOs be accountable, transparent, democratic and participatory. In Chapter 4, the study has examined this question and established that state-NGO tensions are partly attributed to the lack of accountability and transparency among some NGOs within the sector. This raises questions about the mandate, independence, funding, representativeness, and accountability of NGOs. States impose registration as a way of holding NGOs accountable. The study recommends that NGOs set clear objectives, be committed to their mandate, expand their membership base, identify independent sources of funding, and adopt self-regulatory practices such as codes of conduct in order to address the challenge of legitimacy. Where states seek to regulate the activities of NGOs, what are the minimum standards expected of them?

8. 1. 3. States can regulate the Operations of NGOs

State regulation of NGOs has often raised considerable debate. This question has been investigated in this study in Chapter 5. The right to freedom of association recognises the

right of every individual to form, join, and participate in an association. In a democracy the state should provide the space and the legal framework for individuals to organise in the form of associations in order to express their opinions and hold leaders accountable. This duty extends to the obligation of the state to provide the legal and regulatory framework within which NGOs operate.

Although registration is not compulsory, associations have to register in order to operate within the law. International law does not permit states to prohibit the formation of associations except where the objectives for which they are formed are unlawful. The International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights to which Uganda is a party do not permit registration procedures that are lengthy and result in undue delay. The study concludes that registration procedures should be simple, speedy, apolitical and inexpensive. Can the state reject an application for registration or revoke registration of an NGO?

8. 1. 4. Criteria for registration must be laid out clearly

Whether the state can reject an application for registration or revoke registration is an issue of concern. This study has addressed itself to this matter. The regulatory law must spell out the criteria upon which an application can be denied or registration cancelled. The exercise of such power should not be arbitrary neither should the authority have broad discretionary powers. Grounds on which rejection can be based must only be those prescribed by law and well defined; the law must be precise and should not contravene human rights principles. Acceptable grounds have been provided under Article 22 (2) of the International Covenant on Civil and Political Rights which limits such restrictions to acts that threaten national security, public order, the rights and freedoms of others. What amounts to 'prohibited activities' should be defined under the NGO Act as it is in Malawi. How much information is required for one to register to an NGO?

8. 1. 5. Registration requirements must be reasonable and less restrictive

The amount of information required and conditions imposed for one to register an NGO has often raised considerable concern. How onerous are the registration requirements? How strict are the requirements? The study has addressed itself to this issue as well. The thesis has examined this issue and found varying experiences among the countries studied. In countries that have adopted a state-led regulatory model such as Ethiopia and Zimbabwe, registration is

mandatory, and failure to register attracts penalties. Registration requirements are burdensome in some and less demanding in others. In some countries like Ethiopia, restrictions are imposed on funding of NGOs that carry out human rights or democracy-related activities, which violates their constitutional and treaty obligations. States that have a state-NGO led regulatory model like Malawi also impose strict registration conditions but unlike countries that have a state-led model, they do not impose funding restrictions on human rights NGOs. Meanwhile, in states that follow a self-regulatory model like South Africa, registration is voluntary, and they impose minimal registration requirements, and above all, encourage human rights and democracy-related activities.

This thesis finds that regulatory laws that impose strict and burdensome conditions for registration do not meet the requirements of the right to freedom of association. The study recommends minimal requirements for registration. When registration takes place, what are the acceptable reporting requirements?

8. 1. 6. Reporting Obligations must be reasonable

NGOs have to fulfil reporting requirements to government as provided by the law. The NGO Act often prescribes such reporting obligations. The frequency of the reporting and the consequences should one fail to report have often caused concern. Should renewal of registration be dependent on reporting? Chapter 5 addressed itself to the issue of reporting requirements. International law does not prescribe a minimum reporting period although it encourages a reasonable period. The study has examined the reporting periods required by international and regional bodies. The African Commission on Human Rights requires NGOs with observer status to submit a report of their activity every two years. The United Nations and the Council of Europe require NGOs to submit a report every four years. The study recommends a period of four years to minimise state interference in the affairs of the organisation. Where NGO laws are adopted, how participatory should the legislative process be?

8. 1. 7. The Legislative Process should be participatory

The process of formulating the NGO law has been a subject of study in this thesis. To what extent are NGOs involved in formulating the NGO law? The thesis reviewed the legislative process in six selected countries of Eastern and Southern Africa in Chapter 6. The study

noted that there is a link between the legislative process and the outcome of the NGO law. Where the aim of the law is to control the NGOs like Zimbabwe, the country adopted a state-led regulatory model and there was least participation of NGOs in the enactment of the law. Where the purpose of the law was to co-ordinate NGO activities like Malawi and Kenya, the country adopted a state-NGO led model, and the degree of involvement of NGOs in the formulation process was much higher. In countries that sought to promote the NGO sector like South Africa, such countries adopted a self-regulatory model and the legislative process was more transparent, more inclusive, and more participatory. The study recommends the adoption of a self-regulatory model as one that is best suited to involve NGOs in the legislative process. What about the NGO regulatory body, how representative should it be?

8. 1. 8. The NGO Regulatory Mechanism must be representative

The appointment process, membership, security of tenure and independence of the NGO regulatory body affects the state-NGO relations. The study, in Chapter 6, has investigated the criteria for the appointment and the composition of the National NGO Board in the six countries chosen for the comparative review and found variations in the degree of public involvement and independence of the NGO Boards. In some countries like Ethiopia and Uganda, the NGO Boards are part of Government departments controlled by the relevant Government Ministry, and in others like Kenya, they are semi-or autonomous regulatory bodies. In some countries like South Africa, the NGO Board is composed entirely of government nominees, in others like Kenya and Zimbabwe the Board has both government nominees and NGO representatives appointed by government on the recommendation of NGOs. In some countries like South Africa, the criterion for the appointment of members to the NGO Board is laid out, while in others such as Ethiopia, it is silent. The study has established a link between the regulatory model, the appointment process and composition of the Board. Where the country has adopted a state-led regulatory model, the criteria for the appointment of members to the Board are not laid out, and the state is more controlling of the NGO regulatory body; less controlling with a higher likelihood of having the criteria for the appointment process laid out in a state-NGO led model, and more independent, transparent, and with well laid out criteria in a self-regulatory model. The study recommends an inclusive and representative appointment process, where NGOs are represented on the regulatory body. Where a regulatory body has been appointed, what are its powers? Are they controlling or enabling?

8. 1. 9. The Powers of the Regulatory body must be subject to review

Can the Board reject an application for registration or refuse the renewal of registration? Does it have power to de-register an organisation? Can it interfere with the internal matters of the organisation? Are decisions of the Board subject to appeal or judicial review? The study has examined this issue in Chapter 6. The study found varying experiences in the six countries that were reviewed. In countries that have adopted a state-led regulatory model like Uganda and Zimbabwe, the NGO Board has broad discretionary powers. The Board has power to accept an application for registration and issue a certificate of registration on such conditions as it deems appropriate. The Board can also reject an application for registration without giving any reasons; neither does the NGO law provide the time-limit within which its decision must be given. In such countries, government can suspend NGO officers, take over management or leadership of the NGO or suspend a licence where the NGO Board believes that the NGO has used the organisation for an unlawful purpose. The powers of the Board are not subject to judicial review.

In countries that have adopted a state-NGO led regulatory model like Kenya and Malawi, the Board has wide discretionary powers, but these powers are subject to a right of appeal to a higher body usually a Minister or a tribunal, and the right of appeal to the High Court is entrenched. The Board has power to accept an application for registration and issue a certificate of registration on conditions as it deems fit, but a time-limit is provided within which it must make a decision on whether to accept or deny an application. The grounds for rejection of an application must also be given.

In countries that have a self-regulatory model like South Africa, the regulatory body has wide but not arbitrary powers. The body can only deny registration only in cases where an applicant has failed to comply with the registration requirements. A time-limit is given within which a decision must be communicated to the applicant on whether the application has been accepted or rejected. Even where a refusal takes place, the applicant has a right to an administrative review of the decision before an administrative tribunal. Even the tribunal has a time- limit within which it must give its decision with reasons.

The study finds that broad and discretionary powers can result in arbitrary decision-making, and as the study has shown lead to unwarranted state interference. This violates the right to

freedom of association. The study therefore recommends that the powers of the Board must always be subject to review to avoid bureaucratic discretion.

Chapter 7 examines the legal and regulatory framework governing NGOs in Uganda and as the discussion has shown, it does not meet the basic requirements of a regulatory model that meets the internationally accepted human rights principles.

In view of these findings and conclusions, what follows is a summary of the key proposals for the improvement of the NGO regulatory framework for Uganda.

8. 2. SUMMARY OF KEY PROPOSALS FOR THE REFORM OF THE REGULATORY FRAMEWORK GOVERNING NGOs IN UGANDA

International law permits states to regulate NGOs provided they do not deprive them of the right to free political expression.¹⁰¹⁹ Uganda adopted a state-led regulatory model of regulation, which, as the previous discussion has shown, is more controlling than enabling.

The study has noted that the registration of NGOs has its origins in the colonial state which used it as an instrument of control. With the democratic reform of the 1980s, there was a ‘retreat of the state’ that saw a rebirth of NGOs. NGOs have since become a driving force in promoting democracy, accountability, and public participation in governance. But to achieve this, NGOs need legal frameworks that allow them the freedom to operate.

The regulatory framework must take into account the registration process, accountability, and organisational autonomy. To what extent do these guarantees exist in this framework? The process of developing the law should be consultative and borrow from good practice. The objective of the law should be to increase efficiency, transparency, and accountability. The NGO Act should strike a delicate balance between enabling NGOs, providing space, mobilising citizen participation, and avoiding unwarranted interference of the state. In several of these respects the NGO Act fails, as the study has shown.

In the state-NGO led model, there is more flexibility, respect for organisational autonomy and emphasis on participation other than control. Whereas the state remains a primary actor in regulation, there is considerable value in self-regulation. The Kenyan model of having an

¹⁰¹⁹ McBride op cit note 519 at 25-26.

Independent Regulatory Authority alongside a National Federation of Public Benefit Organizations adds value to state regulation. NGOs have the benefit of developing common standards, ethical codes of conduct, professional skills, and enhancing participation. Having a one-stop centre for registration and a tribunal for dispute resolution enhances the transparency of the regulatory mechanism. More importantly, having an independent Regulatory Authority free from outside control and direction would promote integrity, efficiency, professionalism, and trust in the current regulatory framework. In view of the above discussion this thesis recommends a review of the regulatory framework as follows:

8. 2. 1. Registration requirements

Section 4(a) of the NGO Act that prohibits an organisation to operate without being registered is restrictive and inconsistent with Articles 20(1), 29 (1) (e), 43 2(c) of the Constitution, and should be repealed. Although the state has a duty to regulate organisations, limiting their fundamental right of association to the act of mandatory registration is inconsistent with Article 20(1) and Article 29(1)(e) of the Constitution of Uganda; Article 22(1) of the International Covenant on Civil and Political Rights (1966) and Article 10(1) of the African Charter to which Uganda is a party. Article 20(1) of the Constitution of Uganda provides that fundamental rights are inherent and not granted by the State. Although the right to freedom of association as provided under Article 29 (1) (e) of the Constitution is not absolute, it can only be limited in accordance with article 43-(2(c) which upholds practices consistent with the standards accepted in a free and democratic society.¹⁰²⁰ In a constitutional democracy as it is the case in South Africa, registration is voluntary.

The wide discretion granted to the NGO Board, and to the Minister (sections 2, 2(2), 8, 9, 10, and section 4(a)) of the NGO Act to deny registration or revoke a certificate of registration limits the exercise of associational rights provided under articles 20 (1), (2), 29 1(e) of the Constitution. The NGO Act should be amended to provide narrow and objective standards to guide the authorities. For example, the NGO Act should spell out the grounds upon which the Board can deny an application for registration. The NGO Act should specify a time limit within which a decision has to be made to register a new NGO or revoke a certificate of registration. Even where the Board accepts an application for registration and issues a

¹⁰²⁰ See Article 43 of the Constitution of the Republic of Uganda, 1995.

certificate of registration, it should spell out the conditions clearly. The law should also spell out the grievance procedure in case of refusal or revocation of registration.

The requirement for annual permits and the demand for re-registration are expensive and cumbersome, and give unfettered powers to the Board that are liable to abuse. A certificate of registration renewable every five years should be adequate.

Where an NGO chooses to appeal to the Minister, a time-limit should be prescribed within which the Minister responds. The appeal process should clearly indicate that the complaint should be in writing, giving reasons for the appeal. The NGO Act should clearly indicate that the applicant has a right of appeal against the Minister's decision to deny registration or order an involuntary dissolution. The Minister should be obliged to give reasons for his decision in case of a denial of an appeal.

Regulation 13(a) that prohibits an NGO from making direct contact with the people in their area of operation without giving seven days' notice in writing of its intention to do so to the local councils and the Resident District Commissioner is controlling and inconsistent with democratic practice. The rule should be relaxed by encouraging NGOs to inform the authorities as part of their reporting obligations.

8. 2. 2. The Composition of the National Board for Non-Governmental Organisations

The NGO Act does not provide the criteria for the appointment of members to the National Board for NGOs, neither do NGOs have representation on a body that regulates their activities. This thesis argues that NGOs have a right to participate in decision-making in matters that affect them, and therefore advocates for an inclusive, transparent, and participatory appointment process. NGOs should be consulted in making appointments to the regulatory body. This thesis recommends that the NGO Act should provide for NGOs to have representatives on the regulatory body to allow for inclusive and participatory decision-making.

8. 2. 3. Self-Regulation of NGOs

The National NGO Policy recognises self-regulation, if effectively applied by all NGOs, as the most cost-effective means of fostering discipline and benchmarking quality assurance

within the sector.¹⁰²¹ It notes that such a mechanism minimises the need and extra costs of implementing a government-driven policing regime.¹⁰²² The current regulatory regime, notwithstanding this policy declaration, is state-led. In order to promote maximum participation of NGOs and respect for associational rights, this thesis recommends that Section 4 (2) of the NGO Act (as amended) be repealed to introduce state-NGO led regulation. An Independent NGO Regulatory Authority should be established to replace the current National Board for NGOs. The Independent Authority should be autonomous. The membership of the Authority should comprise of experts drawn from different fields, relevant ministries as well as representatives of NGOs. The members of the Authority should be appointed by the Minister through a competitive process involving applications and interviews. The Authority will advise on voluntary registration procedures, complaints handling, appeals process, certification, and quality assurance, tax benefits, and voluntary dissolution processes.

The NGO Act should also provide for self-regulation. Every organization should have the freedom to join in association with another organisation or other organizations. Organizations should have the freedom to form a National Federation of NGOs within which they can regulate their conduct. The National Federation of NGOs should be independent of the Authority. Borrowing from the experience of the European INGO Participatory Status Procedure of the Council of Europe, the Authority should be obliged to seek the opinion of the National Federation of NGOs in making decisions on applications for registration of NGOs. This thesis further recommends that such opinion should be sought from the Federation in case of de-registering of an NGO. The self-regulating body of NGOs should, among its objectives and functions, promote self-regulation of NGOs, formulate a Code of conduct by which NGOs commit themselves to good governance, transparency, non-discrimination as well as increase stakeholder participation.

8. 2. 4. Reporting Obligations for NGOs

The Board has power to issue an Annual Permit to an organisation on condition that the NGO submits its Annual report, Audited Accounts and any additional information as the Board may require. As noted earlier, the requirement for an Annual permit gives excessive discretion to

¹⁰²¹ See The Uganda National NGO Policy, 2010, 31.

¹⁰²² Ibid.

the Board which may renew or de-register an organisation. The African Commission on Human Rights requires NGOs with Observer status with the Commission to report every two years. The United Nations requires NGOs with UN Consultative status to report every four years. The Council of Europe also requires NGOs with Participatory status with the Council to report every four years. This thesis recommends that the NGO Act should be amended to change the reporting period, from annual reporting to every four years in accordance with the standard set by the regional bodies.

8. 2. 5. Democracy, Accountability, Participation

The NGO Act makes it an offence for any organisation to operate contrary to the conditions or directions specified in its permit or certificate of incorporation, and the director or officer of such an organisation also commits an offence, and is liable on conviction to a fine or imprisonment or both.¹⁰²³ Restrictions on the right to freedom of association are only permissible where such actions would be a threat to national security, public order or the rights and freedoms of others.¹⁰²⁴ The right to freedom of association enjoins states not to adopt laws or policies or repeal pre-existing domestic laws that are incompatible with the standards set by the covenant.¹⁰²⁵ Failure to honour conditions set by the Board is not an acceptable ground for restricting the enjoyment of the right to association. This thesis recommends that the provisions should be repealed to ‘decriminalise’ NGO activism and specify that the primary role of human rights NGOs is to open space for democratic forces to operate. The NGO Act should make specific provision recognising NGO participation in policy making.

Uganda, like many sub-Saharan African countries in transition to democracy, should aspire for a regulatory framework for NGOs that is inclusive, accountable, more participatory and transparent. This thesis recommends that a state-led regulatory model does not match Uganda’s future aspirations. Instead, Uganda should adopt a state-NGO led (hybrid) system of regulation that allows self-regulation alongside state regulation. This would require the amendment of the NGO Act to provide for an Independent Regulatory Authority that is composed of government nominees as well as representatives of NGOs. Besides the regulatory body, the law should create a self-regulating NGO Federation that oversees the

¹⁰²³ Section 4 (e) (5) and (6) of the Non-Governmental Organizations Registration (Amendment) Act, 2006.

¹⁰²⁴ Article 22 (2) of the International Covenant on Civil and Political Rights (1966).

¹⁰²⁵ UN Human Rights Committee General Comment No 14, Paragraph 50.

credibility and transparency of NGOs through a quality assurance mechanism. The National Federation of NGOs would spell out procedures for the conduct of democratic nominations for representatives of NGOs to the Independent NGO Regulatory Authority.

8. 3. FINAL REMARKS

The proposals put forward in this study would ensure that Uganda adopts an appropriate regulatory model that meets the internationally accepted human rights principles. The proposals are feasible. The reforms if implemented, would improve the state-NGO relations which are currently at their lowest level since the NRM Government took power in 1986. What is required is an amendment of the NGO Act to implement the suggested reforms. The aim is to meet the requirements for the right to freedom of association as provided in Uganda's Constitution, and international and regional treaties to which Uganda is a party.

Uganda should take immediate steps to improve the regulatory regime for NGOs to avoid unnecessary litigation. Already, the *Andrew Kaggwa case* has shown that the NGO Act is in conflict with Uganda's constitutional obligations and is in need of urgent reform.¹⁰²⁶

¹⁰²⁶ Op cit note 992.

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