



NGOs/CSOs CONCERNS ON NON-GOVERNMENTAL ORGANIZATIONS (AMENDMENT) ACT 2018

TO: The Speaker of National Assembly

CC: The Leader of the House

CC: The Leader of Opposition in Parliament

CC: The Leader of Peoples Party (PP) in Parliament

CC: The Leader of United Democratic Front (UDF) in Parliament

CC: The Leader of Alliance for Democracy (AFORD) in Parliament

FROM: The Council for NGOs in Malawi (CONGOMA) and Human Rights Defenders Coalition (HRDC)

1. INTRODUCTION

Rt. Honourable Speaker, Sir, we the undersigned Non-Governmental Organisations (NGOs) under the leadership of the Council for Non-Governmental Organizations in Malawi (CONGOMA) and the Human Rights Defenders Coalition (HRDC), write to bring to your attention our candid observations and concerns as regards the Non-Governmental Organizations (Amendment) Act, 2018 which was gazetted on 9th November 2018. According to the intent and objects of the Amendment Act, it is stipulated that the Amendment Act seeks to promote freedom of association as enshrined in Section 32 of the Constitution; removing the requirement for mandatory double registration; and enhancing

the role of the NGO Board in the oversight and regulation of NGOs in Malawi. However, a critical analysis of the Bill reveals that the Amendment Act largely runs counter to the promotion of freedom of association, and that it is aimed at restricting the civic space in Malawi. Precisely, it is an attempt by the State to capture and kill civil society.

2. SOME POSITIVES WORTHY NOTING IN THE AMENDMENT ACT

We note the following as some of the positives that have been included in this Amendment Act:

1. The requirement that members of the proposed NGO Regulatory Authority should have relevant expertise and experience;
2. The consideration of gender and social inclusion in making appointments into the proposed NGO Regulatory Authority by ensuring that at least half of the appointees are women and also taking into account the provisions of the Disability Act. However, the provision is vague in terms of the specific provisions of the Disability Act which it wants to take into consideration when making such appointments. It would have been better if the amended Act had clearly spelt out the minimum number of persons with disability to have a seat in the proposed NGO Regulatory Authority i.e. at least one person with disability.

3. AREAS OF CONCERN IN THE AMENDMENT ACT

Having made observations on the process and content of the Amendment Act, we note the following concerns:

1. Lack of consultation on the amendment Act, a clear breach of the spirit and letter of the Republican Constitution

We observe with dismay that the entire process on the Amendment Act was devoid of thorough consultations with relevant NGO actors including CONGOMA despite the fact that such an Amendment Act would directly affect the sector. The NGO sector only learnt about the amendment Act through social media after it had been gazetted. We strongly feel this is unwarranted and a clear breach of the spirit and letter of the Constitution of Malawi which provides in section 96 (2) that the Cabinet shall make legislative proposals available in time in order to permit sufficient canvassing of expert and public opinion. This requires that there must be adequate time between the gazetting of the Amendment Act and the Parliamentary deliberations so that the Parliamentarians and citizens are well conversant with the issues raised in this Amendment Act and influence its contents. Section

8 of the Constitution clearly stipulates that Parliamentary deliberations must reflect the interests of the people of Malawi and this provision requires Members of Parliament to have a fair opportunity to make consultations and appreciate the interests of their constituents and the public at large including those that the Law would directly affect. Sadly, we note that this has not been complied with in this case. The manner in which the Amendment Act is being rushed raises deep suspicions on motive of the Amendment Act.

2. Unwarranted State Encroachment on Civic Space (civil society capture)

- (a) The Amendment Act creates a monster regulator and coordinator of NGOs in the proposed NGO Regulatory Authority with absolute powers without accountability checks. It whittles down the role of CONGOMA – a registered trust- and grabs its registered mandate and transfers it to the proposed NGO Regulatory Authority. In other words, the Amendment Act spells the demise of CSO activism.
- (b) The Amendment Act eliminates the NGO's role (through CONGOMA) in appointment and removal of members of the NGO Regulatory Authority. The powers to appoint are retained with the Minister who is said to effect such appointments in "*consultation with relevant professional and other bodies*". The vagueness in the identity of the said "*professional and other bodies*" in our considered view leaves room for manipulation, abuse and unfair selection. Furthermore, we find it difficult to justify the inclusion of the Secretary responsible for Home Affairs and Internal Security as an ex officio member of the NGO Authority, especially in comparison with the mandate of the Ministry and the NGO's work.
- (c) Lack of grounds for removal of members from the Authority creates room for abuse and manipulation.
- (d) The removal of CONGOMA as coordinator and collective representative of NGOs entails the NGOs shall not have an independent platform where they can voice out their concerns and hold the NGO Authority accountable.
- (e) The proposed amendment to section 34 of the Bill will provide that where the Act is contravened by an NGO, it shall be liable to a fine of MK15 million and imprisonment of 7 years of a director or trustee. Whilst such a penalty could be justifiable in the case of fraud and a gross breach of a director or trustee's fiduciary responsibility, it would not be a proportionate sentence for lesser violations of the provisions in the NGO Act. As such, it could be said that Section

34 is disproportionate and will have a chilling effect on the exercise of the right to freedom of association. The proposed fines are unreasonable.

- (f) We are shocked that government in the proposed Amendment Act, has chosen to apply freedom of association selectively in that, they are removing the mandatory registration with CONGOMA on the basis of freedom of association while maintaining the fact that there should be mandatory registration of NGOs with the proposed NGO Authority. This is against the spirit of freedom of association as per Section 32 of the Republican Constitution, article 22 of the International Convention on Civil and Political Rights and article 10 of the African Charter on Human and Peoples Rights to which Malawi is party.

3. Vague and Overly Broad Provisions

Some of the provisions of the Bill have been drafted in a vague and overly broad manner. We find them to be extremely troubling especially given the fact that some of the provisions propose to give the proposed Authority some significant powers. For instance, in clause 7 (f) of the Amendment Act it is proposed to empower the Authority to issue and revoke registration certificates of NGOs. No safeguards have been put in place in the provision to regulate the exercise of this power. This is likely to lead to abuse. Furthermore, in clause 9, it is proposed to amend section 22 of the Act on reporting obligations, by empowering the Authority to impose 'any measures' as it deems fit. This proposal is also overly broad, dangerously vague and prone to abuse.

4. RECOMMENDATIONS

In view of the above, we recommend the following:

- 4.1.** The Amendment Act should not be tabled in Parliament as it is not a product of a thorough, inclusive and democratic process of consultation.
- 4.2.** The Amendment Act should include seats to be occupied by members of the NGO Sector in the proposed NGO Authority. In addition, all appointments by the Minister (excluding the permanent ex-officios) should be done in direct consultation with CONGOMA. Such appointments should further be approved by Parliament through the Public Appointments Committee.
- 4.3.** The role of CONGOMA as NGO Coordinating body should be retained as the proposed Regulatory Authority cannot represent and promote the

collective interests and concerns of NGOs in Malawi because the proposed Authority is a Government entity.

- 4.4. Remove imposition of criminal responsibility on individual trustees and directors as this is the responsibility of the Courts to remove Corporate veil.
- 4.5. The Amendment Act should further clearly stipulate which infractions of the Act are criminal offences, and that petty infractions should not be subject of criminal sanctions.
- 4.6. The requirement of mandatory registration with NGO Board should be removed as it is in conflict with freedom of association universal.
- 4.7. Provisions of the Amendment Act that are overly broad and vague should be redrafted so that they give citizens sufficient guidance as to what is expected of them.

5. CONCLUSION

Looking at the gravity of the issues of concern which require time and adequate consultations, we as CONGOMA and HRDC petition the Speaker that the Amendment Act should not be tabled in Parliament as it is not a product of a thorough, inclusive and democratic process of consultation. To this end, we propose that all processes around Law reform or review around NGO Act and other NGO related laws should be spearheaded by an independent Constitutional body such as the Law Commission.

Signed by:

Steven Duwa
CONGOMA Chairperson

Timothy Mtambo
HRDC Chairperson

Endorsed by NGOs and Malawians of good will:

Public Affairs Committee (PAC)

Church and Society Livingstonia Synod

Centre for Human Rights and Rehabilitation (CHRR)

Centre for Development of People (CEDEP)

Youth and Society (YAS)

Malawi Human Rights Resource Centre (MHRRC)

Human Rights Consultative Committee (HRCC)

Coalition for the Empowerment of Women and Girls (CEWAG)

Foundations for Community Support Services (FOCUS)

Youth Coordinating Agency in Development (YOCADE)

Youth Watch and Society

Malawi Network of Religious Leaders Living with or Personally Affected by HIV and AIDS (MANERELA+)

Action for Community Transformation (ACT)

Outreach Scout Foundation (OSF)

Young Women's Christian Association (YWCA)

Karonga Youth for Justice and Development (KYJD)

Sky Foundation

Africa Windmill Project

Youth Arm Organisation

Action Hope

National Women's Lobby Group

Young Women's Christian Association (YWCA)

Mponela Aids Information and Counseling centre (MAICC)

Centre for Social Concern and Development (CESOCODE)

Forum for the Development of Youth with Disabilities (FDYD)

Tithandizane Theatre for Development

Gender Support Programme (GSP)

Elderly Peoples Association (EPA)

Foundation for Children

Future Planning for the Child (FPC)

Mzuzu Civil Society Network (MCISON)

Corruption and Rights Watch

Institute for Policy Interaction (IPI)

COIDA

Dr. Billy Abner Mayaya – Central Region HRDC Chairperson

Happy Mhango- Northern Region HRDC Chairperson

Masauko Thawe – Southern Region HRDC Chairperson

Madalitso Banda – Eastern Region HRDC Chairperson

Charles Kajoloweka - Human Rights Defender

Makhumbo Mkanavimbundi Muntali – Concerned citizen

Macdonald Sylvester Sembereka – Human Rights Activist

Loyce Simfukwe – Concerned Citizen

Thokozani Mapemba - Human Rights Defender

Andrew Salima - Human Rights Defender

Luke Tembo – Human Rights Defender

Grecian Mbewe - Human Rights Defender

Moir Walita – Human Rights Defender

Beatrice Mateyo – Human Rights and Gender Activist

Dennis Msewu – Human Rights Defender

Madalitso Mwenda- Human Rights Defender

Alie Mwachande – Human Rights Defender

Amon Lukhere – Human Rights Defender

Harod Kachepatsonga – Concerned Citizen

Henry Mhango - Vice Chair HRDC South

William Liwimba - Human Rights Defender

